



# The Becket Fund

FOR RELIGIOUS LIBERTY

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April 8, 2013

### Submitted electronically

Secretary Kathleen Sebelius  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9968-P  
P.O. Box 8013  
Baltimore, MD 21244-1850

Re: Coverage of Certain Preventive Services Under the Affordable Care Act  
Notice of Proposed Rulemaking, 78 Fed. Reg. 8456 (Feb. 6, 2013)  
CMS-9968-P

Dear Secretary Sebelius,

We write in response to your request for comments on the Notice of Proposed Rulemaking (“NPRM”) on preventive services. 78 Fed. Reg. 8456 (Feb. 6, 2013).

The Becket Fund is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund takes no position on the morality of any particular drug or procedure covered under the contraceptive mandate (“Mandate”).<sup>1</sup> Instead, it focuses on the right of each person to follow his or her conscience, and the corollary right to join together with others to form organizations which reflect shared and deeply held beliefs.

The Becket Fund has repeatedly objected to the Mandate’s violation of conscience. Seven months before the Mandate was adopted, the Becket Fund warned that a broad contraceptive mandate would conflict with conscience rights.<sup>2</sup> The Becket Fund protested against the narrow definition of religious employer in the Interim Final Rule that is currently in force, and pointed out the ways that the accommodation proposed in the Advanced Notice of Proposed Rulemaking (“ANPRM”) failed to relieve the Mandate’s substantial burden on

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<sup>1</sup> By “Mandate,” we mean the requirement that health insurance plans cover all FDA-approved contraceptive methods (including embryo-destroying drugs such as *ella* and Plan B), sterilization procedures, and patient education and counseling—a requirement that has been published as a final rule at 77 Fed. Reg. 8725 (Feb. 15, 2012).

<sup>2</sup> Eric N. Kniffin, The Becket Fund, Remarks to IOM Committee on Preventative Services for Women, January 12, 2011.

religious objectors.<sup>3</sup> When it became clear that these comments were falling on deaf ears, the Becket Fund was the first organization to challenge the Mandate in court.<sup>4</sup> Today, the Becket Fund represents eight clients in seven separate lawsuits challenging the Mandate.<sup>5</sup>

You have already received our prior comments submitted on September 30, 2011, and June 15, 2012. We reincorporate those comments by reference here and supplement them with three additional points below.

*First*, as we explain in the attached brief (at 16, 37-38), there is no basis in the Constitution or the Religious Freedom Restoration Act (“RFRA”) for excluding religious for-profit businesses and their owners from the conscience protections offered to other religious objectors. Indeed, a categorical exclusion of that nature would violate the First Amendment. Congress has exempted thousands of non-religious for-profit businesses covering millions of Americans from the Mandate for political and economic reasons.<sup>6</sup> Br. at 7, 42. The NPRM’s position that no for-profit business should be exempted for religious reasons relegates the conscience rights of these businesses and their owners to a subordinate position, behind political expediency and bureaucratic convenience. This is not the balance struck by RFRA and the First Amendment.<sup>7</sup> Br. at 39-53.

*Second*, the NPRM’s accommodation for certain non-profit religious organizations suffers from the same basic flaw as the accommodation outlined in the ANPRM: it fails to permit religious organizations to offer health insurance that reflects their deeply-held beliefs.<sup>8</sup> *See* Becket Fund

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<sup>3</sup> Letter from The Becket Fund to HHS re: Interim Final Rules on Preventive Services (September 30, 2011) available at <http://www.becketfund.org/wp-content/uploads/2011/09/BF-Comments-to-HHS-on-Contraception-Mandate-9-30-11.pdf>; Letter from the Becket Fund to HHS re: Advance Notice of Proposed Rulemaking on Preventive Services (June 15, 2012) (“Becket Fund ANPRM Letter”), available at <http://www.becketfund.org/wp-content/uploads/2012/06/hhs-comments-on-anpr-final.pdf>.

<sup>4</sup> *Belmont Abbey College v. Sebelius*, No. 11-CV-1989 (D.D.C.) (filed Nov. 10, 2011).

<sup>5</sup> *Colorado Christian University v. Sebelius*, No. 11-CV-3350 (D. Colo.); *Eternal Word Television Network v. Sebelius*, No. 12-CV-501 (N.D. Ala.) (dismissed March 25, 2013); *Ave Maria University v. Sebelius*, No. 12-CV-88 (M.D. Fla.) (dismissed March 29, 2013); *Wheaton College, Belmont Abbey College v. Sebelius*, Nos. 12-5273 & 12-5291 (D.C. Cir.); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.); *East Texas Baptist University and Houston Baptist University v. Sebelius*, No. 12-3009 (S.D. Tex.).

<sup>6</sup> *See, e.g.*, HealthCare.gov, Keeping the Health Plan You Have (June 14, 2010), <http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html>.

<sup>7</sup> *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993) (stating that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’” and striking down a law that prohibited religiously-motivated conduct while permitting a broad range of similar conduct undertaken for secular ends).

<sup>8</sup> Other commenters have pointed out the significant technical problems with the accommodation proposed in the NPRM. *See, e.g.*, Self-Insurance Institute of America, Inc., Comments on the NPRM at 1-2 (Feb. 25, 2013). These problems are particularly acute with respect to self-insured organizations, which have no actual proposed rule to evaluate, just “alternative approaches.” *See* 78 Fed. Reg. at 8463. There is a significant risk that these technical flaws will make it much more difficult for objecting religious organizations to establish group health insurance plans at all, which would create an additional

ANPRM Letter at 6-7. Under the accommodation proposed in the NPRM, religious organizations would still be forced to facilitate access to products and services that many of them believe to be deeply immoral, even though the obligation for procuring separate insurance policies covering these services would ostensibly fall on insurers or third-party administrators. More fundamentally, the proposed accommodation would continue to perpetuate an unacceptable three-tiered system under which the government determines which organizations are “religious enough” to qualify for a full exemption and which are not entitled to any relief at all.

*Third*, although the definition of religious organizations that qualify for a full exemption from the Mandate has been clarified,<sup>9</sup> the proposed rules drive a new wedge between churches and their close religious affiliates. Today, religious organizations like schools and hospitals are free to join the health insurance plans established by churches, and many do.<sup>10</sup> Under the ANPRM, these affiliated organizations would have received the benefit of a full exemption from the Mandate. 77 Fed. Reg. at 16502. The NPRM expressly removes this option and would force schools, hospitals, and other church-affiliated organizations to operate under the accommodation instead. 78 Fed. Reg. at 8467. This revised approach further underscores the arbitrary nature of the distinctions the NPRM has drawn among religious organizations.

The Becket Fund continues to urge the Department of Health and Human Services to adopt a rule that respects the conscience rights of all religious organizations equally, and that recognizes the principle that Americans do not lose their religious liberty when they earn a living or establish a business.

Sincerely,

          s/ S. Kyle Duncan            
S. Kyle Duncan  
*General Counsel*  
*The Becket Fund for Religious Liberty*

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burden on their rights.

<sup>9</sup> See 78 Fed. Reg. at 8461.

<sup>10</sup> See, e.g., Church Alliance Comments on the ANPRM at 4 (June 19, 2012) (noting that church insurance plans “often cover closely affiliated church employers” such as seminaries, and also sometimes cover “employers that are controlled by or associated with the church, such as parochial schools, church camps, nursing homes, hospitals and post-secondary schools”).