House Committee on the Judiciary
"The Obama Administration's Abuse of Power"

Testimony of Lori Windham, Senior Counsel, The Becket Fund for Religious Liberty
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Mr. Chairman and distinguished Members of the Committee, allow me to thank you for the invitation and opportunity to be with you today to offer testimony on the Obama Administration's abuse of power in violating Americans' religious freedom.

I am here today representing The Becket Fund for Religious Liberty, where I serve as Senior Counsel. At the Becket Fund, we protect religious freedom for all religious traditions, including Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, and others. I will summarize my remarks and ask that my full written testimony be entered into the record.

I. Introduction

Nearly a year ago, on October 5th, I sat with my colleagues before the United States Supreme Court as we argued that churches and synagogues have a constitutional right to choose their clergy according to religious principles, without government interference. I was not alone in my shock when the Obama Administration's lawyers opposed our position by arguing that churches are no different than bowling clubs, and that our First Amendment guarantee of religious freedom does not protect religious organizations. In fact, the position taken by the Administration was so extreme that several Justices criticized the argument from the bench, calling it "extraordinary" and "amazing." The government stood before the Supreme Court and argued that it could control the hiring decisions of religious institutions. We said that this would be a clear breach of the First Amendment, and a power grab by the Executive Branch.

The Supreme Court agreed. As you know, the Justices ruled in our favor unanimously. In a 9-0 decision, the Supreme Court rejected the Administration's arguments and its attempt to regulate how religious organizations choose their leaders, calling its position "extreme." But I am saddened to report that the overreach of this Administration in redefining the limits of religious liberty in this country did not end—or even begin—there.

The Becket Fund for Religious Liberty is a non-profit organization which, for the past eighteen years, has worked to defend the religious liberty rights of people of all faiths. Our work

crosses political and religious lines and focuses on the constitutional and legal guarantees enshrined in our founding, guarantees that enable every American to live with the dignity they deserve. We call them as we see them, and sometimes that means we side with the government and sometimes we don't. We've been on the same side as the Department of Justice where they get it right and oppose them when they get it wrong.

Unfortunately, this Administration has kept us very busy. And "unfortunately" is actually not strong enough a word, because the ability of millions of Americans to live according to the dictates of their consciences is now at risk. If the government can trample First Amendment freedoms, then none of our fundamental rights are secure.

I would like to share a few of the cases where the Becket Fund has been fighting back against overreach by the Administration.

II. The Administration's Attempt to Trample Religious Freedom in *Hosanna-Tabor* v. *EEOC.*

In the recent U.S. Supreme Court case, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, which I referred to at the beginning of my testimony, the Becket Fund sought to protect the Lutheran church's ability to hire and fire religion teachers according to the teachers' ability to represent the Church's religious message. The doctrine at issue—the "ministerial exception" doctrine—is one that has long existed in our religious freedom jurisprudence. It springs from the well-settled understanding that our Constitution protects religious groups from government interference, including and perhaps especially when it comes to matters of internal governance and religious autonomy. Another way to put it is this: If the separation of church and state means anything, it means that government officials shouldn't be in the business of picking priests and rabbis.

Yet the Obama Administration in *Hosanna-Tabor* veered far off the path of established precedent. It argued that the First Amendment provides no special protection to religious organizations in the selection of their own clergy. This position was so drastic that Supreme Court Justices called it "untenable," "remarkable," and "extreme." All nine Justices agreed that the Administration's position had to be rejected

The Becket Fund won a unanimous victory in *Hosanna-Tabor* and sent a strong message to the Administration that it could not tell a church whom it should choose to teach its beliefs.

But apparently the Administration did not get the message.

III. The Administration's Attempt to Trample Religious Freedom under the HHS Contraception Mandate.

Last summer, the Administration, acting pursuant to the Affordable Care Act, issued a regulation requiring all employer health plans to provide contraceptives and abortion-causing drugs. That regulation, "the Mandate," applies to most religious organizations that are opposed to contraception or abortion, and to many business owners who want to ensure their practices are consistent with their faith. The Administration's actions were met with public uproar, with

religious groups opposed to contraception or abortion decrying the violation of their religious freedom.

A. The Mandate's Lack of Protection for Religious Freedom

Although the Mandate is riddled with exceptions—exceptions for certain religious organizations, exceptions made for convenience or expediency—the Administration has stubbornly refused to create an exception that would protect thousands of religious organizations and individuals who cannot follow both the Mandate and their faith.

The Mandate has a very narrow religious exception. The Mandate exempts certain religious employers, but it defines "religious employers" so narrowly that millions of employers who are inspired by and implement their faith through their work have been left unprotected. Indeed, the exception is so narrow that even Mother Theresa would not have qualified as a "religious employer." For example, the exception requires that an employer primarily employ and serve people of their own faith. This has effectively penalized those who express their faith by serving the community at large. The same religious organizations that help the government in fulfilling the essential needs of all Americans are now being forced by the Administration to choose between following their faith or facing hefty fines for non-compliance with the government's Mandate.

The Mandate also applies with full force to businesses that are religiously-oriented or owned and operated by religious individuals. The government has effectively said that you forfeit your free exercise rights when you open a business. But in the only decision on the merits of the Mandate to date, a Colorado federal district judge disagreed. The government argued that businesses, even small family businesses, have no constitutional or statutory protections for religious freedom. The judge rejected this argument and issued an injunction against the Mandate.

The assault on religious liberty the Mandate represents is unprecedented. Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health care sector. Moreover, Democratic congressman Bart Stupak, when offering the critical vote that enabled the health care bill to become law, reaffirmed his belief in the President's assurances that the conscience rights of Americans would be secure. As it happened, he was completely mistaken.

The government Mandate is also far broader than any state contraception mandate to date. At least 22 states have no contraception mandate at all. Of the 28 states that have some mandate, none require contraception coverage in self-insured and ERISA plans, and the vast majority exempt plans for other reasons as well. The Mandate ends those exemptions and forces organizations that were exempt from state mandates to comply with the federal Mandate.

Because the Mandate violates both the Religious Freedom Restoration Act (RFRA) and the Constitution, the Becket Fund filed the first lawsuit in the nation challenging the Mandate, on behalf of Belmont Abbey College in North Carolina. Since then, the Becket Fund has filed four more lawsuits on behalf of Colorado Christian University, Eternal Word Television Network, Ave Maria University, and Wheaton College. At least twenty-three additional lawsuits, brought

by a wide variety of religious organizations, are currently pending in federal courts across the country.

B. The Government's Attempts to Circumvent Both the Administrative Procedure Act and Judicial Scrutiny

Not only has the Administration restricted religious freedom, it has used questionable tactics to create the Mandate and insulate it from judicial review. The Administration issued the Mandate without first publishing a proposed regulation or accepting public comment, as is required by Congress under the Administrative Procedure Act. The Administration claimed the ability to subvert and radically accelerate the normal APA procedures because of the great importance of the regulation. It accepted comments on the rule only after it was put into place, and it has refused to rescind the rule or expand the narrow religious employer exemption as a result of those comments.

Predictably, this example of executive overreach caused a great public outcry. Rather than revise or rescind the Mandate, the Administration has responded to the complaints of hundreds of thousands of objectors with a series of inadequate measures. First, the Administration announced that while it would not expand the religious employer exemption, it would give certain non-profit religious groups an extra year to comply with the Mandate. This so-called "safe harbor" meant that such religious groups would have one more year to decide whether to comply with the Mandate and violate their faith, drop health care insurance coverage for their employees altogether and incur a hefty fine, or try to offer non-compliant insurance and incur even larger fines.

Second, when this did not end the public protest against the Mandate, the President announced a supposed compromise. He promised that in a rule yet to be developed, insurance companies—not the religious employers themselves—would be forced to pay for the abortion-inducing drugs, sterilization, and contraception. In March, the Administration issued an Advance Notice of Proposed Rulemaking (ANPRM), in which it suggested "potential means of accommodating" religious organizations subject to the Mandate. However, the administration's proposed "accommodation" fails in many important respects.

The first problem is that it leaves out many entities that should be protected. It is limited to non-exempt, "non-profit religious organizations." Although the Administration does not say how it intends to define "religious organizations," it suggests that the definition should be limited to churches or tax-exempt organizations that are "controlled by or associated with a church or a convention or association of churches." Under the definition (and other alternative definitions), a small business owner will not be covered by the accommodation because she is a not a non-profit. Similarly, a non-profit, non-religious organization dedicated to caring for women in crisis pregnancies will not be covered by the proposed accommodation, nor will fraternal organizations, religious colleges, or parachurch ministries, which are not "controlled by or associated with a church or a convention or association of churches," be covered.

An even deeper problem with the proposed "accommodation" is that it does not actually relieve the burden on many of the religious organizations that qualify for the accommodation. Under the proposals outlined in the ANPRM, religious organizations will still be obligated to

assist in providing these drugs and services by providing their insurers with the information and authorizations necessary to provide these drugs. The ANPRM does not offer any adequate solution for self-insured organizations, who must otherwise pay for these drugs out-of-pocket. The proposals in the ANPRM for dealing with self-insured organizations range from impractical to illegal, and have been criticized by an industry group, the Self-Insurance Institute of America, on this basis.

Worse yet, the government has treated both the ANPRM and its safe harbor guidelines as a moving target, altering and manipulating them as needed to avoid judicial scrutiny of the Mandate. Although the government has offered suggestions for a new regulation in the ANPRM, it has not yet published a proposed rule, and has repeatedly used the tentative nature of the ANPRM to avoid judicial review of the rule already in place. The government has argued, in some cases successfully, that courts should not review the existing Mandate because the forthcoming rule might change its impact on those challenging the Mandate. But nearly six months after the ANPRM, the government still refuses to state what that new rule is going to look like.

The government's manipulation of the safe harbor guidelines has become even more transparent over time. First, the government has promised not to enforce the Mandate for a year, but it has refused to exempt religious organizations from private enforcement. That means that religious organizations may face lawsuits in the coming year from private individuals who object to their policies. Second, the government's safe harbor guidance document indicates that employers who object to some, but not all, forms of contraception are not eligible. But the Administration has since stated in court papers that those organizations are eligible for the safe harbor. Third, just last month, the government quietly revised the safe harbor to cover some additional organizations. It did this because it faced a lawsuit from Wheaton College, which was not eligible under the original safe harbor. Time and again, the government has changed the rules in order to insulate the Mandate from judicial review. But there is one rule they won't change: forcing religious organizations to pay for drugs contrary to their religious beliefs.

C. The Mandate's Threat to Religious Liberty

Congress has made it clear that federal laws, including the Affordable Care Act, should not compromise religious freedom. But the Administration has trampled upon that guarantee time and time again. The Administration has ignored the intentions of Congress and restricted the rights of religious individuals and organizations. In doing so, it has violated the Constitution, ignored the Congressional command of RFRA, and endangered the rights of millions of Americans seeking to work, worship, and serve others.

IV. Conclusion

The Administration has paid lip service to the importance of religious freedom, while at the same time launching an unprecedented government encroachment on the fundamental right of religious freedom. When it comes to the First Amendment, the Administration should not be saying one thing and doing another. Protecting religious freedom often means defending the rights of people with whom you disagree. If these abuses are permitted to continue, they will

create grave injustice and set a terrible precedent for even more serious restrictions on liberty in the future. Every American should be concerned, regardless of political or religious beliefs.