



Written by [Michael Tennant](#) on June 1, 2017

White House Preparing Religious Exemptions to Contraceptive Mandate

The Trump administration appears poised to relax the Obama administration's rule forcing employers to offer free contraceptive coverage to their employees even if doing so conflicts with an employer's religious beliefs.

The White House Office of Management and Budget (OMB) posted a [notice](#) on its website that it is considering an "interim final rule" concerning "coverage of certain preventive services under the Affordable Care Act." According to the [New York Times](#), that is a reference to the contraceptive mandate, which the Obama administration issued in 2011 as part of its ObamaCare regulations.



The mandate has been the subject of much controversy and led to numerous lawsuits, primarily from Christian businesses and organizations that consider artificial contraception sinful. The Little Sisters of the Poor, a 178-year-old religious order that serves the elderly poor in over 30 countries, were among the most prominent — or perhaps the most sympathetic — litigants. Their case, bundled with six others, reached the Supreme Court, which ultimately chose to [remand the cases](#) to their respective appeals courts without ruling on them, believing a compromise could be reached in which insurers would cover contraception with no involvement from employers. Such a compromise was not reached by the end of the Obama administration, and the conflicting decisions from the appeals courts left the matter unsettled.

During the 2016 presidential campaign, candidate Donald Trump [vowed](#) to "make absolutely certain religious orders like the Little Sisters of Poor are not bullied by the federal government because of their religious beliefs." On May 4, President Trump signed an [executive order](#) directing the Treasury, Labor, and Health and Human Services secretaries to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate." Speaking to representatives of the Little Sisters whom he had invited to the signing ceremony, Trump said, "With this executive order, we are ending the attacks on your religious liberty."

The OMB rule is being reviewed pursuant to Trump's order. "Because the policy change is embodied in an interim final rule, it could take effect immediately upon publication in the Federal Register," wrote the *Times*. "When agencies issue interim final rules, however, they typically invite public comments and can later revise the rules in light of those comments."

Proponents of the contraceptive mandate are, naturally, fighting such a rule change with every weapon in their arsenal.

Last week, 14 ultraliberal Democratic senators sent a [letter](#) to OMB director Mick Mulvaney urging him "to cease any efforts ... that would undermine access to affordable preventive services, including



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contraception, for women.” They declared Trump’s executive order “dangerous,” claiming it would lead to “discrimination against not only women but also LGBTQ people, religious minorities, and others.”

Other parties threatened to sue if the mandate were rolled back in the slightest. Gretchen Borchelt, a vice president of the National Women’s Law Center, told the *Times* her organization is already preparing a lawsuit, saying, “We think whatever the rule is, it will allow an employer’s religious beliefs to keep birth control away from women.”

This is, of course, patent nonsense. Granting some exemptions to an unconstitutional mandate that employers pay for contraceptive coverage for their employees does not “keep birth control away from women,” nor does it promote discrimination. It merely means that women who desire contraception will have to pay for it themselves — as most did prior to ObamaCare — rather than being able to force their employers to do so if it violates their employers’ religious beliefs. There is, after all, that pesky little clause in the First Amendment that bars the federal government from “prohibiting the free exercise” of religion, which surely means more than simply letting people go to church.

In her interview with the *Times*, Borchelt listed of some of the arguments that would likely be used in her group’s lawsuit:

If the Trump administration does not adequately explain and justify the rule, she said, it could be challenged as “arbitrary and capricious,” in violation of federal law. In addition, she said, women could challenge it as violating a section of the Affordable Care Act that broadly prohibits discrimination in health programs that receive federal funds.

Ms. Borchelt also pointed to a little-known provision of the Affordable Care Act that says the health secretary shall not issue any rule that “impedes timely access to health care services” or “creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care.”

Sadly, given the current state of jurisprudence, these arguments might carry the day.

For this reason, plus the fact that a future administration could reinstate the mandate just as easily as this administration is (slightly) dismantling it, mandate opponents also want a definitive court decision. Mark Rienzi, an attorney with the Becket Fund for Religious Liberty who represents the Little Sisters, told the *Times* that while the rule change would be welcome, “they would still seek a court order to ensure that the government could not impose similar requirements in the future.”

President Trump is to be applauded for keeping his campaign promise to those with religious objections to contraception. Americans would be better served, however, if his administration scrapped the entire contraceptive mandate rather than carving out some narrow exemptions to it. The federal government has no constitutional authority to mandate that any employer, whether Christian, Jew, Muslim, or atheist, provide insurance coverage of any kind. At least that’s not the way the Founders conceived it.



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