



Did Ginsburg hint at the court's direction on the HHS mandate?

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The legal win last week for Barack Obama at the Supreme Court on ObamaCare came with some significant downside. Among them, the affirmation of constitutionality for the ACA means that the HHS mandate on contraception remains in place, a *diktat* to religious organizations to fund and provide access to sterilization, abortifacients, and other means of birth control that violate the tenets of their faiths. Dozens of Catholic organizations have already filed suit, and [plan to go full speed ahead](#) with them:

The Supreme Court may have ruled on Obamacare, but a pro-life law firm that is behind some of the many lawsuits that have been filed against the HHS mandate that requires religious groups to pay for birth control and abortion-causing drugs say those challenges continue.

Last Thursday, [the Supreme Court issued a 5-4 decision](#) essentially upholding the Obamacare law that pro-life groups regard as the biggest expansion of abortion and abortion funding since Roe v. Wade. The law also drew strong opposition from the pro-life community not only over abortion but because the legislation also promotes rationing of medical care that could lead to involuntarily denying lifesaving treatment. ...

But the law was also problematic for pro-lifers because of the controversial HHS mandate — which The Becket Fund for Religious Liberty indicates are still a topic of legal challenges that will move forward. Although the Supreme Court rejected claims challenging the individual mandate, the pro-life legal group says it allowed religious-liberty lawsuits against the HHS Mandate to proceed.

“The court’s opinion did not decide the issues in our cases,” said Hannah Smith, Senior Counsel at the Becket Fund for Religious Liberty. “We are challenging the Health and Human Services (HHS) mandate on religious liberty grounds which are not part of today’s decision. We will move forward seeking vindication of our client’s First Amendment rights.”

In other words, the political problems with ObamaCare remain — and in this case, an inexplicably self-inflicted political problem. The US Conference of Catholic Bishops

took a lot of flak for conducting its Fortnight for Freedom in the middle of an election campaign, but as they pointed out, *they* didn't choose the timing of the order that would force Catholic organizations to fund and facilitate access to birth control. That decision came from the White House, which could have resolved the controversy — at least as far as the USCCB is concerned — by extending the religious exemption to all religious organizations, a change that would have impacted less than a million workers in an economy of over 142 million jobs. Instead, Obama and HHS Secretary Kathleen Sebelius chose to deliberately antagonize a constituency Obama won in 2008 by nine points, and a leadership group that should have been a natural ally, as it has pushed for universal health care for almost a century.

Earlier this week, [Politico reported](#) that Obama's obstinacy on this point could lead to another defeat, this one both legal and political. In reading the dissent written by Justice Ruth Bader Ginsburg, she defended the individual mandate to carry health insurance, but noted that the Constitution still limited the federal government from imposing other mandates:

Several of the groups that have filed suit saw a glimmer of hope for their case in Justice Ruth Bader Ginsburg's opinion in the Supreme Court's individual mandate case.

“Other provisions of the Constitution also check congressional overreaching,” Ginsburg wrote. “A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion or infringed on a liberty interest protected by the Due Process Clause.”

The phrasing caught the eye of many opponents of the law.

“You can never know the motivation of the justices, but the fact that she put that in there seems to me a suggestion to the administration that you need to find a way to figure this out,” said Grace-Marie Turner, president of the Galen Institute. “It's just such a direct affront to the First Amendment.”

“I think the justices are aware that there are these HHS mandate cases out there,” said Eric Rassbach, deputy general counsel at the Becket Fund, which is representing the plaintiffs in four of the cases. “They're going to be dealing with the Affordable Care Act cases for several years.”

Don't forget that this is the same court that delivered [an embarrassing and unanimous slap](#) at the Department of Justice for its attempt to apply EEOC laws to churches in their employment of ministers — and, importantly, others as well. In that 9-0 decision in January, the court ruled that religious organizations had a First Amendment right to determine their own hiring policies as part of their religious expression. Quite to the point of this controversy, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* did not involve an actual minister within the four walls of a church, but a teacher

at a school of the kind that would be entirely subject to the HHS contraception mandate. Walter Olson at [Cato](#) described the case prior to the decision:

A Michigan teacher who taught a mix of secular and religious topics at a (now-closed) religious grade school filed suit against the school over alleged retaliation under the Americans with Disabilities Act. The church had designated her particular teaching position (unlike some others) as reserved for persons with a “calling,” and it deemed her not to have such a calling, given her willingness to resort to court action rather than internal church dispute mechanisms. But perhaps the school had erred by reserving the position for persons with a calling. If so, who should decide where to draw the line? The federal Equal Employment Opportunity Commission? A federal court that might be unfamiliar with, or unsympathetic to, church doctrine?

Had the Obama administration sought to sidestep culture-war politics and buff up its pluralist credentials, it might have urged the high court to read the ministerial exception broadly to include jobs including religious instruction, or at least urge it to decide the case at hand narrowly. Instead, it astonished some onlookers by urging the Court to reconsider the ministerial exception entirely.

If Ginsburg was trying to send a message to the Obama administration, she must have been mystified as to why it was necessary to do so. *Hosanna-Tabor* should have been message enough. Clearly, the administration will lose in federal court, and lose *big*. If they’re bothering to read the opinions in the ACA decision, the geniuses who thought up the incredibly narrow and repulsive religious exemption to the HHS contraception mandate had better start working on an exit strategy from it — when it still might do Obama some political good.