US Supreme Court hears arguments on corporate “religious right” to bar birth control to employees

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On March 23, the US Supreme Court heard oral arguments in a set of seven consolidated cases, all of which involve institutions that insist on their “religious right” to prevent employees and students from obtaining birth control.

These cases are part of a reactionary line of Supreme Court jurisprudence based on a tendentious conception of “religious liberty,” as well as the pseudo-legal doctrine of supposed constitutional “rights” for corporations. In these cases, the supposed religious liberty of businesses has been invoked in order to undermine the First Amendment’s Establishment Clause, which asserts the separation of church and state.

In a series of rulings beginning with *Burwell v. Hobby Lobby* (2014), the Supreme Court held that the Affordable Care Act (Obamacare) violated the “religious liberty” of corporations because it required employers to provide insurance coverage for birth control.

In a provocative ruling in a case known as *Wheaton College*, decided a few days after *Hobby Lobby*, the Supreme Court held that religious firms could unilaterally refuse to comply with the law. Invoking the Religious Freedom Restoration Act of 1993, the Supreme Court decided that filling out a one-page government form to opt out of paying for contraception was too burdensome on the employer’s alleged religious liberty.

The current set of cases, consolidated under the caption *Zubik v. Burwell*, were brought on behalf of numerous religiously affiliated individuals and institutions, including Priests for Life, Southern Nazarene University, Geneva College, the Roman Catholic Archbishop of Washington, East Texas Baptist University, and Little Sisters of the Poor Home for the Aged. David A. Zubik, whose name appears on the caption, is the Roman Catholic bishop of Pittsburgh.

The issue in these cases is whether it violates the “religious liberty” of the employer for the employees to receive access to birth control, even if the employer does not have to pay for it.

In a series of cowardly maneuvers, the Obama administration added loopholes to the Affordable Care Act’s regulatory framework that were designed to placate religious fundamentalists. For example, an organization that qualifies as a “religious employer” is automatically exempted. This term is defined as “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively religious activities of any religious order.”

In addition, existing health care plans that already excluded contraception were exempted from compliance with the law. These concessions by the Obama administration contributed to the legal framework in which the *Hobby Lobby* decision was issued.

Among the Obama administration’s many concessions was an “accommodation” to religious groups providing that where a business objected to the provision of contraceptives to its employees, the coverage would generally still be provided, at no cost to the employer.

The forces behind the campaign for “religious liberty”—who will not be satisfied until the Bill of Rights is overturned and the United States is transformed into a theocracy—contend that this accommodation constitutes government “hijacking” of

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their health care plans. In other words, according to the Catholic bishops and religious schools that have challenged this provision, even with the accommodation, it still violates their "religious liberty" if their employees or students have access to contraception.

In a friend-of-the-court brief filed by the Conference of Catholic Bishops, the Catholic Church argued that even if it does not have to provide coverage for contraception, the very act of "opting out" of the law makes the Church "complicit in a process" that is sinful and evil.

Of the nine federal appeals courts that have heard these cases, all but one has upheld the accommodation. The Eighth Circuit, however, ruled in favor of the religious organizations. The Eighth Circuit based its ruling on the "religious belief and practice," "religious mission," and "sincerely held religious belief" of the employer, as well as the employer's "belief" that contraception constitutes "abortion on demand."

Relying on the Wheaton College decision and the Religious Freedom Restoration Act of 1993, the Eighth Circuit held that even the accommodation process imposes "a substantial burden on [the employer's] exercise of religion." The Eighth Circuit includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

In the March 23 oral arguments before the Supreme Court, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan signaled that they would likely rule in favor of upholding the accommodation.

Chief Justice John Roberts and Justice Samuel Alito indicated that they would side with the religious groups, while the supposed "swing justice," Anthony Kennedy, used the word "hijack" in his questioning, adopting the jargon of the religious fundamentalists. (Justice Clarence Thomas, who generally sided with the late Justice Antonin Scalia, was characteristically mute during oral arguments.)

If Kennedy sides with the religious groups, the outcome of the case will have been affected by the unexpected death in February of Scalia, the ideological leader of the far-right bloc on the court. A 4-4 tie vote would leave the status quo ante in place and the split decisions of the appeals courts would remain unresolved.

On March 29, the Supreme Court invited additional briefing on whether a compromise could be reached that would break the apparent deadlock. The Supreme Court—accepting the argument that religious groups would be "complicit in sin" if their employees received coverage for birth control—asked the parties to address the issue of "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners."

According to this compromise, the religious groups "would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds. Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the federal government, or to their employees." The briefs setting forth the parties' positions on the proposed compromise are due April 20.

The campaign for the "religious liberty" of employers is thoroughly reactionary. As the *World Socialist Web Site* noted at the time, "The *Hobby Lobby* and *Wheaton College* decisions herald the return of even more sinister 'rights' of employers. After all, it was once the case that proprietors claimed the 'right' to exclude Jews, or the 'right' to refuse to serve blacks, or the 'right' to refuse to hire or promote women. 'It is my private property,' the proprietor would say, 'I have the right to do what I want with it.'"

Last week, the state of Mississippi enacted a sweeping anti-gay law under the guise of protecting "religious freedom." Under this flagrantly discriminatory law, both public and private businesses can exercise their "religious rights" to refuse to provide service to gay people.

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