



## Supreme Court hears arguments today on religious objection to contraceptive-coverage opt out

Debra Cassens Weiss

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The U.S. Supreme Court will hear oral arguments on Wednesday on a challenge to the opt-out procedure offered to nonprofits with religious affiliations that allows them to avoid providing contraceptive coverage required by the Affordable Care Act.

The death of Justice Antonin Scalia raises the possibility of a 4-4 split in the seven consolidated cases referred to as *Zubik v. Burwell*. The [Washington Post](#), the [New York Times](#) and the [Wall Street Journal](#) (sub. req.) have coverage.

Challengers say the opt-out process violates the Religious Freedom Restoration Act because it leads to contraceptive coverage for their employees by third parties. RFRA provides that “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”

All but one of the federal appeals courts considering the issue have ruled for the government. Ruling the other way, the St. Louis-based 8th U.S. Circuit Court of Appeals said a residential-care facility operated by CNS International Ministries was likely to succeed on the merits of its RFRA claim.

*Zubik* follows *Burwell v. Hobby Lobby Stores Inc.*, a 5-4 decision in 2014 that found closely held corporations can’t be required to provide insurance coverage for contraceptives over their owners’ religious objections. Scalia was in the majority in that case.

The majority opinion by Justice Samuel A. Alito Jr. noted a less-restrictive alternative that is offered to religious nonprofits but not to private companies. It gives religious nonprofits an exemption from the contraceptive mandate that puts the cost burden on insurers. A concurring opinion by Justice Anthony M. Kennedy stressed that the government could still pay for contraceptive coverage that is not provided by the company, though he didn’t rule on the legality of such an alternative.

In the new case, “all eyes will be on Justice Kennedy,” according to Elizabeth Wydra, president of the Constitutional Accountability Center, who spoke at a Cato Institute discussion of the case

covered by the Post. He could provide a fifth vote to uphold the opt out, or he could vote with conservatives, leading to a 4-4 tie.

The Obama administration argues its opt-out procedure complies with RFRA, while the religious groups say even participating in that procedure would be sinful and the requirement violates the law.