In Supreme Court case, potentially big shift on religious freedom

by Henry Gass

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(*The Christian Science Monitor*) The Unites States Supreme Court on Wednesday became the theater for a debate over religious freedom that could have far-reaching consequences for America's religious communities.

Outside the court, the division was stark. At the foot of the marble steps, nuns sang with their young supporters. Next to them, another group of young people waved "Hands Off My Birth Control" signs.

Inside the court, during about two-and-a-half hours of uninterrupted questioning, the justices essentially explored how these two groups might be able to coexist moving forward.

The case is the fourth legal challenge to the Affordable Care Act to reach the court, and the second in two years questioning the act's contraception mandate. In 2013, the court decided that Obamacare can't force privately owned companies with few shareholders to provide certain kinds of contraception for employees. In response, the Obama administration crafted an accommodation to exempt such businesses.

In the current case, religious nonprofits are objecting to that accommodation. They say the accommodation is just window dressing because contraception is still covered by the employer's insurance company—even if the nonprofit is no longer paying for it.

At issue Wednesday was the question of how far the government has to go to accommodate the desires of a religious nonprofit—and at what point an accommodation goes too far.

"When is it that government has to act to accommodate [religious freedom], and when doesn't it have to act to accommodate?" asked Justice Sonia Sotomayor. "We live in a pluralistic society in which government has to function."

For those backing the government, there is a concern that the plaintiffs—seven organizations including the Roman Catholic Little Sisters of the Poor—are seeking to change the nature of religious accommodations. By saying the Obamacare accommodation doesn't go far enough, they could be setting an impossibly high bar for religious accommodations in the future.

Accommodations could become so hard to write that lawmakers will stop attempting to do it. In that way, wrote Steven Schwinn, an associate professor at the John Marshall Law School, a favorable ruling for the Little Sisters could actually have negative consequences for religious freedom.

"This kind of claim seems to turn the idea of an accommodation on its head," he wrote on his blog. "It potentially subjects other religious accommodations in other policy areas to similar religious freedom challenges, with a result of forcing the government ship in the future to turn away from a policy altogether."

Douglas Laycock, a professor at the University of Virginia School of Law, agreed. He sided against the government in the 2013 case, but now is backing the government in the Little Sisters case. In an opinion article for the *Washington Post*, he argued that the plaintiff's argument represented "a mortal threat to an essential and widespread source of protection for religious liberty."

"Exemptions are hard to enact as it is, and they keep getting harder to enact," he said. "It's an essential part of legislative compromise to put some boundaries on these things.... If [states] can't make that kind of compromise then lots of Democrats, and probably some Republicans, won't vote for these exemptions at all."

Some 160 minutes of arguments Wednesday suggested that the final decision at the Supreme Court will be close.

The court's liberal wing seemed to take the position that, within a pluralistic society that includes many often-conflicting desires, no one can get everything she wants.

"Sometimes when a religious person who's not a hermit or a monk is a member of society, he does have to accept all kinds of things that are just terrible for him," said Justice Stephen Breyer.

"As in all things, it can't be all my way," added Justice Ruth Bader Ginsburg. "There has to be an accommodation, and that's what the government tried to do."

Yet the court's two potential swing justices seemed less convinced. Both Chief Justice John Roberts and Justice Anthony Kennedy questioned whether the accommodation served to hijack the petitioner's insurance plans, making them complicit in providing contraceptive services they find morally wrong.

"The petitioner has used the phrase *hijacking*, and it seems to me that's an accurate description of what the government wants to do," said Chief Justice Roberts.

"Religious organization [health] plans here are, in effect, subsidizing the conduct that they deemed immoral," Justice Kennedy said.

One issue the justices didn't directly address is the practical judicial consequence of a 4-to-4 tie vote. In such an event, the court would not write an opinion and the rulings of the lower courts would stand.

But that becomes problematic in this case, *Zubik v. Burwell*. The case is a consolidation of seven different petitions, and in the lower courts there were conflicting rulings on those petitions. As a result, if there were a tie vote, the contraception mandate would apply in some areas of the country but not others.