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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER IX - STATUTORY PROTECTION FOR RELIGIOUS LIBERTY

Introduction

The position taken by the majority of the Supreme Court in *Employment Division v. Smith* to narrow the protection provided by the Free Exercise Clause was criticized by many. In order to overturn the effect of the decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA created federal statutory protection for religious freedom against government action by incorporating the use of the compelling interest test. It applied to both the state and federal governments. In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court considered the constitutionality of RFRA as applied to the states and struck down that aspect of the statute as beyond the power of Congress under Section 5 of the Fourteenth Amendment to limit state action. RFRA still applies to the actions of the federal government and has been broadly interpreted by the Supreme Court.

After the Supreme Court decision in *City of Boerne*, over 20 states passed their own versions of laws to provide statutory protection for freedom of religion. In addition, Congress passed a new statute called the Religious Land Use and Institutionalized Persons Act (RLUIPA) utilizing its Commerce and Spending Clause powers to restore a small percentage of the protections for religious freedom against state interference that were eliminated when the Court invalidated RFRA as applied to the states. The Supreme Court rejected an Establishment Clause challenge to RLUIPA in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

A. Religious Freedom Restoration Act of 1993 (RFRA)

1. Statute

SEC. 1. SHORT TITLE.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings: The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without

compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes: The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

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SEC. 5. DEFINITIONS.

As used in this Act --

(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of

that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act .

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act .

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

2. GONZALES v. O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL
546 U.S. 418 (2006)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A religious sect with origins in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government. The Government concedes that this practice is a sincere exercise of religion, but nonetheless sought to prohibit the small American branch of the sect from engaging in the practice, on the ground that the Controlled Substances Act bars all use of the hallucinogen. The sect sued to block enforcement against it of the ban on the sacramental tea, and moved for a preliminary injunction.

It relied on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government "demonstrates that application of the burden to the person" represents the least restrictive means of advancing a compelling interest. Before this Court, the Government's central submission is that it has a compelling interest in the uniform application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice. We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does not prohibit governments from burdening religious practices through generally applicable laws. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA) which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*. Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." The only exception recognized by the statute requires the

Government to satisfy the compelling interest test—to "demonstrat[e] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."

The Controlled Substances Act regulates the importation, manufacture, distribution, and use of psychotropic substances. The Act classifies substances into five schedules based on their potential for abuse, the extent to which they have an accepted medical use, and their safety. Substances listed in Schedule I are subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects.

O Centro Espírita Beneficente União do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Central to the UDV's faith is receiving communion through hoasca (pronounced "wass-ca"), a sacramental tea made from two plants unique to the Amazon region. One of the plants, psychotriaviridis, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, banisteriopsis caapi. DMT, as well as "any material, compound, mixture, or preparation, which contains any quantity of [DMT]," is listed in Schedule I of the Act.

In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of hoasca. A subsequent investigation revealed that the UDV had received 14 prior shipments of hoasca. The inspectors seized the intercepted shipment and threatened the UDV with prosecution. The UDV filed suit. The complaint alleged that applying the Controlled Substances Act to the UDV's sacramental use of hoasca violates RFRA. The UDV moved for a preliminary injunction, so that it could continue to practice its faith pending trial.

At a hearing on the preliminary injunction, the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV. The Government argued, however, that applying the Act was the least restrictive means of advancing three compelling governmental interests: protecting the health and safety of UDV members, preventing the diversion of hoasca from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Substances.

The District Court heard evidence from both parties on the health risks of hoasca and the potential for diversion from the church. The Government presented evidence to the effect that use of hoasca, or DMT more generally, can cause psychotic reactions, cardiac irregularities, and adverse drug interactions. The UDV countered by citing studies documenting the safety of its sacramental use of hoasca. With respect to diversion, the Government pointed to a general rise in the illicit use of hallucinogens, and cited interest in the illegal use of DMT and hoasca; the UDV emphasized the thinness of any market for hoasca, the relatively small amounts of the substance imported by the church, and the absence of any diversion problem in the past.

The District Court concluded that the evidence on health risks was "in equipoise," and similarly that the evidence on diversion was "virtually balanced." In the face of such an even showing, the court reasoned that the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV's sincere religious

exercise. The court also rejected the asserted interest in complying with the 1971 Convention on Psychotropic Substances, holding that the Convention does not apply to hoasca.

The court entered a preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use of hoasca. The injunction requires the church to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn susceptible UDV members of the dangers of hoasca. The Government appealed the preliminary injunction and a panel of the Tenth Circuit affirmed, as did a majority of the Circuit sitting en banc. We granted certiorari.

The Government does not challenge the District Court's factual findings or its conclusion that the evidence submitted was evenly balanced. Instead, the Government maintains that such evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act. We review the District Court's legal rulings de novo and its ultimate decision to issue the preliminary injunction for abuse of discretion.

The Government's argument rests on the Controlled Substances Act itself. The Government contends that the Act's description of Schedule I substances as having "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision" by itself precludes any consideration of exceptions such as that sought by the UDV. The Government goes on to argue that the regulatory regime established by the Act—a "closed" system that prohibits all use of controlled substances except as authorized by the Act itself, "cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions." According to the Government, there would be no way to cabin religious exceptions once recognized. Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Act serves a compelling purpose and admits of no exceptions.

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the particular claimant whose sincere exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." In each of those cases, this Court looked beyond broadly formulated interests and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances cannot carry the day. This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

And in fact an exception has been made to the Schedule I ban for religious use. For the past

35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church. In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. Everything the Government says about the DMT in hoasca applies in equal measure to the mescaline in peyote, yet both the Executive and Congress have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings can preclude any consideration of a similar exception for the 130 American members of the UDV who want to practice theirs.

The peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA. The Government argues that the effectiveness of the Controlled Substances Act will be "necessarily undercut" if the Act is not uniformly applied. The peyote exception, however, has been in place since the outset of the Act, and there is no evidence that it has "undercut" the Government's ability to enforce the ban on peyote use by non-Indians.

We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance. The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV's sacramental use of hoasca. It cannot compensate for that failure now with the bold argument that there can be no RFRA exceptions at all to the Controlled Substances Act.

Before the District Court, the Government also asserted an interest in compliance with the United Nations Convention on Psychotropic Substances. The Convention calls on signatories to prohibit the use of hallucinogens, including DMT. The Government argues that it has a compelling interest in meeting its international obligations by complying with the Convention.

The District Court rejected this interest because it found that the Convention does not cover hoasca. We do not agree. The fact that hoasca is covered by the Convention, however, does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention, to the UDV's sacramental use of the tea. At the present stage, it suffices to observe that the Government did not even submit evidence addressing the international consequences of granting an exemption for the UDV. The Government simply submitted affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs. We do not doubt the validity of these interests, but under RFRA invocation of such general interests, standing alone, is not enough.

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws `neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior

governmental interests." We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate a compelling interest in barring the UDV's sacramental use of hoasca.

3. Burwell v. Hobby Lobby Stores, Inc.
134 S. Ct. 2751 (2014)

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA) permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price--as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for

all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages on others" or that require "the general public [to] pick up the tab." And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on thousands of women employed by Hobby Lobby." The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010. ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individual." And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. In August 2011, the HRSA promulgated the Women's Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of

preventing an already fertilized egg from developing by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services.

In addition, HHS has exempted certain religious nonprofit organizations, described as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered on account of religious objections." To qualify for this accommodation, an employer must certify that it is such an organization. When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"--that existed prior to March 23, 2010, and that have not made specified changes after that date--need not comply with many of the Act's requirements, including the contraceptive mandate. And employers with fewer than 50 employees are not required to provide health insurance at all. All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

II

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages shares humanity with those who conceived it." Fifty years ago, Norman Hahn started a wood-working business, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." The company's "Vision and Values Statements" affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage." As explained in Conestoga's "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." It is therefore "against [their] moral

conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God." The Hahns have excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients.

The Hahns and Conestoga sued HHS under RFRA and the Free Exercise Clause, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. These include two forms of emergency contraception and two types of intrauterine devices. In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs."

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. Hobby Lobby is organized as a for-profit corporation. One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation. These two businesses remain closely held, and David, Barbara, and their children retain exclusive control of both companies. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO.

Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays. The businesses refuse to engage in transactions that promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy newspaper ads inviting people to "know Jesus as Lord and Savior."

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. Their group-health-insurance plan is not a grandfathered plan.

The Greens, Hobby Lobby, and Mardel sued to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.

III

RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest." The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA.

According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences. HHS would put merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations.

RFRA was designed to provide very broad protection for religious liberty. Congress went far beyond what this Court has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA's text reveals that Congress did no such thing.

Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." The purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation. When rights are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

As we noted above, RFRA applies to "a person's" exercise of religion, and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." Under the Act, "the wor[d] 'person' include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a clear and affirmative answer to the question whether the companies in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales v. O Centro Espírita Beneficiente União do Vegetal*; *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA. This concession dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations in these cases. No known understanding of the term "person" includes some but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because HHS concedes that nonprofit corporations can be protected by RFRA. If the corporate form is not enough, what about the profit-making objective? In *Braunfeld v. Brown*, 366 U.S. 599 (1961), we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric. These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. We have little trouble concluding that it does. As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS

mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. For Hobby Lobby, the bill could amount to about $475 million per year; for Conestoga, the assessment could be $33 million per year; and for Mardel, it could be about $15 million per year. These sums are surely substantial.

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness, was transferred to a job making turrets for tanks. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs and work that he found morally objectionable. This Court, however, held that "it is not for us to say that the line he drew was an unreasonable one."

Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest. We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling, and we will proceed to consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest."

The least-restrictive-means standard is exceptionally demanding and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives. Nor has HHS provided any statistics regarding the number of employees who might be affected. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay anything in order to achieve this important goal. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend funds to accommodate citizens' religious beliefs. HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by Congress.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive. HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "exclude contraceptive coverage from the group health insurance coverage" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements on the eligible organization, the group health plan, or plan participants or beneficiaries."

We do not decide whether an approach of this type complies with RFRA for all religious claims. At a minimum, it does not impinge on plaintiffs' religious belief that providing insurance for the contraceptives at issue violates their religion, and it serves HHS's interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," because their employers' insurers would be responsible for providing information and coverage.

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *United States v. Lee*, but these cases are quite different. Our holding in *Lee* noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures. We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers purchase insurance for their own employees. Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III-C-1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever the government, i.e., the general public, can pick up the tab.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith--in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent. . . .

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA. In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened." The legislative history is correspondingly emphatic on RFRA's aim. In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." In short, the Act reinstates the law as it was prior to *Smith*, without "creat[ing] . . . new rights for any religious practice or for any potential litigant."

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. To support its conception of RFRA, one that sets a new course, the Court highlights RFRA's requirement that the government, if its action substantially burdens a person's religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. "[B]y imposing a least-restrictive-means test," the Court suggests, RFRA "went beyond what was required by our pre-*Smith* decisions." But the Congress that passed RFRA correctly read this Court's pre-*Smith* case law as including within the "compelling interest test" a "least restrictive means" requirement. . . .

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise . . . religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a

compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest? Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test applies to government actions that "substantially burden a person's exercise of religion." This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." Here, context does so indicate. RFRA speaks of "a person's exercise of religion." Whether a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-*Smith* "free-exercise caselaw." There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until today, religious exemptions had never been extended to any entity operating in "the commercial, profit-making world." The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs constantly escapes the Court's attention.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood--combined with its other errors in construing RFRA--invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." Congress no doubt meant the modifier "substantially" to carry weight. The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. But those beliefs do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that

[plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger. Undertaking the inquiry that the Court forgoes, I conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives. Instead, it calls on the companies to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician is in any meaningful sense [her employer's] decision or action." It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. The mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court's reasoning appears to permit Hobby Lobby and Conestoga to exclude from their group health plans all contraceptives.

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions. Federal statutes often include exemptions for small employers,

and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993 (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967 (originally exempting employers with fewer than 50 employees, the statute now governs employers with 20 or more employees); Americans With Disabilities Act (applicable to employers with 15 or more employees); Title VII (originally exempting employers with fewer than 25 employees, the statute now governs employers with 15 or more employees). The ACA's grandfathering provision allows a phasing-in period for compliance with a number of the Act's requirements. Once specified changes are made, grandfathered status ceases. The percentage of employees in grandfathered plans is steadily declining. In short, far from a categorical exemption, the grandfathering provision is "temporary, a means for gradually transitioning employers into mandatory coverage."

The Court ultimately acknowledges a critical point: RFRA's application "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others--here, the very persons the contraceptive coverage requirement was designed to protect.

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law to ensure that their commercial employers can adhere unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation afforded to nonprofit religion-based organizations. According to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims."

In sum, in view of what Congress sought to accomplish, i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee*. Today's Court dismisses *Lee* as a tax case. But the *Lee* Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of faith are not to be superimposed on statutory schemes which are binding on others in that activity." The statutory scheme of employer-based comprehensive health coverage is surely binding on others engaged in the same trade or business as the challengers. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs.

Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of religious beliefs. *See, e.g., Newman v. Piggie Park Enters., Inc.,* 256 F. Supp. 941, 945 (D.S.C.1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration); *Elane Photography, LLC v. Willock*, 309 P. 3d 53 (N.M. 2013) (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on religious beliefs), *cert. denied*, 134 S. Ct. 1787 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not determine the plausibility of a religious claim"?

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including intravenous fluids and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists)?

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest.

There is an overriding interest, I believe, in keeping courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. The Court, I fear, has ventured into a minefield by its reading of RFRA.

4. Zubik v. Burwell
136 S. Ct. 1557 (2016)

Per Curiam.

Petitioners are primarily nonprofit organizations that provide health insurance to their employees. Federal regulations require petitioners to cover certain contraceptives as part of their health plans, unless petitioners submit a form either to their insurer or to the Federal Government, stating that they object on religious grounds to providing contraceptive coverage. Petitioners allege that submitting this notice substantially burdens the exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993.

Following oral argument, the Court requested supplemental briefing addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." Both petitioners and the Government now confirm that such an option is feasible.

In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals. The parties on remand should be afforded an opportunity to arrive at an approach that accommodates petitioners' religious exercise while ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage." Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by petitioners' health plans "obtain, without cost, the full range of FDA approved contraceptives."

Professor's Note: In October, 2017, the Department of Health and Human Services, the Labor Department, and the Department of the Treasury issued new rules that erode ACA coverage for contraception. These rules end the dispute over notification litigated in *Zubik v. Burwell* and provide broad protections for employers that have religious or moral objections to providing health insurance coverage for contraception to their employees. Under the new rules, employers with such objections who choose not to provide such coverage no longer have to notify either their insurers or the Federal Government of their intention not to provide such coverage. Moreover, notification to their employees, while it may be required by ERISA, an employment or union contract, or state law, is no longer a requirement of regulations issued pursuant to the ACA. Several lawsuits have already been filed in an effort to block the new rules.

B. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT of 2000 (RLUIPA)

1. Statute

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a

religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application. This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action. A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. . . .

(b) Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 U.S.C. § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law. . .that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) . . . .

2. CUTTER v. WILKINSON
544 U.S. 709 (2005)

GINSBURG, J., delivered the opinion for a unanimous Court.

Petitioners are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of "nonmainstream" religions. They complain that prison officials, in violation of RLUIPA, have failed to accommodate their religious exercise "in a variety of ways, including denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items, and failing to provide a chaplain trained in their faith." In response to petitioners' complaints, respondent prison officials have mounted a facial challenge to the institutionalized-persons provision of RLUIPA; respondents contend that the Act improperly advances religion in violation of the Establishment Clause.

"This Court has long recognized that the government may accommodate religious practices without violating the Establishment Clause." Just last Term, in *Locke v. Davey*, the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" But § 3 of RLUIPA, we hold, does not, on its face, exceed the limits of permissible government accommodation.

RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens. Ten years before RLUIPA's enactment, the Court held, in *Employment Div. v. Smith*, that the Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. Responding to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA "applied to all Federal and State law," but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment.

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation; § 3 relates to religious exercise by institutionalized persons. Section 3, at issue here, provides that "no [state or local] government

shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Section 3 applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance," or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."

Before enacting § 3, Congress documented that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise.[1] To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord "due deference to the experience and expertise of prison and jail administrators."

Our decisions recognize that "there is room for play in the joints" between the Religion Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. We hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths.

Section 3 covers state-run institutions -- mental hospitals, prisons, and the like -- in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.

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[1] The hearings held by Congress revealed, for a typical example, that "[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food." Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. The "Michigan Department of Corrections prohibited the lighting of Chanukah candles at all state prisons" even though "smoking" and "votive candles" were permitted. A priest in Oklahoma stated that prisoners' religious possessions, "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials.

We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. In *Caldor*, the Court held the law invalid under the Establishment Clause because it "unyieldingly weighted" the interests of Sabbatarians "over all other interests." We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "context matters" in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."

Finally, RLUIPA does not differentiate among bona fide faiths. In *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), we held that the law violated the Establishment Clause in part because it "singled out a particular religious sect for special treatment." RLUIPA presents no such defect. It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.

In upholding RLUIPA's institutionalized-persons provision, we emphasize that respondents "have raised a facial challenge to [the Act's] constitutionality." Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, as-applied challenges would be in order.

3. Holt v. Hobbs
135 S. Ct. 853 (2015)

Justice Alito delivered the opinion of the Court.

Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, is an Arkansas inmate and a devout Muslim who wishes to grow a ½-inch beard in accordance with his religious beliefs. Petitioner's objection to shaving his beard clashes with the Arkansas Department of Correction's grooming policy, which prohibits inmates from growing beards unless they have a particular dermatological condition. We hold that the Department's policy, as applied in this case, violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest.

We conclude in this case that the Department's policy substantially burdens petitioner's religious exercise. Although we do not question the importance of the Department's interests in stopping the flow of contraband and facilitating prisoner identification, we do doubt whether the prohibition against petitioner's beard furthers its compelling interest about contraband. And we conclude that the Department has failed to show that its policy is the least restrictive means of furthering its compelling interests.

Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), "to provide very broad protection for religious liberty." RLUIPA concerns two areas of government activity: Section 2 governs land-use regulation, and Section 3 governs religious exercise by institutionalized persons. Section 3 mirrors RFRA and provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RLUIPA thus allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA."

Several provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise." And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."

Petitioner, as noted, is in the custody of the Arkansas Department of Correction and he objects on religious grounds to the Department's grooming policy, which provides that "[n]o inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." The policy makes no exception for inmates who object on religious grounds, but it does contain an exemption for prisoners with medical needs. The policy provides that "failure to abide by [the Department's] grooming standards is grounds for disciplinary action."

Petitioner sought permission to grow a beard and, although he believes that his faith requires him not to trim his beard at all, he proposed a "compromise" under which he would grow only a ½-inch beard. Prison officials denied his request. Petitioner filed a pro se complaint in Federal District Court challenging the grooming policy under RLUIPA.

Under RLUIPA, petitioner bore the initial burden of proving that the Department's grooming policy implicates his religious exercise. A prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation. Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.

In addition to showing that the relevant exercise of religion is grounded in a sincerely held religious belief, petitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion. Petitioner easily satisfied that obligation. The Department's grooming policy requires petitioner to shave his beard and thus to "engage in conduct that seriously violates [his] religious beliefs." If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise. Indeed, the Department does not argue otherwise.

Since petitioner met his burden of showing that the Department's grooming policy

substantially burdened his exercise of religion, the burden shifted to the Department to show that its refusal to allow petitioner to grow a ½-inch beard "(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest."

The Department argues that its grooming policy represents the least restrictive means of furthering a " 'broadly formulated interest,' namely, the Department's compelling interest in prison safety and security. But RLUIPA, like RFRA, " 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.' " RLUIPA requires us to " 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants' " and "to look to the marginal interest in enforcing" the challenged government action in that particular context. In this case, that means the enforcement of the Department's policy to prevent petitioner from growing a ½-inch beard.

The Department contends that enforcing this prohibition is the least restrictive means of furthering prison safety and security in two specific ways. The Department first claims that the no-beard policy prevents prisoners from hiding contraband. The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards.

We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a ½-inch beard is hard to take seriously. As noted, the Magistrate Judge observed that it was "almost preposterous to think that [petitioner] could hide contraband" in the short beard he had grown at the time of the evidentiary hearing. An item of contraband would have to be very small indeed to be concealed by a ½-inch beard, and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out. Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a ½-inch beard rather than in the longer hair on his head.

The Magistrate Judge, the District Court, and the Court of Appeals all thought that they were bound to defer to the Department's assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband. RLUIPA, however, does not permit such unquestioning deference. RLUIPA, like RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest. Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard. And without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a ½-inch beard actually furthers the Department's interest in rooting out contraband.

Even if the Department could make that showing, its contraband argument would still fail

because the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband. "The least-restrictive-means standard is exceptionally demanding," and it requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]."" [I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it."

The Department failed to establish that it could not satisfy its security concerns by simply searching petitioner's beard. The Department already searches prisoners' hair and clothing, and it presumably examines the ½-inch beards of inmates with dermatological conditions. It has offered no sound reason why hair [and] clothing can be searched but ½-inch beards cannot. The Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair [and] clothing. And the Department has failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard. For all these reasons, the Department's interest in eliminating contraband cannot sustain its refusal to allow petitioner to grow a ½-inch beard.

The Department contends that its grooming policy is necessary to further an additional compelling interest, i.e., preventing prisoners from disguising their identities. The Department tells us that the no-beard policy allows security officers to identify prisoners quickly and accurately. It claims that bearded inmates could shave their beards and change their appearance in order to enter restricted areas within the prison, to escape, and to evade apprehension after escaping.

We agree that prisons have a compelling interest in the quick and reliable identification of prisoners, and we acknowledge that any alteration in a prisoner's appearance, such as by shaving a beard, might, in the absence of effective countermeasures, have at least some effect on the ability of guards or others to make a quick identification. But even if we assume that the Department's grooming policy sufficiently furthers its interest in the identification of prisoners, that policy still violates RLUIPA as applied in the circumstances present here. The Department contends that a prisoner who has a beard when he is photographed for identification purposes might confuse guards by shaving his beard. But as petitioner has argued, the Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter.

In addition to its failure to prove that petitioner's proposed alternatives would not sufficiently serve its security interests, the Department has not provided an adequate response to two additional arguments that implicate the RLUIPA analysis. First, the Department has not adequately demonstrated why its grooming policy is underinclusive in at least two respects. Although the Department denied petitioner's request to grow a ½-inch beard, it permits prisoners with a dermatological condition to grow ½-inch beards. The Department does this even though both beards pose similar risks. Second, the Department failed to show why the vast majority of States and the Federal Government permit inmates to grow ½-inch beards, but it cannot. When so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it must take a different course, and the Department failed to make that showing here.