No. 00-914

In the Supreme Court of the United States

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., ET AL., PETITIONERS

v.

MICHAEL MCMULLAN, ACTING DEPUTY ADMINISTRATOR, HEALTH CARE FINANCE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 4454 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 426-432, allows individuals who have sincere religious objections to receiving medical care to obtain Medicare and Medicaid coverage for non-medical health care services, such as bed and board and nursing services, incurred in religious non-medical health care institutions. The question presented is:

Whether, by allowing individuals with religious objections to medical care to receive the same compensation for non-medical health care services routinely enjoyed by Medicare and Medicaid beneficiaries as part of their medical treatment, Section 4454 violates the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-53) is reported at 212 F.3d 1084. The opinion of the district court (Pet. App. 54-72) and an order correcting certain factual errors in that opinion (Pet. App. 73-75) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 1, 2000. A petition for rehearing was denied on August 29, 2000. The petition for a writ of certiorari was filed

on November 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Medicare Act, 42 U.S.C. 1395 *et seq.*, and the Medicaid Act, 42 U.S.C. 1396 *et seq.*, to increase the access of elderly, disabled, and low-income individuals to health care. Part A of the Medicare program creates a comprehensive insurance program that provides individuals 65 years or older and individuals with disabilities "basic protection against the costs of hospital, related post-hospital, home health services, and hospice care." 42 U.S.C. 1395c. The Medicare program is financed through a separate federal income tax on employee wages and self-employment income. See 26 U.S.C. 1401(b), 3101(b). Benefits under Part A of the Medicare program are available for care furnished by health care providers that qualify as a hospital, skilled nursing facility, home health agency, or hospice. 42 U.S.C. 1395d(a), 1395x(e) (1994 & Supp. IV 1998) (definition of "hospital"), 1395i-3 (1994 & Supp. IV 1998) (definition of "skilled nursing facility"), 1395x(*o*) (definition of "home health agency"), 1395x(dd)(2) (1994 & Supp. IV 1998) (definition of "hospice program"). Medicare benefits may include payments for bed and board; nursing, medical, social, diagnostic, and therapeutic services; and drugs, biologicals, supplies, appliances, and equipment. 42 U.S.C. 1395d(a), 1395x(b) (1994 & Supp. IV 1998) (hospitals), 1395x(h) (1994 & Supp. IV 1998) (nursing facilities), 1395x(m) (1994 & Supp. IV 1998) (home health services), 1395x(dd)(1) (1994 & Supp. IV 1998) (hospice care). Individual beneficiaries select the provider from which they will receive care, and Medicare then reimburses the provider

for providing covered services to the beneficiaries. See 42 U.S.C. 1395d(a), 1395f (1994 & Supp. IV 1998).

The Medicaid Act is designed to enable each State "to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. 1396. The Medicaid program is jointly financed by the federal and state governments and is administered by the States. 42 U.S.C. 1396b(a), 1396d(b) (1994 & Supp. IV 1998).

States participating in the Medicaid program are required to submit a "state plan" that fulfills broad requirements imposed by the statute and regulations. 42 U.S.C. 1396, 1396a (1994 & Supp. IV 1998). A state plan must provide for coverage of certain basic medical services, including inpatient and outpatient hospital services, other laboratory and x-ray services, and physician and nursing services. 42 U.S.C. 1396a(a)(10) (1994 & Supp. IV 1998), 1396d(a)(1)-(5), (17) and (21). A State may also, at its option, provide benefits for a variety of other health-care-related services, 42 U.S.C. 1396d(a) (Supp. IV 1998), including, in relevant part, "any other type of remedial care recognized under State law, specified by the Secretary." 42 U.S.C. 1396d(a)(27) (Supp. IV 1998). Within the broad limits established by the Medicaid statute and implementing regulations, each State determines the type, scope, and duration of services for which benefits are available, and the standards of eligibility. 42 U.S.C. 1396a(a)(10) (1994 & Supp. IV 1998). As with Medicare, beneficiaries select the provider from which they will receive services, and the State reimburses the provider for

covered services. The States, in turn, file claims with the federal government for reimbursement at the end of each year. See 42 U.S.C. 1396, 1396b (1994 & Supp. IV 1998).

As originally enacted, the Medicare and Medicaid statutes included special provisions allowing compensation for purely non-medical services, unaccompanied by medical treatment, only if the beneficiary sought treatment in a sanatorium "operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts." 42 U.S.C. 1395x(e) and (y)(1) (1994). Those provisions were struck down as unconstitutional in *Children's Healthcare Is a Legal Duty, Inc.* v. *Vladeck*, 938 F. Supp. 1466, 1469-1470 (D. Minn. 1996), vacated as moot, Nos. 96-3936 & 96-3938 (8th Cir. Sept. 9, 1997).[1]

b. In Section 4454 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 426-432, Congress amended the Medicare and Medicaid programs to remove the sect-specific limitation in the exception. In its place, Congress enacted provisions that allow all individuals who have a medical condition serious enough to warrant admission to a hospital or skilled nursing facility, but who have sincere religious objections to receiving medical care, to receive reimbursement for the same non-medical health care services that are reimbursable when provided in a hospital or skilled nursing facility incident to medical care.[2] Congress's

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[1] The Department of Justice declined to seek further review and notified Congress that it would no longer defend the constitutionality of those particular provisions. See Pet. App. 141-157.

[2] See 42 U.S.C. 1395x(b) (1994 & Supp. IV 1998) (defining "inpatient hospital services" to include, *e.g.*, bed and board, nursing services, and health care supplies); 42 U.S.C. 1395x(h) (1994 & Supp. IV 1998) (similarly defining "extended care services").

purpose was to provide "a sect-neutral accommodation available to any person who is relying on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs." H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. 768 (1997).

To that end, Congress amended the definitions of "hospital" and "skilled nursing facility" in the Medicare Act to include "a religious nonmedical health care institution * * *, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements * * * as may be provided in regulations consistent with section 1395i-5 of this title." 42 U.S.C. 1395x(e) (Supp. IV 1998); see also 42 U.S.C. 1395x(y)(1) (Supp. IV 1998). The amendments further define a "religious nonmedical health care institution" (RNHCI) as a facility that, *inter alia*:

> (C) provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs;
>
> (D) provides such nonmedical items and services exclusively through nonmedical nursing personnel who are experienced in caring for the physical needs of such patients; [and]
>
> * * * * *
>
> (F) on the basis of its religious beliefs, does not provide through its personnel or otherwise medical

> items and services (including any medical screening, examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients.

42 U.S.C. 1395x(ss) (Supp. IV 1998). In addition, the RNHCI must be a lawfully operated nonprofit organization, must provide non-medical items and services to inpatients on a 24-hour basis, and may not be owned by or affiliated with a provider of medical treatment or services. 42 U.S.C. 1395x(ss)(1)(A), (B), (E) and (G) (Supp. IV 1998). As the court of appeals explained, Congress imposed those requirements "to ensure the safety of patients receiving medical care through Medicare and Medicaid." Pet. App. 11. Otherwise, Congress feared, "an institution that provides both medical and spiritual healing services" could "evade the medical oversight and other quality of care standards that Medicare and Medicaid impose on all medical institutions," but not on RNHCIs. *Ibid.*

Congress further amended the statute to allow reimbursement for services furnished in an RNHCI only if the individual's condition was sufficiently serious that the patient would qualify for benefits for inpatient hospital services or extended care services in a medical facility. 42 U.S.C. 1395i-5(a)(2) (Supp. IV 1998). Further, Congress authorized payment only for "inpatient hospital services or post-hospital extended care services," 42 U.S.C. 1395i-5(a) (Supp. IV 1998), which are defined to include only secular health care services such as bed and board, nursing services, and health care supplies. 42 U.S.C. 1395x(b) (1994 & Supp. IV 1998) (defining "inpatient hospital services"); 1395x(h) (1994 & Supp. IV 1998) (defining "extended care services").[3]

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[3] Because RNHCIs do not provide medical care, Congress exempted them from the medical standards and medical review

Congress further conditioned the receipt of benefits on the individual beneficiary making a written election to receive such benefits in an RNHCI. 42 U.S.C. 1395i-5 (Supp. IV 1998).[4]

The amendments provide that patients in an RNHCI are not required "to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient * * * objects thereto on religious grounds." 42 U.S.C.1395x(ss)(3)(A)(i) (Supp. IV 1998). That provision, however, "shall not be construed as preventing the Secretary [of Health and Human Services] from requiring * * * the provision of sufficient information regarding an individual's condition as a condition for receipt of benefits." 42 U.S.C. 1395x(ss)(3)(A)(ii) (Supp. IV 1998).

In addition, an RNHCI's initial coverage determinations are subject to the same administrative and judicial review procedures that govern coverage determinations by hospitals and skilled nursing facilities. The initial coverage determination is reviewed by a fiscal intermediary (usually an insurance company), which is independent of the RNHCI. The fiscal intermediary's decision is then subject to review by the Provider Reimbursement Review Board, the Secretary of Health and Human Services, and ultimately the

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requirements that apply to facilities providing medical care under the Medicare and Medicaid programs. 42 U.S.C. 1320c-11, 1396a(a), 1396g(e)(1) (Supp. IV 1998).

[4] The individual must certify in writing that he or she "is conscientiously opposed to acceptance of nonexcepted medical treatment," and that his or her "acceptance of nonexcepted medical treatment would be inconsistent with the individual's sincere religious beliefs." 42 U.S.C. 1395i-5(b)(2)(A) (Supp. IV 1998).

courts.[5] See 42 U.S.C. 1395x(ss)(1)(H)-(J) and (3)(B)(ii) (Supp. IV 1998), 1395*oo*; see also 64 Fed. Reg. 67,028, 67,038 (1999) (interim final regulations implementing the 1997 amendments).[6]

2. a. One day after the enactment of Section 4454 of the Balanced Budget Act of 1997, petitioners, as taxpayers, filed suit challenging the amendments made by that Section as a violation of the Establishment Clause, both on their face and as applied to Christian Science sanatoria. The First Church of Christ Scientist intervened. The district court granted summary judgment in favor of respondents on the ground that Section 4454 is a permissible, sect-neutral accommodation of religion. Pet. App. 54-75.

b. The court of appeals affirmed. Pet. App. 1-31. The court first rejected petitioners' argument that Section 4454 should be subject to strict scrutiny as a denominational preference. The court explained that Section 4454 "is by its terms sect-neutral" and that its legislative history reveals that its impetus was "to accommodate all persons who object to medical care for religious reasons." *Id.* at 8-9. Finally, the court reasoned that the eligibility requirements and limitations established by Section 4454 "reflect valid secular jus-

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[5] Petitioners' assertion (Pet. 9) that Section 4454 leaves an RNHCI "virtually free to determine its own coverage" thus misunderstands the statute's operation.

[6] The statutory provisions discussed in the text are those applicable to the Medicare program. Parallel amendments were made in the Medicaid statute to permit coverage of non-medical services provided by an RNHCI, where the beneficiary's condition otherwise qualifies him or her for Medicaid services. See 42 U.S.C. 1396a(a), 1396g (Supp. IV 1998); Pet. App. 5; *Children's Healthcare Is a Legal Duty*, 938 F. Supp. at 1469-1471.

tifications" rather than "a religious gerrymander." *Id.* at 10.

Then, applying the analytical framework of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (Pet. App. 13), the court of appeals held that Section 4454 is consistent with the Establishment Clause. First, the court ruled (Pet. App. 14-15) that Section 4454 has a secular legislative purpose because "it removes a special burden imposed by the Medicare and Medicaid Acts upon persons who hold religious objections to medical care" and who otherwise would be "forced to choose between adhering to the tenets of their faith and receiving government aid." The court noted (*id.* at 15) that the pressure to abandon religious beliefs to obtain some form of health care coverage is "especially acute under Medicaid, which often represents the only source of health care for indigent persons." See also *id.* at 17 (noting that both unemployment compensation and Medicare and Medicaid benefits are "of great importance to personal well-being").

Second, the court concluded that Section 4454's primary effect neither advances nor inhibits religion. Applying this Court's accommodation precedents, the court stated that Section 4454 would "impermissibly advance[] or inhibit[] religion only if it imposes a substantial burden on nonbeneficiaries, or provides a benefit to religious believers without providing a corresponding benefit to a large number of nonreligious groups or individuals." Pet. App. 19-20 (citations omitted). The court held that Section 4454 does not impose a substantial burden on nonbeneficiaries, noting that petitioners failed to show that Section 4454 would result in any increased tax burdens on the general population or in any particular burdens on individual nonbeneficiaries. *Id.* at 20. Nor, the court concluded,

does Section 4454 grant any special benefit to individuals who have religious objections to medical care, because it "merely permits" patients in RNHCIs "to receive a 'subset,' i.e. the nonmedical portion, of the care provided by Medicare and Medicaid to patients of medical institutions." *Id.* at 21. Patients in an RNHCI, the court emphasized, are "never reimbursed for services for which medical patients are not similarly reimbursed." *Id.* at 23-24. The court further held that Section 4454 "does not create any more of an incentive for persons to engage in religion than other religious accommodations that have been upheld by the Supreme Court," *id.* at 25, and does not provide funding for any religious activity that may occur in an RNHCI, *ibid.* See also *id.* at 26 (Section 4454 does "not fund the spiritual healing services that may take place" in an RNHCI). "Because the[] [covered] physical care services, such as dressing of wounds and assistance in eating, are inherently secular, and are not converted into [religious activities] by the fact that they are carried out by organizations with religious affiliations," the court reasoned, "the primary function" of the RNHCIs "is secular in nature." *Id.* at 26-27 (citations and internal quotation marks omitted).

Third, the court rejected (Pet. App. 27) petitioners' argument that Section 4454 unlawfully delegates to RNHCIs, which are religious organizations, ultimate decision-making authority regarding Medicare and Medicaid coverage. The court noted (*id.* at 28) that the statute "makes clear" that RNHCIs "offer[] only an initial recommendation regarding Medicare and Medicaid coverage," and that the "Secretary, typically acting through a fiscal intermediary in the form of a private insurance company, then reviews the RNHCI's recommendation to finally determine whether the patient is

entitled to Medicare or Medicaid benefits for the services provided." The court further noted that the Secretary "is authorized to obtain any * * * information that she believes to be necessary to perform her evaluation," and is "expressly empowered to deny Medicare and Medicaid benefits * * * if any information requested is not provided," *id.* at 28-29, thereby ensuring "substantial and meaningful review by the Secretary, or her agent," *id.* at 25 n.8. The court found, in petitioners' facial challenge, no reason to question "the soundness of Congress's judgment that the Secretary generally will be able to make a competent coverage determination based upon the non-medical information available to her." *Id.* at 29.[7]

Judge Lay dissented, Pet. App. 31-53, explaining that he would have ruled that Section 4454 creates an unconstitutional denominational preference in favor of the Christian Science church and also that Section 4454 violates each prong of the *Lemon* test.

ARGUMENT

1. a. Petitioners contend (Pet. 17-19) that this Court should grant review to address what petitioners perceive to be divergence in the courts of appeals' analyses of religious accommodation issues. Petitioners, however, identify no conflict among the circuits on the question presented. To the contrary, the decision of the court of appeals, and the underlying district court decision, are the first in the country to address the constitutionality of Section 4454. To our knowledge, no

[7] The court also rejected petitioners' argument that Section 4454 may not be constitutionally applied to Christian Science sanatoria because those institutions are pervasively sectarian. See Pet. App. 29-30. Petitioners have not sought this Court's review of the court of appeals' disposition of their as-applied challenge.

other federal or state court has broached the issue.[8] Given the statute's nascency and the dearth of lower court authority considering the constitutional question, review of a decision sustaining Section 4454's constitutionality at this time would be premature.

b. Unable to identify any relevant division among the circuits, petitioners assert (Pet. 17) that the lower courts are in "disarray" on the constitutional principles governing religious accommodations more generally. The few cases they cite to support that proposition, however, demonstrate precisely the opposite. In each of the decisions they cite—*Stark* v. *Independent School District, No. 640*, 123 F.3d 1068 (8th Cir. 1997) (authored by the same judge who authored the opinion below), cert. denied, 523 U.S. 1094 (1998) (Pet. 17-18); *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), cert. denied, 121 S. Ct. 759 (2001) (Pet. 18); *Ehlers-Renzi* v. *Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000), cert. denied, No. 00-1118 (Feb. 26, 2001) (Pet. 18-19); and *Cohen* v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), cert. denied, 512 U.S. 1236 (1994) (Pet. 19)—the court of appeals applied the same *Lemon* v. *Kurtzman* analysis[9] applied by the court of appeals here and, also like the court here, sustained the religious accommodation. Petitioners' own submission thus demonstrates harmony, rather than conflict, in the courts of appeals' analyses.[10]

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[8] Petitioners note (Pet. 23) only that another challenge was recently filed in the Northern District of California. *Kong* v. *McMullan*, No. C-00-4285-CRB (N.D. Cal. filed Nov. 17, 2000).

[9] *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

[10] Petitioners' reliance on *Lamont* v. *Woods*, 948 F.2d 825 (2d Cir. 1991), and *Elewski* v. *City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), cert. denied, 523 U.S. 1004 (1998), is misplaced. *Lamont* concerned the federal government's direct construction, maintenance,

Earlier this week, moreover, this Court denied a petition for a writ of certiorari that advanced the virtually identical argument concerning an asserted disarray in lower court opinions. *Ehlers-Renzi* v. *Connelly Sch. of the Holy Child*, *supra*. Given that the petition in *Ehlers-Renzi* relied, in part, on the court of appeals' decision here and on many of the same appellate decisions cited by petitioners, there is no basis for a different disposition of the instant petition.

c. In any event, petitioners err in suggesting (Pet. 19) that the courts of appeals "desperately need guidance" on three particular issues. First, there is no need for further guidance at this time regarding the "trigger that requires or justifies accommodation analysis" (*ibid.*). This Court has consistently held that accommodation can be appropriate if it lifts a significant or special government-imposed burden on the free exercise of religion. See, *e.g.*, *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 338 (1987). The court of appeals found such a burden here (Pet. App. 14-17), and the petition offers no evidence that other courts of appeals have abandoned that requirement.

Second, the petition fails to show that further guidance is needed concerning "whether the existence of a general funding or zoning scheme *ever* imposes a constitutionally significant burden on religious dissenters that would justify accommodation" (Pet. 19; emphasis

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and operation of religious schools abroad for foreign nationals. *Elewski* concerned city funding of a creche in a public park. Neither involved accommodation analysis.

added). This Court, however, has cautioned that bright doctrinal lines may not be appropriate when analyzing the often delicate intersection of the Free Exercise and Establishment Clauses. See *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984) (eschewing "an absolutist approach in applying the Establishment Clause" because each case entails "line-drawing; no fixed, *per se* rule can be framed"). The present case, involving a national insurance program, is ill-suited to address accommodation analysis as it might pertain to general funding or zoning schemes.

Third, there is no need for further review to address "whether both *Lemon* analysis and accommodation analysis are appropriate when analyzing under the Establishment Clause a scheme that specially benefits religion in general or particular religious entities" (Pet. 19). This Court has applied the *Lemon* test in permissive accommodation cases, see *Amos*, 483 U.S. at 338, and all the courts of appeals petitioners cite (Pet. 17-19) have followed suit, see *Ehlers-Renzi*, 224 F.3d at 288-292; *Boyajian*, 212 F.3d at 5-10; *Stark*, 123 F.3d at 1073-1075; and *Cohen*, 8 F.3d at 488-494.[11]

2. Petitioners likewise err in contending (Pet. 19-22) that the court of appeals' decision departs from this

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[11] As the court of appeals explained (Pet. App. 12-13 n.5), *Grumet* v. *Pataki*, 93 N.Y.2d 677, cert. denied, 528 U.S. 946 (1999), is consistent with its approach. In that case, the New York Court of Appeals held unconstitutional a law permitting the creation of special school districts because it contained arbitrary wealth and population criteria that served no valid, secular purpose, and that effectively limited the religious accommodation at issue to a single religious sect. See *id.* at 690. In the present case, by contrast, the court of appeals held that Section 4454's terms and qualifications are sect-neutral and reasonably advance neutral, secular goals. Pet. App. 10-12.

Court's precedents. The court of appeals hewed to the same accommodation analysis applied by this Court in earlier cases, such as *Texas Monthly, Inc.* v. *Bullock*, and *Corporation of the Presiding Bishop* v. *Amos*, *supra*.

a. Petitioners insist that "payment of a tax into a general governmental scheme" can never amount to a sufficiently significant burden on religion to permit accommodation consistent with the Establishment Clause. Pet. 20-21 (citing *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217 (2000); *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983); and *United States* v. *Lee*, 455 U.S. 252 (1982)). Those cases, however, held only that the Constitution did not *compel* an accommodation; they did not hold that accommodation would be forbidden. In fact, a religious objection to the payment of taxes can, in certain circumstances, justify different types of permissive legislative accommodations. In *Lee*, this Court noted that, although not constitutionally compelled to do so, Congress had provided an exemption from social security taxes for members of religious groups who are conscientiously opposed to such insurance schemes and whose religious communities make comparable provision for their members. 455 U.S. at 255-256 n.4.

Moreover, petitioners misunderstand the nature of the burden that Congress alleviated here. Congress reasonably concluded that, absent Section 4454, the requirement of medical care as a prerequisite to the receipt of other forms of palliative care would force upon religious adherents the Hobson's Choice of adhering to their faith and forgoing vital governmental benefits, or violating their religious tenets to enjoy the same benefits that are available to members of the

public generally. This Court has consistently acknowledged that imposing such a choice can exert "substantial" pressure on an individual "to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-718 (1981); see also *Frazee* v. *Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). If, as the Court has held, such burdens may be sufficient to compel accommodation under the Free Exercise Clause, then the pressure identified by Congress here on critically ill individuals who need nursing services is sufficient to permit accommodation under the Establishment Clause. See Pet. App. 15-17; H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. 768 (1997) (finding that it would be "particularly harsh to cut off nursing benefits for poor and elderly men and women who have not made alternative arrangements for financing their health care and who now rely on the availability of nonmedical nursing benefits at a time when other patients receive reimbursement for hospital care").

b. Petitioners further err in arguing (Pet. 15, 20) that accommodation is *per se* impermissible if it results in federal money being distributed to religious institutions. This Court has long held that the Establishment Clause does not disqualify religious institutions from receiving public funds to carry out valid, secular purposes—including, in particular, the provision of health care services. See, *e.g.*, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); accord *Bowen* v. *Kendrick*, 487 U.S. 589, 613 (1988); *Lemon* v. *Kurtzman*, 403 U.S. at 616-617 (upholding public funding of "health care services" provided in pervasively sectarian schools). Section 4454, moreover, does not involve the direct distribution

of money from the federal government to religious entities. Rather, funds are paid to religious institutions only as a result of the intervening, independent decisions of individual beneficiaries to seek non-medical health care services from an RNHCI, rather than a traditional Medicare or Medicaid provider. See *Mitchell* v. *Helms*, 120 S. Ct. 2530, 2544-2546 (2000) (plurality opinion); *Agostini* v. *Felton*, 521 U.S. 203, 225-226 (1997); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (providing vocational rehabilitation assistance funds to a seminary school based on student's choice); cf. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (providing sign-language interpreter in parochial school based on independent choice of student and parents).

c. Nor is *Agostini* v. *Felton*, *supra*, of help to petitioners (see Pet. 15, 21). In *Agostini*, the Court held that the primary-effect inquiry focuses on whether government action (1) results in religious indoctrination, (2) defines its recipients by reference to religion, and (3) creates an excessive entanglement with religion. 521 U.S. at 234. But *Agostini* did not involve an accommodation claim, and the decision *expanded* the ability of government to extend generally available educational benefits to students in religious schools.

Moreover, while Section 4454 limits the accommodation "by reference to religion," that is by definition true of all religious accommodation provisions. See, *e.g.*, *Amos*, 483 U.S. at 329-330 n.1 (Title VII accommodation for religious employers); *Zorach* v. *Clauson*, 343 U.S. 306, 308 n.1 (1952) (sustaining early release of students from public schools for religious instruction). The critical consideration, for purposes of the primary effects test, is whether the accommodation provides a special benefit "by reference to religion," or instead

simply lifts a significant burden on the receipt of widely available secular benefits. As the court of appeals and district court found, Section 4454 does not grant any special benefit to individuals who have religious objections to medical care. It "merely permits" patients in RNHCIs "to receive a 'subset,' i.e. the non-medical portion, of the care provided by Medicare and Medicaid to patients of medical institutions." Pet. App. 21.[12] Furthermore, eligibility under Section 4454 turns upon the beneficiaries' objectively and secularly defined medical condition and their receipt of secular, non-medical health-care benefits, such as nursing services. All that Section 4454 does is ensure that patients whose religious beliefs motivate them to seek those health care benefits in a religious, non-medical health care institution, rather than in a hospital or similar facility, are not excluded from coverage, again much like *Agostini* made clear that a student's choice to receive educational services in a religious school did not deprive him or her of the same Title I benefits available to students in nonreligious schools. See Pet. App. 22 (under Section 4454, "patients are not reimbursed for any services for which they would not be similarly reimbursed if they had sought care at a medical institution").

For those same reasons, petitioners' reliance (Pet. 24-25) on *Mitchell* v. *Helms*, *supra*, and *Larson* v. *Valente*, 456 U.S. 228 (1982), is misplaced. As amended by Section 4454, the Medicaid and Medicare programs now "offer[] aid on the same terms, without regard to

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[12] Contrast *Texas Monthly*, 489 U.S. at 15 (plurality opinion) (invalidating tax exemption that was limited to religious publications, because the tax did not impose a significant, government-created burden on free exercise).

religion, to all who adequately further that purpose" by meeting the statute's definition of medical eligibility and incurring covered services; government "has provided no more than that same level [of aid] to religious recipients." *Mitchell*, 120 S. Ct. at 2541 (plurality opinion).

Further, petitioners' concern that Section 4454 creates a "financial incentive" to undergo religious indoctrination is farfetched. Pet. 25 (citing *Mitchell*, 120 S. Ct. at 2561 (O'Connor, J., concurring in the judgment)). The amended Medicare and Medicaid programs, through their extensive coverage of medical treatment, give acutely ill patients every incentive to seek comprehensive medical care. It is thus highly unlikely that Section 4454 will inspire any acutely ill person to forgo reimbursable medical services solely to avail herself of the narrower category of reimbursed benefits available under Section 4454. Rather, Section 4454 simply removes a significant financial disincentive for religiously motivated beneficiaries to adhere to their pre-established faith convictions.

Petitioners are equally wrong in arguing (Pet. 28-29) that Section 4454 grants religious believers a special benefit by exempting them from the general ban on Medicare and Medicaid reimbursement for "custodial care." The custodial-care exclusion prohibits reimbursement for personal care services unless such services are "given as part of an integrated plan of care that, as a whole, requires professional supervision." Pet. App. 22 (citing 42 C.F.R. 409.33(a)(1) and(d)). Nothing in Section 4454 excepts RNHCIs from that ban on reimbursement for "custodial care," and, in fact, Section 4454 retains the substance of that exclusion by authorizing reimbursement only for individuals who have a condition that would allow them to be admitted

to a hospital or skilled nursing facility. See 42 U.S.C. 1395i-5(b)(2) (Supp. IV 1998); see also *Friedman* v. *Secretary of the Dep't of Health & Human Servs.*, 819 F.2d 42, 45 (2d Cir. 1987) (custodial care exclusion bars reimbursement of personal care services to individuals who do not have a condition that requires inpatient medical care). While Section 4454 does permit reimbursement of health care services that are not provided incident to medical care, it ensures that only patients whose conditions warrant covered medical care in a medical facility (as distinguished from custodial care standing alone) are eligible for reimbursement, and the reimbursement is limited to the same non-medical care services covered for patients in medical facilities.[13]

3. Lastly, petitioners complain about the anticipated operation and implementation of Section 4454. However, because petitioners chose to make a facial attack on a statute at the moment of its inception, without an adequate record of application, interpretation, or judicial construction, or even the issuance of final agency regulations implementing the statute, petitioners have provided this Court no meaningful or practical context in which to review their claims, making an exercise of this Court's certiorari jurisdiction at this time inappropriate.

In any event, petitioners' contention (Pet. 26-27) that Section 4454 is a mere congressional pretext to justify continued sect-specific aid to Christian Scientists is belied both by Section 4454's neutral terms and its

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[13] The petition does not argue that Section 4454 results in excessive entanglement between the government and religion. In any event, the court of appeals correctly rejected that contention. See Pet. App. 27-29 (describing the carefully calibrated oversight provisions formulated by Congress).

legislative history, which shows that Congress intended to extend the accommodation previously afforded only to Christian Scientists to "any person who is relying on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs." H.R. Conf. Rep. No. 217, *supra*, at 768; see also Pet. App. 9-10 (rejecting petitioners' "selective and strained reading of the legislative history" and noting that "there is no such evidence that Congress sought to include only Christian Scientists within the challenged provisions or, conversely, to exclude any other denomination"); cf. *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring) ("[t]here is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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