

In the United States Court of Appeals for the Ninth Circuit

DAVID KONG, *Plaintiff-Appellant*,

v.

THOMAS SCULLY, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF CENTERS FOR MEDICARE AND MEDICAID SERVICES, AN AGENCY OF THE UNITED STATES; AND TOMMY THOMPSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendants-Appellees*,

THE FIRST CHURCH OF CHRIST, SCIENTIST, *Intervenor Defendant-Appellee*.

**Appeal from the United States District Court for the
Northern District of California, No. C-00-4285 CRB
The Honorable Judge Charles R. Breyer**

**BRIEF FOR INTERVENOR DEFENDANT-APPELLEE
THE FIRST CHURCH OF CHRIST, SCIENTIST**

MICHAEL W. MCCONNELL
KENNETH S. GELLER
Mayer, Brown, Rowe & Maw
1909 K Street N.W.
Washington, DC 20006
(202) 263-3000

GEORGE A. YUHAS
NANCY E. HARRIS
Orrick, Herrington & Sutcliffe
400 Sansome Street
San Francisco, CA 94111
(415) 392-1122

STEPHEN M. SHAPIRO
Counsel of Record
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Intervenor Defendant-Appellee The First Church of Christ, Scientist

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor Defendant-Appellee The First Church of Christ, Scientist, a nonprofit, unincorporated religious association with a board of directors that constitutes a body corporate under the laws of the State of Massachusetts, states that it has no parent corporation and no publicly held stock.

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STATEMENT OF ISSUES

I. Whether Medicare and Medicaid provisions that authorize reimbursement of the nonmedical subset of standard nursing care services consistent with the practices of persons who are opposed, on religious grounds, to receiving the medical component of federal health care benefits are facially invalid under the Establishment Clause.

II. Whether Medicare and Medicaid reimbursement of nonmedical nursing care services of a purely physical nature, such as feeding, cleanliness care, or assistance with movement, constitutes the “direct funding of religious activity” in violation of the Establishment Clause, as applied to Christian Science nursing facilities.

JURISDICTIONAL STATEMENT

Defendant-appellee adopts plaintiff-appellant’s jurisdictional statement.

Local Rule 28-2.2.

STATEMENT OF THE CASE

Plaintiff, appellant here, claims that the Establishment Clause does not permit Congress to fund nonmedical nursing care services for poor and elderly Americans who qualify for federal health care but cannot accept the medical component of such care without compromising their faith. This is the sixth court in which the same counsel has made the same argument on essentially the same record. It has been rejected by three district courts (including Judge Charles Breyer in the court below), the Eighth Circuit, and the Supreme Court on certiorari. See *Children's Healthcare Is A Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996) (*CHILD I*), *vacated*, Nos. 96-3936MNST & 96-3938MNST (8th Cir. Sept. 9, 1997); *Children's Healthcare Is A Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000) (*CHILD II*), *cert. denied*, 121 S. Ct. 1483 (2001); ER604-622 (district court opinion in *CHILD II*); Op.18 (decision below).¹ All have reached the same conclusion. This Court should affirm, and bring this repetitious litigation to an end.

STATEMENT OF FACTS

A. The Medicare And Medicaid Programs

Medicare pays for hospital and post-hospitalization care for “[e]very individual” who has attained age 65 and is eligible for Social Security. 42 U.S.C.

¹ “Op.” refers to Judge Breyer’s summary judgment opinion. “Br.” refers to plaintiff-appellant’s opening brief.

§§ 426(a), 1395c, 1395d. Medicare is funded by compulsory payroll deductions and self-employment taxes. 26 U.S.C. §§ 3101-3128. Medicaid, which is funded by general tax revenues, provides grants to the States to furnish similar health care assistance to the needy. 42 U.S.C. § 1396. Virtually all Americans, including Christian Scientists, must pay taxes to support these Programs.

Patient choice is central to Medicare and Medicaid. 42 U.S.C. § 1395a; see HCFA, MEDICARE: HOSPITAL MANUAL § 100 (1993) (ER496). In addition to medical treatment, patients may elect a range of treatment methods, including osteopathy, podiatry, chiropractic, psychology, and physical therapy. *E.g.*, 42 U.S.C. §§ 1395x(r), 1395k(a)(2)(B)-(C), 1396d(a)(11). Hospice care, which includes services of social workers and pastoral counselors, is also covered. *Id.* § 1395x(dd).

Several provisions ensure that the Programs do not interfere with the religious beliefs of patients or providers. Medicaid recipients, for example, may not be compelled to “accept any * * * health care or services” (other than to prevent the spread of contagious diseases) if they “objec[t]* * * thereto on religious grounds.” 42 U.S.C. § 1396f; see also *id.* § 1395a. A similar protection extends to providers. *Id.* § 300a-7(d).

Patients may receive reimbursement for care at the hundreds of participating hospitals operated by religious denominations, as well as at secular

institutions. See AMERICAN HOSPITAL ASS'N, GUIDE TO THE HEALTH CARE FIELD B49 (2000) (ER501) (noting more than 600 church-related hospitals, with 130,000 beds, in multi-hospital systems alone). Participating hospitals include Jewish, Catholic, Lutheran, Baptist, Methodist, and other religious facilities. ER385. Many such facilities employ chaplains, maintain chapels, display religious symbols, provide Bibles and other religious literature, and are governed by religious mission statements. See, e.g., ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, *reprinted in* 24 ORIGINS 449 (1994) (ER503-505). Catholic hospitals, for example, are subject to directives promulgated by the United States Conference of Catholic Bishops, which require that Catholic health care be “animated by the Gospel of Jesus Christ” and tailored “to the religious and spiritual needs of all those it serves.” *Ibid.* The Programs traditionally have reimbursed hospitals for inpatients’ religious pastoral care because of the “beneficial therapeutic effect on the medical condition of a patient.” *Baylor Univ. Med. Ctr. v. Blue Cross Ass’n*, No. 82-D59, Medicare & Medicaid Guide (CCH) ¶ 31,871, at 9314 (Provider Reimbursement Rev. Bd. Feb. 25, 1982), *aff’d*, Medicare & Medicaid Guide (CCH) ¶ 31,971 (Apr. 21, 1982) (HCFA Deputy Adm’r Dec’n) (ER507-510). See also AMERICAN HOSPITAL ASS’N, STATEMENT ON HOSPITAL CHAPLAINCY (1967) and related bulletin (ER512-515).

B. The Original Accommodation Of Christian Science Nursing Care

Spiritual healing, through prayer alone, is central to the practice of Christian Science. Although Christian Science does not teach that accepting medical care is wrong or sinful, faithful adherents believe that “reliance on medical treatment clearly departs from the practice of Christian Science.” CHRISTIAN SCIENTISTS AND THE PRACTICE OF SPIRITUAL HEALING 51 (1991) (ER520). Those who practice Christian Science therefore eschew medical care.

Whatever their chosen form of healing—medical or spiritual—patients undergoing treatment for serious illness sometimes are unable to cope with their bodily needs without skilled nursing assistance. Such nursing assistance is a component of Program coverage for hospitalized patients. Much of this physical care—including comprehensive bedside care, cleaning or bandaging wounds, adapting foods and feeding patients, helping patients to move and to walk, changing linens, assisting with personal cleanliness, and other necessary physical services—is not inherently medical in nature. In medical facilities, however, such services are provided only in conjunction with medical treatment. For this reason, Christian Scientists and others with similar beliefs cannot receive this component of federal health care coverage unless it is unbundled from the medical component and provided in a nonmedical environment. ER457, 480, 488.

Accordingly, when the Programs were first under consideration, representatives of Christian Science requested to be exempted from both payments and benefits. HEARINGS ON H.R. 4222 BEFORE THE HOUSE WAYS & MEANS COMM., 87th Cong., 1st Sess. 728-729 (1961) (“HEARINGS ON H.R. 4222”) (ER524-525). Congress enacted such an exemption in the case of the Amish. See 26 U.S.C. § 1402(g). In the case of Christian Science, however, Congress instead enacted a “benefit of hospitalization” broad enough to include seriously ill patients relying on the practice of Christian Science for healing. HEARINGS ON H.R. 4222, at 729 (statement of Chairman Mills). Congress accomplished this by including physical nursing care provided in Christian Science nursing facilities to the same extent that comparable nonmedical elements of nursing care would be covered for patients in hospitals and other skilled nursing facilities. *E.g.*, 42 U.S.C. §§ 1395x(e), 1395x(y)(1); 42 C.F.R. § 440.170(b)(2) (1996). The provision explicitly applied *only* to Christian Science sanatoria.

Christian Science nursing care—which is distinct from the strictly religious healing work of Christian Science *practitioners*—is provided by skilled nonmedical nurses who are “trained and experienced in the principles of nonmedical care” and “in caring for the physical needs of * * * patients.” 42 C.F.R. §§ 403.702, 403.720. It is undisputed that these nurses provide many of the same

basic nursing services that are provided to patients in medical facilities, only without medical involvement. Op.2, 14-15; ER55-58, 448-450, 462, 464, 466.²

Christian Science nursing facilities, sometimes called “sanatoria,” serve patients who are “unable to take physical care of [themselves] as a result of an acute condition” and thus “would be confined in a hospital if they were not relying entirely on Christian Science for healing.” HEARINGS ON H.R. 6675 BEFORE THE SENATE FINANCE COMMITTEE, 89th Cong., 1st Sess. 698 (1965) (ER542). Such facilities are independent of the Church and exist solely to serve patients’ health care needs. ER62, 447-448, 462-464, 467. It is undisputed that admittance to Christian Science nursing facilities is not limited to Church members; admittance is limited to those pursuing healing through Christian Science, but one may practice Christian Science, and engage a Christian Science practitioner, while belonging to another religious denomination or to no denomination at all. ER61, 448, 485, 463.

Congress exempted Christian Science nursing services and facilities from medical oversight, which is both unnecessary in light of the facilities’ nonmedical character and inconsistent with Christian Scientists’ religious exercise. 42 U.S.C. §§ 1320c-11, 1395x(e), 1396a(a), 1396g(e); S. REP. NO. 89-404, at 30

² Secular sources have noted the high quality of these services. See, e.g., Frisch, *Examination of an Alternative Approach to Nursing: The Christian Science Nurse*, 7 J. HOLISTIC NURSING 6 (1989) (ER527-532); Holmes, *Pressure Sores in a Christian Science Sanatorium*, 14 AM. J. FORENSIC MED. & PATHOLOGY 10 (1993) (ER535-536).

(1965) (ER551); H.R. REP. NO. 92-231, at 120 (1971) (ER556). While exempted from medical regulation, however, Christian Science nursing facilities have always been subject to generally applicable safety, fire, sanitation, building, licensing, and other regulations under federal, state, and local law. See *ibid.*; 42 C.F.R. § 403.720; 64 Fed. Reg. 67028, 67032-67036, 67049-67050 (Nov. 30, 1999) (ER560-564, 568, 581-582); ER464.

C. The *CHILD I* Litigation

In *CHILD I*, 938 F. Supp. 1466 (D. Minn. 1996), taxpayers filed suit alleging that the accommodation violated the Establishment Clause under several theories, including those raised by plaintiff in this case. The district court upheld the statute in all but one respect: it “authorize[d] exemptions to the programs in expressly sectarian terms.” *Id.* at 1479. The court held that it was permissible to include Christian Science nursing facilities within the Programs while exempting them from regulations inconsistent with religious nonmedical care. That accommodation served a “compelling interest” in avoiding a burden on religious exercise and, apart from its sect-specificity, was “laudable.” *Id.* at 1478, 1480. But it was unlawful for the statute to “explicitly address institutions of a single religion.” *Id.* at 1480. See Op.2.

D. The 1997 Amendments To The Accommodation

In response to the district court's decision in *CHILD I*, Congress amended the Programs. Whereas the original statute limited eligibility to "Christian Science sanatori[a]," the amendment extends to any "religious nonmedical health care institution" ("RNHCI"). 42 U.S.C. § 1395x(ss)(1). Congress's "sect-neutral accommodation [is] 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. 105-217, at 768 (1997) ("H.R. CONF. REP.") (emphasis added) (ER143); see also 64 Fed. Reg. at 67029 ("Services furnished in any facility that meets the definition of an RNHCI may qualify for payment, not just those provided in Christian Science sanatoria"). Such an approach, Congress determined, would "serv[e] the interest of religious freedom" while "avoid[ing] the unfairness of requiring these Americans to pay taxes, including payroll taxes to the Medicare Trust Fund, for years without being able to receive any benefits." H.R. CONF. REP. at 768. Congress found that "these modifications fully respond to and satisfy the constitutional concerns raised by the district court [in *CHILD I*]." *Ibid.*

The amendment defines an RNHCI as an institution that, among other things, "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.” 42 U.S.C. § 1395x(ss)(1)(C). Eligible RNHCIs may not be owned by or affiliated with any medical provider. *Id.* § 1395x(ss)(1)(G). Congress determined that these and other “detailed eligibility criteria” are “necessary to protect the health and safety of patients in such institutions and to prevent fraud and abuse.” H.R. CONF. REP. at 769.

Like the prior law, the amended statute explicitly provides that “payment * * * may be made for inpatient hospital services or post-hospital extended care services furnished an individual in a religious nonmedical health care institution only if * * * the individual has a condition such that the individual would qualify for benefits under this part for inpatient hospital services or extended care services, respectively, if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not such an institution.” 42 U.S.C. § 1395i-5(a)(2); see Op.2. The implementing regulations direct that if it is not possible to “establish necessity or appropriateness of care,” the RNHCI must recommend that “the patient’s admission, extended stay, or other services not be approved for payment.” 64 Fed. Reg. at 67036; ER387.

“Reimbursable services are limited to nonmedical nursing services and related items, comparable to services and related nursing materials supplied to inpatients in a hospital or a medical skilled nursing facility.” H.R. CONF. REP. at

768. In addition to bed and board, covered care is confined by law to basic physical services, such as “assistance in moving, turning, positioning, and ambulation; meeting nutritional needs, and comfort and support measures.” 64 Fed. Reg. at 67030. As Judge Breyer explained, these services and supplies “are the same as the services and supplies paid for at qualified medical facilities.” Op.15.

Similarly, Congress provided that “[n]o payments can be made for the services of those who provide spiritual treatment through prayer; and, therefore, in the case of Christian Scientists, for example, no payments can be made for the services of the Christian Science practitioner.” H.R. CONF. REP. at 768. As explained in the statute’s implementing regulations, “[n]either Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities.” 64 Fed. Reg. at 67043; accord *id.* at 67029-67030; ER386, 390-391, 434. In sum, as Judge Breyer found, “the Programs’ funds are not directed to religious activities; instead, the Programs only pay for secular services, such as room and board, physical nonmedical care, and nutritional services.” Op.17.

These requirements are vigorously enforced by HCFA, which conducts “unannounced on-site surveys” of participating RNHCI and regularly “review[s] the facility system of records to assure that they support coverage decisions” for “all admissions.” ER387-389. Visiting teams “determine that the facility has in effect a written utilization review plan to assess the necessity of services furnished to

Medicare beneficiaries,” and “review utilization review committee notes, nurses notes, other records and reports, and utilization determinations * * * to ensure that utilization review activities are being carried out as described in the plan.” ER388-389. Moreover, “[a]s with all Medicare providers,” funds are disbursed to RNHCIs only through a “fiscal intermediary,” typically a private insurance company, which “examines each claim for payment for RNHCI services to ensure that only payments for properly covered services are made.” ER389-390. The Secretary has designated Blue Cross of Tennessee as fiscal intermediary for Christian Science nursing facilities. *Ibid.*

Finally, recognizing that “RNHCIs do not offer any medical treatments or procedures” (64 Fed. Reg. at 67036), Congress exempted them from medical regulation. 42 U.S.C. §§ 1320c-11, 1395x(e), 1396a(a), 1396g(e). But the statute makes it an explicit “[c]ondition of participation” that “[t]he RNHCI must operate in compliance with all applicable Federal, State, and local laws, regulations, and codes.” 64 Fed. Reg. at 67049; accord 42 C.F.R. § 403.720. These regulations include, among others, extensive federal requirements relating to “patients’ rights,” “quality assessment and performance,” “food services,” “discharge planning,” “administration,” “staffing,” “physical environment,” “safety from fire,” “utilization review,” nondiscrimination, and “safeguards to protect against the possibility of fraud and abuse.” *Id.* at 67032-67036, 67049-67050; ER386-387. In addition, the

statute empowers the Secretary to impose such “other requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.” 42 U.S.C. § 1395x(ss)(1)(J).³

E. The *CHILD II* Litigation

The day after the amended provisions became law, the same plaintiffs that sued in *CHILD I* were back in court again. Citing the same evidence and represented by the same counsel, they repeated the various arguments that had been rejected in the previous case—that the statute constituted an unconstitutional “benefit” to religion, lacked secular purpose and effect, was an unconstitutional delegation of decisionmaking power to a religious institution, and, as applied to Christian Science facilities, subsidized religious activity—and also claimed that the amended statute was a “gerrymander”—a program of “special benefits” designed to disguise Congress’s favoritism of Christian Science. *CHILD II*, 212 F.3d at 1090-1100. The district court, Judge Ann D. Montgomery, rejected these arguments in their entirety (see ER604-622), and the Eighth Circuit affirmed. Plaintiffs petitioned for certiorari. The Supreme Court denied the petition without dissent. 121 S. Ct. 1483 (2001).

³ This provision, which plaintiff and his *amici* ignore, provides a full answer to their policy arguments regarding quality of care.

F. The Proceedings Below

The complaint in this case is virtually identical to that in the two previous cases. Like the plaintiffs in *CHILD I* and *CHILD II*, plaintiff-appellant David Kong claims to be a taxpayer who “objects” to the “religious theology” of Christian Science. Cmpl. ¶ 5 (ER2-3). Again, the principal claim is that the amended statute constitutes “a sect-specific preference” that provides “special benefits” to Christian Scientists. *Id.* ¶ 1 (ER2); Op.3. Plaintiff also asserts that the statute “delegates coverage decisions to the RNHCIs,” in violation of *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982), and that it provides “direct payment” for “religious activity” in “pervasively sectarian” Christian Science sanatoria. Cmpl. ¶¶ 1, 16-17 (ER2, 5); Op.3. In support of these claims, plaintiff relies upon factual submissions closely tracking those submitted in *CHILD I* and *CHILD II*.

In a careful and thorough opinion, Judge Breyer rejected these arguments on cross motions for summary judgment and sustained the Programs against all constitutional challenges. The court first considered plaintiff’s allegation that the statute constitutes a sect-specific preference subject to strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982). While acknowledging that the Establishment Clause bars “subtle departures from neutrality” and “religious gerrymanders,” the court determined that the “text, legislative history, and effect” of the challenged statute all demonstrate religious neutrality. Op.6.

Accommodation is available to “[a]ny individual who states in writing that he or she is ‘conscientiously opposed’ to medical treatment and that such treatment is ‘inconsistent with the individual’s sincere religious beliefs,’” and “[t]here simply is no evidence * * * that the requirements of the statute were drafted to favor one religion, or group of religions, over others, or that the statute in fact favors Christian Science over other religions.” Op.6, 8.

The court considered plaintiff’s remaining claims under the framework of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). With respect to *Lemon*’s “secular purpose” prong, the court explained that under *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), “the alleviation of significant governmental interference with the free exercise of religion can constitute a secular legislative purpose.” Op.9. Because the challenged provisions serve to “accommodate a burden upon those whose religious convictions are inconsistent with the receipt of medical care”—by “avoid[ing] the unfairness of requiring [them] to pay taxes, including payroll taxes to the Medicare Trust Fund, for years without being able to receive any benefits”—it concluded that Section 4454 satisfied the secular purpose requirement. Op.9, 10 (quoting H.R. CONF. REP. at 768).

Turning to *Lemon*’s “primary effect” prong, the district court observed that an accommodation unconstitutionally advances religion “if it (1) imposes a substantial burden on nonbeneficiaries or (2) is not designed to alleviate a

government-imposed burden that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause.” Op.12 (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989)). As to whether the statute substantially burdens nonbeneficiaries, Judge Breyer found that “[t]here is no competent evidence before the Court that those who receive their care in a RNHCI cost taxpayers more than those who receive their care in medical facilities.” Op.12. The court also rejected plaintiff’s contention that the accommodation provides “special benefits” to its beneficiaries, stating:

[T]he RNHCI is reimbursed only for the skilled nonmedical nursing services for which medical hospitals are also reimbursed. Rather than being “special benefits,” these benefits are the same as some of the funded inpatient services provided to similarly situated people who receive care in medical institutions.

Op.13-14 (citation omitted). Since the statute “provides RNHCI patients with but a ‘subset’ of the financial support most other Program participants receive,” the court concluded that “the exemption does not convey a message of endorsement and does not encourage non-believers to alter their religious beliefs.” Op.14.

Concerning *Lemon*’s “entanglement” prong, Judge Breyer rejected plaintiff’s argument that the statute unconstitutionally delegates coverage decisions under the Programs to the RNHCI. Like participating hospitals, the court explained, an RNHCI “makes an initial recommendation regarding coverage.” Op.16. But this is not an unlawful delegation of government power, because “the Secretary or a fiscal intermediary, such as a private insurance company, retains

plenary review to determine whether items and services provided are covered, excessive or fraudulent,” and “the fiscal intermediary audits the activities of RNHCIs and issues a ‘notice of amount of program reimbursement’ concerning submitted claims.” *Ibid.*

Finally, the court below rejected plaintiff’s as-applied claim that the challenged provisions finance “religious activity” in “pervasively sectarian” Christian Science sanatoria. Op.17. As Judge Breyer explained:

First, * * * the Programs’ funds are not directed to religious activities; instead, the Programs only pay for secular services, such as room and board, physical nonmedical care, and nutritional services. Second, the Court agrees with the Eighth Circuit that Christian Science sanatoria are not “pervasively sectarian.” See *CHILD II*, 212 F.3d at 1100. While the record reflects that Christian Science nurses hope to aid in the spiritual healing process, their religious motivation does not affect the essentially secular nature of their activities. See *Bowen*, 487 U.S. at 613, 621. Third, the Supreme Court has held that the government may fund health care services in pervasively sectarian institutions without running afoul of the requirement that it not fund religious activities. See *Wolman v. Walter*, 433 U.S. 229, 242 (1977) (upholding public funding of health services in parochial schools), overruled in part on other grounds, *Mitchell v. Helms*, 530 U.S. 793 (2000).

Op.17.

SUMMARY OF ARGUMENT

The challenged statute is fully consistent with the Establishment Clause. It is well settled that religious organizations may deliver publicly funded health care and that Congress may adjust the terms of public benefit programs to ensure that all persons may participate in a manner consistent with the dictates of

their faith. For this reason, the Eighth Circuit recently rejected each of plaintiff’s arguments in a case brought by the same counsel and involving a nearly indistinguishable record. *CHILD II*, 212 F.3d at 1090-1100. As Judge Breyer concluded—in accord with every other court to consider the question—the statute “facilitates Congress’s goal of protecting the interests of religious minorities while at the same time fulfilling the ‘governmental obligation of neutrality in the face of religious differences.’” Op.18 (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

Plaintiff’s argument depends, at its core, on a misunderstanding or mischaracterization of the statute. As every court has concluded, the accommodations do not provide their beneficiaries with any “special” or additional benefit to which other Americans are not entitled, but simply enable them to enjoy a small part—the nonmedical subset—of generally available Medicare and Medicaid benefits, in a manner consistent with their religious conscience. Op.13-14; *CHILD II*, 212 F.3d at 1096-98.⁴ Accordingly, the judgment of the district court should be affirmed.

⁴ This case is thus entirely different from *Warren v. Commissioner of Internal Revenue*, No. 00-71217, which concerns the constitutionality of a tax benefit extended only to “ministers of the gospel.” In this case, the accommodation enables beneficiaries to share in a part of the benefits extended to *everyone*.

ARGUMENT

I. The Statute Constitutes A Permissible Legislative Effort To Remove A Significant Burden On The Exercise Of Religion Without Imposing A Substantial Burden On Program Nonbeneficiaries.

Within the general outline of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court has developed several lines of analysis to deal with different Establishment Clause issues. Most pertinent to this case is the doctrine of “accommodation,” which provides a framework for distinguishing between unconstitutional establishments and legitimate efforts to protect religious minorities. See generally *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

In *Amos*, the Supreme Court described the circumstances in which the government may enact provisions that accommodate religion. In so doing, the Court expressly repudiated the argument that laws that “single[] out religious entities for a benefit” or “give special consideration to religious groups are *per se* invalid.” 483 U.S. at 338. Rather, “[w]here * * * government acts with the proper purpose of lifting a regulation that burdens the exercise of religion,” there is “no reason to require that the exemption come packaged with benefits to secular entities.” *Ibid.* See also *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 705 (1994) (noting that “the Constitution allows the State to accommodate religious needs by alleviating special burdens”); Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1446-1449

(1992) (citing over 2,000 religious accommodations in state and federal law). As Justice Brennan later stated in *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion), “benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs” are permissible so long as they are “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause” or “would not[] impose substantial burdens on nonbeneficiaries” of the Programs.

The Eighth Circuit in *CHILD II* and Judge Breyer below concluded that the accommodation at issue here satisfies not one, but *both* of these alternative criteria. 212 F.3d at 1093-1098; Op.12-14. First, “[b]y extending nonmedical health care benefits to individuals who object for reasons of religion to medical treatment, section 4454 spares such individuals from being forced to choose between adhering to the tenets of their faith and receiving government aid, and in doing so removes a burden that the law would otherwise impose.” 212 F.3d at 1093-1094. Second, the statute imposes no burden whatsoever on those who do not participate in the accommodation, as it extends no benefit to religious believers that is not equally available to all other Americans. *Id.* at 1096-1098. Beneficiaries of

the statute receive only a subset—the nonmedical portion—of Medicare and Medicaid services otherwise available to everyone. *Ibid.*⁵

A. The Amended Accommodation Removes A Significant Burden On Religious Exercise.

Every court to consider the issue has concluded that it would burden persons who rely solely upon religious healing methods to require them to pay taxes to support programs whose benefits they may receive only by violating their faith. *CHILD II*, 212 F.3d at 1093-1094; *CHILD I*, 938 F. Supp. at 1474-1475; Op.10-11. Congress expressed the same view, observing that to require poor and elderly persons who are religiously opposed to receiving medical care to obtain care from medical facilities would pressure them to abandon essential precepts of their religion. H.R. CONF. REP. at 768. It cannot be disputed that this prospect “might significantly deter adherents of [religious nonmedical care] from conduct protected

⁵ Plaintiff’s heavy reliance on *Agostini v. Felton*, 521 U.S. 203 (1997), is misplaced, and surprising in light of his own admission (Br.50) that both *Agostini* and *Mitchell* say “not a single word” about accommodation. See *CHILD II*, 212 F.3d at 1095 (recognizing that *Agostini* “did not involve a religious accommodation”). If courts indiscriminately concluded that a law may not “define its recipients by reference to religion” (*Agostini*, 521 U.S. at 234), then *no* accommodation could be upheld, because *every* accommodation so defines its recipients. *Agostini* and *Mitchell* were not accommodation cases, and they should not be read as silently overruling every Supreme Court decision approving of religious accommodations. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952); *Amos*; *Texas Monthly*.

by the Free Exercise Clause.” *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion); ER457, 480, 488.⁶

Plaintiff nonetheless contends that the accommodation doctrine has never been applied to a “direct aid program” that provides “special benefits” to members of “certain religious institutions.” Br.43-44. According to plaintiff, the district court’s “unprecedented” decision to uphold a “statute that pays money to religious organizations” could have resulted only from Judge Breyer’s “inflated view of accommodation” that considers “denying financial subsidies to religious organizations” to be a “significan[t] burden [on] Free Exercise rights.” Br.38-39, 42. See also Br.22 (“The district court’s inflation of the limited and seldom used theory of permissive accommodation of religion, which the Supreme Court has specifically rejected for direct aid programs, is plainly erroneous.”).⁷

⁶ For purposes of this litigation, we do not contend that failure to make this accommodation would necessarily be unconstitutional. But as Judge Breyer recognized (Op.10-11), a legislative accommodation of religion may be valid under the Establishment Clause even if the burden lifted by the accommodation would not violate the Free Exercise Clause. See *Amos*, 483 U.S. at 334 (“the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)); accord *Kiryas Joel*, 512 U.S. at 705-706; *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-145 (1987).

⁷ Plaintiff cites Department of Justice correspondence in support of his claims on this and other points. But it should go without saying that such materials are not legal authority.

It is plaintiff—not Judge Breyer and the Eighth Circuit—whose position is unprecedented. Indeed, one of the cornerstones of First Amendment jurisprudence, *Sherbert*, 374 U.S. at 404, involved an accommodation to enable an individual to obtain the benefit of a tax-supported program. Although *Sherbert* is now of limited authority with regard to *mandatory* accommodations under the Free Exercise Clause, its principle has been unanimously reaffirmed with regard to *permissible* legislative accommodations, of the sort at issue here. Moreover, numerous other Supreme Court and lower court decisions—including decisions by this Court—have upheld legislative accommodations in the context of government benefit programs. As the court recognized in *CHILD I*, 938 F. Supp. at 1478, Congress’s “very important interest” in “the accommodation of the exercise of religion * * * is magnified when the accommodation is made to ensure participation in a comprehensive welfare system.”

In *Sherbert*, the Court held that, in the absence of compelling justification, a state must adjust the terms of a public benefit program to enable an otherwise eligible recipient to participate without violating the tenets of her religion. The program at issue, unemployment compensation, required all recipients to be “available” for all “suitable” work, which effectively excluded Sabbatarians who could not accept work on Saturday. In words equally applicable here, the Court observed:

[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

374 U.S. at 404. In *Thomas v. Review Bd.*, 450 U.S. 707, 717-718 (1981), the Court explained that “[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”

Other cases in which the Court has upheld accommodations that enable religious individuals or institutions to share in government benefit programs include *Frazer v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832, 835 (1989), and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987). In *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311-312 (9th Cir. 1974), this Court rejected an establishment clause challenge to Section 401(b) of the Hill-Burton Act, which accommodates the needs of hospitals with religious objections to certain medical procedures, enabling them to receive government benefits. Indeed, even in cases in which accommodations have been struck down (such as *Kiryas Joel* and *Texas Monthly*), not a single Justice has *ever* advocated the view that there can be no accommodation within the context of a government aid program. Given the

prevalence of religious accommodations in numerous state and federal benefit statutes throughout state and federal law, plaintiff's radical theory would amount to nothing less than a judicial wrecking ball.⁸

Like Judge Breyer (Op.11), both the district court in *CHILD I* and the Eighth Circuit in *CHILD II* recognized the close parallel between this case and the *Sherbert* line of cases. As the Eighth Circuit explained:

Absent section 4454, the Medicare and Medicaid Acts place individuals who hold religious objections to medical care in a situation similar to that contemplated by the *Sherbert* line of cases. They are forced to choose between adhering to their religious beliefs and foregoing all government health care benefits, or violating their religious convictions and receiving the medical care provided by Medicare and Medicaid.

212 F.3d at 1093-1094. Accord *CHILD I*, 938 F. Supp. at 1478. In other words, just as Mrs. Sherbert could not (absent accommodation) obtain unemployment

⁸ *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973), *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), and *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir.) (en banc), *vacated*, 122 S. Ct. 340 (2001), are not to the contrary. *Nyquist* acknowledged that failure to fund the educational services there at issue imposed a burden on religion; it simply held that independent Establishment Clause limitations precluded financial support for religious education. 413 U.S. at 788-789. The same is true of *Gentala*, which involved a *free exercise* claim seeking funding of a National Day of Prayer event—pure religious expression deemed to serve no secular purpose. See 244 F.3d at 1082. In its cursory discussion of the burden issue, moreover, the court in *Gentala* held only that the plaintiffs “made no showing that their ability to worship as they choose has been discernibly burdened by the operation of the Civic Events program.” *Id.* at 1082. *KDM*, too, considered the question of “impermissible burden” only in the context of a *free exercise* claim. *KDM* did not hold that it would be unconstitutional for the legislature to accommodate the religious person.

compensation without violating her faith, those who rely on religious healing in lieu of medicine cannot (absent accommodation) obtain health care benefits without violating theirs. Congress has simply made the kind of accommodation here that was held to be constitutionally required in *Sherbert*. See Op.11.

It was argued in *Sherbert* that granting a religious exemption was an “establishment.” But as the Court explained, such exemptions “reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences.” 374 U.S. at 409. There, as here, the religious adherent received no more from the government program than her secular counterparts, and in both cases the exemption is simply a means of achieving neutrality of result. If a public school serves cheeseburgers to needy children in a school lunch program, it is not unconstitutional to procure kosher meals for those who are Jewish.

Citing *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Bowen v. Roy*, 476 U.S. 693 (1986), plaintiff dismisses *Sherbert* and its progeny as “a narrow group of unemployment compensation decisions” that the Supreme Court has repeatedly distinguished and “confine[d].” Br.38-42. But as Judge Breyer recognized (Op.11), this confuses two separate issues: whether an accommodation is *permissible* and whether it is *required*. While *Smith* and *Roy* narrowed the circumstances in which the Constitution *requires* accommodating religion, they in no way cast doubt on legislative accommodations that exceed the constitutional

minimum. Nor do they alter the analysis of whether government action imposes a burden on religion in the first place.⁹ Indeed, *Smith* makes clear that the primary responsibility for accommodating religion has shifted from the courts to the legislatures. 494 U.S. at 890. Thus, if anything, that decision requires *greater* deference to legislative accommodations of religion.

The proposition that religious accommodations are *permissible*, even in the context of public benefit programs, commanded the support of even the dissenting Justices in the *Sherbert* line of cases. As then-Associate Justice Rehnquist—who joined the *Smith* majority—explained in *Thomas*:

[G]overnmental assistance which does not have the effect of “inducing” religious belief, but instead merely “accommodates” or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment. I would think that in this case, as in *Sherbert*, had the State voluntarily chosen to pay unemployment compensation benefits to persons who left their jobs for religious reasons, such aid would be constitutionally permissible * * * .

450 U.S. at 727 (Rehnquist, J., dissenting); accord *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting).

⁹ For the same reason, *Bob Jones University v. United States*, 461 U.S. 574 (1983), and *Swaggart Ministries v. California Dep’t of Equalization*, 493 U.S. 378 (1990), on which plaintiff relies (at 42), are irrelevant. In these cases, the Court held that accommodations are not constitutionally mandated. The Court did not suggest that a legislative accommodation would have violated the Establishment Clause.

Likewise, although the Justices who made up the plurality in *Roy* (Burger, Rehnquist, Powell) rejected a *free exercise* challenge to the requirement that one be assigned a social security number in order to receive food stamps, they expressly acknowledged that “[a]n exemption adopted by Congress to accommodate religious beliefs such as [these] would not violate the First Amendment’s Establishment Clause.” 476 U.S. at 712 n.19 (citing *Sherbert*). “As a matter of legislative policy,” they explained, Congress is free “to make religious accommodations to a general and neutral system of awarding benefits.” *Id.* at 712.¹⁰

As Judge Breyer recognized, where Congress has carefully considered the issue and determined that accommodation is necessary for adherents of minority religions to participate in a comprehensive benefits program, courts should be cautious before overriding that determination. Op.18 (citing *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988)). The traditional “presumption in favor of the

¹⁰ Plaintiff misstates the holding in *Roy*, suggesting that “the application of *Sherbert* to programs that call for a choice between adhering to religious beliefs and accepting a government benefit is inappropriate.” Br.41. But plaintiff quotes from the plurality opinion in *Roy*, without noting that the plurality’s distinction between denials of government benefits and direct government compulsion was *rejected* by a *majority* in *Roy*, and again the following Term. See *Hobbie*, 480 U.S. at 141 (“Five Justices expressly rejected this argument in *Roy*. We reject the argument again today” (citations omitted)). Moreover, although the *Smith* majority held that “neutral law[s] of general applicability” (494 U.S. at 879) are not subject to strict scrutiny *regardless* of whether they involve benefits or compulsion, it did *not* revive the *Roy* plurality’s distinction between a denial of benefits and compulsion.

constitutionality of statutes enacted by Congress” (*Kendrick*, 487 U.S. at 617) is particularly strong “when, as here, Congress specifically considered the question of the Act’s constitutionality.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). See H.R. CONF. REP. at 768; 143 CONG. REC. S6322 (daily ed. June 25, 1997) (Sen. Kennedy); 143 CONG. REC. S8447 (daily ed. July 31, 1997) (Sen. Hatch). Congress is entitled to special deference when it adheres to “‘our happy tradition’ of ‘avoiding unnecessary clashes with the dictates of conscience.’” *Gillette v. United States*, 401 U.S. 437, 453 (1971).

B. The Statute Imposes No Substantial Burden On Program Nonbeneficiaries.

An accommodation of religion is also permissible if it “would not[] impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs.” *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion). The Programs easily satisfy that requirement. *CHILD II*, 212 F.3d at 1095-1096; *CHILD I*, 938 F. Supp. at 1480; Op.12.

The Programs impose no burden whatsoever on other persons. All those who contribute to the Programs have a range of choices available to them; no one has an interest in what type of care others may select. Insofar as participants must “elect” either medical care or care in an RNHCI (42 U.S.C. § 1395i-5(b)), it is the religious beneficiaries who receive less for their tax dollar. As the court explained in *CHILD II*, “RNHCI patients receive none of the costly medical

procedures, such as x-rays and laboratory tests, and only a small percentage of the physical care services received by persons obtaining care at medical institutions.” 212 F.3d at 1096 (citing 42 U.S.C. § 1395x(ss)(1)(C); HEARINGS ON H.R. 6675, *supra*, at 699 (statement of Dr. J. Buroughs Stokes)). That is why Judge Breyer called it “unsurprising” that there is no record evidence showing “that those who receive their care in a RNHCI cost taxpayers more than those who receive their care in medical facilities.” Op.12. Indeed, plaintiff’s own factual submission confirms that “[s]anatorium costs tend to be lower than hospital or nursing home costs.” 11/23/83 Letter from HCFA Administrator Carolyne K. Davis to Rep. Berkley Bedell (ER275), cited in *CHILD II*, 212 F.3d at 1096.¹¹ As the *CHILD I* court concluded, “the Medicare and Medicaid exemptions *do* operate to remove a burden to the free exercise of the Christian Science religion, without necessarily increasing the tax bills of non-Christian Scientists.” 938 F. Supp. at 1480.

¹¹ Disregarding his own evidentiary submission, plaintiff incorrectly states in his brief that beneficiaries of the accommodation receive an “average benefit of \$8,000,” which is “approximately 48% higher than the \$5,410 per individual per year in Medicare as a whole.” Br.14-15. The \$5,410 figure that plaintiff cites (ER220) pertains to the average expenditure for all those who are *eligible* for medical care, *including those who receive no care*. As the district court found: “There is no competent evidence before the Court that those who receive their care in a RNHCI cost taxpayers more than those who receive their care in medical facilities.” Op.12.

C. Plaintiff’s Contention That The Amended Accommodation Provides “Special Benefits” To Religion Is Based On A Mischaracterization Of The Statutes.

Plaintiff’s argument is premised on the notion that RNHCI patients receive “special benefits” that are otherwise unavailable in the Programs. *E.g.*, Br.3-4, 9, 11, 13, 19, 35, 44, 49. But as Judge Breyer recognized (Op.13-14), that argument mischaracterizes the statute: viewed as a whole, the statute entitles religious persons who object to receiving medical care to only a *subset*—the nonmedical portion—of the care to which other poor and elderly persons are entitled. Congress limited “[r]eimburseable services * * * to nonmedical nursing services and related items, comparable to services and related nursing materials supplied to inpatients in a hospital or a medical skilled nursing facility.” H.R. CONF. REP. at 768. “RNHCI patients, just like medical patients, may not be reimbursed for services that, if performed in a medical facility, would not constitute skilled care.” *CHILD II*, 212 F.3d at 1097.

Plaintiff’s remarkable assertion that “[t]he record is undisputed that RNHCI services are not the same services that are rendered by medical hospitals” (Br.13) is contradicted by express findings of the district court. See Op.13 (“the RNHCI is reimbursed only for the skilled nonmedical nursing services for which medical hospitals are also reimbursed”). Nor has it any basis in the factual record of this case. Plaintiff has not identified a single nursing service that would be

covered under the Programs if provided by a religious nonmedical health care institution but not if provided by a hospital. As plaintiff's own factual submission makes clear, each service provided in Christian Science nursing facilities is also reimbursed under the Programs "if the patient is receiving care under the direct supervision of a licensed physician or surgeon." ER364; see also ER55-58 (describing physical care services provided by Christian Science nursing facilities to seriously ill patients).¹²

Plaintiff's characterization of RNHCI services as "special" is based entirely on the fact that they are provided without the involvement of medical doctors. According to him, any care that "lacks physician orders" is "custodial," and "custodial care" is not reimbursable at medical facilities. Br.11. As the Eighth Circuit recognized, this argument is based on an out-of-context definition of "custodial care" and "ignore[s] the fundamental principle upon which section 4454 is based." 212 F.3d at 1096-1097.

As plaintiff's own submission demonstrates, "custodial care"—properly defined—has always been excluded from coverage, *even in Christian Science nursing facilities*. See HCFA CHRISTIAN SCIENCE SUPPLEMENT § CS-200A

¹² Plaintiff notes that Congress rejected draft language that would have limited reimbursement to services "comparable to (or the equivalent of) inpatient hospital services." Br.14. The legislative history does not articulate a reason for this drafting decision, but the obvious explanation is that the language was redundant.

(“services are excluded from coverage * * * if they constitute custodial care”) (ER267) (superseded regulations). The Programs provide coverage for “services furnished an individual in [an RNHCI] only if the individual has a condition such that the individual would qualify for benefits * * * if the individual were an inpatient or a resident in a hospital or skilled nursing facility that was not such an institution.” 42 U.S.C. § 1395i-5(a)(2). In the medical context, governing regulations define custodial care as “any care that is not ordered by a physician,” but *also* provide that “[s]uch services * * * are not considered custodial when given as part of an integrated plan of care that, as a whole, requires professional supervision.” *CHILD II*, 212 F.3d at 1096 (citing 42 C.F.R. §§ 409.33(d), 409.33(a)(1)). Accordingly, “section 4454 extends to RNHCI patients only those benefits that they could have received if they had sought treatment at a medical institution, and then only a subset, *i.e.* the nonmedical portion, of those benefits.” *Id.* at 1097. See 42 U.S.C. § 1395y(a)(9) (excluding custodial care from coverage for both medical institutions and RNHCI); *CHILD I*, 938 F. Supp. at 1485 (“Christian Scientists are not receiving benefits which are unavailable to outsiders—other recipients of Medicaid and Medicare are aided by government payment for bed and board, and for nursing services and supplies”).

The logic of the “custodial care” exclusion, which plaintiff ignores, is that Medicare and Medicaid pay for bed, board, nursing supplies, and physical care

services only when a patient’s condition is such that she would be hospitalized—and not simply because the patient is aged or unable to take care of herself. RNCHI patients receive these services when, and only when, their condition is such that they would be eligible to receive them in a hospital setting. See *CHILD II*, 212 F.3d at 1097. Thus, as Judge Breyer recognized, “[r]ather than being ‘special benefits,’ these benefits are the same as some of the funded inpatient services provided to similarly situated people who receive care in medical institutions.” Op.14. See also Foix, *Healing By Spiritual Means: Why Children’s Healthcare v. Vladeck Necessitates Amending the Social Security Act*, 15 L. & INEQ. J. 373, 413 (1997) (“accommodating Christian Scientists provides the poor and elderly of the denomination with the same physical nursing care provided to others not of their religion”). Once this basic feature of the statutes is understood, plaintiff’s constitutional argument has no validity.

D. The Programs Do Not Entail Excessive Entanglement Between Church And State.

Plaintiff also claims that the accommodation fails *Lemon’s* “entanglement” prong because it “effectively delegates coverage decisions under the programs to the RNHCI,” in violation of *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982) (Br.51-52). According to plaintiff, RNHCIs are entirely free to determine their own “standards of quality” and “measures of performance.” Br.54. As Judge Breyer recognized (Op.16), this argument misrepresents the statutory scheme.

To begin with, an RNHCI's utilization review committee, like its counterpart in a medical facility (see 42 U.S.C. § 1395x(k)(2)), "offers only an initial recommendation regarding * * * coverage." *CHILD II*, 212 F.3d at 1099 (citing 42 U.S.C. §§ 1395x(ss)(1)(H)-(J), 1395x(ss)(3)(B)(ii)). Such recommendations are subject to plenary review by the Secretary's designated fiscal intermediary. *Ibid.*; see generally *Regions Hosp. v. Shalala*, 522 U.S. 448, 452-453 (1998); HCFA HOSPITAL MANUAL § 120. The fiscal intermediary audits the activities of such facilities and issues a "notice of amount of program reimbursement" ("NAPR") (42 C.F.R. § 405.1803) regarding submitted claims. See *Regions Hosp.*, 522 U.S. at 452-453; HCFA HOSPITAL MANUAL § 120. In conducting this audit, the fiscal intermediary "examines each claim for payment for RNHCI services to ensure that only payments for properly covered services are made." (ER388-390). The NAPR is in turn subject to review by the Provider Reimbursement Review Board, the Secretary, and, ultimately, the courts. 42 U.S.C. § 1395oo(a), (b), (f)(1); 42 C.F.R. §§ 405.1835, 405.1837; *Regions Hosp.*, 522 U.S. at 452-453.¹³ The coverage determinations made by the RNHCIs are carefully reviewed by HCFA in determining whether the facility will retain its certification

¹³ Although *Regions Hospital* involved a medical hospital, these procedures apply to religious nonmedical health care institutions as well. See 42 U.S.C. § 1395x(e) (defining religious nonmedical health care institutions as "hospitals" for purposes of these and other provisions).

as a HCFA provider. ER388-389. In sum, there is no more “delegation” here than in any other situation where an institution makes the initial, non-final determination of eligibility. As the court explained in *CHILD II*, “RNHCI coverage decisions are subject to substantial and meaningful review by the Secretary, or her agent.” 212 F.3d at 1098 n.8; accord *id.* at 1099.

Plaintiff suggests that, because in lieu of providing a physician certificate, the RNCHI utilization review committee describes the patient’s condition in nonmedical language, the Secretary cannot perform his oversight function. Br.13-14, 53. The statute, however, provides that nothing therein shall “be construed as preventing the Secretary 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)), and HCFA’s regulations direct that if it is not possible to “establish necessity or appropriateness of care,” the RNHCI must recommend that “the patient’s admission, extended stay, or other services not be approved for payment.” 64 Fed. Reg. at 67036. If the Secretary and the fiscal intermediary, after reviewing the facility’s records, lack “reasonable assurances” regarding a coverage decision, they may deny coverage, request additional information, or continue to monitor the facility to ensure that the Programs provide properly limited coverage. 42 U.S.C. § 1395x(ss)(2). Moreover, HCFA regularly conducts “unannounced on-site surveys” of the RNHCIs and “review[s] the facility

system of records to assure that they support coverage” for “all admissions.” ER387-389.

Plaintiff’s assertion that RNHCIs are permitted to “self-regulat[e]” in a manner “unheard of in other institutions under Medicare” (Br.9-10) lacks any record support. On the contrary, “[a]s with all Medicare providers,” payments to RNHCIs are subject to approval by a fiscal intermediary that “must audit the records of providers as necessary to assure that only proper payments are made.” ER389-390. Indeed, “[i]n addition to the general guidance furnished to intermediaries” that are responsible for payments to medical facilities, the fiscal intermediary that processes RNHCI claims is required to follow a detailed program memorandum and fill out additional forms to ensure that the statute’s stringent eligibility requirements are being met. ER390-391, 434-441. This should lay to rest plaintiff’s allegation that “[t]he Secretary has adopted no standards to determine the reasonableness and necessity of services ancillary to religious treatment.” Br.12.¹⁴

¹⁴ Nor are RNHCIs free of regulatory oversight in other respects. See, *e.g.*, 42 U.S.C. § 1395x(ss)(1)(J) (authorizing the Secretary to impose such “requirements [as he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution”); 42 C.F.R. § 403.720 (“Medicare covers services in an RNHCI if the following conditions are met: * * * (2) [It] [i]s lawfully operated under all applicable Federal, State, and local laws and regulations.”); *id.* § 403.702 (“Religious nonmedical nursing personnel” must be “trained and experienced in the principles of nonmedical care, and formally recognized as (continued...)”) (continued...)

In any event, plaintiff's claims, even if true, would constitute mere policy objections to the effectiveness of administrative and fiscal controls. The constitutional precedent on which he relies, *Larkin v. Grendel's Den*, bears no resemblance to this case. *Larkin* involved the delegation of governmental power to a church over the affairs of its neighbors—the authority to decide whether nearby landowners could sell alcoholic beverages. 459 U.S. at 127. Thus, *Larkin* is doubly inapposite: RNHCIs do not exercise any final authority whatsoever; moreover, the “authority” they *do* exercise, in common with all Medicare providers, is simply to determine how federal law applies to *themselves*.

II. Plaintiff's Claim Of Sect-Discrimination Is Based On A Mischaracterization Of The Statute And Its Legislative History.

Plaintiff argues that the amended law is really a sect-specific accommodation in disguise. Br.1-3, 24-29. Although the statute no longer refers to Christian Science, plaintiff asserts that Congress intended “to continue the benefits solely to” Christian Scientists. *Id.* at 29. In supposed support of this contention, he cites legislative history and statutory eligibility criteria that, he says, apply “only to Christian Science sanatoria.” *Id.* at 2, 28. In both respects, plaintiff has badly misrepresented the statute.

¹⁴ (...continued)
competent in the administration of care within their religious nonmedical health care group”).

A. The Text And Legislative History Of The Amended Statute Reveal Congress’s Clear Intention To Accommodate All Religious Objectors To Medical Care.

Plaintiff’s suggestion that the Court may infer a discriminatory intent on account of references in the legislative history to “continuing” benefits to Christian Scientists (Br.28-29) is nothing short of absurd. To be sure, Congress was *aware* of the district court’s decision in *CHILD I*, which affected only Christian Scientists, and that Christian Scientists are the most conspicuous example of a group needing this type of accommodation. But the express purpose of the 1997 amendments was to broaden the statute into 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. at 768. As Judge Breyer put it, “the fact that Congress wanted to continue benefits to Christian Scientists does not mean they wanted to continue benefits *solely* to Christian Scientists.” Op.7-8 (emphasis in original).

In response to the identical argument in *CHILD II*, the Eighth Circuit stated:

Although Congress enacted section 4454 in response to *CHILD I*, appellants’ characterization of section 4454 as nothing more than an attempt to “reinstate” to Christian Scientists the benefits invalidated in *CHILD I* is supported only by a selective and strained reading of the legislative history. A more accurate reading, in our view, reveals that the legislative impetus behind section 4454 was to accommodate all persons who object to medical care for religious reasons, not only Christian Scientists.

212 F.3d at 1091. The statute’s “terms, legislative history, and effect all suggest denominational neutrality.” *Id.* at 1090.

Plaintiff argues that the statute is subject to strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982), because it has a “disparate impact” in its “actual operation.” Br.30-32. As Judge Breyer recognized, this argument fails for several reasons. To begin with, *Larson* did *not* hold that a statute’s disparate impact among different religions requires application of strict scrutiny. Op.7; see also *CHILD II*, 212 F.3d at 1091. On the contrary, the Court stated that the statute at issue in *Larson* was “not simply a facially neutral statute, the provisions of which happen to have a ‘disparate impact’ upon different religious organizations.” 456 U.S. at 246 n.23. Indeed, if an accommodation were invalid simply because it yielded a “disparate impact” among different faiths, it is difficult to imagine any accommodation that would survive review, since almost any such law will affect some faiths more than others. See Op.7. Congress’s accommodation of religious headwear in the military (10 U.S.C. § 774) was a direct response to *Goldman v. Weinberger*, 475 U.S. 503 (1986), which highlighted Orthodox Jewish servicemen’s need for such accommodation. Statutes exempting sacramental peyote use from criminal sanction, which exist in numerous states (*Smith*, 494 U.S. at 890) and the United States Code (42 U.S.C. § 1996a), benefit only adherents of Native American faiths. And federal provisions exempting ritual slaughter from regulation (*e.g.*, 7

U.S.C. § 1906) primarily benefit those who adhere to kosher dietary laws. See *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.) (Friendly, Palmieri, Bonsal), *aff'd*, 419 U.S. 806 (1974) (upholding this statute against free exercise and establishment challenges).

Although the statute in *Larson* did not refer to a denomination by name, the legislative history revealed a desire to “regulate the Moonies” without affecting more established churches like the Roman Catholic. 456 U.S. at 254-255. Subsequent cases make clear that *Larson* requires strict scrutiny only where the law *facially* or *intentionally* differentiates among religions. *Hernandez v. Commissioner*, 490 U.S. 680, 695 (1989) (emphasis added). As the Court explained in *Amos*, 483 U.S. at 339, “where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test.” Accord *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Likewise, in *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995), this Court expressly rejected the argument it “should apply a strict scrutiny analysis, rather than the *Lemon* test, because § 1402(g) involves disparate treatment of different religious

sects.” Where a statute “is not facially discriminatory,” this court explained, “the *Lemon* test applies.” *Ibid.*¹⁵

Moreover, even if the amended accommodation were subject to strict scrutiny, *CHILD I* demonstrates that it easily withstands that analysis. As the district court there stated, “the interest in accommodating religious beliefs in the context of generally available public welfare programs, in order to ensure that all those who pay taxes to support the programs may benefit from them, is a sufficiently compelling interest to survive the first prong of strict scrutiny review.” 938 F. Supp. at 1478; accord *id.* at 1479, 1480, 1485; Foix, *supra*, 15 L. & INEQ. J. at 413. The court invalidated the statutes only because they “explicitly address[ed] institutions of a single religion.” 938 F. Supp. at 1473. That infirmity no longer exists. *CHILD II*, 212 F.3d at 1090-1092; Op.6-8.

B. Congress Had Rational Secular Justifications For Each Of The Eligibility Criteria Challenged By Plaintiff.

Plaintiff’s remaining argument for strict scrutiny is that the accommodation’s “extensive” eligibility criteria evidence an illegitimate Congressional effort to favor Christian Science institutions. Br.25, 28-29. Due

¹⁵ Plaintiff’s suggestion that Judge Breyer treated *Droz* “as somehow overruling *Larson*” (Br.32)—that he held that *Larson* is no longer “the law of the land” (Br.24)—is patently erroneous. Judge Breyer carefully applied *Larson* in light of *Droz*, which is precisely what a judge is supposed to do. See Op.6 (citing *Droz*’s observation that the statute in *Larson* amounted to “a judgment that some religions were worthy of exemption and others were not” (quoting 48 F.3d at 1124)).

respect to a coordinate branch of government, however, should require a court to insist on clear proof before accepting an accusation that Congress's actions are a sham or an illicit effort to favor one religion over another. The Supreme Court has held that "a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn." *Gillette*, 401 U.S. at 452; *CHILD II*, 212 F.3d at 1091.¹⁶ This plaintiff has failed to do.

As the Eighth Circuit recognized (212 F.3d at 1092), and as Judge Breyer observed below, "Congress drew its lines in section 4454 for neutral, secular reasons." Op.8. The eligibility requirements were developed by congressional and executive officials to ensure that the Programs could be efficiently administered and controlled, without becoming a vehicle for abuse. Medicare and Medicaid have tended to expand in unexpected ways, and Congress is entitled to set strict eligibility criteria to prevent that from happening and to ensure that the accommodation's benefits are confined to those who, by reason of religious conviction, would otherwise be excluded. As Congress stated, "detailed eligibility criteria * * * are necessary to protect the health and safety of patients in [religious

¹⁶ Plaintiff incorrectly suggests (Br.31-32) that *Larson* overruled this aspect of *Gillette*. As the passage quoted by plaintiff illustrates, *Larson* held only that the eligibility requirements of the statute at issue there *did* grant a denominational preference, thus subjecting it to strict scrutiny.

nonmedical health care] institutions and to prevent fraud and abuse.” H.R. CONF. REP. at 769.

Several of the eligibility requirements attacked by plaintiff (Br.26)—such as the exclusion of facilities that provide medical care (42 U.S.C. § 1395x(ss)(1)(C))—are designed to ensure that institutions that *do* provide medical care are subject to medical regulation in their entirety. As the Eighth Circuit explained (212 F.3d at 1092), these requirements

see[k] to ensure the safety of patients receiving medical care through Medicare and Medicaid. Without these requirements, an institution that provides both medical and spiritual healing services might qualify as an RNHCI and therefore evade the medical oversight and other quality of care standards that Medicare and Medicaid impose on all medical institutions, but not on RNHCIs. Such a result would compromise the safety of persons receiving medical care at institutions that also promote spiritual healing. Thus, these eligibility requirements ensure that only those facilities that provide no medical care are exempt from the medical oversight requirements; all others are subject to the full panoply of oversight mechanisms.

The other two eligibility criteria challenged by plaintiff (Br.26)—the limitation to facilities whose refusal to provide medical care is based on religious belief (42 U.S.C. § 1395x(ss)(1)(F)), and to facilities that serve only patients who are relying solely on religious healing methods (*id.* § 1395x(ss)(1)(C))—together serve at least three rational purposes. First, limiting eligibility to institutions that admit only individuals “engaged in spiritual healing” (Br.26) makes it possible to monitor compliance on an institution-by-institution basis, which is both easier and a more reliable means of detecting fraud or abuse. As the Eighth Circuit observed:

This limitation enables the government, in monitoring section 4454 compliance, to focus its time and resources on patients concentrated in a relatively small number of facilities, rather than on patients in thousands of health care institutions nationwide. As a result, the administration of section 4454 is both more manageable and effective, thereby decreasing the possibility that it will be used as a tool to defraud or abuse the Medicare and Medicaid programs.

212 F.3d at 1092. In other words, if participants must obtain care in an institution committed to religious nonmedical health care, it is both less likely that anyone will try to evade the statute's limitations and more likely that any such effort will be detected.

Second, in crafting the challenged provisions, Congress was accommodating not only religious individuals who object to receiving medical care, but religious institutions that oppose administering it. It is well established that Congress may accommodate institutions as well as individuals, and that doing so serves a valid secular purpose. *E.g.*, *Amos*, 483 U.S. at 335. See 42 U.S.C. § 300a-7(d) (exempting medical *providers* from having to perform procedures over their objection); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311-312 (9th Cir. 1974) (rejecting establishment clause challenge to provision accommodating federally funded hospitals with religious objections to certain medical procedures).

Finally, Congress was understandably reluctant to encourage the proliferation of institutions that provide nursing care without the involvement or supervision of doctors. Although exempting participating institutions from medical

regulation is necessary to achieve the purpose of the accommodations, it is entirely proper for Congress to minimize the risk of a proliferation of new facilities whose cumulative effect on the fisc could be substantial.

In sum, the eligibility criteria all reflect valid secular justifications. *CHILD II*, 212 F.3d at 1092. As Judge Breyer observed, they are designed to “prevent fraud and abuse,” to “ensure effective administration of the law,” and to “avert the possibility that an institution which provides both medical and spiritual services will manage to evade the normal medical oversight requirements, endangering patients.” Op.8.

C. Plaintiff’s Approach Is Inconsistent With Principles Of Judicial Review That Apply To Religious Accommodations.

Plaintiff’s suspicious and hypercritical critique of the details of a carefully considered regulatory scheme is inconsistent with Congress’s wide latitude to fashion workable accommodations. See *Amos*, 483 U.S. at 334-335; *Roy*, 476 U.S. at 712 (plurality opinion). The closest parallel to this case is the judicial treatment of challenges to 26 U.S.C. § 1402(g), which exempts from Social Security taxation self-employed “member[s] of a recognized religious sect” who are “conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments [for various benefits including health care],” if (and only if) the sect “has been in existence at all times since December 31, 1950” and makes “provision for [its] dependent members” in a manner adjudged by the

Secretary to be “reasonable.” 26 U.S.C. § 1402(g)(1)(D), (E). Those are exceedingly narrow criteria, which benefit the Amish and probably no one else. In an opinion declining to expand this exemption on free exercise grounds, the Supreme Court expressly approved its carefully drawn limitations:

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own “welfare” system are distinguishable from the generality of wage earners employed by others.

United States v. Lee, 455 U.S. 252, 260-261 (1982).

Although frequently challenged on theories similar to plaintiff’s, § 1402(g) has been upheld by every court to address its constitutionality.²⁴ In *Droz*, for example, this Court sustained § 1402(g) against the claim that it discriminates among religions. As the Court explained, “[Section] 1402(g) grants a religious exemption, provided that the individual belongs to an organization with its own welfare system. This is not a promotion of some religions over others. It is a

²⁴ See *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Ballinger v. Commissioner*, 728 F.2d 1287 (10th Cir. 1984); *Olsen v. Commissioner*, 709 F.2d 278 (4th Cir. 1983); *Hatcher v. Commissioner*, 688 F.2d 82 (10th Cir. 1979); *Jaggard v. Commissioner*, 582 F.2d 1189 (8th Cir. 1978) (per curiam); *Smart v. United States*, 332 F.2d 283 (2d Cir. 1964); *Varga v. United States*, 467 F. Supp. 1113, 1118-1119 (D. Md. 1979), *aff’d without opinion*, 618 F.2d 106 (4th Cir. 1980); *Randolph v. Commissioner*, 74 T.C. 284 (1980); *Henson v. Commissioner*, 66 T.C. 835 (1976); *Palmer v. Commissioner*, 52 T.C. 310 (1969).

religious exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church.” 48 F.3d at 1124. A like analysis applied to this case produces the same conclusion.

Plaintiff attempts to distinguish *Droz* on the purported basis that it involved accommodation of *individuals* rather than organizations. Br.32. But that is false: *Droz* involved Section 1402(g) of the tax code, which—precisely like Section 4454—accommodates individuals *within the context of religious groups that care for their members*. See 48 F.3d at 1121. In any event, it is well settled that the government’s discretion to enact accommodations is not limited to religious individuals. See, e.g., *Amos* (upholding accommodation of religious organizations under Title VII); *Chrisman*, 506 F.2d at 311-312.

III. Plaintiff’s “As Applied” Claim Is Without Merit.

Plaintiff devotes the final five pages of his brief to a last-ditch “as applied” claim—that permitting Christian Science sanatoria to participate in the Programs amounts to direct government funding of the “religious mission” of “pervasively sectarian” institutions, in violation of *Lemon*’s second prong. Br.55-59.

This claim fails for two independent reasons. First, to the extent that the “pervasively sectarian” doctrine remains valid,²⁵ the Supreme Court has expressly held that in light of the secular nature of physical health care services, such services may be provided at state expense even in institutions that *are* pervasively sectarian. *E.g.*, *Wolman v. Walter*, 433 U.S. 229, 242 (1977) (upholding provision of “physician” and “nursing” care in pervasively sectarian schools), *overruled in part on other grounds*, *Mitchell v. Helms*, 530 U.S. 793 (2000). Second, plaintiff in any event has failed to provide evidence to demonstrate that RNHCIs, including Christian Science sanatoria, are pervasively sectarian. As the Eighth Circuit observed on an almost identical record, the function of Christian Science sanatoria is to “provide physical nursing services to sick individuals”—for example, they “bathe patients, wash and bandage sores, change bed pans, and assist patients in dressing and walking”—and these services “are distinct and separable from any religious activity that may take place within such facilities.” 212 F.3d at 1100.

²⁵ Recent opinions indicate that it no longer has legal significance, at least outside the original context of parochial schools. See *Mitchell v. Helms*, 530 U.S. 793, 825-829 (2000) (four-Justice plurality) (stating that the doctrine has been abandoned); *id.* at 849-857 (O’Connor, J., concurring) (rejecting any presumption regarding “diversion” of aid to religious uses based on the religious character of an institution); *Witters v. Washington Dep’t of Servs.*, 474 U.S. 481 (1986) (not applying the doctrine in case approving public funding of training for ministry at Bible college); *Bowen v. Kendrick*, 487 U.S. 589, 611, 613 (1988) (observing that to extend the “pervasively sectarian” category beyond “parochial schools” “would jeopardize government aid to religiously affiliated hospitals”).

Judge Breyer agreed, observing that “the Programs’ funds are not directed to religious activities; instead, the Programs only pay for secular services, such as room and board, physical nonmedical care, and nutritional services.” Op.17. Accordingly, such facilities are not “pervasively sectarian” institutions.

A. Physical Health Care Services Are Inherently Secular And Non-Ideological In Character, And May Even Be Provided In “Pervasively Sectarian” Institutions.

In only two circumstances has the Supreme Court struck down aid to religiously affiliated institutions: (1) where aid is directed to “specifically religious” activities; and (2) where aid is given to a pervasively sectarian organization for activities that could be diverted to religious ends. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 746 (1973). There is no bar to state subsidy of services of an inherently nonreligious character—such as bus rides, school lunches, secular textbooks, or health care services—even within the context of “pervasively sectarian” institutions. Subsidies of such services do not “advance religion.” *Wolman*, 433 U.S. at 237-238, 248; *Board of Educ. v. Allen*, 392 U.S. 236, 244-247 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 17, 18 (1947). In the Court’s most recent decision, *Mitchell v. Helms*, 530 U.S. 793 (2000), the controlling opinion—a concurrence by Justice O’Connor joined by Justice Breyer—stated that “plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes” (*id.* at 857), and that to justify

a holding that a program is unconstitutional, violations must be “extensive” rather than “*de minimus*” (*id.* at 865-66). The Court placed greatest emphasis on statutory and regulatory safeguards—analogueous to those in this case, see pages 9-13, *supra*—to ensure that public funds are spent for secular purposes. *Id.* at 861-63.

Here, too, payments under the statute are strictly limited by law to physical services—bed, board, nursing services, and nursing supplies. See 42 U.S.C. §§ 1395i-5(a)(2), 1395x(b), 1395x(h); H.R. CONF. REP. at 768; *CHILD II*, 212 F.3d at 1098. As explained in the implementing regulations, “[t]he programs will *only* pay for nonmedical health care services furnished in RNHCIs[.] * * * Neither Medicare nor Medicaid will pay for *any* religious aspects of care provided in these facilities.” 64 Fed. Reg. at 67028, 67043 (emphasis added).²⁶

The legislative history likewise confirms that Congress solely intended to fund secular, physical health care services. As the House Conference Report states:

Reimbursable services are limited to nonmedical nursing services and related items, comparable to services and related nursing materials supplied to patients in a hospital or a skilled nursing facility. These services and items are plainly secular in nature. No payments can be made for the services of those who provide spiritual treatment through prayer; and, therefore, in the

²⁶ No payments are made for the services of Christian Science practitioners, whose function is spiritual in nature. 64 Fed. Reg. at 67029. Practitioners are not employed or paid by, or affiliated with, Christian Science nursing facilities or individual nurses. ER447, 463-464, 483.

case of Christian Scientists, no payments can be made for the services of the Christian Science practitioner.

H.R. CONF. REP. at 768. Thus, plaintiff's unsupported assertion (at 48) that "Section 4454 pays the cost of operating all aspects of the religious institution" is belied by the text of the statute, which limits reimbursement to physical care (42 U.S.C. § 1395i-5(a)(2)), the instructions of Congress, which expressly disclaim payment for the religious aspects of religious nonmedical health care (H.R. CONF. REP. at 768), and the statute's implementing regulations, which disavow payment "for any religious aspects of care provided in these facilities." 64 Fed. Reg. at 67043. Plaintiff's assertion that "there is absolutely nothing * * * in the statute or regulations" to the effect that religious services will not be funded (Br.48) is completely unfounded.

Under these circumstances, the claim that payments to Christian Science sanatoria subsidize "religious activity" was properly rejected by the district court as a matter of law. As the court explained in *CHILD II*, "[j]ust as the provision of health services in religious schools does not have the primary effect of aiding religion, no more so does the administering of mundane physical services in Christian Science sanatoria." 212 F.3d at 1100. And in light of the strictly secular nature of these physical services, they could be provided at state expense even if the nursing facilities *were* legally deemed to be pervasively sectarian. See *Wolman*, 433

U.S. at 242 (upholding provision of “physician” and “nursing” care in parochial schools); accord *Lemon*, 403 U.S. at 616-617.

B. Religious Nonmedical Health Care Institutions Are Not “Pervasively Sectarian” Institutions.

In any case, plaintiff’s portrayal of Christian Science nursing facilities as “pervasively sectarian” falls far short of the standard set by Supreme Court precedent. The principal function of Christian Science nurses is to provide *physical care* in a manner that is consistent with the patient’s chosen form of healing, and the principal function of Christian Science nursing facilities is to provide this physical care to bedridden or other seriously ill patients who cannot be cared for at home. ER447-450, 462-464. The nursing facilities are neither owned nor controlled by the Church, and the Church receives no Medicare or Medicaid funds either directly or indirectly. ER463. To be sure, the environment is designed to support, rather than conflict with, the spiritual healing process. But as Congress determined (H.R. CONF. REP. at 768) and the Eighth Circuit recognized in *CHILD II*, “the primary function of Christian Science sanatoria—the provision of physical nursing services—is secular.” 212 F.3d at 1098, 1100; accord Op.17-18.

Even the distorted descriptions of Christian Science nursing in plaintiff’s own factual submission make clear that Christian Science nurses provide physical care to patients, such as bathing, dressing, personal cleanliness care, assistance with movement, feeding, and washing and bandaging wounds. ER55-58,

364.²⁷ It is not the nurses' duty, or the duty of the facility, to engage in religious teaching or indoctrination, to pray for the patient, or to engage in spiritual healing; nor do they work under the direction of a Christian Science practitioner. ER62 (explaining that only practitioners "pray directly for the patient"); ER448, 463-466, 479. While a Christian Science nurse may read to a patient who cannot read to himself, much as a medical nurse might do, religious material is to be read only if the patient so chooses. ER448, 451, 464-466.

Plaintiff makes much of the fact that nurses view their provision of physical care as a ministry (Br.15-16), but this does not distinguish their services from those provided in church-affiliated hospitals. The Establishment Clause does not prohibit the funding of physical care merely because religious nurses understand their calling as a means of expressing love, compassion, mercy, and other qualities valued by their faith. *Kendrick*, 487 U.S. at 613; see *In re St. John Med. Ctr.*, 632 N.E.2d 595, 595-596 (Ohio App. 1993) (hospital may be run by religious order that understands "Catholic health care" as its "ministry for life" and "focuses on the spiritual, psychological, and physical, as well as medical, needs of a patient"); Hall & Lanig, *Spiritual Caring Behaviors as Reported by Christian Nurses*, 15 W. J. OF NURSING RESEARCH 730 (1993) (reporting survey of religious attitudes and conduct

²⁷ For a more accurate description of Christian Science nursing services, see ER448-450.

among various Christian medical nurses) (ER640-651). Thus, as Judge Breyer found, although Christian Science nurses may “hope to aid in the spiritual healing process, their religious motivation does not affect the essentially secular nature of their activities.” Op.17; accord, *CHILD II*, 212 F.3d at 1100.

Courts have consistently validated government financing of health care provided by sectarian institutions. See, e.g., *Tulsa Area Hosp. Council v. Oral Roberts Univ.*, 626 P.2d 316, 318 (Okla. 1981) (sustaining state funding of religious hospital practicing “holistic medicine” through “ministry to the body, mind, and spirit”); *Truitt v. Board of Pub. Works*, 221 A.2d 370, 387-392 (Md. 1966) (sustaining state funding of Catholic hospital although some funds defrayed costs of chapel and pastoral care and noting that “exclusion of * * * church-affiliated hospitals” would create “constitutional problems”); Note, *Government Aid to Religious Social Services Providers*, 75 VA. L. REV. 1077, 1084-1085 (1989) (noting that hundreds of church-affiliated hospitals receive government funding). Nonetheless, it is undisputed that Christian Science sanatoria are independent of, and not controlled by, the Church. ER62 (conceding that “the sanatoria are autonomous from the Mother Church and branch churches”); accord ER448, 452-

453, 463. Plaintiff's claim that Christian Science nursing facilities enjoy "little or no institutional autonomy" (Br.56) is thus contradicted by his own affiant.²⁸

Likewise, the fact that administrators and nurses at Christian Science sanatoria are members of the Church (and may be subject to some Church requirements) (Br.15-16) is legally irrelevant. More than a century ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court settled that the Establishment Clause does not bar the government from giving direct grants of funds to health care providers sponsored and run by religious bodies. There the Court upheld a federal appropriation for construction of a hospital operated by "members of a monastic order or sisterhood of the Roman Catholic Church," and "conducted under the auspices of said church." *Id.* at 297-298. The hospital was staffed by nuns who served as nurses, reflecting the fact that health care is a traditional part of Christian ministry. "Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence * * * . Nor is it material that the hospital may be

²⁸ It is undisputed that admittance to Christian Science nursing facilities is not restricted to members of the Church, but rather is open to members of other religious denominations or those who adhere to no formal religious tradition, provided they are relying upon Christian Science for healing. ER61; accord ER448, 463.

conducted under the auspices of the Roman Catholic Church.” *Id.* at 298. Although the church exercised “great and perhaps controlling influence over the management of the hospital,” that fact was “surely not sufficient to convert such a corporation into a religious or sectarian body.” *Ibid.* The direct grant thus was held constitutional.²⁹

The Supreme Court has never held that a religious health care provider—or any institution other than a parochial school, for that matter—is a “pervasively sectarian” institution. See Op.17. The reason is that, unlike the teaching in parochial schools—which is uniquely susceptible to use for religious indoctrination—health care services are separate and distinct from religious indoctrination and worship.³⁰ To extend the definition of “pervasively sectarian” beyond “parochial schools,” the Court has observed, “would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a ‘symbolic link’ between the hospital—part of whose ‘religious mission’

²⁹ The Supreme Court has frequently cited *Bradfield* with approval in modern cases. *E.g.*, *Kendrick*, 487 U.S. at 609; *Mueller v. Allen*, 463 U.S. 388, 393 (1983); *Roemer*, 426 U.S. at 747; *Hunt*, 413 U.S. at 742-743; *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); see also *Mitchell*, 530 U.S. at 895 n.16 (Souter, J., dissenting).

³⁰ The Court has often noted that education raises special Establishment Clause concerns. See *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (noting the “particular [establishment] concerns that arise in the context of public elementary and secondary schools”); accord *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772 (1973). Plaintiff nonetheless relies principally on education cases.

might be to save lives—and whatever government entity is subsidizing the purely secular medical services provided to the patient.” *Kendrick*, 487 U.S. at 611, 613.

The category of “pervasively sectarian” institutions has thus been reserved for institutions “in which religion so pervades its functions that any government aid it receives, even if designated for secular activities, impermissibly assists religion because the institution is unable to separate the funded secular activities from its religious mission.” *CHILD II*, 212 F.3d at 1098; accord *Op.17*; see generally *Roemer*, 426 U.S. at 755 (plurality opinion); *Hunt*, 413 U.S. at 746. But cleansing a wound or transferring a bedridden patient to a wheelchair is not a forbidden “religious activity” simply because a nurse believes he or she is thereby communicating the love of Christ. Congress made the judgment, based on years of successful operation of the predecessor Programs, that it is possible to fund the physical nursing services of religious nonmedical health care facilities without paying for religious activity. H.R. CONF. REP. at 768 (citing *Bradfield* and *Kendrick*). Plaintiff provides no reason to doubt that judgment. See *CHILD II*, 212 F.3d at 1100; *Op.17*.

Plaintiff’s “as applied” challenge must therefore be rejected as a matter of law, as the Eighth Circuit ruled in *CHILD II* and as Judge Breyer ruled below. There is no need for further factfinding because, even accepting plaintiff’s factual submission as true, reimbursement is limited to physical services, and such services

“are not converted into [religious] activities by the fact that they are carried out by organizations with religious affiliations.” *Kendrick*, 487 U.S. at 613. There is no basis in the record for concluding that Christian Science facilities are “pervasively sectarian,” and no basis in law for concluding that it would be impermissible to fund physical nursing services in such facilities even if they were.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

MICHAEL W. MCCONNELL
KENNETH S. GELLER
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

GEORGE A. YUHAS
NANCY E. HARRIS
Orrick, Herrington & Sutcliffe
400 Sansome Street
San Francisco, CA 94111
(415) 392-1122

STEPHEN M. SHAPIRO
Counsel of Record
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Intervenor Defendant-Appellee The First Church of Christ, Scientist

STATEMENT OF RELATED CASES

No related cases are known to be pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,953 words.

David W. Fuller

CERTIFICATE OF SERVICE

I certify that I served two copies of the Brief for Intervenor Defendant-Appellee The First Church of Christ, Scientist, by overnight delivery, on June 27, 2002, addressed to:

Andrea G. Asaro
Rosen Bien & Asaro
155 Montgomery St. 8th Floor
San Francisco, CA 94104

Robert J. Bruno
Robert J. Bruno, Ltd.
1601 East Highway 13, # 107
Burnsville, MN 55337

Lowell Sturgill
United States Department of Justice
Civil Division
601 D Street, N.W.
Room 9140
Washington, DC 20530-0001

David W. Fuller