

**In the United States Court of Appeals for the Ninth Circuit**

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DAVID KONG, *Plaintiff-Appellant*

v.

MICHAEL MCMULLAN, 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*.

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

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**INTERVENOR DEFENDANT-APPELLEE THE FIRST CHURCH  
OF CHRIST, SCIENTIST'S RESPONSE TO PETITION FOR PANEL  
REHEARING AND SUGGESTION FOR REHEARING EN BANC**

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## INTRODUCTION

Intervenor Defendant-Appellee The First Church of Christ, Scientist (“Church”) respectfully asks this Court to deny the petition for rehearing. Plaintiff has failed to justify panel rehearing, let alone demonstrate the sort of “egregious error[]” that would justify the “extraordinary” step of en banc review. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9<sup>th</sup> Cir. 1994) (separate opinion of Kleinfeld, J.). “Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the opinions of three-judge panels should constitute the final action of this court.” *Newdow v. United States Congress*, 328 F.3d 466, 470 (9<sup>th</sup> Cir. 2003) (separate opinion of Reinhardt, J.), cert. granted, 124 S. Ct. 384 (2003); *id.* at 469 (rehearing en banc is appropriate only “when it is *both* of exceptional importance *and* the decision *requires correction*”) (emphasis in original).

Plaintiff has not begun to satisfy the “rigid standards” for en banc review. Fed. R. App. P. 35(b) (advisory comm. note to 1998 amendments). There is nothing extraordinary about the panel’s unanimous decision affirming Judge Breyer’s ruling upholding a federal statute that has been sustained by every court that has examined it. This statute, which had broad bipartisan support in Congress, has been defended by the Department of Justice in both the Clinton and Bush administrations. The

public interest also does not support rehearing, and plaintiff has not shown any inconsistency between the panel’s ruling and any other court decision.

Even if plaintiff had valid objections to some aspects of the unanimous panel’s ruling (and he does not, as demonstrated below), that alone would not justify en banc review. “The en banc court is not the Language Police. Its function is not to maintain uniformity of language or thought by three judge panels, but to maintain uniformity of decisions.” *United States v. Burdeau*, 180 F.3d 1091, 1092 (9<sup>th</sup> Cir. 1999) (separate opinion of Tashima, J.) (emphasis in original); *Hart v. Massanari*, 266 F.3d 1155, 1172 n.29 (9<sup>th</sup> Cir. 2001) (“Because they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels”). Accordingly, rehearing should be denied.

## **REASONS FOR DENYING THE PETITION**

### **I. The Petition Satisfies None Of The Criteria For En Banc Review.**

Fed. R. App. P. 35 provides that rehearing en banc “is not favored” and will be granted only upon a showing that (1) “the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed,” or (2) the petition presents “questions of exceptional importance” (*e.g.*, where the panel’s decision “conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue”). See Fed. R. App. P. 35(a), (b)(1)(A)-(B). The petition fails to satisfy either of these criteria.

Plaintiff repeatedly asserts that the panel’s decision “overlooked” and is “inconsistent with” controlling precedent. Pet. 3, 4, 7, 13, 15. But one searches the petition in vain for any showing that the holding of a single case from this Court, the Supreme Court or any other circuit actually conflicts with the panel’s ruling. Plaintiff cites *free exercise* decisions, for example, in an attempt to establish that “the failure to subsidize religious organizations” can never be a burden justifying accommodation. Pet. 11.<sup>1</sup> Not one of these cases held that it would be unconstitutional for the *legislature* to accommodate religious persons. 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 *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (“the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause”).

The petition likewise fails to raise any question of exceptional importance that would justify en banc review. The panel’s decision leaves intact a federal statute that

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<sup>1</sup> See, e.g., *American Family Ass’n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9<sup>th</sup> Cir.), cert. denied, 537 U.S. 886 (2002) (Free Exercise Clause does not prevent city from denouncing religiously-motivated advertising campaign with which it disagrees); *Gentala v. City of Tucson*, 244 F.3d 1065, 1082 (9<sup>th</sup> Cir.) (en banc) (Free Exercise Clause does not require funding of National Day of Prayer event), vacated, 534 U.S. 946 (2001); *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051-1052 (9<sup>th</sup> Cir. 1999) (Free Exercise Clause does not require public school district to fund vision specialist for disabled student in parochial school).

has been in effect in one form or another for over thirty years, and it is consistent with the rulings of every other court that has considered plaintiff’s arguments.<sup>2</sup> Under these circumstances, plaintiff’s baseless criticisms of the panel’s ruling do not even arguably rise to the level of “exceptional importance.”

Nor does the public interest support rehearing. While the public interest would have been undermined if the panel had reached the *opposite* result – cutting off health care benefits to impoverished, disabled and elderly persons who have paid their share of taxes for many decades – there is no injustice in maintaining a status quo that allows a small minority of religious individuals to receive a small *subset* of broader benefits available to all.

**II. The Petition Rests On Mischaracterizations Of The Statute, The Record, And The Panel Decision.**

**A. The Establishment Clause Permits Accommodation Of Religious Persons Who Require Nonmedical Health Care.**

The challenged statute is fully consistent with the Establishment Clause. It is well settled that religious organizations may deliver publicly funded health care.

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<sup>2</sup> See *Children’s Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996) (*CHILD I*), vacated on mootness grounds, 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, 532 U.S. 957 (2001); ER604 (district court opinion in *CHILD II*); ER727 (Judge Breyer’s decision below). Plaintiff’s counsel presented essentially the same arguments now raised before this Court in his petition for certiorari in *CHILD II*, and the Supreme Court denied certiorari without any recorded dissent.

*Zelman v. Simmons-Harris*, 536 U.S. 639, 666 (2002) (O’Connor, J., concurring) (“Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare and Medicaid.”) (citations omitted); *Bradfield v. Roberts*, 175 U.S. 291, 297-298 (1899) (upholding federal appropriation for construction of hospital operated by “members of a monastic order or sisterhood of the Roman Catholic Church”).<sup>3</sup> As we showed in our brief to the panel (“Church Br.,” at 3-4), Medicare and Medicaid reimburse patients for care received at hundreds of Jewish, Catholic, Lutheran, Baptist, Methodist, and other religious hospitals nationwide, and traditionally have paid even for inpatient *religious pastoral care* because of the “beneficial therapeutic effect on the medical condition of a patient.”

The Supreme Court also has 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.” *Amos*, 483 U.S. at 338. Rather, where “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 comes packaged with benefits to secular entities.” *Ibid.* See also *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S.

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<sup>3</sup> The Supreme Court has frequently cited *Bradfield* with approval. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988); *Mueller v. Allen*, 463 U.S. 388, 393 (1983); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746-747 (1976); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); see also *Mitchell v. Helms*, 530 U.S. 793, 895 n.16 (2000) (Souter, J., dissenting).

687, 705 (1994) (noting that “the Constitution allows the State to accommodate religious needs by alleviating special burdens”).

Accommodating religious needs by alleviating special burdens is precisely what Section 4454 does. As Congress recognized, requiring poor and elderly persons who are religiously opposed to receiving medical care to obtain care from medical facilities would coerce them to abandon essential precepts of their religion. H.R. Conf. Rep. No. 105-217, at 768 (1997). As the court explained 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.” Plaintiff’s cavalier observation (at 10) that the Programs are “entirely voluntary” fails to acknowledge that Medicare and Medicaid are “universal” and “comprehensive” programs available to all. Br. *amicus curiae* of Sen. Edward Kennedy at 3; see Panel Decision (“Op.”) 12822 (McKeown, J.) (Congress’s desire to accommodate the needs of those opposed to medical care was both “understandable” and “laudable”).<sup>4</sup>

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<sup>4</sup> Judge McKeown’s view that Section 4454 may be broadly construed to extend to nonreligious conscientious objectors constitutes an additional reason for denying plaintiff’s petition. Although we do not think it legally required, the Church would not oppose such a reading of the statute, and the government indicated as much in its brief to the panel. See U.S. Br. 24. A broadening construction, rather than invalidation of the law, is the appropriate response if a statute is deemed constitutionally underinclusive. *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (“ordinarily extension, rather than nullification, is the proper course”); *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979).

Plaintiff misleadingly asserts that the accommodation doctrine is “extremely narrow and rarely applicable,” stating that “[t]he Court has never upheld as an accommodation the payment of taxpayer funds to religious organizations, much less a statute that favors a particular religious organization.” Pet. 9-10. Yet even in cases in which accommodations have been struck down (such as *Kiryas Joel* and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)), not a single Justice has *ever* advocated the view that there can be no statutory accommodation within the context of a universal government aid program. Given the prevalence of religious accommodations in numerous state and federal benefit statutes, see Church Br. 24-25, 40-41, plaintiff’s radical theory amounts to a judicial wrecking ball.

**B. The Accommodation Does Not Create A “Special Benefit.”**

Plaintiff’s arguments depend on the mistaken view that Section 4454 creates “special benefits” for those religiously opposed to medical care. Pet. 1-2. No member of the panel agreed with this gross mischaracterization of the statute, and for good reason. Viewed as a whole, see *Zelman*, 536 U.S. at 655-656, 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]eimbursable 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.

The law thus precludes payments under the statute other than for secular health care services such as bed and board, nursing services, and health care supplies. See 42 U.S.C. §§ 1395i-5(a)(2), 1395x(b), (h); H.R. CONF. REP. at 768.<sup>5</sup>

Plaintiff’s “special benefit” theory ignores the fact that Medicare and Medicaid are *multi-billion dollar* entitlement programs that already accommodate a vast range of individual needs and preferences. Patients may receive medical care in religious hospitals, as noted above. Those objecting to traditional care may elect a range of alternative treatment methods in addition to standard medical treatment, including osteopathy and chiropractic care. 42 U.S.C. § 1395x(r). Psychology, physical therapy, and hospice care – which includes services of social workers and pastoral counselors – are also covered. *Id.* §§ 1395k(a)(2)(B)-(C), 1395x(dd), 1396d(a)(11). Given Congress’s determination to provide universal coverage and maximize patient choice, Section 4454 represents but a “small island where persons who do not believe in medical help may have some governmental support comparable to that furnished by the government to those who do.” Op. 12817 (Noonan, J.).

**C. The Accommodation Does Not Reflect A Denominational Preference.**

Plaintiff’s argument that Section 4454 amounts to “sect discrimination” and a “denominational preference” is wholly without merit. Arguing that Senators Hatch

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<sup>5</sup> No payments are permitted for the services of Christian Science practitioners, whose function is spiritual in nature. 64 Fed. Reg. 67028, 67029 (Nov. 30, 1999).

and Kennedy expressly referred to Christian Scientists in floor debate, he complains (at 5-6) that in enacting Section 4454 “Congress intended to restore benefits to Christian Science institutions.” To be sure, Congress was *aware* of *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 \* \* \* for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs.” H.R. CONF. REP. at 768. This situation is therefore completely unlike that in *Larson v. Valente*, 456 U.S. 228, 254-255 (1982), where the legislature intentionally sought to “get at” the “Moonies” while protecting Catholics.

Nor is it constitutionally significant that no entities other than Christian Science sanatoria have as yet qualified as RNHCIs. “Nothing prevents other groups” from taking advantage of the accommodation in the future. Op. 12830 (Rawlinson, J.). Moreover, even if Christian Scientists were the only existing group that could qualify (and they do not appear to be),<sup>6</sup> that alone would not invalidate the accommodation. If an accommodation were invalid simply because it yielded

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<sup>6</sup> Standard reference works on religion list numerous faiths that encourage reliance on spiritual care rather than medical care, including the Unity School of Christianity, New Thought, and certain Pentecostal denominations. See generally J. Gordon Melton, *ENCYCLOPEDIA OF AMERICAN RELIGIONS* 79-80, 83, 138 (5<sup>th</sup> ed. 1996); F.E. Mayer, *THE RELIGIOUS BODIES OF AMERICA* 537-541 (1954).

benefits to only one or a small number of religious sects, then unusual religions with unique needs could never be accommodated.

Plaintiff's charge that Section 4454 "patently exclude[s]" "traditional Hmong groups" and "some fundamentalist Christian sects" is also unfounded. Pet. 5, 7. Anyone who believes in the use of prayer and medicine together is *already* accommodated by the inclusive Medicare and Medicaid programs, since such persons may receive their care in hospitals but remain free to reject specific procedures on religious grounds (as many Hmong people do). See 42 U.S.C. § 1396f (beneficiaries 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"); see also *id.* § 1395a. As Congress recognized, it is only those who cannot undergo medical diagnosis and treatment without violating their conscientiously held religious beliefs who must receive their care in alternative institutions such as RNHCIs.

Plaintiff's argument (at 5) that the "only purpose" for the various statutory eligibility requirements "is to exclude all other sects" is frivolous. Medicare and Medicaid have sometimes expanded in unexpected ways, and Congress is entitled to set eligibility criteria to ensure that the accommodation's benefits are confined to those who, by reason of religious conviction, would otherwise be excluded. See H.R. CONF. REP. at 769 ("detailed eligibility criteria \* \* \* are necessary to protect the

health and safety of patients in [religious nonmedical health care] institutions and to prevent fraud and abuse”). The statutory criteria also ensure that institutions that *do* provide medical care are subject to medical regulation in their entirety and discourage a proliferation of institutions that provide nursing care without the involvement or supervision of doctors. *CHILD II*, 212 F.3d at 1092. On this basis Judge Rawlinson correctly determined that strict scrutiny is inapplicable to Section 4454, a conclusion with which concurring Judges Noonan and McKeown did not disagree. Op. 12830.<sup>7</sup>

**D. The Accommodation Does Not Entail Excessive Entanglement Between Church And State.**

Plaintiff’s contention that Section 4454 represents an “extraordinary grant of power \* \* \* to a religious entity” in violation of *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982), severely distorts the statutory scheme. Pet. 1, 7-8. 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 initial coverage recommendations. 42 U.S.C. § 1395x(ss)(1)(H)-(J), (2), (3)(B)(ii). Such recommendations are subject to plenary review by the Secretary’s designated fiscal intermediary, whose reports in turn are subject to review by the Provider Reimbursement Review Board, the

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<sup>7</sup> Plaintiff’s complaint (at 6) that “Judges Noonan and McKeown failed to consider the issue of sect discrimination” is without merit. The federal courts repeatedly have rejected plaintiff’s position on this issue (see n. 2, p. 4 *supra*), which hence requires no additional discussion. None of the cases cited at page 6 of plaintiff’s petition purports to require that meritless claims always be discussed *in a written opinion*, concurring or otherwise.

Secretary, and, ultimately, the courts. 42 U.S.C. §§ 1395h, 1395oo(a), (b), (f)(1); 42 C.F.R. §§ 405.1803, .1835, .1837; ER 497-498 (HCFA, MEDICARE: HOSPITAL MANUAL § 120 (1993)).

Moreover, the statute expressly provides that it shall not “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. Admittance records convey information such as that the patient has a head wound, or is weak and unable to stand, and therefore needs 24-hour nursing care. Nonetheless, 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).<sup>8</sup>

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<sup>8</sup> The very recently passed Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (Dec. 8, 2003), not yet codified in the United States Code, would make certain immaterial changes in the regulatory scheme, including the replacement of fiscal intermediaries with “medical administrative contractors.” Implementing regulations have not yet been promulgated and the new law does not affect the issues in this case.

Plaintiff mistakenly suggests (at 7) that Judge Noonan found Section 4454 to be a “standardless delegation of governmental power” to religious institutions, “identical in all respects” to the law struck down in *Larkin*. He did not. The law in *Larkin* involved the final exercise of state authority by 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 exercise no final authority whatsoever; moreover, the “authority” they *do* exercise, *in common with all Medicare providers*, is simply to determine in the first instance how federal law applies to *themselves*. That is why Judge Noonan rightly rejected plaintiff’s argument for “extending *Grendel’s Den* further” to prevent Congress from relieving persons opposed to medical care of the cruel choice between their health and their faith. Op. 12819.

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

Plaintiff’s argument that Section 4454 is unconstitutional as applied to Christian Science nursing facilities because they are “pervasively sectarian” also merits no further attention from this Court. Although plaintiff barely raised his “as applied” argument – tacking it onto the end of his initial brief only as a last-ditch effort to salvage his claims – the Church’s prior brief thoroughly responded to his assertions; thus, the panel was well aware of the issues he now seeks to reargue.

Plaintiff’s claim that “there are few, if any, purely secular activities” at the facilities (Pet. 14) is based on a slew of distorted factual assertions that have nothing to do with the realities of Christian Science sanatoria and are flatly contradicted by plaintiff’s own submissions in this case.<sup>9</sup> As noted above (see *supra* p. 8), reimbursement under the statute is strictly limited to inherently nonreligious services such as bed and board, nursing services and health care supplies, 42 U.S.C. §§ 1395i-5(a)(2); 1395x(b), (h). Congress’s determination that coverage can be restricted to services that “are plainly secular in nature,” H.R. REP. at 768, is entitled to deference, especially under a regulatory program that clearly provides that funds may not be used for religious purposes. See, e.g., 64 Fed. Reg. at 67043 (“Neither Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities”).

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, e.g., *Bowen*, 487 U.S. at 611, 613 (extending the definition of “pervasively sectarian” beyond “parochial schools” would “jeopardize government aid to religiously affiliated hospitals”). Thus, Judge Noonan correctly rejected

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<sup>9</sup> See, e.g., ER61 (affidavit of former Christian Science nurse acknowledging that admittance to Christian Science nursing facilities is not restricted to members of the Church); ER62 (same, stating that the sanatoria are not Church-accredited and are in fact “autonomous from the Mother Church and branch churches”); *ibid.* (same, explaining that nurses do not engage in spiritual healing and that only practitioners, who are not employed by the facility, “pray directly for the patient”).

plaintiff's misguided description of Christian Science nursing facilities as "pervasively sectarian" institutions, a conclusion not disputed by the other members of the panel. See Op. 12817 (Noonan, J.) (rejecting supposed analogy between RNHCIs and parochial schools and concluding: "That is not how the physical care of the RNHCIs can be described.").

Furthermore, 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); accord *Lemon v. Kurtzman*, 403 U.S. 602, 616-617 (1971). Plaintiff offers no valid ground on which to overthrow these settled principles and accept an "as applied" claim that the courts have consistently rejected. See n. 2, p. 4 *supra*.

## **CONCLUSION**

The petition for rehearing and rehearing en banc should be denied.

Respectfully submitted.

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## **CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached Response to Petition for Panel Rehearing and Suggestion for Rehearing En Banc for Intervenor Defendant-Appellee The First Church of Christ, Scientist is in compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: January 12, 2004

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David W. Fuller  
Attorney for Intervenor  
Defendant-Appellee

## CERTIFICATE OF SERVICE

I certify that I served two copies of **INTERVENOR DEFENDANT-APPELLEE THE FIRST CHURCH OF CHRIST, SCIENTIST'S RESPONSE TO PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC**, by overnight delivery, on January 12, 2004, addressed to:

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