

The amicus brief, Children's Healthcare Is A Legal Duty, Inc. (CHILD), et al. v. Nancy-Ann Min DeParle, et al. and The First Church of Christ, Scientist, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Eighth Circuit on February 12, 1999.

No. 98-3521

In the United States Court of Appeals
for the Eighth Circuit

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

Plaintiffs/ Appellants,
v.

NANCY-ANN MIN DE PARLE, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE
HEALTH CARE FINANCE ADMINISTRATION; AND DONNA SHALALA, IN HER OFFICIAL
CAPACITY
AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants/ Appellees,

AND THE FIRST CHURCH OF CHRIST, SCIENTIST,

Defendant/Intervenor/Appellee.

On Appeal From The United States District Court
For The District of Minnesota

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY,
NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA,
CHRISTIAN MEDICAL AND DENTAL SOCIETY,
NATIONAL ASSOCIATION OF EVANGELICALS,
GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE
UNITED METHODIST CHURCH, AND PRESBYTERIAN CHURCH (U.S.A.)
IN SUPPORT OF ALL DEFENDANTS/APPELLEES URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the amici curiae, the Christian Legal Society, the National Council of Churches, the Christian Medical and Dental Society, the National Association of Evangelicals, the United Methodist Church, through its General Council on Finance and Administration, and Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) state that they have no parent corporations and issue no publicly held stock.

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INTEREST OF THE AMICI CURIAE

The amici--the Christian Legal Society, the National Council of Churches, the Christian Medical and Dental Society, the National Association of Evangelicals, the General Council on Finance and Administration of the United Methodist Church, and the Presbyterian Church (U.S.A.)--are religious denominations and organizations with a variety of theological perspectives. Statements of interest specific to each amici are found in the Addendum.

All the amici have significant theological differences with The First Church of Christ, Scientist; none of the amici is religiously opposed to receiving medical care, as are Christian Scientists. But the amici are concerned to protect the principle of governmental tolerance for all faiths, which is threatened by the plaintiffs' attacks on the constitutionality of the amended Medicare and Medicaid provisions here. In particular, the amici wish to defend the ability of legislatures and administrators to make reasonable accommodations to enable citizens with particular religious scruples to participate in general programs of government benefits. The amici also wish to ensure that health care facilities of various faiths, at which citizens exercise their choice to receive treatment, will not be disqualified from participation in government health care benefits programs because those facilities have a religious affiliation or orientation.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises questions concerning two important aspects of the law of the First Amendment's Religion Clause. The first is the ability of legislatures to make accommodations in general

statutes and benefit programs to take account of conflicts between such statutes and the conscientious religious beliefs and practices of citizens. The second is the ability of religiously affiliated health care institutions to participate in general programs of government benefits paying for the physical care of citizens.

The challenged provisions of the Medicare and Medicaid statutes are a commendable example of legislative accommodation in a program of government benefits that aims at universal coverage based on patient choice. Congress recognized that some seriously ill citizens, as a matter of religious conscience, will not accept medical care but will choose to seek nonmedical health care while relying on spiritual means of healing. Congress wanted those citizens, to the extent possible, to be able to participate in the benefits of Medicare and Medicaid, since they contribute payroll taxes to support the programs. Congress made clear that the programs do not financially reimburse the spiritual treatment itself. But it did recognize that while medical objectors are receiving spiritual treatment, they will receive supporting nonmedical nursing care "comparable to services and related nursing materials supplied to inpatients in a hospital or a medical skilled nursing facility." BALANCED BUDGET ACT OF 1997, H.R. CONF. REP. NO. 105-217 at 768 (App. 598). Congress therefore modified the statutes to separate out and reimburse this physical, nonmedical nursing care, and it also sensibly freed nonmedical institutions from having to meet certain qualifications more appropriate to a medical facility. Originally, these accommodations extended specifically to Christian Science institutions and their patients. But after the district court's earlier decision in *Children's Healthcare Is a Legal Duty v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996), Congress extended the provisions to accommodate any "religious nonmedical health care institution" (RNHCI). Now, citizens of any faith who conscientiously choose spiritual treatment over medical treatment in an RNHCI are eligible to receive the benefits of supporting nonmedical nursing care.

The plaintiffs and their supporting amici resent this and call it "special benefits" for religion. But they mischaracterize the effect of the statutes, which the district court in this case correctly found was simply to provide a "subset" of Medicare and Medicaid benefits to permit religious medical objectors to be covered for the secular aspects of their treatment. The RNHCI accommodations create no incentive to practice religion and, given their carefully defined nature, impose no burden on anyone else. In this light, the plaintiffs' arguments against these statutes would require the invalidation of many accommodations found in various benefit programs of both federal and state governments. Only a rigid and intolerant reading of the Establishment Clause would forbid the government to take account of how the eligibility conditions for benefit programs can pressure citizens to violate their faith in order to receive such

benefits.

The plaintiffs' argument that the terms of the accommodations prefer the Christian Science faith would also cast doubt on a large number of accommodations in federal and state law. Accommodations in particular statutes, directed at particular problems, often benefit one or a very few groups. As long as the terms of the accommodation are supported by neutral, secular reasons, there is no basis for the courts to second-guess them as "gerrymanders."

The plaintiffs' as-applied challenge raises another question: whether, for the first time in our history, a court will strike down government assistance for the physical care provided by a health care institution on the ground that the institution is substantially religious in character. For several reasons, this Court should decline to take that dramatic step, which would create unprecedented uncertainty for religious health care institutions who rely heavily on Medicare and Medicaid benefits. First, the nursing services reimbursed under the RNHCI provisions are "secular and non-ideological" under Supreme Court precedent and could be funded even in a "pervasively sectarian" institution. Second, the "pervasively sectarian" category, developed and applied in the context of religious education with its focus on teaching, should not be applied to the very different activity of health care.

ARGUMENT

I. THE CHALLENGED PROVISIONS ARE A PERMISSIBLE MEASURE TO ACCOMMODATE THE BELIEFS OF RELIGIOUS CITIZENS SO THEY CAN PARTICIPATE IN THE BENEFITS OF MEDICARE AND MEDICAID.

The plaintiffs' major complaint is that the RNHCI accommodations violate the Establishment Clause because they provide "special benefits" to religious citizens and institutions. See, e.g., Plaintiffs' Br. 23, 25, 27. The plaintiffs try to make this look like a case in which, for example, government provided \$3,000 to every religious citizen for medical treatment and \$2,000 to every nonreligious citizen. While such favoritism for religion would obviously violate the Establishment Clause, what Congress did in the RNHCI provisions is completely different. The special provisions for religion here merely make it possible for religious citizens with objections to medical treatment to participate in a portion of the benefits of Medicare and Medicaid, for which they have paid payroll taxes. As such, the provisions are an entirely permissible accommodation of religion.

It is well established that legislatures have authority to give distinctive accommodation to religious practice, even when the accommodation is not required by the Free Exercise Clause. In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the

Supreme Court unanimously upheld the exemption of religious organizations from Title VII's prohibition against religious discrimination in employment, saying that the exemption was constitutional even if it was not required by the Free Exercise Clause, and even though it did not "come packaged with benefits to secular entities." *Id.* at 338. Indeed, the Court said, "there is ample room for accommodation of religion under the Establishment Clause." *Id.* See also *Gillette v. United States*, 401 U.S. 437, 453-54 (1971) (upholding draft exemption); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (upholding accommodation; stating that government "follows the best of our traditions" when it "accommodates the public services to [citizens'] spiritual needs"). Even in decisions that have held particular accommodations unconstitutional, the justices have always been at pains to say that other accommodations specifically for religion remain valid. See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion of Brennan, J.); *Bd. of Educ., Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687, 705 (1994).

That distinctive accommodation of religion is an accepted practice is shown by the hundreds of such accommodations in federal and state statutes, administrative regulations, school board policies, and other actions by government entities. Such provisions reflect our nation's "'happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette*, 401 U.S. at 453-54 (quotation omitted). Accommodations appear in a variety of statutory contexts, including licensing, taxation, employment, criminal liability, education and children's welfare. For just a sampling of such provisions, see James A. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 *VA. L. REV.* 1407, 1445-50 (1992).

It is all the more important today that legislatures have discretion to accommodate religious conscience, because of the Supreme Court's holding that religious accommodations are rarely required by the Free Exercise Clause. *Employment Division v. Smith*, 494 U.S. 872 (1990). As government programs of both regulation and benefits become more pervasive, it becomes more necessary for government to have some ability to take specific measures to avoid clashes with conscience. Although *Smith* held that such measures were rarely constitutionally mandated, it explicitly endorsed their enactment through "the political process." *Id.* at 890.

We agree with the brief of the Church (at 23 & n.10) that the proper standard for reviewing the accommodations for RNHCIs here is no more stringent than the analysis set forth in Justice Brennan's plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). Under that analysis, a provision that confers benefits "exclusively upon religious groups or upon individuals on account of their religious beliefs" is constitutional if it removes a "significant

deterrent to the exercise of religion" (id. at 15, 18 n.8) or does not "impose substantial burdens on nonbeneficiaries" (id. at 18 n.8). The RNHCI accommodations satisfy both parts of the test (see Church's Br. 30-32; U.S. Br. 24-28, 35-36)); we will concentrate on how they remove a significant deterrent from religious exercise.

This standard is simply an application of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on which the plaintiffs and the amicus MCLU rely. The factors in *Texas Monthly* are aimed at distinguishing a permissible accommodation from an impermissible "endorsement" of religious belief. See *Texas Monthly*, 489 U.S. at 17. And the proposition that government may not act with the purpose or effect of endorsing religion is a refinement and clarification of *Lemon's* prohibition on laws that have the purpose or primary effect of "advancing" religion. See *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-93 (1989). The Court's unanimous decision in *Amos*, applying the *Lemon* test, holds that "it is a permissible government purpose to alleviate significant governmental interference" with religious activity, and that such a measure simply "allows churches to advance religion" and does not impermissibly involve "the government itself [in] advanc[ing] religion through its own activities and influence." 483 U.S. at 335, 337 (emphases in original).

There is no doubt that the RNHCI accommodations remove a significant burden from religious conscience and activity. Without the accommodations, as Congress noted, citizens who object to receiving medical treatment would be required 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. Such a result would place the same pressure on the religious nonmedical objector that the Supreme Court called an "unmistakable" burden on Sabbatarian believers in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (striking down the denial of unemployment benefits to a woman whose religious precepts forbade her to work on Saturdays). A denial of Medicare and Medicaid benefits for nonmedical nursing services to a citizen whose faith requires nonmedical instead of medical treatment "forces her to choose between following the precepts of her religion and forfeiting [Medicare and Medicaid] benefits, on the one hand, and abandoning one of the precepts of her religion in order to [obtain nursing benefits through medical treatment], on the other." *Sherbert*, 374 U.S. at 404. Accord *Thomas v. Review Board*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987); *Frazee v. Dept. of Empl. Security*, 489 U.S. 829 (1989).

Like the appellees, we do not claim for purposes of this case that the RNHCI accommodations are required by the Free Exercise Clause; but they surely satisfy the *Texas Monthly* test for a significant burden on religion justifying a discretionary accommodation by the legislature. Unlike the sales tax exemption for

religious publications struck down in *Texas Monthly*, here it is clear that requiring citizens to pursue medical treatment in order to be eligible for nursing benefits under Medicare "would offend their religious beliefs [and] inhibit religious activity." 489 U.S. at 18.¹

The plaintiffs' whole case rests on mischaracterizing the RNHCI accommodations as going beyond removal of a burden and actually creating an affirmative preference for religion - as though Congress granted \$3,000 to each religious citizen and only \$2,000 to each nonreligious one. But this is simply wrong. The district court's decision and the appellees' briefs (Church's Br. 32-36, U.S. Br.24-30) amply show why the accommodations simply restore the ability of citizens with objections to medical care to receive part of the universal Medicare benefits offered to sick persons. See Dist. Ct. Op. at 12 (by receiving reimbursement for nursing services alone, religious medical objectors receive only a "subset" of benefits available to other citizens). Indeed, since the Medicare and Medicaid statutes already provide coverage for a wide variety of health care choices, the extension of limited benefits for nursing care to religious medical objectors does nothing more than include their choice among the "broad spectrum" of "private choices" covered by a neutral, general program of government aid. *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983); accord *Witters v. Dept. of Services*, 474 U.S. 481, 487-88 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8-9 (1993).

An alternative way of posing the "burden" question is to ask whether the government accommodation goes beyond lifting a burden and creates an affirmative incentive to practice religion. As Chief Justice Rehnquist has written, government is permitted to take action that "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas*, 450 U.S. at 727 (Rehnquist, J., dissenting on other grounds). Accord *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 2014 (1997); *Zobrest*, 509 U.S. at 9-10 (both upholding benefits

¹The plaintiffs and their supporting amici argue that these clear holdings of the unemployment benefits decisions are now inapplicable because those decisions were narrowed by *Employment Division v. Smith*. But *Smith* did not question that the denial of benefits imposed a significant burden on religious citizens. It held only that such a burden does not violate the Free Exercise Clause if it results from a "neutral, generally applicable law" (494 U.S. at 881), and that the unemployment benefits laws were not generally applicable because their overall standard of "good cause" for refusing work "created a mechanism for individualized exemptions" that the state "[could] not refuse to extend . . . to cases of 'religious hardship' without compelling reason." *Id.* at 884 (quotation omitted). *Smith* itself makes clear that the fact that an accommodation is not required does not mean it is forbidden (*id.* at 890): the plaintiffs' use of *Smith* is directly at odds with that decision's theme of legislative discretion on the matter of accommodating religious conduct.

programs that created no financial incentive to use religious institutions). Despite the plaintiffs' suggestions to the contrary (Br. 35), there is no reason to think that the RNHCI provisions induce people to seek spiritual treatment or go to religious facilities. The accommodations require citizens to elect between medical and nonmedical treatment, and the vast majority of Americans believe medical care is the most effective health care option and, out of simple self-interest, would not want to forego it when they became sick. Nor is there any reason to think that those who fail to qualify for Medicare coverage will be able to obtain benefits for pure custodial care by going to RNHCIs. The statutes still require RNHCIs to ascertain that a patient's medical condition is covered in order to trigger benefits for nursing care, and such determinations are subject to several levels of administrative and judicial review.²

Because the plaintiffs cannot show that these particular accommodations induce religious practice rather than merely lifting a burden from it, they instead make a broadside attack on religious accommodations in general. Many of the plaintiffs' arguments entail that all provisions freeing religion from generally applicable regulations are invalid. For example, the plaintiffs argue that "[a]ccommodation does not include adjustment to religiously grounded preferences" (Br. 25) and that "[u]sing religious theology as a statutory classification to achieve a permissible secular result is inherently contradictory" (id. at 38). But obviously any instance of accommodation of religion is an adjustment by government to the religiously grounded beliefs and decisions of some citizens. And obviously any instance of accommodation "us[es] religious theology" in that it refers to a particular theological belief or practice that has come in conflict with the law and that is being accommodated. The plaintiffs' arguments would invalidate all of the hundreds, perhaps thousands, of accommodations specifically for religion found in federal and state statutes and regulations. This Court should reject such a radical attack on our "happy tradition" of avoiding clashes between law and conscience (Gillette, 401 U.S. at 453-54).

Even read most narrowly, the plaintiffs' claim is that no government benefits program can make any special provision to avoid forcing religious believers to violate their conscience if they accept the benefits. The plaintiffs' brief makes clear that they would characterize any religious accommodation in a benefits program as an invalid "special benefit." They argue that "[r]eligious accommodation . . . has only been applied to 'exemptions from onerous duties'" and "has never been applied to uphold special religious inclusion in a government benefit program." Plaintiffs' Br. 40;

²The plaintiffs argue that there is not sufficient review of the RNHCI's coverage decisions, but amici believe that the appellees' briefs refute that claim. Church's Br. 36-39; U.S. Br. 42-44.

accord *id.* at 25, 41. They say that any religion-specific provisions in a government benefits statute violate "the neutrality and secularity requirements" of *Lemon v. Kurtzman* because they are not "made available to both religious and secular beneficiaries" (*id.* at 34) and because they "define their beneficiaries by reference to religion" (*id.* at 24).

We have already shown why freeing religious believers from the choice between violating their faith and losing government benefits is consistent with case law and with notions of fairness, religious tolerance, and universal coverage. Moreover, the plaintiffs' position here would cast into doubt a large number of accommodations given specifically to religion in federal and state programs of funding.³ For example, religious institutions receiving general federal child care grants are both exempt from the condition prohibiting religious discrimination and specifically permitted to require employees to refrain from alcohol or drug use. 42 U.S.C. § 98581(a)(1)(B). Religious institutions receiving federal money under contracts to provide welfare services are similarly exempt from the general condition prohibiting religious discrimination, as well as from any condition that would require the institution to "alter its form of internal governance." 42 U.S.C. § 604a(f); *id.* § 604a(d)(2). The prohibitions on sex discrimination by recipients of federal aid contain exemptions for religious institutions with sex-differential policies required by their religious tenets. 20 U.S.C. § 1681(a)(3); 20 U.S.C. § 1132c-3(d) (also including exemption for religious discrimination). Indeed, the plaintiffs' attack would invalidate not just the RNHCI accommodations, but also another accommodation in the Medicare/Medicaid statutes that allows a recipient to refuse to accept medical services to which she "objects . . . on religious grounds." 42 U.S.C. § 1396f; see also *id.* § 300a-7 (accommodations for objections of providers).

The plaintiffs' attack could also cast into doubt numerous accommodations in other programs of government benefits. For example, since free public schooling is undoubtedly an important tax-supported state benefit,⁴ the plaintiffs' rigid position of "no special treatment" could call into question the ability of officials

³For reasons that do not affect its support for appellees' position in this case, amicus the National Council of Churches does not endorse all of the examples of accommodation listed in this section of the brief. See Statement of Interest of National Council of Churches in the Addendum, *infra* at A-3.

⁴As former Supreme Court Justice Clark put it, burdensome regulations in public schools force a student with conscientious objections either to violate his religious beliefs "or to give up his public education." *Spence v. Bailey*, 465 F.2d 797, 799 (6th Cir. 1972) (Clark, J., sitting by designation) (following *Sherbert* explicitly in holding that public high school student with religious objection could not be required to attend ROTC class as condition of graduation).

to make adjustments in public school rules for religious objections by parents or students. Doubts could be raised as to whether schools could exempt students from a generally-required sex education class that contravened their religious tenets, dress codes that conflicted with their religious garb, or school events that occurred on their Sabbath - in contrast with numerous school policies of accommodation and with numerous court decisions approving such policies.⁵ Likewise, since government employment is an important tax-supported benefit (see, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citing numerous cases)), the plaintiffs' position would call into question many provisions requiring government agencies to make accommodations for various religious practices of their employees. See, e.g., Title VII, § 701(h), 42 U.S.C. § 2000e(g) (requiring employers, including governments to "reasonably accommodate" employees' religious practices); 5 U.S.C. § 5550a (federal employees who must be absent from work for religious reasons must be allowed to do so, and make up the work when possible); White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace § 1(c) (1997) (requiring accommodation of federal employees' religious needs including Sabbaths, religious holidays, and religious garb); *Rankins v. Comm. on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (1979) (state constitution requires government to accommodate employees' religious tenets). See also *Quaring v. Peterson*, 728 F.2d 1121, 1125, 1127-28 (8th Cir. 1984), *aff'd* by an equally divided Court sub nom. *Jensen v. Quaring*, 472 U.S. 478 (1985) (holding that accommodating plaintiffs' religious objection to being photographed, so as not to deny her "important benefit" of a drivers' license, would not violate the Establishment Clause).

The breadth of the plaintiffs' argument may also be shown by considering hypothetical examples. Suppose, for instance, that a local government provided funds for entities to conduct youth recreational activities and directed that they be scheduled on Friday or Saturday so as not to interfere with schoolwork. If a Jewish religious agency objected that it could not conduct activities on Friday nights or Saturdays because of Sabbath restrictions, the

⁵Just a few examples include Cal. Educ. Code § 51240 (exempting children whose families object on religious grounds from health, family life, and sex education classes); Ala. Code § 16-41-6 (exempting children who object on religious grounds from certain health and drug-education classes); Ala. Code § 16-30-3 (exempting public school students from immunization requirements if their parents object on religious grounds); *Hsu v. Roslyn Free School Dist.*, 85 F.2d 839, 864-66 (2d Cir. 1996) (exempting student religious club from general school antidiscrimination policy would not violate Establishment Clause); *Church of God (Worldwide) v. Amarillo Indep. School Dist.*, 511 F. Supp. 613, 618 (N.D. Tex. 1981) (exempting from school-attendance policy student who observed several religious holidays would not violate Establishment Clause).

plaintiffs' position would forbid the government from enacting a provision allowing recipient agencies with conscientious religious objections to conduct activities on another night. By the plaintiffs' logic, such a provision too would be invalid because it is a "special religious inclusion in a government benefit program," that covers "only religious institutions and [beneficiaries]," and "define[s its] beneficiaries by reference to religion." The Establishment Clause does not require such a crabbed and intolerant reading of religious liberty.

II. THE CRITERIA IN THE RNHCI ACCOMMODATIONS ARE NOT A SECT PREFERENCE, BECAUSE THEY ARE BASED ON "NEUTRAL, SECULAR REASONS."

Since the plaintiffs cannot show that the RNHCI accommodations constitute invalid favoritism for religion, they are reduced to arguing that the terms of the accommodations create an unconstitutional preference for the Christian Science faith. But this argument similarly fails. As amended, the RNHCI accommodations on their face extend to any "religious nonmedical health care institution," not just to Christian Science ones. Congress plainly showed its expectation that the expanded provisions might make other institutions newly eligible, when, for example, it set the initial cap on expenditures at more than double the amount of previous annual payments under the Christian Science-only provisions (42 U.S.C. § 1395i-5(c)(2)(C)(ii)(I)).

Disregarding this text and evidence, plaintiffs nonetheless claim that Congress purposely "gerrymandered" the RNHCI accommodations so as to benefit only Christian Science institutions. As a result, they claim, the accommodations are invalid under the strict scrutiny test applied in *Larson v. Valente*, 456 U.S. 228 (1982). Again, their challenge fails because it would destroy the flexibility that Congress has repeatedly been held to have in making an accommodation in a particular statute to take account of that statute's burden on a particular religious practice.

In many situations in which the legislature accommodates religious conduct in a particular statutory context, the accommodation will extend in practice to only one or a few groups. That is partly because the legislature is addressing only the conflict with religious conduct caused by the particular statute in question; and partly because the legislature often has good secular reasons for setting limits on the accommodation, limits that in practice rule out the claims of certain other religious groups. For these reasons, the appropriate analysis for the RNHCI accommodations is not strict scrutiny under *Larson v. Valente*. Rather, the appropriate standard is that of *Gillette v. United States*, 401 U.S. 437 (1971), which rejected an Establishment Clause challenge to the federal exemptions from military service on the ground that Congress had "neutral, secular reasons" (*id.* at 457) for exempting those who had a religious objection to all wars but not those whose objection was only to a particular war. As long as the accommodation already satisfies the Lemon test as clarified in *Texas Monthly* - as this one does (see part I) - the fact that it benefits some faiths and not others need be

justified only by "neutral, secular reasons" under Gillette.⁶

Amici need not repeat the extensive record as to Congress's "neutral, secular reasons" for setting the eligibility criteria in the RNHCI accommodations; we agree with the appellees' summary of those reasons. See Church's Br. 42-45; U.S. Br. 26-28. The Supreme Court in Gillette held that Congress could legitimately exempt only total conscientious objectors because allowing selective objection could produce self-interested claims and "erratic or even discriminatory decisionmaking" (401 U.S. at 455-56). Congress did a very similar thing here: it limited the RNHCI accommodations to individuals and institutions using solely nonmedical treatment, in order to ensure that medical treatment would not be given without medical regulation and that institutions or individuals would not feign a conscientious objection in order to obtain both medical and nonmedical benefits. There is no basis to question Congress's judgment that the 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 (App. 599).

The plaintiffs give no reasons why the RNHCI eligibility criteria do not serve the neutral purposes - ensuring regulation of medical treatment for safety, preventing fraud and abuse - that Congress indicated. Instead, they make a number of broad attacks, which if accepted in other cases would destroy the ability of legislatures to make religious accommodations in particular statutes. The point may be made more clearly by showing the effect that the plaintiffs' arguments would have on a religious exemption that the Supreme Court has expressly endorsed: the exemption in a number of

⁶Larson explicitly set forth two features that made the religious distinctions in that statute suspect, and different from a familiar accommodation like that in Gillette - and from the RNHCI accommodations. First, the distinctions in the Larson statute still were simply "between different religious organizations," while the terms of the Gillette accommodation "focused on individual conscientious belief, not sectarian affiliation" and could be raised by persons with the relevant belief no matter what official affiliation they had. Larson, 456 U.S. at 247 n.23. Similarly, it is clear that the RNHCI accommodations aim at accommodating a conscientious belief of individuals and organizations - objection to medical treatment and seeking of nonmedical treatment - and that individuals and organizations with such a belief can benefit from the accommodations even if they come from other faiths. See, e.g., supra p. 19 (Congress budgeted additional expenditures in anticipation of newly eligible institutions); Church Br. 5 (Christian Science sanatoria are open to persons of other faiths seeking spiritual treatment).

Second, Larson noted that the different treatment of organizations there was "deliberate" (id.); indeed the legislative history showed an "explicit intention of including particular religious denominations [such as the 'Moonies'] and not others [such as the Roman Catholic Church]." Id. at 254-55. Here there is no evidence of a congressional desire to exclude other groups besides Christian Scientists; there is nothing like the strong evidence necessary to warrant attributing an invidious motivation to Congress.

states' drug statutes for the sacramental use of peyote, to which the Court referred approvingly in *Smith*, 494 U.S. at 890.

For example, the plaintiffs argue that there can be no neutral, secular reason for the accommodation of persons with religious beliefs against medical treatment, because "[u]sing religious theology as a statutory classification to achieve a permissible secular result is inherently contradictory." Plaintiffs Br. 38. But since the very point of an accommodation is to lift a particular burden on religion from a particular statute, the legislature must refer to that belief (to a "religious theology") in order to set the boundaries of the accommodation. Otherwise, no accommodation for a particular conflict between religion and legal duties could ever be made. The legislature would be forbidden from exempting religious peyote users from the drug laws because it would have to refer to their theological belief that peyote use is a sacrament or a religious duty.

Likewise, the plaintiffs lay great stress on the fact that (for now) only Christian Science institutions appear to meet the eligibility criteria. Indeed, plaintiffs go so far as to suggest that "the statute's actual reach is determinative of the question" of sect preference. Br. 45. But many accommodations enacted in specific statutory contexts will benefit only one or a few groups. That does not necessarily reflect invidious discrimination; the legislature has to deal with particular problems as they arise in particular statutory contexts, and it also may have "neutral, secular" reasons for limiting the scope of an accommodation. Gillette makes clear that an accommodation is not an unconstitutional sect-specific "gerrymander" if its terms are supported by such neutral, secular reasons - and as we have noted, the plaintiffs here have provided no reason to question the terms Congress set for the RNHCI accommodations. *Smith* endorsed the exemptions for sacramental peyote use even though they benefit mostly Native American believers and few others, and even though the laws contain no exemptions for religious uses of other drugs. As then-Judge Ruth Bader Ginsburg held for the D.C. Circuit in language appropriate here, a "tightly-cabined" exemption for the use of peyote in "circumscribed" ceremonies of the Native American Church does not require an exemption for a less disciplined "religious use of marijuana (or any other controlled substance)" by a different group. *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463-64 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990) (R. Ginsburg, J.).

Indeed, if the plaintiffs are right that the "actual reach" of a statute is crucial, then there could never be an accommodation for a religious minority holding a belief held by no other faith, since every such accommodation would benefit only one sect. That surely would take the Establishment Clause, a provision designed to protect religious minorities, and stand it on its head: the more a group is

truly a distinctive minority, the less government can do to accommodate it.

Finally, the plaintiffs say that the accommodations are a preference for Christian Science because Congress stated that they would permit patients in Christian Science facilities to "continue[]" to receive Medicare and Medicaid benefits. Br. 39. But that is to argue, nonsensically, that the legislature cannot enact an accommodation for religious practice if it has some idea of a particular group that the accommodation will protect. Such an argument would strike down scores of legislative accommodations in particular statutes. There can be no doubt that the legislatures that enacted the statutory exemptions for sacramental peyote use had in mind that it would shield members of the Native American Church who use peyote - and indeed after Smith rejected the constitutional claim, exemptions could be (and were) enacted so that Native American believers could "continue" to be protected in their worship.

III. HEALTH CARE FACILITIES MAY CONSTITUTIONALLY RECEIVE GOVERNMENT AID FOR PHYSICAL HEALTH CARE EVEN THOUGH THE FACILITIES HAVE A RELIGIOUS ORIENTATION AND AFFILIATION.

Finally, there is no merit in the plaintiffs' "as applied" challenge to the receipt of Medicare and Medicaid reimbursements by Christian Science sanatoria. The plaintiffs argue that the reimbursements fund religious teaching; but that contention is directly contradicted by the language and background of the RNHCI provisions, which limit funding to "physical care" such as bed, board, nursing services, and nursing supplies. 42 U.S.C. § 1395-5i(5)(a)(2); see also H.R. CONF. REP. at 768 (App. 598) (funding only items and services "plainly secular in nature," and not including spiritual treatment itself). In an attempt to overcome this barrier, the plaintiffs and their supporting amici seek to invoke the presumption that government assistance flowing to a "pervasively sectarian institution" is almost always invalid because it will inevitably be used to finance religious teaching. The plaintiffs' attempt, however, should be rejected for several reasons.

First, even a "pervasively sectarian institution" may receive government funding for nursing services such as bathing, dressing, feeding, and washing and bandaging wounds, the tasks performed by Christian Science nurses. See Cook Aff. para. 6 (App. 183); Holtzman Aff. para. 6 (App. 818). The Supreme Court has held several times that benefits for physical health care may be provided even to students in elementary and secondary schools - the quintessential example of "pervasively sectarian" institutions - because such services are "secular, neutral, and non-ideological" and therefore "do not have the primary effect of advancing religion." *Wolman v. Walter*, 433 U.S. 229, 242 (1977) (upholding funding of speech and

hearing diagnostic services in parochial schools, and noting that the funding of nursing services was so accepted that it had not even been challenged in the lawsuit). Accord *Meek v. Pittenger*, 421 U.S. 349, 364, 368 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971).

The arguments of the plaintiffs and their amici as to why nursing services in Christian Science sanatoria are forbidden "religious" activity would dangerously inject courts into the examination of nursing services at many religiously affiliated hospitals across the nation. For example, the amici point out that Christian Science nurses must be members of the Church and must attend religious services, are instructed and encouraged to believe "that Christian Science nursing is a religious ministry," and "frequently read to patients from the Bible or from other Christian Science literature" and talk to patients about Christian Science. AAP Br. 9-10; see also MCLU Br. 22-23. These characteristics do not fundamentally distinguish Christian Science nurses from those in other religious hospitals. The hospital in *Bradfield v. Roberts*, 175 U.S. 291 (1899), like countless other Catholic facilities, was staffed by nuns who served as nurses, yet the Court still allowed it to receive direct federal grants for building construction. Obviously, a great many nurses, including those in both religious and secular hospitals, see their work "as a ministry to which we've been called by God." NURSES CHRISTIAN FELLOWSHIP, *CONCEPTS IN NURSING - A CHRISTIAN PERSPECTIVE* 4 (1990). And Christian Science nurses may speak and read to patients about religious matters when asked, but that too is common in other religious hospitals. Neither of these points detracts from the fact that the primary purpose of Christian Science nurses is to provide basic physical care, which the Court has made clear is "secular and non-ideological."⁷

⁷The Court's most recent Establishment Clause decision, *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997), further supports the proposition that wholly secular aid can be provided even to institutions whose atmosphere is significantly religious. There the Court overruled previous decisions that had forbidden the provision of public school teachers for remedial classes in religious schools, even though those decisions had been based on the factual premise that nearly all of the schools receiving aid "were 'pervasively sectarian' in character." *Agostini*, 117 S. Ct. at 2008 (quoting and overruling *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 379 (1985); also overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)). Despite the character of the schools, the Court did not apply the presumption that virtually any aid given to them would directly promote religious teaching unless it were subject to intrusive monitoring. Instead the Court looked at the particular activity in question - the placing of public school teachers in religious schools to teach secular subjects - and found that it did not "have the impermissible effect of advancing religion through indoctrination." *Agostini*, 117 S. Ct. at 2014. If *Agostini* permits the funding of an activity even in the classic "pervasively sectarian" institution - elementary and secondary schools - this Court should be loath to take the giant step of applying the doctrine for the first time to physical services in a health care institution.

Second, the "pervasively sectarian" analysis has never been extended to question aid to health care institutions, and this Court should not take that dramatic step. The Supreme Court has applied the "pervasively sectarian" doctrine in a number of decisions involving various forms of aid to religious educational institutions. The Court held that even if such aid were facially limited to certain secular activities of the school, it would have the impermissible effect of directly supporting religious teaching because all the teaching at the school was permeated with religion. See, e.g., *Lemon*, 403 U.S. at 617. But in the health care area, it is perfectly possible for non-ideological physical care, such as nursing services, to be separated from religious teaching and proselytization - and for the government to fund only the former, as it does in the RNHCI provisions. *Wolman*, *supra*.

Unlike the work of schools, whose central and pervasive purpose is to teach and to inculcate values, much of the work of health care entities consists of providing physical services - from medical attention to simple assistance with bathing, washing, or feeding - that are unquestionably "secular" and "non-ideological" as the Supreme Court understands those terms. Thus, if the provision of health care is secular and non-ideological even in a pervasively sectarian elementary school, it is all the more so in an institution where providing physical health care is the primary mission. When such services constitute a major focus of the institution, it is simply inappropriate to apply the "pervasively sectarian" concept. For this reason, the Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988), warned that to extend the definition of "pervasively sectarian" beyond "parochial schools" would "jeopardize government aid to religiously affiliated hospitals" even when government "is subsidizing the purely medical services provided to the patient." *Id.* at 611, 613. And although the dissent in *Kendrick* was willing to extend the label "pervasively sectarian" to the entire class of religious family-service agencies involved there, the dissenters still emphasized that health care facilities are different. *Id.* at 641 (Blackmun, J., dissenting); *id.* at 623 (O'Connor, J., concurring).

To be sure, religious hospitals and other health-care facilities and their employees perform many of their tasks out of deep religious motivation. But as we have already noted, that does not transform the tasks themselves into "religious activity" from which the government is required to withhold funds available to other health-care providers. Such a conclusion would discriminate against certain providers of health care (and the patients who wish to receive such care) solely on the basis that the providers' motivation is religious. See *Truitt v. Board of Pub. Works*, 221 A.2d 370, 392 (Md. 1966) (holding that such an exclusion would create "constitutional problems"). Accordingly, courts have repeatedly

upheld the provision of health care financing to religiously affiliated institutions among others. See *id.* at 387-92; *Tulsa Area Hosp. Council v. Oral Roberts Univ.*, 626 P.2d 316, 318 (Okla. 1981) (upholding funding of religious hospital providing "holistic medicine" and "ministry to the body, mind, and spirit").

To apply the "pervasively sectarian" concept for the first time to health care would suddenly introduce great uncertainty in a system where it has been settled for a century that religious institutions may receive government funding. *Bradfield, supra.* Hundreds of church-affiliated hospitals have received government financial support for years, and Medicare and Medicaid reimbursements are, of course, particularly crucial to the financing of such institutions. See, e.g., Timothy S. Burgett, Note, *Government Aid to Religious Social Service Providers*, 75 VA. L. REV. 1077, 1084-85 (1989) (reporting 1965 study that almost 40 percent of Jewish and Christian hospitals received direct construction funds under Hill-Burton Act); EDWARD S. MALLY, JR., *HEALTH CARE HANDBOOK* 16-18 (1986) (American Hospital Association survey showing that 44.7 percent of inpatient days in Catholic hospitals were supported by Medicare and 9.3 percent by Medicaid).

Plaintiffs' arguments as to why Christian Science sanatoria are "pervasively sectarian" illustrate the mischief that the doctrine will do if it is transplanted to the health care field from the education field. To begin with, the plaintiffs simply ignore the evidence that shows that sanatoria employees, particularly the nurses, do not do spiritual healing themselves, but rather provide physical care and a supportive environment for their patients. See, e.g., *Church's Br.* 50-51 (summarizing evidence); VERNA BENNER CARSON, *SPIRITUAL DIMENSIONS OF NURSING PRACTICE* 100 (1989) (statement by non-Christian Scientist that sanatoria "are maintained for those needing nursing assistance in the course of a healing") (emphasis added). If a court were to hold the Christian Science nursing facilities to be pervasively sectarian because they direct employees to provide such a "supportive environment" for spiritual interaction, it would cause uncertainty for a large number of other religious health care institutions that likewise emphasize providing a spiritually supportive environment for patient care. See, e.g., MALLY, *supra*, at 10-11 (quoting Ethical Guidelines for Catholic Health Care Institutions) (employees of Catholic facilities "have a special responsibility to foster awareness of the institution's primary reason for existence: to bring Christ's healing comfort and power to all"); *Oral Roberts Univ.*, 626 P.2d at 318 (hospital provided "ministry to body, mind, and spirit").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned, a member of the bar of this Court, hereby certifies that the foregoing brief is proportionally spaced in 14 point New Times Roman and contains 6996 words. Pursuant to 8th Circuit Rule 28(a)(c), (d), the undersigned hereby certifies that this brief was prepared on Word Perfect, Version 5.1, and that the accompanying diskette has been scanned for viruses and was found to be virus-free.

Dated: Annandale, Virginia

February 12, 1999

Steven T. McFarland

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that he caused two copies of the foregoing brief, and accompanying diskettes, to be served by U.S. Mail, first-class postage pre-paid, on February 12, 1999, upon:

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ADDENDUM

STATEMENTS OF INTEREST

The Christian Legal Society ("CLS"), through the Center for Law and Religious Freedom (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association, and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the

Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs amici curiae on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident" truth that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. THE DECLARATION OF INDEPENDENCE (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law"

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The National Council of the Churches of Christ in the USA ("NCC") is the nation's oldest and largest ecumenical body with 35 Protestant, Anglican and Orthodox member communions with an aggregate membership of more the 54 million. The NCC does not purport to speak for all of these Christians or for all of these churches but rather for its General Assembly which includes representatives of all its member bodies.

The NCC supports the vigorous enforcement of both the Establishment and Free Exercise Clauses and views this case as an important and permissible accommodation for Christian Scientists and others who for religious reasons are unable to accept traditional medical treatment. However, the NCC does not consider every accommodation of religion to be either appropriate or permissible. For that reason, it does not endorse all of the examples listed in

this amicus brief. In particular, sections of the Act for Better Child Care (42 U.S.C. Section 98581) and the Personal Responsibility and Work Opportunity Reconciliation Act or "Charitable Choice" as it is commonly known (42 U.S.C. Section 604) which allow religious discrimination in the employment of persons who provide services funded directly and entirely by the government would seem to cross the line of accommodations not permitted by the First Amendment. Such disagreement over a handful of examples, however, does not change the NCC's fundamental support for the position of the Department of Health and Human Services or of the Christian Science Church.

The Christian Medical and Dental Society ("CMDS") was founded in 1931 and today represents over 10,500 members -- primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of those principles with professional practice. Among other functions, the CMDS Medical Ethics Commission gathers together member experts in the field of medical ethics who formulate positions on vital issues. These positions are subsequently voted upon for adoption, amendment, or rejection by over 100 elected representatives to the national convention of the Society.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The General Council on Finance and Administration ("GCFA") is the finance and administrative arm of The United Methodist Church. The United Methodist Church is a worldwide religious denomination with approximately nine million members in the United States, and it has approximately 36,000 local churches in the United States⁸. The denomination is embedded not only in the tradition and teachings of religious tolerance but also seeks to provide for the maintenance of worship, the edification of behaviors, and the redemption of the world. GCFA has an interest in this litigation, as it is officially

⁸ The United Methodist Church is the name of the denomination. It is not a jural entity capable of filing suit or being sued.

assigned under The Book of Discipline to safeguard and protect the legal rights and interests of the denomination (pargraph 807.4).

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 174 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statement binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Since 1988 the General Assembly of the Presbyterian Church (U.S.A.) has had a policy suggesting that it is ". . . the proper function of society including government in their concern for justice to ensure equal access to health services." That same Assembly adopted a policy urging ". . . substantial deference to the self understanding . . ." of nontraditional religious groups. While the Presbyterian Church (U.S.A.) has no hesitation to urge its members to utilize traditional medical treatments, the General Assembly nonetheless believes that all taxpayers should enjoy the benefit of quality health care. The Stated Clerk urges that this Court affirm Congress's decision to accommodate the religious beliefs and practice of these Christian Science adherents.

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