No. 00-914

IN THE

Supreme Court of the United States

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.,
BRUCE BOSTROM, and STEVEN PETERSEN,

Petitioners,

—v.—

NANCY-ANN MIN DE PARLE, DIRECTOR OF HEALTH CARE
FINANCE ADMINISTRATION, et al.,

—and—

FIRST CHURCH OF CHRIST SCIENTIST, BOSTON, MASSACHUSETTS,

Respondents.

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

BRIEF OF ANTI-DEFAMATION LEAGUE, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has consistently adhered to the

principle that its goal of combating religious prejudice, as well as the general stability of our democracy, are best served through the strict separation of church and state. Religious liberty requires the use of the Establishment Clause to keep government out of religion and religion out of government, and the use of the Free Exercise Clause to guard jealously the rights of all to their fundamental religious beliefs and the exercise of those beliefs free from government intrusion. ADL's mission has guided it in the last decades to file *amicus* briefs in virtually every major church-state case to reach the Court. Because of the importance of the issue presented in *this* case, ADL urges the Court to grant review, and having done so, to reverse what is at bottom a misplaced effort to protect religious freedom. If not corrected, the Eighth Circuit's decision will have the ultimate effect of significantly eroding our nation's fundamental religious liberties.[1]

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* has obtained and lodges herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH AND CREATES CONFUSION ABOUT THIS COURT'S HOLDING IN *MITCHELL v. HELMS*

This Court's precedents stretching from *Lemon v. Kurtzman*, 411 U.S. 192 (1973), to *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), make it clear that the Establishment Clause forbids the government from granting monetary aid to pervasively sectarian institutions if that monetary aid directly advances the institution's religious mission. *Mitchell*, 120 S. Ct. at 2558 (O'Connor, J., concurring); *id.* at 2585 (Souter, J., dissenting). The statute at issue in this case directly contravenes that rule. In failing to acknowledge that cornerstone principle, the decision below exceeded mere error and creates a field of confusion that virtually mandates this Court's review.

Section 4454 of the Balanced Budget Act exempts "Religious Non-Medical Health Care Institutions" ("RNHCI") from certain Medicaid and Medicare requirements. *Children's Healthcare Is A Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1094 (8th Cir. 2000). The only RNHCI which have received funding under Section 4454 are Christian Science sanatoria. These sanatoria offer faith healing in conjunction with non-medical, custodial, nursing care. As stated by the Church of Christ Scientist, there is an "inseparable" relationship between the church's theology and its "healing ministry." *See Official Home Page of the Church of Christ, Scientist* (visited January 30, 2001) (http://www.tfccs.com/GV/QANDA/CSHQ2.html]. The Christian Science Church defines the nursing services it offers primarily in terms of spiritual healing, making it clear that the purpose of "treatment" in Christian Science is inextricably entangled with its religious message, and that government monetary aid intended to advance the

healing objective of Christian Science cannot fail at the same time to advance the stated religious purposes of the group.[2]

Notwithstanding the admitted entanglement between Christian Science theology and the Christian Science healing mission, the court below held that Christian Science sanatorias' primary objective was to render a service — custodial nursing care — that is separable from its religious and sectarian purposes. *Children's Healthcare*, 212 F.3d at 1098. This misapprehends the fundamental purpose of the sanatoria, contradicts the Christian Science Church's own admissions concerning the custodial services its sanatoria offer, and demonstrates the danger of requiring government to evaluate the nature of the offerings of religions and religious groups.

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[2] The Christian Science Church describes its nurses as follows:

> [A]n experienced Christian Scientist prepared to provide skillful physical care and spiritual reassurance consistent with the theology of Christian Science. Christian Science nursing does not include any form of medical treatment, such as diagnosing, drugs, or therapy. It does include practical bedside care, such as bathing, dressing wounds, turning, lifting, modification of food, etc.

The Church notes that its adherents will receive spiritual healing, not medical care, at its sanatoria:

> Anyone who is depending solely on God for healing and who is applying the principles of Christian Science, as explained in Science and Health with Key to the Scriptures by Mary Baker Eddy, may engage a nurse at home or go to a Christian Science nursing facility.

See Official Home Page of the Church of Christ, Scientist (visited January 30, 2001) (http://www. tfccs.com/ GV/ QANDA/ CSHQ14.html].

ADL is particularly concerned with the lower court's holding that provision of direct monetary aid to a pervasively sectarian institution is constitutional as a permissible accommodation of religion and religious practices. *Children's Healthcare*, 212 F.3d 1093-95. At best, this notion may be characterized as a misunderstanding of this Court's precedents. Left unreviewed, however, the decision below threatens to expand the accommodation doctrine so that it swallows the Establishment Clause whole. [3]

Only last term, in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), the Court emphasized that government monetary aid to pervasively sectarian institutions passes scrutiny only if it is made on the same basis as like funding to non-sectarian institutions. The neutrality requirement that the Court enunciated in *Mitchell* leaves no room for accommodation analysis in the context of direct funding, because accommodation, by definition, necessarily provides a non-neutral benefit. In suggesting that Section 4454 passes muster as a "permissible accommodation" of religion, the court below created an exception to the Establishment Clause that is not only unmoored from precedent, but also fosters confusion concerning *Mitchell*.

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[3] The lower court also fails to deal with the danger of diversion of government aid granted for secular purposes to the sectarian purposes of an institution such as the Christian Science Church, a matter of heightened concern where, as here, government aid is in the form of direct money grants. *See Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (requiring factual findings by District Court concerning actual use of public funds). However, Section 4454 is unconstitutional without regard to diversion as the aid at issue here does not pass the Court's threshold requirement that it be granted for purposes separable from the institution's sectarian mission.

The decision below demonstrates that the circuit courts remain confused concerning the appropriate analysis of government actions at this boundary, and that there is no consensus as to when accommodation analysis is triggered, or how to reconcile competing claims under the Free Exercise and Establishment Clauses. The Court should accordingly take this opportunity to clarify the line between permissible alleviation of a burden on religion under the Free Exercise Clause, and impermissible government support thereof through direct monetary aid.

The majority in the divided panel below started with the proposition that federal funding of medical care burdens the religious beliefs of those who, for religious reasons, do not believe in medical care. Thus, the mere existence of the federal Medicaid/Medicare program, according to the majority, somehow impinges on those who *reject* medical treatment because of their religious beliefs. Starting from this illogical premise, the majority leapt to the equally illogical conclusion that Section 4454 was a permissible accommodation that avoids burdening individuals with a choice between exercising their religious beliefs and accepting a government benefit.

Accommodation of religious beliefs may, in certain circumstances, be permissible even when not required by the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). But the fact that accommodation may be *permissible* does not *ipso facto* constitutionally prohibit the *lack* of accommodation. Stated otherwise, in the absence of a showing of a constitutionally significant burden on religion, one that prevents its exercise *per se*, an accommodation such as that in the case at bar is nothing more than a direct benefit to religion, and accordingly violates the Establishment Clause. *Mitchell*, 120 S. Ct. at 2558, 2585; *Agostini v. Felton*, 521 U.S. 203, 228 (1997).

The analysis of the court below also misconceives accommodation theory. One may be inclined, or even forced, to decline a government benefit because of one's religious beliefs, but standing alone this does not constitute a constitutionally significant burden on the *practice* of religion. As Judge Lay pointed out in dissent in the court below, the mere existence of a tax-funded government benefit is not the sort of burden on religious practice that accommodation theory is meant to remedy. *Children's Healthcare* at 1105 (Lay, J. dissenting). Religious accommodation is a means to alleviate a burden on the exercise of religious beliefs. Religious accommodation cannot, consistent with the First Amendment, be transformed into a means to provide a direct government benefit to religious adherents. *Id.*

B. THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE APPLICATION OF THE *LEMON* TEST IN THE CONTEXT OF ACCOMMODATION ANALYSIS

While the mere correction of a circuit error does not ordinarily justify the Court in granting *certiorari*, this particular misinterpretation of the *Lemon* test requires it. It does so because despite a decade of efforts, the courts of appeals have failed to develop a consistent analytic approach to the application of the *Lemon* factors in the context of permissible accommodation of religious beliefs and exercise.[4]

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[4] *See, e.g., Stark v. Independent School Dist.*, 123 F.3d 1068 (8th Cir. 1997) (public school opened in response to religious sect's needs, and exemption of students from portions of the curriculum, did not violate Establishment Clause, because accommodation is a valid secular purpose so long as it is neutral); *Lamont v. Woods*, 948 F.2d (Continued...)

The court's misapplication of the *Lemon* analysis in the case at bar underscores the need for guidance in this area. The lower court started with a fundamental misconception as to permissive accommodation analysis, elevating it to a constitutionally mandated remedy that is nowhere required by this Court's decisions. The lower court then held that, because provision of care to the sick is essentially secular, government may disregard the fact that such care is provided by a pervasively sectarian group along with religious worship. It thus held that Section 4454 had a valid secular purpose, and therefore satisfied the first prong of *Lemon*. That finding enabled the court to disregard the *Lemon* test. Holding that the statute is a permissive accommodation of religion, the court fabricated essentially a new test — that such a statute should not be struck down as an endorsement of

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825 (2nd Cir. 1991) (test for federal funding of religious schools abroad is whether a particular recipient is pervasively sectarian; even then, funding could be valid, so long as there was a compelling reason for it and it did not have primary effect of advancing religion); *Elewski v. Syracuse*, 123 F.3d 51 (2nd Cir. 1997) (crèche display in a public park was valid because a reasonable observer would not perceive a message of endorsement); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (upholding state-required exemption of religious uses from zoning laws, because primary purpose is to protect religious uses from discrimination, and because it "represents a secular judgment that religious institutions . . . are compatible with every other type of land use"), *cert. pending*, No. 00-452; *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283 (4th Cir. 2000) (upholding state-wide exemption of schools on land owned by religious groups from permit requirement for additions and improvements, because state articulated a valid secular purpose of avoiding government scrutiny and public debate over religious matters); *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding local zoning ordinance exempting church-run daycare centers from special use permit, because exemption had the valid secular purpose of "minimizing meddling in religious affairs").

religion unless it imposes a substantial burden on *non-believers*, or provides a special benefit to religious believers. *Children's Healthcare*, 212 F.3d at 1095.

This approach fails at the first step, and betrays a fundamental misunderstanding of the method of analysis provided by *Lemon*. The holding that Section 4454 does not confer a special benefit on religious adherents ignores the conceded facts. Providing such a special benefit to a particular sect is not and cannot be a valid secular purpose. Nor can it be transformed into one under the rubric of "permissive accommodation." *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 n. 9 (1985). The decision below stands the law on its head by holding that such an enactment must be sustained unless it imposes a substantial burden on *non-believers*.

Finally, the majority below also misapplied the *Lemon* prohibition of "excessive entanglement." *Lemon* forbids the delegation of governmental functions to sectarian institutions; such delegation is in and of itself forbidden "excessive entanglement." *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696-97. Section 4454 allows for only limited governmental review of Medicaid and Medicare eligibility decisions made by the administrators of Christian Science sanatoria (42 U.S.C. § 1395x(ss)), and while these eligibility decisions result in direct monetary payments to a pervasively sectarian group, the government cannot request medical examinations in order to verify such decisions. Nevertheless, the majority held that the government had not delegated authority, because the statute on its face allocated final decision-making authority to the Secretary of Health. The majority failed to examine whether, on this record, there were, in fact, adequate safeguards against such a delegation and

hence protections against prohibited "excessive entanglement."

C. THE DECISION BELOW CONFLICTS WITH WELL SETTLED SECT-BASED, STRICT SCRUTINY ANALYSIS

A cornerstone of First Amendment analysis is the principle that a governmental classification in favor of one sect over another, or of the religious over the non-religious, is suspect and triggers strict constitutional scrutiny. *Larson v. Valente*, 456 U.S. 228 (1982). Under that precept, such a statute passes muster only if it is closely fit to the furtherance of a compelling state interest. Section 4454 falls within the range of government enactments triggering strict scrutiny because it "grant[s] a denominational preference," *Larson* at 246, in this case by singling out a particular sect and its adherents for government benefits unavailable to other sects. Section 4454 is facially void because it makes no pretense of furthering any compelling state interest.

Section 4454 is not a neutral enactment. To the contrary, the statute defines its beneficiaries as "religious" institutions. In thus selecting and benefiting a religious group, the statute contravenes well settled rules. The Court's decision in *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), illustrates this principle. In *Kiryas Joel*, the Court invalidated the New York State Legislature's creation of a special school district designed to serve a village whose population is composed exclusively of members of one religious sect. At issue in *Kiryas Joel* was the salutary desire on the part of the state legislature to permit strict Jewish religious adherents, the Satmar Hasidim, a dedicated school district so that handicapped children in the religiously isolated and rigidly observant community

could be educated without intermingling with children of other faiths.

Like Section 4454, the special district in *Kiryas Joel* was not defined according to the religious beliefs of intended beneficiaries; it was rather identified by reference to inhabitants of the village of Kiryas Joel, as Justice Souter put it, "in terms not expressly religious," a fact which was urged to distinguish the case from the delegation of civic authority to a religious group which doomed the statute at issue in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). As Justice Souter pointed out, however, the Court's "analysis does not end with the text of the statute at issue," *id.* at 699, citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985), and *Gomillion v. Lightfoot*, 364 U.S. 339, 341-42 (1960), but rather requires the Court to examine whether the context of the government action "identifies . . . recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly." *Id.* at 699. In *Kiryas Joel*, given the context, the statute "depart[ed] from th[e] constitutional command" to pursue a course of neutrality toward religion and not to favor one religion over others or religious adherents collectively over nonadherents by "delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Id.* at 696.

Much like the statute in *Kiryas Joel*, Section 4454 "identifies the recipients of governmental aid" by reference to doctrinal adherence — the substitution of "RNHCI" for "Christian Science sanatoria" cannot obscure the fact that entitlement to the benefit is defined by religious practice. Despite the use of the general term

"RNHCI" in the amending legislation, neither the parties nor *amici* below were able to identify *any* institution qualifying for the exemptions provided by Section 4454 other than Christian Science sanatoria. Similarly, Section 4454 was enacted after provisions of the Medicaid and Medicare Acts that explicitly exempted Christian Science sanatoria from funding and medical oversight requirements were struck down as violative of the Establishment Clause. Section 4454 was thus enacted in a "legal and historical" context that leaves little doubt of its purpose to restore such exemptions *to a specifically identified religious group,* and thus "gives no assurance that governmental power has been or will be exercised neutrally." *Kiryas Joel* at 696. The congressional history evidences the statute's lack of facial neutrality. *See Children's Healthcare*, 212 F.3d at 1100 (Lay, J., dissenting).

Nor does Section 4454 fall within that narrow range of cases permitting use of government funds to benefit religious groups. Hence, this case is not governed by *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding federal grants to nonprofit organizations for counseling and research in premarital adolescent sexual relations and pregnancy), or by *Mueller v. Allen*, 463 U.S. 388 (1983) (validating tax benefit available to parents of private and public school children, including religious schools). While government monies flowed to religious coffers to fund non-religious services in those cases, in the case at bar the monies flow to the religious coffers of a particular sect only and for the very purpose of funding its adherents' practices — in this case the "faith healing" and spiritual counseling that are the essence of Christian Science. This is the statute posited by Justice Kennedy in his concurrence in *Kendrick*, "which provides for exclusive or disproportionate funding to pervasively sectarian organizations [and] may impermissibly advance

religion and as such be invalid on its face." *Kendrick,* 487 U.S. at 624-25 (Kennedy, J., concurring).

Section 4454 represents not only direct monetary aid to a pervasively sectarian institution and thus impermissibly advances religion, but also amounts to an endorsement of religion. This is illustrated by *Lynch v. Donnelly*, 465 U.S. 668 (1984). In that case, the Court held that a city's display of a crèche, along with other, secular, symbols of the Christmas season, did not constitute an establishment of religion, and accordingly sustained the city's actions against First Amendment challenge. *Id.* at 681-82.

Justice O'Connor concurred in this result, but chose the vehicle of this case to advance the analysis of "endorsement" under *Lemon.* Thus, rather than attempting merely to discern whether there was a "secular purpose" in the governmental action and therefore whether the nativity scene in issue met the first prong of the *Lemon* test, Justice O'Connor suggested that *Lemon* can be clarified as an analytic device by focusing on whether a particular challenged action furthers institutional entanglement with religion or whether it can be said to constitute an endorsement or disapproval of religion. *Id.* at 689. The latter focus — whether government action "conveys a message of endorsement or disapproval of religion" — underscores the defect of the statute in the case at bar.

Using the analytic structure suggested by Justice O'Connor, it is plain that Congress's enactment of Section 4454 was specifically intended to benefit a particular sect, and thus *prima facie,* constitutes an endorsement of that sect. Congress's actual intent is irrelevant; if reasonable citizens would construe Congress's intent to convey an endorsement of a

particular religion, then the Establishment Clause has been violated. As Justice O'Connor explained,

> [w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Id. at 692. Here, there can be no doubt that the singling out of a particular sect for treatment different — and more deferential — than that afforded to any other religion sends a message of endorsement, and thus affects, in a very real way, "status in the political community." The invidious effect of this can be readily observed in the comments of the congressmen who sponsored Section 4454. However well-intentioned they might have been, they transgressed a constitutional line in adopting a plan that endorses religious practices because it funnels government funds directly to those practices, and that benefits the adherents of one religion to the exclusion of any others.

Finally, while the circuit court's error in failing to apply sect-based analysis and strict scrutiny might not always require review in this Court, in the case at bar review is supported by the critical nature of the issue and by its national importance — as the dissent below points out, there is "no other decision in the United States which has upheld such a program" granting special benefits to one religious sect or group. *Children's Healthcare*, 212 F.3d at 1100 (Lay, J., dissenting). Other factors equally mandate review. The statute is a Congressional enactment, not a local one, with effect

throughout the United States. With the emergence of "faith-based initiatives" in the new Administration and the renewed prominence of religious groups in rendering social services, sect-based classifications such as the one at bar assume a new aspect in our national life that deserves intense scrutiny by this Court. That the court below used accommodation analysis in order to reach its decision, and thus created undue confusion concerning the future application of such analysis, underscores the gravity of the error, and compounds the need for review.

* * *

CONCLUSION

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

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