VEILED IN TEXTUAL NEUTRALITY: IS THAT ENOUGH? A CANDID REEXAMINATION OF THE CONSTITUTIONALITY OF SECTION 4454 OF THE BALANCED BUDGET ACT OF 1997

INTRODUCTION

The First Amendment of the Constitution of the United States guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The fundamental principle underlying the establishment prong of this command is government neutrality toward religion.[2] Judge Learned Hand captured the essence of this tenet when he stated, "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their

1. U.S. CONST. amend. I.

2. *See* Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1088–89 (8th Cir. 2000); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (declaring that government should not "pass laws which aid one religion, aid all religions, or prefer one religion over another").

conduct to his own religious necessities."[3] This article examines a government provision that dangerously challenges the very existence of this principle.

In 1997, Congress enacted Section 4454 of the Balanced Budget Act of 1997, which allows patients to receive reimbursement (through Medicare and Medicaid) for nonmedical care if they object to medical treatment for religious reasons and receive such care in a facility that also objects to medical treatment for religious reasons.[4] This statute was created as a direct response to cure the constitutional deficiencies found in the previous Medicare/Medicaid exemptions for members of the First Church of Christ, Scientist,[5] but ultimately failed in this endeavor. In essence, "[t]he new language has resulted in the same stream of money directly pouring into the same religious coffers, with the putative category of recipients having been changed only from an identified, particular sect to an identified, particular set of religious beliefs."[6]

This Note presents a brief history of both the Medicare and Medicaid Acts along with the respective Christian Science exemptions and the evolution of Section 4454. It also discusses various facial challenges that have been applied to Section 4454 and the decisions that have twice upheld its constitutionality. In a frank examination of the previous courts' decisions, this Note points out various fallacies in the courts' reasoning and in the analysis applied. Section 4454 is reexamined under two different standards—the strict scrutiny standard and the *Lemon* test—with each test revealing an obvious violation of the Establishment Clause. The provision facially discriminates among religious sects in its text, legislative history, and actual operation by directing government funding and benefits to religious organizations that essentially determine their own eligibility requirements for receiving benefits. In its conclusion, this Note addresses the magnitude of this issue (for example, hundreds of millions of Medicare and Medicaid dollars are spent annually and program funds are quickly evaporating, putting millions of American citizens at risk of depleting health care resources) and calls for government action to remedy this violation.

3. Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953).

4. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426–32 (1997).

5. *See* Children's Healthcare Is a Legal Duty, Inc. v. Vladeck (*CHILD I*), 938 F. Supp. 1466, 1485 (D. Minn. 1996).

6. Petition for Writ of Certiorari at 26, Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 532 U.S. 957 (2000) (No. 00-0914).

I. BACKGROUND

A. Medicare and Medicaid

In an attempt to expand access to health care among certain segments of the population, Congress enacted the Medicare Act[7] and the Medicaid Act[8] in 1965. The Medicare Act provides benefits for all individuals age sixty-five or over who are eligible for social security benefits as well as disabled individuals who are under the age of sixty-five.[9] These benefits are limited to care furnished by health care providers that qualify as a hospital, skilled nursing facility, home health agency, or hospice, and may include payments for bed and board, nursing services, therapeutic services, diagnostic services, drugs, supplies, and equipment.[10] Medicare excludes payment for care that is merely custodial (defined as "any care that is not 'skilled services'")[11] and services that are "not 'reasonable and necessary for the diagnosis or treatment of illness or injury.'"[12] Medicare is "financed through a separate federal income tax on self-employment . . . [and] federal employment taxes on wages paid to employees."[13]

In contrast, the Medicaid Act is jointly financed by the federal and state governments and administered by the states.[14] It provides benefits to low-income families with dependent children and to impoverished individuals who are aged, blind, or disabled.[15] States participating in the program must submit state plans that meet broad statutory requirements in order to receive federal funding.[16] First, these state plans must provide for coverage of certain basic medical services (such as inpatient and outpatient hospital services, other laboratory and x-ray services, and physician and nursing services); then states have the authority to determine the type, scope, and duration of services for which benefits are available and to set the standards for eligibility.[17]

7. 42 U.S.C. §§ 1395–1395iii (2000).
8. 42 U.S.C. §§ 1396–1396w-2 (2000).
9. 42 U.S.C. § 1395c (2000).
10. *See id.* §§ 1395–1395iii.
11. Brief of Appellant and Addendum at 11, Kong v. Scully, 341 F.3d 1132 (9th Cir. 2003) (No. 02-15057) ("'Skilled services' are defined in 42 C.F.R. § 409.31(1) as those that '[a]re ordered by a physician.'").
12. *Id.* (quoting 42 U.S.C. § 1395y(a)(1)(A) (2000)).
13. *See* Brief for Federal Defendants-Appellees at 2, *Scully*, 341 F.3d 1132 (No. 02-15057) (citing 26 U.S.C. §§ 1401(b), 3101(b)).
14. *See* 42 U.S.C. §§ 1396b(a), 1396d(b) (2000).
15. *See id.* § 1396a.
16. *See id.* §§ 1396, 1396a.
17. *See id.*

B. Christian Science Exceptions

From their enactment until 1996, both Acts included express exceptions for members of the First Church of Christ, Scientist ("Christian Scientists").[18] Christian Scientists are part of a religious group that "believe[s] [physical] symptoms are not caused by viruses or bacteria, but by not being spiritually whole with God."[19] Christian Scientists "object[] to medical care and embrace[] prayer as the sole means of healing."[20] The group "emphasize[s] that Jesus never relied upon the practice of medicine or the use of medications"[21] and believe that "the proper concept of imitating Jesus' life includes emulating Jesus' practice of spiritual healing."[22] When sick, "a Christian Scientist turns to a Christian Science practitioner for help through prayer instead of to a doctor; when in need of hospital care, a Christian Scientist goes to a Christian Science sanatorium rather than a medical hospital."[23]

A Christian Science sanatorium "provide[s] physical nursing care to inpatients who may not be able to care for themselves or obtain nursing care in their home, while they receive their spiritual treatment."[24] Sanatoria are regulated by a "certification and listing process"[25] utilized by the Church to "ensure the reliability and integrity of these healers."[26] Institutions must satisfy various requirements established by the Church to become Church-certified, such as the requirements that the "[s]anatoria must offer the services of at least one Church-certified practitioner and nurse"[27] and the "practitioner must submit . . . evidence that he or she has healed at least three persons by spiritual means."[28] Like other health care institutions, certified Christian Science sanatoria and "practitioners bill their patients for spiritual treatments";[29] however, unlike most health care institutions, sanatoria do not affirmatively require "that Church nurses obtain formal medical education."[30]

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18. *See* Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1088 (8th Cir. 2000).
19. Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 271 (2003).
20. *CHILD II,* 212 F.3d at 1088.
21. Danyll Foix, *From Exemptions of Christian Science Sanatoria to Persons Who Engage in Healing by Spiritual Means: Why* Children's Healthcare v. Vladeck *Necessitates Amending the Social Security Act*, 15 LAW & INEQ. 373, 377 (1997).
22. *Id.*
23. Brief for Federal Defendants-Appellees, *supra* note 13, at 5 (quoting *Medical Care for the Aged: Hearing Before the H. Comm. on Ways and Means*, 88th Cong. 486 (1963)).
24. Foix, *supra* note 22, at 378.
25. *Id.* at 379.
26. *Id.* at 378–79.
27. *Id.* at 379.
28. *Id.*
29. *Id.* at 380.
30. *Id.*

The effectiveness and legitimacy of Christian Science sanatoria have often been examined in comparison to the advanced technology and life-saving techniques that are widely available under the American medical system.[31] Although "[t]he effectiveness of Christian Science and faith healing methods cannot be compared to medical therapies because members of these churches do not participate in scientific studies," studies based on mortality rates and on retrospective evaluation of causes of death strongly suggest that spiritual healing is less effective than medicine.[32] Records from a coroner's office in Seattle, Washington, reveal that for a twenty-one-year period beginning in 1935, death rates for Christian Scientists for most causes of death were substantially higher than for non-Christian Scientists.[33] For example, Christian Science deaths from diabetes and malignancy were twice the national average.[34] This ineffectiveness of care—especially with respect to the care of children—has been a prominent issue across the country that has sparked debate concerning the rights of children as well as rights to medical care in general. In a retrospective study of child fatalities between 1975 and 1995, an estimated 172 children died after their parents rejected medical care on religious grounds.[35] "Of these children, one hundred forty (140) suffered conditions for which survival rates exceeded ninety percent, if there had been timely medical intervention; and eighteen more could have survived at a rate exceeding fifty percent."[36] Another example of the questionable effectiveness of Christian Science sanatoria is shown through the evidence of a 1994 measles outbreak in St. Louis that spread from one Christian Science youth to 247 other people, most of whom were children and many of whom were non-Christian Scientists.[37] The reported cost of this outbreak to St. Louis County was in excess of $100,000.[38] The lack of quality requirements and the inability to efficiently monitor Christian Science sanatoria distinguishes this type of care from the typical medical care that most Americans receive.

By seeking to extend the nonmedical elements of Medicare and Medicaid-funded services to Christian Scientists, Congress exempted Church-certified sanatoria from meeting the same medical care provider qualifications as other medical care institutions.[39] Congress granted exemptions that included Christian Science sanatorium in the definition of the term "hos-

31. *See* Richard A. Hughes, *The Death of Children by Faith-Based Medical Neglect*, 20 J.L. & RELIGION 247, 247 (2004–2005); Merrick, *supra* note 19, at 273.
32. Merrick, *supra* note 19, at 273.
33. *See id.*
34. *See id.*
35. *See* Hughes, *supra* note 31, at 247; *see also* Merrick, *supra* note 19, at 274.
36. Hughes, *supra* note 31, at 247.
37. *See* Merrick, *supra* note 19, at 275.
38. *See id.*
39. *See* Foix, *supra* note 22, at 385.

pital" and exempted sanatoria from certain medical oversight provisions in the Act.[40] As a result, sanatoria were not required to provide the "services of licensed physicians, employ licensed and registered nurses or complete hospital utilization review plans in order to receive Medicare and Medicaid reimbursements."[41] In essence, "Congress effectively waived for the Christian Scientists the medical treatment requirement applicable to all other patients."[42]

C. Christian Scientists Exceptions Found Unconstitutional

In 1996, the United States District Court for the District of Minnesota found the exemptions to be facially discriminatory among religious sects and invalidated them as a violation of the Establishment Clause.[43] The court held that the provisions could not survive strict scrutiny even if they were intended to accommodate religion because of the fact that the exemptions discriminated "among religious sects by expressly singling out one for favorable treatment."[44] The court reasoned that although a compelling interest existed in "'ensur[ing] that all those who pay taxes to support [Medicare] programs may benefit from them,' the exemptions were not closely fitted to that interest since they accommodated only Christian Scientists and no other religious denominations who may believe in spiritual healing."[45] Congress responded to the district court's decision by rewriting the provisions to eliminate sect-specific references and by enacting Section 4454 of the Balanced Budget Act of 1997.[46] In Section 4454, Congress eliminated any sect-specific portions of the Medicare and Medicaid Acts and replaced those portions "'with a sect-neutral accommodation available to any person who is relying on a religious method of healing and for whom the acceptance of the medical health services would be inconsistent with his or her religious beliefs.'"[47] Congress, in effect, struck all references to "Christian Science sanatoria" and replaced them with references to a sect-neutral exemption for all "religious nonmedical health care institutions (RNHCIs)."[48] This new provision allows any patient to

40. *See* Lisa S. Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1010 (2001); *see also* Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1088 (8th Cir. 2000).

41. Foix, *supra* note 22, at 386.

42. Bressman, *supra* note 40, at 1010–11.

43. *See* Children's Healthcare Is a Legal Duty, Inc. v. Vladeck (*CHILD I*), 938 F. Supp. 1466, 1485 (D. Minn. 1996).

44. Bressman, *supra* note 40, at 1011; *see also CHILD I*, 938 F. Supp. at 1485.

45. Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 N.Y. CITY L. REV. 53, 110 (2005) (quoting *CHILD I*, 938 F. Supp. at 1478).

46. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426–32 (1997).

47. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1089 (8th Cir. 2000) (quoting H.R. REP. NO. 105-217, at 767 (1997) (Conf. Rep.)).

48. *CHILD II,* 212 F.3d at 1089; *see also* Brief for Federal Defendants-Appellees, *supra* note 13, at

receive reimbursement for nonmedical care if that patient objects to medical treatment for religious reasons and receives such care in a facility that also objects to medical treatment for religious reasons.[49]

II. SECTION 4454 AND RELIGIOUS NONMEDICAL HEALTH CARE INSTITUTIONS

Congress defined an RNHCI as an institution that, among other things, "provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs."[50] Section 4454 "enables individuals who hold religious objections to medical care to receive government assistance for care that they receive at RNHCIs" while also excusing RNHCIs from all medically-based supervision.[51] The receipt of these benefits is conditioned on the individual beneficiary making a written election to receive such benefits in an RNHCI.[52] Section 4454 amends the Medicare Act in three main ways: it expressly includes RNHCIs within Medicare's definition of "hospital" and "skilled nursing facility"; it provides Medicare benefits for services rendered in an RNHCI if the recipient of the services has a condition such that the recipient would have been entitled to benefits if the recipient had received the same services in a medical facility; and it exempts RNHCIs from the "peer review" medical oversight requirements required by 42 U.S.C. § 1320c.[53]

Section 4454 modifies the Medicaid Act in much the same way; it modifies statutory requirements for state Medicaid plans relating to RNHCIs[54] and excludes RNHCIs from Medicaid's definition of "nursing home," which results in the exemption of RNHCIs from state licensing requirements for nursing home administrators.[55] Another notable change occurs in subsection 1395x(ss)(3), which "limits the degree to which the Secretary may impose medical review requirements that are inconsistent

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49. *See* Bressman, *supra* note 40, at 1011.

50. 42 U.S.C. § 1395x(ss)(1)(C) (2000).

51. *CHILD II*, 212 F.3d at 1089.

52. Brief for the Federal Respondents in Opposition at 7, Children's Healthcare Is a Legal Duty, Inc. v. McMullan, 532 U.S. 957 (2001) (No. 00-914); *see id.* at n.4 ("The individual must certify in writing that he or she 'is conscientiously opposed to acceptance of nonexcepted medical treatment,' and that his or her 'acceptance of nonexcepted medical treatment would be inconsistent with the individual's sincere religious beliefs.'") (quoting 42 U.S.C. § 1395i-5(b)(2)(A) (Supp. IV 1998)).

53. *See* 42 U.S.C. §§ 1395x(e), 1395x(y)(1), 1395i-5(a)(2), 1320c-11 (2000 & Supp. I 2005); *see also CHILD II*, 212 F.3d at 1089.

54. *See CHILD II*, 212 F.3d at 1089 ("[S]tate plans may not establish state agency oversight of the quality of care provided in RNCHIs, nor may they require RNHCI utilization review committees . . . to be composed of medical personnel.").

55. 42 U.S.C. §§ 1396a(a), 1396g(e)(1) (2000); *see also CHILD II*, 212 F.3d at 1089.

with the religious beliefs of RNHCI patients."[56] As a result, the Secretary cannot "require any patient of a [RNHCI] to undergo medical screening, examination, diagnosis, prognosis, or treatment . . . if such patient . . . objects thereto on religious grounds."[57]

To qualify as a Medicare or Medicaid RNHCI, a facility must meet ten requirements; the facility will not qualify unless it:

- Is described in subsection (c)(3) of §501 of the Internal Revenue Code of 1986 and is exempt from taxes under subsection 501(a);

- Is lawfully operated under all applicable Federal, State, and local laws and regulations;

- Furnishes only nonmedical nursing items and services to beneficiaries who choose to rely solely upon a religious method of healing, and for whom the acceptance of medical services would be inconsistent with their religious beliefs. . . . ;

- Furnishes nonmedical items and services exclusively through nonmedical nursing personnel who are experienced in caring for the physical needs of nonmedical patients. . . . ;

- Furnishes nonmedical items and services to inpatients on a 24-hour basis;

- Does not furnish, on the basis of religious beliefs, through its personnel or otherwise, medical items and services (including any medical screening, examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients;

- Is not owned by, under common ownership with, or has an ownership interest of 5 percent or more in, a provider of medical treatment or services and is not affiliated with a provider of medical treatment or services or with an individual who has an ownership interest of 5 percent or more in a provider of medical treatment or services (permissible affiliations are described in §403.739(c));

- Has in effect a utilization review plan that meets the requirements of §403.720(a)(8);

56. Brief for Federal Defendants-Appellees, *supra* note 13, at 12.
57. 42 U.S.C. § 1395x(ss)(3)(A)(i) (2000).

> • Provides information CMS [the Center for Medicare and Medicaid Services] may require to implement §1821 of the Act, including information relating to quality of care and coverage determinations; and
>
> • Meets other requirements CMS finds necessary in the interest of the health and safety of the patients who receive services in the institution.[58]

These requirements are set forth by the Centers for Medicare and Medicaid Services. An RNHCI also must be approved and certified by the Boston Regional Office, which has primary responsibility for ensuring that RNHCIs conform to the specific conditions of coverage.[59] To be approved, an RNHCI must be in compliance with both the conditions for coverage and the conditions of participation contained in the regulations.[60] It is important to note that the regulations state that "[n]either Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities."[61]

III. FACIAL AND APPLIED CHALLENGES TO SECTION 4454

A. Children's Healthcare is a Legal Duty, Inc. v. Min De Parle

In 2000, Children's Healthcare is a Legal Duty, Inc. (CHILD)[62] brought suit against the Director of the Health Care Financing Administration and the Secretary of the United States Department of Health and Human Services, claiming that Section 4454 violated the Establishment Clause both on its face and as applied to Christian Science sanatoria.[63] The United States District Court for the District of Minnesota rejected

58. Centers for Medicare and Medicaid Services, *Religious Nonmedical Health Care Institutions*, http://www.cms.hhs.gov/CertificationandComplianc/19_RNHCIs.asp (last visited Nov. 3, 2009).

59. *Id.*

60. Medicare and Medicaid Programs; Religious Nonmedical Health Care Institutions and Advance Directives, 68 Fed. Reg. 66,710; 66,711 (Nov. 28, 2003) (to be codified at 42 C.F.R. pt. 403).

61. *Id.* at 66,719.

62. For details on CHILD and its mission, visit their website at http://www.childrenshealthcare.org/ ("Children's Healthcare Is a Legal Duty (CHILD, Inc.) is a non-profit national membership organization established in 1983 to protect children from abusive religious and cultural practices, especially religion-based medical neglect."). *See also* Janna C. Merrick, *Christian Science Healing of Minor Children: Spiritual Exemption Statutes, First Amendment Rights, and Fair Notice*, 10 ISSUES L. & MED. 321, 327 (1994) (CHILD was founded by "Rita Swan, a former Christian Scientist whose infant son died of meningitis . . . [after] . . . she and her husband were pressured not to seek conventional medical care when their son became ill.").

63. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1089 (8th Cir. 2000). *See also* Merrick, *supra* note 19, at 287 ("Much of the motivation for filing the suit was CHILD's concern about the lack of training that sanitoria nurses have in caring for sick children both in the sanitoria and when sanitoria nurses attend sick children in their homes.").

CHILD's claim and granted summary judgment in favor of the government and intervenor Christian Scientists.[64] CHILD appealed the decision to the Eighth Circuit, which reviewed the grant of summary judgment de novo and affirmed the district court's decision.[65] On appeal, the following parties appeared in support of the petitioners as amici curiae: American Academy of Pediatrics, the American Medical Association, the American Nurses Association, Iowa Medical Society, Minnesota Civil Liberties Union, the American Humanist Association, Americans for Religious Liberty, and the Council for Secular Humanism.[66]

The Eighth Circuit held that Section 4454 does not facially discriminate among religious sects and therefore is not subject to strict scrutiny review.[67] The court based this decision on its examination of the statute's terms, legislative history, and effect—all of which the court found to suggest denominational neutrality.[68] Although it first recognized that a law need not expressly distinguish between religions by sect name to facially discriminate among religions, the court directly supported its determination that Section 4454 is sect-neutral by stating that "[i]t does not include or disqualify any particular sect by name, but instead uses religiously neutral terms to define RNHCIs."[69] The court also relied on Section 4454's legislative history to substantiate its claim of neutrality: "A more accurate reading . . . reveals that the legislative impetus behind section 4454 was to accommodate all persons who object to medical care for religious reasons, not only Christian Scientists."[70] Finally, the court found that "the practical effect of section 4454 [did] not render it facially discriminatory . . . because . . . [the fact] that few facilities other than Christian Science sanatoria qualify as RNHCIs . . . is insufficient [by itself] to make section 4454 impermissibly discriminatory."[71] In sum, the court refused to apply strict scrutiny review because it found that Section 4454 "was intended to extend health care benefits to as many people as possible while at the same time ensuring the continued viability of the Medicare and Medicaid programs."[72]

Upon refusing to apply strict scrutiny, the court applied the less stringent *Lemon* test[73] and concluded that Section 4454 is a permissible ac-

64. *CHILD II*, 212 F.3d at 1089.
65. *Id.* at 1100.
66. *See* Petition for a Writ of Certiorari, *supra* note 6.
67. *CHILD II*, 212 F.3d at 1092.
68. *Id.* at 1090.
69. *Id.*
70. *Id.* at 1091.
71. *Id.*
72. *Id.* at 1092.
73. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing a three-pronged test used in evaluating constitutionality under the Establishment Clause).

commodation of religion under the Establishment Clause.[74] The court held that Section 4454 satisfied the first prong of *Lemon*, which requires a law to have a secular legislative purpose, because "it removes a special burden imposed by the Medicare and Medicaid Acts upon persons who hold religious objections to medical care."[75] The court reasoned that the burden placed on religious adherents when they are forced to choose between adhering to their religious beliefs and foregoing all government health care benefits, or violating their religious convictions and receiving the medical care provided by Medicare and Medicaid, is sufficient to permit congressional accommodation.[76] The court also reasoned that Christian Science sanatoria were not pervasively sectarian and rejected the appellant's as-applied challenge to Section 4454.[77] Upon concluding that a religious accommodation impermissibly advances or inhibits religion (the second *Lemon* prong) only if it imposes a substantial burden on non-beneficiaries or provides a benefit to religious groups without providing a corresponding benefit to a large number of nonreligious groups or individuals, the court held that Section 4454 does not impermissibly advance or inhibit religion.[78] Finally, the court examined the statute under the third prong of *Lemon*, which requires that the law not foster excessive government entanglement with religion.[79] The court disagreed with CHILD's argument that the statute promotes excessive entanglement because it allows RNHCI utilization review committees, which are composed of lay persons who are religiously opposed to medical care, to make admissions and other coverage decisions that are not based on medical examination or diagnosis.[80] The court countered this argument by asserting that RNHCIs offer only an initial recommendation regarding coverage and that Section 4454 expressly provides for governmental review of these RNHCI coverage decisions, resulting in a permissible delegation of authority.[81] Upon reasoning that Section 4454 satisfied the requirements of *Lemon* and that Christian Science sanatoria were not pervasively sectarian, the court rejected CHILD's as-applied challenge to Section 4454 and found the statute to be a permissible accommodation of religion.[82]

Following the Eighth Circuit's decision, CHILD petitioned for a writ of certiorari to the Supreme Court of the United States, declaring that the

74. *CHILD II*, 212 F.3d at 1099.
75. *Id.* at 1093.
76. *Id.* at 1094.
77. *Id.* at 1100.
78. *Id.* at 1096 ("[B]ecause section 4454 merely permits RNHCI patients to receive a 'subset,' i.e. the nonmedical portion, of the care provided by Medicare and Medicaid to patients of medical institutions, it extends no special benefit to religious believers who receive care at RNHCIs.").
79. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
80. *CHILD II*, 212 F.3d at 1099.
81. *Id.*
82. *Id.* at 1100. This faulty reasoning is examined and critiqued *infra*.

decision below "turns [the Supreme Court's] Establishment Clause jurisprudence on its head and demands correction before it plays havoc with the many instances in which a religious individual objects to some aspect of a government funding program."[83] The petition for writ of certiorari was denied.[84]

B. Kong v. Scully

In another case challenging the constitutionality of Section 4454, David Kong, identifying himself as a taxpayer of the United States, filed a complaint asserting that Section 4454 is "a sect-specific establishment of religion" and therefore violates the Establishment Clause.[85] Kong claimed that the statute provides special benefits to Christian Scientists, "delegates coverage decisions to the RNHCIs" in violation of *Larkin v. Grendel's Den*,[86] and provides direct payment for "religious activity" in "pervasively sectarian" Christian Science sanatoria.[87] The United States District Court for the Northern District of California granted summary judgment for the government and the intervening Christian Scientists.[88] On appeal in 2003, the Ninth Circuit affirmed the district court's ruling and stated:

> When the government is in the business of taxing for health care and providing it to its citizens, an incidental expenditure, less than 1/10 of 1% of the amount annually expended, in order to accommodate, to a degree, the religious beliefs of a minority is not reasonably read as an establishment of religion.[89]

In a First Amendment philosophy-based opinion, the court held that the amendments did not effect a sect-specific establishment of religion and that the amendments' delegation of power to RNHCIs to determine when to admit and discharge persons, without standards, also did not constitute establishment of religion.[90] The court reasoned that Section 4454 did not symbolize government approval of faith healing and that it was simply an accommodation of a religious minority to let them practice their religion

83. Petition for Writ of Certiorari, *supra* note 6, at 15–16.
84. Children's Healthcare Is a Legal Duty, Inc. v. McMullan, 532 U.S. 957 (2001) (denying writ of certiorari).
85. Kong v. Scully, 341 F.3d 1132, 1137 (9th Cir. 2003).
86. 459 U.S. 116, 126 (1982) (invalidating a statute that granted religious bodies veto power over applications for liquor licenses because it brought about a "fusion of governmental and religious functions").
87. Kong v. Min De Parle, No. 00-4285, 2001 WL 1464549, at *2 (N.D. Cal. Nov. 13, 2001).
88. *Id.* at *1.
89. *Scully*, 341 F.3d at 1141.
90. *Id.*

without penalty, which is a lawful secular purpose.[91] In a somewhat unconvincing conclusion, the court stated:

> Here an arguably unconstitutional delegation of power to religious institutions has occurred; but it has occurred as the only way of unburdening an exercise of religious belief. Logic leads us to condemn the establishment. . . . It is more in tune with the Bill of Rights to give relief to a religious minority than to find a constitutional evil in congressional response to a constituency.[92]

The Ninth Circuit's conclusion is contradictory at best. The court seemed to circumvent the problematic aspects of section 4454 with a simple declaration of constitutionality that was not supported by any solid reasoning or explanation.

IV. CONSTITUTIONAL ANALYSIS OF SECTION 4454 REVISITED

Although both the Eighth and Ninth Circuits found Section 4454 to be constitutional, each circuit essentially used misguided reasoning in reaching this conclusion. Not only did the courts fail to analyze the issue under the correct standard—strict scrutiny—but they also improperly applied the less stringent standard that they in fact employed. In essence, the majority in each of these courts violated a fundamental principle of the Constitution by upholding a statute that provides a government benefit solely to religious institutions and their adherents. By doing so, the courts created an entirely different line of precedent. The need for the Supreme Court's comprehensive examination of this issue is substantial:

> Not only is government aid flowing from the federal government directly into religious coffers as a special benefit to recipients defined according to their religious belief, but the majority below introduced an Establishment Clause theory that flies in the face of the origins of the Establishment Clause as well as all of [the Supreme Court's] applicable government-aid-to-religion decisions.[93]

If the Supreme Court were to scrutinize this issue, a more orthodox analysis of Section 4454 would likely result. An overview of this analysis is discussed below.

91. *Id.* at 1140.
92. *Id.* at 1141.
93. Petition for Writ of Certiorari, *supra* note 6, at 16.

A. Sect Discrimination

In deciding what standard to apply to determine Section 4454's constitutionality, both appellate courts began with an examination of whether Section 4454 discriminated among religious sects,[94] which would result in the application of strict scrutiny review under *Larson v. Valente*.[95] In *Larson*, the Court held that law granting denominational preferences must be closely fitted to a compelling governmental interest and stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[96] The *Larson* decision also supports the ideas that "statutes can create denominational preferences without explicitly naming different religions for different treatment"[97] and "[s]uch discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation."[98] If a statute does not explicitly and deliberately distinguish between different religious organizations, it is analyzed under the three-part test set forth by the Supreme Court in *Lemon v. Kurtzman*.[99]

The Eighth and Ninth Circuits both reasoned that Section 4454 does not facially differentiate among religious sects because its terms, legislative history, and effect all suggest denominational neutrality.[100] The Eighth Circuit explained that Section 4454 is intended to extend health care benefits to as many people as possible while also ensuring the validity of the federal programs.[101] The court stated, "Section 4454 is by its terms sect-neutral. It does not include or disqualify any particular sect by name, but instead uses religiously neutral terms to define RNHCIs, and those persons who may receive Medicare and Medicaid coverage for care received in RNHCIs."[102]

The courts were correct in recognizing that the Medicare and Medicaid provisions do not specifically name any religious sect; however, they erred in holding that the provisions do not reveal facial differentiation of religious sects because "every other indicator reveals that these provisions are far from neutral and that they have as their object a denominational preference for Christian Scientists."[103] The statute's discriminatory effect, which is applied through an extensive definition of eligibility, can be seen

94. *Scully*, 341 F.3d at 1140; Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1090 (8th Cir. 2000).
95. 456 U.S. 228 (1982).
96. Patrick-Justice, *supra* note 45, at 55 (quoting *Larson*, 456 U.S. at 244).
97. *Id.* at 75.
98. *CHILD II*, 212 F.3d at 1090.
99. *Id.* (referring to Lemon v. Kurtzman, 403 U.S. 602 (1971)).
100. *Id.*
101. *Id.* at 1092.
102. *Id.* at 1090–91 (internal citation omitted).
103. *Id.* at 1101 (Lay, J., dissenting).

not only in the language of Section 4454 but also in its legislative history.[104] The courts simply ignore the fact that the benefits of the statute are only available to those institutions that meet a broad textual definition which relegates assistance to institutions that provide "only nonmedical nursing items and services exclusively to patients who choose to rely *solely* upon a religious method of healing."[105] By concluding that Section 4454's language is "sect-neutral" because anyone could adhere to the particularized religious requirements of the statute, the courts simply "ignore[d] the boundaries delimited by the statute itself."[106]

1. Section 4454's Legislative History

From its beginning in 1996, the Christian Scientist exemption has reflected explicit and deliberate distinctions among religions. Although the original exemptions were found unconstitutional and were ultimately amended,[107] the amendments did ostensibly nothing to alleviate the discriminatory defect. Substantial legislative and administrative evidence exists that exposes the fact that Congress did not intend Section 4454 to apply to all religious organizations, but rather only to Christian Scientist sanatoria.[108] The very amendment that was proposed by Senator Orrin Hatch to bring the statute under the umbrella of constitutionality was entitled "Christian Science Sanitoria" and stated that "unless [Medicare or Medicaid] is changed, large numbers of Christian Scientists who have paid into Medicare for over 30 years will be denied access to the benefits they reasonably expected for care provided in Christian Science nursing care facilities."[109] In his address to Congress in support of the amendment, Senator Hatch identified no other possible beneficiaries of the amendment, resulting in a strong presumption that the "sole impetus for the present law was the alleged plight of Christian Scientists."[110]

The proposed amendment, which substituted the words "religious nonmedical health care institution" for each reference to "Christian Science sanatorium," was approved by the Senate Finance Committee, and the process contained much debate and discussion about the amendment.[111]

104. *See* Brief of Appellant and Addendum, *supra* note 11, at 25–34; Petition for Writ of Certiorari, *supra* note 6, at 5.

105. Brief for Amicus Curiae the American Academy of Pediatrics Supporting Appellant and Reversal at 17, Kong v. Scully, 341 F.3d 1132 (9th Cir. 2003) (No. 02-15057) (emphasis in original). *See also* Reply Brief of Appellant at 1, *Scully*, 341 F.3d 1132 (No. 02-15057).

106. Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 18.

107. *See CHILD II*, 212 F.3d at 1089.

108. *See CHILD II*, 212 F.3d at 1102 (Lay, J., dissenting); Brief of Appellant and Addendum, *supra* note 11, at 28–29.

109. *CHILD II*, 212 F.3d at 1102.

110. *Id. See also* Brief of Appellant and Addendum, *supra* note 11, at 29.

111. *CHILD II*, 212 F.3d at 1102 (Lay, J., dissenting).

For example, Senator Kennedy spoke of the terms of the amendment as being "deserve[d] to be enacted into law so that the needed benefits will *continue* to be available" after he discussed the thirty year history of the Christian Science Church and its vast health care system.[112] Similarly, Senator Hatch supported his bill with testimonials of Christian Scientists and even stated the need for the proposed amendment was brought to his attention by a Christian Scientist in Utah.[113] In addition to the Senate's discussion of the importance of the amendment for Christian Scientists, the House Conference Report also refers to an interest in "continuing" benefits to Christian Scientists.[114]

Although Section 4454 includes some language implying an objective to accommodate an expansive class of religious objectors, it must not be overlooked that "the clear theme underlying every aspect of the legislative history" was Congress's attempt to "continue" the benefits that previously existed for Christian Scientists.[115] To defend this question of the legislative history and the statute's purpose, the government cites a previous Supreme Court case, *Board of Education of Kiryas Joel Village School District v. Grumet*,[116] in which the Court struck down a state legislature's creation of a special school district for a religious group, stating that "the law provided 'no assurance that the next similarly situated group seeking a school district of its own [would] receive one.'"[117] In *Kiryas Joel*, taxpayers and an association of state school boards brought an action challenging the constitutionality of a statute which created a special school district for a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism.[118] The village of Kiryas Joel originally fell within another public school district until a special state statute was passed which carved out a separate district, following village lines, to serve this distinctive population.[119] Under the statute, the village of Kiryas Joel was allowed to elect a board of education to take such actions as opening schools, hiring teach-

112. *Id.* (quoting 143 CONG. REC. S6301-02, S6321-22 (daily ed. June 25, 1997) (statement of Sen. Kennedy) (emphasis in original)).

113. *Id.*

114. *See* H.R. REP. NO. 105-217, at 768 (1997) (Conf. Rep.) (Congress stated that its purpose in enacting section 4454 was to provide "a sect-neutral accommodation available to any person who is relying on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs."). *See also* Brief for Federal Defendants-Appellees, *supra* note 13, at 20–28.

115. *CHILD II*, 212 F.3d at 1103 (Lay, J., dissenting). *See also* Brief of Appellant and Addendum, *supra* note 11, at 29 (It must also be noted that "[t]here is no evidence in the record that Congress had any other religion in mind" when enacting this provision.); Reply Brief of Appellant, *supra* note 105, at 7 ("Congress held no hearings to determine the scope of possible beneficiaries.").

116. 512 U.S. 687 (1994).

117. Brief for Federal Defendants-Appellees, *supra* note 13, at 25 (quoting *Board of Education of Kiryas Joel Village School District,* 512 U.S. at 703).

118. *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 690.

119. *Id.*

ers, prescribing textbooks, and raising property taxes to fund operations.[120] Although this board of education had plenary legal authority over the elementary and secondary education of all school-aged children in the village, in practice it only ran a special education program for handicapped children because the other village children stayed in their parochial schools.[121] The school district also was willing to pay tuition for any child who wished to seek a public-school education.[122] The Supreme Court declared the statute unconstitutional, finding that it was not neutral toward religion, and stated that "the statute . . . departs from this constitutional command 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."[123]

The government contended that Section 4454 is distinguishable from the statute in *Kiryas Joel* because it provides benefits to "*anyone* who has a sincere religious objection to medical care [and that] Christian Scientists benefit from section 4454 only because they meet that sect-neutral criterion."[124] However, this provision does not direct benefits to individuals, but instead to religious organizations, and it requires many more requirements than simply "'a sincere religious objection to medical care.'"[125] Also, the sect-discrimination attributes of Section 4454 are seen through Congress's designation that allows certain religious organizations (mainly, Christian Scientist) to both determine eligibility for benefits and to administer those benefits through unspecified programs.[126]

As a whole, the language and legislative history of Section 4454 reveal a specific intent to solely benefit Christian Scientists that can no longer be ignored. Even though the insertion of "sect-neutral" language was intended to broaden the statute's scope, the previous provision and its effects must not be so quickly disregarded. In *McCreary County, Kentucky v. ACLU*,[127] where the Court declared a display of the Ten Commandments in the county courthouse unconstitutional, the Court made clear that the evolution of the display could be taken into account when evaluating the counties' claim of a secular purpose for the display.[128] In this case, the courthouse had revised its Ten Commandments display three different

120. *Id.* at 693.
121. *Id.* at 693–94.
122. *Id.* at 694.
123. *Id.* at 696.
124. Brief for Federal Defendants-Appellees, *supra* note 13, at 25.
125. Reply Brief of Appellant, *supra* note 105, at 5–6 (citation omitted).
126. *See* Reply Brief of Appellant, *supra* note 105, at 6–7 ("It was no coincidence that the criteria selected by Congress in the definition of a RNHCI happened to exactly coincide with the religious characteristics of Christian Science sanatoria and no other known religious institution.").
127. 545 U.S. 844 (2005).
128. *Id.* at 881.

times in an obvious attempt to adhere with previous court orders to take down the display, which had been deemed a violation of the Establishment Clause.[129] Each revision involved adding other secular documents such as the Magna Carta and Declaration of Independence to the display which was eventually named "The Foundations of American Law and Government Display."[130] By reasoning that it was permissible to examine the display in light of its evolution to determine its actual purpose, the Court stated:

> We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.[131]

Just as the Court in *McCreary* took the display's evolution into consideration in finding it unconstitutional, the Eighth and Ninth Circuits should have given more weight to Section 4454's history and its incredibly narrow crafting when analyzing its sect-discriminatory language. Although a statute should not be automatically dismissed as unconstitutional simply because it has a questionable past, it is important to closely examine not only the process of its formation but also the intent of those creating it. An analysis of this nature would expose Congress's true purpose in enacting this statute—to continue Medicare and Medicaid benefits *only* to Christian Scientists.

2. Actual Effect of 4454

The Supreme Court has often observed that a law's object can be found by analyzing its actual effect.[132] Section 4454's overall effect is that it "allows only *some* but not *all* religious facilities to circumvent medical oversight [which] demonstrates only that the statute's benefit—compensation for *nonmedical* services—is being selectively granted on the basis of an unconstitutional denomination preference."[133] This actual effect is similar to a school district law in *Grumet v. Pataki* (also known as *Kiryas Joel III*).[134] In this case, the New York Legislature tried (for the third time) to establish a public school district for the benefit of disabled children in the village of Kiryas Joel, a community that strictly adheres to Sat-

129. *Id.* at 856.
130. *Id.*
131. *Id.* at 874.
132. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).
133. Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 20.
134. Grumet v. Pataki, 720 N.E.2d 66 (N.Y. 1999).

mar Hasidism. This new law benefited only the village of Kiryas Joel and one other municipality.[135] The third version of the law was comprised of entirely secular language, but the court found that "[a]lthough chapter 390 sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect."[136] The court also held that the law was written "in such a way that permits the statute's benefits to flow almost exclusively to the religious sect it was plainly designed to aid."[137] This court's reasoning could undoubtedly be applied to Section 4454, which was clearly designed to aid only Christian Scientists.

In another attempt to justify the sect discrimination in Section 4454, the government claimed that the fact that Christian Science sanatoria are the only known institutions that meet the RNHCI definition is of no consequence because "[t]he Supreme Court has never struck down a sect-neutral accommodation of religion based on the number of sects that have sought to qualify."[138] Not only is this assertion not true,[139] but it simply overlooks the main point—even if another religious organization qualified for reimbursement under the RNHCI definition, Section 4454 would still be sect-specific because the definition allows some, but not all, religions to qualify.[140] The statute ignores that there are countless other groups who object to medical care and whose practices and beliefs do not include those set forth in 42 U.S.C. § 1395x(ss)(1).[141] These groups include "numerous fundamentalist protestant sects [that] believe in anointing with holy oil to the exclusion of medical care"[142] and groups such as the Hmong, whose traditional healing includes "animal sacrifice, shamanism, herbal treatment, trance, and string tying ceremonies."[143]

135. *Id.* at 70. *See also* Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1103 (8th Cir. 2000) (Lay, J., dissenting).

136. *Pataki*, 720 N.E.2d at 72 (citation omitted).

137. *Id.* at 73.

138. Brief for Federal Defendants-Appellees, *supra* note 13, at 27.

139. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703–05 (1994) (striking down a statute that defined school district boundaries to coincide with a religious enclave of Satmar Hasidim because it was the only religion implicated by the definition of the school district boundaries).

140. *See* Reply Brief of Appellant, *supra* note 105, at 1–5.

141. Brief of Appellant and Addendum, *supra* note 11, at 33.

142. *Id.* at 33–34 (These religious groups would not qualify because they "don't have religious beliefs that prohibit care by the medically trained, or prohibit medical diagnosis, or gather the sick into exclusive institutions that meet the definition.").

143. *Id.* at 34 (asserting that their use and administration of drugs would exclude the Hmong from receiving benefits under Section 4454).

3. Strict Scrutiny Analysis

Section 4454 discriminates among religious organizations not only in its text and legislative and administrative history, but also in its actual operation; therefore, the courts should adhere to the decision in *Larson v. Valente* and analyze this statute's constitutionality under the heightened standard of strict scrutiny. This standard requires a statute to be supported by a compelling governmental interest using closely tailored means.[144] When analyzed under this standard, Section 4454 cannot survive as constitutional because there is "no compelling governmental interest in providing special eligibility solely to certain religious organizations, or alternatively, because of Section 4454's exceedingly detailed and burdensome definition of eligible organizations, there is no close tailoring."[145] The courts that have addressed this issue erred in failing to apply strict scrutiny to Section 4454; however, assuming, arguendo, that *Larson* does not apply, the statute also fails to pass constitutional muster under the less rigorous *Lemon* test that has been previously applied.

B. Lemon *Analysis*

In *Lemon v. Kurtzman*,[146] the Supreme Court established a three-prong test to use when analyzing government action under the Establishment Clause. To survive a constitutional challenge under this test, the action must "1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive government entanglement with religion."[147] Section 4454 fails to satisfy each of these requirements and thus violates the Establishment Clause.

1. Secular Purpose

To fulfill the first prong of *Lemon*, a statute must have a secular legislative purpose.[148] Section 4454 falls short of satisfying this requirement for various reasons. The purpose of the statute can be seen through its legislative history, which blatantly reveals a purpose to "continue" providing benefits that were allowable to Christian Scientists under the original exemptions in the Medicare and Medicaid Acts.[149] The statute also confines its benefits to religious organizations and uses "specific religious theology

144. *See* Larson v. Valente, 456 U.S. 228, 248 (1982).
145. Brief of Appellant and Addendum, *supra* note 11, at 35.
146. 403 U.S. 602 (1971).
147. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1103 (8th Cir. 2000) (Lay, J., dissenting) (citing *Lemon*, 403 U.S. at 612–13).
148. *See id.*
149. *See id.*

and practices to define eligibility."[150] Even if the government's assertion that the statute is meant to benefit all religious objectors to medical care is accepted, the statute's purpose can still not be considered secular.[151]

Similarly, it is hard to identify the provision as secular when the record proves that Section 4454 allows for the payment of Christian Science nursing, which is entirely inseparable from the religious activity of Christian Science faith-healing.[152] Previously, when the Court has upheld aid to institutions performing "both secular and sectarian functions," it "has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones."[153] In fact, "[a] Christian Science nurse reads religious messages to the patient, encourages religious thought [,] . . . and reports to the practitioner the patient's state of mind about adherence to and practice of Christian Science, as well as physical appearance."[154] The nurses also work as a team with the Christian Science practitioners in assisting the patient.[155] Although Christian Science nurses' duties do include some secular activities such as caring for bodily needs, bandaging wounds, and helping patients to move about the sanatorium, Christian Science nursing cannot be said just to be "medical care without the medicine";[156] therefore, ensuring that government reimbursements are solely for secular medical care would be unrealistic and unmanageable.

In another attempt to classify Section 4454 as secular, the government points to the fact that the Supreme Court has often recognized that the accommodation of religion can sometimes constitute a permissive secular purpose.[157] It is important to note, however, that while this type of accommodation may be constitutionally permissive in some settings, "accommodation is not a principle without limits."[158] The government contends that Section 4454 properly accommodates religion because it "removes a special burden imposed by the Medicare and Medicaid Acts upon

150. Brief of Appellant and Addendum, *supra* note 11, at 36.

151. *See id.*

152. *See* Reply Brief of Appellant, *supra* note 105, at 24. *See also* Brief of Appellant and Addendum, *supra* note 11, at 47 ("Section 4454 . . . provides no assurance that the payments are solely for secular services.").

153. Brief of Appellant and Addendum, *supra* note 11, at 47. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Bowen v. Kendrick, 487 U.S. 589 (1988); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1975).

154. Brief of Appellant and Addendum, *supra* note 11, at 16.

155. *See id.*

156. *Id.* at 19.

157. *See* Brief for Federal Defendants-Appellees, *supra* note 13, at 29. *See also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994); Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987).

158. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1104 (8th Cir. 2000) (Lay, J., dissenting) (quoting *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 706).

persons who hold religious objections to medical care."[159] In supporting this assertion, the government bases its reasoning on the decision in *Sherbert v. Verner*,[160] which allowed unemployment benefits to be paid to a Sabbatarian who refused to work on Saturday.[161] The imposed burden in *Sherbert* that was relieved through accommodation is compared to the burden that allegedly would exist without Section 4454—the fact that individuals objecting to medical care would be burdened by being forced to choose between adhering to their religious beliefs and foregoing health care, or violating their beliefs and receiving care.[162] This reasoning is inherently flawed for numerous reasons.

First, the "burden" that the government claims (if even a burden at all) is not the kind of burden that the accommodation theory was designed to address.[163] The Medicare and Medicaid programs were formed so that the government could provide "the secular benefit of medical care"[164] through reimbursement for hospital expenses, post-hospital care, and other "reasonable and necessary [services] for the diagnosis or treatment of illness or injury."[165] The statutory framework allows reimbursement of personal nursing care only when it is associated with actual medical care.[166] Thus, "[w]ithout section 4454, religious objectors to medical care are denied reimbursement for nonmedical personal nursing care because they decline to accept the very benefit (medical care) for which any reimbursement of such care must be a part. This choice to decline a benefit is not a 'burden.'"[167] Accordingly, by enacting Section 4454, the government created a mechanism for the federal programs to directly subsidize religious practices "by providing compensation nobody else is entitled to receive—payment for *non*-medical services not rendered in connection with medical treatment but instead solely in connection with *religious* activities."[168] By confusing the significant difference between the distribution of benefits and a government exemption designed to alleviate a burden, "accommodations" of this nature are simply impermissible because there is no constitutionally significant burden on the religious believer.[169]

Second, a burden is not automatically imposed on religious believers simply because they pay taxes into a system that ultimately provides bene-

159. *CHILD II*, 212 F.3d at 1093.
160. 374 U.S. 398 (1963).
161. *Id.* at 399.
162. *See CHILD II*, 212 F.3d at 1093.
163. *Id.* at 1105 (Lay, J., dissenting).
164. *Id.*
165. 42 U.S.C. § 1395y(a)(1)(A) (2000). *See also CHILD II*, 212 F.3d at 1105 (Lay, J., dissenting).
166. *See* 42 U.S.C. § 1395y(a)(1)(A) (2000).
167. *CHILD II*, 212 F.3d at 1105 (Lay, J., dissenting).
168. Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 22–23.
169. *See CHILD II*, 212 F.3d at 1105 (Lay, J., dissenting); Petition for Writ of Certiorari, *supra* note 6, at 20.

fits for medical care. The Supreme Court has held that the payment of a tax into a general governmental scheme that supports a program the taxpayer objects to does not inevitably create a burden that triggers government accommodation.[170] For example, "[t]hose who do not own cars or ever travel on highways still must pay income taxes that are then used to maintain roads, and the same principle applies here."[171] Similarly, a religious believer is not necessarily burdened by basically choosing to decline a benefit that flows from the federal tax system.

Even if it is assumed that a proper burden is imposed on religious objectors, Section 4454 still crosses the line of constitutionally-permissible accommodations which "cannot benefit only particular religions or benefit all religions but not nonreligious organizations."[172] In this light, Section 4454 is much like a Connecticut statute that was struck down by the Supreme Court in *Estate of Thornton v. Caldor*.[173] The statute allowed Sabbatarian employees an absolute right not to work on their designated Sabbath without losing the right to their unemployment benefits.[174] In reasoning that the statute's "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," the Court held that the law violated the Establishment Clause.[175] Similarly, the benefit available under Section 4454 is only available to religious objectors (in practice, only to Christian Scientists) and thus violates the Court's proscription against favoring only certain religious organizations; therefore, even if a burden is found to exist, Section 4454 cannot be a permissible accommodation.

Because Section 4454 deliberately designates certain religious institutions as the sole eligible recipients of its benefits and because the section relieves no constitutionally significant burden on a believer's free exercise of religion, Section 4454 essentially fails to satisfy the secular purpose prong of the *Lemon* test.[176]

170. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 193 (1991); United States v. Lee, 455 U.S. 252, 260 (1981) ("[R]eligious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

171. Petition for Writ of Certiorari, *supra* note 6, at 22.

172. *CHILD II*, 212 F.3d at 1106 (Lay, J., dissenting).

173. 472 U.S. 703 (1985).

174. *Id.* at 705.

175. *Id.* at 710. *See also CHILD II*, 212 F.3d at 1106 (Lay, J., dissenting) ("The Court found the law impermissibly gave Sabbatarians privileges that were not available to others who had legitimate but non-religious reasons for missing weekend work.").

176. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

2. Primary Effect

A statute is impermissible if its primary effect is the advancement or inhibition of religion.[177] Courts have often interpreted this requirement to mean that, in order to withstand constitutional analysis, government action cannot have the effect of endorsing religion.[178] In an attempt to further clarify this requirement, the Supreme Court in *Texas Monthly v. Bullock*[179] focused on the fact that a statute must have sufficient breadth to include secular organizations to pass constitutional muster.[180] The plurality has been summarized as stating that:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.[181]

Thus, the Court made clear that government action is an unconstitutional endorsement of religion when it affords a benefit to one community that is not equally provided to others.[182] Since Section 4454 does not actually relieve a "burden" placed on religious groups in espousing or practicing their beliefs, which include abstaining from medical care, the statute places RNHCIs

> in the same favored position vis a vis nonreligious institutions that the Supreme Court held violated the Establishment Clause in *Texas Monthly*. . . . Because institutions, unlike individuals, have no entitlement to receive Medicare funds, § 4454 "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[183]

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177. *See id.*

178. *See* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) ("[W]hether the challenged governmental practice either has the purpose or effect of 'endorsing' religion . . . [is] a concern that has long had a place in our Establishment Clause jurisprudence.").

179. 489 U.S. 1 (1989).

180. *Id.* at 14 (finding that a state statute that exempted religious periodicals from sales and use taxes lacked sufficient breadth to pass scrutiny under the Establishment Clause).

181. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1106 (8th Cir. 2000) (Lay, J., dissenting) (quoting *Texas Monthly*, 489 U.S. at 14).

182. *See CHILD II*, 212 F.3d at 1106 (Lay, J., dissenting); *see also* Bd. Of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703–04 (1994).

183. Kong v. Scully, 341 F.3d 1132, 1144 (9th Cir. 2003) (McKeown, J., concurring) (quoting *Texas*

Section 4454 also violates the second prong of *Lemon*[184] by providing RNHCI patients with benefits for alleged conditions for which no non-RNHCI patient would be covered, without regard to the medical necessity and therapeutic value of the treatment being rendered.[185] Medicare expressly excludes reimbursement for "custodial care," which is defined as "any care that does not meet the requirements for coverage as [skilled nursing] care."[186] As previously stated, "skilled nursing" includes the types of services that are ordered by a physician and require the skills of technical or professional personnel as well as the supervision of such personnel or a physician.[187] Skilled nursing services generally do not include personal care services "such as [the] administration of routine oral medication, eye drops, ointments, changing dressings, and routine care of incontinent patients," and they are excluded from government reimbursement under the "custodial care" exception.[188] RNHCIs, on the other hand, provide only nonmedical nursing items and services and, as a whole, have "institutional religious beliefs against providing medical care, examination, diagnosis, prognosis, or treatment, and can have no affiliation with medical providers."[189] Under these definitions, it is clear that the services provided in an RNHCI cannot meet the requirements for regular skilled nursing services and thus are qualified simply as custodial care; therefore, this type of care violates the secular purpose prong and should be excluded from government reimbursement under the Medicare and Medicaid Acts.

The government does not contend that the care provided in RNHCIs does not fit within the definition of "custodial care," but instead defends this inconsistency by suggesting that Section 4454 only provides RNHCI patients with a "subset" of the financial support that most other program participants receive.[190] The government asserts that the purpose of the custodial care exclusion is to ensure that the programs "do not reimburse personal care services unless the patient has a condition that requires medical care" and that Section 4454 does not contradict this exclusion.[191] This suggestion that stand-alone nonmedical nursing can be a "subset" of medical care is illogical.[192] Judge Donald Lay summed up this discrepancy by stating: "RNHCIs and the care they provide are, by definition, 'non-medical.'

Monthly, 489 U.S. at 14).

184. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

185. *See* 42 U.S.C. § 1395f(a)(2)(B), (a)(3) (2000).

186. 42 C.F.R. § 411.15(g) (2008). *See also CHILD II*, 212 F.3d at 1107 (Lay, J., dissenting).

187. *See* 42 C.F.R. § 409.31 (2005).

188. *CHILD II*, 212 F.3d at 1107 (Lay, J., dissenting). *See also* 42 C.F.R. § 409.33 (2005).

189. *CHILD II*, 212 F.3d at 1107 (Lay, J., dissenting).

190. Brief for Federal Defendants-Appellees, *supra* note 13, at 37.

191. *Id.* at 38.

192. *See CHILD II*, 212 F.3d at 1108 (Lay, J., dissenting); Reply Brief of Appellant, *supra* note 105, at 20.

That which is defined as *not* being X cannot logically be a subset of X."[193] In essence, the religious objector wants to "unbundle medical and non-medical services in a way that would effectively rewrite the Medicare and Medicaid framework."[194] The special benefit of receiving reimbursement for nonmedical services as a stand-alone benefit that is allowed to religious objectors under Section 4454 has the ultimate effect of endorsing religion.

The government also fails in an attempt to justify Section 4454's secular purpose by claiming that the section "retains the substance of [the custodial care] requirement by allowing reimbursement only for persons who have a condition that would justify admission to a hospital or skilled nursing facility."[195] This argument is flawed for two main reasons. First, it ignores the facts that having a condition warranting hospitalization is not part of the custodial care exclusion and that this type of lenient standard is not available to any other Medicare beneficiaries. As a result, "RNHCI patients receive stand-alone nonmedical services and *are* reimbursed for them because of their specific religious beliefs; non-religious objectors and custodial care patients receive stand-alone nonmedical services and *are not* reimbursed for them because of their lack of specific religious beliefs."[196] Secondly, the government's argument overlooks the fact that any attempt to fit Christian Science practices into a structure designed for conventional medicine raises countless irreconcilable issues. For example, Christian Science principles forbid any medical diagnosis and examination, making it essentially impossible to make the determination that a patient is "suffering from an illness that would result in hospitalization" and is therefore entitled to reimbursement from the government.[197] This anomaly allows religious adherents access to government-subsidized benefits to which patients who rely on actual medical practices would not be entitled.[198] The granting of this special benefit to a single religious group has the primary effect of advancing and endorsing religion and thus violates the effects prong of *Lemon*.[199]

193. *CHILD II*, 212 F.3d at 1108 (Lay, J., dissenting).

194. Kong v. Scully, 341 F.3d 1132, 1143 (9th Cir. 2003) (McKeown, J., concurring). *See also CHILD II*, 212 F.3d at 1107–08 (Lay, J., dissenting) ("The entire nature of Medicare and Medicaid is to provide medical services in a manner managed by medical criteria and qualifications and governed by the medical profession.").

195. Brief for Federal Defendants-Appellees, *supra* note 13, at 38. *See also* 42 U.S.C. § 1395i-5(b)(2) (2000).

196. *CHILD II*, 212 F.3d at 1108 (Lay, J., dissenting).

197. *See* Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 27. *See also* 42 U.S.C. § 1395i-5(a)(2) (2000).

198. *See* Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 27.

199. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

3. Excessive Entanglement

The third and final prong of the *Lemon* test requires that a law not foster excessive entanglement of government and religion or delegate a governmental power to religious institutions.[200] "In essence, the prohibition on excessive entanglement minimally means 'a State may not delegate its civic authority to a group chosen according to a religious criterion.'"[201] The Court addressed this issue in *Larkin v. Grendel's Den, Inc.*,[202] when it deemed a Massachusetts statute that granted religious bodies veto power over applications for liquor licenses unconstitutional. The Court held that the statute brought about "a fusion of governmental and religious functions"[203] by delegating important, discretionary governmental powers to religious bodies and by lacking any effective guarantee that the delegated powers would be used exclusively for secular, neutral, and non-ideological purposes.[204] Likewise in *Kiryas Joel*, the Court struck down a statute that created a religious school and found that it "depart[ed] from [the] constitutional command [of the Establishment Clause] 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."[205]

Section 4454 unequivocally violates this established principle by replacing all outside review functions and coverage decisions with the discretionary authority of sanatorium personnel. The statute not only allows the initial decision regarding medical necessity to be made at the RNHCI, but also allows the initial review to be done by the RNHCI's own utilization review committee.[206] Although the final decision-making authority is vested in the Secretary of Health and Human Services, Section 4454 undisputedly "delegates coverage decisions to the RNHCI to a far greater extent than medical hospitals."[207] The established "review system" fails to eliminate the excessive entanglement issues that arise under Section 4454 for various reasons.

First, although the initial decision granting admission to patients at an RNHCI is supposed to be made on the basis of medical need for hospitali-

200. *Id.* at 613.

201. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1108 (8th Cir. 2000) (Lay, J., dissenting) (quoting Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696–97 (1994)).

202. 459 U.S. 116 (1982).

203. *Id.* at 126.

204. *Id.* at 125–27. *See also CHILD II*, 212 F.3d at 1108 (Lay, J., dissenting); Brief for Amicus Curiae the American Academy of Pediatrics, *supra* note 105, at 29–30.

205. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994).

206. *See* 42 U.S.C § 1395x(ss)(1)(H)(ii) (2000).

207. Brief of Appellant and Addendum, *supra* note 11, at 52.

zation, these decisions lack validity because they are made by a lay person who is religiously opposed to medical diagnosis, examination, and treatment in the first place. "[T]o ask an individual opposed to medical care on a religious basis to make a medical determination without regard to religion" is "beyond foolhardy."[208] Section 4454 explicitly prohibits admission decisions made by the medically trained using examination and diagnosis, which is the basis for all other hospital admission decisions used under Medicare and Medicaid.[209] This seems to overlook the fact that Medicare expressly excludes coverage for services that "are not reasonable and necessary for the diagnosis or treatment of illness or injury."[210] How, then, is a service's reasonableness and necessity for diagnosis or treatment effectively determined without any type of medical examination? By granting this broad decision-making power to RNHCIs, Section 4454, in reality, allows a religious institution to create its own standards for quality, performance, and federal reimbursement—the very essence of "a fusion of governmental and religious functions."[211] The vital importance of these standards is revealed through the ineffectiveness of Christian Science sanatoriums as healing mechanisms.[212] Human lives are being placed in the hands of Christian Science nurses and practitioners who rely solely on prayer for healing when cutting-edge, life-saving technology is most likely available minutes away.

To offset this almost unrestrained grant of power to RNHCIs, Congress designated "ultimate" review power to the Secretary of Health and Human Services (Secretary).[213] However, this review is inhibited through the statutory limitation that provides that the Secretary cannot require "any patient of [an RNHCI] to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient . . . objects thereto on religious grounds."[214] Although the provision allows the Secretary to require "sufficient information" regarding an individual's condition and to review such information to the extent necessary to determine coverage, the limitations on this review seem contradictory to the very purpose of this section of the provi-

208. *CHILD II*, 212 F.3d at 1109 (Lay, J., dissenting) (asserting that the "statutes here delegate the initial 'diagnosis' of medical status to untrained laypersons who deny the reality of medical need").

209. *See* 42 U.S.C. §§ 1395i-5, 1395x(ss)(1)(F) (2000). *See also* 42 U.S.C. §§ 1395x(e), 1320c (2000); Brief of Appellant and Addendum, *supra* note 11, at 52 (Other health care institutions reimbursed under these programs "rely on the utilization safeguards of PRO oversight, medical diagnosis, medical community standards, medical training, and state medical licensure.").

210. 42 U.S.C. § 1395y(a)(1)(A) (2000).

211. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982) (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963)).

212. *See supra* text accompanying notes 31–38.

213. 42 U.S.C. § 1395y(a)(9) (2000).

214. Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle (*CHILD II*), 212 F.3d 1084, 1108 (8th Cir. 2000) (Lay, J., dissenting) (quoting 42 U.S.C. § 1395x(ss)(3)(A)(i) (2000)).

sion. If no medical examination is allowed, how then can the Secretary decide that such treatment is necessary? This question remains unanswered even by the Secretary. In the Health Care Financing Administration's (HCFA's) Rules and Regulations for Medicaid and Medicare Programs, the Secretary stated:

> One key challenge is to identify a system whose classification mechanism can be adapted to use the information available in the RNHCI setting, i.e., functional status and resource use but not diagnosis or other medical information. At this point, we are not sure how that can be achieved fully in any of these settings.[215]

The effectiveness of this standardless, subjective review is slighted even more given the context of the provision's enactment, including "(1) the historical preference for the utilization decisions of the sanatoria under sectarian standards of the [HCFA], (2) Congress' stated intention to continue benefit payments at the same level as the payments under [HCFA] standards, and (3) the Secretary's continuation of RNHCI funding under the Christian Science sanatorium methodology."[216] Ultimately, "[t]he delegation by Section 4454 to the RNHCI of what are governmental functions of utilization standards, peer review oversight, standards of care, and personnel qualification is not saved by saying that the Secretary has the final standardless discretion to pay or deny the claim or impose other requirements."[217] In effect and application, Section 4454 fails to satisfy the third prong of *Lemon* by fostering excessive entanglement of government and religion in violation of the Establishment Clause. As a result, Section 4454 fails to fulfill any of the requirements established by the Supreme Court in determining constitutionality under the *Lemon* test; therefore, Section 4454 cannot survive a constitutional challenge under the Establishment Clause.

CONCLUSION

Americans have access to some of the greatest technological medical advancements in the world. The government is attempting, albeit somewhat inefficiently, to do its part in ensuring that all Americans are afforded full access through programs such as Medicare and Medicaid. Although an ever-increasing amount of government spending is designated for these programs, the programs' resources are quickly diminishing, and many families still struggle with the ability to obtain care.[218] The impor-

215. Medicare and Medicaid Programs; Religious Nonmedical Health Care Institutions and Advance Directives, 64 Fed. Reg. 67,028; 67,038 (Nov. 30, 1999) (to be codified at 42 C.F.R. pt. 403).
216. Brief of Appellant and Addendum, *supra* note 11, at 53.
217. Reply Brief of Appellant, *supra* note 105, at 23.
218. *See* The Henry J. Kaiser Family Foundation, *Medicare Spending and Financing Fact Sheet*,

tance of this phenomenon and the intimate way it touches every American can be seen through the heated debates that have arisen across the country regarding health care and the government's role in ensuring such care. Given the soaring cost estimates of the most recently proposed government plans, the government, first and foremost, must do everything in its power to guarantee that no dollar allotted to these programs is wasted and that all Americans receive the best, most effective medicine available. One step in accomplishing this feat is to reexamine the constitutionality of Section 4454 of the Balanced Budget Act of 1997. By addressing this issue, the government (Supreme Court or Congress) could not only help alleviate pressing health care issues, but also remedy a violation of the Establishment Clause.[219]

Section 4454 facially discriminates among religious sects in its text, legislative history, and actual operation by directing government funding and benefits to religious organizations that essentially determine their own eligibility requirements for receiving benefits. The statute allows some religious facilities to elude the medical oversight that is normally required and to obtain reimbursement for nonmedical custodial services; therefore, this statute should be analyzed under strict scrutiny which requires a compelling governmental interest and closely tailored means. Section 4454 cannot survive this standard because no compelling interest exists in providing special benefits to adherents of a particular religious sect; therefore, Section 4454 is unconstitutional under the Establishment Clause.

Even when analyzed under the less stringent *Lemon* test, Section 4454 cannot pass constitutional demands. First, the section does not have a secular purpose—it was intentionally designed to elect certain religious institutions as the sole eligible recipients of its benefits, and it does not relieve any constitutionally significant burden on a believer's free exercise of religion. Second, the section has a primary effect that advances religion because it grants RNHCI patients benefits for alleged conditions for which no non-RNHCI patient would be covered, without regard to medical necessity and therapeutic value of the treatment being provided. Finally, Section 4454 violates the excessive entanglement prong by delegating the significant governmental functions of utilization standards, peer review oversight, standards of care, and personnel qualification to the discretionary authority of the religious institutions themselves. As seen when examining the Medicare and Medicaid provisions' form and effect, Section 4454 violates the fundamental principle underlying the First Amendment's Establishment Clause—government neutrality toward religion—and merely

http://www.kff.org/medicare/upload/7305_03.pdf (last visited Nov. 3, 2009).

219. *See* Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 LAW & CONTEMP. PROBS. 359, 377 (2000) (stating that, as of 1999, Christian Scientists had reportedly collected fifty million dollars through federal Medicare and Medicaid payments).

serves to reinstate the unconstitutional provisions struck down in *CHILD I*;[220] therefore, it is imperative that this issue be addressed by the Supreme Court to bring this statute within constitutional bounds and prevent further unnecessary government spending.

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220. 938 F. Supp. 1466 (D. Minn. 1996).