No. _____

IN THE
Supreme Court of the United States

BAYOU SHORES SNF, LLC,
Petitioner,

v.

FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Medicare Act provides that "[n]o action against the United States, the [Secretary of Health and Human Services], or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. 405(h).

The plain language of this provision does not include a bar on actions brought under Section 1334 of Title 28, which provides "exclusive jurisdiction" to district courts over bankruptcy cases. Nevertheless, in this case, the Eleventh Circuit held that Section 405(h) bars district and bankruptcy courts from hearing Medicare-related claims. In contrast, the Ninth Circuit and numerous bankruptcy courts have held that Section 405(h) does not bar district and bankruptcy courts from exercising jurisdiction over claims arising under the Medicare Act. Relatedly, the lower courts are divided over whether a debtor must exhaust administrative remedies pursuant to Section 405(h) before pursuing the relief available to it under the Bankruptcy Code.

The questions presented are:

1. Does 42 U.S.C. 405(h) bar a district court from exercising jurisdiction over claims arising under the Medicare Act?

2. Does 42 U.S.C. 405(h) require a debtor to exhaust administrative remedies prior to pursuing the relief available to debtors under the Bankruptcy Code?

CORPORATE DISCLOSURE STATEMENT

Bayou Shores SNF, LLC is a privately held corporation. No parent corporation or any publicly held corporation owns or has ever owned any stock in Bayou Shores.

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PETITION FOR WRIT OF CERTIORARI

Bayou Shores SNF, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 828 F.3d 1297. Pet. App. 1a-71a. The order of the district court granting a stay pending appeal is unreported. Pet. App. 86a-92a. The order of the district court on appeal from the bankruptcy court is reported at 533 B.R. 337. Pet. App. 72a-85a. The orders of the bankruptcy court confirming Petitioner's plan of reorganization are reported at 525 B.R. 160, Pet. App. 95a-124a, and unreported, Pet. App. 125a-145a.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2016. A petition for rehearing was denied on October 3, 2016. Pet. App. 94a. Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 2, 2017. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case primarily involves 28 U.S.C. 1334 and 42 U.S.C. 405(g) and (h). These provisions are reproduced in the appendix to this petition. Pet. App. 146a-150a.

STATEMENT OF THE CASE

This case presents an opportunity to resolve two recurring and important questions that have divided the lower courts. Both questions concern the relationship

between the federal schemes that apply to bankruptcy cases and to claims arising under the Medicare Act.

The Judicial Code provides comprehensive jurisdiction to district courts and bankruptcy courts to deal with all matters connected with a debtor's estate. The courts possess "exclusive jurisdiction" over "all cases under title 11" and "all property of the estate." 28 U.S.C. 1334(a), (e)(1).

The Medicare Act authorizes administrative law judges to hear appeals of claims arising under the statute. One such type of appeal may arise when the government seeks to terminate one of its agreements with a health care provider. In channeling such appeals through administrative review, Section 405(h) of the Medicare Act states that no action shall be brought "under section 1331 or 1346 of Title 28" to recover on any claim arising under the statute. 42 U.S.C. 405(h). Notably absent from Section 405(h) is any bar on actions brought under Section 1334—the statutory basis for district courts' "exclusive jurisdiction" over bankruptcy cases. The significance of this omission has sharply divided the courts of appeals and forms the basis for this Petition.

Petitioner Bayou Shores is a skilled nursing facility that cared for severely ill patients who were difficult to place due to the type and severity of their illness. Pet. App. 96a. Most of its patients had mental illnesses and nearly all were indigent, relying upon Medicaid or Medicare to pay for their care. Pet. App. 97a. In 2014, Bayou Shores received three negative findings in surveys performed by the Agency for Healthcare Administration for the State of Florida ("AHCA"),

which recommended that the Department of Health and Human Services ("HHS") terminate Bayou Shores' provider agreements. Pet. App. 98a-99a. Bayou Shores immediately acted to cure the deficiencies, and faced with a termination threat, timely sought administrative review. Pet. App. 100a-102a. To avoid the immediate cessation of its business while administrative review was underway, Bayou Shores filed for bankruptcy. Pet. App. 103a.

The bankruptcy court, convinced that it possessed jurisdiction over the provider agreements as assets of the estate, presided over Bayou Shores' reorganization. Pet. App. 105a-110a. It enforced the automatic stay to prevent the termination of the provider agreements. Pet. App. 103a-104a. It appointed an independent patient care ombudsman to oversee patient welfare. Pet. App. 115a. It determined that Bayou Shores had provided adequate assurances of future performance under the provider agreements and authorized Bayou Shores' assumption of those agreements. Pet. App. 113a-116a. And it confirmed Bayou Shores' plan of reorganization. Pet. App. 125a-145a.

The district court reversed the confirmation orders, finding that notwithstanding the bankruptcy court's comprehensive jurisdiction over property of the estate, the Medicare Act stripped the court of jurisdiction over Bayou Shores' provider agreements. Pet. App. 78a-84a.

Bayou Shores timely appealed the district court's order to the Eleventh Circuit and moved to stay the termination of its provider agreements pending appeal. Pet. App. 86a-92a. The district court granted a stay, stating that it would be "draconian" to force patients and

their families to move from the facility, disrupting their "dignity based on a jurisdictional debate that has resulted in significant contrary opinions among the circuit courts and the lower courts." Pet. App. 91a.

The Eleventh Circuit affirmed. Acknowledging that "lower courts have split, with some assuming jurisdiction, and others deciding jurisdiction was barred," Pet. App. 30a (footnote omitted), the Eleventh Circuit decided to "align [itself] with the Seventh, Eighth, and Third Circuits and hold that § 405(h) bars § 1334 jurisdiction over claims that 'arise under [the Medicare Act],'" Pet. App. 34a (alteration in original). Additionally, the Eleventh Circuit held that Bayou Shores' claims were properly dismissed because they had not been administratively exhausted before Bayou Shores petitioned for bankruptcy. Pet. App. 60a-62a. Accordingly, the Eleventh Circuit held that the bankruptcy court erred in exercising subject-matter jurisdiction over Bayou Shores' provider agreements.

Because the Eleventh Circuit's decision squarely conflicts with the decisions of other circuits on two important questions of federal law, and because this case is an optimal vehicle through which to address those closely-related questions, the petition for a writ of certiorari should be granted.

A. The Statutory Scheme Governing Bankruptcy

1. Article I of the Constitution assigns to Congress the "Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Pursuant to that authority, Congress has granted federal courts "original and

exclusive jurisdiction of all cases under title 11." 28 U.S.C. 1334(a).

A "critical feature[]" of every bankruptcy proceeding is the bankruptcy court's "exercise of exclusive jurisdiction over all the debtor's property." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363-64 (2006); *see also* 28 U.S.C. 1334(e)(1). Congress provided this comprehensive grant of jurisdiction "to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982) (citing H.R. Rep. No. 95-595, at 43-48 (1977); S. Rep. No. 95-989, at 17 (1978)).

The bankruptcy system includes several other features in service of those goals. As relevant here, the automatic stay prohibits commencement or continuation of certain actions against the debtor, 11 U.S.C. 362(a); a debtor may assume its executory contracts after curing any default, 11 U.S.C. 365; bankruptcy courts may issue all relief "necessary or appropriate" to carry out the bankruptcy process, 11 U.S.C. 105(a); and bankruptcy courts may confirm a debtor's plan of reorganization, vesting all property of the estate in the debtor, free and clear of all claims, 11 U.S.C. 1141. In 11 U.S.C. 106, Congress abrogated the federal government's sovereign immunity with respect to the foregoing provisions, thereby submitting the United States to the jurisdiction of the bankruptcy courts.

2. In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which, among other things incorporated specific provisions into the Bankruptcy Code relating to health

care businesses, including skilled nursing facilities. Among other things, it granted a special administrative priority to the winding-up of such businesses, 11 U.S.C. 503(b)(8), and authorized the compensation of a patient care ombudsman from property of the estate, 11 U.S.C. 330(a). Congress also provided that, under circumstances not present here, HHS need not seek relief from the automatic stay to exclude a bankrupt health care business from participation in Medicare.[1] 42 U.S.C. 1320a-7(a) & (b).

B. The Statutory And Regulatory Schemes Governing Participation In The Medicare And Medicaid Programs.

1. Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U.S.C. 1395 et seq., is commonly known as the Medicare Act. To participate in Medicare and Medicaid and receive payment for covered services, a health care provider must enter into a "provider agreement" with HHS. 42 U.S.C. 1395cc, 1396a(a)(27); 42 C.F.R. 442.10-442.42, 489.1-489.29.

Federal and state officials may terminate a provider agreement if they determine that the provider is not complying with its terms or other legal requirements. *See* 42 U.S.C. 1396i-3(h)(2); 42 U.S.C. 1396r(h)(2); 42 C.F.R. 488.406, 488.408(e). Providers

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[1] Exclusion is distinct from termination. *See* Nathaniel M. Lackman & Keith C. Owens, *Health Care Providers and the Automatic Stay: Is Medicare Termination Different than Exclusion?*, 25-9 Am. Bankr. Inst. J. 32 (2006), http://www.abi.org/abi-journal/health-care-providers-and-the-automatic-stay-is-medicare-termination-different-than.

must be given written notice of any deficiencies noted in the state survey, a statement of any remedies imposed, and a statement of the facility's right to appeal. 42 C.F.R. 488.330(c), 488.402(f). If a sanction is imposed, the provider may in some instances contest the underlying survey findings through a formal evidentiary hearing before an Administrative Law Judge. 42 C.F.R. 498.3(b), 498.5; 42 C.F.R. 431.153(i). Skilled nursing facilities like Bayou Shores may also appeal an adverse hearing decision to HHS's Departmental Appeals Board. 42 C.F.R. 498.80, 42 C.F.R. 431.153(g).

2. The Medicare Act limits a party's ability to pursue claims arising under the Act in federal court. In 42 U.S.C. 405(g), as incorporated into Medicare by 42 U.S.C. 1395ii, Congress provided for judicial review following a final decision by the agency. Congress then limited review of the agency's decision as follows:

> The findings and decision of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28, to recover on any claim arising under this subchapter.

42 U.S.C. 405(h).

Section 405 was enacted in 1939 as part of the Social Security Act. As originally drafted, it barred actions brought "under section 41 of Title 28 to recover on any claim arising under sections 401-09 of this chapter." 42 U.S.C. 405(h) (1939). At the time, "§ 41 contained all of that title's grants of jurisdiction to United States district courts," *Weinberger v. Salfi*, 422 U.S. 749, 756 n.3 (1975), including "all matters and proceedings in bankruptcy," 28 U.S.C. 41(19) (1934).

In 1948, however, Congress revised the U.S. Code, extracting the various jurisdictional grants from Section 41 and re-codifying some of them as 28 U.S.C. 1331 to 1348, 1350 to 1357, 1359, 1397, 2361, 2401, and 2402. Pub. L. No. 80-773, 62 Stat. 869, 930–36, 970-71 (1948); 28 U.S.C. 1331–1348, 1350–1357, 1359, 1397, 2361, 2401-2402 (1952). When Congress rewrote Section 41, it did not update Section 405(h), which continued to refer to then-defunct 28 U.S.C. 41.

This Court noted this flaw in its opinion in *Salfi*, 422 U.S. at 756 n.3. The next year, the Office of Law Revision Counsel[2] removed the reference to Section 41 and replaced it with references to 28 U.S.C. 1331 and 1346—the jurisdictional grants for federal questions and suits against the United States, respectively. As one court has surmised, "Clearly the Office of Law Revision Counsel believed that these grants of jurisdiction were the only ones relevant to SSA or Medicare Act claims." *Nurses' Registry & Home Health Care v. Burwell (In re*

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[2] The Office of the Law Revision Counsel is a body within the U.S. House of Representatives whose purpose is to codify the laws of the U.S. and publish updates to the U.S. Code. *See* 2 U.S.C. 285 et seq.

Nurses' Registry & Home Health Corp.), 533 B.R. 590, 594 (Bankr. E.D. Ky. 2015). A codification note acknowledged that the amended statute no longer referenced all of the jurisdictional provisions that formerly comprised Section 41. *See* 42 U.S.C.A. 405 (West 1982).

Eight years later, Congress enacted the Law Revision Counsel's changes. *See* Deficit Reduction Act of 1984 ("DRA"), Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 494, 1162 ("Section 205(h) of such Act is amended by striking out 'section 24 of the Judicial Code of the United States' and inserting in lieu thereof 'section 1331 or 1346 of title 28, United States Code . . . .'"). In enacting the DRA, Congress stated that its amendments should not "be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date." *Id.*, § 2664(b), 98 Stat. at 1171-72.

3. The omission of any mention of Section 1334—the federal subject-matter statute governing bankruptcy claims—from Section 405(h) has become increasingly relevant as the administrative process under the Medicare Act has proven impractical for health care companies facing a financial crisis upon termination of their provider agreements by the government. While facilities terminated from Medicare theoretically have access to expedited administrative review, 42 U.S.C. 1395cc(h)(1)(B), in reality this process is not available to a health care provider facing imminent insolvency. Severe backlogs prevent appeals from being heard in a timely manner. In 2015, the Office of Medicare Hearings and Appeals ("OMHA") reported that the average

adjudication took 572 days, and that this time frame "will continue to increase until receipt levels and adjudication capacity are brought into balance." *See Creating a More Efficient and Level Playing Field: Audit and Appeals Issues in Medicare: Hearing Before the S. Comm. On Finance*, 114th Cong. 38 (2015) (prepared statement of Nancy J. Griswold, Chief A.L.J., OMHA). Indeed, "[d]ue to record receipt levels," OMHA projected in 2015 a 20-24 week delay just to *docket* a new appeal. *See* OMHA, *Adjudication Timeframes*, https://wayback.archive-it.org/3909/20160811195818/http://www.hhs.gov/omha/important_notice_regarding_adjudication_timeframes.html.

Making these delays more problematic, CMS can institute recoupment against a provider's ongoing payments while the provider's appeal is pending. This loss of revenue creates a very high risk of insolvency. *See* Samuel R. Maizel & Michael B. Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply to Bankruptcy Courts*, 32 Emory Bankr. Dev. J. 19, 29 (2015).

Against this backdrop, health care facilities have increasingly resorted to the bankruptcy courts, where they can resolve any outstanding defaults before assuming their provider agreements as part of a plan of reorganization.

C. Statement of Facts and Procedural History

In 2014, Bayou Shores received three negative findings in surveys performed by the Agency for Healthcare Administration for the State of Florida

("AHCA"), which recommended to HHS termination of Bayou Shores' provider agreements. Pet. App. 98a-99a.

Bayou Shores timely sought administrative review. Pet. App. 102a. To avoid the immediate cessation of its business while administrative review was underway, Bayou Shores filed a chapter 11 case, invoking the district court's jurisdiction pursuant to 28 U.S.C. 1334 and the protection of the automatic stay of 11 U.S.C. 362(a) afforded to property of the estate, as defined in 11 U.S.C. 541(a). Pet. App. 103a-104a. The district court automatically referred the case to the bankruptcy court pursuant to 28 U.S.C. 157(a).

Seven days later, and without requesting relief from the stay, AHCA personnel stormed Bayou Shores' facility, dropping letters at patient bedsides informing them that their Medicaid and Medicare benefits would be terminated and that they were welcome to remain at Bayou Shores but would have to pay for their own care. Pet. App. 119a.

Bayou Shores initially sought emergency injunctive relief from the U.S. District Court for the Middle District of Florida to prevent termination of its provider agreements while it pursued administrative remedies. Pet. App. 102a. On motion of HHS, the district court dismissed Bayou Shores' complaint for lack of subject-matter jurisdiction pursuant to 42 U.S.C. 405(h). Pet. App. 102a-103a.

Bayou Shores then sought emergency relief from the bankruptcy court. Pet. App. 103a. Bayou Shores' motion requested a finding that the automatic stay applied and/or a temporary injunction to protect the flow

of funds to the patients and to allow Bayou Shores to remain open while it pursued administrative remedies. Pet. App. 103a-104a. The bankruptcy court reasoned that it had jurisdiction pursuant to 28 U.S.C. 1334(a) because the provider agreements were property of the estate. Pet. App. 8a. After taking evidence and testimony regarding the termination process, the bankruptcy court concluded that AHCA was acting in its pecuniary interests in electing to terminate patient benefits, and not acting to protect patient health, safety and welfare, so the automatic stay applied. Pet. App. 119a. Further, after receiving testimony on the potential harm to Bayou Shores' patients if they were forcibly removed, the bankruptcy court temporarily enjoined AHCA from removing patients and terminating their benefits while Bayou Shores proceeded through the administrative process. Pet. App. 9a.

AHCA and HHS appealed this decision to the district court (hereinafter the "First Appeals") but did not seek a stay pending appeal. Pet. App. 72a-73a. Meanwhile, the bankruptcy court appointed an independent patient care ombudsman pursuant to 11 U.S.C. 333 to oversee patient welfare. Pet. App. 115a. The ombudsman filed two reports concluding Bayou Shores' patients were well cared-for and content. Pet. App. 115a-116a.

Bayou Shores filed a plan of reorganization, which the bankruptcy court confirmed. Pet. App. 95a-124a. The bankruptcy court again stated its belief that jurisdiction was proper under 28 U.S.C. 1334(a), and rejected HHS and AHCA's argument that 42 U.S.C.

405(h) stripped the bankruptcy court of jurisdiction. Pet. App. 105a-110a. The bankruptcy court reasoned that the plain language of Section 405(h), which refers only to 28 U.S.C 1331 and 1346, did not prevent the bankruptcy court from exercising jurisdiction over the assumption of the provider agreements. *Id.* Moreover, because Bayou Shores appeared to have remedied the cited deficiencies, the bankruptcy court found that Bayou Shores had provided adequate assurances of future performance under the provider agreements, and thus was eligible to assume them under 11 U.S.C. 365(b)(1)(C). Pet. App. 110a-116a. Finding the remainder of the statutory requirements fulfilled, the bankruptcy court confirmed Bayou Shores' plan. Pet. App. 125a-145a.

HHS and AHCA appealed the orders confirming the plan to the district court, which upheld the Secretary's jurisdictional challenge and reversed the confirmation orders with respect to the assumption of Bayou Shores' provider agreements. Pet. App. 72a-85a.

Bayou Shores timely appealed the district court's order to the Eleventh Circuit, which affirmed. Pet. App. 1a-71a. Acknowledging that "lower courts have split, with some assuming jurisdiction, and others deciding jurisdiction was barred," Pet. App. 30a (footnote omitted), the Eleventh Circuit decided to "align [itself] with the Seventh, Eighth, and Third Circuits and hold that § 405(h) bars § 1334 jurisdiction over claims that 'arise under [the Medicare Act],'" Pet. App. 34a (alteration in original). Additionally, the Eleventh Circuit held that Bayou Shores failed to exhaust its administrative remedies before pursuing relief from the

bankruptcy court. Pet. App. 60a-62a. Accordingly, the Eleventh Circuit held that the bankruptcy court erred when it exercised subject-matter jurisdiction over Bayou Shores' provider agreements.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision in this case deepens an existing split over whether Section 405(h) bars a bankruptcy court from exercising jurisdiction over claims arising under the Medicare Act. It also conflicts with the decisions of at least two other courts of appeals and multiple bankruptcy courts on the question of whether Section 405(h) requires a debtor to exhaust administrative remedies prior to pursuing the relief available to debtors under the Bankruptcy Code.

These conflicts create intolerable discord on important issues of bankruptcy law, Medicare law, federal jurisdiction, and statutory interpretation—and they cannot be resolved without this Court's review. Because this case presents an optimal vehicle for addressing and resolving both conflicts, the petition should be granted.

A. The Eleventh Circuit's Decision Deepened Two Acknowledged Splits About The Meaning Of 42 U.S.C. 405(h).

1. The Split On Section 405(h)'s Jurisdictional Bar

As the Eleventh Circuit recognized, the "[c]ourts [are] split over the application of § 405(h)" to suits arising under Section 1334, which grants district courts "exclusive" jurisdiction over bankruptcy cases. Pet.

App. 26a; 28 U.S.C. 1334; *accord Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757, 759 (1st Cir. 2016) (recognizing that "there is a circuit split on the lack-of-jurisdiction holding pertaining to § 405(h)"). The "Supreme Court has yet to speak on this precise issue," Pet. App. 21a, but the "arguments for and against jurisdiction have been well developed by circuits ruling in favor of each." *U.S. Dep't of Health & Human Servs. v. James*, 256 B.R. 479, 482 (W.D. Ky. 2000).

1. ***Ninth Circuit.*** On one side of the split is the Ninth Circuit, which held in *Sullivan v. Town & Country Home Nursing Services, Inc. (In re Town & Country Home Nursing Services, Inc.)*, 963 F.2d 1146 (9th Cir. 1991), that "Section 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334." *Id.* at 1155. The court held that the omission of Section 1334 makes sense because it "allows a single court to preside over all of the affairs of the estate," pursuant to Section 1334's exclusive and "broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate." *Id.*

Accordingly, the Ninth Circuit found that a plain-text reading of Section 405(h) in the context of bankruptcy cases "promotes a congressionally-endorsed objective: the efficient and expeditious resolution of all matters connected to the bankruptcy estate." *Id.* (quotation marks omitted).

The Ninth Circuit's ruling in *Town & Country* is firmly settled in that circuit. In *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1141 n.11 (9th Cir. 2010), the Ninth Circuit re-affirmed *Town & Country*'s holding

for bankruptcy jurisdiction, and the court subsequently denied a petition for rehearing *en banc*. *See also* Pet. App. 29a-30a (discussing *Do Sung Uhm*). Thus, the Ninth Circuit's law on this issue will persist unless this Court intervenes.

2. ***Eleventh Circuit.*** The Eleventh Circuit in this case expressly disagreed with the Ninth Circuit, holding that Section 405(h) bars bankruptcy jurisdiction under Section 1334, even though 1334 is not listed. Pet. App. 52a ("[T]his Court is constrained to disagree with the Ninth Circuit's *Town & Country* opinion….").

The Eleventh Circuit aligned itself with the Third, Seventh, and Eighth Circuits. Pet. App. 34a. In the view of these circuits, the fact that Section 405(h) mentions only 28 U.S.C. 1331 and 1346 is the result of a codification error. Contrary to its plain language, they believe the statute was intended to include every grant of jurisdiction that was listed under the *former* version of Section 405(h)—a list that would include dozens of additional sources of jurisdiction not listed in the current version, including the exclusive jurisdiction given to district courts over the debtor's estate. These other circuits do not expressly discuss bankruptcy jurisdiction under Section 1334, but hold that the omission of Section 1332—the statutory basis for diversity jurisdiction—was a scrivener's error susceptible to judicial correction. In this case, the Eleventh Circuit relied on the reasoning of these decisions, creating a circuit split on the jurisdiction of bankruptcy courts to entertain Medicare-related claims. *See* Pet. App. 26a-31a.

Third Circuit. In *Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 346-47

(3d Cir. 2012), the Third Circuit "agree[d] that the language [of § 405(h)] may at first appear to bar only jurisdiction under §§ 1331 or 1346." *Id.* However, the court concluded that the prior version of Section 405(h) was much more expansive, and that Congress's subsequent listing of only Sections 1331 and 1346 was not "intended to make any substantive change." *Id.* Accordingly, the court held that Section 405(h) "continues to bar virtually all grants of jurisdiction under Title 28," including 28 U.S.C. 1332, which—like Section 1334—is not mentioned in Section 405(h). *Id.*

Seventh Circuit. In *Bodimetric Health Services, Inc. v. Aetna Life & Casualty*, 903 F.2d 480, 488-90 (7th Cir. 1990), the Seventh Circuit likewise addressed whether Section 405(h) barred suits arising just under Sections 1331 and 1346—or instead also bars suits arising under the unlisted diversity provision, Section 1332. *Bodimetric* acknowledged that Section 405(h) "on its face" would permit all actions except those brought under Sections 1331 or 1346. *Id.* at 488. However, the court noted that "[u]pon its *original* enactment, section 405(h) barred all actions brought pursuant to 28 U.S.C. section 41, which, in turn, contained virtually all of the grants of jurisdiction to the United States district courts under Title 28." *Id.* (emphasis in original; alterations and quotation marks omitted). The Seventh Circuit concluded that the subsequent change in language to list just Sections 1331 and 1346 was a mere "technical correction," and that Section 405(h)'s language should be judicially corrected to preclude judicial review of all the grants of jurisdiction listed in the former 28 U.S.C. 41, *id.* at 489, which included not only diversity cases under

Section 1332 (as relevant in *Bodimetric*) but also bankruptcy cases under Section 1334, *see id.* at 488.

Eighth Circuit. In *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998), another diversity case, the Eighth Circuit likewise held that "despite its literal wording," Section 405(h) should be read as barring all cases whose jurisdiction would previously have been included under 28 U.S.C. 41. *Id.* at 1004.[3]

3. The split on this issue has also deeply divided bankruptcy and district courts across the country. Many have adopted the Ninth Circuit's position that Sections 405(h) and 1334 should be read according to their unambiguous terms and that courts should not "correct" Section 405(h) to incorporate sources of jurisdiction that Congress did not list. *See, e.g.*, *Nurses' Registry*, 533 B.R. at 593–97; *Slater Health Ctr., Inc. v. United States (In re Slater Health Ctr., Inc.)*, 294 B.R. 423, 427-28 (Bankr. D.R.I. 2003), *vacated in part*, 306 B.R. 20 (D.R.I. 2004), *aff'd*, 398 F.3d 98 (1st Cir. 2005); *In re Healthback, L.L.C.*, 226 B.R. 464, 472–74 (Bankr. W.D. Okla. 1998), *vacated*, No. 97–22616–BH, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999).

Other bankruptcy and district courts have adopted the position espoused by the Eleventh Circuit—and held

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[3] The Sixth Circuit has suggested, although not squarely held, that Section 405(h)'s jurisdictional bar extends beyond just Sections 1331 and 1346. *See BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 n.11 (6th Cir. 2005) ("[I]t is arguable, as a matter of statutory construction, that jurisdiction under 28 U.S.C. § 1361 is precluded by the third sentence of § 405(h).").

that Section 405(h)'s jurisdictional bar applies to bankruptcy cases. *See, e.g.*, *Excel Home Care, Inc. v. U.S. Dep't of Health & Human Servs.*, 316 B.R. 565, 572-74 (D. Mass. 2004); *House of Mercy, Inc. v. Ctrs. For Medicare & Medicaid Servs. (In re House of Mercy, Inc.)*, 353 B.R. 867, 869-73 (Bankr. W.D. La. 2006); *In re Fluellen*, No. 05-40336 (ALG), 2006 WL 687160, at *1 (Bankr. S.D.N.Y. Mar. 13, 2006); *James*, 256 B.R. at 481-82.

4. As commentators have noted, the federal courts "have debated this issue for more than thirty years and are not in agreement on the outcome." Maizel & Potere, 32 Emory Bankr. Dev. J. at 20. While the meaning of Section 405(h) has divided courts for years, there is now a clear circuit split as to its significance for bankruptcy cases. It is time for this Court to resolve this important question of federal jurisdiction.

2. The Split On Section 405's Exhaustion Requirement

The second question presented is intricately linked both practically and analytically with the first. As the Ninth Circuit has noted, the lower courts also "have divided on th[e] question" of whether Section 405—assuming that it does not flatly bar a suit under Section 1334—nonetheless still requires exhaustion of administrative remedies before the bankruptcy court can exercise jurisdiction. *Town & Country*, 963 F.2d at 1154. Lower courts too acknowledge that the courts "have split on this issue." *James*, 256 B.R. at 481-82 (citing the Ninth Circuit and Third Circuit decisions discussed *infra*).

Moreover, the split developed after this Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975). Though *Salfi* held that administrative exhaustion was required for suits brought under Section 405 seeking review of a Medicare decision, the Court did not address whether exhaustion was required where the suit was instead brought pursuant to the "exclusive" and independent authority provided to bankruptcy courts under Section 1334 to administer a debtor's estate, as is the case here. That is the issue on which the lower courts have split.

1. ***Ninth Circuit.*** The Ninth Circuit has held that a bankruptcy court can assert jurisdiction over Medicare-related claims without requiring exhaustion under Section 405. *Town & Country*, 963 F.2d at 1154-55. *Town & Country* reasoned that "'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'" *Id.* (citation omitted). The debtor in *Town & Country*, like the Petitioner here, was not seeking "judicial review" of a Medicare decision under Section 405; rather, its claims were brought pursuant to Section 1334, which independently grants the bankruptcy court "exclusive" jurisdiction to administer an estate. 28 U.S.C. 1334. The Ninth Circuit found that the exhaustion requirements of Section 405 therefore did not apply.

Third Circuit. Directly relying on *Town & Country*, the Third Circuit also has held that "the mandate of section 405(h) that the Medicare Act's administrative review procedures be exhausted before judicial review is sought simply does not apply to [a] case" arising under

Section 1334. *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1073-74 (3d Cir. 1992). The Third Circuit found that, like in *Town & Country*, "the Bankruptcy Code supplies an independent basis for jurisdiction," and therefore Section 405(h)'s exhaustion prerequisites were not applicable. *Id.* at 1072. In other words, where a case arises under the Bankruptcy Code, it does not arise under the Medicare Act and therefore the Medicare Act's exhaustion requirements do not apply.

The Third Circuit explained why Congress would have given the bankruptcy court authority to review such issues immediately: it would "advance[] the congressionally-endorsed objective of the 'effective and expeditious resolution of all matters connected to the bankruptcy estate'" by giving one court authority over all matters that conceivably could impact the debtor. *Id.* at 1074 (quoting *Town & Country*, 963 F.2d at 1155).

2. ***Eleventh Circuit.*** In this case, the Eleventh Circuit created a circuit split by concluding that, under Section 405(h), the bankruptcy court could not administer Bayou Shores' provider agreements as part of the estate until after Bayou Shores' administrative claims were exhausted. *See* Pet. App. 60a-62a. Relying in part on *Salfi*, the Eleventh Circuit concluded that "neither Bayou Shores nor the bankruptcy court has explained why standard principles of administrative exhaustion should not prevent a district court from hearing Bayou Shores' case." Pet. App. 61a.

3. While no other courts of appeals have adopted the Eleventh Circuit's position on this issue, the split on exhaustion extends to the lower courts. Many

bankruptcy and district courts have reached the same conclusion as the Eleventh Circuit, requiring exhaustion in bankruptcy cases. *See Parkview Adventist Med. Ctr. v. United States ex rel. Dep't of Health & Human Servs.*, No. 2:15-cv-00320-JDL, 2016 WL 3029947, at *5-8 (D. Me. May 25, 2016) (concluding that Sections 405(g) and (h) "[t]ogether . . . require the exhaustion of administrative remedies through the agency review process before judicial review takes place"), *aff'd*, 842 F.3d 757 (1st Cir. 2016); *Sullivan v. Hiser (In re St. Mary Hosp.)*, 123 B.R. 14, 16-18 (E.D. Pa. 1991); *Rodriguez v. United States (In re Rodriquez)*, No. 09-93431-JB, 2010 WL 2035733, at *3-5 (Bankr. N.D. Ga. Mar. 23, 2010); *Andrews v. Blue Cross & Blue Shield of Mich. (In re Clawson Med. Rehab. & Pain Care Ctr., P.C.)*, 12 B.R. 647 (Bankr. E.D. Mich. 1981).

And on the other side, many bankruptcy and district courts have directly relied on *University Medical* and *Town & Country* to reach the opposite conclusion, holding that Section 405 does *not* require exhaustion for bankruptcy cases. *See Slater Health Ctr., Inc. v. United States (In re Slater Health Ctr., Inc.)*, 306 B.R. 20, 24 (D.R.I. 2004) (citing *University Medical* in support of holding that "[s]ince the Bankruptcy Code supplies an independent basis for jurisdiction, the exhaustion of administrative remedies is not required" under Section 405), *aff'd*, 398 F.3d 98 (1st Cir. 2005); *First Am. Health Care of Ga., Inc. v. Dep't of Health & Human Servs.*, 208 B.R. 985, 988-89 (Bankr. S.D. Ga. 1996) (citing *Town & Country*), *vacated and superseded by consent order*, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996); *In re Healthback*, 226 B.R. at 469-70 (citing *University*

Medical and *Town & Country*); *Parker N. Am. v. Resolution Trust Corp. (In re Parker N. Am. Corp.)*, 148 B.R. 925, 929 (C.D. Cal. 1992) (citing *Town & Country*); *Gingold v. United States ex rel. Dep't of Health & Human Servs. (In re Shelby County Healthcare Servs. Of AL, Inc.)*, 80 B.R. 555, 559-61 (Bankr. N.D. Ga. 1987).[4]

Both questions presented by this case involve circuit conflicts ripe for the Court's review. The Ninth Circuit has declined to reverse its decision in *Town & Country*. *See Do Sung Uhm*, 620 F.3d at 1141 n.11. And the Eleventh Circuit denied rehearing in this case without a single judge calling for a vote on the petition. Pet. App. 93a-94a. As a result, there is no realistic prospect that the circuit conflicts will resolve without the Court's intervention.

B. The Questions Presented Are Recurring And Important.

The questions presented in this case are recurring and of exceptional legal and practical importance. The continued uncertainty surrounding them imposes a significant burden on health care providers and their patients. And an enduring circuit split will bring about dramatically different outcomes based on nothing more than geographic happenstance.

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[4] As the Ninth Circuit noted, courts have found that exhaustion is unnecessary because of an independent grant of judicial review in other contexts as well. *See Town & Country*, 963 F.2d at 1154 (discussing exhaustion requirement of the Federal Tort Claims Act); *see also Ashbrook v. Block*, 917 F.2d 918, 921-23 (6th Cir. 1990); *Zayler v. United States*, 279 F. Supp. 2d 805, 814-15 (E.D. Tex. 2003) (listing cases), *aff'd*, 468 F.3d 248 (5th Cir. 2006).

1. The recurring nature of these issues is shown by the sheer number of lower courts across the country that have weighed in regarding Section 405. *See supra*, at 18-19, 22-23. "[H]undreds of courts, including dozens of bankruptcy courts, have analyzed the applicability of § 405(h) since the 1980s." Maizel & Potere, 32 Emory Bankr. Dev. J. at 25. Yet, as discussed above, they are deeply split on the two questions presented.

The issues have also generated a significant body of scholarly literature, with advocates for both sides. *See generally id.* (arguing Section 405(h) does not bar Section 1334 jurisdiction and exhaustion is not required); Peter R. Roest, *Recovery of Medicare and Medicaid Overpayments in Bankruptcy*, 10 Annals Health L. 1 (2001) (arguing Section 405(h) does not bar Section 1334 jurisdiction); John Aloysius Cogan Jr. & Rodney A. Johnson, *Administrative Channeling Under the Medicare Act Clarified: Illinois Council, Section 405(h), and the Application of Congressional Intent*, 9 Annals Health L. 125 (2000) (arguing Section 405(h) should bar Section 1334 jurisdiction).

2. The questions presented in this case are exceptionally important. *First*, national uniformity in the bankruptcy context is critical; indeed, the Constitution itself notes the importance of "establish[ing] . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. This power to create a uniform system was intended to "secur[e] equality of rights and remedies among the citizens of all the states." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1102, at 6 (1833). To maintain that uniformity,

this Court frequently grants review to resolve disagreements among courts of appeals in the bankruptcy context. *See, e.g.*, *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015); *Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014); *Hall v. United States*, 132 S. Ct. 1882, 1886 & n.1 (2012); *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 68 & n.4 (2011).

Second, the absence of uniformity in this case risks arbitrary and unfairly divergent outcomes. In circuits that reject the Eleventh Circuit's rule, health care providers faced with Medicare termination will be able to reorganize and emerge from bankruptcy relatively unscathed. In circuits that have adopted the Eleventh Circuit's rule, health care providers will be forced to close their doors while waiting perhaps years to proceed through the Medicare Program's appeals process, or more likely, will never survive to see an appeal. Given the backlog in administrative determinations, it would often be "optimistic to expect a final accounting within five years." *First Am. Health Care*, 208 B.R. at 989-90; *accord In re Healthback*, 226 B.R. at 475. Thus, in most cases, "[i]t is beyond question that the Debtor would have long ceased doing business by the time the administrative procedures . . . are exhausted." *First Am. Health Care*, 208 B.R. at 989-90; *accord* Pet. App. 113a ("[I]t is highly unlikely the [administrative] appeals process will be complete before the debtor files for bankruptcy."); Maizel & Potere, *supra*, at 27-29 (under the government's theory, a hospital could face the "fatal dilemma" of being put out of business before being able to challenge an HHS decision).

Requiring exhaustion thereby "disrupt[s]" the "entire bankruptcy scheme," because "the purpose of the bankruptcy statutes, to provide a debtor breathing room to attempt an effective reorganization, would be completely defeated." *In re Healthback*, 226 B.R. at 475.

Third, uncertainty over the questions presented affects all participants in the Medicare and Medicaid Programs. This uncertainty no doubt exists for health care providers. But it also imposes a significant toll on the lives of a provider's patients and their families. A court adopting the Eleventh Circuit's interpretation of Section 405 can cause the debtor's business to "fail immediately," which can "wreak havoc on the lives of [thousands of] patients that are medicated, bathed, clothed, and otherwise cared for by the Debtor's caregivers." *Nurses'*, 533 B.R. at 598. On a moment's notice, those patients would all have to find new facilities equipped to handle their needs, where they would be cared for by unfamiliar staff and subjected to different routines. *See* Pet. App. 89a-90a, 121a-122a (noting that "patients may be at a greater risk if they transfer" due to "a phenomenon known as transfer trauma").

Because the consequences of that outcome are so dire, the law's uncertainty itself causes a significant burden. As a case progresses from bankruptcy court to district court and then to the circuit (assuming the health care provider can afford to keep appealing), patients can be whipsawed as one court rules that the facility can enjoy bankruptcy protection, then the next court rules to the contrary, as happened here. As the district court noted, "there is a significant factor of human dignity at issue here," because while bankruptcy

and other courts spend years attempting to reconcile the meaning of Section 405, patients and their families are left not knowing whether they will be able to sleep in the same bed on any given night. Pet. App. 89a-90a. It is "draconian to disrupt their dignity based on a jurisdictional debate that has resulted in significant contrary opinions among the circuit courts and the lower courts." Pet. App. 91a.

It is utterly arbitrary that facilities and patients located in some circuits suffer these catastrophic consequences, while facilities and patients in other circuits may continue to operate during the pendency of the administrative appeals. Resolving the circuit splits would provide certainty over whether bankruptcy protection is a viable avenue for a facility's survival.

C. This Case Is An Ideal Vehicle.

1. This case is the perfect vehicle because it presents the Court with the opportunity to resolve *both* sources of uncertainty regarding a bankruptcy court's authority: whether Section 405(h)'s jurisdictional bar applies to suits brought under Section 1334, and whether Section 405 requires exhaustion of cases brought under Section 1334. Both questions presented were squarely resolved by the Eleventh Circuit in this case and were the basis for that court's decision to affirm the district court.

There are two primary reasons why resolving both questions is so important. *First*, there is a significant practical benefit to answering both issues at once. Given the urgency of these bankruptcy proceedings, in the vast majority of cases it will be irrelevant whether a

bankruptcy court can hear Medicare claims *unless* it can hear them immediately (*i.e.*, without waiting years for exhaustion). *See supra*, at 25-26 (explaining that facilities can fail immediately if they cannot proceed through bankruptcy). If the Court resolved just the jurisdictional question, the split on exhaustion would remain, producing the same practical effect as if the bankruptcy court lacked jurisdiction: a complete inability to orderly and timely resolve bankruptcy claims in an area where urgency is critical.

Second, many lower courts view the questions as interrelated. The Eleventh Circuit treated the two questions as separate and alternative inquiries, without overlapping analysis. *See* Pet. App. 60a-62a. However, other courts have concluded that the issues rise and fall together: if Section 405 does not apply to cases brought under Section 1334, then not only can the bankruptcy court hear such suits (Question Presented 1), but the separate exhaustion requirement in Section 405 also does not apply (Question Presented 2). *See, e.g.*, *Town & Country*, 963 F.2d at 1154-55; *James*, 256 B.R. at 481-82. Some courts have even combined the issues into a single question: whether there is a "jurisdictional bar on judicial review of unexhausted Medicare disputes." *Nurses' Registry*, 533 B.R. at 592.

Given that the lower courts themselves cannot agree on whether, and to what extent, the analysis for the two questions presented overlaps, this Court should grant a case that presents both issues—as this case does. Otherwise, the Court would risk trying to resolve the "interplay between" these two analytically linked provisions, without the benefit of full briefing on both.

Midland, 145 F.3d at 1002 (noting that district court "complicated matters" by trying to address Section 405(h) without § 405(g)).

For these logical and practical reasons, this Court should answer both questions presented.

2. The petition also presents this Court with a rare chance to resolve these disputed issues, which are often litigated in bankruptcy courts but infrequently reach the appellate courts. "The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010). Only one out of every 1,580 bankruptcy cases reaches the circuit level, compared to one in every 12 non-prisoner civil suits. *Id.* at 783.

Further, in the specific context of Section 405, debtors often go out of business with no appreciable assets in their estates—and the cases become moot—*as a direct result of* the lower courts' rulings on whether bankruptcy protection is available under Section 405(h). *See supra*, at 9-10, 25-26. The catastrophic practical consequences of those lower court rulings regarding Section 405 thereby insulate them from meaningful review by this Court, perpetuating the split in the courts below. This explains why there have been "hundreds" of cases analyzing the significance of Section 405(h) but relatively few circuit decisions. *See* Maizel & Potere, 32 Emory Bankr. Dev. J. at 25.

Petitioner's case presents an opportunity to resolve these circuit splits because it is still ongoing and presents a live controversy. Petitioner has preserved both questions presented at the bankruptcy, district, and circuit courts. And, as the government conceded and the Eleventh Circuit held, there remains an ongoing controversy here because the government has insisted that it "intends to seek recoupment of . . . payments if the bankruptcy court's orders are found to be invalid." Pet. App. 62a; *see also* Eleventh Circ. Br. for Federal Appellees 28-29, 2015 WL 7292479 ("There is, and has been at each stage of this appeal, a live, justiciable controversy . . . ."). By maintaining a live controversy during the years of appeals required to reach this Court, Petitioner's case presents a uniquely optimal vehicle through which this Court can resolve the questions presented.

* * *

The petition squarely presents the Court with the opportunity to resolve circuit splits on two related questions of great importance to bankruptcy and Medicare law. The Court should grant the petition and reverse the Eleventh Circuit.

D. The Decision Below Is Incorrect.

In addition to being inconsistent with the decisions of other courts of appeals and numerous district and bankruptcy courts, the Eleventh Circuit's decisions on both questions presented are incorrect.

1. The Eleventh Circuit held that Section 405(h)'s omission of Section 1334 was a codification error that the court had authority to correct on its own. *See* Pet. App.

35a-52a. This conclusion is contrary to several of this Court's established statutory-interpretation cases.

First, "when [a] statute's language is plain, the sole function of the courts—at least where the disposition suggested by the text is not absurd—is to enforce it according to its terms," because "[i]t is beyond [the judicial] province to rescue Congress from its drafting errors." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 542 (2004) (quotations omitted). All parties agree that Section 405's language is plain and unambiguous: Section 1334 is not included in the list of grants of jurisdiction that are banned under Section 405.

That rule announced in *Lamie* applies even where a party claims the statute unintentionally omitted a term. In *Lamie*, this Court addressed a party's argument that the Court could "read an absent word into the statute" because the omission was "presumably by inadvertence." *Lamie*, 540 U.S. at 538. The Court rejected that argument and made clear that "[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." *Id.* at 542. If the Court decided to add the missing term on its own, then it would no longer be engaging in "construction of the statute, but [rather], in effect, an enlargement of it." *Id.* at 538 (quotations and alteration omitted). "With a plain, nonabsurd meaning in view, we need not proceed in this way." *Id.; accord Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Bath Iron Works Corp.*, 885 F.2d 983, 988, 990 (1st Cir. 1989) (Breyer, J.) ("Faced with language that is fairly clear and a statute that makes reasonable sense," "the time . . . to catch, and

to correct, that [drafting] error was before the bill became law, not after.").

The Eleventh Circuit should have followed *Lamie* and held that the plain language of Section 405 controls, unless and until Congress itself changes that statute.

Second, assuming there is a scrivener's error "exception" to this plain-meaning rule,[5] the omission of Section 1334 is *not* a correctable scrivener's error. Scrivener's errors usually refer to minor typographical mistakes such as the "placement of the quotation marks" within a statute, *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993)—but not the omission of dozens of statutory grants of federal jurisdiction, as the Eleventh Circuit held here. That is especially true where, as here, Congress would have made this "error" while observing a codification note specifically calling out the omission of those provisions. *See* 42 U.S.C.A. 405 (West 1982).

Even if such a glaring omission could fall into the category of scrivener's errors, such an error may be corrected only where it is "clear beyond question" that the statutory language is, in fact, erroneous. *U.S. Nat'l Bank*, 508 U.S. at 462. That is especially true where the alleged error concerns a provision that would restrict access to the courts. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."). To

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[5] *See Johnson v. United States*, 529 U.S. 694, 723–24 (2000) (Scalia, J., dissenting) (noting that "[p]erhaps" there is a scrivener's error "exception" to the plain-meaning canon).

warrant correction, the literal reading of the statute must produce an "absurd" outcome. *Lamie*, 540 U.S. at 542. However, the omission of Section 1334 does not produce an "absurd" result. Excluding bankruptcy cases from Section 405(h)'s bar "allows a single court to preside over all of the affairs of the estate," *Town & Country*, 963 F.2d at 1155, thereby advancing Congress's intent that bankruptcy courts "deal efficiently and expeditiously with all matters connected with the bankruptcy estate," *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

Finally, even assuming the omission was a scrivener's error, the Court still should not "correct" it, because there are subsequent "considerations suggest[ing] Congress may have intended the change the scrivener worked." *Lamie*, 540 U.S. at 540. When Congress later amended Section 405 by enactment of the Social Security Independence And Program Improvements Act Of 1994, Pub. L. 103-296, 108 Stat. 1464, it had the opportunity to strip bankruptcy courts of Section 1334 jurisdiction over Medicare claims but chose not to do so. If a scrivener's error led to the omission of Section 1334 from Section 405(h) when the DRA of 1984 was enacted, then surely Congress could have fixed this problem. It never did.

Instead, Congress has enlarged the powers of bankruptcy courts, and in particular has recognized their role in presiding over health care bankruptcies. It has provided bankruptcy courts with the power to do everything the bankruptcy court did here: enforce the automatic stay, 11 U.S.C. 362(a); order a debtor to assume an executory contract after curing any default,

11 U.S.C. 365; issue relief "necessary or appropriate" to carry out the bankruptcy process, 11 U.S.C. 105(a); and confirm a debtor's plan of reorganization, 11 U.S.C. 1141. The foregoing actions were authorized by 11 U.S.C. 106, in which Congress also abrogated the government's sovereign immunity with respect to the foregoing provisions. Even if the language of Section 405(h) had been a codification error, Congress's subsequent legislation authorizing the specific actions taken by the bankruptcy court here should control. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (interpretation of statute appropriately altered where "subsequent statutes more specifically address the topic at hand").

The government cannot satisfy its high burden of showing that the omission of Section 1334 was "beyond question" a scrivener's error that the courts are empowered to correct.

2. The Eleventh Circuit's decision regarding exhaustion was also erroneous. The exhaustion prerequisite of Section 405 does not apply here because Bayou Shores did not seek review of an agency finding or decision before the bankruptcy court. It sought relief pursuant to the independent and "exclusive" grant of jurisdiction in Section 1334. As the Ninth Circuit correctly held, "'[W]here there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'" *Town & Country*, 963 F.2d at 1154-55 (citation omitted).

The argument in favor of requiring exhaustion in bankruptcy cases "is specious," because it "erroneously

attempt[s] to characterize a bankruptcy proceeding as 'judicial review'" under Section 405, when in truth "a bankruptcy proceeding is not making a substantive ruling on Medicare law"—and thus "the doctrine of exhaustion of administrative remedies would not be applicable." *In re Healthback*, 226 B.R. at 470 n.5.

In other words, when a bankruptcy court exercises its power to appoint a health care ombudsman or to order the assumption of a provider agreement, it is solely exercising its authority as a bankruptcy court. *Supra*, at 5-6. It is not reviewing agency findings, nor substituting its judgment for that of the agency. As the bankruptcy court here noted, Bayou Shores' assumption of its provider agreements did not in any way cancel or overturn the deficiencies cited by the agency. Pet. App. 120a-121a. Indeed, the bankruptcy court analyzed the likely outcome of the administrative appeal in determining the feasibility of Bayou Shores' plan, reflecting its understanding that the administrative process would continue unimpeded. Pet. App. 121a-123a. Far from interfering with the administrative process, the bankruptcy court simply exercised its authority under the Bankruptcy Code. *Contra Bd. of Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32 (1991) (district court erred in enjoining the Board from prosecuting administrative proceedings).

Under these circumstances, requiring exhaustion of administrative remedies before a bankruptcy court can administer a health care debtor's estate impedes Congressional intent for bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex*, 514 U.S. at 308. If

the Eleventh Circuit's interpretation were correct, the government could drive a health care provider out of business while awaiting administrative review. Practically speaking, this would preclude any "attempt [at] an effective reorganization," thereby "completely defeat[ing]" the "purpose of the bankruptcy statutes." *In re Healthback*, 226 B.R. at 475.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 2, 2017

APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

IN RE: BAYOU SHORES SNF, LLC, DEBTOR.
FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, UNITED STATES OF AMERICA, ON BEHALF OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Plaintiffs–Appellees,

v.

BAYOU SHORES SNF, LLC,
Defendant–Appellant.

No. 15-13731

July 11, 2016

Before HULL, JULIE CARNES, and CLEVENGER,* Circuit Judges.

OPINION

CLEVENGER, Circuit Judge:

Bayou Shores SNF, LLC ("Bayou Shores") operates a skilled nursing facility in St. Petersburg, Florida. Most of Bayou Shores' patients are on Medicare or Medicaid, and over ninety percent of its revenue is derived from Medicare and Medicaid patients. It receives compensation for Medicare and

Medicaid services through provider agreements entered into with the federal and state governments. Bayou Shores' entitlement to participate in the provider agreements depends on its continued compliance with qualification requirements for such facilities that are established by the Secretary of the Department of Health and Human Services. After an unchallenged exercise of her statutory oversight authority, the Secretary determined that Bayou Shores was not in substantial compliance with the Medicare program participation requirements, and that conditions in its facility constituted an immediate jeopardy to residents' health and safety. By letter dated July 22, 2014, the Secretary notified Bayou Shores that its Medicare provider agreement "will be terminated at 11:59 pm on August 3, 2014." The termination of Bayou Shores' Medicare provider agreement triggered the termination of its Medicaid provider agreement as well.

To avoid the consequences of termination of its provider agreements, Bayou Shores sought protection in the United States Bankruptcy Court for the Middle District of Florida. Rejecting the jurisdictional challenge from the Secretary, the bankruptcy court assumed authority over the Medicare and Medicaid provider agreements as part of the debtor's estate, enjoined the Secretary from terminating the provider agreements, determined for itself that Bayou Shores was qualified to participate in the provider agreements, required the Secretary to maintain the stream of monetary benefit under the agreements, reorganized

the debtor's estate, and finally issued its Confirmation Order on December 31, 2014.

On appeal, in a June 26, 2015, Order, the United States District Court for the Middle District of Florida upheld the Secretary's jurisdictional challenge and reversed the Confirmation Order with respect to the assumption of the debtor's Medicare and Medicaid provider agreements. *See In re Bayou Shores SNF, LLC*, 533 B.R. 337, 343 (M.D. Fla. 2015).

Bayou Shores timely appeals the decision of the district court. The appeal turns on the jurisdictional question. From the Social Security Amendments of 1939 until 1984, it is undisputed that bankruptcy courts lacked jurisdiction over Medicare claims. The statute barring such jurisdiction was finally recodified in 1984 to reflect an earlier recodification of the Judicial Code. In cases involving the interpretation of statutory language changed in a recodification, it has long been established that no change in the previous recodified law is recognized unless Congress's intention to make a substantive change is "clearly expressed." *United States v. Ryder*, 110 U.S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308 (1884). Now the central question is whether the statutory revision in this case demonstrated Congress's clear intention to vest the bankruptcy courts with jurisdiction over Medicare claims. We think it is abundantly clear that Congress expressed no such intention.

Therefore, after careful review of the record and the parties' briefs, and with the benefit of oral argument, and for the reasons set forth below, we affirm the district court's Order.

I. BACKGROUND

The relevant facts of this case are generally undisputed and ably set out by the district court in the opinion below. *See In re Bayou Shores SNF, LLC*, 533 B.R. 337, 338–40 (M.D. Fla. 2015). A brief summary follows.

A. Bayou Shores' "Skilled Nursing Facility"

As noted above, Bayou Shores operates a "skilled nursing facility"[1] in St. Petersburg, Florida, and approximately ninety percent of Bayou Shores' revenue is derived from caring for Medicare and Medicaid patients. To be eligible for the Medicare/Medicaid program, Bayou Shores entered into so-called "provider agreements" with the federal and Florida state governments, respectively, which provide reimbursement to Bayou Shores for the provision of medical services to Bayou Shores' Medicare/Medicaid patients. As a condition of payment under these agreements Bayou Shores must comply with certain regulatory requirements pertaining to skilled nursing facilities.[2] The Plaintiffs in this case are the government agencies primarily tasked with monitoring Bayou Shores' compliance with these regulations: the Florida Agency for Health Care Administration ("AHCA") and the United States Department of Health and Human Services ("HHS")

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[1] A "skilled nursing facility" is statutorily defined at 42 U.S.C. § 1395i–3(a).

[2] *See e.g.* 42 C.F.R. Part 483, Subsection B.

(collectively, "the Government"). AHCA is responsible for conducting surveys of skilled nursing facilities in Florida and administering the state's Medicaid program. HHS administers Medicare nationally, and uses AHCA's surveys to decide whether skilled nursing facilities in Florida are compliant with the regulations, and if not, what remedial action to take. When conditions at a skilled nursing facility pose immediate jeopardy to the health or safety of the facility's patients, the law requires the Secretary to select and execute an appropriate remedy.[3]

On February 10, 2014, AHCA conducted such a survey at Bayou Shores' skilled nursing facility. As a result of the survey, AHCA reported to HHS that Bayou Shores was not compliant with the relevant regulations. The survey noted a number of problems including failing to correctly track residents' "Do Not Resuscitate" orders, poor patient hygiene, and unsecured expired medications. AHCA determined

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[3] The Secretary of HHS's duty to take remedial action in the face of immediate jeopardy to a facility's patients is explained in 42 U.S.C. § 1395i–3(h)(2), where Congress specified that the Secretary "shall" take remedial action in response to immediate jeopardy. *See* 42 U.S.C. § 1395i–3(h)(2)(A)–(B) (statutorily defined remedies include termination from program, denial of payments, civil monetary penalties, and appointment of temporary management); *see also id.* at (f)(1) ("It is the duty and responsibility of the Secretary to assure that requirements which govern the provision of care in skilled nursing facilities under this subchapter, and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.").

that at least some of these deficiencies posed a threat of immediate jeopardy to Bayou Shores' patients.[4] Bayou Shores was given an opportunity to remedy these deficiencies. In a follow-up survey on March 20, 2014, AHCA again found a number of deficiencies. These included Bayou Shores placing a "known sexual offender" in a room with a disabled patient without informing that patient, and subsequently failing to appropriately handle an alleged sexual assault by the "known sexual offender" reported by the disabled patient. As with the previous survey, AHCA found that at least some of these deficiencies posed a threat of immediate jeopardy to Bayou Shores' patients. Bayou Shores was again given the opportunity to remedy the deficiencies.

The proverbial "last straw" was a final survey on July 11, 2014, in which further deficiencies were identified, including allowing a mentally impaired resident to leave the facility unaccompanied on a hot Florida day (he was later found at a bus station). AHCA again determined that at least some of these deficiencies placed Bayou Shores' residents in

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[4] Immediate jeopardy exists if the nursing home's noncompliance has caused or is likely to cause "serious injury, harm, impairment or death to a resident." 42 C.F.R. § 488.301. The regulation only requires that the nursing home's noncompliance is likely to cause harm to "a resident." Though correctly quoting the regulation, the bankruptcy court appears to have incorrectly believed that actual harm is required for a finding of "immediate jeopardy." *See In re Bayou Shores SNF, LLC*, 525 B.R. 160, 163 (Bankr. M.D. Fla. 2014). However, actual harm is not a prerequisite for a finding of immediate jeopardy.

immediate jeopardy. After the third finding of non-compliance, HHS sent Bayou Shores a letter on July 22, 2014 notifying Bayou Shores that its non-compliance posed an "immediate jeopardy to [Bayou Shores'] residents' health and safety," and that HHS was exercising its regulatory discretion to terminate Bayou Shores' Medicare provider agreement. HHS's letter stated that the "Medicare provider agreement will be terminated at 11:59 pm on August 3, 2014."[5] The termination of Bayou Shores' Medicare provider agreement triggered the termination of Bayou Shores' Medicaid provider agreement.[6]

B. Bankruptcy Court Proceedings

Two days before this looming deadline, on August 1, 2014, Bayou Shores sought emergency injunctive relief from the U.S. District Court for the Middle District of

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[5] The statute permits HHS to terminate a provider agreement in light of a finding of immediate jeopardy without a pre-termination hearing for the provider. *See* 42 U.S.C. § 1395i–3(h)(2)(a); *see also Cathedral Rock of N. Coll. Hill, Inc. v. Shalala*, 223 F.3d 354, 366 (6th Cir. 2000) (no pre-termination hearing required under Due Process Clause); *Northlake Cmty. Hosp. v. United States*, 654 F.2d 1234, 1241–43 (7th Cir. 1981) (same).

[6] Though Bayou Shores disputes whether Florida has followed the correct procedure to "finalize" the termination of their Medicaid provider agreement, Bayou Shores does not appear to dispute that such termination will be the end result of the termination of the Medicare provider agreement. *See e.g.* 42 U.S.C. § 1396a(a)(39); Fla. Stat. § 409.913(14); *see also Livingston Care Ctr., Inc. v. United States*, 934 F.2d 719, 720 (6th Cir. 1991) ("The Secretary of Health and Human Services's termination of the plaintiffs' Medicare certification automatically triggered termination of plaintiffs' Medicaid certification as well").

Florida to prevent the termination of the provider agreements. The district court initially granted Bayou Shores' request for a temporary restraining order. However, on motion of HHS, the district court dismissed Bayou Shores' complaint for lack of subject matter jurisdiction. On August 15, 2014, the court found that Bayou Shores had not exhausted its administrative remedies, and thus Medicare's jurisdictional bar (42 U.S.C. § 405(h)) prevented the district court from exercising jurisdiction over the termination of the provider agreements. *See Bayou Shores SNF, LLC v. Burwell*, No. 8:14–CV–1849–T–33MAP, 2014 WL 4059900, *6–8 (M.D. Fla. Aug. 15, 2014). Approximately an hour after issuance of the district court's order, Bayou Shores filed a Voluntary Petition for Chapter 11 bankruptcy, and sought an emergency injunction from the bankruptcy court preventing HHS and AHCA from terminating the provider agreements. The Government, at each opportunity, challenged the bankruptcy court's jurisdiction to order assumption of the provider agreements.

On August 25, 2014, the bankruptcy court issued the preliminary injunction sought by Bayou Shores. The bankruptcy court reasoned that it had jurisdiction pursuant to 28 U.S.C. § 1334,[7] the provider agreements were property of the estate, and an automatic stay preventing HHS and AHCA from terminating the agreements was thus proper. At a subsequent

[7] 28 U.S.C. § 1334, titled "Bankruptcy cases and proceedings," generally defines the original and exclusive jurisdiction of district courts over bankruptcy proceedings.

evidentiary hearing on August 26, the bankruptcy court heard testimony from doctors, patients, and other Bayou Shores witnesses. Concluding that in its view Bayou Shores' patients did not appear to be in any immediate jeopardy, the bankruptcy court issued an order on September 5, 2014 that (among other things) forbade HHS and AHCA from terminating Bayou Shores' provider agreements.

After further proceedings, on December 31, 2014 the bankruptcy court issued its Confirmation Order. *See In re Bayou Shores SNF, LLC*, 525 B.R. 160 (Bankr. M.D. Fla. 2014). In the Confirmation Order, the bankruptcy court again stated its belief that jurisdiction was proper under 28 U.S.C § 1334, and rejected HHS and AHCA's argument that the same 42 U.S.C. § 405(h) bar applied to the bankruptcy court as applied to the district court. The bankruptcy court reasoned that the plain language of § 405(h), which refers only to 28 U.S.C §§ 1331 and 1346, did not prevent the bankruptcy court from exercising jurisdiction over the assumption of the provider agreements under § 1334. *Id.* at 166. The bankruptcy court further concluded that because Bayou Shores appeared to have remedied the deficiencies it was originally cited for, Bayou Shores had provided adequate assurances of future performance under the provider agreements, and thus was eligible to assume them. Finding the remainder of the statutory requirements fulfilled, the bankruptcy court confirmed Bayou Shore's Chapter 11 plan. The bankruptcy court

also ordered the dissolution of the automatic stay and preliminary injunction.[8]

C. District Court Proceedings

HHS and AHCA separately appealed both the bankruptcy court's September 5, 2014 Order, and the Confirmation Order. The appeals were consolidated by the district court. As they had argued to the bankruptcy court, HHS and AHCA asserted to the district court that 42 U.S.C. § 405(h) denied the bankruptcy court jurisdiction over the provider agreements. The district court agreed. While acknowledging that the bankruptcy court's reading of § 405(h) was an issue that the Eleventh Circuit had not squarely addressed, the district court noted that the majority of other circuit courts addressing the issue "have examined Congress' intent when it enacted the jurisdictional bar and concluded that the omission of section 1334 and other jurisdictional grants (like section 1332) was inconsistent with that intent." *In re Bayou Shores*, 533 B.R. at 342. The district court reviewed the relevant statutory language and legislative history, as well as decisions from other courts examining the same. In particular, the district court noted that the absence of § 1334 in the recodified 42 U.S.C. § 405(h) appeared to be the result of a codification error. Based on that

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[8] *See* Bankr. ECF No. 285 at 12-13 (ordering that "all injunctions and stays previously provided for in this case pursuant to sections 105 and/or 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date."). As explained further *infra*, the parties dispute what effect this dissolution has on the issues in this case.

analysis, the district court held that it "respectfully disagree[d] [with the bankruptcy court] and align[ed] itself with the majority view" in finding that § 405(h) must be understood to bar jurisdiction under § 1334. *Id.* at 343.

Because it was undisputed that Bayou Shores had yet to exhaust its administrative remedies, and "no other independent basis for jurisdiction existed to enjoin and order the assumption of the Medicare and Medicaid provider agreements," the district court reversed the orders of the bankruptcy court (with respect to the provider agreements). *Id.*

The district court also noted that a hotly contested issue on appeal was "the exact timing of any termination of the provider agreements." *Id.* However, the district court found that it did not need to resolve that issue, because the timing was irrelevant to whether or not the bankruptcy court lacked jurisdiction to hear the case in the first place. *Id.*[9]

Bayou Shores timely appealed the district court's order.

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[9] The Government argues that the provider agreements terminated prior to Bayou Shores filing their bankruptcy petition, thus depriving the bankruptcy court of jurisdiction over the provider agreements. Bayou Shores (for various reasons) contests that argument. For reasons we explain below, we do not find it necessary to resolve this dispute.

II. STANDARD OF REVIEW

In a bankruptcy case, this Court sits as a second court of review and thus examines independently the factual and legal determinations of the bankruptcy court and employs the same standards of review as the district court. *See Brown v. Gore (In re Brown)*, 742 F.3d 1309, 1315 (11th Cir. 2014). We review the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *Id.* The district court's legal determinations are also reviewed de novo. *See Dionne v. Simmons (In re Simmons)*, 200 F.3d 738, 741 (11th Cir. 2000).

III. BANKRUPTCY COURT JURISDICTION OVER MEDICARE CLAIMS

The primary dispute in this case is purely legal: does 42 U.S.C. § 405(h) bar a bankruptcy court from exercising 28 U.S.C. § 1334 jurisdiction over claims that arise under the Medicare Act? Bayou Shores' primary argument is that the plain text of § 405(h) precludes district court jurisdiction under 28 U.S.C. §§ 1331 and 1346 only. The Government argues that the lack of a reference to § 1334 is merely a result of a codification error, and that properly construed the statute requires exhaustion of administrative remedies before bringing a Medicare claim before any district court.

Because we conclude that the lack of a reference to § 1334 in § 405(h) is the result of a codification error, we agree with the Government that the bankruptcy court lacked jurisdiction over the termination of the provider agreements. To see why, we turn first to an examination of the history of § 405(h).

A. Legislative history of § 405(h)

The relevant text of the 42 U.S.C. § 405(h) currently reads (emphasis added):

> (h) Finality of Commissioner's decision
>
> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought *under section 1331 or 1346 of Title 28* to recover on any claim arising under this subchapter.[10]

Bayou Shores argues that the third sentence of § 405(h) forbids only an "action" brought under "section 1331 [*i.e.* federal question jurisdiction] or 1346 [*i.e.* suits against the federal government] of Title 28." Because Bayou Shores' action was brought under section 1334 of Title 28 (*i.e.* bankruptcy jurisdiction), Bayou Shores argues that § 405(h) does not apply. To understand why Bayou Shores is incorrect however requires a thorough examination of the history of § 405(h), which reveals

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[10] § 405(h) applies to Medicare via 42 U.S.C. § 1395ii, which states that "any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively."

that the issue is not as straightforward as Bayou Shores suggests.

The original text of § 405(h) when passed in 1939 was largely the same as it is today, with the crucial difference for this case emphasized below:

> (h) The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under *section 24 of the Judicial Code of the United States* to recover on any claim arising under this title.

See Social Security Amendments of 1939, Pub. L. No. 76–379, 53 Stat. 1360 (1939) (emphasis added). In 1939, "section 24 of the Judicial Code" defined the original jurisdiction granted to district courts, including jurisdiction over bankruptcy claims (*see* Judicial Code, Pub. L. No. 61–475, 36 Stat. 1087, § 24(19) (1911)), diversity and federal question claims (*id.* at § 24(1)), and claims against the United States (*id.* at § 24(20)). With few exceptions then, section 24 of the Judicial Code originally "contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of [Medicare] statutes." *See Weinberger v. Salfi*, 422 U.S. 749, 756, n. 3, 95 S. Ct. 2457, 45 L. Ed. 2 522 (1975). It is thus undisputed that under the original text of § 405(h),

bankruptcy court jurisdiction over Medicare claims was barred.

In 1948, however, Congress recodified section 24 of the Judicial Code under title 28 of the U.S. Code.[11] As part of that revision, Congress split the district courts' jurisdictional grants into multiple sections under Title 28. *See* U.S. Code, Title 28, Pub. L. No. 80–773, 62 Stat. 869 (1948). Among other things, federal question jurisdiction was re-codified to 28 U.S.C. § 1331, diversity jurisdiction to § 1332, suits against the government to § 1346, and bankruptcy jurisdiction to § 1334. *See id.* at Ch. 85, §§ 1331-1359 ("District Courts; Jurisdiction").

After the 1948 re-codification however, the text of § 405(h) continued to incorrectly refer to "section 24 of the Judicial Code" for approximately the next thirty years. Indeed, the Supreme Court noted this issue in its 1975 *Salfi* decision. The text in the body of the Court's opinion replaced the reference in § 405(h) to "section 24 of the Judicial Code" with "[§ 1331 et seq.] of Title 28." *See Salfi*, 422 U.S. at 756, 95 S. Ct. 2457. A footnote in

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[11] Codification refers generally to the process of arranging and organizing the Statutes at Large into the U.S. Code. *See generally* Proceedings of the Fifty-First Annual Meeting of the American Association of Law Libraries, Fifth General Session, 51 Law Libr. J. 388 (1958) (remarks of Dr. Charles Zinn, Law Revision Counsel, explaining the process of codification); *see also* William W. Barron, *The Judicial Code*, 8 F.R.D. 439 (1949) (the "Chief Reviser, Title 28, U.S. Code, Judiciary and Judicial Procedure, and Title 18, U.S. Code, Crime and Criminal Procedure" explaining generally the 1948 Judicial Code revisions).

the opinion acknowledged the apparent error created by the 1948 Judicial Code recodification. *See id.* at n. 3.

By 1976 (after the *Weinberger* decision), the Office of the Law Revision Counsel appears to have recognized the error.[12] In the edition of the U.S. Code published that year, the revisers substituted the phrase "section 24 of the Judicial Code of the United States" in § 405(h) with the now current language, "sections 1331 or 1346 of title 28." A "Codification" note included in the 1976 revision indicates the following about the change:

> In subsec. (h), "sections 1331 or 1346 of title 28" was substituted for "section 24 of the Judicial Code of the United States" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, section 1 of which enacted Title 28, Judiciary and Judicial Procedure. Prior to the enactment of Title 28, section 24 of the Judicial Code was classified to section 41 of Title 28.

See 42 U.S.C. § 405 (1976). The revisers expanded somewhat on this note in the 1982 version of the code (added text emphasized):

> In subsec. (h), "sections 1331 or 1346 of title 28" was substituted for "section 24 of the Judicial Code of the United States" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, section 1 of

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[12] The Office of the Law Revision Counsel, created in 1974, is a body within the U.S. House of Representatives whose principal purpose is to codify the laws of the U.S. and periodically publish updates to the U.S. Code. *See* 2 U.S.C. §§ 285 *et. seq.*

> which enacted Title 28, Judiciary and Judicial Procedure. Prior to the enactment of Title 28, section 24 of the Judicial Code was classified to section 41 of Title 28. *Jurisdictional provisions previously covered by section 41 of Title 28 are covered by sections 1331 to 1348, 1350 to 1357, 1359, 1397, 1399, 2361, 2401, and 2402 of Title 28.*

See 42 U.S.C. § 405 (1982).

A year later, H.R. 3805, the "Technical Corrections Act of 1983" was introduced to the floor of the House. 129 Cong. Rec. 23,439 (1983) (statement of Rep. Rostenkowski). A report on the bill describes its derivation and purpose as follows:

> The technical amendments made by the Technical Corrections Act of 1983 are intended to clarify and conform various provisions adopted by the acts listed above. The bill is based on a review by the staffs of the Joint Committee on Taxation and the Committee on Ways and Means, taking into account the comments submitted to the Congress that concerned changes that would be technical in nature. The bill was developed with the assistance of the Treasury Department, the Social Security Administration, and the Health Care Financing Administration.

See STAFF OF J. COMM. ON TAXATION, 98th CONG., DESCRIPTION OF H.R. 3805 (TECHNICAL CORRECTIONS ACT OF 1983), at 1 (J. Comm. Print 1983) ("H.R. 3805 Rept.").

Among the numerous "technical amendments" was an amendment to § 405(h), proposing to enact the prior codification into positive law:

> (D) Section 205(h) of such Act is amended by striking out "Section 24 of the Judicial Code of the United States" and inserting in lieu thereof "section 1331 or 1346 of title 28, United States Code."

See Technical Corrections Act of 1983: Hearing on H.R. 3805 Before the H. Comm. on Ways and Means, 98th Cong. 79 (1984) (draft text of H.R. 3805).[13] That section of the act, titled "Sec. 403. Other Technical Corrections in [old age, survivors, and disability insurance] Provisions,"[14] was followed by this in "Sec. 404. Effective Dates":

> (b)(1) Except to the extent otherwise specifically provided in this title, the amendments made by section 403 shall be effective on the date of

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[13] The U.S. Code is not necessarily "positive law." Rather, the text of the U.S. Code is *prima facie* evidence of the law of the United States; where the code conflicts with the Statutes at Large however, the Statutes at Large trump. *See U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448, 113 S. Ct. 2173, 124 L. Ed. 2 402 (1993). Additionally, some parts of the code have been enacted into positive law; when this happens, the text of the code becomes evidence of the law. *See id.* at 448 n. 3, 113 S. Ct. 2173 (citing to 1 U.S.C. § 204(a)); *see generally* Alice I. Youmans, et. al., *Questions & Answers*, 78 Law. Libr. J. 585, 590 (1986) (explaining the relationship between the U.S. Code, Statutes at Large, and positive law).

[14] *See e.g.* H.R. 3805 Rept. at 20.

> enactment of this Act; *but none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date.*

See id. at 89–90 (emphasis added). The legislative history of H.R. 3805 appears to characterize this and other "technical corrections" as "certain corrections of spelling, punctuation, and cross-references in title XVIII of the Social Security Act and in cross-references to the Internal Revenue Code." *See* H.R. 3805 Rept. at 37.[15] Moreover, the bill's sponsor, Rep. Dan Rostenkowski, noted when the bill was introduced: "I would like to emphasize that this bill intends simply to correct technical errors and to better reflect the policies established by the Congress in enacting the original legislation." 129 Cong. Rec. 23321, 23440 (1983). H.R. 3805 did not contain any provisions relating to the jurisdiction of bankruptcy courts.

Although H.R. 3805 did not become law, in 1984 it was merged into another bill, H.R. 4170, which Congress passed as The Deficit Reduction Act of 1984, Pub. L. No. 98–369, 98 Stat. 494 (1984) (hereinafter, the "DRA").[16] As noted in the bill itself, the general purpose of the DRA was "to provide for tax reform, and for deficit reduction." *See* 98 Stat. at 494. The DRA

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[15] The report similarly notes that where no descriptions are provided, the amendments are "clerical in nature." *Id.* at 1.

[16] *See* H.R. Rep. No. 98-432, pt. 2, at 1027 (1984) (explaining that "Title VI—Technical Corrections" of H.R. 4170 originated as the amended H.R. 3805).

did not contain any provisions relating to the scope of bankruptcy court jurisdiction.

The amendment to § 405(h) is located in "DIVISON V—SPENDING REDUCTION ACT OF 1984", "TITLE VI—OASDI, SSI, AFDC, AND OTHER PROGRAMS," "Subtitle D—Technical Corrections," "Sec. 2663. Other technical corrections in the Social Security Act and related provisions." Consistent with the 1976 and 1982 codification (and the amendment originally proposed in H.R. 3805), section 2663(a)(4)(D) ordered that "Section 205(h) of [the Social Security Act] is amended by striking out 'section 24 of the Judicial Code of the United States' and inserting in lieu thereof 'section 1331 or 1346 of title 28, United States Code,'." *See* 98 Stat. at 1162. Section 2664 of the DRA further requires that "[e]xcept to the extent otherwise specifically provided in this subtitle, the amendments made by section 2663 shall be effective on the date of the enactment of this Act; but none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date." *See id.* at 1171–72.

The House committee report on the DRA explains the reasons for the "technical corrections" of certain sections in the bill, but does not specifically address the amendments to § 405(h). The report generally states that the "bill makes certain corrections of spelling, punctuation, cross-references and other clerical amendments to the Social Security Act and related provisions in the Internal Revenue Code." *See* H.R. Rep. No. 98-432, pt. 2, at 1663 (1984). Nothing in the

report or elsewhere in the legislative history, in so far as we have been able to determine, expresses any intention to change the jurisdiction of bankruptcy courts, let alone to grant bankruptcy courts parallel authority with HHS over Medicare claims.

It thus appears that the current text of § 405(h) is the result of the Office of the Law Revision Counsel's mistaken codification, an error enacted into positive law by the DRA. While the Supreme Court has yet to speak on this precise issue, the Court has had reason to interpret § 405(h) in a number of cases that are helpful in resolving the current dispute. We thus turn to an examination of those cases before turning back to the codification issue.

B. Supreme Court cases interpreting § 405(h)

The earliest relevant Supreme Court decision, *Salfi*, was decided prior to the DRA amendment to § 405(h). In *Salfi* the plaintiff brought suit to challenge the Social Security Administration's "duration-of-relationship requirements" as unconstitutional. 422 U.S. at 752–53, 95 S. Ct. 2457. The district court exercised jurisdiction over the case pursuant to 28 U.S.C. § 1331. *Id.* at 755, 95 S. Ct. 2457. While deciding the constitutional question against the plaintiff, more relevant for our purposes is the Court's analysis of the "serious question as to whether the District Court had jurisdiction over this suit" to begin with. *See Salfi*, *id.* at 756, 95 S. Ct. 2457.

In examining the requirements of § 405(h), the Court found that the third sentence, "No action against

the United States, the Secretary, or any officer or employee thereof shall be brought under (§ 1331 et seq.) of Title 28 to recover on any claim arising under (Title II of the Social Security Act)"[17] should be read as more than merely a "codified requirement of administrative exhaustion" because the first two sentences of § 405(h) already require administrative exhaustion. *Id.* at 757, 95 S. Ct. 2457.[18] Those first two sentences prevent review of any decision of the Secretary other than as set out in § 405(g), which prescribes "typical requirements for review of matters before an administrative agency, including administrative exhaustion." *Id.* at 758, 95 S. Ct. 2457. The Court thus explained that the third sentence of § 405(h) acted to bar actions under § 1331, even where administrative remedies had been exhausted. *Id.* at 757, 95 S. Ct. 2457.

Somewhat less than a decade later, the Court again considered § 405(h) again in *Heckler v. Ringer*, 466 U.S.

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[17] As noted previously, the third sentence of § 405(h) at the time incorrectly referred to title 24 of the Judicial Code, and the Court's opinion inserted the correct cross-reference to the relevant section of Title 28 of the U.S. Code. *See id.* at 756 n. 3, 95 S. Ct. 2457. While surely strong evidence of how the Supreme Court reads § 405(h), *Salfi* did not raise the interpretive issue at the heart of this case, and thus does not dispose of the issue.

[18] The first two sentences read: "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." 42 U.S.C. § 405(h).

602, 104 S. Ct. 2013, 80 L. Ed. 2 622 (1984). In *Ringer*, the underlying factual dispute involved "challenges to the policy of the Secretary of Health and Human Services (Secretary) as to the payment of Medicare benefits for a surgical procedure known as bilateral carotid body resection (BCBR)." *Id.* at 604–05, 104 S. Ct. 2013. The focus of the case was whether the plaintiff's claims "arose" under the Medicare Act. *See e.g. id.* at 612–613, 104 S. Ct. 2013. But in characterizing § 405(h) and its own holding in *Salfi*, the Court held that "[t]he third sentence of 42 U.S.C. § 405(h), made applicable to the Medicare Act by 42 U.S.C. § 1395ii, provides that § 405(g), to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review for all 'claim[s] arising under' the Medicare Act." *Id.* at 614–15, 104 S. Ct. 2013.

Perhaps most instructive is a more recent case, decided long after the 1984 DRA amendments to § 405(h), *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 120 S. Ct. 1084, 146 L. Ed. 2 1 (2000). The plaintiffs in *Illinois Council* were an association of nursing homes challenging the legality and constitutionality of certain Medicare-related regulations. *Id.* at 5, 120 S. Ct. 1084. As in *Ringer*, the key issue in *Illinois Council* was whether the plaintiff's claims "arose" under the Medicare Act (and were thus subject to the § 405(h) jurisdictional bar). *Id.* at 9–10, 120 S. Ct. 108.

However, in explaining the application of § 405(h) to the case, the Court again emphasized that the effect of § 405(h) was to reach beyond normal principles of "administrative exhaustion" and "ripeness," and

prevent even the application of normal exceptions to those doctrines. *Id.* at 12, 120 S. Ct. 1084. The Court held that § 405(h) "demands the 'channeling' of *virtually all legal attacks* through the agency." *Id.* at 13, 120 S. Ct. 1084 (emphasis added). Moreover, the Court explained the balancing policy interests inherent in such a scheme:

> [I]t assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying "ripeness" and "exhaustion" exceptions case by case. But this assurance comes at a price, namely, occasional individual, delay-related hardship. In the context of a massive, complex health and safety program such as Medicare, embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations, any of which may become the subject of a legal challenge in any of several different courts, paying this price may seem justified.

Id. at 13, 120 S. Ct. 1084. As the Court noted, whatever one may think of such a policy, it was clearly that chosen by Congress in creating § 405(h).[19]

A few salient points about § 405(h) are thus clear from the relevant Supreme Court cases. *Salfi* makes clear that the first two sentences of § 405(h) require

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[19] *See id.* at 13, 120 S. Ct. 1084 (noting that "[i]n any event, such was the judgment of Congress as understood in *Salfi* and *Ringer*").

standard administrative exhaustion of remedies prior to bringing Medicare claims before a district court. *See Salfi*, 422 U.S. at 757, 95 S. Ct. 2457. Moreover, § 405(h) "demands the 'channeling' of virtually all legal attacks through the agency," making § 405(g) the "sole avenue for judicial review for all 'claim[s] arising under' the Medicare Act." *See Illinois Council*, 529 U.S. at 13, 120 S. Ct. 1084; *Ringer*, 466 U.S. at 615–14, 104 S. Ct. 2013. However, we must acknowledge a common thread running through all three cases: each involved a suit brought under 28 U.S.C. § 1331, a jurisdictional grant that all parties agree was barred by § 405(h) prior to the 1984 amendments and continues to be barred after the amendments.[20] Thus, none of these cases answers

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[20] Similarly, to the extent our Court has addressed the reach of the jurisdictional bar of § 405(h) since the 1984 DRA amendments, it appears that the cases have been § 1331 cases. *See e.g. Dial v. Healthspring of Alabama, Inc.*, 541 F.3d 1044, 1047–48 (11th Cir. 2008); *Cochran v. U.S. Health Care Fin. Admin.*, 291 F.3d 775, 778–79 (11th Cir. 2002); *United States v. Blue Cross & Blue Shield of Alabama, Inc.*, 156 F.3d 1098, 1101 (11th Cir. 1998); *Am. Acad. of Dermatology v. Dep't of Health & Human Servs.*, 118 F.3d 1495, 1499 n. 8 (11th Cir. 1997); *Am. Fed'n of Home Health Agencies, Inc. v. Heckler*, 754 F.2d 896, 897–98 (11th Cir. 1984). Both parties cite and discuss *V.N.A. of Greater Tift Cty., Inc. v. Heckler*, 711 F.2d 1020 (11th Cir. 1983). Though *V.N.A.* was decided before the 1984 amendments, it appears the Court in that case cited to the Law Revision Counsel's 1976 (or 1982) re-codified version of the statute in its opinion. *See V.N.A.*, 711 F.2d at 1024. In a footnote of the opinion, the Court notes that "[t]here can be no question that § 405(h) fully applies to the present case, because the district court's jurisdiction is founded on 28 U.S.C. § 1331." *Id.* at n. 5. We also note *Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293, 1295 n. 3 (11th Cir. 2004), in which this Court assumed, but did not decide, that mandamus jurisdiction under § 1361 was not

the question before us, namely, does § 405(h) bar jurisdiction under § 1334? To further examine the question, we turn to the decisions of our sister circuits.

C. Courts split over the application of § 405(h) to district courts

The decisions of our sister circuits (and the lower courts) fall into two categories. The first group of cases holds that the jurisdictional bar of § 405(h) applies to cases brought under § 1332 jurisdiction (*i.e.* diversity jurisdiction), notwithstanding the fact that § 1332 (like § 1334) is not mentioned in the statute. The second group of cases directly considers whether § 1334 jurisdiction can lie in the face of § 405(h).

1. Cases holding that § 405(h) bars jurisdiction

The primary case among the first category of § 1332 decisions is from the Seventh Circuit in *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990). In determining whether a review of plaintiff's claims in a district court was precluded by § 405(h), the Seventh Circuit noted the "curious" fact that § 405(h) on its face appears to bar "actions brought pursuant to federal question jurisdiction and actions brought against the United States but appears to permit actions brought pursuant to diversity jurisdiction." *See id.* at 488. However, the Seventh Circuit then analyzed the codification history described *supra*, holding that in § 2664(b) of the DRA Congress

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barred under § 405(h). These cases do not address the issue of whether actions brought under § 1334 are barred by § 405(h).

had "clearly expressed" its intent not to substantively change the scope of § 405(h). *Id.* at 489. Thus, because the statute prior to amendment had clearly barred diversity jurisdiction, the revised statute continued to bar diversity jurisdiction. *Id.*

Both the Third and Eighth circuits have subsequently adopted the holding and analysis of *Bodimetric*. *See Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 346–47 (3d Cir. 2012); *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir. 1998). An earlier Third Circuit case, *In re Univ. Med. Ctr., Inc.*, 973 F.2d 1065, 1073–74 (3d Cir. 1992), appears to suggest (but not hold) that § 405(h) may not apply to bankruptcy courts. However, that case involved a claim that HHS had violated an automatic bankruptcy stay. The court's opinion hinged on its holding that such a claim did not "arise" under the Medicare act. *Id.* at 1073. In *Nichole Med. Equip.*, the Third Circuit explicitly adopted *Bodimetric*, noting that "Congress clearly prohibited federal courts from exercising subject matter jurisdiction or diversity jurisdiction over claims arising under the [Medicare] Act." *See* 694 F.3d at 347.

Several circuits have thus addressed the question of whether § 405(h) bars districts court jurisdiction other than pursuant only to §§ 1331 and 1346. Those circuits read the history of § 405(h) to conclude that the codification error acts to carry forward the original § 405(h)'s jurisdictional restrictions.[21]

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[21] Although not squarely deciding the issue, a number of other circuit court decisions have suggested that § 405(h) bars

2. Cases holding that § 405(h) does not bar § 1334 jurisdiction

The second category of cases come first from the Ninth Circuit and begin with *In re Town & Country Home Nursing Servs.*, 963 F.2d 1146 (9th Cir. 1991). The court there was asked to determine if the failure to exhaust administrative remedies precluded a bankruptcy court from exercising jurisdiction over state law tort and contract claims "arising out of the government's setoff of Medicare overpayments." *Id.* at 1154. The Ninth Circuit held that "Section 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334." *Id.* at 1155. The Ninth Circuit appears to have placed great weight on "section 1334's broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate." *Id.* However, the court did not discuss or analyze the legislative history relied on in the *Bodimetric* line of cases.

A later Ninth Circuit case, *Kaiser v. Blue Cross of California*, 347 F.3d 1107, 1114 (9th Cir. 2003), cites favorably to both *Bodimetric* and *Midland Psychiatric* for what those cases say about a claim that "arises

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jurisdictions other than pursuant to only §§ 1331 and 1346. *See BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 n. 11 (6th Cir. 2005) (citing favorably to *Bodimetric* analysis); *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548, 550 (Fed. Cir. 1994) (holding that Court of Federal claims jurisdiction barred by § 405(h)). The First Circuit has recognized the issue, but declined to address it. *See In re Ludlow Hosp. Soc., Inc.*, 124 F.3d 22, 25 n. 7 (1st Cir. 1997) (recognizing, but avoiding, § 405(h) jurisdictional issue by deciding case on merits).

under Medicare." It appears that the court in *Kaiser* assumed that the plaintiffs were proceeding under federal-question jurisdiction (which is indisputably precluded by § 405(h)), and thus the only relevant question was whether their claims "arose" under Medicare. But in a dicta discussion of whether there had been a waiver of sovereign immunity, the court noted that "11 U.S.C. § 106(a), which refers to waivers of sovereign immunity in bankruptcy proceedings, could not apply since any consideration of claims against the government in [debtor]'s bankruptcy would likely require consideration of the merits of the Medicare claims, again invoking 42 U.S.C. § 405(g)." *Id.* at 1117. Thus, *Kaiser* at least hints that the court would have come to the opposite conclusion of *In re Town & Country*, *i.e.* by holding that bankruptcy jurisdiction could not trump the exhaustion requirements of §§ 405(g) and (h).

A more recent Ninth Circuit decision, *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010) attempted to address what it characterized as a possible conflict between *Kaiser* and *In re Town & Country*. The *Do Sung Uhm* court cites *Kaiser* for the proposition that "[j]urisdiction over cases 'arising under' Medicare exists only under 42 U.S.C. § 405(g), which requires an agency decision in advance of judicial review." *Id.* at 1140–41. In a footnote though, the court acknowledges the tension between *Kaiser*'s broad reading of § 405(h) and *In re Town & Country*'s more narrow reading, but reconciles the two on the grounds that *In re Town & Country* relied on the "special status" of bankruptcy court jurisdiction over

bankruptcy issues. *Id.* at 1141 n.11. The court concludes that *In re Town & Country*'s reading of 42 U.S.C. § 405(h) applies "only to actions brought under § 1334, while not bearing on the relationship between § 405(h) and other jurisdictional provisions such as § 1332." *Id.* The Ninth Circuit thus joins the other circuit courts in unanimously opining that § 405(h) bars diversity jurisdiction under § 1332, notwithstanding the omission of § 1332 from the text of § 405(h).

However, the Ninth Circuit is alone among circuit court decisions in reading § 405(h) to permit bankruptcy court jurisdiction over Medicare claims under § 1334. Many lower courts have also considered the issue of § 1334 jurisdiction. These lower courts have split, with some assuming jurisdiction,[22] and others deciding jurisdiction was barred.[23] Case going both

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[22] *See e.g. In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 593–97 (Bankr. E.D. Ky. 2015); *In re Slater Health Ctr., Inc.*, 294 B.R. 423, 428 (Bankr. D.R.I. 2003), *vacated in part*, 306 B.R. 20 (D.R.I. 2004), *aff'd*, 398 F.3d 98 (1st Cir. 2005); *In re Healthback, L.L.C.*, 226 B.R. 464, 472–74 (Bankr. W.D. Okla. 1998), *vacated*, *In re HealthBack, L.L.C.*, Case No. 97–22616–BH, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999); *First Am. Health Care of Georgia Inc. v. Dep't of Health & Human Servs.*, 208 B.R. 985, 988–90 (Bankr. S.D. Ga. 1996), *vacated and superseded sub nom.*, *First Am. Health Care of Georgia, Inc. v. U.S. Dep't of Health & Human Servs.*, Case No. 96–2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996); *In re Healthmaster Home Health Care, Inc.*, Case No. 95–10548, 1995 WL 928920, at *1 (Bankr. S.D. Ga. Apr. 13, 1995); *In re Shelby Cty. Healthcare Servs. of AL, Inc.*, 80 B.R. 555, 557–60 (Bankr. N.D. Ga. 1987).

[23] *Excel Home Care, Inc. v. U.S. Dep't of Health & Human Servs.*, 316 B.R. 565, 572–574 (D. Mass. 2004); *In re Hodges*, 364 B.R. 304, 305–06 (Bankr. N.D. Ill. 2007); *In re House of Mercy, Inc.*, 353 B.R.

ways have recognized and analyzed the codification error that led to the present omission of § 1334 from the text of § 405(h). *Compare e.g. In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 593–97 (Bankr. E.D. Ky. 2015) (assuming jurisdiction under § 1334) *to In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 245–46 (Bankr. S.D. Fla. 1994) (holding that § 1334 jurisdiction is barred).

We also note some limited scholarship addressing this issue as well. Articles written by members of the bankruptcy bar argue that under the "plain meaning" doctrine, bankruptcy courts' § 1334 jurisdiction is not barred by § 405(h). *See* Samuel R. Maizel & Michael B. Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply to Bankruptcy Courts*, 32 Emory Bankr. Dev. J. 19, 66 (2015); Peter R. Roest, *Recovery of Medicare and Medicaid Overpayments in Bankruptcy*, 10 Annals Health L. 1, 1 (2001). Conversely, an article written by

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867, 869–73 (Bankr. W.D. La. 2006); *In re Fluellen*, Case No. 05–40336, 2006 WL 687160, at *1 (Bankr. S.D.N.Y. Mar. 13, 2006); *U.S., Dep't of Health & Human Servs. v. James*, 256 B.R. 479, 481–82 (W.D. Ky. 2000); *In re Hosp. Staffing Servs., Inc.*, 258 B.R. 53, 57–58 (S.D. Fla. 2000); *In re Mid–Delta Health Sys., Inc.*, 251 B.R. 811, 814–15 (Bankr. N.D. Miss. 1999); *In re Tri Cty. Home Health Servs., Inc.*, 230 B.R. 106, 108 n. 1 (Bankr. W.D. Tenn. 1999); *In re S. Inst. for Treatment & Evaluation, Inc.*, 217 B.R. 962, 965 (Bankr. S.D. Fla. 1998); *In re Home Comp Care, Inc.*, 221 B.R. 202, 206 (N.D. Ill. 1998); *In re AHN Homecare, LLC*, 222 B.R. 804, 807–10 (Bankr. N.D. Tex. 1998); *In re Orthotic Ctr., Inc.*, 193 B.R. 832, 835 (N.D. Ohio 1996); *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 245–46 (Bankr. S.D. Fla. 1994); *In re Upsher Labs., Inc.*, 135 B.R. 117, 117–20 (Bankr. W.D. Mo. 1991); *In re St. Mary Hosp.*, 123 B.R. 14, 16–18 (E.D. Pa. 1991).

current and former counsel for HHS argues that, based on the legislative history, the amended § 405(h) should have the same effect as the prior version, *i.e.* barring bankruptcy court jurisdiction. *See* John Aloysius Cogan Jr. & Rodney A. Johnson, *Administrative Channeling Under the Medicare Act Clarified: Illinois Council, Section 405(h), and the Application of Congressional Intent*, 9 Annals Health L. 125, 125 (2000).

3. Mandamus jurisdiction and § 405(h)

We note in passing a related issue: whether § 405(h) bars mandamus jurisdiction exercised pursuant to 28 U.S.C. § 1361. As noted *supra*, n. 20, this circuit has not decided that issue. *See Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293, 1295 n. 3 (11th Cir. 2004). The Supreme Court has also repeatedly declined to decide whether mandamus jurisdiction is prohibited by § 405(h). *See e.g. Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456 n. 3, 119 S. Ct. 930, 142 L. Ed. 2 919 (1999). However, the great weight of authority from other circuits has almost uniformly found that § 405(h) does not necessarily deprive district courts of mandamus jurisdiction over Medicare claims.[24]

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[24] *See e.g. Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 766 (5th Cir. 2011); *Cordoba v. Massanari*, 256 F.3d 1044, 1047 (10th Cir. 2001); *Buchanan v. Apfel*, 249 F.3d 485, 491–92 (6th Cir. 2001); *Briggs v. Sullivan*, 886 F.2d 1132, 1142 (9th Cir. 1989); *Burnett v. Bowen*, 830 F.2d 731, 738 (7th Cir. 1987); *Ganem v. Heckler*, 746 F.2d 844, 851–52 (D.C. Cir. 1984); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983), *judgment vacated sub. nom. on other grounds*, *Heckler v. Kuehner*, 469 U.S. 977, 105 S.

Superficially at least, there is some commonality between the issue in those cases regarding § 1361, and the issue in our case involving § 1334, because both jurisdictional provisions are not listed in the text of § 405(h). The commonality is just that though, superficial. As Judge Friendly of the Second Circuit accurately explained, when § 405(h) was passed in 1939, mandamus jurisdiction was not one of the jurisdictional provisions contained in Section 24 of the Judicial Code. *See Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981).[25] Thus, unlike § 1334, there is no argument to be made that the codification of section 24 into Title 28 had any impact on the availability of mandamus relief under § 1361. *See id.; see also Ganem v. Heckler*, 746 F.2d 844, 851 (D.C. Cir. 1984) (noting that absence of § 1361 was unrelated to codification error because even in original version of § 405(h), § 24 of the Judicial Code did not include

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Ct. 376, 83 L. Ed. 2 312 (1984); *Belles v. Schweiker*, 720 F.2d 509, 513 (8th Cir. 1983); *Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981).

[25] In fact, at that time only district courts in the District of Columbia could exercise mandamus jurisdiction, pursuant to an uncodified grant of authority dating back to the early nineteenth century and the District of Columbia's adoption of Maryland law. *See id.* District courts elsewhere in the country were granted mandamus jurisdiction explicitly when Congress passed the Mandamus and Venue Act, Pub. L. No. 87–748, 76 Stat. 744 (1962). Judge Friendly reasoned that Congress likely did not intend to bar District of Columbia courts' mandamus jurisdiction when it passed § 405(h) because that uncodified jurisdiction was not specifically excluded, and Congress similarly did not intend mandamus jurisdiction to suddenly become subject to § 405(h) when mandamus jurisdiction was extended to other courts in 1962. *See Ellis*, 643 F.2d at 81.

District of Columbia's common law jurisdiction to issue mandamus writs).

However, the issue of whether a district court can exercise mandamus jurisdiction related to Medicare claims, notwithstanding the § 405(h) bar, is neither in front of the court, nor necessary to resolve the current dispute. As previously, we thus decline to decide the issue. *See Lifestar Ambulance Serv.*, 365 F.3d at 1295 n.3.

D. The Bankruptcy Court Lacked Jurisdiction Under § 405(h)

With that considerable background in mind, we turn now to the issue in this case: did 42 U.S.C. § 405(h) bar the bankruptcy court below from taking jurisdiction over Bayou Shore's Medicare provider agreement under 28 U.S.C. § 1334? Because we are persuaded that the 1984 amendments to § 405(h) were a codification and not a substantive change, we align ourselves with the Seventh, Eighth, and Third Circuits and hold that § 405(h) bars § 1334 jurisdiction over claims that "arise under [the Medicare Act]."

1. The Deficit Reduction Act of 1984 amendment to § 405(h) was a codification and did not substantively change the law.

Bayou Shores' primary argument, and the primary argument of courts holding that § 1334 jurisdiction is not barred § 405(h), is relatively straightforward: the text of the third sentence of § 405(h) does not mention § 1334, and thus, under the "plain meaning" of the statute § 1334 jurisdiction is not barred by § 405(h).

Bayou Shores is certainly correct that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2 1024 (2004) (internal quotation marks and citations removed); *see also Owner–Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys., Inc.*, 622 F.3d 1307, 1327 (11th Cir. 2010) (holding that "[t]here is no reason for this Court to rewrite a statute because of an alleged scrivener error unless a literal interpretation would lead to an absurd result.")

But that is not the end of the analysis because this case is governed by a particular canon in statutory construction regarding the codification of law, *i.e.* the process of converting and organizing the Statutes at Large into the U.S. Code. Since virtually the founding of the Republic, it has been recognized that when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise. For example, in the oldest case we have been able to locate,[26] *Taylor v. Delancy*, 2 Cai. Cas. 143, 151 (N.Y. Sup. Ct. 1805), the New York

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[26] The difficulties inherent in codifying and organizing the law are older still, and plagued even the earliest democracy. Aristotle notes that after the Athenian statesmen Solon "had organized the [Athenian] constitution in the manner stated, people kept coming to him and worrying him about his laws, criticizing some points and asking questions about others," causing him to leave Greece for Egypt for the next ten years. *See* ARISTOTLE, THE ATHENIAN CONSTITUTION, Ch. 11 (H. Rackham trans., Cambridge, MA, Harvard University Press 1952).

Supreme Court of Judicature[27] held "that where the law, antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change."

The Supreme Court appears to have recognized the canon at least as early as *Stewart v. Kahn*, 78 U.S. 493, 502, 11 Wall. 493, 20 L. Ed. 176 (1870), where the Court held that "[a] change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature." The Court reiterated the principle in *United States v. Ryder*, 110 U.S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308 (1884), holding that "[i]t will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." This canon of statutory construction has remained undisturbed since that time. *See e.g. McDonald v. Hovey*, 110 U.S. 619, 629, 4 S. Ct. 142, 28 L. Ed. 269 (1884); *Logan v. United States*, 144 U.S. 263, 302, 12 S. Ct. 617, 36 L. Ed. 429 (1892), *abrogated on other grounds*, *Witherspoon v. State of Ill.*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2 776 (1968); *Holmgren v. United States*, 217 U.S. 509, 520, 30 S. Ct. 588, 54 L. Ed. 861 (1910); *Anderson v. Pac. Coast*

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[27] The Supreme Court of Judicature was the "highest common-law" state court in New York at that time. *See William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 478, 982 N.Y.S.2d 813, 5 N.E.3d 976 (2013).

S.S. Co., 225 U.S. 187, 199, 32 S. Ct. 626, 56 L. Ed. 1047 (1912); *United States v. Sischo*, 262 U.S. 165, 168–69, 43 S. Ct. 511, 67 L. Ed. 925 (1923); *Hale v. Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 102, 58 S. Ct. 102, 82 L. Ed. 72 (1937); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227, 77 S. Ct. 787, 1 L. Ed. 2 786 (1957); *United States v. FMC Corp.*, 84 S. Ct. 4, 7, 11 L. Ed. 2 20 (Goldberg, Circuit Justice 1963); *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S. Ct. 1082, 12 L. Ed. 2 152 (1964); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162, 93 S. Ct. 408, 34 L. Ed. 2 375 (1972); *Cass v. United States*, 417 U.S. 72, 82, 94 S. Ct. 2167, 40 L. Ed. 2 668 (1974); *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 422 U.S. 289, 309 n. 12, 95 S. Ct. 2336, 45 L. Ed. 2 191 (1975); *Muniz v. Hoffman*, 422 U.S. 454, 470, 95 S. Ct. 2178, 45 L. Ed. 2 319 (1975); *Fulman v. United States*, 434 U.S. 528, 538, 98 S. Ct. 841, 55 L. Ed. 2 1 (1978); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 318, 105 S. Ct. 3180, 87 L. Ed. 2 220 (1985); *Finley v. United States*, 490 U.S. 545, 554, 109 S. Ct. 2003, 104 L. Ed. 2 593 (1989); *Ankenbrandt v. Richards*, 504 U.S. 689, 700, 112 S. Ct. 2206, 119 L. Ed. 2 468 (1992); *Keene Corp. v. United States*, 508 U.S. 200, 209, 113 S. Ct. 2035, 124 L. Ed. 2 118 (1993); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20, 126 S. Ct. 1264, 164 L. Ed. 2 10 (2006); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136, 128 S. Ct. 750, 169 L. Ed. 2 591 (2008).

As it happens, a number of these cases from the 20th century arise from an event that directly touches

on the issues in our case: the 1948 recodification of the Judicial Code.[28]

In one of the earlier cases to examine the 1948 recodification, *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 77 S. Ct. 787, 1 L. Ed. 2 786 (1957), the Court considered whether the recodification had substantively changed venue rules in patent cases. The issue was whether or not the specific patent venue statute, 28 U.S.C. § 1400(b) was supplemented by the more general (and more expansive) civil suit venue statute, 28 U.S.C. § 1391. *Id.* at 222, 77 S. Ct. 787. The Court first noted that in a pre-1948 recodification case, *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 62 S. Ct. 780, 86 L. Ed. 1026 (1942), the Court had already determined that the more specific patent venue provisions in the old Judicial Code of 1911 trumped more general venue provisions for civil suits.[29] The only issue therefore was whether the 1948 recodification (which recodified § 48 of the Judicial Code to 28 U.S.C. § 1400(b)) had substantively changed the patent venue statute. *Fourco Glass*, 353 U.S. at 225, 77 S. Ct. 787. Noting that neither the legislative history, nor the Reviser's Notes, indicated that any substantive change was intended, the Court reasoned that "[t]he change of arrangement, which placed

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[28] The 1948 recodification moved "section 24 of the Judicial Code" to Title 28 of the U.S. Code, but 42 U.S.C. § 405(h) continued to refer to "section 24 of the Judicial Code" until the DRA amendment in 1984.

[29] *Compare* Judicial Code, Pub. L. No. 61–475, 36 Stat. 1087, § 48 (1911) *with id.* at § 52.

portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." *Id.* at 227, 77 S. Ct. 787 (internal quotation marks and citations omitted) (quoting from *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 198, 32 S. Ct. 626, 56 L. Ed. 1047 (1912)). The Court thus held that no substantive change to 28 U.S.C. § 1400(b) had occurred during the 1948 recodification and the result in *Stonite Products* dictated the outcome of the case. *Id.* at 227-28, 77 S. Ct. 787.

Similarly, in *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162, 93 S. Ct. 408, 34 L. Ed. 375 (1972), the Court rejected the argument that the 1948 Judicial Code revisions substantively changed the existing law concerning appellate court jurisdiction over interlocutory appeals in Government civil antitrust cases. The 1948 revision to 28 U.S.C. § 1292(a)(1) allowed interlocutory appeals of district court order to the courts of appeals, "except where a direct review may be had in the Supreme Court." *Id.* Under then-existing law, appellate courts had no jurisdiction over any appeals in Government civil antitrust cases (which were appealed directly to the Supreme Court), and interlocutory appeals to the Supreme Court in Government civil antitrust cases were not permitted. *Id.* at 154–56, 160, 93 S. Ct. 408. The Court thus reasoned that a possible interpretation of the new language added by the 1948 revisions, "except where a direct review may be had in the Supreme Court," was

that appellate court jurisdiction over interlocutory appeals in Government civil anti-trust cases was now available (contrary to prior law) because "direct review" in the Supreme Court of an interlocutory appeal could not "be had." *Id.* at 162, 93 S. Ct. 408.

Citing to *Fourco Glass*, the Court rejected that interpretation because no such change to existing law had been "clearly expressed" by the 1948 revisions. "To the contrary, the Revisers' Notes fail to reveal any intention to expand the scope of the pre-existing jurisdiction of the courts of appeals over interlocutory appeals; the new § 1292 is described merely as a consolidation of a number of previously separate code provisions—including the general interlocutory appeals provision—'with necessary changes in phraseology to effect the consolidation.'" *Id.* at 162–63, 93 S. Ct. 408. The Court thus concluded that the 1948 revisions did not substantively expand the jurisdiction of appellate courts. *Id.* at 163, 93 S. Ct. 408.

Muniz v. Hoffman, 422 U.S. 454, 456–57, 95 S. Ct. 2178, 45 L. Ed. 2 319 (1975) arose out of a labor dispute between the San Francisco Typographical Union and a local daily newspaper, in which the union and its officers had been cited for criminal contempt in violating certain court orders and subsequently denied a jury trial in the criminal contempt proceedings. A key issue in the case was whether the Wagner and Taft-Hartley Acts,[30] which authorized courts to grant certain

[30] National Labor Relations Act, Pub. L. No. 74–198, 49 Stat. 449 (1935) (the "Wagner Act"); Labor Management Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (the "Taft-Harley Act").

injunctions, permitted jury trials to those found in contempt of the injunctions. *Id.* at 461, 95 S. Ct. 2178. The parties appeared to agree that prior to the 1948 revisions of the Criminal Code,[31] a contemnor had no right to a jury trial in contempt actions to enforce injunctions issued under the Wagner and Taft-Hartley Acts, notwithstanding the jury requirements in § 11 of the earlier passed Norris-LaGuardia Act.[32] Petitioners argued however that in recodifying § 11 of Norris-LaGuardia as 18 U.S.C. § 3692 in 1948, Congress had overruled its prior policy of not permitting jury trials in contempt actions to enforce injunctions issued under the Wagner and Taft-Hartley Acts. *Id.* at 467, 95 S. Ct. 2178.

The Court rejected this argument, holding that "[w]e cannot accept the proposition that Congress, without expressly so providing, intended in § 3692 to change the rules for enforcing injunctions," which rules existed when § 11 was originally passed. *See Muniz*, 422 U.S. at 468, 95 S. Ct. 2178. The Court examined the legislative history of the recodification and the Reviser's Notes, which consistently expressed that no

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[31] As the Court notes, the 1948 revision to the Criminal Code followed a "parallel course" to the revision to the Judicial Code, and was prepared by the same staff of experts. *See Muniz*, 422 U.S. at 470 n. 10, 95 S. Ct. 2178.

[32] Injunctions in Labor Disputes, Pub. L. No. 72–65, 47 Stat. 70 (1932) (the "Norris-LaGuardia Act"). § 11 of the Norris-LaGuardia Act provided jury trials in certain contempt actions, but unquestionably did not provide a jury right in contempt actions arising out of injunctions issued pursuant to the Wagner or Taft-Harley Acts. *See Muniz*, 422 U.S. at 462-463, 95 S. Ct. 2178.

substantive change was intended by the revision. *Id.* at 467–469, 95 S. Ct. 2178. Citing *Fourco Glass*, the Court reiterated the longstanding rule that "[n]o changes of law or policy ... are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Id.* at 472, 95 S. Ct. 2178 (internal quotation marks omitted). The Court thus expressed some incredulity at the proposition that the major policy change petitioners argued for could be effected by Congress without any mention of it in any of the legislative history or notes:

> In view of the express disavowals in the House and Senate Reports on the revisions of both the Criminal Code and the Judicial Code, it would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Revisers' Note of that change. It is not tenable to argue that the Revisers' Note to § 3692, although it explained in detail what words were deleted from and added to what had been § 11 of the Norris-LaGuardia Act, simply did not bother to explain at all, much less in detail, that an admittedly substantial right was being conferred on potential contemnors that had been rejected in the defeat of the Ball amendment the previous year and that, historically, contemnors had never enjoyed.

See id. at 472, 95 S. Ct. 2178.

Finley v. United States, 490 U.S. 545, 553–54, 109 S. Ct. 2003, 104 L. Ed. 2 593 (1989), involved a question of whether the 1948 recodification of the Judicial Code

substantively created new "pendent-party" jurisdiction when it recodified the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (the "FTCA").[33] Writing for the Court, Justice Scalia rejected that argument, holding that "[u]nder established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Id.* at 554, 109 S. Ct. 2003 (internal quotation marks omitted) (quoting from *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199, 32 S. Ct. 626, 56 L. Ed. 1047 (1912) and citing to *United States v. Ryder*, 110 U.S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308 (1884)). Finding "no suggestion, much less a clear expression, that the minor rewording at issue here imported a substantive change," the Court held that the pre-codification interpretation of the statute continued to hold (*i.e.* no "pendent-party" jurisdiction under the FTCA). *Id.* at 554–56, 109 S. Ct. 2003.

Finally, our own court has recently applied this canon in *Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor*, 712 F.3d 476 (11th Cir. 2013). There we held that certain amendments to 49 U.S.C. § 31105 enacted by the Revision of Title 49, United States Code Annotated, "Transportation", Pub. L. No. 103–272, 108 Stat. 745 (1994) were simply revisions and codifications,

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[33] "Pendent-party" jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by [a] federal court." *See Finley*, 490 U.S. at 549, 109 S. Ct. 2003. As opposed to "pendent-claim" jurisdiction, which is "jurisdiction over nonfederal claims between parties litigating other matters properly before the court." *Id.* at 548, 109 S. Ct. 2003.

and thus did not change the pre-amendment scope of the law. *Koch Foods*, 712 F.3d at 485. We noted in *Koch Foods* that (much like § 2664(b) of the DRA amendments here) the recodification statute cautioned that the revisions and codifications were enacted "without substantive change," and that the legislative history (like the legislative history of the DRA here) emphasized that the changes were not substantive. *Id.* The interpretive canon used in *Koch Foods* is the one we use in this case: "As the Supreme Court has observed, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Id.* at 486 (quoting from *Finley*, 490 U.S. at 554, 109 S. Ct. 2003).

We turn then to applying the recodification canon of statutory construction to our case. It is clear that the Office of the Law Revision Counsel made an error in revising § 405(h) in 1976 (and again in 1982). Rather than include the full range of jurisdictional grants that were clearly forbidden under the prior law,[34] the Law Revision Counsel (who it must be recalled has no authority to pass laws or alter the jurisdiction of federal district courts)[35] mistakenly decided to update the cross-reference only to § 1346 and § 1331 of the new

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[34] *I.e.* each district court jurisdictional grant listed in Section 24 of the Judicial Code of 1911.

[35] *See e.g. N. Dakota v. United States*, 460 U.S. 300, 311 n. 13, 103 S. Ct. 1095, 75 L. Ed. 2 77 (1983) (noting that the editorial decisions made by a codifier without the approval of Congress should be given no weight in interpreting a statute).

Title 28. We find no indication whatsoever, let alone a "clear indication," in the Law Revision Counsel's Codification note that the revisers intended or were suggesting an expansion of district court jurisdiction to review Medicare and Social Security claims, thereby reversing forty years of Congressional policy. On the contrary, the title of the note ("Codification") and its contents indicate that the change was a mere codification (*i.e.* updating the cross-reference to "section 24 of the Judicial code" to its new location in Title 28 of the U.S. Code), and not a substantive change. One would expect that if the revisers intended the kind of fundamental change in policy and expansion of the jurisdiction of bankruptcy courts that Bayou Shores suggests, it would merit *some* mention. *See Muniz*, 422 U.S. at 472, 95 S. Ct. 2178 ("It is not tenable to argue that the Revisers' Note ..., although it explained in detail what words were deleted ... and added ..., simply did not bother to explain at all, much less in detail, that an admittedly substantial right was being conferred ...").

Moreover we do not find it significant, contrary to Bayou Shores' suggestion, that Congress enacted the error into positive law when it passed the DRA in 1984. There is no evidence in the DRA that Congress "clearly expressed" an intention to reverse decades of Medicare and Social Security Act policy and give bankruptcy courts parallel jurisdiction with HHS to adjudicate Medicare claims (and parallel jurisdiction with the Social Security Administration to adjudicate Social Security claims). Again, if Congress intended such an important expansion of bankruptcy court jurisdiction to

be enacted in a recodification, one would expect to find some indication in the statute or legislative history stating as much. *See Tidewater Oil*, 409 U.S. at 162–63, 93 S. Ct. 408 (finding no indication in Reviser's Notes or legislative history that Congress intended recodification to expand federal appellate court jurisdiction). Bayou Shores points to no such indication, nor are we able to find one.

To the contrary, the *statute itself* tells us that the amendment in question is not to be interpreted as making any substantive change to the law: "none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date." *See* DRA, § 2664(b); *see also Koch Foods*, 712 F.3d at 485 (noting that the statute "expressly states that no substantive change is intended by the revisions to the language").[36] The legislative history of the bill similarly emphasizes that the amendments in § 2663 (including the amendment to § 405(h)) were not intended to be substantive. *See* H.R. Rep. No. 98-432, pt. 2, at 1663 (1984) (noting that the bill "makes certain corrections of spelling, punctuation, cross-references and other clerical amendments to the

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[36] The bankruptcy court referred to § 2664(b) as "legislative history." *See In re Bayou Shores*, 525 B.R. at 167. Strictly speaking, that is not correct. "Legislative history" refers to "proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates." *Black's Law Dictionary* (10th ed. 2014). Conversely, § 2664(b) of the DRA is positive law: it is part of a statute that was passed by Congress and signed into law by the President.

Social Security Act and related provisions in the Internal Revenue Code"). Rep. Dan Rostenkowski (the original sponsor of H.R. 3805, containing the "technical corrections" that were merged into the DRA) "emphasize[d] that this bill intends simply to correct technical errors and to better reflect the policies established by the Congress in enacting the original legislation." 129 Cong. Rec. 23321, 23440 (1983).

Per long standing Supreme Court precedent, we "will not ... infer[ ] that the legislature, in revising and consolidating [§ 405(h)] intended to change their policy, unless such intention be clearly expressed." *See United States v. Ryder*, 110 U.S. 729, 740, 4 S. Ct. 196, 28 L. Ed. 308 (1884). Here, we find no clear expression of any intent to change Congressional policy with respect to bankruptcy court jurisdiction over Medicare claims. To the contrary, the statute and legislative history detailed above expresses an intent *not* to substantively amend § 405(h).[37]

In reply, Bayou Shores attempts to downplay the mandate of § 2664(b) in the DRA by arguing that despite the statute's command that the amendments

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[37] The Seventh Circuit's *Bodimetric* decision (and thus the decisions of the Third and Eighth Circuits adopting *Bodimetric*) recognized and correctly applied this recodification canon of statutory interpretation. *See Bodimetric*, 903 F.2d at 489 (citing to *Muniz* and *U.S. v. Ryder*). Conversely, the cases holding that § 405(h) does not bar jurisdiction under § 1334 do not appear to have recognized the existence of the canon, let alone analyzed whether it applies to this issue. It is clear that in ignoring a canon of statutory construction that courts have been applying for more than a century, these latter courts erred.

are not to be interpreted as substantive, certain of the amendments were in fact substantive. *See* Appellant's Reply Br. at 2-9. We are not persuaded by this argument. As an initial matter, Bayou Shores essentially asks us to ignore § 2664(b) and Congress's command that the amendments are not substantive, which we are clearly not free to do. In *Muniz* the Supreme Court indicated that "[t]he nature of the revision process itself requires the courts, including this Court, to give particular force to the many express disavowals in the House and Senate Reports of any intent to effect substantive changes in the law." *See Muniz*, 422 U.S. at 472 n.11, 95 S. Ct. 2178. Here we think it most reasonable to give force to Congress's express disavowals in the DRA itself and in the legislative history "of any intent to effect substantive changes in the law."

Moreover, the two examples that Bayou Shores cites as "substantive" amendments in § 2663 of the DRA are, on closer review, at least arguably non-substantive. First, Bayou Shores argues that § 2663(e)(3) of the DRA expanded criminal liability for impersonating certain persons in order to obtain information about their Social Security benefits. Appellant's Reply Br. at 3-4. The language in § 2663(e)(3) orders that "Section 1107(b) of [the Social Security Act] is amended by striking out 'former wife divorced,' each place it appears and inserting in lieu thereof 'divorced wife, divorced husband, surviving divorced wife, surviving divorced husband, surviving divorced mother, surviving divorced father.'" The House committee report on the bill indicates that this

amendment was intended to bring Section 1107(b) into conformity with an earlier amendment eliminating gender-based distinctions in the Social Security Act.[38] Thus, arguably the earlier amendment had already eliminated gender distinctions in Section 1107(b), and the DRA amendments merely revised the text of Section 1107(b) to correctly reflect those earlier amendments.[39]

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[38] *See* H.R. Rep. No. 98-432, pt. 2, at 1659 (1984) ("While the Social Security Amendments of 1983 sought to eliminate all gender-based distinctions in the Social Security Act, this gender-based distinction was not eliminated by those amendments. In order to assure that the Social Security Act provides the same penalty for fraud regardless of sex, the bill provides that the penalty for fraud would also apply to an individual who falsely represents that he is the divorced husband of a worker or beneficiary.")

[39] Even assuming Bayou Shores is correct that this provision substantively changed existing law, it would not change the result in this case. The House report indicates the "clear intent" behind the amendment to Section 1107(b) (whether substantive or not), whereas nothing in the legislative history indicates a "clear intent" to change the jurisdiction of bankruptcy courts with the amendment to § 405(h). Thus, the amendment to Section 1107(b) is not analogous to the amendment to § 405(h). It is certainly possible that Congress intended to make substantive amendments in the codification and revision section of the DRA. However, under *United States v. Ryder* and its progeny we require *some* indication that a substantive change in the revision was intended. *See e.g. Ex parte Collett*, 337 U.S. 55, 65–71, 69 S. Ct. 944, 93 L. Ed. 1207 (1949) (explaining that reviser's notes and legislative history made clear that addition of 28 U.S.C. § 1404(a), which made forum non coveniens transfers available in any district court civil action, was a substantive amendment enacted by the 1948 Judicial Code revision).

Second, Bayou Shores points to § 2663(a)(15)(C), and characterizes it as denying certain benefits to college students that they otherwise would have received under the prior version of the statute. Appellant's Reply Br. at 5. The relevant text of the amendment orders that "(C) Section 222(b)(4) of such Act is amended by striking out 'full-time student' and inserting in lieu thereof 'full-time elementary or secondary school student'." *See* DRA at § 2663(a)(15)(C). A close reading of the legislative history suggests that Bayou Shores is mistaken about this provision as well. Section 222(b)(4) of the Social Security Act (codified at 42 U.S.C. § 422) was added by Congress in 1965.[40] At the time § 222(b)(4) was added to the larger section, the term "full-time student" was "as defined and determined under section 202(d)."[41] Turning then to Section 202(d), that section was amended in 1981 (prior to the DRA in 1984) in a section titled "Elimination of child's insurance benefits in the case of children age 18 through 22 who attend postsecondary schools."[42] The 1981 amendment makes clear that "full time student" was to be defined as elementary and high-school students, not college

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[40] *See* Social Security Amendments of 1965, Pub. L. No. 89–97, 79 Stat. 286 at § 306(14) (1965).

[41] Section 202 of the Social Security Act is codified at 42 U.S.C. § 402. The current statute continues to refer to section 202 for its definition of "full-time elementary or secondary school student."

[42] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, 95 Stat. 357 at § 2210 (1981).

students.[43] A Senate report issued the following year noted that under the prior law children beneficiaries could receive benefits until they were 22 as long as they were in school, while the 1981 amendments eliminated those benefits for anyone over 18 attending post-secondary schooling.[44] It thus appears that the 1984 amendment in the DRA referenced by Bayou Shores was a "technical correction" because it simply updated § 222(b)(4) of the statute to be consistent with the definitions in the earlier amended § 202(d).

Finally, even if we assume for the sake of argument that Bayou Shores has correctly identified two substantive changes in § 2663, the examples Bayou Shores relies on are minor substantive amendments at best, compared to the massive shift in policy that giving bankruptcy courts parallel authority to adjudicate Medicare disputes would represent. This is akin to finding a few hidden firecrackers in the bill and thus inferring the presence of an atomic bomb. In other words, the presence of two minor substantive changes in § 2663 (assuming they are substantive), can hardly justify interpreting the amendment to § 405(h) as enacting a significant change in Congressional policy by creating bankruptcy court jurisdiction over Medicare claims.

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[43] *See id.* ("SEC. 2210. (a)(1) Section 202(d) of the Social Security Act is amended ... by striking out 'full-time student' each place it appears and inserting in lieu thereof 'full-time elementary or secondary school student'.")

[44] *See* S. Rep. No. 97-314, Vol. I, at 106 (1982).

Therefore, we conclude that because the previous version of § 405(h) precluded bankruptcy court review of Medicare claims under § 1334, so too must the newly revised § 405(h) bar such actions.

2. § 1334 does not give bankruptcy courts special jurisdiction over Medicare claims

In light of the above explanation, this Court is constrained to disagree with the Ninth Circuit's *In re Town & Country* opinion, and thus holds that § 405(h) bars a bankruptcy court acting pursuant to § 1334 from exercising jurisdiction over Medicare claims. However, both the Ninth Circuit in *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010) and Bayou Shores here argue that § 1334 has a "special status" that is different and distinct from other jurisdictional provisions (such as § 1332).[45] In particular, Bayou Shores argues that the text of § 1334(b) itself defines the expansive nature of bankruptcy court jurisdiction: "notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11." *See* 28 U.S.C. § 1334(b). However, we read the Supreme Court's opinion in *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2 358 (1991), as effectively foreclosing that argument.

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[45] *See, e.g.*, Appellant's Reply Br. at 9-12.

In *MCorp Fin.*, the Court held that bankruptcy law's automatic stay provision (11 U.S.C. § 362) could not stay an administrative proceeding by the Board of Governors of the Federal Reserve System against MCorp Financial. The Court first found that the administrative proceeding fell squarely into the exception in § 362 for proceedings to enforce a "governmental unit's police or regulatory power." *Id.* at 39–40, 112 S. Ct. 459.[46] The Court rejected MCorp Financial's argument that for the exception to apply, the bankruptcy court would need to determine in the first instance whether the exercise of regulatory power was legitimate; the Court held that such a reading "would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity," and that "[s]uch a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with *the limited authority Congress has vested in bankruptcy courts*." *Id.* at 40, 112 S. Ct. 459 (emphasis added).

Importantly, the Court rejected MCorp's broad reading of 28 U.S.C. § 1334(b), holding that "[s]ection 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other 'courts,' and, of course, an administrative agency such as the Board is not a

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[46] The parties dispute a similar question on appeal. However, our decision that the bankruptcy court lacked subject matter jurisdiction over the provider agreements renders moot the question of whether HHS's actions fall in § 362's exceptions. We thus decline to decide that issue.

'court.'" *Id.* at 41–42, 112 S. Ct. 459. That is precisely the situation here: Bayou Shores' provider agreement was terminated by the Centers for Medicare & Medicaid Services ("CMS"), which is an administrative agency within HHS and not a "court." Thus, § 1334(b) does not concern the allocation of jurisdiction between the bankruptcy court and HHS, and cannot trump the § 405(h) jurisdictional bar.

Bayou Shores raises an additional argument relating to the 1984 amendments to § 1334. Bayou Shores points out that the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat 333 (July 10, 1984) (the "Bankruptcy Act") was passed only eight days prior to passage of the DRA, and among other things significantly enlarged the scope of bankruptcy court jurisdiction.[47] According to Bayou Shores, because "28 U.S.C. § 1334 was enacted first, and 42 U.S.C. § 405(h) was enacted days later," Congress's failure to include § 1334 in § 405(h) indicates a positive intent to expand the scope of bankruptcy court jurisdiction. Appellant's Br. at 45. We disagree. *See N. L. R. B. v. Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' Int'l Ass'n, AFL–CIO*, 404 U.S. 116, 129–30, 92 S. Ct. 360, 30 L. Ed. 2 312 (1971) ("The Court has frequently cautioned that it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.") (quotation marks omitted).

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[47] The Bankruptcy Act added subsection 1334(b), discussed *supra*. *See* Bankruptcy Act at § 101(a).

As an initial matter, reading too much into the significance of the timing of the passage of these acts is at best speculative, particularly since the DRA had nothing to do with bankruptcy court jurisdiction, nor does Bayou Shores point to any evidence suggesting that Congress had the Bankruptcy Act in mind when passing the DRA.[48] Moreover Bayou Shores' timing argument also cuts the opposite way: one would equally expect that if Congress were inclined to expand the jurisdiction of bankruptcy courts to include hearing Medicare and Social Security claims, it would have done that in the Bankruptcy Act that it had just passed, rather than burying it as a "Technical Correction" in a bill wholly unrelated to bankruptcy courts (*i.e.* the DRA).

3. Barring bankruptcy court jurisdiction is consistent with Congressional Medicare policy

The bankruptcy court also relied on what was essentially a policy argument about the wisdom of allowing a bankruptcy court rather than HHS to adjudicate Medicare claims:

> Consider the following hypothetical: a debtor that operates a skilled nursing facility has its Medicare provider agreement terminated

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[48] Approximately forty-some public laws were passed by Congress in July of 1984. *See* https://www.congress.gov/public-laws/98th-congress. We are skeptical of the suggestion that the temporal proximity between any one of these laws and the Bankruptcy Act, standing alone, has any particular significance in interpreting any of these laws.

> because it was improperly cited for noncompliance. The debtor immediately appeals the finding of noncompliance. But because CMS stops payment for Medicare residents, the debtor is forced to file for bankruptcy. If the Court were to adopt HHS's view, the debtor in that hypothetical scenario could never assume its Medicare provider agreement since it is highly unlikely the appeals process will be complete before the debtor files for bankruptcy.

See In re Bayou Shores, 525 B.R. at 169.[49] In other words, unless the bankruptcy court can take jurisdiction over the provider agreements, Bayou Shores would cease to exist as a going concern long

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[49] *See also* Samuel R. Maizel & Michael B. Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply to Bankruptcy Courts*, 32 Emory Bankr. Dev. J. 19, 27-29 (2015) (noting that because of the length of the HHS appeals process, a hospital could be faced with the "fatal dilemma" of being put out of business before being able to challenge an adverse HHS decision); *but see Oakland Med. Grp., P.C. v. Sec'y of Health & Human Servs., Health Care Fin. Admin.*, 298 F.3d 507, 511 (6th Cir. 2002) ("[T]he government has a strong interest in expediting provider-termination procedures because: (1) the Secretary's responsibility for insuring the safety and care of elderly and disabled Medicare patients is of primary importance, and (2) the government has a strong interest in minimizing the expenses of administering the Medicare program.") (internal quotation marks and citations omitted); *Northlake Cmty. Hosp. v. United States*, 654 F.2d 1234, 1242 (7th Cir. 1981) (explaining that "a provider's financial need to be subsidized for the care of its Medicare patients is only incidental to the purpose and design of the (Medicare) program.") (internal quotation marks and citations omitted).

before the HHS administrative appeals process could complete.[50]

While we are not unsympathetic to this argument, the choice of whether the bankruptcy court or HHS is best positioned to adjudicate Medicare claims is a policy decision that the bankruptcy court was not empowered to make. As explained at length above, § 405(h) and (g) restricts the role of district courts to a limited review of final HHS decisions, thus reflecting Congressional policy to let HHS adjudicate those claims in the first instance. The Supreme Court explained in *Illinois Council* that the review provisions of § 405(h) and (g) give HHS a greater opportunity to "apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts." *See* 529 U.S. at 13, 120 S. Ct. 1084.

Indeed, the bankruptcy court's actions here illustrate the kind of "premature interference" that *Illinois Council* had in mind. While the bankruptcy court went to great length to deny that it was reviewing the merits of HHS's findings or decisions (*see e.g. In re Bayou Shores SNF*, 525 B.R. at 168), that is effectively what the bankruptcy court did. After holding an evidentiary hearing on the conditions at

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[50] This assumes of course that Bayou Shores will be successful in regaining the provider agreements in the administrative appeals process. That in turn is a dubious proposition as an administrative law judge in that appeal has already granted summary judgment against Bayou Shores on the issue of the termination of the provider agreements. *See* Bankr. ECF No. 261-1, Administrative Law Judge Ruling on Motion for Partial Summary Judgement (Dec. 16, 2015).

Bayou Shores' facility, the bankruptcy court apparently decided that the three deficiencies Bayou Shores was cited for were not particularly serious. *Id.* at 163. The court also decided that Bayou Shores had corrected each of the deficiencies it was cited for and provided adequate assurances that it would be in compliance with the Medicare regulations in the future. *Id.* at 170–171. Notwithstanding HHS's determination to the contrary, the bankruptcy court deemed the health and safety of Bayou Shores' patients free of immediate jeopardy. The practical outcome of the bankruptcy court's decision was thus a reversal of HHS's decision: the bankruptcy court rolled back the termination, gave Bayou Shores back its provider agreements, and effectively prevented HHS from terminating Bayou Shores from the Medicare/Medicaid program for its repeated deficiencies. That was functionally a decision on the merits of the underlying HHS decision, and an interference with HHS's role in deciding who is eligible to participate in Medicare/Medicaid.[51]

The Government for its part disputes the bankruptcy court's version of the facts. With respect to the three violations, the picture painted by the

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[51] We have explained previously that where both parties to a Medicare claim dispute "engage in extensive discovery and presentation of their whole cases on the merits, the district court does exactly what [HHS] is expected to do," and therefore "[i]t is simply not realistic to say that the district court in such a case does not address and decide the merits of the case." *V.N.A. of Greater Tift Cty., Inc. v. Heckler*, 711 F.2d 1020, 1032 (11th Cir. 1983). Such a merits-review is contrary to the policy embodied by the Medicare Act's limited judicial review provisions. *See id.*

Government suggests far more serious issues with the care provided by Bayou Shores to its patients. Federal Appellee Br. at 14-16; State Appellee's Br. at 3-4.[52] Moreover, the Government argues that simply coming back into compliance after each violation was not the issue. Rather, terminating repeat offenders like Bayou Shores was a key part of Congress's overhaul of nursing home regulations, and was intended to stop "instances in which substandard providers had avoided termination from Medicare by claiming that they had cured serious violations of safety standards, only to lapse back into noncompliance after the threat of administrative sanction was removed." Federal Appellee's Br. at 50-51.

In any event, we do not need to decide whose version of the facts is correct, nor do we need decide whether the bankruptcy court's decision on the merits of HHS's action was correct. HHS, not the bankruptcy court, has been charged by Congress with administering the Medicare Act and regulating Medicare providers. Indeed, the bankruptcy court's

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[52] Most disturbingly perhaps, the bankruptcy court's opinion describes the result of the second incident somewhat innocuously: "[T]he patient with the history of abuse—who was in the facility for less than 24 hours—did not touch or otherwise harm the other resident." *In re Bayou Shores SNF*, 525 B.R. at 163. But the Government contends that the "patient with the history of abuse" "sexually molest[ed]" his roommate during those 24 hours. Federal Appellee Br. at 14-16; State Appellee's Br. at 3-4. According to the underlying report, the roommate reported in an interview that the patient with the history of abuse "put his hand under the curtain and moved his hand on the sheet to about ¼ inch from my private parts." *See In re Bayou Shores*, Bankr. ECF No. 42-2 at 17.

action here stymied the direct statutory mandate from Congress to HHS to take appropriate action (including potentially terminating a provider agreement) when, as here, a survey determines that a nursing home's condition "immediately jeopardize[s] the health or safety of its residents." *See* 42 U.S.C. § 1395i–3(h)(2).[53] And though charged with broad jurisdiction to deal with issues related to a debtor's bankruptcy estate, bankruptcy courts generally lack the institutional competence or technical expertise of HHS to oversee the health and welfare of nursing home patients or to interpret and administer a "massive, complex health and safety program such as Medicare." *See Illinois Council*, 529 U.S. at 13, 120 S. Ct. 1084. Or at least, that is the judgment of Congress we derive from the enactment of § 405(h) in 1939 (and the recodification in 1984).

4. § 405(h) clearly requires administrative exhaustion

Finally, while much of the above dispute concerns the third sentence of § 405(h) and whether it completely bars bankruptcy jurisdiction under § 1334, we do not overlook the effect of the first two sentences as well. The bankruptcy court dismissed the second sentence as merely limiting "the ability of federal courts to review

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[53] If the deficiencies immediately jeopardize the health and safety of a facility's residents, "the Secretary *shall take immediate action* to remove the jeopardy and correct the deficiencies through the remedy specified in subparagraph (B)(iii), *or terminate the facility's participation under this subchapter* and may provide, in addition, for one or more of the other remedies described in subparagraph (B)." 42 U.S.C. § 1395i–3(h)(2) (emphasis added).

the findings of fact or an agency decision." *In re Bayou Shores SNF*, 525 B.R. at 167. Though correct in a minimalist sense, we think that is an overly narrow understanding of the statute. The Supreme Court made clear in *Salfi* that the first two sentences of § 405(h) "assure that administrative exhaustion will be required" and "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405(g)." 422 U.S. at 757, 95 S. Ct. 2457. The third sentence, according to the Court in *Salfi*, means that no action may be brought pursuant to any jurisdiction other than § 405(g), even where administrative remedies have been exhausted. *Id.*; *see also Illinois Council*, 529 U.S. at 13, 120 S. Ct. 1084.

Bayou Shores does not dispute that its claims have not been administratively exhausted; in fact, as of the date of the oral argument, Bayou Shores' administrative appeal was still pending in front of an administrative law judge at HHS. *See* Oral Argument, March 29, 2016. Putting aside the jurisdictional question then, neither Bayou Shores nor the bankruptcy court has explained why standard principles of administrative exhaustion should not prevent a district court from hearing Bayou Shores' case. *See e.g. In re Rodriquez*, No. 09–93431–JB, 2010 WL 2035733, at *3–5 (Bankr. N.D. Ga. Mar. 23, 2010) (relying on § 405(g) and (h) to hold that bankruptcy court would not entertain non-administratively exhausted Social Security claims). Bayou Shores has also not shown that any exception to standard administrative exhaustion principles should apply here. *See McCarthy v. Madigan*, 503 U.S. 140, 146–149, 112 S.

Ct. 1081, 117 L. Ed. 2 291 (1992) (explaining the "three broad sets of circumstances" in which exceptions to administrative exhaustion may apply).

Thus, even if we were to assume that § 405(h) does not bar jurisdiction under § 1334, the bankruptcy court erred by not dismissing Bayou Shores' claim for failure to exhaust Bayou Shores' administrative remedies first.

IV. OTHER ARGUMENTS

Bayou Shores raises a number of other issues that it contends warrant reversal of the district court's Order. For the reasons below, we do not find these arguments persuasive.

A. Mootness

Bayou Shores argues that this dispute is either constitutionally moot or equitably moot. With respect to constitutional mootness, Bayou Shores contends that because the bankruptcy court's injunction and automatic stay have been dissolved, no live controversy between the parties remains. The Government contends that at least two live issues remain. First, the bankruptcy court's stay and injunction (even if now dissolved) prevented the Government from stopping payments to Bayou Shores during the pendency of the bankruptcy case. The Government argues that it intends to seek recoupment of these payments if the bankruptcy court's orders are found to be invalid. Second, contrary to Bayou Shores' contention that the injunction and stay have dissolved, the Government contends that the bankruptcy court's Confirmation

Order continues to indefinitely enjoin the Government from terminating the provider agreements.[54]

A case is constitutionally moot when "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2 491 (1969). Put another way, "[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216–17 (11th Cir. 2000) (internal quotations and citations omitted). Here, a holding that the bankruptcy court lacked subject matter jurisdiction would allow the Government to go forward with its efforts to terminate Bayou Shores from the Medicare/Medicaid program, as well as allow the Government to try and recover payments made to Bayou Shores since the filing of the

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[54] For example, we note that the Confirmation Order contains the following: "Nothing set forth in the Amended Plan or this Order shall limit the power and authority of AHCA to take action related to the renewal or revocation of the Debtor's license necessary to protect public health, safety and welfare, ***provided however, that any such actions related to the renewal or revocation of the license may not be based upon the termination of the Medicare and Medicaid provider agreements that have been assumed by the Debtor***." *In re Bayou Shores*, Bankr. ECF No. 285 at 14. At oral argument, Bayou Shores conceded that this second issue was not constitutionally moot.

bankruptcy court action.[55] Meaningful relief is thus available, and this case is not constitutionally moot.

Bayou Shores argues alternatively that the case is equitably moot because its Chapter 11 plan has been substantially consummated. Equitable mootness is a discretionary doctrine that permits courts sitting in bankruptcy appeals to dismiss challenges (typically to confirmation plans) when effective relief would be impossible. *See In re Nica Holdings, Inc.*, 810 F.3d 781, 786 (11th Cir. 2015). Central to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief. *Id.* (quoting from *First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)). The equitable mootness doctrine seeks to avoid an appellate decision that "would knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Id.*

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[55] Bayou Shores argues that the Government has no claim to damages because the Government "would be required to pay for the care of Bayou's patients, if not at Bayou, somewhere, because the vast majority of Bayou's patients are indigent." Appellant's Reply Br. at 28. That argument misses the mark though. The Government is not seeking to claw back the money merely to pocket the funds or to avoid paying for the care of Bayou Shores' patients. Rather, the Government (as required by statute) will not pay a facility such as Bayou Shores that fails to comply with health and safety regulations. In other words, while the Government may be required to pay for the care of Bayou Shores' patients, it reasonably wants to pay someone other than Bayou Shores for that service.

at 787 (citing *Miami Ctr., Ltd. P'ship v. Bank of NY*, 838 F.2d 1547, 1555 (11th Cir. 1988)).

Here however, we are reviewing whether the district court was correct in dismissing for lack of subject matter jurisdiction. "Subject-matter jurisdiction properly comprehended ... refers to a tribunal's power to hear a case, *a matter that can never be forfeited or waived.*" *See Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81, 130, 130 S. Ct. 584, 175 L. Ed. 2 428 (2009) (internal quotation marks omitted; citations omitted; emphasis added). Because we agree with the district court that the bankruptcy court lacked subject matter jurisdiction over the assumption of Bayou Shores' provider agreements, that must end the inquiry. When the lower court "lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2 501 (1986). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2 210 (1998). The Supreme Court in *Steel Co.* characterized this threshold inquiry as "inflexible and without exception." *See id.* at 94–95, 118 S. Ct. 1003 (quoting from *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)).

Thus, even assuming for the sake of argument that Bayou Shores is correct that this situation justifies the application of equitable mootness, the absence of jurisdiction precludes the exercise of that discretionary authority. Our only role here is to correct the bankruptcy court's error by affirming the district court's Order.[56]

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[56] Of course, we are addressing only the issue of the bankruptcy court's authority to adjudicate Bayou Shores' claim to ownership of the provider agreements terminated by the Government. To the extent Bayou Shores has other property in its bankruptcy estate, nothing in this opinion addresses or reaches the bankruptcy court's actions with respect to that property.

Further, while we do not rule on the equitable mootness issue, we note that the limited factual record in front of us suggests it would not be appropriate to do so in this situation. Although the Government did not obtain a stay, it appears from our review of the record that it was not for lack of trying. *See In re Nica Holdings*, 810 F.3d at 787 ("On this record, we cannot fault [appellant] for not getting a stay."). Moreover, the simplicity of the transactions and amounts of money involved here appear more akin to the "simpler" transactions in *In re Nica Holdings*, 810 F.3d at 788 (no equitable mootness) than in the complex multi-million dollar transactions that justified equitable mootness in *In re Club Assocs.*, 956 F.2d 1065 and *Miami Ctr., Ltd. P'ship v. Bank of NY*, 820 F.2d 376 (11th Cir. 1987). Finally, the reliance interests of Bayou Shores' creditors, who we must presume understood they were lending money to a nursing home that the Government was attempting to shut down for violating health and safety regulations, also do not weigh much in favor of applying equitable mootness.

B. Bayou Shores' claims "arise" under the Medicare Act

Bayou Shores additionally argues that its claims do not "arise" under the Medicare Act, and thus are not subject to the § 405(h) jurisdictional bar. According to Bayou Shores, "[n]either the September 5 Order nor the Confirmation Orders had anything to do with recovering a claim (a right to payment) arising under the Medicare Act." Appellant's Br. at 58.

Bayou Shores' position however has already been rejected by the Supreme Court. In *Illinois Council* the Court rejected the argument that claims "arising under" the Medicare Act were limited to monetary claims:

> Nor can we accept a distinction that limits the scope of § 405(h) to claims for monetary benefits. Claims for money, claims for other benefits, *claims of program eligibility*, and *claims that contest a sanction or remedy* may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory provisions. *There is no reason to distinguish among them in terms of the language or in terms of the purposes of § 405(h)* ... Nor for similar reasons can we here limit those provisions to claims that involve "amounts."

Id. at 14, 120 S. Ct. 1084 (emphasis added).

Here, the determination of whether Bayou Shores is allowed to keep its provider agreements could be characterized as either a "claim[ ] of program eligibility" (*i.e.* whether Bayou Shore is eligible to participate in Medicare) or a "claim[ ] that contest[s] a sanction or remedy" (*i.e.* the sanction of terminating Bayou Shores from the Medicare program). In either case, the Supreme Court made clear in *Illinois Council* that Bayou Shores' claims fall within the ambit of § 405(h)'s "claim[s] arising under" the Medicare Act.

C. Bayou Shores' Medicaid claims rise and fall with its Medicare claims

The parties also dispute whether the termination of Bayou Shores' Medicare provider agreement resulted in the termination of Bayou Shores' Medicaid provider agreement. In its briefing, Bayou Shores contends that AHCA failed to use the required procedures under Florida state law to terminate a Medicaid agreement. The Government argues that Medicaid agreements terminate by operation of law when Medicare agreements terminate. *See* 42 U.S.C. § 1396a(a)(39).

Without resolving this dispute, we note that the only issue necessary to decide is whether the bankruptcy court was barred by § 405(h) from taking jurisdiction over Bayou Shores' Medicaid provider agreements. Courts have held that the Medicare and Medicaid statutory and regulatory provisions "provide that when a dually certified facility challenges a determination that it is not in substantial compliance with the common Medicaid and Medicare regulations and a termination of its participation in both programs, the facility must seek review of this determination

through the Medicare administrative appeals procedure." *Cathedral Rock of N. Coll. Hill, Inc. v. Shalala*, 223 F.3d 354, 366 (6th Cir. 2000); *see also Michigan Ass'n of Homes & Servs. for Aging, Inc. v. Shalala*, 127 F.3d 496, 503 (6th Cir. 1997) ("The Medicaid Act's inclusion of § 405(g) is clear textual support for the proposition that Congress intended the exhaustion of administrative remedies to apply in cases [involving dual Medicare/Medicaid providers]"); *Health Equity Res. Urbana, Inc. v. Sullivan*, 927 F.2d 963, 967 (7th Cir. 1991).

Bayou Shores cannot avoid the jurisdictional bar in § 405(h) by attempting to re-characterize its claim to the Medicaid provider agreement as separate from its claim to the Medicare provider agreement. *See Cathedral Rock*, 223 F.3d at 366–67. Indeed, it can hardly be said that Bayou Shores has a separate Medicaid claim, notwithstanding the two separate provider agreements: the sole reason for termination of Bayou Shores' Medi*caid* provider agreement was the termination of its Medi*care* provider agreement for Bayou Shores' failure to comply with Medi*care* laws and regulations. Allowing Bayou Shores to go forward with only its Medicaid claims would thus put the bankruptcy court in the untenable position of adjudicating a dispute fundamentally about Medicare laws and regulations (*i.e.* whether Bayou Shores was in compliance with the relevant Medicare laws and regulations), despite being barred from adjudicating Bayou Shores' Medicare claims. *See Rhode Island Hosp. v. Califano*, 585 F.2d 1153, 1162 (1st Cir. 1978) ("Were we to assume § 1331 jurisdiction over the

Hospital's Medicaid claim we would find ourselves in the peculiar posture of hearing a case that consists entirely of a challenge to the limits promulgated under [the Medicare Act], when we are expressly barred by [the Medicare Act] from entertaining that challenge at this time.").

Accordingly, Bayou Shores "cannot avoid the Medicare Act's administrative channeling requirement simply because as a dual Medicare and Medicaid provider, its claims also fall under Medicaid Act." *Cathedral Rock*, 223 F.3d at 367.[57]

D. Termination of the provider agreements

On appeal, the parties continue to dispute whether the provider agreements in question terminated before or after the filing of Bayou Shores' bankruptcy petition. Because we have determined that the bankruptcy court lacked jurisdiction over the termination of the provider agreements, we decline to rule on the issue of whether or not the agreements terminated prior to the filing of the bankruptcy petition.

V. Conclusion

We agree with the district court that the bankruptcy court erred as a matter of law when it exercised subject matter jurisdiction over the provider agreements in this case. The bankruptcy court was without § 1334 jurisdiction under the § 405(h) bar to

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[57] We do not need to decide here whether a different result would accrue in a case where a party presents only Medicaid claims to a bankruptcy court.

issue orders enjoining the termination of the provider agreements and to further order the assumption of the provider agreements.

Thus, finding no reversible error in the district court's June 26, 2015, Order (*In re Bayou Shores*, 533 B.R. at 343) we AFFIRM.

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re BAYOU SHORES SNF, LLC, Debtor
Florida Agency for Health Care Administration and The United States of America, On Behalf of the Secretary of the United States Department of Health and Human Services,
Appellants,

v.

Bayou Shores SNF, LLC,
Appellee.

Bankruptcy No.: 8:14–bk–9521–MGW

Nos.: 8:14–cv–02816–T–30, 8:15–cv–00103–T–30, 8:14–cv–02617–T–30, 8:15–cv–00128–T–30

Signed June 26, 2015.

ORDER

JAMES S. MOODY, JR., District Judge.

THIS CAUSE came before the Court on appeal of the Bankruptcy Court's entry of an injunction prohibiting any action to terminate the Debtor's Medicare and Medicaid provider agreements (the September 5, 2014 Order) and subsequent entry of a confirmation order that ordered the assumption of the Medicare and Medicaid provider agreements (the

Confirmation Order) (collectively, the "Orders"). The Court consolidated four appeals related to the Orders. The appeals present numerous arguments; the heart of the appeals, however, deals with the Bankruptcy Court's jurisdiction to enjoin the termination of and later order the assumption of the Debtor's Medicare and Medicaid provider agreements. The Court concludes that the Bankruptcy Court's Orders violated the Medicare jurisdictional bar set forth in 42 U.S.C. § 405(h); this jurisdictional bar moots any remaining arguments on appeal.

The Court has jurisdiction to hear this bankruptcy appeal under 28 U.S.C. § 158(a).

STANDARD OF REVIEW

A district court reviews a bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. *See In re JLJ, Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993).

BACKGROUND

Although the disposition of the consolidated appeals turns solely on a question of law, a brief summary of the background facts is helpful. The Debtor Bayou Shores SNF, LLC operates a skilled nursing facility, the Rehabilitation Center of St. Petersburg. Most of the Debtor's patients have Alzheimer's disease, dementia, or other serious psychiatric conditions; it is one of the few facilities in the area that accommodates patients with challenging psychiatric needs.

The Debtor provides Medicare and Medicaid services through provider agreements issued by the

federal and state government under the Social Security Act's Medicare and Medicaid provisions. Most of the Debtor's patients are on Medicare or Medicaid. Over ninety percent of the Debtor's revenue is derived from Medicare and Medicaid.

A skilled nursing facility like the Debtor must comply with the requirements set forth in 42 C.F.R. Part 483, Subpart B, to receive payment under the Medicare and Medicaid programs. As such, the Debtor is subject to surveys conducted by the Centers for Medicare and Medicaid Services ("CMS"), an agency of the United States Department of Health and Human Services. CMS may take certain actions, including termination of the Medicare and Medicaid provider agreements, if a survey reflects that a facility is not compliant with the applicable regulations.

The Agency for Health Care Administration ("AHCA"), the Florida state agency that performs nursing home surveys and that administers the Medicaid program in Florida, conducted surveys of the Debtor in approximately February, March, and July of 2014. Each time, the Debtor was cited for deficiencies and determined to be in noncompliance.[1] Ultimately, based on AHCA's July 2014 survey, CMS exercised its

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[1] The facts surrounding the surveys, CMS' determinations of noncompliance, and the Debtor's actions in response to same are outlined in the Bankruptcy Court's "Memorandum Opinion and Order on Confirmation" and need not be repeated here because they are not relevant to the Court's conclusion that the Bankruptcy Court lacked jurisdiction to take action related to the termination of the Medicare and Medicaid provider agreements. (Dkt. 45–36).

discretion to terminate the Debtor's Medicare provider agreement.

In a letter dated July 22, 2014, CMS notified the Debtor that AHCA's survey demonstrated that the Debtor was not in substantial compliance with Medicare and Medicaid requirements and that the conditions constituted immediate jeopardy to residents' health and safety. The letter stated that the Debtor's "Medicare provider agreement will be terminated at 11:59 pm on August 3, 2014" and that Medicare and Medicaid payments would continue for only 30 days from that date. (Dkt. 1–20).

On August 1, 2014, the Debtor filed a Verified Complaint for Injunctive Relief and Mandamus in the federal district court for the Middle District of Florida (Tampa Division). Specifically, in that action, *Bayou Shores SNF LLC v. Sylvia Mathews Burwell, et al.*, Case No. 8:14–cv–1849–T–33–MAP (the "Civil Action"), the Debtor sought and obtained an *ex parte* temporary restraining order ("TRO") that enjoined CMS from terminating the Medicare and Medicaid provider agreements through August 15, 2014.

On August 11, 2014, the Secretary moved to dismiss the Civil Action for lack of subject matter jurisdiction. On August 15, 2014, the district court granted the United States' motion, dismissed the Civil Action, and dissolved the TRO. The district court concluded that Medicare's jurisdictional bar, 42 U.S.C. § 405(h), precluded the court from exercising jurisdiction over the controversy prior to the Debtor exhausting its administrative remedies. It was undisputed that the Debtor had not exhausted its administrative remedies.

Less than one hour after the district court issued its order in the Civil Action dissolving the TRO, the Debtor filed a Voluntary Petition for Chapter 11 bankruptcy. In the bankruptcy action, the Debtor filed an emergency motion to enjoin CMS and AHCA from terminating the Debtor's Medicare and Medicaid provider agreements. On August 25, 2014, the Bankruptcy Court entered an order provisionally granting the Debtor's motion subject to a final evidentiary hearing. (Dkt. 1–15). The Bankruptcy Court noted that it had jurisdiction to consider the motion under 28 U.S.C. § 1334 and that the Debtor had made a "prima facie showing that [its] Medicare and Medicaid provider agreements [were] property of the estate sufficient to warrant the entry of an order providing that the automatic stay [prohibited] CMS, AHCA, and/or any managed care provider from taking action to terminate the Debtor's Medicare and/or Medicaid provider agreements." *Id.*

On August 26, 2014, the Bankruptcy Court held an evidentiary hearing. On September 5, 2014, based on the evidence presented at the evidentiary hearing, the Bankruptcy Court issued its "Order Granting Debtor's Emergency Motion to Enforce the Automatic Stay and/or for an Order Pursuant to 11 U.S.C. § 105, Prohibiting Any Action to Terminate Debtor's Medicaid and Medicare Provider Agreements, to Deny Payment of Claims and/or to Relocate Residents" (the "September 5, 2014 Order). The September 5, 2014 Order granted the Debtor's motion "for the reasons stated in open Court." (Dkts. 1–31 and 1–2).

At the August 26, 2014 hearing, the Bankruptcy Court noted that it had jurisdiction under section 1334. It also concluded that the Medicare provider agreement was not terminated prior to the Debtor's bankruptcy filing; as such, the provider agreement was an executory contract that could be assumed. (Dkt. 1–31). The Bankruptcy Court stated that it had a responsibility to "look at the big picture," that is, "the welfare and concern for the patients." *Id.* at 116:6–11. Based on the testimony presented at the evidentiary hearing, the Bankruptcy Court concluded that the Debtor's patients were not "in any danger." *Id.*

Both AHCA and the United States of America, on behalf of the Secretary of the United States Department of Health and Human Services ("Secretary") appealed the September 5, 2014 Order (the "First Appeals"). These are the First Appeals in front of this Court. In relevant part, both AHCA and the Secretary argue that the Bankruptcy Court lacked jurisdiction to enjoin the terminations of the Debtor's provider agreements.

During the pendency of the First Appeals, the Bankruptcy Court issued the Confirmation Order that asserted jurisdiction over, and ordered the assumption of, the Debtor's Medicare and Medicaid provider agreements. Both AHCA and the Secretary appealed the Confirmation Order (the "Second Appeals") and argue, in relevant part, that the Bankruptcy Court was without jurisdiction to take any action related to the Medicare and Medicaid provider agreements. These are the Second Appeals before this Court. The jurisdictional arguments in the First and Second

Appeals are essentially the same: 42 U.S.C. § 405(h), the Medicare jurisdictional bar, precluded the Bankruptcy Court from taking *any* action related to the provider agreements until the Debtor had exhausted its administrative remedies.

As explained below, the Bankruptcy Court erred as a matter of law because the jurisdictional bar in section 405(h) precluded the Bankruptcy Court from delaying or preventing the effect of CMS' determination that the provider agreements should be terminated.

DISCUSSION

In its "Memorandum Opinion and Order on Confirmation," the Bankruptcy Court concluded, as a matter of law, that it had jurisdiction under 28 U.S.C. § 1334. Specifically, under section 1334, the Bankruptcy Court held that it had jurisdiction "over all civil proceedings arising under title 11, arising in a case under title 11, or related to a proceeding under title 11." (Dkt. 45–36). The Bankruptcy Court noted that "any dispute over the Debtor's ability to assume the Medicare provider agreement is 'related to' [the] title 11 case since the outcome of that dispute could conceivably have an effect on the Debtor's bankruptcy estate." *Id.*[2] The Court finds error in this conclusion of law because it ignores the jurisdictional bar contained in the Medicare Act. The Bankruptcy Court exceeded its subject matter jurisdiction when it interfered with CMS' termination of the provider agreements.

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[2] As stated above, the Bankruptcy Court's prior rulings also implied that it was exercising jurisdiction under section 1334.

Under 42 U.S.C. § 1395cc(h)(1), an institution, like the Debtor in this case, that is "dissatisfied with a determination by the Secretary ... described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary ... and to judicial review of the Secretary's final decision *after such hearing* as is provided in section 405(g) of this title." (emphasis added). The referenced subsection (b)(2) outlines the Secretary's power to terminate a Medicare provider agreement in certain situations, including situations in which "the provider fails to comply substantially with the provisions of the agreement, [or] with the provisions of [the Medicare Act] and regulations thereunder." 42 U.S.C. § 1395cc(b)(2)(A).

Upon an exhaustion of the administrative remedies and upon the issuance of a final agency decision by the Secretary, a provider may seek judicial review. *See* 42 U.S.C. § 405(g). Under section 405(g): "Any individual, after any final decision of the [Secretary] made after a hearing to which he was a party ..., may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the [Secretary] may allow." Thus, with respect to a Medicare dispute, the judicial review provision at section 405(g) is the "exclusive source of federal court jurisdiction." *See Jackson v. Astrue,* 506 F.3d 1349, 1353 (11th Cir. 2007).

Clearly, the Secretary's decision to terminate the Debtor's provider agreements is an issue that arises under Medicare because termination of a provider agreement is specifically covered under the Medicare statute and regulations. Thus, a court, including the

Bankruptcy Court here, is barred from exercising jurisdiction over the parties' dispute except for conducting judicial review of the Secretary's final decision. The Medicare Act incorporates 42 U.S.C. § 405(h) under 42 U.S.C. § 1395ii. Section 405(h) states: "[n]o findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided" and no action against the Secretary "shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under" the Medicare Act. There is no jurisdiction for a court to interpose itself in a provider's termination from the Medicare and Medicaid programs except to provide judicial review under section 405(g) *after* administrative remedies have been exhausted and the Secretary has issued a final agency decision.

Here, the Debtor did not exhaust its administrative remedies with respect to the Secretary's decision to terminate its provider agreements. Rather, after the district court concluded that it lacked jurisdiction and dissolved the TRO, the Debtor filed for Chapter 11 bankruptcy and argued that the provider agreements were property of the estate. The Bankruptcy Court then enjoined any termination of the provider agreements which essentially thwarted the administrative process and allowed the Debtor to circumvent its administrative obligations. But the Bankruptcy Court was without jurisdiction to interpose itself in the process, including entering an injunction to enjoin the provider agreements' termination. *See Bayou Shores SNF, LLC v. Burwell*, No. 8:14–cv–1849–T–33MPA, 2014 WL 4059900 (M.D. Fla. Aug. 15, 2014)

(holding that the district court was without jurisdiction to enjoin the termination of the provider agreements prior to exhaustion of administrative remedies); *Cathedral Rock of North Coll. Hill v. Shalala*, 223 F.3d 354 (6th Cir. 2000) (same); *Affil. Prof'l Home Health Care v. Shalala*, 164 F.3d 282 (5th Cir. 1999) (same); *Livingston Care Ctr., Inc. v. United States*, 934 F.2d 719 (6th Cir. 1991) (same); *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072 (7th Cir. 1982) (same); *Forum Healthcare Grp., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 495 F. Supp. 2d 1321 (N.D. Ga. 2007) (same); *Trade Around the World of PA v. Shalala*, 145 F. Supp. 2d 653 (W.D. Pa. 2001) (same); *Northwest Healthcare, L.P. v. Sullivan*, 793 F. Supp. 724 (W.D. Tex. 1992) (same).

The Bankruptcy Court concluded that its jurisdiction was not barred under section 405(h) because section 405(h) does not expressly proscribe bankruptcy jurisdiction under 28 U.S.C. § 1334. The Eleventh Circuit has not directly addressed this issue. But the majority of courts that have considered the omission of section 1334 (and other jurisdictional grants) from section 405(h) have examined Congress' intent when it enacted the jurisdictional bar and concluded that the omission of section 1334 and other jurisdictional grants (like section 1332) was inconsistent with that intent. The Court agrees with this majority view.

"When originally enacted, the third sentence in section 405(h) specifically prohibited any action under 'Section 24 of the Judicial Code of the United States.' " *In re Hosp. Staffing Servs., Inc.*, 258 B.R. 53, 57–58

(S.D. Fla. 2000). Section 24 (codified at 28 U.S.C. § 41) contained virtually all jurisdictional grants, including bankruptcy jurisdiction. *See* Amendments to Title II of the Social Security Act, § 201, 53 Stat. 1362, 1371 (1939). Jurisdictional grants were placed in separate sections when the judicial code was subsequently revised in 1948. *See* Pub. L. No. 80–773, 62 Stat. 869, 930–35 (1948).

In 1984, Congress revised the Social Security Act's jurisdictional bar, 42 U.S.C. § 405(h) and replaced "Section 24" with "Section 1331 or 1346." Upon this amendment, Congress stated "none of such amendments shall be construed as changing or affecting any right, liability or status or interpretation which existed." Pub. L. 98–369, § 2664(b), 98 Stat. 1171–72 (1984).

"Many courts have analyzed the amendments to section 405(h) and determined that the jurisdictional bar applies to all cases in which administrative remedies have not been exhausted, and not simply those in which jurisdiction is asserted under § 1331 or § 1346." *In re Hosp. Staffing Servs.*, 258 B.R. at 57–58 (citing *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir. 1998); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488–89 (7th Cir. 1990); *Total Renal Labs., Inc. v. Shalala*, 60 F.Supp.2d 1323, 1331 (N.D. Ga. 1999)).

In *Bodimetric Health Services*, the Seventh Circuit analyzed in detail the technical amendments to section 405(h) and rejected the argument that diversity jurisdiction, 28 U.S.C. § 1332, could be used to evade section 405(h)'s jurisdictional bar because section 405(h)

did not expressly reference section 1332. The same analysis and conclusion have applied in the bankruptcy context. *See In re Hosp. Staffing Servs.*, 258 B.R. at 57–58 ("It is clear that the Bankruptcy Court considered the history of § 405(h) and the cases analyzing § 405(h) and correctly concluded that it had no jurisdiction over Appellant's Complaint."); *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 244 (Bankr. S.D. Fla. 1994) ("[T]he omission of 28 U.S.C. § 1334 from the amended version of 42 U.S.C. § 405(h) was not meant to create bankruptcy jurisdiction where it previously was precluded. The intent and effect of the 1984 amendments are that bankruptcy court jurisdiction under § 1334 for claims arising under the Medicare Program is and remains precluded by § 405(h)."); *see also In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991).

The Bankruptcy Court dismissed these decisions as "improperly considering the legislative history of a statute when the statute's text is plain and unambiguous." (Dkt. 45–36). The Court respectfully disagrees and aligns itself with the majority view. As no other independent basis for jurisdiction existed to enjoin and order the assumption of the Medicare and Medicaid provider agreements, the Bankruptcy Court's Orders, to the extent that they impacted those agreements, must be reversed.

Finally, it is worth noting that the Court need not determine the exact timing of any termination of the provider agreements (a hotly contested issue on appeal) because, even if the provider agreements had not been terminated prior to the bankruptcy filing, any action by

the Bankruptcy Court to prevent or delay the effect of the Secretary's determination, including a Confirmation Order ordering the assumption of the provider agreements, constituted a breach of section 405(h)'s jurisdictional bar and was thus in excess of the Bankruptcy Court's subject matter jurisdiction.

CONCLUSION

The Bankruptcy Court erred as a matter of law when it exercised subject matter jurisdiction over the treatment of the provider agreements after the Secretary had determined that the provider agreements would be terminated. The Bankruptcy Court was without jurisdiction under the Medicare jurisdictional bar to issue the injunction that enjoined the Secretary's termination of the provider agreements and this error continued when the Bankruptcy Court subsequently authorized the Debtor to assume the provider agreements.

It is therefore **ORDERED AND ADJUDGED** that:

1. The September 5, 2014 Order and Confirmation Order are reversed to the extent explained herein.[3]
2. This appeal is remanded to the Bankruptcy Court for further proceedings.

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[3] Notably, the reversal of the Confirmation Order is only with respect to the assumption of the Debtor's Medicare and Medicaid provider agreements.

3. The Clerk of Court is directed to close this case and terminate any pending motions as moot.

DONE and **ORDERED**.

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: BAYOU SHORES SNF, LLC, Debtor
Florida Agency for Health Administration
and the United States of America, on Behalf of
the Secretary of the United States Department
of Health and Human Services,
Appellants,

v.

BAYOU SHORES SNF, LLC,
Appellee.

CASE NOS: 8:14-bk-9521-MGW, 8:14-cv-02816-T-30,
8:14-cv-02617-T-30, 8:15-cv-00103-T-30,
8:15-cv-00128-T-30

Signed 10/27/2015

ORDER

JAMES S. MOODY, JR., UNITED STATES DISTRICT JUDGE

THIS CAUSE comes before the Court upon Bayou Shores SNF, LLC's ("Bayou Shores") Emergency Renewed Motion for Further Stay Pending Appeal (Dkt.89) and the Responses (Dkts.93, 94) filed in opposition thereto. On October 26, 2015, the Court held an evidentiary hearing on Bayou Shores' motion. At the conclusion of the hearing, the Court granted the motion

and stated its reasons for doing so. This Order explains that ruling in

PROCEDURAL BACKGROUND

On July 20, 2015, the Court entered its order (Dkt.83), partially granting a motion for stay pending appeal filed by Bayou Shores and authorizing a ninety day stay; the Court noted in its order that Bayou Shores "may seek an additional stay directly from the Eleventh Circuit if it so chooses." Subsequently, Bayous Shores requested an additional stay from the Eleventh Circuit—the motion was denied. Bayous Shores then filed a motion for reconsideration before the Eleventh Circuit. On October 16, 2015, the Eleventh Circuit granted the request to the extent that the stay was extended until 5:00 p.m., on Monday, October 26, 2015. The Eleventh Circuit also stated that Bayou Shores was permitted to present a renewed motion for a stay before this Court, in light of what Bayou Shores characterized as "new evidence." The Eleventh Circuit "underscore[d]" that this Court was the appropriate fact-finder "(1) for considering, in the first instance, any alleged new evidence proferred [sic] by the parties and (2) for making any findings of fact for [the Eleventh Circuit] to review."

On October 26, 2015, this Court held an evidentiary hearing on Bayou Shores' renewed motion. The evidence relied upon in support of Bayou Shores' motion was admitted. The Court heard testimony from witnesses. And the evidence relied upon in support of the responses in opposition was admitted. After considering all of this evidence, the Court granted the stay during the pendency of the appeal.

LEGAL STANDARD

The grant of an emergency motion to stay a district court's order pending appeal is "an exceptional response granted only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay." *Garcia–Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (citing *Jean v. Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982)). Although the first factor is typically the most important, it is less crucial when "the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Id.* (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)).

DISCUSSION

As the Court stated on the record at the October 26, 2015 hearing, it believes that its order, reversing the Bankruptcy Court for lack of jurisdiction, will be affirmed. However, whether 42 U.S.C. § 405(h) proscribes bankruptcy jurisdiction under 28 U.S.C. § 1334 is an issue of first impression for the Eleventh Circuit and upon which this Court and the Bankruptcy Court disagree. There is also disagreement on this issue among other circuit courts and lower courts.

In its renewed motion, Bayou Shores relies heavily on a recent case, *In re Nurses Registry and Home Health Corp.*, 533 B.R. 590 (Bankr. E.D. Ky. 2015). There, the court suggested that this Court went

against the plain language of the statute with respect to the jurisdictional issue. Essentially, the court applied the same analysis that Bayou Shores has advocated in this appeal. For the same reasons discussed in the Court's reversal order, it does not agree with the court's holding in *In re Nurses Registry and Home Health Corp.*; however, the Court must acknowledge the debate and that reasonable people could disagree. This is especially so since there is no binding authority on this issue. As such, whether Bayou Shores is likely to prevail on its appeal is not dispositive on the issue of whether a stay is appropriate, especially in light of the remaining factors, which weigh heavily in favor of a stay. The Court now turns to those factors and its findings of fact based on the evidence.

Bayou Shores presented ample evidence that absent a stay it and its patients, employees, and staff will suffer irreparable damage. The Court finds that if the stay is not continued, Bayou Shores will no longer be able to operate and will be forced to discharge its patients and terminate its staff. Notably, this evidence also relates to the public interest, an interest that is highly relevant here because it involves the patients and their family.

The Court heard testimony from Andrea Pankhurst, Bayou Shores' administrator. Pankhurst's duties include daily interaction with the patients. She is also responsible for initiating the transfer of any patient. During the initial ninety-day stay, Pankhurst called other facilities in order to determine alternative residences. If Bayou Shores ceases operations as a result of the stay being lifted, Pankhurst is responsible

for signing a notice of transfer for each patient that specifies the effective date of the transfer and the location to which the resident is being discharged or transferred. She testified that about thirty-seven of Bayou Shores' patients require a limited access unit in connection with their care; these patients exhibit active psychiatric behaviors and can be violent to themselves and others. Pankhurst identified only two facilities in the area that were appropriate for these patients—one facility had six open beds and the other had two open beds. The facilities required an admission process. This was inadequate to house these nearly thirty-seven patients that would need alternative residences in a facility with a limited access unit if Bayou Shores shut down as a result of the stay being lifted. The Court finds that, absent a stay, these high risk patients would be irreparably harmed because they require a skilled facility that can accommodate their needs. They also need stability and a daily routine that does not change.

The Court also finds that, as of this date, it is unrebutted that Bayou Shores is operating in substantial compliance with all applicable regulatory requirements. Its patients are receiving adequate care and do not want to leave the facility. Pankhurst testified that many of the patients' family members and/or guardians refused to transfer their loved ones despite the uncertainty of Bayou Shores' future because they are happy with Bayou Shores' care.

Finally, the Court finds that the Florida Agency for Health Care Administration ("AHCA") and the United States Department of Health and Human Services ("HHS") will suffer no harm, much less substantial

harm, from a stay pending appeal. Medicare and Medicaid are required under both federal and state law to pay for the care of Bayou Shores' patients regardless of where they reside, whether it be at Bayou Shores or at any other nursing home.

CONCLUSION

Bayou Shores' appeal boils down to a jurisdictional issue—one that the Eleventh Circuit has not addressed to date. During the pendency of that appeal, Bayou Shores is faced with closing its operations and displacing its staff and patients if the Court does not grant its request for a stay. After considering the evidence, the Court finds that Bayou Shores has met its burden to establish a stay. There is certainly substantial evidence of irreparable harm—to Bayou Shores, its patients, the patients' family and guardians, and the public. In contrast, an additional stay will not harm AHCA or HHS.

As Bayou Shores noted, there is a significant factor of human dignity at issue here that this Court cannot ignore. Bayou Shores' patients are comfortable, they know the staff, they have the same routines, and they retain some dignity and independence from this comfort and familiarity. It would be draconian to disrupt their dignity based on a jurisdictional debate that has resulted in significant contrary opinions among the circuit courts and the lower courts.

It is therefore **ORDERED AND ADJUDGED** that:

1. Bayou Shores SNF, LLC's ("Bayou Shores") Emergency Renewed Motion for Further Stay

Pending Appeal (Dkt.89) is granted to the extent stated herein.

2. The Court's Reversal Order (Dkt.# 72) is STAYED (with no bond required) until the Eleventh Circuit rules upon the merits of the issues on appeal.

3. As stated on the record, Bayou Shores is hereby barred from accepting any new Medicare and/or Medicaid patients during the stay.

DONE and **ORDERED**.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13731-FF

In Re: BAYOU SHORES SNF, LLC,

Debtor.

FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, UNITED STATES OF AMERICA, on behalf of the Secretary of the United States Department of Health and Human Services,

Plaintiffs – Appellees

versus

BAYOU SHORES SNF, LLC,

Defendant – Appellant

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: HULL, JULIE CARNES, and CLEVENGER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42 *Honorable Raymond C. Clevenger, III, United States Circuit Judge for the Federal Circuit sitting by designation.

Appendix E

UNITED STATES BANKRUPTCY COURT,
M.D. FLORIDA,
TAMPA DIVISION.

IN RE: BAYOU SHORES SNF, LLC, Debtor.

Case No. 8:14–bk–09521–MGW

Signed December 31, 2014

Michael G. Williamson, United States Bankruptcy Judge

MEMORANDUM OPINION AND ORDER ON CONFIRMATION

The Court can only confirm a debtor's proposed plan if it is feasible. Here, the Debtor, which operates a skilled nursing facility that derives 90% of its revenue from Medicare and Medicaid patients, has proposed a chapter 11 plan that is funded from its continuing operations. All of the creditors in the case have voted in favor of the plan. But the United States Department of Health & Human Services ("HHS") has objected that the plan is not feasible because it says the Debtor's Medicare provider agreement was terminated prepetition, and as a consequence, so was its Medicaid provider agreement. This Court must now decide whether the Debtor's plan is feasible.

The Court concludes the plan is feasible because the Debtor has the right to assume the Medicare provider agreement under Bankruptcy Code § 365. Although

HHS, through the Center for Medicare & Medicaid Services ("CMS"),[1] gave the Debtor notice it was terminating its Medicare provider agreement prepetition, that termination was not complete and irreversible until the appeals process was complete. And the appeals process was not completed prepetition. For that reason, the Medicare provider agreement can be assumed under Bankruptcy Code § 365, which means the Debtor's Medicaid provider agreement does not terminate as a matter of law. Because the Debtor's Medicare and Medicaid provider agreements remain in effect, the Court concludes the Debtor's plan is feasible and should be confirmed.

Background

The Debtor cares for patients with severe psychiatric conditions

The Debtor owns and operates a 159–bed skilled nursing facility known as the Rehabilitation Center in St. Petersburg, Florida.[2] The Debtor currently has 109 patients, most of whom have Alzheimer's, dementia, or other serious psychiatric conditions.[3] The Debtor is one of the few facilities—if not the only one—in the area that is capable of meeting the needs of patients with challenging psychiatric needs.[4]

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[1] CMS is the operating component of HHS charged with administering the Medicare and Medicaid programs.

[2] Doc. No. 250 at ¶4; Doc. No. 266 at ¶4.

[3] Doc. No. 250 at ¶4; Ex. 20 at 33-34 & 38.

[4] Ex. 20 at 29.

The Debtor relies on Medicare and Medicaid revenue

All but a handful of the Debtor's patients are on Medicaid or Medicare. Medicare, of course, is a federal program that provides payment for skilled nursing services for aged or disabled individuals. Similarly, Medicaid is a joint federal and state program that provides medical assistance to low-income individuals who are disabled. Over 90% of the Debtor's revenue is derived from Medicare and Medicaid.[5]

CMS and AHCA conduct surveys to ensure providers are complying with the Medicare and Medicaid program requirements

To receive payment under the Medicare and Medicaid programs, a skilled nursing facility such as the Debtor must comply with the requirements set forth in 42 C.F.R. Part 483, Subpart B. Skilled nursing facilities like the Debtor are subject to standard, special, and other surveys by the State or CMS—depending on whether the facility participates in one or both programs—to certify they are in compliance with applicable federal law.[6] If a skilled nursing facility is certified to be in noncompliance, then CMS may terminate any Medicare provider agreements that are in effect at the time or apply alternative remedies instead of—or in addition to—termination.[7]

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[5] Doc. No. 250 at 2 n. 1; Doc. No. 266 at 2 n. 1.

[6] 42 C.F.R. § 488.308.

[7] 42 C.F.R. § 488.330(b)(2).

In determining which remedies to apply, CMS must determine the seriousness of the deficiency that has caused the facility to be noncompliant.[8] The seriousness of a deficiency generally ranges from "no actual harm with a potential for minimal harm" to "immediate jeopardy to resident health or safety."[9] "Immediate jeopardy" means "a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident."[10] Regardless of which remedies CMS decides to apply, a skilled nursing facility must complete a "plan of correction" that describes the actions the facility will take to correct any cited deficiencies and the date by which the deficiencies will be corrected.[11]

The Debtor is cited for three deficiencies

Between February 2014 and July 2014, the Debtor was cited for deficiencies—and determined to be in noncompliance—three separate times.[12] The first deficiency had to do with recordkeeping. A February

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[8] 42 C.F.R. § 488.404(a). The possible remedies (instead of or in addition to termination of the provider agreement) include: temporary management, denial of payment, civil monetary penalties, state monitoring, transfer of residents, closure of the facility, and directed plan of correction. 42 C.F.R. § 488.406(a).

[9] 42 C.F.R. § 488.404(b).

[10] *Id.*

[11] 42 C.F.R. § 488.408(f).

[12] Ex. 20 at 19-28

2014 survey revealed that, as a result of the facility's transition to electronic medical records, some of the residents' files contained conflicting entries with respect to "Do No Resuscitate Orders."[13] The second deficiency had to do with admissions procedures. In March 2014, an individual with a history of sexual exploitation or abuse was admitted to the Debtor's facility.[14] Staff members, however, failed to identify this threat and placed him in a room with another resident.[15] Fortunately, the patient with the history of abuse—who was in the facility for less than 24 hours—did not touch or otherwise harm the other resident. The third deficiency had to do with facility security. In July 2014, a resident on the Debtor's second-floor secure unit left the facility with visitors and was found unharmed on a nearby street corner fifteen minutes later.[16] Although no resident was hurt in any of the three incidents, the Debtor was nevertheless cited for "immediate jeopardy" on each occasion.[17]

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[13] *Id.* at 20-21.

[14] *Id.* at 21.

[15] *Id.* at 21-22.

[16] *Id.* at 24-25.

[17] *Id.* at 19-28.

The Debtor is brought back into substantial compliance after the first two deficiencies

The Debtor immediately cured the first two deficiencies.[18] In the case of the "Do Not Resuscitate" orders, the Debtor made sure that the orders for each resident matched.[19] If a patient had a "Do Not Resuscitate Order," the facility made sure the physician order said the patient was not to be resuscitated.[20] As for the admissions procedures, the Debtor wrote a new set of policies and procedures governing abuse of residents.[21] After the Debtor cured the first two deficiencies, CMS revisited the facility and determined the Debtor was in substantial compliance.[22] On May 29, 2014, CMS notified the Debtor it was in substantial compliance with the Medicare and Medicaid requirements as of May 13, 2014.[23]

The Debtor immediately cures the third deficiency

As with the first two deficiencies, the Debtor immediately cured the third deficiency. Specifically, the Debtor implemented an entirely new system for screening and assessing patients for potential elopement issues and changed the procedure for guests

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[18] *Id.* at 20-23.

[19] *Id.* at 21.

[20] *Id.*

[21] *Id.* at 22.

[22] *Id.* at 23.

[23] Ex. 2.

and patients to access the facility's secure unit.[24] The Debtor also took the additional step of hiring a third-party consultant—David Hoffman & Associates—to conduct an extensive review of the corrective measures the Debtor had taken and determine whether the Debtor had been brought back into substantial compliance.[25] On July 17, 2014, just one week after the survey that led to the third deficiency, the Debtor provided CMS with a detailed list of the steps it had taken to remove the "immediate jeopardy" and bring its facility back into substantial compliance.[26] Rather than revisit the facility to certify it was in substantial compliance, as is apparently customary where there is no actual harm to residents, CMS instead opted to terminate the Debtor's Medicare provider agreement.[27]

CMS terminates the Debtor's Medicare provider agreement

On July 22, 2014, CMS notified the Debtor that it was terminating the Debtor's Medicare provider agreement effective August 3, 2014, which would also result in termination of the Debtors' Medicaid provider

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[24] Exs. 4 & 5; see also Ex. 20 at 23-24.

[25] Doc. No. 250 at ¶¶ 10-11; see also Ex. 20 at 25-27.

[26] Exhibit 4; *see also* Ex. 20 at 25. The Debtor had apparently implemented the corrective measures as of July 17, 2014. Hoffman then reviewed those corrective measures on July 29–30, 2014. Doc. No. 250 at ¶¶ 10–11.

[27] Ex. 20 at 27-28; 32 & 48-49; Doc. No. 250 at ¶ 12.

agreement.[28] The Debtor appealed the termination of its Medicare provider agreement and requested an expedited hearing before an administrative law judge. The appeal of the decision to terminate the provider agreement, however, did not prevent CMS from denying payment to the Debtor, which would have set a catastrophic chain of events in motion: denial of payment would have caused the Debtor to default under its lease, default under its lease would have forced the Debtor to close its facility, closure of the facility would have forced the transfer of the Debtor's patients, many of whom would have had no place to go or would have potentially been harmed by the transfer.[29]

The district court temporarily enjoins CMS from terminating the Medicare provider agreement

So on August 1, 2014, two days before the Medicare provider agreement was terminated, the Debtor sought and obtained an ex parte temporary restraining order from district court that enjoined CMS from terminating the agreement through August 15, 2014.[30] HHS then moved to dissolve the temporary restraining order based on the district court's lack of subject-matter

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[28] Ex. 3.

[29] Exhibit 20 at 29-32.

[30] The Debtor filed an action in district court for the Middle District of Florida (Tampa Division) styled *Bayou Shores SNF, LLC v. Sylvia Mathews Burwell*, Case No. 8:14–cv–1849–T–33–MAP.

jurisdiction.[31] According to HHS, 42 U.S.C. § 405 mandates that the Debtor exhaust all of its administrative remedies before it can bring a claim under the Medicare statute in district court. In particular, 42 U.S.C. § 405(h) precluded the district court from (i) reviewing an agency decision before all administrative remedies were exhausted; or (ii) taking jurisdiction over a Medicare–related claim against the United States under 28 U.S.C. § 1331, which grants district courts original jurisdiction over all actions arising under the laws of the United States.[32] The district court agreed that it lacked subject-matter jurisdiction over the dispute because the Debtor had not exhausted its administrative remedies, and as a consequence, it dissolved its temporary restraining order on August 15, 2014.[33]

The Debtor files for bankruptcy

Mere hours after the district court dissolved the temporary restraining order, the Debtor filed this chapter 11 case. A week later, the Debtor sought a ruling from this Court that the automatic stay precluded termination of its Medicare provider agreement.[34] At the conclusion of a final evidentiary hearing on the Debtor's motion, this Court enjoined termination of the Medicare provider agreement

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[31] Dist. Ct. Doc. No. 22.

[32] *Id.*

[33] Dist. Ct. Doc. No. 35.

[34] Doc. No. 25.

pending completion of the administrative appeals process. Since then, the Debtor has fast-tracked this case to confirmation, proposing a plan within four months of filing this case.[35]

The Debtor's proposed plan enjoys the support of all of the creditors in the case, including a secured lender holding an $11 million claim and unsecured creditors holding more than $2 million in claims.[36] The plan also satisfies all of the requirements of Bankruptcy Code § 1129(a) with the exception of perhaps one: feasibility. HHS objects that confirmation is not feasible because the Debtor relies almost exclusively on Medicare and Medicaid for revenue, and those agreements have (or will be) terminated.[37] HHS also objects to the Debtor's attempt to assume the Medicare provider agreement based on its purported prepetition termination.[38] This Court must now determine whether the Debtor's proposed plan is feasible in light of that purported termination.

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[35] Doc. Nos. 185 & 186.

[36] Doc. No. 249-1.

[37] HHS contends its Medicare provider agreement has already been terminated. And the parties generally agree that AHCA is obligated to terminate its Medicaid provider agreement once the Medicare provider agreement has been terminated. But there is some question whether termination of the Medicaid provider agreement occurs by operation of law or requires some other action by AHCA.

[38] Doc. Nos. 229 & 255.

Conclusions of Law

The Court has jurisdiction over the parties' Medicare–related dispute

As a threshold matter, HHS contends that this Court lacks subject-matter jurisdiction over the parties' dispute. According to HHS, "no court has any jurisdiction over any aspect of a Medicare determination, other than to perform a prescribed form of judicial review of a final administrative decision by the Secretary."[39] Because of that, HHS reasons that the Debtor is precluded from raising any challenge to the termination of its Medicare provider agreement before this Court. HHS's argument, however, misses the mark.

It is true that federal courts are generally precluded from exercising federal question jurisdiction over Medicare issues.[40] The statute the district court relied on in dissolving the temporary restraining order—and the statute HHS presumably relies on here—says as much:

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

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[39] Doc. No. 277 at 2.

[40] 42 C.F.R. § 405(h).

> No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.[41]

But this Court's jurisdiction is not based on 28 U.S.C. § 1331 or § 1346.

This Court has independent grounds for exercising jurisdiction: 28 U.S.C. § 1334. Under § 1334, this Court has jurisdiction over all civil proceedings arising under title 11, arising in a case under title 11, or related to a proceeding under title 11. This bankruptcy case, of course, arises under title 11.[42] Confirmation is a contested matter that arises in a case under title 11. And any dispute over the Debtor's ability to assume the Medicare provider agreement is "related to" this title 11 case since the outcome of that dispute could conceivably have an effect on the Debtor's bankruptcy estate.[43] Accordingly, this Court has subject matter jurisdiction over this case, confirmation, and the parties' dispute over whether the Debtor has the

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[41] *Id.*

[42] Technically, the district court for this district has subject-matter jurisdiction over these proceedings. The district court is statutorily empowered to refer all of these proceedings to this Court, which it has done by a standing order of reference.

[43] A bankruptcy court has "related to" jurisdiction if the outcome of a proceeding could conceivably have an effect on the estate being administered. *Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990) (adopting the test articulated in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

authority to assume its Medicare provider agreement under 28 U.S.C. § 1334(b).

In fact, the court in *First American Health Care of Georgia, Inc. v. HHS* recognized that bankruptcy courts have jurisdiction over some Medicare–related disputes under 28 U.S.C. § 1334.[44] In *First American*, the Debtor filed an adversary proceeding seeking turnover of certain periodic income payments it claimed it was entitled to under the Medicare program. HHS moved to dismiss the adversary proceeding because 42 U.S.C. § 405(h) expressly precluded federal courts from exercising federal question jurisdiction over Medicare claims.[45] In denying HHS's motion to dismiss, the *First American* court acknowledged that 42 U.S.C. § 405(h), as originally drafted, precluded bankruptcy jurisdiction over all Medicare disputes. But the Court correctly observed that Congress passed 28 U.S.C. § 1334 in 1984, which conferred bankruptcy jurisdiction on the district court, and nothing in 42 U.S.C. § 405(h) precludes a court from exercising bankruptcy jurisdiction over Medicare disputes under 28 U.S.C. § 1334.[46]

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[44] 208 B.R. 985, 988 (Bankr. S.D. Ga. 1996). The Court later vacated its ruling based on a settlement agreement between the parties. *First Am. Health Care of Georgia, Inc. v. HHS*, 1996 WL 282149 (Bankr. S.D. Ga. 1996). But that does not change the bankruptcy court's analysis, which this Court finds persuasive.

[45] *Id.* at 987.

[46] *Id.* at 988-89.

The Court is aware that some courts have held that omission of 28 U.S.C. § 1334 was essentially a scrivener's error.[47] Those courts begin by observing that 42 U.S.C. § 405(h) previously precluded federal courts from exercising all jurisdiction—including bankruptcy jurisdiction—over Medicare–related claims by prohibiting any action under "section 24 of the Judicial Code of the United States." [48] Section 24 previously contained virtually all of the jurisdictional grants to the district court, including bankruptcy jurisdiction.[49] In 1984, Congress replaced the reference to "section 24" with the phrase "section 1331 or 1346." Since the legislative history regarding that amendment provides the amendment was not to be "construed as changing or affecting any right, liability, status, or interpretation which existed" previously, some courts have ruled that Congress intended 42 U.S.C. § 405(h) to preclude the exercise of bankruptcy jurisdiction under 28 U.S.C. § 1334.[50]

There is one problem with that view: This Court is not free to consider the legislative history of a statute when the statute's text is plain and unambiguous.[51]

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[47] *See, e.g., In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 244 (Bankr. S.D. Fla. 1994).

[48] *Id.* at 244.

[49] *Id.*

[50] *Id.*

[51] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 121 S. Ct. 1302, 149 L.Ed.2d 234 (2001) (refusing to examine legislative history where the face of the statutory provision was

Here, the text of 42 U.S.C. § 405(h) is plain and unambiguous. It plainly provides that federal courts are precluded from exercising jurisdiction on only two bases: 28 U.S.C. §§ 1331 and 1346. Because 42 U.S.C. § 405(h), by its terms, does not preclude this Court from exercising jurisdiction under 28 U.S.C. § 1334, this Court has subject-matter jurisdiction.

The only plausible argument against this Court having subject-matter jurisdiction is the second sentence of 42 U.S.C. § 405(h), which limits the ability of federal courts to review the findings of fact or an agency decision. Of course, that is not what this Court is doing. HHS had made it plain throughout its various filings in this case that CMS's decision to terminate the Debtor's Medicare provider agreement—the central issue in this case—is not subject to appeal.[52] The only properly appealable issue is CMS's determination that the Debtor was in noncompliance with the Medicare program requirements. But this Court, as part of its executory contract analysis discussed below, assumes that the Debtor was, in fact, in noncompliance. Because

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unambiguous); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008) (explaining that courts "may consult legislative history to elucidate a statute's ambiguous or vague terms, but legislative history cannot be used to contradict unambiguous statutory text or to read an ambiguity into a statute which is otherwise clear on its face"); *CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 265 F.3d 1193, 1213 (11th Cir. 2000) (explaining that "resort to legislative history is unnecessary, and indeed, improper, where the statute's terms are plain and unambiguous").

[52] Doc. No. 277 at 6.

this Court assumes the Debtor was in noncompliance, it is not reviewing any findings of fact or agency decision, and as a consequence, 42 U.S.C. § 405(h) does not preclude this Court from considering whether the Debtor can assume its Medicare provider agreement under Bankruptcy Code § 365.

The Debtor can assume the Medicare provider agreement

Under Bankruptcy Code § 365, a debtor may assume an executory contract. The Bankruptcy Code does not define "executory contract." In the absence of a definition, courts have generally followed two approaches to determining whether a contract is executory. Under the first approach, proposed by Professor Vern Countryman, a contract is executory if it is so far unperformed that the failure of either party to complete performance would constitute a material breach of the contract.[53] Under the second approach, aptly named the "functional approach," courts "abandon the traditional focus on the 'executoriness' of contracts in bankruptcy in favor of a more practical, functional approach."[54] Regardless of which test is applied, though, the majority of courts have concluded that Medicare provider agreements are executory contracts,

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[53] *Walton v.Clark & Washington, P.C.*, 454 B.R. 537, 543 (Bankr. M.D. Fla. 2011).

[54] Bankruptcy Law Manual § 9B:3 (5th ed. 2014); *see also Clark & Washington*, 454 B.R. at 543 (explaining that "[u]nder the functional approach, a court looks to the benefits a debtor and its estate would gain if a contract is assumed or rejected.").

a proposition HHS does not appear to dispute.[55] What would otherwise be an executory contract, however, cannot be assumed under Bankruptcy Code § 365 if the contract was terminated pre-petition because there is nothing left for the Debtor to assume.

The central issue in this bankruptcy case is whether the Debtor's Medicare provider agreement was terminated prepetition. According to HHS, the Medicare provider agreement was terminated on August 3, 2014—the date specified in HHS's July 22 notice. The Debtor, however, contends the agreement could not have been terminated prepetition because the right to terminate the agreement expired when the Debtor brought its facility back into substantial compliance, which was on July 18, 2014. The Court concludes the Debtor is correct (i.e., the Medicare provider agreement was not terminated) but for the wrong reason.

The Debtor relies on 42 C.F.R. § 488.454, entitled "Duration of Remedies," in support of its argument.[56] That regulation does provide that certain remedies HHS is entitled to invoke do expire when a revisit by CMS confirms that facility has been brought back into substantial compliance.[57] Expiration of certain remedies

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[55] *In re University Med. Center*, 973 F.2d 1065, 1075 n. 13 (3d Cir. 1992); *In re Monsour Med. Center*, 11 B.R. 1014, 1018 (W.D. Pa. 1981); *In re Vitalsigns Homecare, Inc.*, 396 B.R. 232, 239 (Bankr. D. Mass. 2008); *In re Heffernan Memorial Hosp. Dist.*, 192 B.R. 228, 231 (Bankr. S.D. Cal. 1996).

[56] Doc. No. 278 at 18-21.

[57] 42 C.F.R. § 488.454(a)(1)-(2).

can even predate a revisit if the facility can supply HHS with acceptable documentation showing the facility was in substantial compliance at some point before the revisit survey.[58] But as HHS correctly points out, the regulation the Debtor relies on deals with "alternative remedies" other than termination.[59]

In the Court's view, the answer is much simpler. In order for a prepetition termination of contract to cut off a debtor's rights under § 365, the termination must be complete and not subject to reversal.[60] Here, the Debtor had a right to appeal termination of the provider agreement. While that appeal may be limited in scope, the fact remains that termination of the provider agreement is not complete—and is, in fact, subject to reversal—until the appeals process is complete. Because the appeals process was not complete before this case was filed, the contract was not "terminated" prepetition for purposes of § 365.

Concluding that a Medicare provider agreement is "terminated"—for purposes of § 365—before the appeals process is complete would lead to absurd results. Consider the following hypothetical: a debtor that operates a skilled nursing facility has its Medicare provider agreement terminated because it was improperly cited for noncompliance. The debtor

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[58] 42 C.F.R. § 488.454€.

[59] Doc. No. 277 at 2-4.

[60] *In re Fontainebleau Hotel Corp.,* 515 F.2d 913, 915 (5th Cir. 1975); *see also Moody v. Amoco Oil Co.,* 734 F.2d 1200, 1212 (7th Cir. 1984); *In re Bricker*, 43 B.R. 344, 347 (Bankr. D. Ariz. 1984).

immediately appeals the finding of noncompliance. But because CMS stops payment for Medicare residents, the debtor is forced to file for bankruptcy. If the Court were to adopt HHS's view, the debtor in that hypothetical scenario could never assume its Medicare provider agreement since it is highly unlikely the appeals process will be complete before the debtor files for bankruptcy. The only way to preserve a debtor's right to appeal a finding of noncompliance is to consider a Medicare provider agreement terminated—for purposes of § 365—once the appeals process is complete.

Here, the appeals process was not complete prepetition. So termination of the Medicare provider agreement in this case was not complete and irreversible as of the petition date. For that reason, the Medicare provider agreement is subject to being assumed. The only remaining question is whether the Debtor satisfies the requirements for assuming the provider agreement under Bankruptcy Code § 365.

To assume an executory contract that is in default, a debtor must prove that it can promptly cure the default and provide adequate assurance of future performance.[61] Although HHS has challenged the Debtor's right to assume the Medicare provider agreement, it has made no effort to challenge the Debtor's contention that it has cured the existing default and provided adequate assurances of future performance, instead deciding to rely solely on its

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[61] 11 U.S.C. § 365(b); *In re Chapin Revenue Cycle Mgmt.*, 343 B.R. 728, 730 (Bankr. M.D. Fla. 2006).

argument the agreement cannot be assumed because it was terminated prepetition.[62] HHS also appears to be arguing—at least implicitly—that the § 365 requirements do not apply to Medicare provider agreements because a skilled nursing facility or other provider has no right to cure a deficiency. The Court is sympathetic to HHS's argument, but as the Third Circuit Court of Appeal recognized in *In re University Medical Center* over twenty years ago, "Congress' failure to legislate special treatment for the assumption or rejection of Medicare provider agreements indicates that assumption of these agreements, like that of other executory contracts, should be deemed subject to the requirements of section 365, unless and until Congress decides otherwise."[63]

Given the unrefuted evidence at confirmation, the Court easily concludes the Debtor has satisfied the requirements for assuming the Medicare provider agreement. It cannot be disputed—given CMS's notice that the Debtor was in substantial compliance as of May 13, 2014—that the Debtor previously cured the initial two deficiencies in a timely matter. That leaves only the third deficiency. The Debtor offered into evidence the "allegation of compliance" it submitted to CMS on July 17 & 28, 2014 that outlines the steps it took to cure the final deficiency and remove any immediate jeopardy.[64] As part of the corrective

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[62] Doc. No. 255.

[63] 973 F.2d 1065, 1077 (3d Cir. 1992).

[64] Exs. 4 & 5.

measures it took, the Debtor retained a third-party consultant (David Hoffman) who has concluded that the Debtor is currently in substantial compliance with the Medicare program requirements and that the Debtor's patients are being adequately cared for.[65]

Hoffman's conclusions are consistent with the opinions offered by the Patient Care Ombudsman. At the outset of this case, the Court issued an order to show cause to determine whether it was necessary to appoint a patient care ombudsman for the protection of the Debtor's patients.[66] Ultimately, the Court directed the U.S. Trustee to appoint a patient care ombudsman to monitor the quality of patient care and represent the interests of patients in this case. The U.S. Trustee appointed Robert Rosenthal, president of Health Care Management Specialist, Inc., as Patient Care Ombudsman.[67] So far, the Patient Care Ombudsman has issued two reports indicating that the Debtor is adequately and satisfactorily providing for the health

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[65] Doc. No. 250 at ¶¶ 10 & 11; Ex. 20 at 44-49.

[66] Doc. No. 36.

[67] Doc. No. 97. Although Rosenthal is not a doctor or nurse, he has extensive experience operating healthcare and assisted living facilities. AHCA has previously recommended Rosenthal as a receiver for a number of assisted living and skilled nursing facilities. And AHCA submitted his name to the U.S. Trustee for consideration in this case, as well. Because Rosenthal is not a medical professional, the Court authorized him to hire healthcare assistants (such as registered nurses and social workers), including RB Health Partners, Inc., to assist him in his review of the Debtor's operations.

and welfare of the Debtor's patients.[68] Significantly, HHS opted not to offer any evidence—presumably because it could not—that the Debtor is not currently in substantial compliance with the Medicare program requirements (i.e., that the Debtor has not cured the prepetition default).

And the Court is persuaded that the Debtor has provided adequate assurances of future performance. In part, those assurances are based on the corrective actions the Debtor has taken to cure the previous deficiencies and the fact that the Debtor has been satisfactorily and adequately providing for patients' health and welfare under the watchful eye of the Patient Care Ombudsman since this case was filed. It is also based on the fact that the Debtor has retained Hoffman in an ongoing role to evaluate the Debtor's regulatory compliance and Hoffman's willingness to remain on as an advisor as long as necessary to ensure the Debtor is adequately and satisfactorily protecting its residents and complying with applicable regulations. Not to mention, HHS has again failed to offer any evidence refuting the Debtor's ability to perform in the future. Accordingly, the Court concludes the Debtor has satisfied the requirements of § 365 and is permitted to assume its Medicare provider agreement.

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[68] Doc. No. 178-1 at 21; Doc. No. 252 at 17.

The Debtor's plan is feasible even though AHCA indicates it intends to deny renewal of the Debtor's license

The only remaining issue that needs to be considered—even though not raised in an objection to confirmation—is whether the Debtor's plan is feasible despite the fact that AHCA has indicated it intends to seek revocation or deny renewal of the Debtor's nursing home license. Back in June, after the second deficiency had been cited and the facility had been brought back into substantial compliance, AHCA filed an administrative complaint seeking to revoke the Debtor's license.[69] That administrative proceeding has since been abated. But in the meantime, the Debtor filed an application to renew its license. AHCA says it intends on denying the Debtor's application to renew its license, and more recently, AHCA asked the Court to modify its injunction to permit AHCA to either deny the Debtor's license renewal application or invoke the administrative process to revoke the Debtor's license since neither action is prohibited by the automatic stay.[70]

AHCA appears to raise two grounds for refusing to renew or seeking to revoke the Debtor's license. First, AHCA says Florida law requires that it deny renewal of or revoke the Debtor's license because its Medicare and Medicaid provider agreements have been terminated. Second, AHCA says the three deficiencies

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[69] Doc. No. 246-3.

[70] Doc. No. 246.

previously discussed are grounds for both refusing to renew and revoking the Debtor's license. It appears AHCA is correct that refusing to renew the Debtor's license on either ground, at least theoretically, does not run afoul of the automatic stay.

As AHCA contends, Bankruptcy Code § 362(b)(4) does, in fact, except from the automatic stay actions to enforce a state's police or regulatory powers. In determining whether a government's actions qualify as police powers, courts generally apply the "pecuniary" purpose and "public policy" tests.[71] Under those tests, courts consider whether the government action is intended to protect the public safety or welfare or effectuate public policy, on the one hand, or protect the government's pecuniary interest or adjudicate private rights, on the other hand:

> There are two tests for determining whether agency actions fit within the section 362(b)(4) exception: (1) the "pecuniary purpose" test and (2) the "public policy" test. Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare. If the government action is pursued solely to advance a pecuniary interest of the governmental unit, the stay will

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[71] *In re Pollock*, 402 B.R. 534, 536–38 (Bankr. N.D.N.Y.2009); *In re Allegheny Health, Educ. and Research Found.*, 252 B.R. 309, 327 (W.D. Pa. 1999); *In re Selma Apparel Corp.*, 132 B.R. 968, 969–70 (Bankr. S.D. Ala. 1991).

> be imposed. The public policy test "distinguishes between government actions that effectuate public policy and those that adjudicate private rights."[72]

AHCA says its actions satisfy both tests because it is attempting to protect the public safety and welfare and effectuate public policy by denying the Debtor's license renewal application or seeking to revoke the Debtor's license.

The Court agrees that AHCA's refusal to renew or intent to revoke the Debtor's license is an attempt to protect the public safety and welfare. That is perhaps best illustrated by comparing AHCA's actions to those of HHS. In enjoining HHS from terminating the Debtor's Medicare provider agreements, the Court reasoned, in part, that HHS's actions did not fall within the "police powers" exception to the automatic stay.[73] That was because it was apparent to the Court that HHS was only seeking to protect its pecuniary interest in terminating the Debtor's Medicare provider agreement. After all, HHS made no attempt to shut down the Debtor's facility. As far as HHS was concerned, the Debtor could continue to operate its facility and provide care for its patients; HHS simply was not going to pay for it. By contrast, by refusing to renew the Debtor's license, AHCA is essentially attempting to shut down the Debtor's facility because it

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[72] *Universal Life Church, Inc. v. United States*, 128 F.3d 1294, 1297 (9th Cir. 1997) (internal citations omitted).

[73] Ex. 20 at 89-91.

believes the Debtor's operations are jeopardizing the patients' safety and welfare. While it may be an open question whether shutting down the Debtor's facility is in the best interest of its patients, there can be no question the attempt to shut it down is an effort by AHCA to protect what it believes is in the best interests of the patients' safety and welfare.

But the Court concludes that the Debtor's plan is still feasible notwithstanding AHCA's unwillingness to renew the Debtor's license. For starters, AHCA is collaterally estopped from raising the first ground—i.e., termination of the Medicare and Medicaid provider agreements—as a basis for refusing to renew or seeking to revoke the Debtor's license. This Court has ruled that the Debtor has the right to assume the Medicare provider agreement. And the only basis for terminating the Medicaid provider agreement was that the Medicare provider agreement had been terminated. Since that is no longer the case, the Medicaid provider agreement remains in effect. So the only grounds for refusing to renew or seeking to revoke the Debtor's license are the three deficiencies the Debtor has previously been cited for.

Under Florida law, AHCA does have the right to revoke the Debtor's license if the Debtor has been cited for two "class 1 deficiencies" arising from unrelated circumstances during the same survey or from separate surveys during a 30–month period.[74] AHCA contends that the three deficiencies the Debtor has been cited for constitute "class 1 deficiencies" under Florida law. As a

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[74] § 400.121(3)(c)-(d), Fla. Stat.

result AHCA contends it is required to revoke or deny renewal of the Debtor's license. But Florida's Medicaid statutes provide additional protections that are not afforded under the Medicare regulations.

Critically, under the Medicare regulations, the Debtor has no right to challenge the termination of a Medicare provider agreement. The Debtor can challenge the underlying finding of noncompliance that gave rise to termination; but once noncompliance has been established, it appears the Debtor cannot challenge termination of the provider agreement. Florida's Medicaid statutes are different. Under section 400.121, Florida Statutes, the Debtor has the right to present factors that mitigate against revocation or nonrenewal of its license.

Although this Court has no say on whether revocation is appropriate under the circumstances—that decision is up to AHCA under section 400.121, Florida Statutes—it is apparent to the Court that there are a number of mitigating factors that could reasonably lead to the conclusion revocation is not appropriate. For one, the three deficiencies were isolated incidents, and each of them was cured immediately. Moreover, the Debtor has been operating its facility for the last five months in apparent substantial compliance with the Medicare and Medicaid requirements and, according to the Patient Care Ombudsman, in a manner that adequately and satisfactorily provides for the patients' health and welfare.[75] Finally, and perhaps most importantly, the

[75] Doc. No. 178-1 at 21; Doc. No. 252 at 17.

Debtor's facility serves a particularly needy population (i.e., patients with severe psychiatric conditions) that may have trouble finding another skilled nursing facility, and to the extent they can find one, the patients may be at a greater risk if they transfer—because of a phenomenon known as transfer trauma—than if they remained at the Debtor's facility. All of this is to say that AHCA's stated intention of refusing to renew—or seeking to revoke—the Debtor's license does not sound the death knell for the Debtor's business, and as such, it is not a basis for concluding the Debtor's plan is not feasible.

The Court recognizes there are cases holding that feasibility is not established when a debtor's prospects hinge on the uncertain outcome of pending litigation.[76] And it is true the Debtor's license renewal or revocation is uncertain. But what is certain is that denial of confirmation—before the Debtor has even had the opportunity to avail itself of its rights under Florida's license revocation statutes—will displace 109 nursing patients, many of whom suffer from severe psychiatric conditions and will have difficulty finding a place to go. And HHS and AHCA would be hard-pressed to argue there is harm to allow the Debtor to go forward under a confirmed plan until the licensure renewal or revocation issue is fully adjudicated considering that HHS has made no attempt to close the

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[76] Doc. No. 242, citing *Inre Am. Capital Equip.*, 688 F.3d 145, 156 (3d Cir.2012); *In re Ewald*, 298 B.R. 76, 82 (Bankr.E.D.Va.2002); *In re Gregory & Parker, Inc.*, 2013 WL 2285671, at *7 (Bankr. E.D.N.C. May 23, 2013).

Debtor's facility (even though it has that right under the Medicare regulations) and AHCA has abated its efforts to do so (and allowed the Debtor to operate) since July. So while the Debtor's plan does hinge on the uncertain resolution of the pending licensure renewal or revocation action, the Court cannot allow what appears to be a litigation tactic to derail the Debtor's confirmation and displace over 100 nursing home patients.[77]

Conclusion

The sole issue before this Court on confirmation is whether the Debtor's plan is feasible. Because the Debtor has the right to assume its Medicare provider agreement, the Court concludes the plan is feasible. And the fact that AHCA intends to seek revocation or deny renewal of the Debtor's license does not change this Court's feasibility analysis. Accordingly, it is

ORDERED:

1. The Debtor has satisfied the requirements of Bankruptcy Code § 1129 for confirming its proposed chapter 11 plan.

2. The Debtor shall prepare a confirmation order finding that the specific requirements of Bankruptcy

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[77] The Court says that raising the licensure renewal or revocation appears to be a litigation tactic because, although AHCA filed its administrative complaint back in July, it did not raise revocation of the Debtor's license (which is technically separate from licensure renewal) until four months after the Court enjoined CMS from terminating the Medicare provider agreement and shortly before confirmation.

Code § 1129 have been met, incorporating the relevant terms of this Memorandum Opinion, and confirming the Debtor's proposed chapter 11 plan.

3. This order is a nonfinal order and will not become a final order until entry of a confirmation order.

Attorney Elizabeth A. Green is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of this order.

Appendix F

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: CHAPTER 11

BAYOU SHORES, SNF, LLC CASE NO.: 8:14-bk-09521-MGW

Debtor.
_____/

ORDER FINALLY APPROVING THE FIRST AMENDED DISCLOSURE STATEMENT AND CONFIRMING THE FIRST AMENDED PLAN OF REORGANIZATION FILED BY BAYOU SHORES, SNF, LLC

THIS CASE came on for hearing on December 22, 2014 (the "Confirmation Hearing") to consider: (a) final approval of the First Amended Disclosure Statement (Doc. No. 185) ("Disclosure Statement"), and confirmation of the First Amended Plan of Reorganization (Doc. No. 186) ("Amended Plan") submitted by Bayou Shores, SNF, LLC ("Debtor" or "Reorganized Debtor"); (b) the objection to confirmation filed by the U.S. Department of Health and Human Services ("HHS") (Doc. No. 242); and (c) the objections to the assumption of executory contracts

filed by HHS (Doc. No. 255) and United Healthcare Insurance Company (Doc. No. 256).

On November 21, 2014 the Court entered an Order Conditionally Approving Disclosure Statement, Fixing Time to File Objections to the Disclosure Statement, Fixing Time to File Applications for Administrative Expenses, Setting Hearing on Confirmation of the Plan, and Setting Deadlines with Respect to The Confirmation Hearing ("Disclosure Order") (Doc. No. 188). The Amended Plan was distributed to creditors and parties-in-interest on November 21, 2014 (Doc. No. 190). Capitalized terms used herein and not otherwise defined shall have the respective meanings ascribed to them in the Amended Plan and Disclosure Statement.

The Court, having considered the: (a) Amended Plan; (b) proffer of counsel at the Confirmation Hearing; (c) Affidavits of Tzvi Bogomilsky and Michael Bokor in Support of Confirmation ("Confirmation Affidavits") (Doc. No. 250; Doc. No. 266, respectively); (d) Ballot Tabulation (Doc. No. 249); (e) Confirmation Projections (Doc. No. 189); (f) arguments of all counsel present at the Confirmation Hearing; (g) evidence and testimony of witnesses presented at the Confirmation Hearing; (h) the agreements placed on the record at the Confirmation Hearing; (i) the Agreement as the to cure related to the United Healthcare Objection; (j) the lack of any objection to the Disclosure Statement; and (k) the Court having taken judicial notice of the entire record in this case, makes the following findings of fact and conclusions of law pursuant to Rule 7052(a) of the Federal Rules of Bankruptcy Procedure (the

"Bankruptcy Rules") made applicable to this matter pursuant to Rule 9014 of the Bankruptcy Rules.

I. Findings of Fact and Conclusions of Law

A. The Debtor, as proponent of the Amended Plan, has provided good and sufficient notice of: (a) the filing of the Amended Plan and Disclosure Statement; (b) the deadline to file and serve objections to confirmation of the Amended Plan and Disclosure Statement; (c) the deadline and procedures for voting on the Amended Plan; and (d) the hearing date on the confirmation of the Amended Plan. The Court finds that, in accordance with § 1125(e) of the Bankruptcy Code, the Debtor and its designees, agents, representatives, attorneys, and advisors acted in good faith in soliciting acceptances or rejections of the Amended Plan and in compliance with all applicable provisions of the Bankruptcy Code.[1] The Court further finds that the solicitation of acceptances or rejections of the Amended Plan by the Debtor was conducted in good faith and in compliance with the Bankruptcy Code, Bankruptcy Rules, Disclosure Statement Order, and any other procedures established by the Court.

B. The Debtor has afforded all parties in interest with an adequate opportunity to be heard regarding the Amended Plan and Disclosure Statement and the Amended Plan and Disclosure Statement comply with Bankruptcy Code §§ 1125, 1127, and 1129 and 3016 and 3017 of the Bankruptcy Rules. All parties received

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[1] All references to the "Bankruptcy Code" herein shall refer to Title 11 of the United States Code.

adequate notice in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order.

C. The Court has jurisdiction over this case, over the assumption of executory contracts and to conduct the Confirmation Hearing and to finally approve the Disclosure Statement and to confirm the Amended Plan pursuant to 28 U.S.C. § 1334.

D. Confirmation of the Amended Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and this Court has jurisdiction to enter a final order with respect thereto.

E. The Debtor is an eligible Debtor under Section 109 of the Bankruptcy Code.

F. The Ballot Tabulation filed by the Debtor on December 17, 2014, validly and correctly sets forth the tabulation of votes on the Amended Plan, as required by the Bankruptcy Code, Bankruptcy Rules, the Local Rules and the Disclosure Statement Order.

G. The Debtor has solicited and tabulated votes in respect of the Amended Plan in good faith and in a manner consistent with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and the Disclosure Statement Order.

H. Tunic Capital, LLC has deposited $500,000 in Debtor's counsel's trust account and is ready, willing

and able to fund the Exit Financing[2], in accordance with the Amended Plan, pending the Effective Date.

I. The Amended Plan was voted on by all Classes of Impaired Claims that were entitled to vote pursuant to the Bankruptcy Code and the Bankruptcy Rules.

J. The Amended Plan has been accepted in writing by the requisite majorities of all the Impaired Classes of Claims and Interests entitled to vote thereon in accordance with § 1126 of the Bankruptcy Code or the Amended Plan is fair and equitable.

K. The Amended Plan satisfies all of the applicable provisions of the Bankruptcy Code and, as required by Bankruptcy Rule 3016(a), is dated and identifies the Debtor as the proponent.

L. In accordance with § 1122(a) of the Bankruptcy Code, Article II of the Amended Plan classifies together each Claim against and Interest in the Debtor that is substantially similar to other Claims or Interests with the exception that, pursuant to § 1122(b) of the Bankruptcy Code, the Amended Plan designates a separate class of Claims of less than $5,000 as was reasonable and necessary for administrative convenience. The Amended Plan, therefore, satisfies § 1122(a) and § 1122(b) of the Bankruptcy Code.

M. The Amended Plan adequately and properly classifies all Claims and Interests required to be

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[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed in the Amended Plan (Doc. No. 186).

classified, and, accordingly, satisfies § 1123(a)(1) of the Bankruptcy Code.

N. Pursuant to the Amended Plan, Classes 1, 2, 3, and 5 are identified as not Impaired, and Class 4 is identified as Impaired. Accordingly, the Amended Plan satisfies § 1123(a)(2) of the Bankruptcy Code.

O. The Amended Plan specifies the treatment of each Impaired Class of Claims and Interests. Accordingly, the Amended Plan satisfies § 1123(a)(3) of the Bankruptcy Code.

P. The Amended Plan provides the same treatment for each Claim or Interest in each Class unless the holder of such a Claim or Interest agrees to less favorable treatment. Accordingly, the Amended Plan satisfies § 1123(a)(4) of the Bankruptcy Code.

Q. The Amended Plan sets forth the means by which the Amended Plan will be implemented. The Amended Plan makes adequate means for its implementation and satisfies § 1123(a)(5) of the Bankruptcy Code.

R. The Debtor has disclosed the identity of the person who will serve as Managing Member of the Debtor. Accordingly, the Amended Plan satisfies § 1123(a)(7) of the Bankruptcy Code.

S. The Amended Plan provides that all executory contracts or unexpired leases will be deemed rejected as of December 8, 2014, except for any such contracts or leases that (a) have been assumed or rejected pursuant to final Order of the Bankruptcy Court; (b) are specifically assumed in the Amended Plan; or (c)

are the subject, as of entry of this Order, of a motion to assume currently pending before the Bankruptcy Court. The Debtor's decisions regarding the assumption and rejection of executory contracts and unexpired leases are based on and are within the sound business judgment of the Debtor, are necessary to the implementation of the Amended Plan, and are in the best interests of the Debtor, its estate, Holders of Claims, and other parties in interest in this Chapter 11 Case.

T. The Amended Plan complies with the applicable provisions of the Bankruptcy Code, as required under § 1129(a)(l).

U. The Debtor has complied with all of the provisions of the Bankruptcy Code and the Bankruptcy Rules governing notice, disclosure and solicitation in connection with the Amended Plan, the Disclosure Statement, and all other matters considered by this Court in connection with this Chapter 11 Case.

V. Votes to accept or reject the plan have been solicited and tabulated in good faith and in compliance with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, as well as the Disclosure Order. All of the Ballots were properly solicited and tabulated. The Debtor has accordingly satisfied § 1129(a)(2) of the Bankruptcy Code.

W. This Court has examined the totality of the circumstances surrounding the formulation of the Amended Plan. The Amended Plan has been proposed in good faith by the Debtor and its Member and not by any means forbidden by law, as required by § 1129(a)(3)

of the Bankruptcy Code. The Debtor and its Member has acted in good faith in formulating and proposing the Amended Plan and have properly performed their fiduciary duties.

X. All payments to be made by the Debtor to Professionals retained by order of the Court for services or for costs and expenses in or in connection with this Chapter 11 Case, through the Confirmation Date, have been or are subject to review and approval by this Court as reasonable upon the pending, and any supplemental, applications filed under §§ 330, 331 or 503(b) of the Bankruptcy Code. Accordingly, the Amended Plan satisfies § 1129(a)(4) of the Bankruptcy Code.

Y. The Amended Plan provides for post confirmation payment by Debtor of certain fees and expenses of professionals employed by Debtor without prior Court order, but the Court shall have jurisdiction over this matter as provided under the Amended Plan.

Z. The Debtor has disclosed the identity, affiliations and compensation of the individual who will serve as Managing Member.

AA. Although the Debtor is subject to rate approvals of government agencies, the Amended Plan does not provide for any changes in rates that require regulatory approval of any governmental agency. Section 1129(a)(6) of the Bankruptcy Code is accordingly not applicable.

BB. Each Holder of an Impaired Claim that has not accepted the Amended Plan will receive or retain under the Amended Plan on account of such Claim, property

of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtor was liquidated under Chapter 7 of the Bankruptcy Code. Thus, the Amended Plan satisfies the "best interests" test under § 1129(a)(7)(A)(ii) of the Bankruptcy Code.

CC. Pursuant to the Ballot Tabulation (Doc. No. 249) all Impaired Classes have voted in favor of the Amended Plan. As such the Amended Plan satisfies § 1129(a)(8) of the Bankruptcy Code.

DD. The Amended Plan provides that, except as otherwise agreed to by the Holder of an Allowed Administrative Claim and the Debtor, all Allowed Administrative Claims shall be paid by the Reorganized Debtor from the Exit Financing and/or cash flow. Under the Amended Plan, Holders of Allowed Priority Tax Claims shall retain any applicable Lien rights and equal quarterly payments over a period of five (5) years from the Petition Date in accordance with Bankruptcy Code § 1129(a)(9)(C), including interest payable at the rate of 5% as set forth in the Amended Plan. With respect to Professional Fees, such fees shall be payable pursuant to any orders allowing payment of such fees. Based upon the Confirmation Affidavits all such payments are within the resources of the Reorganized Debtor to pay as aforesaid. Accordingly, the Amended Plan satisfies the requirements of § 1129(a)(9) of the Bankruptcy Code.

EE. The Amended Plan satisfies § 1129(a)(10) of the Bankruptcy Code because an Impaired Class has voted to accept the Amended Plan by the requisite

majority, determined without including any acceptance of the Amended Plan by any Insiders.

FF. The management of the Debtor has analyzed the ability of the Debtor to meet its obligations under the Amended Plan. The Debtor's Cash Flow Projections filed with the Court (Doc. No. 189) demonstrate a reasonable likelihood that Debtor will be able to make all payments required pursuant to the Amended Plan and to sustain itself as a viable operating entity, and, based on the Exit Financing from Tunic, will be able to fund the payments required by the Amended Plan and provide working capital for the Debtor. After making all payments required by the Amended Plan on the Effective Date, the Debtor will have sufficient working capital to meet its cash requirements. Because there are a number of mitigating circumstances related to the renewal of the Debtor's license and the license is retained during the appellate process, confirmation of the Amended Plan is not likely to be followed by the liquidation, or the need for further reorganization. The capitalization of the Debtor under the Amended Plan is adequate. Therefore, the Amended Plan has a reasonable likelihood of success, and satisfies the feasibility requirement of § 1129(a)(l1) of the Bankruptcy Code.

GG. The Amended Plan provides for the payment on the Effective Date (or as soon as practicable thereafter) of all fees payable under Section 1930, Title 28, United States Code. The Amended Plan satisfies § 1129(a)(12) of the Bankruptcy Code.

HH. It is not the principal purpose of the Amended Plan to avoid taxes or the application of Section 5 of the Securities Act of 1933, as amended.

II. The failure to include or refer to any provision of the Amended Plan herein shall have no effect on the validity, binding effect and enforceability of such provision, it being the intent of the Court that the Amended Plan be confirmed in its entirety. To the extent of any inconsistencies between the terms of this Confirmation Order and the Amended Plan, the terms of this Confirmation Order shall control, except as otherwise provided herein.

JJ. If any provision of this Confirmation Order is hereafter modified, vacated or reversed by subsequent order of this Court or any other court, such shall not affect the validity of the obligations incurred or undertaken pursuant to, or in connection with, the Amended Plan prior to the Debtor's receipt of written notice of any such order; nor shall any such order affect the validity or enforceability of obligations incurred or undertaken pursuant to, or in connection with, the Amended Plan. Notwithstanding any reversal, modification or vacation hereof, any obligations incurred or undertaken pursuant to and in reliance on this Confirmation Order prior to the effective date of such reversal, modification or vacation shall be governed in all respects by the provisions hereof and of the Amended Plan, and all documents, instruments and agreements related thereto, or any amendments or modifications thereto or thereof.

For the foregoing reasons, the Court determines that the Amended Plan should be confirmed. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Disclosure Statement (Doc. No. 185) is approved on a final basis. The Amended Plan (Doc. No. 186) is confirmed pursuant to § 1129 of the Bankruptcy Code and all of its terms and provisions are approved. The Debtor, Synovus, and Tunic are authorized to take any and all actions contemplated to be taken by them under the Amended Plan.

2. The objection by HHS to Assumption of the Medicare Provider Agreement (Doc. No. 255) is overruled and the Medicare provider agreement shall be assumed upon entry of this order.

3. The findings of this Court set forth above and the conclusions of law stated herein shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. To the extent any finding of fact shall be determined to be a conclusion of law, it shall be so deemed, and vice versa.

4. Notwithstanding Local Rule 3022-1, the requirements of which are hereby supplanted, the Debtor shall file a report within ninety (90) days from the Effective Date, setting forth the progress made in consummating the Amended Plan. The report shall include: (a) a statement of distribution by class, name of creditor, date of distribution, and amount paid; (b) a statement of transfer of property; and (c) a statement of affirmation that the Debtor has substantially

complied with the provisions of the confirmed Amended Plan.

5. The provisions contained in Article VI of the Amended Plan relating to the assumption and rejection of unexpired leases and executory contracts are hereby approved and found to be fair and reasonable. Each unexpired lease or executory contract not expressly assumed is deemed rejected as of December 8, 2014. Claims arising from the rejection of an executory contract or lease shall be filed no later than thirty (30) days after entry of this order.

6. In accordance with the Amended Plan, any objections to Claims shall be commenced within ninety (90) days after the Effective Date. The Debtor shall exercise its prudent business judgment in connection with prosecuting all objections to Claims.

7. In accordance with section 1142 of the Bankruptcy Code, the Debtor, and any other entity designated under the Amended Plan, is authorized, empowered, and directed to issue, execute, deliver, file, and record any document, and to take any action necessary or appropriate to implement, consummate, and otherwise effectuate the Amended Plan in accordance with its terms, and all such entities shall be bound by the terms and provisions of all documents issued, executed, and delivered by them as necessary or appropriate to implement and effectuate the transactions contemplated by the Amended Plan.

8. Upon the occurrence of the Effective Date and in accordance with section 1141(a) of the Bankruptcy Code, the provisions of the Amended Plan and this

Confirmation Order are binding on the Debtor, each Creditor, and every other party in interest in this Bankruptcy Case and any respective successors and/or assigns (whether or not such Creditors or parties-in-interest voted to accept the Amended Plan, whether or not they are impaired under the Amended Plan, and whether or not any Holder has filed, or is deemed to have filed, a proof of Claim or proof of Interest), and any other Person giving, acquiring, or receiving property under the Amended Plan, and any lessor or lessee of property to or from the Debtor. Subject to the terms of the Amended Plan, the rights afforded in the Amended Plan (and as provided in this Confirmation Order) and the treatment of all Claims and Interests therein shall be in exchange for and in complete satisfaction, discharge, and release of all Claims and Interest of any nature whatsoever, known or unknown, including, except as expressly provided in the Amended Plan or this Confirmation Order, interest accrued on or expenses incurred in connection with such Claims from after the Petition Date, against the Debtor or its property or interests in property, and shall, except as expressly provided in the Amended Plan or this Confirmation Order, discharge the Debtor effective immediately from any Claim and any "debt" (as that term is defined in section 101(12) of the Bankruptcy Code) incurred before the Confirmation Date, and shall completely extinguish the Debtor's liability in respect thereof, including, without limitation, any liability of a kind specified in section 502(g) of the Bankruptcy Code.

9. To the fullest extent permitted by applicable law, and except as otherwise provided in the Amended Plan, the operative documents implementing the Amended Plan, or the Confirmation Order, Confirmation: (a) shall operate as a discharge under 11 U.S.C. § 1141(d)(1) of the Bankruptcy Code, and as a release of any and all Claims, Debts, Liens, Security Interests, and encumbrances of and against the Debtor and all Property that arose before Confirmation, including without limitation, any Claim of a kind specified in §§ 502(g), 502(h), or 502(i) of the Bankruptcy Code, and all principal and interest, whether accrued before, on, or after the Petition Date, regardless of whether (i) a Proof of Claim has been filed or deemed filed, (ii) such Claim has been Allowed pursuant to § 502 of the Bankruptcy Code, or (iii) the Holder of such Claim has voted on the Amended Plan or has voted to reject the Amended Plan; and (b) from and after the completion of all payments required under the Amended Plan (i) all Holders of Claims shall be barred and enjoined from asserting against the Debtor and its property any Claims, Debts, Liens, Security Interests, and encumbrances of and against all Property of the Estate, and (ii) the Debtor shall be fully and finally discharged of any liability or obligation on a Disallowed Claim or an Interest. Except as otherwise specifically provided herein, nothing in the Amended Plan shall be deemed to waive, limit, or restrict in any manner the discharge granted upon Confirmation of the Plan pursuant to § 1141 of the Bankruptcy Code.

10. In accordance with sections 524 and 1141(d) of the Bankruptcy Code and except as otherwise set forth

in the Amended Plan and this Confirmation Order, on and after the Effective Date, all Persons and entities that have held, hold, or may hold Claims against or Interests in the Debtor that arose or arise at any time prior to the Effective Date shall be permanently enjoined from: (a) commencing or continuing in any manner any action or other proceeding of any kind against the Debtor, and/or the Reorganized Debtor or with respect to any such Claim or Interest, (b) the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order against the Debtor, and/or the Reorganized Debtor with respect to any such Claim or Interest, (c) creating, perfecting, or enforcing any lien or encumbrance of any kind against the Debtor, and/or the Reorganized Debtor, or against any property or interest in property of the Debtor, and/or the Reorganized Debtor with respect to any such Claim or Interest, or (d) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from the Debtor with respect to any such Claim or Interest, except to the extent allowed in any adversary proceeding pending before this Court. Unless otherwise provided in the Amended Plan or this Confirmation Order, all injunctions and stays previously provided for in this case pursuant to sections 105 and/or 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date.

11. In accordance with sections 105(a) and 524 of the Bankruptcy Code, and except as otherwise provided in the Amended Plan and this Confirmation Order, all Persons are permanently enjoined from, and

restrained against, commencing or continuing in any court any suit, action or other proceeding, or otherwise asserting any Claim or Interest, seeking to hold: the Reorganized Debtor or the property of the Reorganized Debtor liable for any claim, obligation, right, interests, Causes of Action, debt or liability that has been discharged or released pursuant to the Amended Plan and for any and all claims arising under bankruptcy or non-bankruptcy law relating in any way to the Debtor or its business.

12. Nothing set forth in the Amended Plan or this Order shall limit the power and authority of AHCA to take action related to the renewal or revocation of the Debtor's license necessary to protect public health, safety and welfare, provided however, that any such actions related to the renewal or revocation of the license may not be based upon the termination of the Medicare and Medicaid provider agreements that have been assumed by the Debtor.

13. Except as otherwise expressly provided in the Amended Plan and in this Confirmation Order, all assets and property of the Debtor shall be vested in the Reorganized Debtor as provided for in the Amended Plan free and clear of all liens, security interests, encumbrances, claims and interests, and all such liens, security interests, claims and interests are hereby extinguished.

14. This Confirmation Order shall be deemed to constitute all approvals and consents required, if any, by the laws, rules and regulations of any state or other governmental authority with respect to the implementation or confirmation of the Amended Plan.

15. The Reorganized Debtor shall file the Short Form Post Confirmation Avoidance & Claim Litigation Report ("Short Form Report") within ninety (90) days after the Effective Date of the Plan and every ninety (90) days thereafter until entry of a Final Decree. The Short Form Report will follow the form provided on the Court's Procedures page on its website and include all amounts collected and fees and costs associated with post-confirmation avoidance and claim litigation.

16. The Debtor shall pay the United States Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) within ten (10) days of the entry of this order for pre-confirmation period and shall further pay the United States Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) based upon all disbursements of the Reorganized Debtor for post-confirmation periods within the time period set forth in 28 U.S.C. § 1930(a)(6), until the earlier of the closing of this case by the issuance of a Final Decree, the administrative closing of this case by the Court, or upon the entry of an Order by this Court dismissing this case or converting this case to another chapter under the Bankruptcy Code, and the Reorganized Debtor shall provide to the United States Trustee upon the payment of each post-confirmation payment an appropriate affidavit indicating all the cash disbursements for the relevant period.

17. Pursuant to section 1146(a) of the Bankruptcy Code and the Amended Plan, the issuance, transfer, or exchange of notes or securities under the Amended Plan; the creation of any mortgage, deed of trust, or other security interest; the making or assignment of

any lease or sublease; or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Amended Plan shall not be subject to any stamp, real estate transfer, documentary, registration, sales, added-value, mortgage release, mortgage recording, or similar tax.

18. Payment of all Allowed Claims of Professionals for fees and/or expenses, as provided herein, shall be paid, consistent with, and on the date on which, any Order authorizing the payment of such fees and/or expenses to such professional becomes a Final Order. For services rendered between the date of entry of this Order, through the Effective Date, any Professionals to be paid by Debtor shall bill the Debtor and the Debtor is authorized to pay such invoices without Court approval; the Court will hear and determine any disputes regarding such invoices.

19. Upon the entry of the Confirmation Order, the Debtor's Medicaid provider agreement shall be assumed.

20. Upon the entry of the Confirmation Order, the unexpired lease of 42nd Ave South LLC shall be assumed.

21. In accordance with § 1142 of the Bankruptcy Code, the Debtor/Reorganized Debtor and any other entity designated pursuant to the Amended Plan is authorized, empowered and directed to issue, execute, deliver, file and record any document, and to take any action necessary or appropriate to implement, consummate and otherwise effectuate the Amended Plan in accordance with its terms, and all such entities

shall be bound by the terms and provisions of all documents issued, executed and delivered by them as necessary or appropriate to implement or effectuate the transactions contemplated by the Amended Plan.

22. The Debtor may amend or modify the Amended Plan at any time prior to the Effective Date, in accordance with § 1127 of the Bankruptcy Code and the Amended Plan.

23. Notwithstanding Confirmation of the Amended Plan or the occurrence of the Effective Date, in accordance with the Bankruptcy Code and the Amended Plan this Court retains jurisdiction over any and all matters within the jurisdiction of the Bankruptcy Court, including, among other things: (a) to determine all objections that have heretofore been or may be filed to Claims of Creditors and the compromise of claims; (b) to fix and award all compensation to parties who may be so entitled; (c) any adversary proceedings or contested matters brought by the Debtor, including Causes of Action, the proceedings then pending or thereafter brought pursuant to Sections 544, 545, 546, 549, and 550 of the Bankruptcy Code; (d) all controversies and disputes arising under or in connection with the Amended Plan, the enforcement and interpretation of the provisions of the Amended Plan, to issue such order in aid of execution and consummation of the Amended Plan, as may be necessary and appropriate; (e) any motion to modify the Amended Plan in accordance with Section 1127 or to correct any defect, cure any omission or reconcile any inconsistency in the Amended Plan, Disclosure Statement or Confirmation Order to carry out the

purposes of the Amended Plan, to protect property of the Estate from adverse claims or interference inconsistent with the Amended Plan; (f) all claims arising from the rejection of any executory contract or lease; (g) such other matters may be provided in the Bankruptcy Code or the Amended Plan; (h) to ensure that Distributions are accomplished, as provided herein; and (i) to resolve any dispute concerning the right of any person to Distribution hereunder, under applicable law or contract or agreement.

24. Pursuant to the Disclosure Order (Doc. No. 188), the Administrative Claims Bar Date expired on December 8, 2014.

25. All capitalized terms but not otherwise defined in this Order shall have the meaning given to them in the Amended Plan.

26. The fourteen (14) day stay of Bankruptcy Rule 3020(e) shall not apply and this Confirmation Order shall become effective immediately upon entry.

DONE AND ORDERED on January 07, 2015

/s/ Michael W. Williamson
MICHAEL W. WILLIAMSON
United States Bankruptcy Court

Attorney Elizabeth A. Green is directed to serve conformed copies of this order on interested parties and file a proof of service within 3 days of entry of the order.

Appendix G

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if

an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

42 U.S.C. § 405

§ 405. Evidence, procedure, and certification for payments

* * * *

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is

rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject

to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

* * * *