No. 16-967

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether bankruptcy courts have jurisdiction over claims arising under the Medicare Act, where the original text of 42 U.S.C. § 405(h) barred such jurisdiction, but the current text omits such a bar due to a codification error that Congress later enacted into positive law while disclaiming any intention of making a substantive change to the statute.

2. Whether 42 U.S.C. § 405(h) bars litigation of all claims arising under the Medicare Act that have not been administratively exhausted under § 405(g).

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INTRODUCTION

The Medicare Act establishes a complex and comprehensive "federally subsidized health insurance program to be administered by the Secretary" of the Department of Health and Human Services. *Heckler v. Ringer*, 466 U.S. 602, 605 (1984). As part of this carefully crafted statutory scheme, Congress has required agency exhaustion of claims that arise under the Act, followed by deferential federal district court review, and it has deprived the federal courts of jurisdiction to entertain Medicare claims except as provided in the Act. *See* 42 U.S.C. § 405(g), (h). This arrangement may result in "occasional individual, delay-related hardship," but it makes sense "[i]n 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." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). In particular, the arrangement "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts . . . ." *Id.*

Petitioner seeks to inject an anomalous bankruptcy exception into this carefully balanced system by seizing on a codification error—one that Congress expressly provided should have no substantive effect. When first enacted in 1939, the original text of 42 U.S.C. § 405(h) widely barred federal court jurisdiction over claims arising under the Act, including bankruptcy jurisdiction under the predecessor to 28

U.S.C. § 1334. As the Eleventh Circuit's unanimous ruling explains, § 405(h)'s current reference to "section 1331 or 1346 of Title 28" is the result of the Office of the Law Revision Counsel's codification error, which Congress later enacted into positive law. The amendment to § 405(h) appeared in a section of the Deficit Reduction Act of 1984 entitled "Other technical corrections in the Social Security Act and related provisions," and the Act specifically disclaimed any intention of making a substantive change to § 405(h).

This Court should deny the Petition. To begin, this case either is or is likely to become moot. Acting pursuant to state law, Respondent Florida Agency for Health Care Administration ("AHCA") revoked Bayou Shores' nursing home license a month and a half after the Eleventh Circuit's ruling. This revocation remains in place and is independent of the termination of Bayou Shores' provider agreements. Without a license, Bayou Shores cannot lawfully operate its nursing home facility, and it cannot lawfully maintain Medicare or Medicaid provider agreements. Even if the bankruptcy court's orders were resurrected, they would not change the status quo because the orders expressly preserved AHCA's authority to seek the revocation.

Even if it were not moot, this case would not warrant this Court's review. There is no meaningful split in authority on whether a bankruptcy court has jurisdiction to hear unexhausted Medicare claims. Every federal court of appeals that has considered the origin of § 405(h)'s current text has concluded that its jurisdictional bar is coextensive with the original. The Ninth Circuit decision upon which Petitioner relies

did not acknowledge or discuss the provision's origin in its cursory treatment. Moreover, in that case, the government took action that the court viewed as the functional equivalent of filing a proof of claim and invoking the bankruptcy court's jurisdiction—a far cry from what transpired here. It is hardly surprising, then, that more recent Ninth Circuit decisions have retreated from the court's initial take on the question.

In any event, the judgment below is supported by an independent basis that does not warrant this Court's review. As this Court stated in *Weinberger v. Salfi*, "the first two sentences of § 405(h) . . . assure that administrative exhaustion will be required" for all claims arising under the Act and "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405(g)." 422 U.S. 749, 757 (1975); *see also Shalala*, 529 U.S. at 12–13, 19; *Ringer*, 466 U.S. at 614–15. The Eleventh Circuit followed *Salfi* in holding that regardless of § 405(h)'s jurisdictional bar, Petitioner's claims were barred for the independent reason that Petitioner had failed to administratively exhaust them. Contrary to Petitioner's assertions, there is no split between the Eleventh and Third Circuits on this outcome-determinative question, and the Ninth Circuit's current position on the question is far from clear.

As neither question presented warrants review, the Petition should be denied.

STATEMENT

1. Section 405(h) contains both a jurisdictional bar to parallel federal court litigation over claims arising under the Medicare Act[1] and a requirement that such claims must be administratively exhausted under § 405(g). *See Salfi*, 422 U.S. at 756–59. When first enacted in 1939, the original text of § 405(h)'s jurisdictional bar provided that "[n]o action" asserting any claim arising under the Act "shall be brought under section 24 of the Judicial Code of the United States . . . ." Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 205(h), 53 Stat. 1360, 1371 (1939). In its codified form, the reference to "section 24 of the Judicial Code" became "section 41 of Title 28." *See* 42 U.S.C. § 405(h) (1939). At the time, § 41 of Title 28, with few exceptions, "contained all of that title's grants of jurisdiction to United States district courts," *id.*, including bankruptcy jurisdiction, *see* 28 U.S.C. § 41(19) (1934). Section 405(h), therefore, operated as a wide bar to parallel federal court jurisdiction over Medicare Act claims.

In 1948, Congress recodified § 41 into separate jurisdictional grants scattered throughout title 28, *see* Act Amending Title 28 of the United States Code, Pub. L. No. 80-773, 62 Stat. 869, 930–35 (1948), but for the next three decades, § 405(h) incorrectly continued to refer to 28 U.S.C. § 41. This Court noticed the error before Congress did. *See Salfi*, 422 U.S. at 756 n.3. Shortly after *Salfi*'s observation, the Office of

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[1] Section 405(h) is a provision of the Social Security Act, but 42 U.S.C. § 1395ii makes it applicable to the Medicare Act.

the Law Revision Counsel—a body within the U.S. House of Representatives charged with codifying and periodically updating the United States Code, *see* 2 U.S.C. §§ 285 *et seq.*—published the 1976 edition of the U.S. Code, substituting § 405(h)'s outdated reference with the now-current language: "sections 1331 or 1346 of title 28."

In a "Codification" note, the Office explained the substitution: "Prior to the enactment [sic][2] of Title 28, section 24 of the Judicial Code was classified to section 41 of Title 28." 42 U.S.C. § 405 (1976). In its 1982 version of the U.S. Code, the revisers expanded the explanation for the substitution: "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." 42 U.S.C. § 405 (1982). Evidently, the Office of the Law Revision Counsel incorrectly understood its codification to reflect the original enactment. *See* 2 U.S.C. § 285b(1) (requiring the Office's revisions to "conform[] to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections"). The mistaken codification had no legal effect. *See Ganem v. Heckler*, 746 F.2d 844, 850–51 (D.C. Cir. 1984).

Two years later, Congress enacted the mistaken codification into positive law through the Deficit Re-

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[2] Presumably the Office meant "amendment" rather than "enactment," as Title 28 pre-dated the 1948 re-codification.

duction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). The amendment to § 405(h) appears in a section of the Act entitled "Sec. 2663. Other technical corrections in the Social Security Act and related provisions." Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 494, 1162. Section 2663(a)(4)(D) adopted the language of the Office of the Law Revision Counsel's 1976 and 1982 codifications of § 405(h), replacing its outdated reference to "section 24 of the Judicial Code of the United States" with the current language, "section 1331 or 1346 of title 28, United States Code." Section 2664(b) of the Act made clear the change was non-substantive, providing that "none of" section 2663's amendments "shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before" the effective date of the changes. Pub. L. No. 98-369, § 2664(b), 98 Stat. 494, 1171–72.

As the Eleventh Circuit summarized below, "[n]othing . . . in the legislative history . . . expresses any intention to change the jurisdiction of bankruptcy courts, let alone grant bankruptcy courts parallel authority with HHS over Medicare claims." Pet App. 20a–21a. Indeed, the court explained, the text of the Deficit Reduction Act affirmatively disclaims any intention to enact a substantive change to the original version of § 405(h). "It thus appears that the current text of § 405(h) is the result of the Office of the Law Revision Counsel's mistaken codification . . . ." Pet. App. 21a.

2. Petitioner Bayou Shores operated a "skilled nursing facility," as defined by 42 U.S.C. § 1395i-3(a), and derived approximately 90 percent of its revenue

from services rendered to Medicare and Medicaid patients. Pet. App. 4a. Bayou Shores had to comply with regulatory requirements as a condition of its provider agreements with the federal and Florida governments, under which it received reimbursement for its provision of services. Pet. App. 4a. Respondents are the government agencies responsible for monitoring that compliance. Respondent Florida Agency for Health Care Administration ("AHCA") administers the State's Medicaid program and conducts surveys of Florida skilled nursing facilities. Respondent U.S. Department of Health and Human Services ("HHS") nationally administers the Medicare program and uses AHCA's surveys to monitor Florida skilled nursing facilities' compliance with applicable regulatory requirements. Pet. App. 4a–5a.

When a skilled nursing facility fails to meet a regulatory requirement and the deficiencies "immediately jeopardize the health or safety of its residents," the Secretary of HHS must "take immediate action" to remedy the deficiencies. 42 U.S.C. § 1395i-3(h)(2). Among other remedies, the Secretary may terminate the facility's participation in the Medicare program. *Id.* § 1395i-3(h)(2)(A)–(B).

On February 10, 2014, AHCA surveyed Bayou Shores' facility and reported its regulatory noncompliance to HHS. Deficiencies included failure "to correctly track residents' 'Do Not Resuscitate' orders, poor patient hygiene, and unsecured expired medications." Pet. App. 5a. AHCA determined that Bayou Shores' patients were in immediate jeopardy, but Bayou Shores was given an opportunity to cure its noncompliance. A follow-up survey on March 20, 2014,

however, noted further deficiencies, including placement of a known sexual offender in a disabled patient's room and a subsequent failure to appropriately address the disabled patient's report of sexual assault. Pet. App. 5a–6a. Bayou Shores again had the opportunity to cure, but a final survey on July 11, 2014, revealed further noncompliance, "including allowing a mentally impaired resident to leave the facility unaccompanied on a hot Florida day." Pet. App. 6a.

After this third noncompliance and immediate-jeopardy finding, on July 22, 2014, HHS sent a letter notifying Bayou Shores that it would terminate Bayou Shores' Medicare provider agreement. The termination would take effect on August 3, 2014. The termination of the Medicare provider agreement, in turn, would trigger termination of Bayou Shores' Medicaid provider agreement. Pet. App. 7a.

3. Two days before the termination of its provider agreements, Bayou Shores sought an emergency injunction prohibiting termination from the United States District Court for the Middle District of Florida. Pet. App. 7a–8a. After an initial grant of a temporary restraining order, the District Court—on HHS's motion—dismissed Bayou Shores' complaint for lack of subject-matter jurisdiction, concluding that 42 U.S.C. § 405(h)'s jurisdictional bar applied. Pet. App. 8a. About one hour later, Bayou Shores filed a petition for Chapter 11 bankruptcy and sought an emergency injunction prohibiting termination of the agreements, this time from the bankruptcy court. The bankruptcy court issued a preliminary injunction on

August 25, 2014, concluding that it had jurisdiction under 28 U.S.C. § 1334. Pet. App. 8a.

The next day, the bankruptcy court conducted an evidentiary hearing. On September 5, 2014, and "[n]otwithstanding HHS's determination to the contrary," Pet. App. 58a, it issued an order concluding that Bayou Shores' patients were not in immediate jeopardy, and it prohibited termination of the provider agreements. Pet. App. 8a–9a. The bankruptcy court conducted further proceedings and, on December 31, 2014, issued its confirmation order. The order again concluded that the court had jurisdiction, rejecting Respondents' argument that § 405(h)'s jurisdictional bar applied, and concluded that Bayou Shores had remedied its regulatory compliance failures. Pet. App. 9a–10a.

Respondents separately appealed the bankruptcy court's September 5 order and December 31 confirmation order, reiterating their jurisdictional arguments. The district court agreed that § 405(h) barred the bankruptcy court from exercising jurisdiction over Medicare Act claims, reversing the bankruptcy court's orders insofar as they addressed the provider agreements. Pet. App. 10a–11a. Bayou Shores then appealed to the Eleventh Circuit.

4. In a unanimous opinion, a three-judge panel of the Eleventh Circuit affirmed the district court's judgment, concluding that the bankruptcy court lacked jurisdiction and, in any event, Bayou Shores' claims failed for lack of exhaustion of administrative remedies. After thoroughly surveying the development of § 405(h), Pet. App. 14a–21a, the court

concluded 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 [Deficit Reduction Act]." Pet. App. 21a. The court then surveyed the decisions of the lower federal courts, noting that the Third, Seventh, and Eighth Circuits have held that § 405(h)'s jurisdictional bar applies to cases brought under § 1332 jurisdiction (diversity), even though § 1332—like § 1334—is nowhere mentioned in the current text of § 405(h). Pet. App. 26a–27a.

The Eleventh Circuit observed that the Ninth Circuit, "alone among circuit court decisions," Pet. App. 30a, has held § 405(h)'s jurisdictional bar inapplicable to bankruptcy cases brought under § 1334. Pet. App. 28a. However, the court also emphasized that the Ninth Circuit in that case "did not discuss or analyze the legislative history [behind § 405(h)] relied on" by the Third, Seventh, and Eighth Circuits. Pet. App. 28a. Moreover, the Ninth Circuit subsequently limited that outlier case to the narrow issue it decided and "join[ed] the other circuits in unanimously opining that § 405(h) bars diversity jurisdiction under § 1332, notwithstanding the omission of § 1332 from the text of § 405(h)." Pet. App. 30a.

The Eleventh Circuit held "that § 405(h) bars § 1334 jurisdiction over" Medicare Act claims. Pet. App. 34a. It explained that "this case is governed by a particular canon in statutory construction regarding the codification of law": "when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise." Pet. App. 35a. The court traced this venerable

canon through a line of this Court's cases, beginning in the Reconstruction era and continuing through the present day, Pet. App. 35a–37a, including a number of cases that "arise from an event that directly touches on the issues in our case: the 1948 recodification of the Judicial Code." Pet. App. 37a–38a. The court found the canon's application particularly forceful here because "the *statute itself* tells us that the amendment [resulting in § 405(h)'s current language] is not to be interpreted as making any substantive change to the law." Pet. App. 46a (emphasis in original).

The Eleventh Circuit rejected Bayou Shores' argument that there is anything distinctive about bankruptcy jurisdiction under § 1334 such that § 1334—but not other jurisdictional grants the current text of § 405(h) fails to mention—should escape the jurisdictional bar. Pet. App. 52a–55a. The court also found unpersuasive Bayou Shores' "policy argument about the wisdom of allowing a bankruptcy court rather than HHS to adjudicate Medicare claims," noting that "the bankruptcy court's actions here illustrate the kind of 'premature interference' that" this Court has explained § 405 seeks to prevent. Pet. App. 55a, 57a.

Having concluded that § 405(h)'s jurisdictional bar applies in this case, the Eleventh Circuit went on to hold that § 405(h) bars Bayou Shores' claims for the additional reason that Bayou Shores failed to administratively exhaust them. It noted that this Court had already "made clear in *Salfi* that" under § 405(h), "no action [on a claim arising under the Medicare Act] may be brought pursuant to any jurisdiction other

than § 405(g)," which requires exhaustion of administrative remedies. Pet. App. 61a. Because "Bayou Shores does not dispute that its claims have not been administratively exhausted," its claims were barred for this independent reason. Pet. App. 61a.

After the Eleventh Circuit denied Bayou Shores' petition for rehearing en banc, with no judge requesting a poll, Pet. App. 94a, Bayou Shores sought a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. THIS CASE EITHER IS, OR IS LIKELY TO SOON BECOME, MOOT.

As a threshold matter, the Petition should be denied because this case either is or is likely to become moot. On August 29, 2016, Respondent AHCA revoked Bayou Shores' nursing home license. *Bayou Shores SNF, LLC v. State*, No. 15-619, 2016 WL 4974901, at **7–8 (Fla. Div. Admin. Hrgs. Aug. 29, 2016). While based on the violations AHCA discovered during its February, March, and July 2014 surveys, the revocation was independent of the termination of Bayou Shores' provider agreements and founded on its failure to comply with state law. *Bayou Shores SNF, LLC v. State*, No. 15-619, 2016 WL 4974902, at **3, 15–18 (Fla. Div. Admin. Hrgs. July 21, 2016) (recommended order). In particular, the revocation was prompted by Bayou Shores' commission of "three Class I violations within six months." *Id.* at *18. Bayou Shores has appealed the revocation to the Florida Second District Court of Appeal, which denied Bayou Shores' motion to stay. *Bayou Shores SNF, LLC v.*

State of Florida, Agency for Health Care Administration, No. 2D16-4261, Order (Fla. 2d DCA Dec. 8, 2016). Therefore, the license revocation remains in place.

Without a license, Bayou Shores cannot lawfully operate its facility, *see* Fla. Stat. §§ 400.062(1), 408.804(1), and it cannot lawfully maintain Medicare or Medicaid provider agreements, *see* 42 U.S.C. § 1395i-3(a)(3), (d)(2)(A); 42 U.S.C. § 1396r(a)(3), (d)(2)(A); Fla. Stat. § 409.907(1), (3)(a). Indeed, the motion to stay that Bayou Shores filed in its appeal of the license revocation represented that the nursing home "is empty," all its residents have left, and "the facility is not in operation." *Bayou Shores SNF, LLC v. State of Florida, Agency for Health Care Administration*, No. 2D16-4261, Motion for Stay Pending Appeal at 2, 4 (Fla. 2d DCA Nov. 14, 2016). Moreover, even if the bankruptcy court's orders were resurrected, they would change nothing because they expressly preserved AHCA's authority to seek the revocation. Pet. App. 117a–23a, 141a. Thus, any ruling from this Court would not alter the status quo.

This Court has long held that a federal court "is not empowered to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam), or when "it is impossible for a court to grant any effectual relief whatever to the pre-

vailing party," *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks omitted). Here, any decision by this Court on the jurisdictional question could not affect whether Bayou Shores' Medicare and Medicaid provider agreements are effectively terminated under independent state law. Moreover, because Bayou Shores presently has no ability to obtain those provider agreements, the issue whether a bankruptcy court could have asserted jurisdiction—or could in the future assert jurisdiction—over claims arising from termination of the agreements under federal law is not "live."

To the extent any prospect of a live controversy remains, it rests on the uncertain outcome of Bayou Shores' appeal of the license revocation. "[S]peculative contingencies afford no basis for" this Court to "pass[] on the substantive issues" that a petitioner raises "in the absence of evidence that this is a prospect of immediacy and reality." *Bd. of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974)). And even assuming any such speculative contingency saves the case from mootness (at least for now), it renders the case an exceptionally poor candidate for certiorari, particularly since the state appellate court's denial of Petitioner's application for a stay reflects a low likelihood that ongoing state-court proceedings will alter the status quo. In short, this Court should not take a case that either already is, or is likely to become, moot. Thus, the Petition should be denied.

II. THERE IS NO MEANINGFUL SPLIT IN AUTHORITY ON THE SCOPE OF § 405(H)'S JURISDICTIONAL BAR THAT WARRANTS THIS COURT'S REVIEW.

Even if this case were not moot or likely to become moot, it would not warrant certiorari. Every federal court of appeals that has traced the development of § 405(h) has held that its jurisdictional bar extends to grants of jurisdiction included in its original but not its current text. Moreover, only two courts of appeals—the Ninth Circuit in a stale and distinguishable decision that failed to acknowledge that development, and the Eleventh Circuit in the decision below—have even addressed whether the jurisdictional bar extends to claims pursued in bankruptcy under § 1334.[3] While these courts ostensibly reached different conclusions, their divergent answers likely are as much a product of the different postures in which the cases arose as they are a product of the Ninth Circuit's failure to acknowledge or address the codification error that produced § 405(h)'s current text. Subsequent developments show the Ninth Circuit has retreated from its earlier ruling and suggest the court would reconsider it in an appropriate case. And the Eleventh Circuit's ruling alleviated an al-

[3] The Petition frames the first question presented as whether § 405(h) "bar[s] a *district court* from exercising jurisdiction over claims arising under the Medicare Act[.]" Petition i (emphasis added). The precise issue that the Eleventh Circuit addressed below is whether § 405(h) bars a *bankruptcy court* from exercising 28 U.S.C. § 1334 jurisdiction over Medicare Act claims. Pet. App. 12a, 34a, 70a–71a. This Brief in Opposition has reformulated the first question presented to reflect the issue that the Eleventh Circuit addressed.

ready insignificant split between district court and bankruptcy court decisions by abrogating a substantial portion of those that had adopted the Ninth Circuit's approach. Thus, there is no meaningful split in authority on the first question presented to warrant this Court's review.

Circuit courts that have analyzed the codification error. The Seventh Circuit, in *Bodimetric Health Services, Inc. v. Aetna Life & Casualty*, provided the first circuit court analysis of whether § 405(h)'s jurisdictional bar extends to grants of jurisdiction included in its original but not its current text. 903 F.2d 480 (7th Cir. 1990). In *Bodimetric*, a health care provider sued an insurer in diversity under 28 U.S.C. § 1332 for improperly denying Medicare reimbursement claims. *Id.* at 481, 488. The Seventh Circuit affirmed the district court's dismissal for lack of jurisdiction. *Id.* at 481–82.

After holding that the plaintiff's claims arose under the Medicare Act and § 405(h) applied to the suit, *id.* at 483–88, the Seventh Circuit held that § 405(h)'s jurisdictional bar extends to cases brought in diversity, even though § 1332 is not mentioned in § 405(h)'s current text, *id.* at 489–90. The court explained that although the text "appears to permit actions brought pursuant to diversity jurisdiction," "a close reading of the statute (and its legislative history) does not support such a straightforward result." *Id.* at 488. The court traced the development of § 405(h) from its original enactment through the Office of the Law Revision Counsel's codification error and Congress's perpetuation of the error in the Deficit Reduction Act's amendment to § 405(h). *Id.* at 488–89. The Seventh

Circuit noted that in the Deficit Reduction Act, Congress had expressly commanded courts "not to interpret [the Deficit Reduction Act's] 'Technical Corrections' as substantive changes," unequivocally expressing "its intent not to alter the substantive scope of section 405(h)." *Id.* at 489. Therefore, the court held, "[b]ecause the previous version of section 405(h) precluded judicial review of diversity actions, so too must newly revised section 405(h) bar these actions." *Id.* The court noted that "[a]ny other interpretation . . . would contravene" Congress's command not to treat its amendment as a substantive change. *Id.*

The Eighth Circuit and Third Circuit adopted the Seventh Circuit's mode of analysis in *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998), and *Nicole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3d Cir. 2012). Both cases presented the question whether § 405(h)'s jurisdictional bar extends to Medicare Act claims pursued under § 1332 diversity jurisdiction. *Midland*, 145 F.3d at 1003; *Nicole*, 694 F.3d at 346. Both held that it does, relying on the Seventh Circuit's analysis and explanation of the history behind the codification error and non-substantive amendment that yielded § 405(h)'s current text. *Midland*, 145 F.3d at 1004; *Nicole*, 694 F.3d at 346–47.

In holding that § 405(h)'s jurisdictional bar "acts to carry forward the original § 405(h)'s jurisdictional restrictions," including its restrictions on claims brought in bankruptcy, the Eleventh Circuit aligned itself "with the Seventh, Eighth, and Third Circuits." Pet. App. 27a, 34a. In addition, as the Eleventh Cir-

cuit observed, "a number of other circuit court decisions have suggested," without "squarely deciding," that § 405(h)'s jurisdictional bar extends to grants of jurisdiction other than §§ 1331 and 1346. Pet. App. 27a–28a n. 21 (citing *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 n.11 (6th Cir. 2005), and *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548, 550 (Fed. Cir. 1994)).

The Ninth Circuit's view and subsequent retreat from that view. Less than two years after the Seventh Circuit decided *Bodimetric*, the Ninth Circuit decided *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146 (9th Cir. 1992) ("*T & C*")—a case, unlike this one, in which the court of appeals understood the relevant dispute to arise out of the government's affirmative invocation of the bankruptcy court's jurisdiction. *Id.* at 1149–54. In *T & C*, a health care provider filed a petition under Chapter 11 of the Bankruptcy Code. *Id.* at 1148. After the petition was filed, the federal government continued to offset Medicare payments because it believed the provider had been overpaid. *Id.* The provider then initiated an adversary proceeding concerning the setoff, pursuing claims under both the Bankruptcy Code and state law. *Id.*

The bulk of the Ninth Circuit's analysis concerned whether the government—by obtaining post-petition payments from the bankruptcy estate and engaging in "self-help collection efforts," but "without resort to the proof of claim mechanism"—had waived sovereign immunity under 11 U.S.C. § 106 by informally "invok[ing] the jurisdiction of the bankruptcy

court." *Id.* at 1149, 1150. The Ninth Circuit held that even though the government had not filed a proof of claim, its actions were the "functional equivalent" of one, and therefore it had waived sovereign immunity. *Id.* at 1153. The court then went on to hold that even if an actual proof of claim were required for waiver, the government's actions constituted an informal proof of claim. *Id.* at 1153–54.[4]

After its extensive discussion of the sovereign immunity issue, the court then addressed the government's alternative argument that the provider's "failure to exhaust administrative remedies"—under both § 405(h) and the FTCA—"would have precluded [the provider] from asserting its state-law claims outside bankruptcy." *Id.* at 1154. The Ninth Circuit answered this question in the negative. It reasoned that there was "an independent basis for bankruptcy court jurisdiction" in 28 U.S.C. §§ 1334 and 157(b), and thus "exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required." *Id.* at 1154 (internal quotation marks omitted).

Finally, in a single paragraph, the Ninth Circuit confronted the jurisdictional question and concluded

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[4] Congress later amended section 106 to overrule these function-over-form holdings and make clear that the government must actually file a proof of claim to trigger waiver. *See* 140 Cong. Rec. H10752-01, H10766 (Oct. 4, 1994) ("Section 106(b) is clarified by allowing a compulsory counterclaim to be asserted against a governmental unit only where such unit has actually filed a proof of claim in the bankruptcy case. This has the effect of overruling contrary case law, such as [*T & C*] . . . .").

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's brief analysis relied on the current text of § 405(h) and the Ninth Circuit's characterization of the congressional policy animating "section 1334's broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate." *Id.* The court did not acknowledge the Seventh Circuit's then-recent decision in *Bodimetric* or the codification error that *Bodimetric* had identified. *See id.*

To the extent *T & C* appeared to opine that § 405(h)'s jurisdictional bar is limited to the grants of jurisdiction mentioned in its current text (28 U.S.C. §§ 1331 and 1346), the Ninth Circuit has retreated from that view. The retreat began in *Kaiser v. Blue Cross of California*, 347 F.3d 1107 (9th Cir. 2003). In *Kaiser*, the court categorically stated "[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 1111 (emphasis added). The court then favorably cited *Bodimetric* and *Midland* for their analyses of whether claims arise under the Medicare Act for purposes of § 405(h). *Id.* at 1114. As part of its discussion rejecting the provider's argument that the government had waived sovereign immunity on state-law claims, the court—contradicting what it had said in *T & C*—concluded 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 [the provider's] bankruptcy would likely require consideration of the merits of the Medicare claims, again invoking 42 U.S.C. § 405(g)." *Id.* at

1117. In other words, contrary to what the Ninth Circuit said in *T & C*, *Kaiser* concluded that § 405's exhaustion requirement applies to Medicare Act claims raised in bankruptcy.

The Ninth Circuit made its retreat from *T & C* explicit in *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010). There, the court confronted the question whether, in a class action brought pursuant to 28 U.S.C. § 1332(d), § 405(h) requires exhaustion of Medicare Act claims. *Id.* at 1138, 1139. The court cited *Kaiser*'s observation 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. The court then held that some of the claims at issue arose under the Medicare Act, and thus § 405(h) required exhaustion. *Id.* at 1143–45.

Importantly, the Ninth Circuit recognized the apparent inconsistency between *Kaiser* and *T & C*. It noted that "at first blush, *Kaiser*'s rule might seem to conflict with our prior holding [in *T & C*] that: [s]ection 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 1141 n.11 (quoting *T & C*, 963 F.2d at 1155). The court cited the Seventh and Eighth Circuits' decisions in *Bodimetric* and *Midland*, and then attempted to "reconcile[]" *Kaiser* with *T & C* by limiting *T & C* to the narrow issue it decided. The court opined that "[*T & C*'s] reasoning relies almost exclusively on the special status of § 1334's 'broad jurisdictional grant over'" matters affecting the bankruptcy estate. *Id.* "Thus, its reading of 42 U.S.C. § 405(h) can reasonably be understood to

apply only to actions brought under § 1334, while not bearing on the relationship between § 405(h) and other jurisdictional provisions such as § 1332." *Id.*

With *Do Sung Uhm*'s narrowing of *T & C*, the Ninth Circuit "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)." Pet. App. 30a. And although the Ninth Circuit took an unsatisfying stab at reconciling *T & C* with *Kaiser*, its approach signals the court's continued retreat from *T & C* and the fluid nature of this area of law within that circuit.

* * *

Every court of appeals that has analyzed the origin of § 405(h)'s current text has concluded that its jurisdictional bar carries forward the original. And while the Eleventh Circuit's ruling below and the Ninth Circuit's decision in *T & C* might at first glance appear inconsistent, on closer examination, they are reconcilable. It is one thing to conclude, as the Ninth Circuit did in *T & C*, that having invoked the bankruptcy court's jurisdiction by engaging in post-petition "self-help collection efforts" tantamount to a proof of claim, the government cannot prevent the bankruptcy court from resolving the claim. It is an altogether different thing to allow a bankruptcy court to pretermit an administrative proceeding begun outside of bankruptcy where the statutory scheme expressly mandates exhaustion, and where the government did not invoke the bankruptcy court's jurisdiction or ask anything from it. Resolving proofs of claim falls within the core of a bankruptcy court's authority. *See* 28

U.S.C. § 157(b)(2)(B). But interfering with ordinary health-and-safety government actions taken outside the bankruptcy context—here, inspecting a nursing facility and notifying it of impending termination of provider agreements due to noncompliance—does not. *See* 11 U.S.C. § 362(b)(4) (exempting from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power").

To the extent that *T & C* conflicts with the ruling below, *T & C* is a stale decision over 25 years old that failed to acknowledge contrary case law or the origin of § 405(h)'s current text. Moreover, the Ninth Circuit's decision in *T & C* would seem, at a minimum, to be in substantial tension with that court's subsequent decisions, which suggest that the Ninth Circuit may well be willing to revisit its outlier decision. In *Kaiser*, the Ninth Circuit favorably cited contrary decisions of its sister courts and concluded that § 405's exhaustion requirement applies to Medicare Act claims raised in bankruptcy. And in *Do Sung Uhm*, the Ninth Circuit attempted to reconcile *T & C* and *Kaiser* by giving *T & C* a narrow reading. Contrary to Petitioner's contention, Petition 16, the Ninth Circuit's denial of en banc review in *Do Sung Uhm* does not signal the continuing vitality of *T & C*. Rather, it left intact the court's continuing retreat from *T & C* and, if anything, underscores the court's willingness to continue giving *T & C* disfavored treatment. The Ninth Circuit may well reconsider or further limit *T & C* when presented with an opportunity to do so. And at the very least, *Do Sung Uhm* is significant because—by recognizing that § 405(h)'s jurisdictional bar applies to

Medicare Act claims pursued under § 1332, which does not appear in the current statutory text—it rejected Petitioner's approach to the interpretation of § 405(h).

All this aside, any arguable circuit conflict is brand new. Of the five circuit court rulings to have addressed the scope of § 405(h)'s jurisdictional bar, only two—the Ninth Circuit's decision in *T & C* and the Eleventh Circuit's decision below—have addressed the precise question whether that bar extends to bankruptcy jurisdiction under 28 U.S.C. § 1334. Even disregarding the very different postures in which those cases arose, the Petition presents, at most, a question with a newly created, one-to-one circuit split that might benefit from further percolation in the lower courts. *Cf. Do Sung Uhm*, 620 F.3d at 1141 n.11 (explicating *T & C*'s reasoning as relying "almost exclusively on the special status of § 1334's 'broad jurisdictional grant over'" matters affecting the bankruptcy estate).

State of the law in district and bankruptcy courts. Even if a division among district and bankruptcy courts mattered—and it does not, *see* Supreme Court Rule 10(a)—Petitioner overstates its extent. A few bankruptcy courts have taken the Ninth Circuit's approach. *See* Pet. App. 30a n.22 (citing six bankruptcy court orders); *see also* Petition 18 (citing three of the bankruptcy court orders the Eleventh Circuit cited). But these rulings aligning with the Ninth Circuit's view have been few and far between, and of the six that the Eleventh Circuit acknowledged, three issued from bankruptcy courts within the Eleventh Circuit (and are thus abrogated by its ruling), and two

of the others were vacated or vacated in part. *See* Pet. App. 30a n.22. Moreover, neither Petitioner nor the Eleventh Circuit cites a single appellate decision outside of the Ninth Circuit—whether from a court of appeals, district court, or bankruptcy appellate panel—that has adopted the Ninth Circuit's view. All were bankruptcy court rulings. *See* Petition 18; Pet. App. 30a n.22.

Far more common have been district court and bankruptcy court cases taking the Eleventh Circuit's approach. *See* Pet. App. 30a–31a n.23 (citing six district court and nine bankruptcy court rulings); *see also* Petition 19 (citing four of the rulings the Eleventh Circuit cited).

The state of the law in district and bankruptcy courts, therefore, does not provide any meaningful split in authority on which to base a grant of certiorari. Petitioner contends that the question is recurring and that the split among lower courts is "deep[]," pointing to an article that asserts that "hundreds of courts, including dozens of bankruptcy courts, have analyzed the applicability of § 405(h) since the 1980s." Petition 24 (quoting Samuel Maizel & Michael Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply to Bankruptcy Courts*, 32 Emory Bankr. Dev. J. 19, 25 (2015)). As that article itself recognizes, however, many of the cases to which it referred analyzed the separate question—not presented here—whether a given claim "arises under" the Medicare Act. Maizel & Potere at 25 & n.24. In any event, Petitioner does not point to the sort of persistent confusion in bankruptcy courts that might otherwise merit this Court's review.

* * *

For all the above reasons, this Court should deny the Petition. But as explained below, even if this Court were inclined to grant certiorari on the first question presented, this case offers a poor vehicle to do so because the second question presented is also outcome-determinative and is not independently worthy of certiorari.

III. THE SECOND QUESTION PRESENTED IS ALSO OUTCOME-DETERMINATIVE IN THIS CASE, IS NOT INDEPENDENTLY CERTWORTHY, AND THIS COURT ALREADY HAS MADE THE ANSWER CLEAR.

In the Eleventh Circuit, Petitioner argued that its claims do not arise under the Medicare Act and therefore are not subject to § 405(h). Pet. App. 67a. In framing the first question presented, however, Petitioner now concedes that its claims arise under the Act. *See* Petition i; *see also id.* at 2, 14. As in the proceedings below, *see* Pet. App. 61a, Petitioner also does not dispute that it never administratively exhausted its claims before initiating suit. Thus, the second question presented in the Petition asks this Court to decide only whether § 405(h) bars litigation of administratively unexhausted claims arising under the Medicare Act but pursued in bankruptcy.

Petitioner contends the Eleventh Circuit's holding conflicts with how the Third and Ninth Circuits have answered the question. Petition 20–21. However, there is no split between the Eleventh and Third Circuits. The Third Circuit never has held § 405(h)'s exhaustion requirement inapplicable to claims that

arise under the Medicare Act but are pursued in bankruptcy proceedings. The Ninth Circuit, in its stale and distinguishable decision in *T & C*, is the only court of appeals to have gone so far, and it subsequently retreated from that view in *Kaiser*. But in any event, this Court already has made clear that § 405(h) requires exhaustion of all Medicare Act claims, and there is no need for this Court to reiterate its prior holdings on this outcome-determinative question.

This Court's decisions. Time and again, this Court has made clear—relying on the plain statutory text—that § 405(h)'s exhaustion requirement applies to all claims that arise under the Medicare Act. In *Salfi*, this Court confronted a constitutional attack on certain requirements of the Social Security Act (to which § 405(h) is also applicable). 422 U.S. at 753. In explaining the meaning of § 405(h), this Court held 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)." *Id.* at 757 (emphasis added). Section 405(g), in turn, "prescribes typical requirements for review of matters before an administrative agency, including administrative exhaustion." *Id.* at 757–58.

After *Salfi*, this Court has continued to make clear that § 405(h) requires administrative exhaustion of all claims arising under the Medicare Act. In *Ringer*, this Court observed that "[j]udicial review of claims arising under the Medicare Act is available *only* after the Secretary renders a 'final decision' on the claim, in the same manner as is provided in 42 U.S.C.

§ 405(g)," and § 405(g) "is the *sole* avenue for judicial review for *all* 'claim[s] arising under' the Medicare Act." 466 U.S. at 605, 615 (emphases added). And in *Shalala*, this Court understood *Ringer* to "reiterate[] that § 405(h)" requires "all aspects of" a Medicare Act claim to "be channeled through the administrative process." 529 U.S. at 12.

No Conflict with the Third Circuit. Properly understood, the Eleventh Circuit's holding does not conflict with the Third Circuit's decision in *University Medical Center v. Sullivan*, 973 F.2d 1065 (3d Cir. 1992) ("*UMC*"). In that case, the Third Circuit did not hold § 405(h)'s exhaustion requirement inapplicable to Medicare Act claims pursued in bankruptcy. Instead, it held that the claims at issue in that case did not arise under the Medicare Act at all.

At issue in *UMC* was an "adversary proceeding . . . based on the contention that HHS violated the automatic stay provision of the Bankruptcy Code," without any dispute over "the amount of [Medicare] reimbursement due for any cost reporting period." *Id.* at 1073. The Third Circuit held that § 405(h)'s exhaustion requirement was inapplicable because this claim arose under the Bankruptcy Code rather than the Medicare Act. The court reasoned that the debtor's "challenge to the Secretary's attempt to recover pre-petition overpayments through post-petition withholding is not inextricably intertwined with any dispute concerning the fiscal intermediary's reimbursement determinations," and had the debtor "not filed for bankruptcy, there would be no dispute" because "[n]either party questions the amount of pre-petition overpayments" made to the debtor. *Id.* Ra-

ther, the post-petition withholding was before the court only "because [the debtor] filed for bankruptcy and now claims that the withholding violated the automatic stay." *Id.*

UMC, therefore, held that a claim asserting violation of the automatic stay arises under the Bankruptcy Code rather than the Medicare Act. It did *not* hold, however, that where claims (such as Bayou Shores') arise under the Medicare Act, the debtor can avoid § 405(h)'s exhaustion requirement for such claims simply by pursuing them in bankruptcy. Thus, *UMC* does not present a conflict with the Eleventh Circuit's holding.

The Ninth Circuit. In *T & C*, the Ninth Circuit—confronting "claims arising out of the government's [post-petition] setoff of Medicare overpayments" deemed equivalent to a proof of claim—held that § 405(h) did not require the debtor to administratively exhaust those claims. 963 F.2d at 1154. Although the claims arose under the Medicare Act, the court held that because there was "an independent basis for bankruptcy court jurisdiction" in 28 U.S.C. §§ 1334 and 157(b), "exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required." *Id.* (internal quotation marks omitted). As detailed above, however, the Ninth Circuit retreated from that view in *Kaiser*, categorically stating that "[j]urisdiction over cases 'arising under' Medicare exists *only* under 42 U.S.C. § 405(g)," and that § 405's exhaustion requirement applies to Medicare Act claims raised in bankruptcy. 347 F.3d at 1111, 1117; *see supra* 20–21.

* * *

The second question presented does not warrant this Court's review. Only one federal court of appeals—the Ninth Circuit—has answered the question in Petitioner's favor, and it did so over 25 years ago in *T & C*, the same distinguishable and stale case on which Petitioner relies as to the first question presented. The Ninth Circuit already has retreated from its position, concluding that Medicare Act claims pursued in bankruptcy are subject to the exhaustion requirements of § 405. *See Kaiser*, 347 F.3d at 1117. This Court's intervention is not required to correct the Ninth Circuit's distinguishable and disfavored decision in *T & C*, particularly since the relevant area of law is in flux within that circuit. That task is best left to the en banc Ninth Circuit.

Other factors further support denying review. Of the courts of appeals, only the Ninth and Eleventh Circuits have had occasion to confront whether § 405(h) bars litigation of unexhausted claims arising under the Medicare Act but pursued in bankruptcy. Such a newly created, one-to-one circuit split ordinarily might benefit from further percolation in the courts of appeals. However, this Court consistently has held that § 405(h) requires administrative exhaustion of all claims arising under the Medicare Act, there is no need for this Court to repeat its clearly stated and stable position, and this Court's exposition of § 405(h)'s exhaustion requirement is fatal to Bayou Shores' case.

IV. THE DECISION BELOW IS CORRECT.

The First Question Presented. Petitioner contends that the Eleventh Circuit erred in interpreting § 405(h)'s jurisdictional bar because the court failed to give effect to the statute's plain meaning. Petition 31–33. But this begs the question: To which statute's plain meaning should the court have given effect—§ 405(h)'s current text, or § 2664(b) of the Deficit Reduction Act, which commands that Congress's amendment to § 405(h) shall not be construed as a substantive change?

As the Third, Seventh, Eighth, and Eleventh Circuits have concluded, it is the plain meaning of § 2664(b) that should dictate the interpretation of § 405(h)'s jurisdictional bar. *See* Pet. App. 27a, 34a; *Nicole*, 694 F.3d at 346–47; *Midland*, 145 F.3d at 1004; *Bodimetric*, 903 F.2d at 489. For over a century, this Court repeatedly has instructed 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." *Stewart v. Kahn*, 78 U.S. 493, 502 (1870); *accord, e.g., John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008); *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Cass v. United States*, 417 U.S. 72, 82 (1974); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957).

One would expect Congress to be especially clear before it institutes "the massive shift in policy that giving bankruptcy courts parallel authority [with HHS] to adjudicate Medicare disputes would represent." Pet. App. 51a. Elephants do not lurk in

mouseholes. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Or in the Eleventh Circuit's words, even the discovery of "a few hidden firecrackers" in a bill does not justify inferring it must contain "an atomic bomb." Pet. App. 51a.

Here, the courts have confronted not congressional silence, but rather an affirmative and unambiguous congressional command that the amendment to § 405(h) not be interpreted as a substantive change. *See* Pub. L. No. 98-369, § 2664(b), 98 Stat. 494, 1171–72. By "expressly stat[ing] that changes in language resulting from the codification were to have no substantive effect," *Cass*, 417 U.S. at 82, the Deficit Reduction Act's "technical amendments" make clear Congress had no intention of changing § 405(h). This Court has cautioned 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." *Muniz v. Hoffman*, 422 U.S. 454, 472 n.11 (1975). If this is true of plainly expressed intentions in the legislative history, then it must carry particular force where such intentions appear in the statutory text itself. The Third, Seventh, Eighth, and Eleventh Circuits rightly have honored that intention plainly expressed in § 2664(b) of the Deficit Reduction Act. Indeed, even the Ninth Circuit has rejected Petitioner's wooden approach to the current text of § 405(h). *See Do Sung Uhm*, 620 F.3d at 1144–45.

While passing over § 2664(b), Petitioner unpersuasively attempts to divine a congressional intent to fundamentally alter § 405(h). Petitioner contends that

when Congress again amended § 405 in 1994, it could have inserted a reference to § 1334 bankruptcy jurisdiction. Petition 33. This argument, however, cuts the other way. If, as it plainly stated in § 2664(b) of the Deficit Reduction Act, Congress understood its prior revision of § 405(h) as a non-substantive technical amendment, then Congress had no reason to add a reference to § 1334 (or, for that matter, other jurisdictional grants such as § 1332) ten years later.

Moreover, that Congress may have "enlarged the powers of bankruptcy courts" in discrete ways, *see* Petition 33–34, does not in any way suggest—much less clearly state—that Congress intended its "technical" revision of § 405(h) to reverse its longstanding policy against parallel litigation over Medicare Act claims. Petitioner takes issue with that policy choice. Petition 25–26. But that decision was Congress's to make, and Congress chose to allow HHS to review Medicare Act claims in the first instance, unimpeded by parallel court litigation.

By "demand[ing] the 'channeling' of virtually all legal attacks through" HHS, § 405(h) "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts." *Shalala*, 529 U.S. at 13. Of course, "this assurance comes at a price, namely, occasional individual, delay-related hardship." *Id.* But "[i]n 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. In any event, such was the judgment of Congress . . . ." *Id.*

As the Eleventh Circuit explained, the bankruptcy court's actions in this case exemplify the type of "premature interference" Congress sought to prevent in enacting § 405(h). "After holding an evidentiary hearing on the conditions at Bayou Shores' facility, the bankruptcy court apparently decided that the three deficiencies Bayou Shores was cited for were not particularly serious." Pet. App. 57a–58a. "Notwithstanding HHS's determination to the contrary, the bankruptcy court deemed the health and safety of Bayou Shores' patients free of immediate jeopardy." Pet. App. 58a. "The practical outcome of the bankruptcy court's decision was thus a reversal of HHS's decision" that "interfere[d] with HHS's role in deciding who is eligible to participate in Medicare/Medicaid," all by a bankruptcy court lacking "the institutional competence or technical expertise of HHS to oversee the health and welfare of nursing home patients." Pet. App. 58a, 60a.

In sum, the Eleventh Circuit correctly took Congress at its word that the current text of § 405(h) does not represent a substantive change from the original.

The Second Question Presented. The Eleventh Circuit also correctly determined that § 405(h) barred Bayou Shores' claims because they had not been administratively exhausted. This Court has made clear in *Salfi*, *Ringer*, and *Shalala* that § 405(h) requires all claims arising under the Medicare Act to be exhausted under § 405(g) before they can be pursued in litigation. Bayou Shores no longer disputes that its

claims arise under the Medicare Act, and it never has disputed its failure to exhaust them prior to asserting them in the bankruptcy court. Thus, as the Eleventh Circuit concluded, Bayou Shores' claims fall not only to § 405(h)'s jurisdictional bar, but also to the distinct statutory bar on unexhausted claims.

Petitioner nonetheless argues that in considering Medicare Act claims, the bankruptcy court "is not reviewing agency findings, nor substituting its judgment for that of the agency." Petition 35. As explained above, however, that is exactly what the bankruptcy court did here. *See supra* 34. And while Petitioner observes that the exhaustion requirement can cause delay-related hardship, Petition 36, that is a price that Congress was willing to pay to effectuate other policies that are well within the national legislature's power to adopt. *See Shalala*, 529 U.S. at 13.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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