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

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents do not dispute that the questions presented are of substantial importance to litigants and to the administration of the Bankruptcy Code, nor do they dispute the extraordinary stakes for patients and their loved ones. Instead, they quarrel with the existence of a clear circuit split—one the Eleventh Circuit expressly acknowledged it was creating. They reconstruct a rationale for the Ninth Circuit's decision found nowhere in the decision itself. And they attempt to conjure a vehicle issue where none exists.

Finally, respondents argue against granting certiorari because they contend the Eleventh Circuit's decision is correct. If true, that would be a powerful argument for granting certiorari, since on respondents' theory, the Third and Ninth Circuits and lower courts across the country have wrongly decided these issues. Those courts have it right: they take Congress at its word, while the Eleventh Circuit rewrites 42 U.S.C. 405(h) to say something it plainly does not. But whichever side is correct, this split on two critically important questions should be resolved. And this is the perfect case in which to resolve it.

## I. The Court Should Grant Certiorari In This Case.

### A. This Case Is An Excellent Vehicle.

Florida argues that the case is or will soon be moot because Petitioner's license has been revoked. State BIO 12-14. Florida inexplicably ignores the Eleventh Circuit's express holding (Pet. App. 62a-64a), which the Petitioner reiterates (Pet. 30), that this case is not moot because the United States intends to seek recoupment

of the funds paid to Petitioner after the bankruptcy court entered its injunction. The Eleventh Circuit held that the injunction was improper, and that those payments therefore should never have been made. If this Court affirms, the government can pursue its claim for recoupment. If the Court reverses, and the bankruptcy court's decision is upheld, the government cannot. The recoupment claim does not depend on whether Petitioner gets its license restored. The outcome of this appeal thus carries substantial financial consequences for Petitioner, making it an indisputably live controversy.

Unlike Florida, the federal respondent does not argue the case is moot, presumably because it intends to seek recoupment. Indeed, the United States argued to the Eleventh Circuit that its recoupment claim *prevented* a finding that the case was moot. Pet. App. 62a. Knowing the case is not moot, the federal respondent characterizes Petitioner's loss of license as a "vehicle" issue. Fed. BIO 23-24. It is not. Whether Petitioner should or should not have a state license is irrelevant to the federal jurisdictional issues in this case. The government identifies no conceivable way that this state licensing dispute could prevent the Court from deciding the question presented.

### B. There Is A Clear and Recognized Circuit Split On Both Questions Presented.

**Question One.** Question One asks whether Section 405(h) strips bankruptcy courts of jurisdiction over claims arising under the Medicare Act. The Ninth and Eleventh Circuits answered Question One in opposite

ways. The Eleventh Circuit expressly acknowledged that it was creating a split, Pet. App. 52a, a proposition with which the First Circuit has agreed, *see Parkview Adventist Medical Center v. United States ex rel. Department of Health & Human Services*, 842 F.3d 757, 759 (1st Cir. 2016). Respondents' efforts to minimize this square and acknowledged split are unavailing.

1. Respondents point out that the Ninth Circuit case addressed facts that are different from this case. Fed. BIO 20-21; State BIO 22-23 (discussing *Sullivan v. Town & Country Home Nursing Services, Inc. (In re Town & Country Home Nursing Services, Inc.)*, 963 F.2d 1146 (9th Cir. 1991)). That is true but irrelevant. Whether a bankruptcy court is adjudicating tort and contract counterclaims for underpayment, as in *Town & Country*, or ordering a debtor's provider agreement assumed, as in this case, the basis for its *jurisdiction* is the same: 28 U.S.C. 1334. And like the counterclaims in *Town & Country*, the claims in this case "arise under" the Medicare Act.[1] The claims are thus identical in all aspects material to the question presented.

Respondents speculate that the Ninth Circuit *could have* resolved *Town & Country* based on a different rule of decision—one based on the supposedly unique nature of setoff counterclaims. They then postulate that in the

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[1] The Ninth Circuit did, in passing, describe the claims in *Town & Country* as arising under the Bankruptcy Code and state law. But it also described them as "arising out of the government's setoff of Medicare overpayments." 963 F.2d at 1154. And it was Congress's omission of Section 1334 from the text of Section 405(h) that directed the outcome, not whether or not the claims arose under the Medicare statute. *Id.* at 1155.

alternative universe in which *Town & Country* was resolved on that ground, there would be no conflict with the decision below, which did not address setoff counterclaims. But in assessing whether there is a circuit split, this Court looks to what lower courts actually decided, not to hypothetical decisions that might avoid a circuit split but were not actually rendered. In the real world, the conflict between the Ninth Circuit and the decision below is obvious. The Ninth Circuit relied upon Section 1334's "broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate." 963 F.2d at 1155. That includes all proceedings that "could conceivably have any effect on the estate being administered" or "alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)." *Id.* (quotation marks omitted). The claims in this case clearly meet that test: the assumption of Petitioner's provider agreements was critical for plan confirmation. Pet. App. 131a. Though respondents pretend otherwise, *Town & Country* forecloses a future panel from reaching the same result as the Eleventh Circuit.

2. Respondents also seek to minimize the existence of this circuit split by suggesting *Town & Country* has been limited or may be reversed. Courts following that decision disagree, including the Ninth Circuit itself.

Respondents point first to *Kaiser v. Blue Cross of California*, 347 F.3d 1107 (9th Cir. 2003), a case brought pursuant to Section 1332, not Section 1334. *Kaiser* does not address bankruptcy jurisdiction at all, much less limit or overturn *Town & Country*. And to the extent *Kaiser* did provide the government with hopes of

overturning *Town & Country*, those hopes were dashed by *Do Sung Uhm v. Humana*, 620 F.3d 1134 (9th Cir. 2010). *Do Sung Uhm* explained that although "at first blush, *Kaiser*'s rule might seem to conflict" with *Town & Country*, in fact the decisions "can be reconciled" because "*Town & Country*'s reasoning relies almost exclusively on the special status of § 1334's 'broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate.'" *Id.* at 1141 n.11 (citation omitted). In other words, *Do Sung Uhm* distinguished between bankruptcy cases, which are covered by the *Town & Country* rule, and diversity cases, which are not. This is a bankruptcy case. *Town & Country* therefore applies, as bankruptcy courts and the Eleventh Circuit have accurately recognized. *Nurses' Registry & Home Health Corp. v. Burwell (In re Nurses' Registry & Home Health Corp.)*, 533 B.R. 590, 595 n.9 (Bankr. E.D. Ky. 2015) ("The Ninth Circuit…recently reaffirmed its holding that 405(h) does not bar bankruptcy jurisdiction over Medicare Act claims." (citing *Do Sung Uhm*, 620 F.3d at 1141 n.11)); Pet. App. 52a. The federal respondent's suggestion that *Town & Country* would not "necessarily reach any and all bankruptcy cases," Fed. BIO 22 n.4, lacks any support in any case in the quarter-century since *Town & Country* was decided. In short, the Ninth and Eleventh Circuits are squarely divided, and the split will not heal itself.

3. The state respondent seeks to minimize the significance of the split by suggesting that it is shallow. State BIO 24-25. But this issue has bedeviled lower courts for years, and it only rarely reaches the circuit courts: bankrupt debtors go out of business with no

money to appeal, and the government frequently settles when it loses these issues below.[2] Whether a distressed Medicare provider can reorganize in bankruptcy should not depend on whether it resides in Florida versus California. And in circuits that have not reached this question, patients and their families will suffer the consequences of uncertainty. Pet. 26-27. This case provides this Court a somewhat rare opportunity to address and resolve a recurring question of bankruptcy law that is of tremendous practical importance and has caused problems in the bankruptcy and district courts for decades.

**Question Two.** Question Two asks whether Section 405(h) requires a debtor to exhaust administrative remedies prior to pursuing the relief available under the Bankruptcy Code. The Ninth and Third Circuits answered no, while the Eleventh Circuit answered yes. Pet. 20-23. Courts have long complained that "the caselaw does not present a clear answer." *United States Department of Health & Human Services v. James*, 256 B.R. 479, 481-82 (W.D. Ky. 2000); Pet. 19-23.

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[2] It is true that several lower court decisions on the Ninth Circuit side of the split were subsequently vacated. State BIO 24-25. But one court affirmed the Section 405(h) holding while vacating on other grounds, *Slater Health Center, Inc. v. United States (In re Slater Heath Center, Inc.)*, 306 B.R. 20, 24 (D.R.I. 2004), *aff'd*, 398 F.3d 98 (1st Cir. 2005), while others were vacated due to the entry of consent orders, *see In re Healthback, L.L.C.*, No. 97-22616-BH, 1999 WL 35012949, at *1 (Bankr. W.D. Okla. May 28, 1999); *First American Health Care of Georgia, Inc. v. United States Department of Health & Human Services*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996).

Respondents do not contest that the questions are related and ought to be resolved together. Pet. 27-28.

Instead, Respondents again deny a split. They claim that circuits siding with Petitioner on this question found the debtors' claims did not "arise under" Medicare, whereas the claims in this case do. Fed. BIO 20; State BIO 28-29. The federal respondent argues this as to both the Third and Ninth Circuits, and the state respondent only as to the Third Circuit, State BIO 28-29.

Once again Respondents are rewriting the relevant decisions, hypothesizing alternative-reality versions that do not conflict with the decision below. The Ninth Circuit held that Section 1334 contains no exhaustion requirement, and it declined to import one from Section 405(h), even for claims "arising out of the government's setoff of Medicare overpayments." *Town & Country*, 963 F.2d at 1154.[3] It did not rule based on whether the claims arose out of Medicare. It ruled based on the independent jurisdictional grant in Section 1334. The Third Circuit did say the claims did not arise under Medicare, but went on to cite the Ninth Circuit's exhaustion analysis as well. *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1073-74 (3d Cir. 1992).

Lower courts have interpreted both decisions as holding the exhaustion requirement in Section 405(h) inapplicable in bankruptcy. Pet. 22-23; *see, e.g.*, *Nurses' Registry*, 533 B.R. at 595; *Slater*, 306 B.R. at 24; *In re Healthback, L.L.C.*, 226 B.R. 464, 474-75 & nn.13, 14

[3] The state respondent again asserts that *Kaiser* "retreated from" *Town & Country*, State BIO 29-30, but that is as untrue for exhaustion as for jurisdiction. *Supra* 4-5.

(Bankr. W.D. Okla. 1998), *vacated*, No. 97–22616– BH, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999). And they have done so correctly. The exhaustion question concerns the second sentence of Section 405(h), not the third; it asks whether exhaustion is required by the second sentence even if the third sentence is inapplicable. And the second sentence contains no requirement that claims "arise under" the Medicare statute. Yet the Third and Ninth Circuits found the second sentence inapplicable too. This proves their decisions were driven by the absence of an exhaustion requirement in Section 1334, *not* by whether claims arose under Medicare or not. Pet. 20-21.

## II. The Eleventh Circuit's Decision Is Wrong.

Respondents' main argument for denying certiorari is that the Eleventh Circuit is correct. If that were true, it would be a reason to grant certiorari, not to deny it. In any event, the Eleventh Circuit's decision is wrong.

1. The Eleventh Circuit is wrong about the jurisdictional question. There is nothing ambiguous in the plain text of Section 405(h). When Congress amended Section 405(h), it omitted 28 U.S.C. 1334 from the list of affected jurisdictional provisions. And it did so knowing that Section 1334 had previously been affected. *See* Pet. 9, 32. Instead of taking Congress at its word, the Eleventh Circuit rewrote the statute.

Respondents defend the Eleventh Circuit by invoking the recodification canon that "when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise." Fed. BIO 15 (quoting Pet. App.

35a). But there is "a clear indication otherwise": the unambiguous text of the amendment. Congress took a provision that had recently been interpreted by the Supreme Court to capture essentially every grant of jurisdiction to the district courts, Pet. 8, and replaced it with one that referenced just two of those grants. That "indication" is clear as day.

The Eleventh Circuit found Congress's intent unclear because Congress did not explain its decision in legislative history. Pet. App. 45a-46a. But this Court does not "require Congress to state in committee reports…that which is obvious on the face of the statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

Respondents try to inject ambiguity where none resides by pointing to a separate provision of the DRA directing that amendments, including those to 405(h), should not "be construed" to change or affect any previously existing rights, liabilities, statuses, or interpretations. Fed. BIO 14-16; State BIO 32 (citing DRA § 2664(b), 98 Stat. 1171–72). But that provision concerns "Effective dates" of the relevant amendments. While some amendments were made retroactive, DRA § 2664(a), 98 Stat. 1171, others applied prospectively, but without impacting already-vested rights, DRA §§ 2664 (b), 98 Stat. 1171–72. Rather than directing courts that no substantive legal changes were intended, the provision simply protects certain conditions as they "existed" before the effective date.

Even if the provision does what respondents suggest, it could not change the plain text of Section 405(h). An interpretive provision yields to an operative provision, not the reverse. *Cf. Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016) (declining to read a definition into a substantive provision where doing so would nullify it). The Eleventh Circuit conceded as much about other DRA amendments that plainly affected substantive rights, justifying *those* substantive amendments because Congress wrote specific legislative history confirming its intent to change the law, Pet. App. 49a & n.39, but this Court does not require legislative history to confirm unambiguous text. *Supra* 9.

Congress may have overlooked the potential for Medicare disputes to enter federal court via bankruptcy jurisdiction, mistakenly believing that barring Sections 1331 and 1346 was all that was need to channel Medicare claims administratively. But that is a mistake only Congress can fix. Pet. 31-33.

2. The Eleventh Circuit is also wrong on exhaustion. The Third and Ninth Circuits held that the exhaustion requirements of Section 405(h) do not apply where there is an independent grant of jurisdiction to the federal courts. Pet. 34-36. This makes sense: if one is not invoking the jurisdiction of courts under 42 USC 405(g), one need not follow its related exhaustion requirements.

Respondents suggest that this Court's precedents mandate exhaustion in this case. Fed. BIO 11-12; State BIO 27-28. But this Court has never reached this question. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court considered an action brought under 28 U.S.C. 1331, which was undeniably channeled to administrative

review by Section 405(h)'s third sentence. *Salfi* thus does not confront the issue presented here: a claim that is *not* channeled into Section 405(g) because it is brought pursuant to 28 U.S.C. 1334. Equally unavailing is *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), another 1331 case.

The Court certainly did not reach it in *Heckler v. Ringer*, 466 U.S. 602 (1984), wherein the plaintiffs based jurisdiction on Sections 1331, 1361 (mandamus), and 405(g) itself. *Id.* at 609. The Court found 1331 and 405(g) jurisdiction barred by the third sentence of 405(h), but assumed without deciding that mandamus jurisdiction was *not* foreclosed; Section 1361, unlike 1331 but *like* 1334, does not appear in the third sentence. Ultimately, mandamus was not viable because the plaintiffs had not exhausted *as required by the law governing mandamus*. *Id.* at 616-17. There is, of course, no analogous exhaustion requirement for bankruptcy proceedings. And in *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449 (1999), when the government argued that mandamus was unavailable absent exhaustion because of Section 405(h)'s second sentence, this Court expressly "avoided deciding this issue." *See id.* at 456 n.3.

The closest case may be *Califano v. Sanders*, 430 U.S. 99 (1977), which respondents do not cite. The plaintiff's claims were brought under the APA, which plaintiff argued was an independent grant to district courts of subject-matter jurisdiction to review agency decisions. *Id.* at 100-01. This Court could have decided whether Section 405(h)'s second sentence required exhaustion of claims brought under separate

jurisdictional grants, but declined that "shorter route" to decision. *Id.* at 110-11 (Stewart, J., concurring in the judgment). Instead, the Court held the plaintiff was required to exhaust pursuant to Section 405(h) because the APA did *not* contain an independent jurisdictional grant. *Id.* at 104-06. The Bankruptcy Code *does* contain such a grant, and it contains no corresponding exhaustion requirement.

In short, this Court has never decided the issues in this case. It should, and this is the case in which to do it.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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