No. 16-967

In the Supreme Court of the United States

BAYOU SHORES SNF, LLC, PETITIONER

v.

FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a skilled nursing facility that has been terminated from participating in the Medicare program may obtain judicial review of the termination order in bankruptcy court, without exhausting its administrative remedies, notwithstanding that 42 U.S.C. 405(h) "demands the 'channeling' of virtually all legal attacks through the agency." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 828 F.3d 1297. The order of the district court (Pet. App. 72a-85a) is reported at 533 B.R. 337. The order of the district court issuing a stay pending appeal (Pet. App. 86a-92a) is not published in the *Federal Supplement* but is available at 2015 WL 6502704. The order of the bankruptcy court issuing an injunction against respondents (App., *infra*, 1a-2a) is not published in the *Bankruptcy Reporter*, and has been omitted from the petition appendix. The opinion and order of the bankruptcy court holding that petitioner had satisfied the requirements for confirming a plan of reorganization (Pet. App. 95a-124a) is reported at 525 B.R. 160. The order of the bankruptcy court issuing a final order of confirmation (Pet. App. 125a-145a) is not published in the *Bankruptcy Reporter*.

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. 93a-94a). On December 6, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 2, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the Secretary of Health and Human Service's order terminating petitioner's participation in Medicare on the ground that conditions at petitioner's skilled nursing facility placed its patients in immediate jeopardy of serious harm or death. Pet. App. 2a. The United States Bankruptcy Court for the Middle District of Florida enjoined the termination order and required the federal respondent to allow petitioner to continue participating. *Ibid.* The United States District Court for the Middle District of Florida reversed, holding that the bankruptcy court lacked jurisdiction to review and enjoin the termination order. *Id.* at 3a. The court of appeals affirmed. *Ibid.*

1. Congress enacted the Medicare program to provide federally funded health insurance to the elderly and disabled. See Social Security Amendments of 1965 (Medicare Act), Pub. L. No. 89-97, § 102(a), 79 Stat. 295 (adding Title XVIII to the Social Security Act, 42 U.S.C. 301 *et seq.*), as amended, 42 U.S.C. 1395 *et seq.* Medicare is administered by the Centers for Medicare and Medicaid Services (CMS), an agency within the Department of Health and Human Services (HHS). Among others things, Medicare covers in-patient hospital services and skilled nursing care.

To participate in Medicare, a skilled nursing facility must enter into a provider agreement with the Secretary, 42 U.S.C. 1395cc(a), and comply with detailed standards for each resident's health and safety, 42 U.S.C. 1395i-3(a)-(d); 42 C.F.R. 483.1-483.75. Periodic surveys are conducted, typically by a state survey agency, to monitor compliance with health and safety standards. 42 U.S.C. 1395i-3(g); 42 C.F.R. 488.300. If the state survey agency finds statutory or regulatory violations, it forwards its findings to CMS along with a recommendation for appropriate remedial action. 42 U.S.C. 1395i-3(g)(2) and (h).[1]

Congress has vested the Secretary with discretion to impose a broad range of remedies and sanctions to ensure compliance with nursing home standards: Regulatory officials may direct a plan for correcting statutory violations, impose civil money penalties, deny further reimbursement for services rendered after the deficiency is discovered, appoint temporary management, terminate a facility's right to participate in Medicare, or transfer residents and close the facility. 42 U.S.C. 1396i-3(h)(2); 42 C.F.R. 488.406.

Skilled nursing facilities must be given written notice of any deficiencies identified 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),

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[1] In the federally administered Medicare program, the state survey agency recommends an appropriate remedy and the Secretary makes the final decision on remedial action. 42 U.SC. 1395i-3(h)(1) and (2). In Medicaid, these remedial powers are vested in the State. 42 U.S.C. 1396r(h)(1). If the provider is terminated from Medicare, however, it will automatically be terminated from Medicaid as well. 42 U.S.C. 1396a(a)(39).

488.402(f). In most instances in which a remedy or sanction is imposed, the provider may contest the underlying survey findings through a formal evidentiary hearing. 42 C.F.R. 498.3(b), 498.5. The hearing must afford the provider an opportunity to appear before an administrative law judge (ALJ) or other impartial decisionmaker, to be represented by counsel, to call witnesses, and to present other evidence. 42 C.F.R. 498.40-498.66. Hearing decisions must be in writing and set forth the reasons for the enforcement action and the evidence on which it is based. 42 C.F.R. 498.74.

Skilled nursing facilities participating in the Medicare program have a further right to appeal to HHS's Departmental Appeals Board. 42 C.F.R.498.80. The Board is "established in the Office of the Secretary to provide impartial review of disputed agency decisions." 42 C.F.R. 498.2. A facility may present briefs and argument to the Board and may, for good cause shown, introduce additional evidence not considered by the ALJ. 42 C.F.R. 498.85, 498.86. The Board must issue a decision in writing and may modify, affirm, or reverse the ALJ's decision. 42 C.F.R. 498.88.

A Medicare provider may then seek judicial review of a final decision of the Board by commencing a civil action within 60 days. 42 C.F.R. 498.5(c), 498.95. If the challenged decision results in imposition of a civil money penalty, the nursing home may seek review directly in the court of appeals. 42 U.S.C. 1395i-3(h)(2)(B)(ii)(I) (incorporating 42 U.S.C. 1320a-7a(e)). Other final administrative decisions are reviewable in district court. See 42 U.S.C. 1395cc(h)(1)(A) (incorporating 42 U.S.C. 405(g)).

2. Congress has provided that these administrative remedies, followed by judicial review in the district

court or court of appeals, as appropriate, provide the exclusive means of obtaining judicial review over claims arising under the Medicare Act. Specifically, 42 U.S.C. 405(h), as incorporated into Medicare by 42 U.S.C. 1395ii, provides:

> 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).[2]

As originally enacted, Section 405(h) provided that no action "shall be brought under section 24 of the Judicial Code of the United States." Social Security Act Amendments of 1939 (1939 Act), ch. 666, § 205(h), 53 Stat. 1371. At that time, Section 24 of the Judicial Code encompassed virtually every grant of jurisdiction to the district courts, including diversity and bankruptcy jurisdiction. See 28 U.S.C. 41(1) and (19) (1934) (codifying "Judicial Code, section 24").

By the 1980s, the cross-reference had long been out of date. In 1984, Congress enacted a package of "Technical Corrections" that replaced the cross-reference to Section 24 with the current cross-reference that specifically names Sections 1331 and 1346. Deficit Reduction

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[2] Congress directed that any reference to the Commissioner of Social Security be construed as a reference to the Secretary where context so indicates. See 42 U.S.C. 1395cc(h)(1)(A), 1395ii.

Act of 1984 (1984 Corrections), Pub. L. No. 98-369, Tit. VI, Subtit. D, § 2663(a)(4)(D), 98 Stat. 1162. But Congress provided that this was merely a recodification of existing law, not a substantive change: "[N]one of [the] 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." *Id.* § 2664(b), 98 Stat. 1171-1172.

3. a. Petitioner's nursing home was located in St. Petersburg, Florida. Pet. App. 4a. The state survey agency is respondent Florida Agency for Health Care Administration (Florida AHCA). In February, March, and July of 2014, Florida AHCA conducted a survey of the nursing home and found substantial violations of health and safety standards. *Id.* at 5a-7a. It concluded that petitioner had failed to correctly track patient "Do Not Resuscitate" orders, failed to ensure proper patient hygiene, and failed to secure expired medications. *Id.* at 5a. It found that petitioner had placed a known sex offender in a room with a disabled patient and then failed to handle appropriately allegations that the sex offender sexually molested his disabled roommate. *Id.* at 6a. And it found that petitioner had allowed a mentally impaired resident to wander away from the facility unaccompanied on a hot day. *Ibid.* The patient was later found at a bus stop. *Ibid.*

On July 22, 2014, CMS notified petitioner that its non-compliance with regulatory standards posed an "immediate jeopardy to [its] residents' health and safety," and that its Medicare participation agreement would be terminated. Pet. App. 7a. The termination of petitioner's Medicare provider agreement also triggered termination of its participation in Medicaid. *Ibid.*

b. Petitioner did not exhaust its administrative remedies for disputing the termination order. Rather, petitioner sought an injunction against the termination in the United States District Court for the Middle District of Florida. Pet. App. 7a-8a. The district court dismissed for lack of jurisdiction on the ground that petitioner's challenge to the termination order arose under the Medicare statute, and therefore that 42 U.S.C. 405(h) barred petitioner's suit because it had not exhausted its administrative remedies. Pet. App. 8a.

c. Petitioner then filed a petition in the United States Bankruptcy Court for the Middle District of Florida, seeking to reorganize in bankruptcy and again seeking an injunction against the termination. Pet. App. 8a. After an evidentiary hearing, the bankruptcy court ruled in petitioner's favor and issued a preliminary injunction prohibiting the Secretary from terminating petitioner's Medicare provider agreement and barring Medicare from transferring or relocating petitioner's patients. *Id.* at 8a-9a; see App., *infra*, 1a-2a. The bankruptcy court held that it had jurisdiction under 28 U.S.C. 1334, notwithstanding that petitioner had not exhausted its administrative remedies or sought judicial review pursuant to Section 405 and the Medicare Act. See 8/26/14 Bankr. Ct. Tr. 112-113. The bankruptcy court then turned to the termination order, finding that the deficiencies found in the surveys of petitioner's facility had been addressed and that its patients were no longer in jeopardy, *id.* at 116, 118, that terminating the facility would harm petitioner's patients, employees, customers, and creditors, *id.* at 117-118, and that the termination was not an exercise of the government's police power exempted from the Bankruptcy Code's automatic stay, *id.* at 117.

The bankruptcy court subsequently confirmed a plan of reorganization. Pet. App. 125a-145a. The final confirmation order permanently barred the Secretary from terminating petitioner's Medicare provider agreement on the basis of the deficiencies uncovered in the pre-petition surveys. *Id.* at 136a, 140a.

d. The federal respondent appealed the preliminary injunction and confirmation order to the United States District Court for the Middle District of Florida. Pet. App. 72a-73a. The court reversed, holding that the bankruptcy court lacked jurisdiction to enjoin the Secretary's termination of petitioner's provider agreements. *Id.* at 72a-85a. The district court reasoned that "[t]here 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." *Id.* at 80a. The court therefore held that "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." *Id.* at 83a-84a.

The district court stayed its order pending petitioner's appeal to the court of appeals, but barred petitioner from accepting any new Medicare or Medicaid patients while the stay remained in effect. Pet. App. 91a-92a.

e. The court of appeals affirmed. Pet. App. 1a-71a. The court held that Section 405(h) prohibits a bank-

ruptcy court from reviewing the Secretary's determination to terminate a Medicare provider, and that in any event exhaustion of administrative remedies would be required. *Id.* at 70a-71a. The court reasoned that, as originally enacted, Section 405(h) expressly barred bankruptcy jurisdiction over claims arising under the Social Security Act (which encompasses Medicare). *Id.* at 13a-15a. The court further concluded that the omission of a cross-reference to bankruptcy jurisdiction in the current version of Section 405(h) was the result of a codification error that did not reflect a congressional intent to permit bankruptcy courts to exercise jurisdiction over Medicare claims. *Id.* at 15a-21a. The court explained that a longstanding canon of statutory construction establishes that when Congress recodifies the law, courts should presume that no substantive change is intended absent clear evidence to the contrary. *Id.* at 37a-44a. The court found no such clear evidence. Rather, it traced the omission of a reference to bankruptcy jurisdiction in the current codification of Section 405(h) to an error made by the Office of Law Revision Counsel when that body, in 1976, sought to conform Section 405(h) to prior changes in the codification of the Judicial Code. *Id.* at 44a-45a. The court observed that in 1984, when Congress enacted the Office of Law Revision Counsel's recodification of Section 405(h) into positive law, the statute itself expressly stated that this amendment was not intended to change or affect prior law. *Id.* at 44a-47a (citing 1984 Corrections § 2664(b), 98 Stat. 1172). The court concluded 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." *Id.* at 52a.

The court of appeals next concluded that the general grant of bankruptcy jurisdiction in 28 U.S.C. 1334 does not override Section 405(h)'s preclusion of bankruptcy jurisdiction. Section 1334(b) provides that "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." 28 U.S.C. 1334(b). The court, citing *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U.S. 32, 41-42 (1991), held that Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other courts, not the allocation of jurisdiction between the bankruptcy court and an administrative agency. Pet. App. 52a-54a. "Thus, § 1334(b) does not concern the allocation of jurisdiction between the bankruptcy court and HHS, and cannot trump the § 405(h) jurisdictional bar." *Id.* at 54a.

The court of appeals further concluded that the first two sentences of Section 405(h) confirm that judicial review of claims challenging the termination of a Medicare provider may not be had in any judicial forum without exhaustion of administrative remedies. Pet. App. 60a-62a. Section 405(h)'s first two sentences "'assure that administrative exhaustion will be required' and 'prevent review of decisions of the Secretary save as provided in the [Social Security] Act, which provision is made in § 405(g).'" *Id.* at 61a (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975)). The court therefore concluded that, because petitioner had not exhausted its administrative remedies, the bankruptcy court lacked jurisdiction. *Ibid.*

ARGUMENT

Petitioner renews its contention (Pet. 14) that it could obtain judicial review of the Secretary's termination order, without exhausting its administrative remedies, simply by invoking the jurisdiction of the bankruptcy court under 28 U.S.C. 1334. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Indeed, every court of appeals to address the codification history of Section 405(h) has agreed that its channeling and exhaustion requirements are not limited to the two jurisdictional provisions it currently cross-references. This would also be a poor vehicle for deciding the question presented, as petitioner's state operating license has been separately revoked and it therefore cannot currently participate in Medicare regardless of how the questions presented were resolved. Further review is unwarranted.

1. The court of appeals correctly held that the bankruptcy court lacked jurisdiction to review the Secretary's decision to terminate petitioner's participation in Medicare.

a. In Section 405(h), Congress channeled all manner of claims that arise under the Medicare statute through the comprehensive administrative and judicial review procedures established therein. Section 405(h) provides that the Secretary's "findings and decision * * * shall be binding" upon every party; that "[n]o findings of fact or decision" of the Secretary "shall be reviewed," except as provided in the Medicare Act; and that "[n]o action * * * shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under" Medicare. 42 U.S.C. 405(h). This Court has characterized the Section 405(h) bar to other avenues of review

as "sweeping and direct," *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), and explained that it applies to "all 'claim[s] arising under' the Medicare Act," *Heckler* v. *Ringer*, 466 U.S. 602, 615 (1984) (brackets in original) (quoting 42 U.S.C. 405(h)). In *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (*Illinois Council*), the Court stated that Section 405(h) reaches beyond ordinary administrative law principles of ripeness and exhaustion of administrative remedies and "demands the 'channeling of virtually all legal attacks through the agency." *Id.* at 13. The statute, this Court explained, thereby "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." *Ibid.*

Petitioner nonetheless argues (Pet. 30-34) that Section 405(h)'s channeling and exhaustion requirements do not apply to courts exercising bankruptcy jurisdiction under 28 U.S.C. 1334 because, in its current codification, the third sentence of Section 405(h) expressly bars the exercise of jurisdiction under 28 U.S.C. 1331 and 1346, but does not refer to Section 1334. Petitioner contends (Pet. 34-36) that this omission should be interpreted to allow bankruptcy courts to review claims arising under the Medicare Act, without any need for administrative exhaustion.

The court of appeals correctly rejected that argument. At the outset, Section 405(h)'s second sentence provides that "[n]o 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). This suit does not arise in a manner

"as herein provided," *i.e.*, through exhaustion of administrative remedies and then by judicial review in the specified manner. *Ibid.* Accordingly, Section 405(h)'s second sentence barred petitioner from raising its unexhausted challenge to the Secretary's termination decision in bankruptcy court.

Section 405(h)'s third sentence also bars review in bankruptcy court. It is undisputed that, as originally enacted in 1939, Section 405(h) barred bankruptcy courts from exercising jurisdiction over claims arising under the Social Security Act, of which the Medicare Act is now a part. Pet. App. 3a. Specifically, it barred such claims brought "under section 24 of the Judicial Code," which encompassed the grant of bankruptcy jurisdiction. 1939 Act § 205(h), 53 Stat. 1371; see 28 U.S.C. 41(19) (1934). As the court of appeals explained, the omission of a reference to bankruptcy jurisdiction in the current text of Section 405(h) is the product of a series of recodifications that did not change the statute's original meaning. Pet. App. 3a.

Section 405(h)'s cross-reference became out-of-date in 1948, when Congress reorganized the Judicial Code. In that revision, Congress moved the general grants of jurisdiction from the catch-all provision of Section 24 of the Judicial Code to a series of separate sections in Chapter 85 of Title 28. See Act of June 25, 1948 (1948 Recodification), ch. 646, § 1, 62 Stat. 930. That reorganization included separately codified provisions for diversity jurisdiction and bankruptcy jurisdiction. *Ibid.* (creating 28 U.S.C. 1332 and 1334). Congress expressly provided, however, that the 1948 Recodification was technical and not intended to make any substantive change in any limitation on jurisdiction. See 1948 Recodification §§ 2(b), 33, 39, 62 Stat. 985, 991-992. It is

thus undisputed that Section 405(h) continued to apply to claims arising under the Social Security Act that were brought in bankruptcy court, notwithstanding that the cross-reference was out of date.

In 1975, this Court noticed the problem and quoted Section 405(h) as providing that no action "shall be brought under [§ 1331 *et seq.*] of Title 28." *Salfi*, 422 U.S. at 756. That description encompasses bankruptcy jurisdiction. And in 1976, the Office of Law Revision Counsel revised the cross-reference printed in the U.S. Code, but erroneously referred solely to actions brought under 28 U.S.C. 1331 or 1346, without including a reference to diversity jurisdiction, bankruptcy jurisdiction, or any other bases of jurisdiction covered by Section 405(h). See 42 U.S.C. 405(h) & codification note, at p. 661 (1982).[3]

In 1984, Congress enacted the Office of Law Revision Counsel's mistaken recodification of Section 405(h) into positive law, "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.'" 1984 Corrections § 2663(a)(4)(D), 98 Stat. 1162. Congress again provided, however, that the recodification was not substantive: It "shall [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. 1171-1172.

As the court of appeals correctly observed, "[i]t thus appears that the current text of § 405(h) is the result of the Office of Law Revision Counsel's mistaken codifica-

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[3] The Office of Law Revision Counsel's mistake did not change the law. *North Dakota* v. *United States*, 460 U.S. 300, 311 n.13 (1983).

tion, an error enacted into positive law by the [1984 Corrections]." Pet. App. 21a. "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." *Id.* at 35a. This Court has applied this canon of construction in a long line of cases running from at least 1871 to the present day—including cases concluding that the 1948 Recodification did not alter the meaning of statutes relying on cross-references to provisions formerly codified elsewhere. See *id.* at 36a-40a; *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); see also *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1871). Accordingly, Congress's action in 1984 to correct Section 405(h)'s cross-reference to conform it to the 1948 Recodification of the Judicial Code cannot be construed to alter Section 405(h)'s meaning absent a clearly expressed congressional intent to change the law. Pet. App. 44a.

As the court of appeals correctly concluded, there is no such indication here. In particular, no indication exists that the Office of Law Revision Counsel, in omitting a reference to bankruptcy jurisdiction from its revision of Section 405(h), intended to reverse 40 years of congressional policy, or that it had any authority to do so. Pet. App. 44a-45a; see 2 U.S.C. 285b(1) (directing the Office to preserve the "policy, intent, and purpose of the Congress in the original enactments"). Moreover, as the court of appeals explained, Congress did not intend to effect such a substantial change in the Social Security Act's jurisdictional provisions when, in the 1984 Corrections, it enacted the revision of Section 405(h) into positive law. To the contrary, Section 2664(b) of the 1984

Corrections itself provides that Congress did not intend any substantive change. Pet. App. 46a-47a.

The court of appeals' interpretation of Section 405(h) is thus consistent not only with the recodification cannon, but also with the text of the statutes that Congress has enacted into law. The 1984 Corrections statute provides that Section 405(h)'s amended text "shall [not] be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date." § 2664(b), 98 Stat. 1171-1172. And it is undisputed that "(under the provisions of law involved) before that date," Section 405(h) applied to the exercise of bankruptcy jurisdiction. Pet. App. 3a. The 1939 Act did so expressly, § 205(h), 53 Stat. 1371, and the 1948 Recodification did not alter "[a]ny rights or liabilities [then] existing," § 39, 62 Stat. 992. Those provisions, when read together—and particularly when read in light of Section 405(h)'s separate requirement of exhaustion before challenging any "findings of fact or decision" of the Secretary, 42 U.S.C. 405(h),—thus foreclose petitioner's position.

b. Petitioner's other arguments lack merit. Petitioner contends (Pet. 32) that statutes should not be construed to restrict access to the courts absent convincing evidence. But as the Court held in *Illinois Council*, Section 405(h) does not prohibit judicial review; it is a channeling statute that conditions jurisdiction on the exhaustion of administrative remedies. 529 U.S. at 23-24. In any event, there is convincing evidence that Congress intended to prevent immediate review in bankruptcy court of claims arising under the Social Security Act (including the Medicare Act), without exhaustion of administrative remedies: In 1939, Congress enacted a statute saying so expressly, and its only subsequent

changes to that law have been recodifications that changed the wording of the third sentence but that Congress declared should not be construed as having any substantive effect. 1984 Corrections § 2664(b), 98 Stat. 1171-1172; 1948 Recodification § 39, 62 Stat. 992.

Petitioner notes (Pet. 33) that Congress amended Section 405 in some respects in 1994, without correcting the omission of a reference to bankruptcy jurisdiction. Such legislative silence, however, is a dubious basis for inferring that Congress intended to permit the exercise of bankruptcy jurisdiction. See *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). The more plausible inference is that Congress understood that the 1984 Corrections did not enable litigants to circumvent Section 405(h)'s exhaustion requirements simply by going to bankruptcy court, and thus understood that there was no problem to solve.

A bankruptcy court's equitable power to administer a case within its jurisdiction (Pet. 33-34) sheds no light on whether the court may exercise jurisdiction in the first instance. "Without jurisdiction the court cannot proceed at all in any cause," 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 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

2. Contrary to petitioner's contention (Pet. 14-23), the court of appeals' decision does not conflict with the decision of any other court of appeals with respect to the sort of claim arising under the Medicare Act at issue here.

a. No other court of appeals has addressed the question whether a bankruptcy court may engage in judicial review of an order issued by the Secretary terminating

a provider's Medicare agreement, notwithstanding Section 405(h)'s exhaustion and channeling requirements, where the terminated provider has not exhausted its administrative remedies. The Third, Seventh, Eighth, and Ninth Circuits have reached similar results, however, in the context of diversity jurisdiction under Section 1332.

The leading case is *Bodimetric Health Services, Inc.* v. *Aetna Life & Casualty*, 903 F.2d 480, cert. denied, 498 U.S. 1012 (1990) (*Bodimetric*), where the Seventh Circuit first held that a provider's unexhausted claims of fraud and misconduct against a fiscal intermediary in processing Medicare reimbursements arose under the Medicare Act. See *id.* at 487. The court then went on to hold that the claimant could not evade Section 405(h)'s exhaustion and channeling requirements for such claims by invoking diversity jurisdiction. See *id.* at 488-490. The court's rationale was substantially similar to that of the Eleventh Circuit below: As originally enacted, the Seventh Circuit explained, Section 405(h) expressly encompassed diversity jurisdiction because it was one of the jurisdictional grants codified in Section 24 of the Judicial Code. See *id.* at 488. Furthermore, the court explained, the appropriate cross-reference to diversity jurisdiction was mistakenly omitted from the wording of the third sentence of Section 405(h) in the recodification proposed by the Office of Law Revision Counsel, which was then later enacted into positive law in the 1984 Corrections that were expressly non-substantive. See *id.* at 488-489. "Because the previous version of section 405(h) precluded judicial review of diversity actions," the court concluded, "so too must newly revised section 405(h) bar these actions." *Id.* at 489.

The Third, Eighth, and Ninth Circuits have reached similar results, holding that unexhausted claims arising

under the Medicare statute cannot be brought in federal court by invoking diversity jurisdiction. See *Nichole Med. Equip. & Supply, Inc.* v. *TriCenturion, Inc.*, 694 F.3d 340, 346-347 (3d Cir. 2012); *Do Sung Uhm* v. *Humana, Inc.*, 620 F.3d 1134, 1139-1141 (9th Cir. 2010); *Midland Psychiatric Assocs., Inc.* v. *United States*, 145 F.3d 1000, 1004 (8th Cir. 1998). The Eleventh Circuit's decision here is consistent with those cases.

b. Petitioner contends (Pet. 14-23) that the Eleventh Circuit's decision conflicts with *University Medical Center* v. *Sullivan (In re University Medical Center)*, 973 F.2d 1065 (3d Cir. 1992) (*UMC*), and *Sullivan* v. *Town & Country Home Nursing Services, Inc. (In re Town & Country Home Nursing Services, Inc.)*, 963 F.2d 1146 (9th Cir. 1992) (*Town & Country*). Although there is some broad language in *Town & Country*, there is no direct conflict.

In both *UMC* and *Town & Country*, a Medicare provider was reorganizing in bankruptcy and brought an adversary proceeding against the federal government, contending that the automatic stay prohibited the Secretary from recovering pre-petition overpayments by withholding the overpaid amounts from future Medicare payments. See *UMC*, 973 F.2d at 1071-1072; *Town & Country*, 963 F.3d 1147-1148. In *Town & Country*, the Ninth Circuit described the petitioner as raising "claims for relief arising under the Bankruptcy Code and state law." 963 F.3d at 1148. In *UMC*, the Third Circuit squarely held that the claims "ar[o]se[] under the Bankruptcy Code and not under the Medicare statute." 973 F.2d at 1073. In both cases, the courts of appeals further concluded that Section 405(h) did not bar review of those claims, stating that "where there is an

independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required." *Id.* at 1073-1074 (quoting *Town & Country*, 963 F.2d at 1154).

UMC and *Town & Country* are distinguishable from the Eleventh Circuit's decision below because the underlying claims at issue in the cases are different. This case involves a substantive claim at the heart of the Medicare statute—whether the Secretary properly terminated petitioner from participating in the program when conditions at petitioner's facility posed an immediate risk of serious harm or death to its patients—not a procedural question about how the government can go about recovering undisputed pre-petition overpayments from a provider that is now in bankruptcy. Section 405(h) applies to claims "arising under" the Medicare statute. 42 U.S.C. 405(h). In *Town & Country*, however, the Ninth Circuit described the setoff/stay claims there as arising under the Bankruptcy Code and state law. 963 F.3d at 1148. And the Third Circuit squarely held that the setoff/stay claims did *not* arise under the Medicare Act. *UMC*, 973 F.2d at 1072. Here, by contrast, petitioner's claims plainly arise under the Medicare Act: Petitioner contends that the Secretary wrongly terminated its participation in Medicare, and petitioner sought an injunction against that order. Cf. *Illinois Council*, 529 U.S. at 14 (noting that "claims of program eligibility" are within the scope of Section 405(h)).

Furthermore, whereas the Third and Ninth Circuits concluded that Section 1334 provided an "independent basis" for jurisdiction over the claims relating to the setoffs of pre-petition overpayments, *UMC*, 973 F.2d at 1073-1074 (quoting *Town & Country*, 963 F.2d at 1154),

neither court has addressed whether an "independent basis" would exist for a bankruptcy court to review the propriety of a termination order. And if anything, the Third Circuit's decision in *UMC* suggests that it would not. The court emphasized that the provider's challenge to the setoffs was "not inextricably intertwined with any dispute concerning the fiscal intermediary's reimbursement," as "[n]either party questions the amount of prepetition overpayments made to UMC nor any other determination of the fiscal intermediary that might be appealed" administratively. 973 F.2d at 1073. The court stated that its holding "d[id] not impinge upon" the Secretary's authority "protected by section 405(h)," and that "there [wa]s no danger of rendering the administrative review channel superfluous, for there is no system of administrative review in place to address the issues raised by UMC in its adversary proceeding." *Ibid.* Here, by contrast, a system of administrative review *is* in place for a provider to challenge an administrative termination, and petitioner's challenge to the termination order is inextricably intertwined with the Secretary's administration of the Medicare program. Petitioner sought to circumvent that process and Congress's requirement that it be utilized, however, by filing in bankruptcy court.

In *Town & Country*, the Ninth Circuit also stated broadly 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." 963 F.3d at 1155. If the Ninth Circuit were to face an unexhausted termination case like this one, it would have the opportunity to decide whether to extend that rationale to this context. If it did, that would open a circuit conflict.

The Ninth Circuit has not taken that step, however, and it is far from clear that it would. The Ninth Circuit decided *Town & Country* 25 years ago, and it did not address the history of Section 405(h) or the Seventh Circuit's earlier decision in *Bodimetric* holding that the third sentence of Section 405(h) extends beyond the two provisions it currently cross-references. In *Do Sung Uhm*, however, the Ninth Circuit confronted that history —and declined to extend *Town & Country*'s broad language to the context of a diversity action. See *Do Sung Uhm*, 620 F.3d at 1140-1141 & n.11;[4] see also *Kaiser* v. *Blue Cross of Cal.*, 347 F.3d 1107, 1111 (9th Cir. 2003) ("Jurisdiction over cases 'arising under' Medicare exists only under 42 U.S.C. § 405(g), which requires an agency decision in advance of judicial review."). Furthermore, in *Illinois Council*, this Court subsequently explained that Section 405(h) "demands the 'channeling' of virtually all legal attacks through the agency." 529 U.S. at 13. It is thus unclear whether the Ninth Circuit would extend *Town & Country* from the setoff/stay context to the termination context, notwithstanding the differences between those types of claims, the unanimous view of the circuits—including the Third and the Ninth—that Section 405(h)'s third sentence extends beyond the two provisions it currently cross-references, the background of the recodification of the third sentence that *Town &*

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[4] *Do Sung Uhm* thus did not (Pet. 15) "re-affirm[]" *Town & Country*; it interpreted *Town & Country* narrowly to avoid an inter- and intra-circuit conflict. And while *Do Sung Uhm* interpreted *Town & Country* as being confined to bankruptcy, see *Do Sung Uhm*, 620 F.3d at 1141 n.11, that does not imply that *Town & Country* would necessarily reach any and all bankruptcy cases. *Do Sung Uhm* was not a bankruptcy case, so the question of which bankruptcy cases might be covered was not presented.

Country did not address, and this Court's powerful reaffirmation of the channeling requirements of Section 405(h) in *Illinois Council*. And, as the court of appeals held, the second sentence of Section 405(h) independently barred judicial review of petitioner's unexhausted challenge to the Secretary's decision terminating its Medicare provider agreement.

3. This would also be a poor vehicle for deciding the questions presented, as petitioner is independently barred from participating in Medicare regardless of the outcome of this case. In a separate proceeding and after the court of appeals' decision in this case, respondent Florida AHCA revoked petitioner's operating license and refused to renew it because of repeated public health and safety violations. See *Bayou Shores SNF, LLC* v. *Florida Agency for Health Care Admin.*, No. 15-0619, 2016 WL 4974901, at *7 (Fla. Div. Admin. Hr'gs Aug. 29, 2016); see also Fla. Stat. Ann. § 400.121(3)(c) and (d) (West 2012) (mandating revocation for multiple class I deficiencies within a 30-month period).[5] Under state law, a nursing home cannot operate without a license. See Fla. Stat. Ann. §§ 400.062(1), 408.804(1) (West 2012). A skilled nursing facility also cannot participate in Medicare unless it is licensed under applicable state law. 42 C.F.R. 483.75(a).[6] Petitioner has appealed the revocation of its operating license, but the state court refused to stay the order pending appeal. See Order, *Bayou Shores SNF, LLC* v. *Florida Agency for Health Care Admin.*, No. 2D16-4261, Docket entry

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[5] The bankruptcy court here previously held that its injunction did not bar AHCA from revoking petitioner's operating license for public health and safety violations. See Pet. App. 117a-123a, 141a.

[6] This provision will be recodified to 42 C.F.R. 483.70(a). See 81 Fed. Reg. 68,861, 68,866 (Oct. 4, 2016).

(Fla. Dist. Ct. App. Dec. 8, 2016). Petitioner thus is currently barred from providing services to patients or participating in Medicare, regardless of the outcome of this case. Moreover, those independent barriers will remain unless and until petitioner succeeds in that state-court appeal, has its license reinstated, and resumes treating patients. Whether those things will ever occur is uncertain at best, making this a particularly poor vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2017

APPENDIX

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:14-bk-09521-MGW

IN RE: BAYOU SHORES SNF LLC, DEBTOR

Filed: Sept. 5, 2014

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

THIS CASE came on for a final evidentiary hearing on Tuesday, August 26, 2014 at 1:30 p.m. on the 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 (Doc. No. 25) ("Motion") filed by Bayou Shores SNF LLC ("Bayou Shores" or "Debtor") and the response in opposition filed by the United States of America (Doc. No. 42) ("Opposition"). After considering the Motion, the Opposition, witness testimony, the evidence and the law, for the reasons

stated in open Court at the conclusion of the hearing it is:

ORDERED:

1. The Motion (Doc. No. 25) is GRANTED.

DATED: Sept. 05, 2014

/s/ M. G. WILLIAMSON
HONORABLE MICHAEL WILLIAMSON
UNITED STATES BANKRUPTCY JUDGE

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