No. 98-1109

In the Supreme Court of the United States

OCTOBER TERM, 1998

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

ILLINOIS COUNCIL ON LONG TERM CARE, INC.

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

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent agrees that the Seventh Circuit's decision in this case creates a conflict in circuit authority that warrants this Court's review. See Br. in Opp. 5 ("This case * * * presents a clear circuit conflict on a significant jurisdictional issue."). As respondent explains, "the Seventh Circuit's decision" regarding the scope of the jurisdictional bar presented by 42 U.S.C. 405(h), as incorporated in 42 U.S.C. 1395ii, "squarely conflicts with [the Sixth Circuit's decision in] *Michigan Assn. of Homes & Services for the Aging, Inc. v. Shalala*, 127 F.3d 496 [(1997)]," and with the "other court of appeals decisions that have limited the holding in *Bowen v. Michigan Academy of [Family]*

Physicians, 476 U.S. 667 (1986) * * * in light of subsequent amendments to Part B of the Medicare program." Br. in Opp. 5; see Pet. 15-16 (citing, *inter alia*, *St. Francis Medical Center* v. *Shalala*, 32 F.3d 805 (3d Cir. 1994), cert. denied, 514 U.S. 1016 (1995); *Abbey* v. *Sullivan*, 978 F.2d 37 (2d Cir. 1992); *National Kidney Patients Ass'n* v. *Sullivan*, 958 F.2d 1127 (D.C. Cir. 1992), cert. denied, 506 U.S. 1049 (1993); and *American Academy of Dermatology* v. *Department of Health & Human Services*, 118 F.3d 1495 (11th Cir. 1997)).[1]

Respondent, moreover, agrees that the conflict over the scope of Section 405(h)'s jurisdictional bar on pre-enforcement challenges to Medicare regulations is "of widespread importance for both a federal agency and for providers nationwide that participate in Medicare." Br. in Opp. 6. The conflict, it notes, is likely to "spawn confusion in the lower courts," "consume an increasing amount of judicial resources," and "encourage forum shopping by plaintiffs seeking to challenge Medicare regulations." *Id.* at 6-7. Respondent therefore joins the

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[1] Although acknowledging a circuit conflict and agreeing that the Secretary's petition should be granted, respondent argues (Br. in Opp. 14-15) that the decision below is consistent with *United States qui tam Body* v. *Blue Cross & Blue Shield of Alabama, Inc.*, 156 F.3d 1098 (11th Cir. 1998). That case, however, involved a *qui tam* suit brought under the False Claims Act, 31 U.S.C. 3729, to recover allegedly wrongful payments made to a Medicare provider. The case did not involve claims against the government and, as the court of appeals held, the *qui tam* relator's cause of action and substantive rights arose under the False Claims Act, not the Medicare statute. 156 F.3d at 1105. As a result, that decision turns on claims and issues that differ substantially from those presented in this case.

Secretary in urging the Court to grant the petition, and urges that the case be set for plenary review.[2]

2. When we filed the petition for certiorari, we suggested (Pet. 8-9, 17) that it be held pending the Court's decision in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, No. 97-1489 (*Your Home*), and then disposed of as appropriate in light of that decision. The Secretary's petition suggested that the Court's decision in *Your Home* might implicate issues concerning the scope of Section 405(h)'s bar and the effect of the Court's prior decision in *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). Although respondent agrees that this case warrants review, respondent argues in its response to the petition that the case should not be held pending decision in *Your Home*, and that plenary review should be granted.

The Court rendered its decision in *Your Home* on February 23, 1999. We now agree with respondent that the appropriate disposition of the petition is to grant plenary review. The Court's decision in *Your Home* is consistent with the Secretary's position here: that Section 405(h), as made applicable to the Medicare Act by 42 U.S.C. 1395ii, channels all claims arising under

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[2] As explained in the petition, the Secretary challenges the judgment of the court of appeals only insofar as it reinstates respondent's claims with respect to, and on behalf of, its members that participate in the *Medicare* program. See Pet. 7 n.5; see also Pet. i (limiting question presented to whether facilities participating "in the *Medicare* program" may obtain judicial review under 28 U.S.C. 1331 and 1346 "to challenge the validity of *Medicare* regulations") (emphasis added). Medicaid (unlike Medicare) does not incorporate the jurisdictional limitation of Section 405(h); as a result, Section 405(h) does not apply to respondent's claims arising under, and on behalf of members participating in, the Medicaid program. Pet. 7 n.5.

the Medicare Program to the avenues of administrative and judicial review provided by the Medicare Act itself—here, as provided by Section 405(g), which is made applicable in this case by 42 U.S.C. 1395cc(h)(1). *Your Home*, however, does not discuss *Michigan Academy*. See Pet. 13-14. Nor does it address the relationship of *Michigan Academy* to *Heckler* v. *Ringer*, 466 U.S. 602 (1984), which rejected the contention that Section 405(h)'s jurisdictional bar does not extend to challenges that, like respondent's claim here, do not themselves involve a specific claim for benefits. See Pet. 12. Because the court of appeals expressed the view that this Court's decision in *Michigan Academy* compelled it to reject the Secretary's position in this case despite the Secretary's reliance on *Ringer*—and expressly stated that it was "obliged to follow the holding of *Michigan Academy*" unless "the Supreme Court tells [it] that * * * a change of direction" is required, Pet. App. 7a—we see no reason to remand this case for further consideration in light of *Your Home*, which does not discuss *Michigan Academy*. Accordingly, we agree with respondent (Br. in Opp. 16) that this case is ready and suitable for the Court's review, and that a remand in light of *Your Home* is neither necessary nor appropriate.

3. Respondent's defense of the ruling below is incorrect and at odds with this Court's precedents. See Pet. 13-16.

a. Respondent begins by attempting to reconcile the decision below with this Court's decision in *Heckler* v. *Ringer*, 466 U.S. at 614-617. See Br. in Opp. 9-10. In *Ringer*, this Court held that, under Section 405(h), as made applicable to Medicare by 42 U.S.C. 1395ii, federal courts can obtain jurisdiction over claims "arising under" the Medicare Act only if the claimant avails

himself of the administrative and judicial review mechanisms established by the Medicare statute itself, *i.e.*, by first presenting his claim to the Secretary and exhausting administrative remedies and then filing suit under Section 405(g), which is made applicable to the Medicare Program by 42 U.S.C. 1395cc(h)(1). According to respondent, the pre-enforcement action at issue in *Ringer*, which sought the invalidation of a Medicare rule, was not "collateral" to a claim for benefits, whereas the claims in this case are; Section 405(h), respondent appears to argue, bars pre-enforcement review only of payment-related claims. Br. in Opp. 9.

That contention is inconsistent with *Ringer* itself, which holds that the "third sentence of 42 U.S.C. § 405(h), made applicable to the Medicare Act by 42 U.S.C. § 1395ii, provides that § 405(g), to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review for *all* 'claim[s] arising under' the Medicare Act," 466 U.S. at 614-615 (emphasis added; footnote omitted). Besides, respondent's claim is inextricably entwined with payment under the Medicare Act: Compliance with the regulations it challenges is a condition of participation in Medicare, and thus controls its members' eligibility for payment under the program. See 42 U.S.C. 1395i-3(a) to (d); 42 C.F.R. 483.1-483.75; see also Pet. App. 17a (That respondent's claim is entwined with benefits eligibility is "evidenced by the relief sought," because respondent "seeks continuation of Medicare payments and reimbursement for past due payments incurred by the patients at the nursing homes."). Just as the plaintiff in *Ringer* sought to bring a pre-enforcement challenge to the Secretary's rule barring payment for the treatment he wanted, respondent here seeks to bring a pre-enforcement challenge to regulations that condition its members'

participation in Medicare (and thus payments under the program) on compliance with certain substantive and remedial requirements.[3]

Respondent's construction is also inconsistent with the structure of the statute and the channeling function that 42 U.S.C. 405(g) and (h) are designed to serve. Section 405(g), which provides for review only of the "final decision" of the Secretary, provides jurisdiction over claims like respondent's after those claims are presented to the Secretary and administrative remedies are exhausted. Section 405(h), made applicable by 42

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[3] Even if one were to assume *arguendo* that respondent's claims were in some sense "collateral," that would not be sufficient to permit a federal court to assume subject matter jurisdiction. First, any collaterality exception could excuse (at most) compliance with waivable requirements of the Medicare Act's judicial review scheme; it could not permit a litigant to circumvent the non-waivable requirement that a claim be presented to the Secretary before judicial review may be had. See *Ringer*, 466 U.S. at 617-618; *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). In this case, the district court held that respondent had failed to present its claims to the Secretary, Pet. App. 19a, and respondent does not contend otherwise. Second, even if the requirement of presentment could be waived, that waiver would not be available absent a showing that following the ordinary statutory review scheme (*i.e.*, presenting claims to the Secretary and exhausting administrative remedies) would prevent the complainant from obtaining effective relief. See *Ringer*, 466 U.S. at 618 (requiring a "colorable showing that [the plaintiff's] injury could not be remedied * * * after exhaustion of his administrative remedies"); *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986) (permitting waiver of exhaustion where plaintiff would be "irreparably injured"). Because respondent's members in fact can obtain review after presenting their claims to the Secretary, see note 4, *infra*, respondent cannot make that showing here. See also Cross-Resp. Br. in Opp. at 11-13, 17-18 & n.10, *Illinois Council on Long Term Care, Inc.* v. *Shalala*, No. 98-1307.

U.S.C. 1395ii, precludes claimants from evading those presentment and exhaustion requirements by seeking review under 28 U.S.C. 1331. See *Ringer*, 466 U.S. at 614-615 ("42 U.S.C. § 405(h) * * * provides that § 405(g), to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review") (footnote omitted). Given the proximity of those provisions and their obviously related purposes, Section 405(h) should be read (at a minimum) as barring courts from reviewing under 28 U.S.C. 1331 and 1346 all claims that—like respondent's—can be reviewed through the mechanism established by Section 405(g); any other construction would permit providers to evade the presentment and exhaustion requirements for certain claims by seeking immediate review under 28 U.S.C. 1331 and 1346, rather than using the specific review mechanism that Congress prescribed.

Section 10(b) of the Administrative Procedure Act (APA), 5 U.S.C. 703, has a channeling function that reinforces this interpretation of Section 405(g) and (h). It expressly provides that, where Congress has provided a "special statutory review proceeding relevant to the subject matter," complainants must use that "form of proceeding for judicial review," unless it is "inadequa[te]." 5 U.S.C. 703. And the APA specifically bars resort to its general provisions for judicial review of agency action unless "there is no other adequate remedy in a court." 5 U.S.C. 704. Because respondent's members can avail themselves of the fully adequate mechanism for judicial review under 42 U.S.C. 405(g), the APA both remits them to that mechanism, and bars them from evading its prerequisites by seeking immediate review under 28 U.S.C. 1331 and 1346 and the cause of action codified in the APA.

b. Nor is respondent correct to assert (Br. in Opp. 10-12) that this Court should follow *Michigan Academy* rather than *Ringer* because it is "more recent," and because portions of it have been followed in other decisions of this Court. In this Court's most recent decision in the area, *Your Home*, the provider made a similar argument, seeking to avoid the jurisdictional limitations of Section 405(h) and invoking *Michigan Academy* on the ground that, absent review through 28 U.S.C. 1331, no judicial review could be had at all. See Pet. Br. at 19-20, 23, *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, No. 97-1489. Citing *Ringer*, this Court rejected that argument, holding the provider's claim to be barred by Section 405(h) because the provider's standing and the substantive basis of its claim were based on the Medicare Act. *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, No. 97-1489 (Feb. 23, 1999), slip op. 7. The same argument applies here with greater force, since respondent's members do have an alternative mechanism for obtaining judicial review of the agency action they seek to challenge.[4]

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[4] Respondent attempts to distinguish *Your Home* by noting that the provider's claim in that case did not involve a facial challenge to the validity of a regulation, and by asserting that the *Your Home* provider could avail itself of administrative remedies. Br. in Opp. 7-8. Both of those contentions are without merit. First, *Your Home* turned on whether standing and the substantive basis of the claim were founded on the Medicare Act; nothing in the decision suggests that a different result would obtain where the provider is challenging the facial validity of a Medicare regulation.

Second, this case cannot be distinguished from *Your Home* based on supposed differences in the availability of administrative remedies. Contrary to respondent's contentions, and as we have shown in the petition (at 3-4), respondent's nursing home members have substantial rights to administrative and judicial review of

c. Finally, respondent errs in asserting that the decision below correctly applies this Court's decisions in *Michigan Academy* and *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). As explained in our petition (at 13-14), both *Michigan Academy* and *McNary* underscore the point that federal courts may assert jurisdiction over claims arising under the Medicare Act under 28 U.S.C. 1331 and 1346 only where (if at all) the statute otherwise would afford no meaningful avenue of judicial review, as only in that situation does the presumption against unreviewability come into play. See *Michigan Academy*, 476 U.S. at 678-681; *McNary*, 498 U.S. at 498. Indeed, the Court reiterated that distinction in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), upon which respondent relies (Br. in Opp. 12-13, 14). Notwithstanding *Michigan Academy*, the Court in *Thunder Basin* held that the pre-enforcement challenge there was not subject to judicial review under 28 U.S.C. 1331 because the statutory scheme provided for meaningful judicial review after a final agency decision and evidenced an intent to allocate initial review to an administrative tribunal.

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administrative actions taken to enforce federal standards of care. It is true that the administrative process will not generally address challenges to the validity of a federal regulation, but judicial review of such claims *is* fully available after exhaustion of administrative remedies, compilation of an administrative record detailing the factual context of the claim, and issuance of a final agency decision. The Court made that very point in *Weinberger* v. *Salfi*, 422 U.S. 749, 760-762 (1975), where it held that a challenge to the constitutionality of a provision of the Act—which likewise could not be resolved in the administrative process—had to be brought under Section 405(g), rather than through an independent action invoking district court jurisdiction under 28 U.S.C. 1331. See also *Michigan Ass'n of Homes & Servs. for Aging, Inc.* v. *Shalala*, 127 F.3d 496, 500 (6th Cir. 1997).

See 510 U.S. at 207 & n.8, 213-214. The same is true here.

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For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 1999