SUPREME COURT OF THE UNITED STATES

No. 98–1109

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS *v.* ILLINOIS COUNCIL ON LONG TERM CARE, INC.

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

[February 29, 2000]

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, and with whom JUSTICE SCALIA joins except as to Part III, dissenting.

Unlike the majority, I take no position on how 42 U. S. C. §405(h) applies to respondent's suit. That section is beside the point in this case because it does not apply of its own force to the Medicare Act, but only by virtue of 42 U. S. C. §1395ii, the Medicare Act's incorporating reference to §405(h).[1] I read *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667 (1986), to hold that this incorporating reference is triggered when a particular fact-bound determination is in dispute, but not in the case, as here, of a "challeng[e] to the validity of the Secretary's instructions and regulations." *Id.*, at 680. Though this (or any) interpretation of §1395ii is not entirely free from doubt in light of the arguable tension between *Michigan Academy* and our earlier decision in *Heckler* v. *Ringer,* 466 U. S. 602 (1984), I would resolve such doubt by following our longstanding presumption in favor of preenforcement judicial review. Accordingly, I would hold that §405(h)

[1] Section 1395ii provides in relevant part that the provisions of §405(h) "shall also apply with respect to [the Medicare Act] to the same extent as they are applicable with respect to [the Social Security Act]."

does not apply to respondent's challenge, and therefore does not preclude respondent from bringing suit under general federal-question jurisdiction, 28 U. S. C. §1331.

I

A

Michigan Academy was the first time we discussed the meaning of §1395ii. In earlier Medicare Act cases where the plaintiffs had sought to proceed under general federal-question jurisdiction, we either had no need to address §1395ii, or assumed in passing (and without discussion) that §1395ii *always* incorporates §405(h).

Our decision in *United States* v. *Erika, Inc.,* 456 U. S. 201 (1982), involved the former situation. We dealt there with a Part B dispute over the appropriate amount of reimbursement for certain medical supplies.[2] The statute provided for the determination of benefit amounts to be made by a private insurance carrier designated by the Secretary, and authorized *de novo* review of the initial determination by another officer designated by the carrier. *Id.,* at 203 (citing 42 U. S. C. §1395u (1982 ed.)). But the statutory scheme did not mention the possibility of judicial review of Part B benefit amount determinations, much less review by the Secretary. By contrast, the statute did expressly provide for administrative review by the Secretary and judicial review in two instances: disputes concerning the claimant's eligibility for benefits under Part A or Part B, and disputes over benefit amount determinations *under Part A.* 456 U. S., at 207 (citing 42 U. S. C.

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[2] Part B of the Medicare Act provides voluntary supplemental insurance coverage to eligible individuals for certain physician charges and medical services that are not covered by Part A. Individuals' Part B benefits claims are routinely assigned to providers of services, who then seek reimbursement.

§1395ff (1982 ed.)). We found this contrast illuminating: "In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of [Part B benefit amount determinations]." 456 U. S., at 208.[3] The inference was strong enough that we had no need to discuss the Government's alternative contention that §405(h) expressly precluded a claim under general jurisdictional provisions. See *id.*, at 206, n. 6. We therefore had no occasion to decide whether §1395ii even incorporates §405(h) into the Medicare Act. (So too in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), we did not need to interpret §1395ii, but for a different and more obvious reason: *Salfi* was a Social Security case, not a Medicare case, so §405(h) was directly applicable.)

Our opinion in *Ringer* was equally silent on the meaning of §1395ii, this time assuming in passing that it operates as a garden variety incorporating reference of §405(h),[4] an assumption shared by the parties to the case, see Brief for Petitioner 18, 22, and Brief for Respondents 26–29, in *Heckler* v. *Ringer*, O. T. 1983, No. 82–1772. *Ringer* involved a dispute over reimbursement for a surgical procedure under Part A of the Act, see 466 U. S., at 608–609, n. 4, so, unlike in *Erika* (which involved Part B), it was clear that the individual plaintiffs could seek judicial

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[3] Our decision in *Erika* illustrates the longstanding principle that a statute whose provisions are finely wrought may support the preclusion of judicial review, even though that preclusion is only by negative implication. See, *e.g.*, *United States* v. *Fausto*, 484 U. S. 439, 452 (1988); *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 351 (1984); *Switchmen* v. *National Mediation Bd.*, 320 U. S. 297, 305–306 (1943).

[4] See *Heckler* v. *Ringer*, 466 U. S. 602, 614–615 (1984) ("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" (alteration in original)).

review under §1395ff (via §405(g)) after they had presented a claim for benefits to the Secretary and suffered an unfavorable final decision. But the plaintiffs chose not to follow this route to review. Instead, they attempted to challenge the Secretary's policy prohibiting reimbursement for the surgery as violating constitutional due process and several statutory provisions, invoking general federal-question jurisdiction.[5] As noted, we assumed that §1395ii incorporates §405(h) in the situation of a preenforcement challenge to the Secretary's Medicare Act regulations and policies, and held that §405(h)'s third sentence— "No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter"— expressly precluded Ringer's suit. *Ringer, supra,* at 615–616.

B

We squarely addressed §1395ii for the first time in our 1986 decision in *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667 (1986). The Secretary had adopted a regulation that authorized the payment of Part B benefits in different amounts for similar physicians' services. An association of family physicians and several individual doctors filed suit to challenge this regulation. *Id.,* at 668. These plaintiffs asserted no concrete claim to Part B benefits, for judicial review of such a claim was clearly foreclosed by the statute as interpreted in *Erika;* they instead invoked federal-question jurisdiction. Our

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[5]The plaintiffs also asserted, to no avail, that the District Court had jurisdiction under 28 U. S. C. §1361 (mandamus) and 42 U. S. C. §1395ff (1982 ed., and Supp. II) (judicial review of Part A benefit amount determinations). See *Ringer, supra,* at 617–618.

unanimous opinion[6] in their favor began by rejecting the Secretary's contention that the provisions construed in *Erika* impliedly precluded review not only of benefit amount determinations under Part B, but also of challenges against the Secretary's methodologies for determining such amounts. 476 U. S., at 673. The "precisely drawn" provisions on which we had focused in *Erika* did not support the Secretary's proposed inference, as they "simply d[id] not speak to challenges mounted against the *method* by which such amounts are to be determined." 476 U. S., at 675.

We then turned to the Secretary's argument that §405(h), incorporated by §1395ii into the Medicare Act, *expressly* precludes a claimant from resorting to general federal-question jurisdiction under 28 U. S. C. §1331. The Secretary contended that under *Salfi, supra,* at 756–762, and *Ringer, supra,* at 614–616, "the third sentence of §405(h) by its terms prevents any resort to the grant of general federal-question jurisdiction contained in 28 U. S. C. §1331." 476 U. S., at 679. The plaintiffs responded that §405(h)'s third sentence precludes use of §1331 only when Congress has provided specific procedures for judicial review of final agency action. *Ibid.* We declined, however, to enter that debate:

> "Whichever may be the better reading of *Salfi* and *Ringer*, we need not pass on the meaning of §405(h) in the abstract to resolve this case. Section 405(h) does not apply on its own terms to Part B of the Medicare program, but is instead incorporated *mutatis mutandis* by §1395ii. The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of 'amount

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[6] Then-JUSTICE REHNQUIST did not participate.

> determinations'— *i. e.*, those 'quite minor matters,' 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett), remitted finally and exclusively to adjudication by private insurance carriers in a 'fair hearing.' By the same token, matters which Congress did *not* delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law. In the face of this persuasive evidence of legislative intent, we will not indulge the Government's assumption that Congress contemplated review by carriers of 'trivial' monetary claims, *ibid.*, but intended no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program." *Id.*, at 680 (footnotes omitted).

We accordingly held that the physicians' challenge to the Secretary's regulation could proceed under general federal-question jurisdiction.

C

In light of the quoted passage, it is beyond dispute that our holding in *Michigan Academy* rested squarely on the meaning of §1395ii. Accord, *ante*, at 13. Under *Michigan Academy*, a case involving an "amount determinatio[n]" would trigger §1395ii's incorporation of §405(h), and thus bar federal-question jurisdiction; a "challeng[e] to the validity of the Secretary's instructions and regulations" would not. 476 U. S., at 680.

This dichotomy does not translate exactly to the instant case, the majority tells us, because the Secretary's determination to terminate a nursing home's provider agreement, see 42 U. S. C. §1395cc(b) (1994 ed., and Supp. III), in no sense resembles the determination of an "amount" of an individual's benefits under Part A or B, see §1395ff. Therefore, the majority concludes, *Michigan Academy*'s

interpretation of §1395ii simply does not bear on respondent's challenge to the Secretary's regulations here. See *ante*, at 15.

But §1395ii applies to more than just §1395ff, the provision concerning benefit amounts; it applies, rather, to the entire Medicare Act, including §1395cc, the provision concerning provider agreements that *is* directly at issue here. And we have "stron[g] cause to construe a *single* formulation . . . the same way each time it is called into play." *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994). Accordingly, the interpretation of §1395ii that we announced in *Michigan Academy* must have a more general import than a distinction between Part B benefits determinations, on the one hand, and Part B methods guiding such determinations, on the other. *Michigan Academy* must have established a distinction between, on the one hand, a dispute over *any* particularized determination and, on the other hand, a "challeng[e] to the validity of the Secretary's instructions and regulations," 476 U. S., at 680.[7] The former triggers §1395ii's incorporation of §405(h); the latter does not.

This case obviously falls into the latter category. Respondent in no way disputes any particularized determinations, but instead mounts a general challenge to the Secretary's regulations (and manual) prescribing inspection and enforcement procedures for the teams that survey participating nursing homes, 59 Fed. Reg. 56116 (1994), claiming that these were promulgated without notice and

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[7] For this reason, it is beside the point that Congress amended §1395ff after *Michigan Academy* to make express provision for administrative and judicial review of Part B benefits claims. See Pub. L. 99–509, §9341(a)(1)(B), 100 Stat. 2037. Congress has *not* substantively amended §1395ii since *Michigan Academy*, and so *Michigan Academy*'s gloss on §1395ii deserves as much *stare decisis* respect today as it ever has.

comment, are unconstitutionally vague, contravene the Medicare Act's requirement of enforcement consistency, and violate due process by affording insufficient administrative review. Like the *Michigan Academy* plaintiffs, who challenged the Secretary's regulation concerning the payment of benefits for physicians' services, 476 U. S., at 668, respondent may proceed in district court under general federal-question jurisdiction.

Perhaps recognizing that this result follows straightforwardly from what our *Michigan Academy* opinion actually says, the majority creatively recasts that decision as having established an exception to §1395ii's incorporation of §405(h): Section 1395ii will not apply "where its application to a particular category of cases, such as Medicare Part B 'methodology' challenges, would not lead to a channeling of review through the agency, but would mean no review at all." *Ante*, at 14. In doing so, the Court confuses the reasoning (more precisely, *one half* of the reasoning) of *Michigan Academy* with the holding in that case. In *Michigan Academy*, we undoubtedly relied on the reality that, if the challenge to the Secretary's regulations were not allowed to proceed under general federal-question jurisdiction, the Secretary's administration of Part B benefit amount determinations would be entirely insulated from judicial review, a result in tension with the "'strong presumption that Congress did not mean to prohibit all judicial review' of executive action."[8] 476 U. S., at

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[8] The majority opinion may enjoy the "virtu[e] of consistency with *Michigan Academy*'s actual language," *ante*, at 16— but only *some* of the language, and not the most important part. As I explain in the text, the language that the majority opinion purports to track merely sets forth one of the two rationales for the holding in *Michigan Academy*. My reading of *Michigan Academy*, not the majority's, is consistent with the language in *Michigan Academy* setting forth that case's *holding*: §1395ii "foreclose[s] review only of 'amount determinations,' . . . [not] challenges to the validity of the Secretary's instructions and regula-

681 (quoting *Dunlop* v. *Bachowski,* 421 U. S. 560, 567 (1975)). But we placed at least equal reliance on the legislative history of the 1972 amendments to the Medicare Act, see 476 U. S., at 680, and our *holding* was that challenges to particular determinations would trigger §1395ii, whereas challenges to the Secretary's instructions and regulations governing particular determinations would not, *ibid.;* see *supra*, at 7. Indeed, in setting aside the physicians' argument that §405(h) bars general federal-question jurisdiction only when Congress has provided "specific procedures . . . for judicial review of final action by the Secretary," *Michigan Academy, supra,* at 679–680, we expressly *declined* to decide the case by announcing the "exception" suggested by the majority. While we might have done so, cf. *Mathews* v. *Eldridge,* 424 U. S. 319, 328–330 (1976) (describing limited exception to 42 U. S. C. §405(g)'s requirement that Secretary's decision be "final" before judicial review may be sought), we simply did not phrase our holding in those terms.

II

To be sure, the reading of *Michigan Academy* that I would adopt (and that the Court of Appeals adopted below, 143 F. 3d 1072, 1075–1076 (CA7 1998)), dictates a different result in the earlier *Ringer* case. In *Ringer*, recall, the respondents were individual Medicare claimants who brought a challenge to the Secretary's policy regarding payment of Medicare benefits for a specific surgical procedure. As noted, we (and the parties) simply assumed that §1395ii's incorporating reference to §405(h) was triggered by such a challenge, and proceeded directly to decide the case based on §405(h). And yet, under *Michigan Academy*'s gloss on §1395ii, we would never have reached

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tions." 476 U. S., at 680.

§405(h) because §1395ii would not have been activated by such a "challeng[e] to the validity of the Secretary's . . . regulatio[n]." 476 U. S., at 680.[9]

But it is one thing to conclude that the result in *Ringer* would have been different had we applied *Michigan Academy*'s §1395ii analysis to that case; it is quite another to declare that *Michigan Academy* effected a *sub silentio* overruling of *Ringer*. Contrary to the majority's representation, *ante,* at 14, my approach entails only the former, and therefore does not offend *stare decisis* principles as a *sub silentio* overruling would. As noted, *supra,* at 3–4, our opinion in *Ringer* did not expressly decide the meaning of §1395ii, assuming instead (as the parties had done) that §1395ii functions as a garden variety incorporating reference, *i.e.*, that §1395ii incorporates §405(h) in every case involving the Medicare Act. Accordingly, "[t]he most that can be said is that the point was in the cas[e] if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall,* 266 U. S. 507, 511 (1925). See also, *e.g.*, *Lopez* v. *Monterey County,* 525 U. S. 266, 281 (1999) ("[T]his Court is not bound by its prior assumptions"); *United States* v. *L. A.*

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[9]While I readily agree with the majority's observation that my reading of *Michigan Academy* implies a different result in *Ringer*, I fail to comprehend the majority's assertion that my view of *Michigan Academy* also implies a different result in *Weinberger* v. *Salfi,* 422 U. S. 749 (1975). See *ante,* at 14. As noted, *supra,* at 3, *Salfi* was a Social Security case, and so §405(h) applied of its own force.

Our post-*Michigan Academy* cases are entirely consistent with my reading of *Michigan Academy*. For example, in *Your Home Visiting Nurse Services, Inc.* v. *Shalala,* 525 U. S. 449 (1999), the challenge was directed to a particular determination of reimbursement benefits, and we held that §405(h), as incorporated into the Medicare Act by §1395ii, precluded resort to general federal-question jurisdiction.

Tucker Truck Lines, Inc., 344 U. S. 33, 38 (1952). In other words, *Michigan Academy* could not have overruled *Ringer* (*sub silentio* or otherwise) on a point that *Ringer* did not decide. The majority opinion can therefore claim no support from its asserted "consistency with the holdings of earlier cases such as *Ringer*." *Ante*, at 16. *Ringer* simply does not constitute a holding on the meaning of §1395ii; or if it does, the majority has engaged in the very practice it condemns— a *sub silentio* overruling (of *Webster* v. *Fall*, *supra*).

Moreover, the majority's criticism of my approach as declaring a *sub silentio* overruling is just as well directed at itself, for *Ringer* is no less overruled by the majority's view of *Michigan Academy* than by my own. According to the majority, the *Michigan Academy* "exception" to §1395ii applies where the aggrieved party "can obtain no review at all unless it can obtain judicial review in a §1331 action." *Ante*, at 17. Consider how this test would apply to Freeman Ringer, one of the four plaintiffs in *Ringer*. Ringer sought to challenge the Secretary's policy proscribing reimbursement for a certain type of surgery (a Part A benefits issue), invoking general federal-question jurisdiction. He had no concrete reimbursement claim to present, for he did not possess the financial means to pay for the surgery up front and await reimbursement. Nor, apparently, could he obtain private financing for the surgery. See *Ringer*, 466 U. S., at 620; *id.*, at 637, n. 24 (STEVENS, J., concurring in judgment in part and dissenting in part) ("Ringer would like nothing more than to give the Secretary [the] opportunity [to rule on a concrete claim for reimbursement]"); Brief for Petitioners 42, n. 23. It seems to me that Ringer is the paradigmatic example of a party who "can obtain no review at all unless [he] can obtain judicial review in a §1331 action," *ante*, at 17, such that he plainly would qualify for the *Michigan Academy* exception to §1395ii as described by the majority.

The majority purports to reaffirm *Ringer in toto*, but it

does so only by revising that case to hold that Ringer, notwithstanding his own inability to obtain judicial review without an anticipatory challenge, did not qualify for the *Michigan Academy* exception to §1395ii because others in his class could afford to pursue review by undergoing the surgery and presenting a concrete claim for reimbursement. See *ante,* at 19. Setting aside the peculiarity of interpreting a statute to deny judicial review to the poor with the promise that the rich will obtain review in their stead,[10] the majority's gloss on *Ringer* ignores the *Ringer* Court's own description of its holding. In rejecting plaintiff Ringer's attempt to use §1331, the *Ringer* Court did not rely on some notion that Ringer or those similarly situated to him could as a practical matter seek judicial review through some means other than §1331; the Court instead reasoned that Ringer's claim was "essentially one requesting the payment of benefits for [a particular] surgery, a claim cognizable only under §405(g)." 466 U. S., at 620.

III

It would overstate matters to say that the foregoing analysis demonstrates beyond question that respondent may invoke general federal-question jurisdiction. Any remaining doubt is resolved, however, by the longstanding canon that "judicial review of executive action 'will not be

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[10] The majority attempts to soften the blow by explaining that "individual hardship may be mitigated in a different way, namely, through excusing a number of the steps in the agency process, *though not the step of presentment of the matter to the agency*." *Ante,* at 19 (emphasis added). But the italicized words show why the majority's concession provides cold comfort to a plaintiff like Ringer– or, arguably, the nursing homes represented by respondent here, see *infra,* at 18–19– who cannot afford to present a concrete claim to the agency, and thus can obtain neither administrative nor judicial review.

cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Gutierrez de Martinez* v. *Lamagno,* 515 U. S. 417, 424 (1995) (quoting *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967)). See also, *e.g., McNary* v. *Haitian Refugee Center, Inc.,* 498 U. S. 479, 496 (1991); *Traynor* v. *Turnage,* 485 U. S. 535, 542 (1988); *Michigan Academy,* 476 U. S., at 670; *Johnson* v. *Robison,* 415 U. S. 361, 373–374 (1974); *Stark* v. *Wickard,* 321 U. S. 288, 309–310 (1944).

The rationale for this "presumption," *Abbott Laboratories, supra,* at 140, is straightforward enough: Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights. As Chief Justice Marshall explained:

> "'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'" *United States* v. *Nourse,* 9 Pet. 8, 28–29 (1835) (as quoted in *Gutierrez de Martinez, supra,* at 424).

See also S. Breyer, R. Stewart, C. Sunstein, & M. Spitzer, Administrative Law and Regulatory Policy 832 (4th ed. 1999) (suggesting that "the presumption of review owes its source to considerations of accountability and legislative supremacy, ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause"); *Michigan Academy, supra,* at 681–682, n. 12 (noting that

interpreting statute to allow judicial review would avoid the serious constitutional issue that would arise if a judicial forum for constitutional claims were denied).[11]

Contrary to the Secretary's representation, Brief for Petitioners 31–32, the presumption favors not merely judicial review "at some point," but *preenforcement* judicial review. While it is true that the presumption may not be quite as strong when the question is now-or-later instead of now-or-never, see *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 207, n. 8, 215, n. 20 (1994), our cases clearly establish that the presumption applies in the former context. Indeed, *Abbott Laboratories*, the "important case . . . which marks the recent era of increased access to judicial review," Breyer, *supra*, at 831, itself involved a preenforcement challenge to a regulation. Although the Food, Drug, and Cosmetic Act (FDCA) did not authorize a preenforcement challenge to the type of regulation the Secretary had issued, and indeed expressly enumerated certain *other* kinds of regulations for which preenforcement review was available, we explained that these indicia of congressional intent must be viewed through the lens of the presumption:

> "The first question we consider is whether Congress by the [FDCA] intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a fi-

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[11] We have observed that Congress "reinforced" the presumption by enacting the Administrative Procedure Act (APA), which "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. §702 (1964 ed., Supp. III)).

> nal agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories,* 387 U. S., at 139–140.

We thus held that the suit could proceed. *Id.,* at 148.

More recently, in *Haitian Refugee Center,* we reaffirmed the applicability of the presumption in the context of a pre-enforcement challenge. At issue in that case was the constitutionality of the Immigration and Naturalization Service's (INS) procedures for administering an amnesty program for illegal aliens. Despite the availability of judicial review of these procedures in the context of statutorily authorized review of orders of exclusion or deportation, and notwithstanding the statute's express prohibition of judicial review of an INS "determination respecting an application for adjustment of status [under the amnesty program]," 8 U. S. C. §1160(e)(1), we held that these factors did not suffice to trump the "strong presumption in favor of judicial review of administrative action." *Haitian Refugee Center,* 498 U. S., at 498.

The majority declines to employ the presumption in favor of preenforcement review to resolve the ambiguity in §1395ii; instead, it concocts a presumption *against* preenforcement review, stating that its holding is "consisten[t] with the distinction that this Court has often drawn between a total preclusion of review and postponement of review." *Ante,* at 16 (citing *Salfi,* 422 U. S., at 762; *Thunder Basin Coal, supra,* at 207, n. 8; *Haitian Regugee Center, supra,* at 496–499). But *Thunder Basin Coal,* as noted, *supra,* at 14, teaches only that the presumption is not as strong when the problem is one of delayed judicial review rather than complete denial of judicial review— it does not establish that the presumption lacks *any* force in the former context. And *Haitian Refugee Center* directly *supports* the applicability of the presumption in favor of

preenforcement review; we there invoked the presumption even though the plaintiffs had a postenforcement review option— voluntarily surrendering themselves for deportation and availing themselves of the statutorily authorized judicial review of an order of exclusion or deportation. *Haitian Refugee Center, supra,* at 496. Only *Salfi* provides the majority with modest support insofar as it acknowledged (and distinguished) just the presumption against the *complete* denial of judicial review, 422 U. S., at 762, omitting mention of the presumption against delayed judicial review. But this omission is readily explained: Presentment of a Social Security benefits claim for purposes of 42 U. S. C. §405(g) is accomplished by the near-costless act of filing an application for benefits, to be contrasted with the extremely burdensome presentment requirement facing the aliens in *Haitian Refugee Center* or the named plaintiff in *Ringer*. The only significant hardship facing the claimants in *Salfi* arose from the possibility that a lengthy administrative review process would postpone a judicial decision ordering the Secretary to pay the disputed benefits; but the Court took care of that problem by leniently construing §405(g)'s requirement of a "final" agency decision and by allowing the Secretary to waive entirely §405(g)'s requirement that decision be made "after a hearing." At bottom, then, the majority cannot demonstrate why the presumption in favor of preenforcement review, which dates at least from *Abbott Laboratories,* should not be invoked to resolve the debate between our conflicting readings of §1395ii.

There is a practical reason why we employ the presumption not only to questions of whether judicial review is available, but also to questions of *when* judicial review is available. Delayed review— that is, a requirement that a regulated entity disobey the regulation, suffer an enforcement proceeding by the agency, and only then seek judicial review— may mean no review at all. For when the

costs of "presenting" a claim via the delayed review route exceed the costs of simply complying with the regulation, the regulated entity will buckle under and comply, even when the regulation is plainly invalid. See Seidenfeld, Playing Games with the Timing of Judicial Review, 58 Ohio St. L. J. 85, 104 (1997). And we can expect that this consequence will often flow from an interpretation of an ambiguous statute to bar preenforcement review. In *Haitian Refugee Center*, for example, the aliens' "postenforcement" review option for asserting their challenge to the agency's procedures required the aliens to voluntarily surrender themselves for deportation, suffer an order of deportation, and seek judicial review of that order in the court of appeals. These costs of presentment, we explained, were "[q]uite obviously . . . tantamount to a complete denial of judicial review for most undocumented aliens." 498 U. S., at 496–497.

A similar predicament faces the nursing homes represented by respondent in the instant case, who contend that the Secretary's regulations (and manual) governing enforcement of substantive standards are unlawful in various respects. The nursing homes' "postenforcement" review route is delineated by 42 U. S. C. §1395cc(h)(1), which provides that "an institution or agency dissatisfied . . . with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title." While the meaning of "determination" in the referenced 42 U. S. C. §1395cc(b)(2) (1994 ed., Supp. III) is not entirely free from doubt, the Secretary has interpreted these provisions to mean that administrative and judicial review is afforded for "any determination that a provider has failed to comply substantially with the statute, agreements, or regulations

whether termination or 'some *other remedy* is imposed.'" *Ante,* at 17 (quoting Reply Brief for Petitioners 14 (emphasis in original)). Still, even under the Secretary's reading, an inspection team's assessment of a deficiency (for noncompliance) against the nursing home does not suffice to trigger administrative and judicial review under §1395cc(h). Presentment of a claim via §1395cc(h) requires the nursing home not merely to expose itself to an assessment of a deficiency by an inspection team, but also to forbear correction of the deficiency until the Secretary (or her state designees) impose a remedy.

Respondent and its *amici* advance several plausible reasons why such forbearance will prove costly– indeed, costly enough that compliance with the challenged regulations and manual is the more rational option. For one, nursing homes face the prospect of termination– the most severe of remedies– simply by virtue of failing to submit a voluntary plan of correction and correct the deficiencies. See 42 CFR §488.456(b)(1) (1998). The Secretary's only response is that terminations are rarely imposed in fact, and certainly are not imposed where the provider has postponed correction of its deficiencies in order to preserve its appeal rights. But any such leniency is solely a matter of grace by the Secretary, see Tr. of Oral Arg. 31, and provides little comfort to a nursing facility pondering the §1395cc(h) route to judicial review. And exposure to the termination remedy is not the only consequence faced by a nursing home that forestalls correction of its deficiencies. The Secretary also may impose civil monetary penalties, which accrue for each day of noncompliance, 42 CFR §§488.430, 488.440(b) (1998), and thus quite plainly stand as a calibrated deterrent to the forbearance strategy. Cf. *Ex parte Young*, 209 U. S. 123, 148 (1908) ("[T]o impose upon a party interested the burden of obtaining a judicial decision . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines . . . is, in effect, to

close up all approaches to the courts").[12] Other costs of the forbearance strategy are less tangible, but potentially as significant. For example, a finding of a deficiency at a nursing facility– which may well rest on unbalanced or inaccurate data– is posted in a place easily accessible to residents, 42 CFR §483.10(g)(1) (1998), disclosed to the public, 42 U. S. C. §1395i–3(g)(5)(A), and posted on the Health Care Finance Authority's Internet website, Reply Brief for Petitioners 20, n. 20.[13] Such negative publicity, which occurs before the nursing home may avail itself of administrative or judicial review via §1395cc(h), is likely to result in substantial reputational harm. See *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 172 (1967) ("Respondents note the importance of public good will in their industry, and not without reason fear the disastrous impact of an announcement that their cosmetics have been seized as 'adulterated'").

I recount these allegations of hardship to respondent's members not because they inform any case-by-case application of the presumption in favor of preenforcement review, but rather because such concerns motivate the presumption in a general sense. A case-by-case inquiry

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[12] In *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200 (1994), the aggrieved mine operator was similarly subject to civil penalties ($5,000) for each day of noncompliance with statutory provisions, which would become final and payable after review by the agency and the appropriate court of appeals. *Id.*, at 204, n. 4, 218. But, unlike the nursing homes at issue here, the aggrieved mine operator apparently had the option of complying and then bringing a judicial challenge. See *id.*, at 221 (SCALIA, J., concurring in part and concurring in judgment).

[13] While the Secretary represents, Reply Brief for Petitioners 20, n. 20, and the Court accepts, *ante*, at 19, that a deficient nursing home may post a response on the website, respondent's *amici* American Health Care Association et al. assert that the website does not accommodate provider comments, but only lists the date a facility has corrected a deficiency, Brief for American Health Care Association et al. as *Amici Curiae* 18.

into hardship is accommodated instead by ripeness doctrine, which "evaluate[s] both the fitness of the issues for judicial decision and the *hardship to the parties of withholding court consideration*." *Abbott Laboratories*, 387 U. S., at 149 (emphasis added). I read our cases to establish just this sort of analysis: (1) in light of the presumption, construe an ambiguous statute in favor of preenforcement review; (2) apply ripeness doctrine to determine whether the suit should be entertained. Thus, in *Abbott Laboratories* and its two companion cases, we construed an ambiguous statute to permit preenforcement review, see *id.*, at 148; *Gardner* v. *Toilet Goods Assn. supra,* at 168; *Toilet Goods Assn., Inc.* v. *Gardner,* 387 U. S. 158, 160 (1967), but we then proceeded to hold that only the suits in the first two of these cases were ripe, *Abbott Laboratories, supra,* at 156; *Gardner* v. *Toilet Goods Assn., supra,* at 170; *Toilet Goods Assn.* v. *Gardner, supra,* at 160–161. See also *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 56–66 (1993) (similar). In line with this mode of analysis, the court below, after concluding that the Medicare Act does not preclude general federal-question jurisdiction over a preenforcement challenge to the Secretary's regulations, held that respondent's APA notice-and-comment challenge was ripe but that its constitutional vagueness claim was not. 143 F. 3d, at 1076–1077.

While I express no view on the proper application of ripeness doctrine to respondent's claims,[14] I am confident that this method of analysis enjoys substantially more support in our cases than does the majority's approach,

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[14]The Secretary did not seek review of the Court of Appeals' holding that respondent's APA notice-and-comment challenge is ripe, Pet. for Cert. i, and this Court denied respondent's cross-petition for certiorari seeking review of the Court of Appeals' holding that respondent's vagueness challenge is not ripe, 526 U. S. 1067 (1999).

which prescribes a case-by-case hardship inquiry at the threshold stage of determining whether preenforcement review has been precluded by statute. See *ante*, at 17 (holding that §1395ii does not incorporate §405(h) where the aggrieved party "can obtain no review at all unless it can obtain judicial review in a §1331 action"). While the majority's variation would be harmless if its hardship test were no more stringent than the hardship prong of ordinary ripeness doctrine, I presume its test is more exacting– otherwise the majority opinion is no more than a well-disguised application of ripeness doctrine to the facts of this case.[15] At bottom, then, the majority superimposes a more burdensome hardship test on ordinary ripeness doctrine for aggrieved persons who seek to bring a preenforcement challenge to the Secretary's regulations under the Medicare Act.[16]

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[15] The majority acknowledges that its hardship test is more burdensome than the hardship prong of ripeness doctrine in at least one respect. We are told that the relevant hardship is not that endured by the "individual plaintiff," but rather that confronted by the "class" of persons similarly situated to the individual plaintiff. *Ante*, at 18; see *infra*, at 12.

[16] The majority betrays its misunderstanding of the relationship between the presumption in favor of preenforcement review and ripeness doctrine when it says that "any . . . presumption [in favor of preenforcement review] must be far weaker than a presumption against preclusion of all review in light of the traditional ripeness doctrine, which often requires initial presentation of a claim to an agency." *Ante*, at 16. I do not dispute that respondent must demonstrate that its claims are ripe before the District Court may entertain respondent's preenforcement challenge. My point is only that respondent should be *permitted* to make its ripeness argument and to have that argument assessed according to traditional ripeness doctrine, rather than facing statutory preclusion of review by (inevitably) failing the majority's "super-hardship" test. As I explained, *supra*, at 20, our cases establish a two-step analysis: (1) in light of the presumption in favor of preenforcement review, construe an ambiguous statute to allow preenforcement review; (2) apply ripeness doctrine to determine whether the suit

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Instead, I would hold that §1395ii, as interpreted by *Michigan Academy*, does not in this case incorporate §405(h)'s preclusion of federal-question jurisdiction, especially in light of the presumption in favor of preenforcement review. I respectfully dissent.

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should be entertained.