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Shalala v. Illinois Council on Long Term Care: The United States Supreme Court Confounds the Crisis in Nursing Home Care with an Unneeded Jurisdictional Channeling Requirement

Marko W. Kipa

Note

SHALALA v. ILLINOIS COUNCIL ON LONG TERM CARE: THE UNITED STATES SUPREME COURT CONFOUNDS THE CRISIS IN NURSING HOME CARE WITH AN UNNEEDED JURISDICTIONAL CHANNELING REQUIREMENT

MARKO W. KIPA*

In *Shalala v. Illinois Council on Long Term Care*,[1] the United States Supreme Court opined that an association of nursing homes (hereinafter "the Council") maintaining a constitutional challenge was required to present its claim to the Secretary of the Department of Health and Human Services before invoking federal question jurisdiction.[2] In reaching its holding, the Supreme Court overruled the Court of Appeals for the Seventh Circuit and admonished the appellate court's reliance on *Bowen v. Michigan Academy of Family Physicians*[3] and *McNary v. Haitian Refugee Center*.[4] The Supreme Court relied on its holdings in *Weinberger v. Salfi*[5] and *Heckler v. Ringer*,[6] finding those cases barred a section 1331 suit antecedent to agency review. However, both of these cases were motivated, in part, by underlying claims for benefits.[7] The Council's claim was a "pure" constitutional claim, an issue neither *Salfi* nor *Ringer* squarely addressed.[8] The Court also found that the Council's claim fell within the ambit of the special jurisdictional channeling provision because it sought "to recover on any

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* University of Maryland School of Law graduate 2002; Journal of Health Care Law & Policy's Executive Editor 2001-2002.

1. 529 U.S. 1 (2000).

2. *See id.* at 2.

3. 476 U.S. 667 (1986). The Court of Appeals for the Seventh Circuit had interpreted the Supreme Court's holding in *Michigan Academy* to stand for the proposition that the jurisdictional channeling requirement was limited to amount determinations. Illinois Council on Long Term Care v. Shalala, 143 F.3d 1072, 1075 (7th Cir. 1998). However, the Supreme Court sided with the Secretary's contention that *Michigan Academy* created an exception which permitted federal question jurisdiction before agency review only when judicial review would be completely foreclosed. *Illinois Council*, 529 U.S. at 19.

4. 498 U.S. 479 (1991). The Court of Appeals for the Seventh Circuit concluded that *Haitian Refugee Center* reaffirmed the reasoning behind *Michigan Academy*. *Illinois Council*, 143 F.3d at 1075 ("reiterat[ing] its conclusion that section 1395ii does not affect regulatory challenges that are detached from any request for reimbursement.").

5. 422 U.S. 749 (1975).

6. 466 U.S. 602 (1984).

7. *See infra* note 36, 42.

8. *See Illinois Council*, 529 U.S. at 34-36 (Thomas, J., dissenting).

claim arising under" the Medicare Act.[9] The Court's holding can be attributed to its interpretation of *Johnson v. Robinson*,[10] as well as its implementation of certain principles of statutory construction. Under *Johnson*, an analogy can be made that the Council's claim neither arose under the Medicare Act, for it arose under the Constitution,[11] nor did it seek "to recover on" as originally contemplated by section 405(h). Besides giving notice to the Secretary, there appears to be no practical consideration for the Court's decision because the Secretary will not rule on constitutional challenges.[12] By according greater weight to practical considerations, considering *Johnson*, adopting alternative interpretations of *Ringer*, *Salfi*, and *Michigan Academy*, and adhering to the monetary connotation of the phrase "to recover on," the Court could have reasonably allowed the Council's constitutional challenge to proceed without requiring it to present the claim to the Secretary.[13]

I. THE CASE

Under the Medicare Act Part A, nursing homes that provide care for Medicare patients after a period in the hospital receive reimbursements for their expenditures.[14] This was not a self-executing provision, and in order to receive payment, nursing homes were obliged to enter into an agreement with the Secretary of Health and Human Services and subject themselves to statutory and regulatory requirements.[15] These requirements were enforced by federal and state agencies that reported violations ("deficiencies") to the Secretary, who in turn, imposed sanctions or remedies.[16]

In 1987, Congress passed the Omnibus Budget Reconciliation Act[17] which imposed a stringent regulatory scheme and gave the Sec-

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9. *See id.* at 5.

10. 415 U.S. 361 (1974).

11. *But cf.* Your Home Visiting Nurses Servs. v. Shalala, 525 U.S. 449 (1999) (*relying on* Heckler v. Ringer, 466 U.S. 602, 615 (1984) ("Petitioners claim 'arises under' the Medicare Act within the meaning of this provision because 'both the standing and the substantive basis for the presentation' of the claim are the Medicare Act.")).

12. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-76 (1986).

13. *See Illinois Council*, 529 U.S. at 44 (Thomas, J., dissenting) (finding that the Council may invoke general federal question jurisdiction). It should also be noted that the author concurs with Justice Thomas' statement in his dissent and also "express[es] no view on the proper application of the ripeness doctrine to [the Council's] claim . . . " *Id.* at 51.

14. *See Illinois Council*, 529 U.S. at 6.

15. *See id.*

16. *See id.*

17. *See* Omnibus Budget Reconciliation Act of 1987, §§ 4201-4218, 101 Stat. 1330-160 to 1330-221 (codified as amended at 42 U.S.C. § 1395i-3 (1994 ed. and Supp. III)).

retary broad discretion in imposing remedies.[18] The remedies were broken down into three categories:

> [1] Where, for example, deficiencies "immediately jeopordize the health or safety of . . . residents" the Secretary must terminate the home's provider agreement or appoint new, temporary management. [2] Where deficiencies are less serious, the Secretary may impose lesser remedies, such as civil penalties, transfer of residents, denial of some or all payment, state monitoring and the like. [3] Where a nursing home, though deficient in some respects, is in "substantial compliance," i.e., where its deficiencies do no more than create "a potential for causing minimal harm," the Secretary will impose no sanction or remedy at all.[19]

The Illinois Council on Long Term Care was "an association of approximately 200 nursing homes [that] participat[ed] in the Medicare (or Medicaid) programs."[20] On behalf of the nursing homes, the Council brought suit in federal district court because of an increase in the number of nursing homes found to be in violation of the new regulations.[21] Before the Omnibus Budget Reconciliation Act was adopted, only six percent of all nursing homes were reprimanded for failing to meet the Secretary's standards.[22] After the Act's adoption, approximately seventy percent of nursing homes were found to be deficient.[23] The Council attributed this change to the vagueness and increased discretionary aspects of the new rules.[24] However, the Council did not present its claim to the Secretary for a "final decision"[25] before initiating the action in federal district court.[26] The United States Court of Appeals for the Seventh Circuit held that the district court did have jurisdiction over the claim.[27] The Supreme Court granted certiorari to resolve the issue of whether the Council

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18. *See Illinois Council*, 529 U.S. at 6.

19. *Id.* (explaining that the seriousness of a violation can vary depending on the deficiency's prevalence, relation to other deficiencies, and past instances of similar violations).

20. *Illinois Council*, 529 U.S. at 9.

21. *See id.* at 9; *see also* 28 U.S.C. § 1331 ("district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

22. *See* Illinois Council on Long Term Care v. Shalala, 143 F.3d 1072, 1074 (7th Cir. 2000).

23. *See id.*

24. *See id.*

25. 42 U.S.C. § 405(g) (2000) (explaining that judicial review in federal district court may only be obtained following a "final decision" of the Secretary).

26. *See Illinois Council*, 529 U.S. at 7-8.

27. *See Illinois Council*, 143 F.3d at 1077. The Court of Appeals nevertheless dismissed the action because it also held that the Council's claim that the regulations were void for vagueness was not ripe for review. *Id.*

needed to present its constitutional claim to the Secretary before bringing the action in federal district court.[28]

II. LEGAL BACKGROUND

The Court's interpretation regarding special jurisdictional channeling provisions took form in *Johnson v. Robinson.*[29] In *Johnson,* the Court narrowly construed the jurisdictional channeling provision of the Veterans' Administration Act[30] and concluded that it barred judicial review of "questions of law or fact" that the Administrator resolved "under" the statute.[31] The Court then distinguished between "questions of law" and "questions of fact" and recognized that a constitutional claim could not be brought under the statute, but only under the United States Constitution.[32] A constitutional claim challenged a decision of Congress, not a decision of the Administrator.[33] Thus, the Court permitted the constitutional claim to be brought in federal district court.[34]

The following year, in *Weinberger v. Salfi,*[35] the Court was confronted with similar, albeit distinguishable circumstances: a claim that arose under an Act as well as under the Constitution.[36] The Court held that because the claim also arose under the Act, it must be channeled through proper agency procedure.[37] Although the plaintiffs initiated their action in the agency, the Secretary never issued a "final

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28. *See Illinois Council,* 529 U.S. at 9-10.

29. 415 U.S. 361 (1974).

30. The Act provides, in pertinent part:

> [T]he decisions of the Administrator on *any question of law or fact under any law administered by the Veteran's Administration* providing benefits for the veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (2000) (emphasis added).

31. *See Johnson,* 415 U.S. at 367.

32. *See id. relying on* Robinson v. Johnson, 352 F. Supp. 848, 853 (D. Mass. 1973) ("The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.").

33. *See Johnson,* 415 U.S. at 367.

34. *See id.* at 373-74.

35. 422 U.S. 749 (1975).

36. *See id.* at 750. A widow was unable to recover benefits for herself and her daughter because they had failed to meet the duration-of-relationship requirement of nine months. *See id.* at 754. Any constitutional claim would therefore have an underlying goal of recovering benefits at some point in the future. *See id.* at 760 ("[I]t is fruitless to argue that this section does not also arise under the Social Security Act.").

37. *See id.* at 760.

decision."[38] The Court noted that a "final decision" was not necessary since the Secretary could waive the requirement when "[the Secretary was satisfied] that the only issue [was] the constitutionality of a statutory requirement, a matter which [was] beyond his jurisdiction to determine, and that the claim [was] neither otherwise invalid nor cognizable under a different section of the Act."[39] Therefore, because the action was initially presented to the agency and the Secretary waived the "final decision" requirement, the plaintiffs were permitted to pursue their action in federal district court.[40]

The Court was again confronted with a dual-purpose "benefits/constitutional" claim in *Heckler v. Ringer*.[41] Once again, the constitutional claim was maintained for the purpose of being able to receive benefits.[42] Respondents brought suit in federal district court without exhausting their administrative remedies.[43] The Court noted that unlike in *Salfi*, the Secretary did not waive the exhaustion requirement and respondents could not circumvent additional agency adjudication.[44] Accordingly, the district court did not have jurisdiction to hear the claim.[45]

In the landmark decision of *Matthews v. Eldridge*,[46] the Court focused on the agency, rather than the district court, and it articulated how due process should be analyzed in an administrative setting.[47] It noted that the fundamental requirement of due process is the "oppor-

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38. *Id.* at 759 n.5. A nursing home is subject to judicial review "after any final decision of the Secretary made after a hearing . . ." 42 U.S.C. § 405(g).

39. *Salfi*, 422 U.S. at 765; *see also* Matthew v. Eldridge, 424 U.S. 319, 330 (1976) (reaffirming the principle articulated in *Salfi* that the Secretary may waive the "final decision" requirement).

40. *See Salfi*, 422 U.S. at 767. It should be noted that although the Court sided with the plaintiffs on the jurisdictional issue, the result was not as favorable as to the merits because the Court found the Act to be constitutional. *Id.* at 785.

41. 466 U.S. 602 (1984). Respondents were individuals who were denied payment for a surgical procedure known as bilateral carotid body resection (BCBR). *See id.* at 604. Although for purposes of this paper the claim was characterized as dual-purpose, the Court found "that whatever constitutional claims Respondents assert are too insubstantial to support subject-matter jurisdiction." *Id.* n.4.

42. *See id.* at 619. The Court classified the plaintiffs into two sub-groups: 1) those who had already had the operation and were seeking retroactive benefits, and 2) those who had not yet had the operation but would receive payment for the operation if the action was successful. *See id.* at 613. Nevertheless, both groups were ultimately seeking some kind of benefit under the Medicare Act. *See id.* at 616, 621.

43. *See id.* at 609-10.

44. *See id.* at 617.

45. *See id.* at 626.

46. 424 U.S. 319 (1976).

47. *See id.* at 332-35. Respondent had properly followed agency procedure and first brought his claim before the Secretary. *See id.* at 328. However, following an unfavorable initial determination, Respondent brought suit in federal district court. *Id.*

tunity to be heard at a meaningful time and in a meaningful manner."[48] However, the Court emphasized that due process was a flexible standard which employed procedural safeguards as the situation dictated.[49] Financial cost alone would not constitute a due process violation, but it was a factor that should be weighed.[50] Hence, administrative agencies were required to afford certain minimal safeguards before due process could be deemed satisfied.[51]

In *Bowen v. Michigan Academy of Family Physicians*,[52] the Court distinguished between judicial review for amount determinations and judicial review for constitutional challenges.[53] It began with "the strong presumption that Congress intended judicial review of administrative action" unless there was clear and convincing intent to withhold review.[54] If there should be a substantial doubt as to Congressional intent, "the general presumption favoring judicial review of administrative action is controlling."[55] The Court adhered to the principles it had enunciated in *United States v. Erika*,[56] and analyzed the language of the statutory text as well as its legislative history.[57] The Court recognized that a claim for benefits would be reviewed by the Secretary and judicial review was regulated by statutory promulgations.[58] However, because a constitutional challenge was not considered by the Secretary in a fair hearing,[59] a denial of judicial review would completely foreclose any review of the Secretary's regulations.[60]

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48. *See id.* at 333 (*citing* Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

49. *See id.* at 334; *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

50. *See Matthews*, 424 U.S. at 348.

51. *See generally* Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

52. 476 U.S. 667 (1986).

53. *See id.*

54. *See id.* at 670-71; *see also* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 n.3 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review").

55. *Michigan Academy*, 476 U.S. at 672 (*quoting* Block v. Community Nutrition Institute, 467 U.S. 340, 350-51 (1984)).

56. 456 U.S. 201 (1982).

57. *See Michigan Academy*, 476 U.S. at 675 (*relying on Erika*, 456 U.S. at 210). However, the Court also had to distinguish its holding in *Erika* to reach its conclusion that constitutional claims were not barred. *See id.* In *Erika*, the Court relied on the Medicare statute's precisely drawn provisions to find that an omission to authorize review as to a section of amount determinations constituted deliberate intent to foreclose review of such claims. 456 U.S. at 208. In *Michigan Academy*, the Court stated that § 1395ff only dealt with amount determinations, and therefore, *Erika* did not control because it was expected that the provision's narrowly drawn scope did not include constitutional claims. 476 U.S. at 675.

58. *See Michigan Academy*, 476 U.S. at 678.

59. *See infra* note 154.

60. *See Michigan Academy*, 476 U.S. at 678.

Nevertheless, *Michigan Academy* explicitly addressed the "amount determinations/constitutional challenge" dichotomy. Based on this distinction, there was no question in the Court's mind that "challenges to the Secretary's instructions and regulations, [were] cognizable in courts of law."[61]

Although the Court was dealing with an Immigration and Naturalization Service (INS) statute[62] in *McNary v. Haitian Refugee Center*,[63] it nevertheless followed the precedent established in *Michigan Academy* and held that the district court had jurisdiction to hear a constitutional claim.[64] The Court distinguished between review of individual denials of applications and review of the constitutionality of the INS's review process.[65] The INS statute controlled the former, but not the latter.[66] The Court also analyzed the pertinent segment of the statute's language which referred only to review "of a determination respecting an application."[67] The *Haitian Refugee Center* Court reached the same conclusion as the *Michigan Academy* Court because the language only encompassed a single act and did not preclude claims based on the procedure of the INS.[68] However, the Court took great pains to dispel any contention that the constitutional claim was in any way a "collateral" attack on an individual determination.[69] Thus, the constitutional claim as to the INS's regulations was allowed to proceed because it did not fall within the ambit of the governing statute.[70]

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61. *Id.* at 680. Unlike in *Salfi* and *Ringer*, the fact that there was not a "final decision" of the Secretary was given little attention in *Michigan Academy* and the Court dismissed such a requirement to a constitutional claim in a footnote. *Id.* n.8 (noting that a constitutional attack on the regulation is not subject to a final decision requirement because the Secretary could not provide a hearing or an administrative remedy).

62. 8 U.S.C. § 1160(e) (2000).

63. 498 U.S. 479 (1991).

64. *See id.* 498 U.S. at 496 ("[the] decision in this case is therefore supported by our unanimous holding in [*Michigan Academy*]").

65. *See id.* at 488.

66. *See id.* at 492.

67. *Id.* 498 U.S. at 492; *see also* 8 U.S.C. § 1160(e).

68. *See Haitian Refugee Center*, 498 U.S. at 492. Congress could have expanded the reach of the statute to encompass constitutional claims through the use of broader language. *See id.* Other sections of the INS statute included language such as: 1) "all causes . . . arising under any of the provisions," or 2) "on all questions of law and fact." 8 U.S.C. § 1329 (2000); *see also* 38 U.S.C. § 211(a) (2000).

69. *See Haitian Refugee Center*, 498 U.S. at 494-96. The Court distinguished the present claim from the claim brought in *Ringer*. *See id.* at 495. In this case, respondents were not seeking any redress from an individual determination, whereas in *Ringer*, the desired ultimate outcome was reimbursement of benefits. *See id.* The outcome here would have no effect on respondents' individual determinations, but would only allow the files to be reconsidered under the new regulations. *See id.*

70. *See id.* at 498-99.

III. THE COURT'S REASONING

In *Shalala v. Illinois Council on Long Term Care*,[71] the United States Supreme Court held that a constitutional challenge to the Secretary's regulations could not be brought in district court under federal question jurisdiction, but rather must proceed through a special review channel.[72] In order to accord full deference to the Court's reasoning, a discernment of the relevant statutory provisions should occur. The Medicare Act provides that a nursing home "dissatisfied . . .with a determination described in subsection (b)(2) . . . shall be entitled to a hearing . . . to the same extent as provided in section 405(b) . . . and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) . . . ."[73] Judicial review may be sought in federal district court regarding "any *final decision* of the [Secretary] made *after a hearing* . . . ."[74] Section 405(h) provided:

> No finding of fact or decision of the [Secretary] shall be reviewed by any person, tribunal of government agency except as herein provided. No actions 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.*[75]

The United States Supreme Court first noted that under *Salfi* and *Ringer*, the Council's claim would be barred.[76] The Court reiterated that in *Salfi*, it held that section 405(h) barred section 1331 jurisdiction because the Social Security Act was the basis for the claim for benefits as well as the constitutional claim.[77] This did not connote that there was a complete ban on constitutional claims, but rather that constitutional claims must adhere to the same jurisdictional mandates as claims for benefits.[78] The Court also noted that in *Ringer* a constitutional claim for future benefits must be channeled through the special

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71. 529 U.S. 1 (2000).

72. *See id.* at 5.

73. 42 U.S.C. § 1395cc(h)(1) (2000). Subsection (b)(2) gave the Secretary the power to terminate an agreement with a nursing home if "the provider fails to comply substantially with the provisions [of the Medicare Act]." 42 U.S.C. §1395(b)(2)(A); *see also Illinois Council*, 529 U.S. at 8.

74. 42 U.S.C. § 405(g) (2000) (emphasis added).

75. 42 U.S.C. § 405(h) (emphasis added).

76. *See Illinois Council*, 529 U.S. at 11.

77. See *id.*; *see also* Weinberger v. Salfi, 422 U.S. 749, 760-61 (1975).

78. *See Illinois Council*, 529 U.S. at 11; *see also Salfi*, 422 U.S. at 762.

jurisdictional requirement.[79] Thus, the Council could not find any solace under *Salfi* and *Ringer.*

Next, the Court distinguished *Haitian Refugee Center* by simply stating that the case "turned on the different language of a different statute."[80] The Medicare Act's language of "arising under" was more broadly structured than the INS statute's language of "of a determination respecting an application."[81] The Court also distinguished *Eldridge,* noting that federal question jurisdiction was permitted only after Respondents brought their claim before the Secretary.[82] The only aspect of the special jurisdictional channeling requirement the Secretary could waive was the exhaustion of remedies, the "final decision."[83] Therefore, *Haitian Refugee Center* and *Eldridge* did not support the Council's position.

If the Council was going to prevail, its entire argument would have to rest on the precedential value of *Michigan Academy.*[84] The Court of Appeals had interpreted *Michigan Academy* as limiting the scope of the special channeling provision to "amount determinations."[85] However, the Supreme Court explained that the *Michigan Academy* decision actually stated that it "would not pass on the meaning of section 405 in the abstract."[86] The Supreme Court read the holding in *Michigan Academy* to create a narrow exception for constitutional claims. Section 405 (h) would not be applied if the presentation of the claim to the agency would lead to no review at all.[87] The Supreme Court was not convinced that the Council would be completely denied judicial review. Hence, it held that the Council was not

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79. *See Illinois Council,* 529 U.S. at 12; *see also* Heckler v. Ringer, 466 U.S. 602, 614 (1984).

80. *See Illinois Council,* 529 U.S. at 14.

81. *See id.*; *see also* McNary v. Haitian Refugee Center, 498 U.S. 479, 492 (1991).

82. *See Illinois Council,* 529 U.S. at 15 (explaining that the requirement that an individual present a claim to the agency before raising it in court is non-waivable).

83. *Id.*

84. *See id.* ("the upshot is that without *Michigan Academy* the Council cannot win.").

85. *Id.*; *see also* Illinois Council on Long Term Care v. Shalala, 143 F.3d 1072, 1075-76 (7th Cir. 1998).

86. *Illinois Council,* 529 U.S. at 17; *see also* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 680 (1986). The Court reasoned that any connotation limiting § 405(h) to amount determination would have overturned *Salfi* and *Ringer* and this is inconsistent with the Court's procedure since it normally does not overturn or dramatically limit its precedent *sub silentio. See Illinois Council,* 529 U.S. at 17-18.

87. *See Illinois Council,* 529 U.S. at 17; *see also Michigan Academy,* 476 U.S. at 681 n.12. The Court found this to be the most plausible interpretation because it is consistent with *Michigan Academy's* actual language, consistent with the precedent established in *Ringer,* and consistent with the distinction between denial of review and postponement of review. *See Illinois Council,* 529 U.S. at 19.

permitted to circumvent the Medicare Act's jurisdictional channeling requirement.[88]

Justice Thomas wrote the dissenting opinion, in *Illinois Council*, which Justice Scalia and Justice Stevens joined.[89] However, both Justice Scalia and Justice Stevens wrote separate dissenting opinions to clarify their positions.[90] Justice Stevens distinguished between claims brought by patients and claims brought by providers.[91] Justice Stevens reasoned that the language of section 405(h) only encompasses patients,' not providers' challenges to the Secretary's regulation.[92] Justice Stevens was also unpersuaded by the majority's "Pandora's Box" rhetoric, noting that there was no indication that the courts would be flooded with additional cases nor that the Court's decisions in *Ringer* and *Salfi* would have to be overturned.[93] On the other hand, Justice Scalia noted that he did not believe that *Michigan Academy* was correctly decided, but since "it is on the books" it should be affirmed on this occasion.[94] Justice Scalia did not join Part III of Justice Thomas' opinion because he was reluctant to use the phrase "presumption of pre-enforcement review," arguing that it set too high a standard.[95]

Justice Thomas read *Michigan Academy* to stand for the proposition that section 405 (h), as incorporated by section 1395ii, was only triggered as to individual amount determinations, not to the "challeng[e] to the validity of the Secretary's instructions and regulations."[96] Prior to its decision in *Michigan Academy*, the Court did not have the opportunity to squarely address section 1395ii.[97] The Court's unanimous decision in *Michigan Academy* noted that the provisions of the Medicare Act "simply [did] not speak to challenges mounted against the method by which amounts are to be determined."[98] The Council did not seek to resolve a dispute as to any particularized de-

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88. *See Illinois Council*, 529 U.S. at 21. The Court agreed that there would be some individual hardship, but believed that these "inconveniences" were only examples of postponement of judicial review. *See id.* at 23.

89. *See id.* at 32 (Thomas, J., dissenting).

90. *See id.* at 30 (Stevens, J., dissenting); *see also id.* at 31 (Scalia, J., dissenting).

91. *See Illinois Council*, 529 U.S. at 31.

92. *See id.* (explaining that when a patient brings a claim, there are only two parties involved, but when a provider brings a claim, three parties are involved).

93. *See id.*

94. *See id.* at 31-32.

95. *See id.* at 32 (stating that presumption "suggests that some unusually clear statement is required by way of negation," and the phrase "reasonable implication" should be used in its place). *Id.*

96. *Illinois Council*, 529 U.S. at 33 (*citing* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 680 (1986)).

97. *See id.*

98. *Id.* at 33 (*citing Michigan Academy*, 476 U.S. at 675).

termination, but generally attacked the Secretary's method of inspection and enforcement.[99] Justice Thomas also advocated adhering to the presumption of pre-enforcement judicial review.[100] It did not matter that there was only a postponement of judicial review; the presumption of pre-enforcement judicial review nevertheless existed, it was just not as strong.[101] Justice Thomas also stated that the numerous burdens imposed on nursing homes seeking judicial review could be interpreted as a complete denial of judicial review.[102] Thus, Justice Thomas would hold that section 405(h) does not hinder federal question jurisdiction of constitutional claims to the Secretary's regulations.[103]

IV. ANALYSIS

The text of the Medicare Act as well as its legislative history reveal an ambiguity as to Congress' intent regarding the Act's enactment.[104] The third sentence of section 405(h), as applied to the Medicare Act through section 1395ii, provides: "No action against the United States, the Commissioner of Social Security or any other officer or employee thereof shall be brought under section 1331 or 1346 of title 28 *to recover on any claim arising under this subchapter.*"[105] When analyzing this provision, the Supreme Court should have first referred to the holding in *Erika*; the Medicare Act must be construed in the context of its narrowly drawn provisions.[106] The Supreme Court also should have referred to *Haitian Refugee Center* where the Court noted if Congress had intended to limit review of constitutional claims "it could easily

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99. *See Illinois Council*, 529 U.S. at 37-39.

100. *See id.* at 43.

101. *See Illinois Council*, 529 U.S. at 46 (*relying on* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) ("teaches only that the presumption is not as strong when the problem is one of delayed judicial review")); *see also* McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) (applying the presumption even though plaintiffs had a post-enforcement review option).

102. *See Illinois Council*, 529 U.S. at 47-48 (noting that the prospect of termination of the agreement, civil monetary fines, and posting of penalties on the Internet considerably deter judicial review); *Haitian Refugee Center*, 498 U.S. at 496-97 (explaining that the hardship associated with presentment was "quite obviously . . . tantamount to a complete denial of judicial review for most undocumented aliens").

103. *See Illinois Council*, 529 U.S. at 52.

104. *See generally* Illinois Council on Long Term Care v. Shalala, 143 F.3d 1072 (7th Cir. 1998); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); Heckler v. Ringer, 466 U.S. 602 (1984); Weinberger v. Salfi, 466 U.S. 602 (1975); United States v. Erika, 456 U.S. 201 (1982).

105. 42 U.S.C. § 405(h) (emphasis added).

106. *See Erika*, 456 U.S. at 208 ("our lodestar is the language of the statute.").

have used broader language."[107] Keeping these basic principles of statutory construction in mind, the author turns to the Supreme Court's analysis of the Medicare Act's text.

The Supreme Court's broad interpretation of "to recover on any claim arising under this subchapter" appears to encompass every imaginable claim whether constitutional or monetary.[108] The Court erroneously interpreted *Ringer* and *Salfi* to reach its conclusion. The Court recognized that in *Salfi* it partially relied on the plaintiff's request for relief to make clear that the action arose "under the act whose benefits [were] sought."[109] The Court attempted to down-play this concession by noting that in *Ringer* it reached a similar result without any request for benefits.[110] However, regardless of the Court's contention, *Ringer* was unequivocally based on benefits: "we hold today that all [of the plaintiffs'] claims . . . are inextricably intertwined with what we hold in essence a claim for benefits and that section 1331 jurisdiction over all their claims is barred by section 405."[111] The Court was correct in noting that a claim for "future benefits" is a section 405(h) claim and must be channeled through the agency.[112] However, the Court cannot contend that after *Ringer* and *Salfi* it had squarely addressed a "pure" constitutional claim with respect to section 405(h).[113]

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107. McNary v. Haitian Refugee Center, 498 U.S. 479, 494 (1991). The statute analyzed in *Haitian Refugee Center* contained slightly different language, but the analogous reasoning was still applicable. In *Illinois Council*, the Supreme Court erroneously believed that section 405(h) contained the hypothetical ideal language articulated in *Haitian Refugee Center*. *See Illinois Council*, 529 U.S. at 14. However, there appears to be an irreconcilable difference between "to recover on any claim arising under this subchapter" and the proffered phrases "all causes . . . arising under any of the provisions [of the immigration statutes]" or "on all questions of law and fact." *See Haitian Refugee Center*, 498 U.S. at 494; *see also* 8 U.S.C. § 1329; 38 U.S.C. § 211(a).

108. *See Illinois Council*, 529 U.S. 9-20.

109. *Illinois Council*, 529 U.S. at 11-12 (*citing* Weinberger v. Salfi, 422 U.S. 749, 761 (1975) (conceding that it had relied upon the fact that the plaintiff was seeking monetary benefits to reach its holding)).

110. *See Illinois Council*, 529 U.S. at 12.

111. Heckler v. Ringer, 466 U.S. 602, 624 (1984). The Court attempted to clarify its position by stating that neither *Ringer* nor *Salfi* was predicated on a claim for benefits: "today we explicitly hold that our conclusion . . . is in no way affected by the fact that . . . respondents did not seek an award of benefits." *Id.* at 623. But the Court was at least aware of the underlying claim for benefits: "the fairest reading of the rather confusing amended complaint is that all Respondents, including Ringer, wish both to invalidate the Secretary's rule and her instructions to replace them with a new rule that allows [respondents] to get payment for BCBR surgery." *Id.*

112. *See Illinois Council*, 529 U.S. at 12; *see also Ringer*, 466 U.S. at 621.

113. *See Illinois Council*, 529 U.S. at 36 (Thomas, J., dissenting); *see also infra* note 114 and accompanying text.

Rather than analogizing the Council's constitutional claim to the claims brought in *Salfi* and in *Ringer*, the Supreme Court should have referred to *Michigan Academy, Johnson*, and *Haitian Refugee Center* for guidance. As mentioned above, both *Salfi* and *Ringer* had an underlying claim for benefits; therefore, *Illinois Council* is factually dissimilar to *Salfi* or *Ringer*.[114] On the other hand, *Michigan Academy, Johnson*, and *Haitian Refugee Center* were directly consistent with the Council's claim because they dealt only with a constitutional claim.[115] Although in *Illinois Council* the Majority dismissed this distinction, one cannot ignore that a constitutional claim as to the Secretary's regulation "arises under" the Constitution, not under the Medicare Act. In *Johnson*, the Court held that a constitutional challenge to the Veterans' Readjustment Benefits Act was outside the scope of the statute.[116] The constitutional challenge was to a decision of Congress, not to an individual determination of the Administrator.[117] In turn, the Council's claim arose not out of a particular decision of the Secretary, but dealt with Congress' passage of the Omnibus Budget Reconciliation Act. A claim arising under the Medicare Act can only be based upon an individual unfavorable determination by the Secretary. The reasoning in *Johnson* and *Michigan Academy* was re-affirmed in *Haitian Refugee Center*.[118] The Court allowed the constitutional action to proceed under section 1331 because "[it attacked] the manner in which the entire program [was] being implemented, allegations beyond the scope of administrative review."[119] The only benefit of a favorable outcome to the plaintiffs would have been the opportunity to have their applications reconsidered under the new constitutional provision.[120] The same rationale applied in *Illinois Council*, the only benefit of a favorable outcome would have been the opportunity to have their inspections conducted under the new constitutional Omnibus Budget Reconciliation Act. These cases stand in direct contrast to the Supreme Court's holding in *Illinois Council*.

The Supreme Court refused to agree with the Seventh Circuit Court of Appeal's holding that *Michigan Academy* limited section

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114. *See* Weinberger v. Salfi, 422 U.S. 749, 761 (1975); *see also Ringer*, 466 U.S. at 624.

115. *See* Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 36 (2000) (Thomas, J., dissenting); *see also Michigan Academy*, 476 U.S. at 678; *McNary v. Haitian Refugee Center*, 498 U.S. 479, 498 (1991).

116. *See* Johnson v. Robinson, 415 U.S. 361, 367 (1974).

117. *See id.*

118. *See Haitian Refugee Center*, 498 U.S. at 498.

119. *Id.* at 488.

120. *See id.* at 495.

405(h) to "amount determinations."[121] The Court did acknowledge that *Michigan Academy* discussed the silence of section 405(h) concerning challenges to the Secretary's methodology.[122] The Court went on to note that the *Michigan Academy* Court ultimately decided not to resolve the meaning of section 405(h) in the abstract.[123] The Court believed that *Michigan Academy* provided an exception only in the extreme instances when channeling review through the agency would lead to no review at all.[124] Although this interpretation of *Michigan Academy* may be correct, the question remains whether *Michigan Academy*, as well as *Salfi* and *Ringer*, correctly interpreted section 405(h). The explicit language of the statute contains the phrase "to recover on."[125] As Justice Stevens noted in his dissent in *Illinois Council*, "[the Council's] challenge to the Secretary's regulations simply do not fall within the 'to recover' language of section 405(h) *that was obviously drafted to describe pecuniary claims.*"[126] Justice Thomas also took issue with the majority's interpretation of *Michigan Academy*, which he reasoned established a distinction between "amount determinations" and challenges to the Secretary's regulations.[127] Under Justice Thomas' view, a claim for benefits that is classified as "to recover on," falls under section 405(h) and hence, triggers section 1395ii.[128] As articulated in *Erika*, the statute should be considered in light of its narrowly drawn provisions.[129] The phrase "to recover on" means to recover on. The Court also noted in *Haitian Refugee Center* that if Congress intended the statute to encompass constitutional challenges to the INS's procedure, "it could easily have used broader statutory language."[130] Instead of using the language "to recover on any claim under this subchapter," Congress could have used the language "all causes . . . arising under any of the provisions [of the Medicare Act]" or "[all causes]

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121. *Illinois Council*, 529 U.S. at 15; *see also* Illinois Council on Long Term Care v. Shalala, 143 F.3d 1072, 1075-76 (7th Cir. 1998).

122. *See Illinois Council*, 529 U.S. at 16; *see also* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675 (1986).

123. *See Illinois Council*, 529 U.S. at 17; *see also Michigan Academy*, 476 U.S. at 680.

124. *See Illinois Council*, 529 U.S. at 17; *see also Michigan Academy*, 476 U.S. at 681.

125. 42 U.S.C. § 405(h).

126. *Illinois Council*, 529 U.S. at 31 (Stevens, J., dissenting) (emphasis added).

127. *See id.* at 33 (Thomas, J., dissenting); *see also* McNary v. Haitian Refugee Center, 498 U.S. 479, 498 (1991) (*relying on* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-76 (1986) ("[the court] recognized that the review of individual determinations of the amount due on particular claims was foreclosed, but upheld the collateral attack on the regulation itself, emphasizing the critical difference between an individual 'amount determination' and a challenge to the procedure for making such a determination.")).

128. *See Illinois Council*, 529 U.S. at 37-38.

129. *See* United States v. Erika, 456 U.S. 201, 208 (1982).

130. McNary v. Haitian Refugee Center, 498 U.S. 479, 494 (1991).

on all questions of law and fact."[131] In light of the Medicare Act's narrowly drawn provisions as well as Congress' discretion to use broader language, a challenge to the Secretary's regulations should not fall under the Medicare Act and should be permitted to be brought in district court under section 1331.[132]

It is also plausible to argue that the Council had indeed satisfied the three requirements of section 405(g) to warrant judicial review. Section 405(g) provides, in pertinent part: "Any individual, after any final decision of the [Secretary] made after a hearing to which he was a party . . . may obtain review of such decision by civil action . . ."[133] Both the "final" and "made after a hearing" segments of section 405(g) can be waived by the Secretary.[134] In contrast, the "decision of the Secretary" is nonwaivable and must be relinquished before attainment of judicial review.[135] However, the Secretary's "promulgation" that she cannot and will not resolve constitutional challenges could be construed as a decision on the Council's claim. In *Ringer*, the Secretary's issuance of a regulation stating that all bilateral carotid body resections (BCBR) are to be denied reimbursement should have constituted a "decision."[136] This was an explicit denial of benefits: "By issuing the challenged BCBR regulation, [the Secretary] decided that BCBR can in no event be reimbursable."[137] If Ringer pursued a claim for the BCBR operation, the decision on his claim would have been predetermined.[138] Once again, the crux of the argument in *Illinois Council* reverts to the Secretary's jurisdictional incapacity to resolve constitutional claims.[139] Just as in *Ringer*, the Secretary's statement is the practical equivalent of "a decision" on the Council's claim. If the

131. *Id.*

132. *See id.*

133. 42 U.S.C. § 405(g).

134. *See* Heckler v. Ringer, 466 U.S. 602, 638 (1984) (Stevens, J., concurring in part, dissenting in part) (*relying on* Weinberger v. Salfi, 422 U.S. 764-767 (1975)).

135. *See id.*

136. *See id.*

137. *Id.* ("If that is not a 'decision of the Secretary,' [Justice Stevens] does not know what is"). As Justice Stevens also articulated, the majority incorrectly referred to the nonwaivable requirement as "presenting a claim for reimbursement" to the Secretary. *Id.* n.27. The majority's reliance on this statement is not only linguistically defunct, but also undercuts their position that the phrase "to recover on" is not limited to claims for benefits. *See id.*

138. *See* Heckler v. Ringer, 466 U.S. 602, 639-40 (1984) (Stevens, J., concurring in part, dissenting in part).

139. *See* Bowen v. Michigan Academy, 476 U.S. 667, 676 (1986). Section 12016 of the Medicare Carrier's Manual provides:

> The HO [Hearing Officer] may not overrule the provisions of law or interpret them in a way different than the HCFA [Health Care Financing Administration] does when he disagrees with their intent; nor may he use hearing decisions as a

Council had filed the claim in the agency, the decision was already predetermined.[140] Hence, it is not unrealistic to contend that the Council satisfied the waivable and nonwaivable pre-requisites of section 405(g) and is therefore entitled to judicial review pursuant to federal question jurisdiction.

Although the Council may not fulfill the Supreme Court's *Michigan Academy* exception of complete denial of judicial review,[141] the Supreme Court incorrectly concluded that the Council did not fulfill the *Haitian Refugee Center* standard of "[a] practical equivalent of a total denial of judicial review."[142] Although simply channeling the action through the agency may indeed only produce a postponement of judicial review, this was not the only repercussion.[143] If the nursing home did not submit a corrective plan and subsequently correct the deficiency, it risked termination of the agreement.[144] In essence, the Council would have to abide by the mandates of the contested statute before it could bring suit challenging the statute. If the "damage has already been done," what incentive does the nursing home have to maintain its action?[145] On the other hand, if the nursing home brings suit without making the corrections, its agreement with the Secretary rests entirely with "leniency that is solely a matter of grace of the Secretary."[146]

Moreover, another of the Secretary's options for enforcement stands as a deterrent to judicial action: "civil penalties which accrue for each day of non-compliance."[147] There are also numerous intangible repercussions which deter judicial action while promoting compli-

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vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program.

Medicare Carrier's Manual §12016 (1985). Although the Secretary's statement in regard to Ringer's claim was stipulated in district court, the Secretary's statement about constitutional challenges was derived from her own procedural manual and is indicative of its draconian application.

140. *See infra* note 154.

141. *See Illinois Council*, 529 U.S. at 20.

142. McNary v. Haitian Refugee Center, 498 U.S. 479, 497 (1991); *see also Illinois Council*, 529 U.S. at 20.

143. *See Illinois Council*, 529 U.S. at 48-52 (Thomas, J., dissenting).

144. *See id.* at 49.

145. *See id.* at 47 (*relying on* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review*, 58 OHIO ST. L.J. 85, 104 (1997) ("for when the costs of 'presenting' a claim via the delayed 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.")).

146. *Illinois Council*, 529 U.S. at 49 (*citing* Tr. of Oral Arg. 31).

147. *Id.* (*relying on* Ex Parte Young, 209 U.S. 123, 148 (1908) ("[T]o impose upon a party interested the burden of obtaining judicial decision . . . only upon the condition that if unsuccessful he must . . . pay fines . . .is, in effect, to close up all approaches to the courts.")).

ance: the deficiency is made available to residents of the nursing home as well as the general public and the deficiency is posted on the Internet.[148] Finally, although the financial burden that the nursing homes accrue cannot alone entail a due process violation, it is one factor which should be considered in conjunction with the other repercussions.[149] Therefore, these deterrents guarantee minimal assertion of judicial review, are tantamount to the practical foreclosure of judicial review,[150] and ensure that any success will only amount to a pyrrhic victory.

The Supreme Court found comfort in the fact that the Secretary may waive some of the requirements to ease the burden, including the exhaustion requirement when further exhaustion would be futile.[151] However, in *Matthews,* the Court recognized that in special circumstances, "deference to the Secretary's conclusion that as to the utility of pursuing the claim through administrative channels is not always appropriate."[152] Although the presentation of the claim to the Secretary is a nonwaivable requirement,[153] the Secretary has repeatedly acknowledged that the agency cannot and will not render a decision on constitutional claims to its regulations.[154] The Secretary's acknowledgment is strengthened through historical consensus that adjudication of constitutional claims has been beyond the power of administrative agencies.[155] In *Matthews,* the Supreme Court made clear that the fundamental principles of due process entailed "the opportunity to be heard at *a meaningful time and in a meaningful manner.*"[156] The Secretary cannot maintain that the Council will be given

148. *See Illinois Council,* 529 U.S. at 49-50.

149. *See* Matthews v. Eldridge, 424 U.S. 319, 348 (1976).

150. *See supra* note 146.

151. *See* Heckler v. Ringer, 466 U.S. 602, 618 (1984); Weinberger v. Salfi, 422 U.S. 749, 765-67 (1975); Matthews v. Diaz, 426 U.S. 67, 76-77 (1976).

152. *Ringer,* 466 U.S. at 618 (*relying on Matthews,* 424 U.S. at 330-32).

153. *See Matthews,* 424 U.S. at 328 ("the nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary.").

154. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-76 (1986) ("as the Secretary has made clear, 'the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program' is not considered in a 'fair hearing' held by a carrier to resolve a grievance . . .").

155. *See* Johnson v. Robinson, 415 U.S. 361, 368 (1974) (finding that the Board of Veterans' Appeals expressly disclaimed authority to decide constitutional questions); *see also Salfi* (*relying on* Oestereich v. Selective Service Bd., 393 U.S. 233, 242 (1968) ("adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies")); Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . .").

156. Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (*citing* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914). In *Matthews,* the

an opportunity to be heard in a meaningful manner. Even if the Council had brought the suit to the agency, the agency would not have been able to offer a resolution.[157] The agency would simply have provided the Council with input that was already known to all: that the agency cannot and will not render a decision on constitutional claims.[158] This was exactly the position taken by Justice Breyer, writing for the majority, in *Illinois Council.* Justice Breyer disregarded the capacity of the agency to provide meaningful adjudication because it was the "action" which had to be channeled for agency review.[159]

It is apparent that the Court also did not take into consideration the time period between the request for a hearing before an administrative law judge and a decision on a claim before mandating that the "action" be initially presented to the Secretary. In *Matthews,* the Court noted that in 1976 the delay was approximately ten months.[160] Thus, it appears that an individual with a constitutional claim will have to request a hearing with the agency and wait for a response (whatever time period that might be) informing him that the agency will not be able to resolve his claim.

V. CONCLUSION

The varying interpretations of Congress' intent regarding the special jurisdictional channeling provision have lead at best to ambiguous conclusions.[161] Despite the plethora of rhetoric demonstrating the futility of agency review of constitutional challenges,[162] a major procedural hurdle nevertheless exists: the initial presentation of the claim to

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Court enunciated that the degree of potential deprivation is a factor to be considered when analyzing due process. *See Matthews,* 424 U.S. at 341. The factual circumstances surrounding the *Matthews* decision are slightly more draconian than the facts at hand. While the Council's claim addressed the implications of requiring constitutional claims to be submitted to the Secretary, Eldridge's claim sought to re-institute his disability payments, presumably his only source of income. *See id.* at 325. However, this factual discrepancy does not undermine the underlying basis of the argument: meaningful review cannot be obtained where the arbitor cannot resolve the issue.

157. *See supra* note 154.

158. *See id.*

159. *See Illinois Council,* 529 U.S. at 23.

160. *See Matthews,* 424 U.S. at 341- 42. The ten months waiting period was a generous approximation. If an individual first seeks a reconsideration hearing, the total time period will be in excess of one year. *Id.*

161. *See* Weinberger v. Salfi, 422 U.S. 749, 787 (1975) (Brennan, J., dissenting) ("The question involves complicated questions of legislative intent and a statutory provision, 42 U.S.C. § 405(h), which has baffled district courts and courts of appeals for years . . .").

162. *See Salfi,* 422 U.S. at 794; Heckler v. Ringer, 466 U.S. 602, 627-647 (1984) (Stevens, J., dissenting); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675-76 (1986); McNary v. Haitian Refugee Center, 498 U.S. 479, 484 (1991).

the Secretary is a non-waivable requirement.[163] Congress' intent as to this aspect is explicit and the Secretary is not delegated any discretion in this matter. It is incumbent upon Congress to recognize that the presentation of a constitutional claim to the Secretary has outlived any practical consideration. The adjudicative process for constitutional challenges should commence in the judiciary. For instance, following the decision in this case, the Council will in all likelihood present its claim to the Secretary, who will, in turn, after a period of consideration waive the exhaustion requirement. The action will then once again reappear at the district court level. This issue could easily have been resolved the first time around. However, the rationale supporting the channeling of claims for benefits to the Secretary still exists; it allows the agency the opportunity to resolve these relatively minor claims without judicial intervention, while simultaneously keeping these claims from "clogging" the court system. By recognizing this distinction, Congress could implement a modified jurisdictional channeling provision which efficiently and fairly accounts for the concerns of the Secretary as well as the claimant.[164] Accordingly, the judiciary is not responsible for bringing about this change, and if a change is to occur, it would have to come from Congress itself.[165]

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163. *See Illinois Council,* 529 U.S. at 24 ("at a minimum, however, the matter must be presented to the agency prior to review in federal court.").

164. *See* Heckler v. Ringer, 466 U.S. 602, 639 (1984) (*relying on* Matthews v. Eldridge, 424 U.S. 319, 330 (1976). The Court recognized that a claimant's interests during a hearing are not effectively advanced because it is unlikely that the Secretary would change the entire regulatory scheme simply at the request a of single claimant. *Id.* On the other hand, the Secretary's stated interests include:

> [P]reventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Salfi, 422 U.S. at 765. Because the Secretary has stated that she will not consider a constitutional claim in hearing, *supra* note 154, none of the Secretary's aforementioned interests are advanced by the channeling provision.

165. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 866 (1984) (*relying on* TVA v. Hill, 437 U.S. 153, 195 (1978) ("The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between non-competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibility in the political branches.'")); *See also* McCarthy v. Madigan, 503 U.S. 140, 156 (1992) ("Congress, of course, is free to design or require an appropriate administrative procedure . . ."); *Ringer,* 466 U.S. at 627 ("if the balance is to be struck anew, the decision must come from Congress and not from this Court.").