No. 14-629

In the Supreme Court of the United States

CHARLES DEGNAN, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' complaint was properly dismissed for failure to exhaust administrative remedies as required by the Medicare statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 765 F.3d 805. The opinion of the district court (Pet. App. 12-19) is reported at 959 F. Supp. 2d 1190.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10-11) was entered on August 25, 2014. The petition for a writ of certiorari was filed on November 24, 2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Medicare is a federally subsidized health insurance program for the elderly and certain disabled individuals. Medicare Act, Pub. L. No. 89-97, § 102(a), 79 Stat. 291 (42 U.S.C. 1395 *et seq.*). This case con-

cerns the "special review channel" governing "administrative and judicial review" of Medicare claims. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 5 (2000) (*Illinois Council*). As relevant here, Section 405(g) of the Social Security Act, 42 U.S.C. 301 *et seq.*, made applicable to Medicare claims by 42 U.S.C. 1395ff(b)(1)(A), provides that judicial review is available only after a claimant exhausts administrative remedies and obtains a "final decision" from the Secretary of Health and Human Services. 42 U.S.C. 405(g). Section 405(h) "make[s] exclusive the judicial review method set forth in [Section] 405(g)," thereby displacing federal-question jurisdiction. *Illinois Council*, 529 U.S. at 10; see 42 U.S.C. 405(h) and 1395ii.

Because "a 'final decision' is a statutorily specified jurisdictional prerequisite" under the Medicare statute, this Court has recognized that the exhaustion requirement is "something more than simply a codification of the judicially developed doctrine of exhaustion." *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). One difference is that the requirement "may not be dispensed with merely by a judicial conclusion of futility." *Ibid.* As the Court has observed, the exhaustion requirement "prevent[s] 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." *Id.* at 765.

Although "the power to determine when finality has occurred ordinarily rests with the Secretary," the Court has recognized that the exhaustion requirement

may be waived in certain exceptional cases "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). In particular, the Court has excused a failure to exhaust when three factors are present: (1) a claimant's challenge "is entirely collateral to his substantive claim of entitlement," (2) "irreparable injuries" could result from the delay associated with exhaustion, and (3) exhaustion would be futile because "[i]t is unrealistic to expect" the Secretary to provide relief through the administrative process. *Id.* at 330-331 & n.11. The Court has made clear that this waiver exception is narrow and that exhaustion is required in the "vast majority" of cases. *Bowen* v. *City of New York*, 476 U.S. 467, 486 (1986).

In addition to the exhaustion requirement, federal jurisdiction over Medicare claims is subject to an amount-in-controversy requirement. See 42 U.S.C. 1395ff(b)(1)(E)(i). In 2012, when this action was filed, judicial review was unavailable if the amount in controversy was less than $1350. See 76 Fed. Reg. 59,138 (Sept. 23, 2011).

2. On July 30, 2012, petitioner Charles Degnan filed this suit in federal district court to challenge the amount of his Medicare Part B premiums. 12-cv-01869 Docket entry No. (Docket Entry No.) 1; see Pet. 11. Part B is a voluntary supplemental insurance program "financed from premium payments by enrollees together with contributions from funds appropriated by the Federal Government." 42 U.S.C. 1395j. Part B premiums are calculated in accordance with 42 U.S.C. 1395r, which provides, *inter alia*, that the

premiums include an adjustment for beneficiaries who enroll late. 42 U.S.C. 1395r(a) and (b). Degnan, a late enrollee, had previously prevailed in a suit related to the calculation of his Part B premiums for 2004 to 2010 and had received a refund of about $760. Pet. App. 4; *id.* at 33-35 (Second Am. Compl. ¶¶ 38, 44, 46); Docket entry No. 25, Ex. 1 (Jan. 11, 2013); see *Degnan* v. *Sebelius*, 658 F. Supp. 2d 969 (D. Minn. 2009) (*Degnan I*). In the present case, Degnan challenged the method of calculation and amount of his Part B premiums for 2011 and 2012. Pet. App. 14. Degnan alleged that respondents had failed to calculate his premiums in accordance with the methodology set forth in *Degnan I*, and he sought to correct the alleged miscalculations on behalf of a class of late enrollees. *Ibid.*; *id.* at 35 (Second Am. Compl. ¶ 46).

Degnan did not exhaust his administrative remedies before he filed the purported class action. See Pet. App. 16 n.2. After he filed suit, the Centers for Medicare and Medicaid Services (CMS) and the Social Security Administration (SSA) reviewed his premiums and realized they had not been properly calculated using the *Degnan I* methodology due to an administrative oversight. Gov't C.A. Br. 7.[1] On September 15, 2012, Degnan was informed that the premiums had been corrected and that CMS and SSA had implemented procedural safeguards to ensure compliance with *Degnan I* and to prevent future errors. Pet. App. 36 (Second Am. Compl. ¶ 47); Docket entry No. 25, Ex. 2, at 1-2 (Jan. 11, 2013). Degnan acknowledged

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[1] Medicare Part B premiums are automatically deducted from an individual's social security benefits. See 42 U.S.C. 1395s(a)(1); see generally Patricia A. Davis, *Medicare: Part B Premiums* 10-11 (Mar. 2014), http://fas.org/sgp/crs/misc/R40082.pdf.

the corrected premiums in an amended complaint, but maintained without further elaboration that they were "still not a proper calculation." Pet. App. 36 (Second Am. Compl. ¶ 47).

The Second Amended Complaint also sought to add Kenneth McCardle, Virginia Belford, and Dale Erlandson as named class members. Pet. App. 23. McCardle, Belford, and Erlandson alleged that they had overpaid their Part B premiums and sought to have the *Degnan I* calculation applied to those premiums. *Id.* at 13; see *id.* at 27-28 (Second Am. Compl. ¶¶ 14-17). However, they had not exhausted—or even initiated—administrative proceedings concerning their premiums. The amended complaint provided no allegations regarding their dates of enrollment in the Medicare Part B program; when they were first eligible to enroll; the amounts of their Part B premiums; the amounts and effects of any adjustments to their premiums; the amounts of their social security benefits, from which their Part B premiums were deducted; their cost-of-living adjustments for each year; and whether their claims satisfied the statutory amount-in-controversy requirement for invoking federal-court jurisdiction under 42 U.S.C. 1395ff(b)(1)(E)(i). See generally Pet. App. 22-41.

3. Respondents filed a motion to dismiss the complaint for lack of subject matter jurisdiction because petitioners did not meet the Medicare statute's jurisdictional prerequisites. See Pet. App. 4; see also Docket entry No. 22 (Jan. 11, 2013) (Mot. to Dismiss); *id.* No. 24 (Jan. 11, 2013) (Mem. of Law in Supp. of Mot. to Dismiss). As respondents explained, petitioners had not exhausted their administrative remedies as required by Section 405(g) and did not satisfy the

stringent requirements for excusing a failure to exhaust. Mem. of Law in Supp. of Mot. to Dismiss 10-15 & n.7. Respondents also argued that the case should be dismissed for several additional reasons. First, Degnan's claim was moot because his premiums had already been recalculated and safeguards had been implemented to ensure that errors would not occur in future years. *Id.* at 8-10. Second, the other plaintiffs had not even presented their claims to the agency—a different component of the "final decision" requirement that is "non-waivable and nonexcusable." *Id.* at 11-12 (quoting *Illinois Council*, 529 U.S. at 15). Finally, petitioners' claims did not satisfy the Medicare statute's amount-in-controversy requirement. *Id.* at 15-16.

4. The district court granted the motion to dismiss based on petitioners' failure to exhaust their administrative remedies. Pet. App. 12-19. The court held that the statutorily mandated exhaustion requirement should not be waived because petitioners' challenge to the amount of their Part B premiums was not collateral to, but rather "inextricably intertwined with," a claim for benefits. *Id.* at 17 (citation and internal quotation marks omitted). The court further explained that "channeling [petitioners'] claims through the administrative process" would "allow[] 'the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference.'" *Id.* at 18 (quoting *Illinois Council*, 529 U.S. at 13). Thus, the court found that "a consideration of equitable factors does not warrant an exception to the exhaustion doctrine." *Ibid.*

5. The court of appeals affirmed in a unanimous decision. Pet. App. 1-9. In considering the factors

this Court had discussed in *Eldridge*, the court of appeals rejected petitioners' argument that "the district court was required to examine *each* factor separately" and should have dispensed with the exhaustion requirement based solely on the alleged futility of administrative proceedings. *Id.* at 6 (internal quotation marks omitted); see *id.* at 8 n.7 (noting that petitioners had waived "any argument regarding the other two *Eldridge* factors" because they did not argue that their challenge was collateral to the merits of a claim for benefits or that they would suffer irreparable injury if required to exhaust). The court explained that the district court's decision was consistent with cases concluding that if a plaintiff "failed to establish the first of the factors [discussed in *Eldridge*], the court need not consider the remaining two." *Id.* at 6-7. Moreover, the district court had "follow[ed] [this] Court's reasoning" by not only examining the factors in *Eldridge*, "but also consider[ing] the practical purposes of the exhaustion requirement." *Id.* at 7. Because the agency should have an opportunity to interpret and apply the statute and the Medicare regulations without "premature interference," the district court had correctly concluded that a waiver would not serve "the policies underlying the 'intensely practical' exhaustion doctrine." *Id.* at 7-8 (quoting *City of New York*, 476 U.S. at 484, and *Illinois Council*, 529 U.S. at 13).

The court of appeals further held that "the thrust of [petitioners'] argument—that exhaustion would be futile—is unpersuasive and does not warrant waiver of the exhaustion requirement on its own." Pet. App. 8. The court explained that exhaustion could help resolve a number of "factual discrepancies" in the case, in-

cluding whether Degnan's claim was moot and "whether all of the named plaintiffs even presented their claim to the agency to satisfy the nonwaivable jurisdictional requirement." *Id.* at 8-9. The lack of an "adequately-developed administrative record" illustrated "the importance of exhaustion in this case." *Id.* at 9. And because petitioners were, "at bottom, ultimately challenging the amount of premiums paid," the court observed that the agency should have an opportunity to assess that issue in the first instance. *Ibid.* Thus, the court held that "this case is not one of the exceptional cases where waiver of exhaustion is appropriate." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 12-20) that the district court erred in declining to excuse their failure to comply with the Medicare statute's exhaustion requirement based solely on the alleged futility of administrative proceedings. This Court's precedent forecloses that argument. Moreover, petitioners' suit was properly dismissed even if futility alone sufficed to excuse exhaustion because the court of appeals held that exhaustion would not be futile in this case.

a. In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), this Court expressly rejected the proposition that futility alone can excuse administrative exhaustion under 42 U.S.C. 405(g), which is made applicable to Medicare claims by 42 U.S.C. 1395ff(b)(1)(A). 422 U.S. at 766. As the Court explained, because Section 405(g) makes exhaustion a "jurisdictional prerequisite" to

suit, the requirement is "something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility." *Ibid.*[2] Thus, while "the Secretary may specify such requirements for exhaustion as [s]he deems serve h[er] own interests in effective and efficient administration," a "court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Ibid.*

This Court's decision in *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), further confirmed that futility alone does not warrant dispensing with the exhaustion requirement for Medicare claims. The plaintiffs in *Illinois Council* contended that they should not be required to channel their claims through the administrative process in accordance with Section 405(h) because procedural regulations "insulat[ed] [those claims] from review," rendering exhaustion futile. *Id.* at 23. The Court rejected that argument. See *id.* at 23-24. As the Court explained, the plaintiffs were still required to "follow[] the special review route that the statutes prescribe," even if "the agency might not provide a hearing for th[eir] *particular contention*, or may lack the power to provide one." *Id.* at 23. The Court emphasized that "a court reviewing an agency determination under [Section] 405(g) has adequate authority to resolve any statutory or constitutional contention that the agency

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[2] Petitioners are therefore wrong to rely on exceptions to the "judicial doctrine[]" of exhaustion in the context of other administrative schemes. Pet. 19 (citation omitted). This Court has made clear that the exhaustion requirement under 42 U.S.C. 405(g) is "significantly different" in part because futility does not suffice to excuse the requirement. *Salfi*, 422 U.S. at 766.

does not, or cannot, decide." *Ibid.* (observing that parties who satisfy Section 405(g)'s requirements "remain free * * * to contest in court the lawfulness of any regulation or statute upon which an agency determination depends"). But the plaintiffs could not pretermit the agency's consideration of the claim based on allegations of futility because "[p]roceeding through the agency * * * provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges." *Id.* at 24.

Petitioners mistakenly contend that *Illinois Council* "made clear that futility alone remains a sufficient basis for waiving the exhaustion requirement." Pet. 15; see Pet. 22. But the language on which petitioners rely contrasts the "ordinary administrative law principle[]" of exhaustion, which is a judicially created doctrine, with the jurisdictionally based and more stringent exhaustion requirement mandated by the Medicare statute. 529 U.S. at 12. *Illinois Council* is therefore consistent with *Salfi*, which emphasized that exhaustion of Medicare claims is "significantly different" from the "judicially developed doctrine of exhaustion"—including specifically with respect to futility. *Salfi*, 422 U.S. at 766.

Petitioners also attempt (Pet. 22) to distinguish *Illinois Council* by noting that it interpreted Section 405(h)'s channeling requirement. But that does not make *Illinois Council*'s analysis "immaterial," as petitioners contend. *Ibid.* Rather, *Illinois Council* recognized that Section 405(h) reinforces Section 405(g) by "mak[ing] exclusive [its] judicial review method." 529 U.S. at 10. *Illinois Council* cannot sensibly be read to approve of a process whereby claimants challenging a Medicare regulation must invoke adminis-

trative review under Section 405(h), only to immediately obtain a waiver from Section 405(g)'s exhaustion requirement. That would deprive the agency of "the opportunity to reconsider its policies, interpretations, and regulations in light of [the plaintiffs'] challenges." *Id.* at 24. Thus, petitioners' argument that futility permits a court to dispense with the exhaustion requirement cannot be squared with this Court's precedent.

b. In any event, petitioners' argument fails on its own terms because the court of appeals held that exhaustion would not be futile in this case. See Pet. App. 8 ("[T]he thrust of [petitioners'] argument—that exhaustion would be futile—is unpersuasive and does not warrant waiver of the exhaustion requirement on its own."). Petitioners maintain that respondents will inevitably adhere to their allegedly unlawful regulation during administrative proceedings. Pet. 2. With respect to petitioner Degnan, the record belies that assertion. CMS and SSA corrected Degnan's premiums after he filed this suit and adopted procedural safeguards to prevent future errors, demonstrating that he could—and ultimately did—obtain relief through the administrative process. Docket entry No. 25, Ex. 1.

More fundamentally, even if administrative review were unlikely to provide the relief petitioners seek, "administrative exhaustion of [their] claims would still serve the purposes of exhaustion and not be futile in the context of the system." *Kaiser* v. *Blue Cross*, 347 F.3d 1107, 1115 (9th Cir. 2003). As the court of appeals explained, requiring petitioners to exhaust administrative remedies would develop a record that could help resolve a number of factual disputes in the

case, including whether petitioner Degnan's claims are moot and whether the other petitioners had complied with the non-waivable requirement that they present their claims to the agency. Pet. App. 8-9; see *Kaiser*, 347 F.3d at 1115-1116 (observing that even though the agency "cannot provide * * * damages" to the plaintiffs, "[t]here is no doubt that an administrative record would provide clarification and would help resolve [their] claims in court").

An adequately developed administrative record also could clarify issues related to each petitioner's claim to reduced premiums, which would be affected by individual factors such as the amount of any adjustment for late enrollment under 42 U.S.C. 1395r(b) and the amount of the claimant's social security benefits. See Gov't C.A. Br. 23 & n.5; see also *Heckler* v. *Ringer*, 466 U.S. 602, 619 n.12 (1984) (explaining that the "purpose of the exhaustion requirement" is served when the Secretary is given an opportunity to deny claims on grounds unrelated to a challenged regulation); *Salfi*, 422 U.S. at 762 (observing that the exhaustion requirement is "manifestly reasonable" even for constitutional claims that the Secretary has no power to resolve, "since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions"). Because petitioners "are, at bottom, ultimately challenging the amount of premiums paid," the court of appeals properly concluded that the agency should assess those claims in the first instance. Pet. App. 9; see *Kaiser*, 347 F.3d at 1116 n.4 ("If a court were to prematurely tackle a question inextricably intertwined with an issue properly re-

solved by an agency, the court would defeat the purposes of [Section] 405(g) and (h) even if the question was not one that the agency has the authority to answer fully," because the court would be "passing judgment on questions which *are* appropriately first answered by" the agency.).

Petitioners do not challenge the court of appeals' determination that exhaustion would serve the purpose of clarifying and refining their claims, and that fact-bound determination would not in any event warrant this Court's review. Because the court held that exhaustion would not be futile, this case would be an unsuitable vehicle to address the question whether futility alone may ever suffice to waive the Medicare statute's exhaustion requirement.

2. Petitioners argue (Pet. 12-18) more generally that it is not necessary for all three factors discussed in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to be present to excuse exhaustion of Medicare claims. That argument does not merit review because *none* of the *Eldridge* factors is present here: Petitioners concede that their challenge is not collateral to a claim for benefits and that they will not suffer irreparable injury if required to exhaust administrative remedies, and the court of appeals properly determined that exhaustion would not be futile. See *Ringer*, 466 U.S. at 618-619 (finding waiver inappropriate when none of the *Eldridge* factors was satisfied). In any event, the court correctly applied the *Eldridge* line of cases here.

a. Petitioners principally argue (Pet. 14-18) that the court of appeals misapplied this Court's decision in *Bowen* v. *City of New York*, 476 U.S. 467 (1986). According to petitioners, "this Court tacitly approved of a disjunctive interpretation of the *Eldridge* factors" in

City of New York and made "the purposes of the exhaustion requirement * * * the primary consideration." Pet. 14, 18. But petitioners cannot establish any conflict between *City of New York* and the court of appeals' analysis in this case.

In *City of New York*, the Court authorized dispensing with the exhaustion requirement based on its determination that all three *Eldridge* factors were satisfied. See 476 U.S. at 483-485. First, the Court explained that the claims were collateral because the plaintiffs did not seek an award of benefits but rather challenged the application of a secret policy in agency proceedings. *Id.* at 483. Second, the Court found that "the claimants * * * would be irreparably injured were the exhaustion requirement now enforced against them" because the plaintiffs depended on disability benefits that had been denied and suffered from mental disturbances so severe that the "administrative appeal[s] [themselves] may trigger a severe medical setback." *Ibid.* Third, the Court observed that "exhaustion would have been futile" because under the "unique circumstances" of the case, which involved a covert policy that the plaintiffs did not know was being applied to their benefit determinations, "there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Id.* at 485. Finally, recognizing that "application of the exhaustion doctrine is 'intensely practical,'" the Court also examined "the policies underlying the exhaustion requirement" and found that "[t]he purposes of exhaustion would not be served by requiring these class members to exhaust administrative remedies." *Id.* at 484 (quoting *Eldridge*, 424 U.S. at 331 n.11).

The court of appeals' analysis in this case is fully consistent with *City of New York*. The court reasoned that under *City of New York*, "the *Eldridge* factors should be considered along with the policies underlying the 'intensely practical' exhaustion doctrine." Pet. App. 7-8 (quoting *City of New York*, 476 U.S. at 484) (citation omitted). The court also concluded that the district court had properly followed the "reasoning in [*City of New York*], in that it not only considered all of the *Eldridge* factors, but also considered the practical purposes of the exhaustion requirement." *Id.* at 7. Because none of the factors discussed in *Eldridge* was satisfied here, and because exhaustion would serve the purpose of "allow[ing] the agency to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference," the court of appeals concluded that, unlike *City of New York*, "this case is not one of the exceptional cases where waiver of exhaustion is appropriate." *Id.* at 8-9 (citation and internal quotation marks omitted).

b. Petitioners are further wrong to assert (Pet. 20) that "[t]he federal courts of appeals have adopted varying approaches to the *Eldridge* factors." Rather, in line with this Court's instruction that the exhaustion requirement is "intensely practical," *Eldridge*, 424 U.S. at 331 n.11 (citation and internal quotation marks omitted), the lower courts have simply emphasized one or another *Eldridge* factor as is relevant based on the different facts of each case. For example, the Ninth Circuit emphasized that a constitutional claim was not colorable in a case where that factor alone sufficed to deny a waiver, see *Hoye* v. *Sullivan*, 985 F.2d 990, 991 (1992) (per curiam) (cited at Pet. 21), while that court refused to excuse exhaustion in a

different case because the plaintiffs could not establish irreparable harm or futility, see *Kaiser*, 347 F.3d at 1115. Compare also, *e.g.*, *Wilkerson* v. *Bowen*, 828 F.2d 117, 121-122 (3d Cir. 1987) (cited at Pet. 21) (emphasizing presence of collaterality and irreparability), with *Taransky* v. *Secretary of the U.S. Dep't of Health & Human Servs.*, 760 F.3d 307, 321 n.14 (3d Cir. 2014) (emphasizing lack of collaterality and futility), cert. denied, No. 14-758 (Feb. 23, 2015). Petitioners have not pointed to any decisions that reach conflicting results regarding dispensing with the exhaustion requirement on materially identical facts.

In particular, petitioners have not identified any decision excusing exhaustion where, as here, *none* of the *Eldridge* factors was satisfied. Nor have petitioners cited any decision holding that asserted futility alone suffices to excuse a failure to exhaust.[3] To the contrary, every court of appeals to consider that question following this Court's most recent analysis of the issue in *Illinois Council* has held that Section 405(g) cannot be excused based solely on futility. See Pet. App. 5-8; *Southern Rehab. Grp., P.L.L.C.* v. *Secretary of Health & Human Servs.*, 732 F.3d 670, 681-683 (6th Cir. 2013) (declining to dispense with exhaustion

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[3] Petitioners contend that the Seventh Circuit held in *Bavido* v. *Apfel*, 215 F.3d 743, 748 (2000), that "waiver is appropriate where the challenge is to the adequacy of the agency procedure itself." Pet. 21. But *Bavido* is inapposite because it concerned exhaustion under the Privacy Act, 5 U.S.C. 552a, not the Medicare statute. See 215 F.3d at 746. In cases involving Section 405(g), the Seventh Circuit employs *Eldridge*'s "three-factor test," dispensing with the exhaustion requirement when "claims are collateral, [the plaintiffs] will be irreparably harmed by further delay, and further pursuit of administrative appeals * * * would be pointless." *Marcus* v. *Sullivan*, 926 F.2d 604, 613, 615 (1991).

based solely on allegation of futility), cert. denied, 134 S. Ct. 2746 (2014); *Lifestar Ambulance Serv., Inc.* v. *United States*, 365 F.3d 1293, 1295-1298 (11th Cir. 2004) (*Lifestar*) (concluding that "the exhaustion requirement is not vitiated by statutory claims that cannot be resolved initially at the administrative level"), cert. denied, 543 U.S. 1050 (2005).[4] Thus, petitioners' claimed circuit conflict is illusory.

3. "[T]he factual discrepancies" caused by the lack of "an adequately-developed administrative record" further make this case a poor vehicle for review. Pet. App. 9. The court of appeals recognized that petitioner Degnan's claim may be moot because his Part B premiums have been adjusted and CMS and SSA have implemented procedures to guard against any future errors. *Id.* at 8; Docket Entry No. 25, Ex. 2. Although Degnan maintains that the "attempted correction * * * is still not a proper calculation," Pet. App. 36 (Second Am. Compl. ¶ 47), he has not identified any specific error and he instead argued in the lower courts only that his claim fell within an excep-

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[4] Contrary to petitioners' assertion (Pet. 21), the Eleventh Circuit has not "eliminate[d] the *Eldridge* test altogether." The case petitioners cite—*Cochran* v. *United States Health Care Fin. Admin.*, 291 F.3d 775 (2002)—declined to excuse exhaustion based on the plaintiff's argument that she would likely *prevail* in administrative proceedings—a "non-futility or fear-of-success exception" that "no court" had ever recognized as a valid basis for excusing a failure to exhaust. *Id.* at 780. The Eleventh Circuit's more recent—and more on point—decision in *Lifestar* confirms that the court continues to apply the *Eldridge* factors in assessing the exhaustion issue. See *Lifestar*, 365 F.3d at 1295-1298 & n.5 (observing that "plaintiffs cannot meet any of the three [*Eldridge*] requirements for waiver").

tion to the mootness doctrine. See Pet. C.A. Reply Br. 27-29.

In addition, the court of appeals noted that "there is a question as to whether all of the named plaintiffs even presented their claim to the agency to satisfy the nonwaivable" presentment requirement under Section 405(g). Pet. App. 8. Petitioners McCardle, Belford, and Erlandson never complained about their premium calculations administratively, but rather simply joined the suit in federal court. See Gov't C.A. Br. 41. Their claims therefore must be dismissed even if exhaustion could properly be waived in this case because courts have no discretion to excuse Section 405(g)'s presentment requirement. See *Illinois Council*, 529 U.S. at 15.

It is also doubtful that petitioners can satisfy the Medicare statute's jurisdictional amount-in-controversy requirement. See 42 U.S.C. 1395ff(b)(1)(E)(i). Petitioners did not allege that their claims met the $1350 threshold. See generally Pet. App. 22-41; cf. *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (observing that lack of jurisdiction is presumed and party asserting it bears burden of proof). Moreover, the revised calculations for petitioner Degnan showed that he had actually *underpaid* $12 during the two years at issue in this suit. See Gov't C.A. Br. 40. Although petitioners argued below that their claims could be aggregated, the Secretary's regulation interpreting the aggregation provision forecloses that argument. See *id.* at 38-39 (describing statutory and regulatory scheme). Because petitioners failed to develop an administrative record proving that their claims met the amount-in-

controversy requirement, the district court lacked jurisdiction over their suit.

Those threshold issues separately warrant dismissal of the case for lack of subject matter jurisdiction. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (explaining that a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Accordingly, this case is a poor vehicle to review the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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