No. 12-262

In the Supreme Court of the United States

BRIAN HALL, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act provides that an individual of age 65 or older and entitled to Social Security benefits is also entitled to Medicare Part A benefits. 42 U.S.C. 426(a). The question presented is:

Whether the Secretary of Health and Human Services is required to establish a mechanism by which an individual statutorily entitled to Medicare Part A benefits can opt out of that entitlement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 667 F.3d 1293. The order of the court of appeals denying panel rehearing (Pet. App. 42a-47a) is unreported, but is available at 2012 WL 1940654. The order of the court of appeals denying rehearing en banc is unreported (Pet. App. 48a-49a). The opinion of the district court (Pet. App. 24a-39a) is reported at 770 F. Supp. 2d 61.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2012. Petitions for rehearing were denied on May 30, 2012 (Pet. App. 42a-49a). The petition for a writ of certiorari was filed on August 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Social Security Act authorizes the payment of monthly "[o]ld-age insurance benefits," commonly referred to as "retirement benefits" or "Social Security benefits." 42 U.S.C. 402(a). An individual "shall be entitled to" Social Security benefits if the individual (1) is "fully insured" within the meaning of the statute, (2) "has attained age 62," and (3) "has filed [an] application for" such benefits. *Ibid.* Pursuant to that statutory scheme, an individual chooses whether (or when) to apply for old-age benefits. An individual who does not file an application is not "entitled" to Social Security benefits. Although the statute does not provide for withdrawal of an application, longstanding regulations permit an individual to withdraw an application for Social Security benefits in certain circumstances. See 5 Fed. Reg. 1866 (May 23, 1940) (permitting voluntary withdrawal before determination); 28 Fed. Reg. 4494-4495 (May 4, 1963) (permitting withdrawal after determination upon repayment of benefits). If the payment of benefits has already begun, the individual must repay any benefits received. See 20 C.F.R. 404.640(b)(3). If the withdrawal request is approved, "the application will be considered as though it was never filed." 20 C.F.R. 404.640(d).[1]

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[1] In 2010, the regulations were amended to place additional limits on withdrawal of approved applications. See 75 Fed. Reg. 76,256 (Dec. 8, 2010) (request for withdrawal must be filed within 12 months of the first month of entitlement and limited to one request); 20 C.F.R. 404.640(b)(4). The preamble explained that the amendments were designed to prevent manipulation of the system by beneficiaries who used the withdrawal option as "something akin to an interest-free loan" from the Social Security Trust Fund and then reapplied later for increased benefits. See 75 Fed. Reg. at 76,257-76,258.

In 1965, Congress amended the Social Security Act to establish the Medicare program. Part A of that program provides insurance for covered inpatient hospital and related post-hospital services and is sometimes referred to as "hospital insurance." An individual "shall be entitled to" benefits under Medicare Part A if the individual (1) "has attained age 65," and (2) "is entitled to monthly insurance benefits under section 402 [*i.e.*, Social Security benefits]." Social Security Amendments of 1965, Pub. L. No. 89-97, § 101, 79 Stat. 290. Under this provision, unlike Social Security benefits, an individual does not choose whether (or when) to apply for Medicare Part A benefits. If an individual is "entitled" to Social Security benefits, he is automatically "entitled" to Medicare Part A benefits when he turns 65.[2] See 42 C.F.R. 406.6(b)(2) ("An individual * * * need not file an application for hospital insurance" if, "[a]t the time of attainment of age 65, [he] is entitled to monthly social security * * * benefits."); 31 Fed. Reg. 3392 (Mar. 4, 1966).

The Social Security Act was later amended to allow certain persons *not* automatically entitled to Medicare Part A benefits to receive such benefits by completing an application or otherwise engaging in an enrollment process. Those individuals include, for example, a person who "has attained age 65" and who "would be enti-

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[2] The automatic entitlement to Medicare Part A benefits also stands in contrast to Medicare Part B, a voluntary insurance program that pays a portion of the cost of certain medical and other health services, including physician and laboratory services, not covered by the Part A program. See 42 U.S.C. 1395j (individuals can "elect to enroll" in Medicare Part B, which is "financed from premium payments by enrollees together with contributions from funds appropriated by the Federal Government").

tled" to monthly Social Security retirement benefits if he had applied for them. See Act of Oct. 19, 1980, Pub. L. No. 96-473, § 2(a), 94 Stat. 2263 (42 U.S.C. 426(a)). Such individuals are "entitled" to Medicare Part A benefits only if they "file an application for hospital insurance." 42 C.F.R. 406.6(c)(4); see 42 U.S.C. 426(a)(2)(A).

The Programs Operations Manual System (POMS) is an internal handbook that provides guidance to Social Security Administration (SSA) employees. Consistent with the statutory and regulatory scheme, the POMS explains that an individual may avoid entitlement to Social Security benefits by not applying for such benefits or by withdrawing his application consistent with the implementing regulations, including the requirement that any benefits received be repaid. The POMS explains further that, if an individual is no longer entitled to Social Security benefits (because he has withdrawn his application and paid back benefits received), then he is also no longer entitled to Medicare Part A benefits under 42 U.S.C. 426(a). Because entitlement to Medicare Part A benefits is automatic for persons over 65 who *are* entitled to monthly Social Security benefits, such persons have no ability to waive their automatic-entitlement status. Accordingly, to disclaim entitlement to Medicare Part A benefits, an individual must withdraw his application for Social Security benefits which, in turn, requires repayment of benefits received. See, *e.g.*, SSA, *POMS*, GN 00206.020 (Pet. App. 57a-60a); *POMS*, HI 00801.034 (Pet. App. 55a-56a); *POMS*, HI 00801.002(B) (Pet. App. 53a-54a); *POMS*, GN 00204.021, http://policy.ssa.gov/poms.nsf/lnx/0200204021.

The Secretary of Health and Human Services (HHS), however, has consistently made clear that an individual's entitlement to Part A benefits does not mean that

the individual has to accept such benefits from Medicare. An entitled individual may choose not to submit claims to Medicare, or may decline to authorize a provider to seek payment from Medicare, in which case the provider may bill the patient directly. See 42 U.S.C. 1395f(a)(1) (generally no payment can be made under Medicare Part A absent a "written request" for such payment from the beneficiary); 42 C.F.R. 489.21(b)(4) ("If the beneficiary or person on his or her behalf refuses to execute a written request [for payment by Medicare], the provider may charge the beneficiary for all services furnished to him or her."); Centers for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Pub. No. 100-04, *Medicare Claims Processing Manual*, ch. 1, § 50.1.5, http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c01.pdf (*Claims Manual*) ("A patient * * * may refuse to request Medicare payment and agree to pay for the services out of their own funds or from other insurance. Such patients may have a philosophical objection to Medicare or may feel that they will receive better care if they pay for services themselves or they are paid for under some other insurance policy.").

2. Petitioners Brian Hall, John J. Kraus, and Richard K. Armey are former federal employees who are entitled to and who receive Social Security benefits under 42 U.S.C. 402(a).[3] Because they are each over 65 years

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[3] The other named petitioners, Lewis Randall and Norman Rogers, were dismissed from the case for lack of standing. See Dist. Ct. Order, 08-1715 Docket entry No. 22 (Sept. 29, 2009). The court of appeals concluded that petitioners Armey and Hall had standing and did not address whether the other petitioners also had standing. See Pet. App. 4a-5a.

of age, petitioners are also entitled to Medicare Part A benefits under 42 U.S.C. 426(a). Pet. App. 3a, 24a-25a.

In 2008, petitioners filed suit against the Secretary of HHS and the Commissioner of SSA, seeking an injunction prohibiting the Secretary and the Commissioner from enforcing three of the POMS provisions and requiring them to "disenroll" petitioners from the Medicare Part A program while retaining their entitlement to Social Security benefits. See Am. Compl., 08-1715 Docket entry No. 4, at 30 (Dec. 15, 2008). Petitioners allege that the POMS provisions are invalid because they conflict with the Social Security Act and its Medicare provisions; they were not properly promulgated under the Administrative Procedure Act; and they violate "the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution." *Id.* at 12, 29.

The district court granted the government's motion for summary judgment. Pet. App. 24a-39a. The court acknowledged that petitioners "have no choice but to participate in Medicare Part A, unless they forego all Social Security Retirement benefits in the future and repay those benefits already received." *Id.* at 35a. That result, the court explained, "occurs by operation of law, not the POMS, which only reflect the legal realities." *Ibid.* The court continued: because the Medicare statute itself "specifies that all persons who have reached age 65 and who are receiving Social Security Retirement benefits are 'entitled' to Medicare Part A," *id.* at 35a-36a, the only "'dis-enrollment' possibility" is for a beneficiary to "make himself un-entitled for Medicare Part A by foregoing one of the essential requirements to become entitled to Medicare Part A—receipt of Social Security Retirement benefits," *id.* at 36a.

3. The court of appeals affirmed. Pet. App. 1a-21a.

a. The court of appeals explained that, under the statutory scheme, "[c]itizens who receive Social Security benefits and are 65 or older are automatically entitled under federal law to Medicare Part A benefits." Pet. App. 2a-3a. As the court observed, that does not mean that citizens so entitled have "to take the Medicare Part A benefits." *Id.* at 3a. Indeed, the court continued, petitioners already "can decline Medicare Part A benefits." *Id.* at 5a (citing *Claims Manual*, ch. 1, § 50.1.5). The court recognized that petitioners "want something more," *i.e.*, they want to "disclaim their legal entitlement to Medicare Part A benefits." But, the court concluded, "the statute simply does not provide any mechanism to achieve that objective." *Id.* at 4a, 5a. The court therefore held that, because petitioners' "position is inconsistent with the statutory text[,] * * * the agency was not required to offer [petitioners] a mechanism for disclaiming their legal entitlement, and its refusal to do so was lawful." *Id.* at 7a-8a.

b. Judge Henderson dissented, finding "no statutory authority for the POM's edict that an individual who declines Medicare, Part A coverage is required to forego/refund [Social Security benefits]." Pet. App. 18a-19a.

4. The court of appeals denied panel rehearing and rehearing en banc. Pet. App. 42a-49a. Judge Henderson specially concurred. *Id.* at 44a-45a. In a separate statement concurring in the denial of panel rehearing, Judge Kavanaugh (joined by Judge Ginsburg) observed that, "[n]o matter how [petitioners] label it, * * * their grievance" is "about the private insurance consequences of their entitlement to Medicare Part A benefits." *Id.* at 46a. That grievance, however, "would be answered only if (i) the private insurers did not penalize [petitioners]

based on their entitlement to Medicare Part A benefits or (ii) [petitioners] could somehow disclaim their entitlement to Medicare Part A benefits in a manner that would satisfy the private insurers that [petitioners] are not entitled to another source of coverage." *Id.* at 46a-47a. Judge Kavanaugh concluded that the court "obviously cannot do anything * * * about the coverage practices of private insurers," and "the statute simply provides no mechanism for a person who is 65 or older and has signed up for Social Security to disclaim his or her entitlement to Medicare Part A benefits (or to 'disenroll,' as [petitioners] put it)." *Id.* at 47a.

ARGUMENT

Petitioners contend (Pet. 5) that the court of appeals erred in "sustain[ing]" provisions in the POMS that improperly and unconstitutionally "link" the Social Security program to Medicare Part A. The court of appeals relied on the statutory text (not the POMS provisions) and correctly sustained a statutory and regulatory scheme that has governed entitlement to Medicare Part A benefits since the program's inception. The court of appeals' rejection of petitioners' novel challenge does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals' decision is correct. An individual is automatically "entitled" to Medicare Part A benefits if two statutory preconditions are met: (1) he "has attained age 65," and (2) he is "entitled to monthly insurance benefits under section 402 [*i.e.*, Social Security benefits]." 42 U.S.C. 426(a). An individual is "entitled to monthly" Social Security benefits "under section 402" if three statutory preconditions are met: (1) he is "fully insured" within the meaning of the statute, (2) he "has attained age 62," and (3) he "has filed [an] applica-

tion for" such benefits. 42 U.S.C. 402(a). Accordingly, a "fully insured" individual who has filed an application for Social Security benefits is "entitled" to Medicare Part A benefits when he turns 65—period.

As the court of appeals held, the Medicare statute itself provides no "avenue for those who are 65 or older and receiving Social Security benefits to disclaim their legal entitlement to Medicare Part A benefits." Pet. App. 3a. So long as that individual remains "entitled to monthly" Social Security benefits, he remains automatically "entitled to" Medicare Part A benefits. Conversely, if an individual is no longer "entitled to monthly" Social Security benefits, he is no longer automatically "entitled to" Medicare Part A benefits. Pursuant to longstanding regulations that predate the Medicare statute, an individual can withdraw his application for Social Security benefits in certain circumstances, if he repays benefits already received. See 28 Fed. Reg. 4494-4495 (May 4, 1963) (permitting withdrawal after determination upon repayment of benefits); 20 C.F.R. 404.640(b)(3); note 1, *supra* (discussing 2010 amendment). If a withdrawal request is approved, "the application will be considered as though it was never filed." 20 C.F.R. 404.640(d). Because, in those circumstances, the individual is no longer "entitled to monthly" Social Security benefits, he is also no longer automatically entitled to Medicare Part A benefits.

2. Petitioners' arguments ignore the statutory and regulatory text and structure.

a. Contrary to petitioners' contentions (Pet. 5), the "link" between the Social Security program and Medicare Part A is plain on the face of the statute. The only reason an individual can disclaim entitlement to Medicare Part A benefits by repaying Social Security bene-

fits already received and forgoing future benefits is because independent and longstanding Social Security regulations permit withdrawal of an application for Social Security benefits (upon repayment), and because automatic entitlement to Medicare Part A benefits rests on concomitant entitlement to Social Security benefits. If those independent regulations did not exist, individuals like petitioners would not be able to disclaim entitlement to Medicare Part A benefits for *any* reason. Likewise, the only reason an individual can disclaim (or avoid) entitlement to Social Security benefits in the first place is because entitlement to Social Security benefits (unlike Medicare Part A) is not automatic—an application is required. Compare 42 U.S.C. 402(a), with 42 U.S.C. 426(a).

Also contrary to petitioners' assertions (Pet. 5, 14-15, 17), the link between Social Security benefits and Medicare Part A benefits is a product of statute and of regulation, not of the POMS provisions challenged by petitioners.[4] The court of appeals did not discuss, let alone "sustain[]," the POMS provisions because they add nothing to the statutory and regulatory scheme that has governed Medicare Part A benefits since the program's inception in 1965. See Pet. App. 7a-8a (explaining that petitioners' "position is inconsistent with the statutory text"). Petitioners never challenged any of the statutory or regulatory provisions and, indeed, they do not even

[4] For this reason, the asserted "novel threshold question" about the level of deference due, Pet. 10, is not presented here. The court of appeals did not give any deference to the POMS provisions (see Pet. 4), and, contrary to petitioners' contention (Pet. 10-11), neither did the district court. See Pet. App. 35a (explaining that the result to which petitioners object "occurs by operation of law, not the POMS, which only reflect the legal realities").

discuss 20 C.F.R. 404.640(b)(3) in their certiorari petition. The POMS provisions themselves merely restate what the statute and regulations make clear: (i) an individual can withdraw a Social Security benefits application under certain circumstances (including repayment of benefits received); (ii) if an individual 65 or older successfully withdraws a Social Security benefits application, he is no longer automatically entitled to Medicare Part A benefits; and (iii) if such an individual does not withdraw his application for Social Security benefits, he remains entitled to Medicare Part A benefits. See, *e.g.*, SSA, *POMS*, GN 00206.020 (Pet. App. 57a-60a); *POMS*, HI 00801.034 (Pet. App. 55a-56a); *POMS*, HI 00801.002(B) (Pet. App. 53a-54a); *POMS*, GN 00204.021, http://policy.ssa.gov/poms.nsf/lnx/0200204021.

Petitioners nevertheless assert (Pet. 5) a right to "opt out" of or "turn down" Medicare Part A. But petitioners fundamentally misunderstand the statutory scheme. As the court of appeals explained (Pet. App. 3a-4a, 5a, 46a), an individual entitled to Medicare Part A benefits can decline those benefits. No one is being forced to accept government benefits they do not wish to receive. Petitioners can decline to authorize a provider to seek payment from Medicare and, instead, choose to pay for the services out-of-pocket or through an independent health insurance policy. See 42 U.S.C. 1395f(a)(1); 42 C.F.R. 489.21(b)(4); *Claims Manual*, ch. 1, § 50.1.5.[5]

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[5] The dissent suggested that an individual could not waive his right to benefits because a participating Medicare hospital is precluded from accepting private payment "for items or services for which [an] individual is entitled to have payment made under [Medicare Part A]." Pet. App. 18a n.9 (quoting 42 U.S.C. 1395cc(a)(1)(A)(i)) (brackets in original). That reading ignores other statutory provisions requiring a written request for benefits, 42 U.S.C. 1395f(a)(1), and the Sec-

Petitioners, however, "want something more," *i.e.*, they want to "turn down" their *entitlement* to Medicare Part A benefits. As the court of appeals held, the Medicare statute "simply does not provide any mechanism to achieve that objective." Pet. App. 5a. Petitioners now contend (Pet. 18-19) that they are not trying to disclaim an "entitlement" to Medicare Part A benefits, but instead would like to simply "opt out" of the Medicare Part A program. But the statutory scheme draws no such distinction. Unlike Social Security benefits and Medicare Part B, Medicare Part A is not an "opt-in" program for individuals (like petitioners) who are 65 or older and entitled to monthly Social Security benefits. Cf. 42 U.S.C. 426(a) (persons 65 or older who would be eligible to receive Social Security benefits but have not applied for them must apply for entitlement to benefits under Part A). For those individuals, there is no application process, no enrollment form, and no Part A premium. Petitioners cannot "opt out" of a program that does not require them to opt in, any more than they can "disenroll" from a program that does not require enrollment. Petitioners ask the Secretary to provide access to a statutory vehicle that does not exist.

b. Petitioners' constitutional arguments (Pet. 19-34) fare no better. As an initial matter, and as petitioners acknowledge (Pet. 6), they were not pressed as such below and no court has considered them. Petitioners rely on this Court's decision in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*), to justify a constitutional challenge based on the Spending Clause, the Takings Clause, the unconsti-

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retary's implementing regulations expressly permitting a provider to "charge the beneficiary for all services furnished" if the beneficiary "refuses to execute" such a "written request," 42 C.F.R. 489.21(b)(4).

tutional-conditions doctrine, and even antitrust law. Of course, this case involves Medicare Part A and Social Security, both fully funded federal programs. It has nothing to do with alleged coercion of States to implement a federal program, or with federalism more generally—the only potential connections to *NFIB*. The court of appeals did not address petitioners' variegated constitutional arguments and this Court should not do so in the first instance.

In any event, the gravamen of petitioners' argument is that the "POMS rules illicitly tie the receipt of Social Security funds to the participation in Medicare Part A." Pet. 34. But the underlying premise is fundamentally flawed. As the court of appeals recognized, petitioners "have it backwards." Pet. App. 7a. The government has never suggested that participation in Medicare Part A is a necessary predicate for Social Security benefits. Quite the contrary. The Medicare statute itself makes entitlement to Social Security benefits an automatic trigger for entitlement to Medicare Part A benefits (upon attaining the age of 65). Accordingly, the purported "unconstitutional condition" petitioners identify, *i.e.*, the need to forfeit Social Security benefits in order to disclaim entitlement to Medicare Part A benefits, is a necessary consequence of the Medicare *statute* and a *Social Security* regulation, first promulgated in 1963 (before the Medicare statute), that petitioners do not challenge.

3. Petitioners identify no conflict among the courts of appeals on this issue and there is none. Indeed, even though the relevant provisions of the statutory and regulatory scheme have existed since the inception of the Medicare statute in 1965, petitioners identify no previous court challenge.

Moreover, there is little reason to believe that the "opt-out" approach petitioners advocate would do anything to redress their asserted injury. See Pet. App. 4a-5a (addressing government's standing argument). Petitioners wish to "opt out" of Medicare Part A because they would prefer to use another form of federally funded health insurance (obtained through the Federal Employee Health Benefits (FEHB) Program) as their primary hospital insurer. They cannot currently do so because, pursuant to another set of federal regulations (issued by the Office of Personnel Management), FEHB carriers provide only secondary hospital insurance coverage to federal retirees entitled to Medicare Part A. See 48 C.F.R. 1652.204-71. Notwithstanding any "waiver" or "opt out," petitioners will remain statutorily "entitled" to Medicare Part A benefits and, thus, ineligible for primary hospital coverage through a FEHB plan. And, as Judge Kavanaugh recognized, the courts "cannot do anything * * * about the coverage practices of private insurers." Pet. App. 47a; see Pet. 19 (acknowledging that "[p]rivate insurers may well insist that anyone eligible for Medicare Part A cannot get coverage unless they also take Medicare Part A"). Further review of petitioners' novel arguments is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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