No.

IN THE
Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
AND XEROX RECOVERY SERVICES, INC.,

Petitioners,

v.

JODIE NEVILS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, governs the federal government's provision of health benefits to millions of federal employees and their dependents. FEHBA authorizes the Office of Personnel Management ("OPM") to enter into contracts with private insurance carriers to administer federal-employee-benefit plans, subject to terms that OPM "considers necessary or desirable." *Id.* § 8902(d). FEHBA expressly "preempt[s] any State or local law" that would prevent enforcement of "the terms of any contract" between OPM and a plan administrator, so long as those terms "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." *Id.* § 8902(m)(1).

A subrogation clause in Petitioner Coventry Health Care of Missouri, Inc.'s contract with OPM requires that it recoup payments of benefits made to plan participants who also recover (or stand to recover) from a third party. In this case, the Supreme Court of Missouri held, disagreeing with the Eighth Circuit and the Supreme Court of Georgia, that Missouri anti-subrogation rules are not preempted by FEHBA, because they do not "relate to the nature, provision, or extent of coverage or benefits." Pet. App. 1a (internal quotation marks omitted).

The question presented is whether FEHBA preempts state laws precluding carriers that administer FEHBA plans from seeking subrogation as required by their contracts with the Office of Personnel Management.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are named in the caption.

Pursuant to this Court's Rule 29.6, petitioner Coventry Health Care of Missouri, Inc. (f/k/a Group Health Plan, Inc.) is a wholly owned subsidiary of Aetna Health Holdings, LLC (successor by merger to Coventry Health Care, Inc.). Aetna Health Holdings, LLC, in turn, is a wholly owned subsidiary of Aetna Inc. Aetna Inc. is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Xerox Recovery Services, Inc. (f/k/a ACS Recovery Services, Inc.) is a wholly owned subsidiary of Xerox Corporation. Xerox Corporation is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Coventry Health Care of Missouri, Inc., formerly known as Group Health Plan, Inc. (hereinafter "GHP"), and Xerox Recovery Services, Inc., formerly known as ACS Recovery Services, Inc. (hereinafter "ACS") (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINIONS BELOW

The Supreme Court of Missouri's opinion (Pet. App. 1a) is reported at 418 S.W.3d 451. The Missouri Court of Appeals' opinion (Pet. App. 48a) is not reported but is available at 2012 WL 6689542. The order and judgment of the Missouri Circuit Court (Pet. App. 43a) is not reported. The memorandum and order of the United States District Court for the Eastern District of Missouri remanding the case to state court (Pet. App. 30a) is not reported but is available at 2011 WL 8144366.

JURISDICTION

The Supreme Court of Missouri entered its judgment on February 4, 2014, accompanied by an opinion adjudicating the federal questions presented in this petition. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 476-87 (1975); *infra* at 35-36.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

All pertinent constitutional, statutory, and regulatory provisions are reproduced in the Appendix at 59a-81a.

STATEMENT

Few areas of law are more inherently federal than the benefits that the federal government provides to its own employees. Federal-employee benefits are of uniquely federal concern, and are governed by extensive federal statutes and regulations. The rights and responsibilities of the private carriers engaged by the government to administer such benefits are specified in contracts made with, and overseen by, the Office of Personnel Management ("OPM").

State interference with federal-employee benefits directly undermines the uniformity essential to their efficient administration. And it imposes severe burdens on the government, private carriers, and the public. To prevent such interference, Congress long ago established, in the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, that state law cannot trump OPM's contracts with its carriers. FEHBA expressly preempts state laws that purport to override "[t]he terms of any contract" under FEHBA "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." *Id.* § 8902(m)(1).

Until recently, courts consistently held that FEHBA preempts state laws that would otherwise interfere with the enforcement of subrogation clauses in contracts between OPM and FEHBA carriers. Subrogation clauses require carriers to recoup benefits paid to beneficiaries who recover compensation from other sources, such as third-party tortfeasors. OPM also has repeatedly expressed the view that FEHBA preempts state laws preventing subrogation by carriers.

In a divided decision, the Supreme Court of Missouri upended that consensus. The majority held that, notwithstanding Section 8902(m)(1), States *can* nullify subrogation provisions of OPM contracts. By doing so, States can preclude carriers from fulfilling their contractual obligations to the government. Two concurring judges disagreed with that conclusion, and acceded to the result only because they believed Section 8902(m)(1) is *unconstitutional*.

The majority's view is now the law of Missouri—at least in *state* courts. The Missouri Supreme Court's decision directly conflicts with a ruling of the Eighth Circuit, as well as decisions of the Georgia Supreme Court and other state and federal courts interpreting this federal statute. Those courts have held that FEHBA *does* preempt state antisubrogation laws. Whether FEHBA carriers can seek subrogation in the Show-Me State now turns on whether a case proceeds in federal or state court.

The United States, as *amicus*, actively supported petitioners' position below, both in briefing and at oral argument. As the United States explained, the "government is responsible for the lion's share of the premiums"—more than $30 *billion* "in 2012 alone"—and "has a substantial interest in ensuring that [FEHBA carriers] may pursue subrogation." Pet. App. 131a. And as it explained in (unsuccessfully) urging *another* state supreme court to reverse a decision that reached the same erroneous result, this "important question of federal law affect[s] the health-insurance benefits the federal government provides to millions of federal employees and their families." U.S. *Amicus* Br. 2, *Kobold* v. *Aetna Life Ins. Co.*, No. CV-13-299-PR (Ariz. Dec. 20, 2013). Allowing state antisubrogation laws to stand despite

FEHBA "destroys the uniformity Congress intended [Section 8902(m)(1)] to establish as to benefits and premiums, and threatens to increase the cost of the FEHB program to the federal government." *Ibid.*

This Court's intervention is urgently needed to correct the Missouri Supreme Court's misreading of federal law and to restore the uniformity essential to fair and efficient administration of federal-employee benefits. The petition should be granted.

1. Congress enacted FEHBA in 1959, creating the Federal Employees Health Benefits Program ("FEHB Program" or "Program") to provide health-insurance benefits for the federal workforce. *See* 5 U.S.C. §§ 8901-8914. The Program's goal is to "assure maximum health benefits for [federal] employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 86-957, at 4 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2916. Today, it is "the largest employer-sponsored health benefits program in the United States," covering more than 8.2 million current and former federal employees and dependents.[1] In 2012, it paid out nearly $45 billion in benefits.[2]

The Program is overseen by OPM, which has broad statutory authority. It can issue implementing

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[1] OPM, OPM Announces 2014 Federal Employees Health Benefits Program Premium Rates (Sept. 24, 2013), http://www.opm.gov/news/releases/2013/09/fehb-rates-announcement/.

[2] *The Federal Employees Health Benefits Program: Is It A Good Value For Federal Employees?—Hearing Before the Subcomm. on Fed. Workforce, U.S. Postal Serv. and the Census of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 2 (2013) ("*2013 Hearing*") (statement of Del. Norton).

regulations, 5 U.S.C. § 8913(a), and enter contracts with private insurance companies ("carriers") to administer plans, *id.* § 8902(a). OPM's contracts must contain "such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." *Id.* § 8902(d).

FEHBA-plan premiums are paid by participants (who generally pay 28%) and the government (which pays the rest). *See* 5 U.S.C. § 8906(b)(1). Premiums are deposited into a special U.S. Treasury fund (the "Fund"). *See id.* § 8909(a). "Experience-rated" carriers pay benefits case-by-case by drawing on the Fund. *See* 48 C.F.R. § 1632.170. "Community-rated" carriers receive premiums from the Fund up front and use them to pay benefits. *See ibid.*[3]

2. In the 1970s, Congress responded to increasing concerns about States' interference with the Program. State-by-state regulation of FEHBA plans had "[i]ncreased premium costs to both the Government and enrollees" and introduced "[a] lack of uniformity of benefits" even "for enrollees in the same plan." H.R. Rep. No. 94-1211, at 3 (1976). The "result" was that "enrollees in some States" would pay "a premium based, in part, on the cost of benefits provided only to enrollees in *other* States." *Ibid.* (emphasis added). To prevent such interference, Congress enacted an express preemption provision, 5 U.S.C. § 8902(m)(1), which originally provided:

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[3] An "experience-rated" plan sets premiums based on enrollees' "actual paid claims" and other costs, whereas a "community-rated" plan sets premiums based on demographics or other characteristics of the group. *See* 48 C.F.R. §§ 1602.170-2, 1602.170-7.

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

5 U.S.C. § 8902(m)(1) (1994).

After two decades of additional experience, Congress concluded that this provision did not go far enough. It accordingly amended Section 8902(m)(1) to "strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 105-374, at 9 (1997). Most significantly, it removed the proviso that only state laws "inconsistent" with FEHBA contracts are preempted. Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366 (1998); *see* 5 U.S.C. § 8902(m)(1).

3. OPM's standard contracts with carriers have long included provisions requiring carriers to seek subrogation and reimbursement from participants.[4] Such provisions apply where a beneficiary receives federal benefits under its FEHBA plan, but also recovers, or has a right to recover, for the same injuries from a different source—for instance, a third-party

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[4] *See*, *e.g.*, Standard Contract for Community-Rated Health Maintenance Organization Carriers § 2.5 (2000), *available at* https://www.opm.gov/healthcare-insurance/healthcare/carriers/-#url=1999 ("2000 Standard Contract").

tortfeasor who caused injury to the beneficiary. *See* Pet. App. 82a. If the beneficiary has not yet recovered from the third party, the carrier must seek to recover from that party directly. *See ibid.* If the beneficiary has already recovered, the carrier must seek reimbursement from the beneficiary. *See ibid.*

Even where subrogation is prohibited by state law, OPM's contracts generally require carriers to subrogate for FEHBA plans if they also "subrogat[e] for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA)." 2000 Standard Contract § 2.5(a)(2). This ensures that FEHBA plans receive equal treatment with private-sector plans governed by ERISA, 29 U.S.C. § 1001 *et seq.*, which this Court has held preempts state laws that preclude insurance administrators from seeking subrogation. *See FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-60 (1990).

The effect of subrogation recovery differs slightly depending on the type of carrier. Experience-rated carriers return recovered sums to the Fund, where they are used to "increase [plan] benefits," to reduce future premiums, or to refund past premiums to participants and the government. 5 U.S.C. § 8909(a)-(b). Community-rated carriers may keep recovered funds, *but* they must take prior years' recoveries into account when calculating premiums.[5] Either way, subrogation reduces the financial burden on the government and plan participants.

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[5] *See* OPM, Community Rating Guidelines 6 (2014), *available at* https://www.opm.gov/healthcare-insurance/healthcare/carriers/2013/2013-11a1.pdf.

For years, OPM has "consistently recognized that the FEHBA preempts state laws that restrict or prohibit … reimbursement and/or subrogation." Pet. App. 84a. Until recently, courts across the country agreed. In 2012, however, OPM became concerned that "[s]ome states are not allowing FEHB Program carriers to collect subrogation and/or reimbursement recoveries." *Id*. at 82a. To correct that misunderstanding, OPM issued a letter (the "2012 Letter") reiterating that it "continue[s] to maintain" its established position. *Id.* at 84a.

4. OPM contracted with GHP to provide benefits to federal employees in Missouri as a community-rated carrier. Pet. App. 2a. GHP's contract provided that GHP "shall" seek subrogation. *Id.* at 2a, 93a. Missouri common law generally prohibits subrogation by insurance companies in personal-injury cases. *Id.* at 3a. GHP's contract nevertheless required it to seek subrogation, even in Missouri, because GHP "subrogate[d] for at least one plan covered under" ERISA in the State. *Id.* at 94a; *see also id.* at 44a.

Respondent Jodie Nevils was a federal employee and participant in the GHP plan. Pet. App. 2a. Nevils was injured in a car accident in 2006, and GHP paid for his medical care. *Ibid.* Nevils pursued a tort action against the driver responsible for his injury and obtained a settlement. *Ibid.* The subrogation clause of the relevant OPM contract required GHP to seek to recover the benefits it paid. *See id.* at 94a. Accordingly, GHP asserted—through a subcontractor, ACS—a lien on Nevils's settlement proceeds for $6,592.24 in benefits GHP had paid. *Id.* at 2a. Nevils repaid that sum, satisfying the lien. *Ibid.*

5. Nevils filed a putative class action against GHP in Missouri state court asserting various state-law claims. All of his claims alleged that, notwithstanding the subrogation provision in GHP's contract with OPM, GHP's subrogation claim violated Missouri's common-law antisubrogation doctrine. Pet. App. 2a, 44a-45a. GHP removed to federal court, but the case was remanded. *Id.* at 42a. On remand, ACS intervened as an additional defendant. *Id.* at 3a.

GHP and ACS sought summary judgment, arguing that Nevils's claims are preempted under FEHBA. The trial court agreed, following existing Missouri case law. Pet. App. 46a-47a.

Nevils appealed, and the Missouri Court of Appeals affirmed, holding Missouri's antisubrogation law preempted. Pet. App. 52a-58a.

6. Nevils sought review in the Supreme Court of Missouri. Pet. App. 1a. The Solicitor General authorized, and the United States filed, an *amicus* brief supporting GHP and ACS. *Id.* at 109a. The United States also presented oral argument. In a divided opinion, the state supreme court reversed. *Id.* at 1a-29a.

a. The majority held that Section 8902(m)(1) does not preempt Missouri's antisubrogation rule. Pet. App. 3a-10a. It dismissed contrary decisions of "[o]ther jurisdictions" as "called into question" by *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006). Pet. App. 5a. In *McVeigh*, this Court narrowly divided on the question whether Section 8902(m)(1) creates federal "arising under" jurisdiction over suits seeking reimbursement pursuant to the terms of a carrier's federal contract. The ma-

jority opinion in this case conceded that *McVeigh* was "not dispositive" because it "expressly declined to determine whether the statute preempts state subrogation laws." *Id.* at 5a-7a. But the majority nevertheless read *McVeigh* as commanding a "'cautious interpretation'" of Section 8902(m)(1), and as implying that subrogation does not "relate to" coverage or benefits. *Ibid.* (citations omitted).

Turning to Section 8902(m)(1)'s text, the majority held that the provision's "operative terms are 'relate to,' 'coverage' and 'benefits.'" Pet. App. 8a (citing *Kobold* v. *Aetna Life Ins. Co.*, 309 P.3d 924 (Ariz. App. 2013), *review denied*, No. CV-13-299-PR (Ariz. Mar. 21, 2014)). Construed in light of the presumption against preemption, those "operative terms" did not preempt antisubrogation laws. *Id.* at 8a-10a & n.1.

According to the majority, "relate to" is limited to "direct and immediate relationship[s]." Pet. App. 9a. The court construed "coverage" as the "scope of the risks insured" without regard to subrogation, and "benefits" as initial payments a participant receives *before* subrogation recoveries. *Id.* at 9a-10a. Applying these definitions, the court held that FEHBA does "not preempt Missouri law barring subrogation" because subrogation "bears no immediate relationship to the nature, provision or extent of Nevils' insurance coverage and benefits." *Id.* at 10a. In a footnote, the court rejected petitioners' and the government's argument that OPM's established and reasonable view merited deference. *Id.* at 10a-11a n.2. It then remanded for litigation of the merits of Nevils's state-law claims. *Id.* at 10a.

b. Judge Wilson, joined by Judge Breckenridge, Pet. App. 11a, concurred only in the judgment,

strongly disagreeing with the majority's statutory analysis. *Id.* at 12a-29a. "[B]enefit repayment terms are *related* to benefits because" an insured "does not care what his 'benefits' are if he will not be allowed to keep them." *Id.* at 18a. And "terms requiring Nevils to *pay* benefits back to GHP that GHP previously had *paid* out … relate to 'payment with respect to … benefits.'" *Ibid.* The concurrence, however, would have held that Section 8902(m)(1) violates the Supremacy Clause, U.S. Const., art. VI, cl. 2. According to the concurrence, FEHBA improperly "give[s] preemptive effect to the benefit repayment terms in GHP's contract" themselves, rather than to "federal *law*." Pet. App. 24a.[6]

REASONS FOR GRANTING THE PETITION

The decision below irreconcilably conflicts with rulings of other state and federal courts regarding both FEHBA's preemptive scope and the deference due to OPM. The Eighth Circuit, the Supreme Court of Georgia, and other courts have held that Section 8902(m)(1) preempts state antisubrogation laws that purport to override provisions of FEHBA contracts. The Missouri Supreme Court reached the opposite conclusion here, holding that Missouri's antisubrogation doctrine trumped GHP's contract with OPM, which *required* GHP to seek subrogation even in States that prohibit it. That holding creates a direct

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[6] The concurrence's constitutional argument, which Nevils did not raise, is meritless. Section 8902(m)(1)'s text, bolstered by the constitutional-avoidance canon, means that "*federal law* 'shall supersede and preempt'" state laws that attempt to trump terms of OPM's contracts with carriers. *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 144-45 (2d Cir. 2005) (Sotomayor, J.), *aff'd*, 547 U.S. 677 (citation omitted).

conflict among the lower courts on an important issue of federal law, which only this Court can resolve. That holding, moreover, is at war with FEHBA's text, its purpose, and this Court's precedent.

The Missouri Supreme Court's conclusion that States may override OPM contracts also contravenes controlling precedent in the area of administrative deference. Even if there were room for doubt about the correct reading of Section 8902(m)(1), the court below should have resolved it by according deference to OPM's settled, well-reasoned view. But the court deemed OPM's understanding unworthy of *any* weight. That refusal to accord any respect to the agency's view likewise conflicts with the views of several regional circuits, underscoring the compelling need for this Court's review.

The consequences of the Missouri Supreme Court's misguided ruling are immense. FEHBA plans cover millions of federal employees. And they expend tens of *billions* of dollars—mostly taxpayers' money—providing benefits. As demonstrated by *amicus* briefs that the Solicitor General authorized here and in another similar case in Arizona, the decision below drastically increases the burdens on the United States, federal employees, and the taxpaying public. And it puts carriers in the impossible position of choosing which sovereign—*a* State, or the *United* States—to obey.

I. THE DECISION BELOW CONFLICTS WITH STATE AND FEDERAL COURT DECISIONS CORRECTLY HOLDING THAT FEHBA PREEMPTS STATE ANTISUBROGATION LAWS.

A. The Decision Below Conflicts With Holdings Of The Eighth Circuit And Georgia Supreme Court That FEHBA Preempts Antisubrogation Laws.

The Missouri Supreme Court's holding that FEHBA does not preempt state antisubrogation laws directly conflicts with decisions of the Eighth Circuit and the Supreme Court of Georgia—and numerous other courts—which have held exactly the opposite.

In *MedCenters Health Care, Inc.* v. *Ochs*, 26 F.3d 865 (8th Cir. 1994), the Eighth Circuit held that Section 8902(m)(1) preempted Minnesota law preventing a FEHBA provider from seeking subrogation under its OPM contract. The provider rendered medical care to a plan participant. The participant's parents (the Ochses) settled on his behalf with the third party responsible for his injuries. *MedCenters Health Care, Inc.* v. *Ochs,* 854 F. Supp. 589, 591 (D. Minn. 1993). The provider's contract contained a subrogation clause requiring it to seek reimbursement if participants recovered from other sources. *Id.* at 591-92. When the Ochses refused to reimburse the provider, it sued. *Id.* at 591. The Ochses invoked Minnesota's "full recovery rule" barring subrogation unless the insured party has recovered his "actual loss." *Id.* at 592 (internal quotation marks omitted).

The Eighth Circuit held that Section 8902(m)(1) "pre-empted the state-law [full-recovery] rule." 26 F.3d at 867. It adopted the reasoning of the district court, which held that, although Minnesota law

would have barred subrogation, "a state common law equitable rule that denies the effect of a contractual provision" providing for subrogation "surely is inconsistent with that provision." 854 F. Supp. at 592-93.[7]

The Eighth Circuit continues to recognize that subrogation is closely related to FEHBA benefits. In *Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1235 (8th Cir. 2012), it held that "the subrogation provision" in a FEHBA plan was "necessarily a product of the benefit payment process." *Id.* at 1233. *Jacks* further held that a carrier *sued* by a participant for seeking subrogation may remove the case to federal court under the statute allowing removal of suits against "person[s] acting under" a federal agency or officer. *Id.* at 1230-35 (emphasis omitted) (quoting 28 U.S.C. § 1442(a)(1)). And once the suit is in federal court, the carrier may of course rely on *Ochs* to argue that state law barring subrogation is preempted.[8]

The Supreme Court of Georgia likewise held in *Thurman* v. *State Farm Mutual Automobile Insur-*

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[7] *Ochs* also affirmed the district court's holding that federal-question jurisdiction lay over the carrier's suit. *See* 26 F.3d at 867; 854 F. Supp. at 593 n.3. *McVeigh* abrogated that jurisdictional holding, *see* 547 U.S. at 689-701, but expressly reserved judgment regarding whether Section 8902(m)(1) preempts state subrogation laws, *see id.* at 698; *infra* at 24-27.

[8] Under *McVeigh*, 547 U.S. 677, however, absent complete diversity or supplemental jurisdiction, a carrier—even though required by its OPM contract to *seek* subrogation—cannot pursue its own subrogation claim in federal court. *See id.* at 689-701. Absent diversity or supplemental jurisdiction, carriers thus can challenge antisubrogation laws as preempted in federal court *only* if sued by plan participants.

ance Co., 598 S.E.2d 448 (Ga. 2004), that FEHBA preempts state antisubrogation laws. Thurman, a FEHBA-plan participant, was injured in an automobile accident, and received benefits from her FEHBA carrier. *Id.* at 449-50. Thurman settled with the third party responsible for the accident, exhausting that third party's insurance coverage. *Id.* at 449. The FEHBA carrier claimed a portion of the settlement proceeds under a subrogation provision of its OPM contract, and was paid directly by the third party's insurer. *Id.* at 450. Thurman sought to recover from her *own* insurer, under an uninsured-motorist policy. Because the FEHBA carrier had taken a portion of Thurman's settlement with the third party's insurer, she argued, the third party was effectively underinsured. *Ibid*.

In holding that Thurman could recover from her own insurer, the Georgia Supreme Court held that Section 8902(m)(1) preempted a state law that otherwise would have barred the FEHBA carrier from seeking subrogation. 598 S.E.2d at 450-51. Whether Thurman could recover from her own insurer, the court explained, turned on whether the FEHBA carrier could properly assert its subrogation claim. *Ibid*. Georgia's full-recovery rule, like Minnesota's, barred "an injured party's medical insurer" from "seek[ing] reimbursement from the injured party unless and until" the injured party fully recovered all of her "economic and noneconomic damages." *Id.* at 451. But Georgia's full-recovery rule, the court held, was preempted by Section 8902(m)(1). *Ibid*. Thurman's FEHBA "benefits are governed by federal law" and the terms of the FEHBA carrier's contract. *Ibid.* Because the contract provided for subrogation, the carrier had a "subrogation lie[n] and w[as] able to enforce [it] upon the injured party's receipt of a settle-

ment from the liable third party, *regardless of* Georgia's requirement that such action be preceded by a determination that the injured person had been fully compensated." *Ibid.* (emphasis added).

The Missouri Supreme Court reached the opposite conclusion here. Pet. App. 3a-10a. Conflict with the Eighth Circuit *or* the Georgia Supreme Court would each be sufficient to merit certiorari, *see* Sup. Ct. R. 10, but a conflict between state and federal courts *within the same State* offers a particularly urgent reason for review. *See*, *e.g.*, *Johnson* v. *California*, 545 U.S. 162, 164 (2005); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). In suits in Missouri *federal* court, governed by *Ochs*, subrogation provisions in FEHBA plans will be given full effect. But in Missouri's *state* courts, the decision below now controls, and those same provisions are practically nullities. The governing law in Missouri will vary based entirely on the legal forum in which suit is brought.

The Georgia Supreme Court and Eighth Circuit are also hardly alone in holding that FEHBA preempts state antisubrogation laws. The Sixth Circuit has recognized that, "[b]ecause federal law preempts state law, [a State] cannot stop [a FEHBA plan] from requiring reimbursement." *Shields* v. *Gov't Emps. Hosp. Ass'n*, 450 F.3d 643, 648 (6th Cir. 2006), *overruled on other grounds by Adkins* v. *Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (en banc). And numerous other lower courts have reached the same conclusion. *See Calingo* v. *Meridian Res. Co.*, 2013 WL 1250448, at *3-4 (S.D.N.Y. Feb. 20, 2013); *NALC Health Benefit Plan* v. *Lunsford*, 879 F. Supp. 760, 762-63 (E.D. Mich. 1995); *Aybar* v. *N.J. Transit Bus Operations, Inc.*, 701 A.2d 932, 937-38 (N.J. App.

Div. 1997); *see also Buatte* v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440, 441-42 (Mo. App. 1996), *overruled by* Pet. App. 3a-10a. The court below relied heavily on one contrary decision from Arizona's intermediate appellate court. *See Kobold*, 309 P.3d at 924; Pet. App. 8a-10a. Notably, however, the United States submitted a brief urging the Arizona Supreme Court to grant review in *Kobold*, *see* U.S. *Amicus* Br. 9-19, *Kobold*, No. CV-13-299-PR, although that request was denied, *see* Order, No. CV-13-299-PR.

This glaring incongruity from one forum to another destroys the uniformity essential to efficient administration of federal-employee benefits, and cannot be allowed to persist.

B. The Missouri Supreme Court's Holding That State Antisubrogation Laws Are Not Preempted Contravenes FEHBA And This Court's Precedent.

The holdings of the Eighth Circuit, the Georgia Supreme Court, and others that the decision below rejected are correct. The decision below cannot be reconciled with FEHBA or with *this* Court's precedent.

1. The Decision Below Distorts FEHBA's Text.

Preemption is "at bottom" a question "of statutory intent." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 30 (1996). Thus, as with any statutory question, a court must resolve it by "'reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.'" *Kasten* v. *Saint-Gobain Performance*

Plastics Corp., 131 S. Ct. 1325, 1330 (2011) (citation omitted).

Where "a federal law contains an express preemption clause," courts must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent." *Chamber of Commerce of United States* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (internal quotation marks omitted). And they must "'begin with … the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,'" *Morales*, 504 U.S. at 383 (quoting *FMC*, 498 U.S. at 57). Courts, moreover, "must have regard to *all* the words used by Congress," *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (emphasis added) (internal quotation marks omitted), and "give effect, if possible, to every clause and word," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

The decision below flouted these principles. It mangled the meaning of the words the court ranked as significant, and simply disregarded the rest.

a. The court below distorted the ordinary meaning of what it deemed Section 8902(m)(1)'s "operative" terms. Its crabbed definition of "benefits" as encompassing only *initial* payments to participants (Pet. App. 9a-10a) entirely disregards the effect of subrogation in reducing the *net* benefits a participant ultimately received. Indeed, as the United States pointed out below, a participant who happens to recover from a third party *before* receiving FEHBA benefits will never receive the duplicative benefits at all (or will receive less). *See* Pet. App. 124a.

This Court has rejected such transparently artificial distinctions in strikingly similar contexts. In *Hillman* v. *Maretta*, 133 S. Ct. 1943 (2013), applying a federal statute governing federal employee life insurance, the Court refused to distinguish initial payment of benefits from a subsequent *transfer* of benefit payments. *See id.* at 1952. Although federal law required that benefits be paid to the employee's named beneficiary, the respondent in *Hillman* claimed that that requirement did not preempt state law requiring a transfer of benefit payments from the beneficiary to the employee's widow. *Id.* at 1948-49. This Court, however, explained that it "makes no difference" whether state law withholds benefits in the first instance or takes them away after they have been paid. *Id.* at 1952. "In either case, state law displaces the beneficiary selected" under federal law. *Ibid.* So, too, as the United States argued below, the Missouri Supreme Court's distinction between benefits paid initially and net benefits a FEHBA participant *keeps* is mere sophistry. *See* Pet. App. 128a.

Indeed, this Court has squarely held that reimbursement "relates to" employee "benefits" in considering the same issue as it affects *private* employers. ERISA, which governs private employees' benefits, contains a preemption clause similar to Section 8902(m)(1). ERISA's clause provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Interpreting that provision, this Court has held that it encompasses state laws that "prohibi[t] plans from … requiring reimbursement." *FMC*, 498 U.S. at 58-60. To be sure, ERISA's provision preempts state law related to a "plan," rather than to "coverage," "benefits," or "payments with respect to benefits." But *FMC*'s rea-

soning is equally applicable to FEHBA. *FMC* held that state laws barring reimbursement "relate to" ERISA plans *precisely because* reimbursement affects the plan's calculation of *benefits*. Such laws, the Court explained, "requir[e] plan providers to calculate benefit levels in" States *with* antisubrogation laws "based on expected liability conditions that differ from those in States" *without* them. *Id.* at 60. That, in turn, "frustrate[s] plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Ibid.* The same is true under FEHBA.

FMC's holding regarding ERISA is especially instructive because of the close parallel between the two preemption provisions' texts and contexts. Multiple courts have held that, due to these similarities, "precedent interpreting the ERISA provision" is "authority for cases involving the FEHBA provision." *Botsford* v. *Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 393-94 (9th Cir. 2002); *see also Pharm. Care Mgt. Ass'n* v. *Rowe*, 429 F.3d 294, 299-300 n.2 (1st Cir. 2005); *Aybar*, 701 A.2d at 935-36. Yet, although the court below was apprised of *FMC*, *see* Pet. App. 118a-119a, it did not even *mention* it.

b. There is much *less* justification for departing from *FMC*'s analysis here, because FEHBA's preemption is in several respects even more expansive than ERISA's. Section 8902(m)(1) shields from state-law interference not only contract terms that "relate to" "benefits," but *also* terms that "relate to … *payments with respect to* benefits." 5 U.S.C. § 8902(m)(1) (emphasis added). Subrogation clauses plainly "relate to" "payments" made "with respect to benefits." Their whole point is to facilitate *repayments* of benefits back to carriers. Thus, even if the Missouri Supreme Court's reading of Section

8902(m)(1)'s purportedly "operative" words were correct, its reading of the statute as a "whole" (*Kasten*, 131 S. Ct. at 1330 (citation omitted)) was plainly wrong.

2. The Decision Below Disregarded Section 8902(m)(1)'s Purpose.

The decision below also paid only lip service to Congress's "purpose," the "ultimate touchstone of pre-emption analysis." *Wis. Dep't of Ind., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 290 (1986) (internal quotation marks omitted). Although it acknowledged the importance of "congressional purpose," Pet. App. 5a, it never considered what Section 8902(m)(1)'s purpose *is*. Congress's aim is readily apparent: It sought to prevent idiosyncratic state laws from interfering with OPM's establishment and carriers' efficient administration of uniform financial assistance that does not depend on a participant's state of residence.

If there were any doubt, it is erased by the legislative history. Congress enacted the original Section 8902(m)(1) to address concerns regarding States' imposition of divergent requirements on FEHBA plans—for example, laws mandating provision of specific benefits. Such requirements could cripple uniformity and make administration of nationwide plans unmanageable. *See* S. Rep. No. 95-903, at 7 (1978); H.R. Rep. No. 95-282, at 3-7 (1977); H.R. Rep. No. 94-1211, at 3. After decades of additional experience, Congress determined that the original provision did not go far enough. It accordingly broadened Section 8902(m)(1) "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being

frustrated by State laws." H.R. Rep. No. 105-374, at 9; *see* S. Rep. No. 105-257, at 9, 14-15 (1997).

These purposes are thwarted by permitting state antisubrogation laws to interfere with administration of FEHBA plans. Allowing States to impose a patchwork of varying restrictions governing when carriers may recoup benefits (if at all) obliterates national uniformity. And it hobbles the cost-cutting efforts that Congress enacted (and strengthened) Section 8902(m)(1) to protect.

3. The Presumption Against Preemption Has No Application To FEHBA.

The Missouri Supreme Court's textual analysis was substantially skewed by the court's view that "the presumption against preemption" requires construing Section 8902(m)(1) not to preempt state antisubrogation laws. Pet. App. 4a, 6a, 8a & n.1. That presumption, however, has no application to federal statutes concerning administration of benefits of federal employees.

The presumption is simply a starting "assum[ption]" that, "[i]n areas of traditional state regulation," state law is not preempted "unless Congress has made such intention clear and manifest." *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (internal quotation marks omitted). It thus is overcome where Congress *has* clearly swept aside state law. Even "state laws 'governing'" areas of quintessential state concern—including "family law"—"'must give way to clearly conflicting federal enactments.'" *Hillman*, 133 S. Ct. at 1950 (citation omitted).

The presumption, moreover, "is not triggered" *at all* "when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). And where the "interests at stake are 'uniquely federal' in nature," the presumption is wholly out of place. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (citation omitted). That is true of "the relationship between a federal agency and the entity it regulates." *Ibid.* That relationship "is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Ibid.* Indeed, state law that is "precisely contrary to [a] duty imposed by [a] Government contract" is preempted if it would create a "significant conflict" with a "federal policy or interest" and the "federal interest requires a uniform rule." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507-09 (1988); *see also Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 365-66 (1943).

The Missouri Supreme Court, though presented with these precedents, Mo. S. Ct. GHP Br. 30-36 ("GHP Br."), never confronted them. Yet they clearly doom any application of the presumption against preemption here. As discussed above, *supra* at 17-21, FEHBA unambiguously preempts Missouri's anti-subrogation rule. But even if Congress's intent were unclear, the presumption could not be sensibly applied to a federal statute governing the administration of *federal* contracts to provide benefits to millions of *federal* employees nationwide. Even more than the government's relationship with entities it regulates, the administration of benefits for workers the government itself employs—pursuant to contract terms established and overseen by OPM—is "inherently federal." *Buckman*, 531 U.S. at 347. The

"'uniquely federal'" interests at stake, *ibid.* (citation omitted), are fundamentally incompatible with a motley assortment of state-specific restrictions.

4. *McVeigh* Has No Bearing On FEHBA's Preemption Of State Antisubrogation Laws.

The decision below also relied on dictum in *McVeigh*, 547 U.S. 677, as support for its countertextual construction of Section 8902(m)(1). Pet. App. 5a-8a. But *McVeigh* has no bearing on whether FEHBA preempts state antisubrogation laws. To the contrary, *McVeigh* expressly *reserved judgment* on that question. 547 U.S. at 697-98.

The only issue *McVeigh* decided was "the proper *forum*" for FEHBA carriers to seek reimbursement of duplicative benefits—not *whether* they may do so notwithstanding state law. 547 U.S. at 682 (emphasis added). In *McVeigh*, a FEHBA carrier filed suit in federal court seeking reimbursement from a participant who had received benefits but also recovered from a third party. *Id.* at 683. The carrier argued that federal-court jurisdiction lay because its claims "'ar[ose] under'" federal law. *Id.* at 683, 688. (quoting 28 U.S.C. § 1331).

Ordinarily, "the presence or absence of federal-question jurisdiction" is judged based on the "face of the plaintiff's properly pleaded complaint," and "federal pre-emption is … a *defense*." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987) (emphasis added). But "the pre-emptive force of" certain statutes "is so 'extraordinary'" that it not only displaces all state law in the field but also "'converts'" any purported state-law claim into a federal one, providing a federal forum for its adjudication. *Id.* at 393 (citations omit-

ted). The carrier in *McVeigh* contended that its complaint "'state[d] a federal claim'" under this doctrine. 547 U.S. at 693 (citation omitted). Over the forceful dissent of four Justices, the Court held federal-question jurisdiction lacking. *See id.* at 689-701; *see also id.* at 702-14 (Breyer, J., joined by Kennedy, Souter, and Alito, JJ., dissenting).

In addressing the subject-matter jurisdiction issue, the Court observed in dictum that Section 8902(m)(1) plausibly might be read as shielding from state interference only terms of OPM contracts that relate to the initial payments that FEHBA beneficiaries receive without regard to the carrier's "post-payments right to reimbursement." 547 U.S. at 697. But the Court also noted that the statute supports the view that state laws that purport to preclude carriers from seeking reimbursement are preempted. *Ibid*. The Court did not probe either possibility because the issue was academic. As the Court made clear, it "*need not choose* between those plausible constructions" because they had no bearing on the jurisdictional question before the Court. *Id.* at 698 (emphasis added). *Regardless* which reading was correct, Section 8902(m)(1) did not confer federal jurisdiction. *Ibid.*

Even taken for all it might be worth, *McVeigh*'s suggestion that the statute's text might not reach subrogation is not particularly informative. *Most* statutory analysis cases involve alternative proffered readings of the relevant language, but nearly all of those alternatives are ordinarily excluded by the relevant context and familiar canons of construction—matters that *McVeigh* did not remotely address. *See*, *e.g.*, *Deal* v. *United States*, 508 U.S. 129, 131-32 (1993). A statute is not ambiguous simply because

two constructions are possible *before* appropriate interpretative tools are applied. Indeed, even in the *criminal* context, this Court has "declined to deem a statute 'ambiguous,'" opening the door for the rule of lenity, "merely because it was *possible* to articulate" a different construction. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). "[T]o acknowledge ambiguity," in other words, "is not to conclude that all interpretations are *equally* plausible." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (emphasis added).

There is quite a bit of distance between the view that a preemption statute does not provide a federal forum and the conclusion that it does not preempt at all. The latter would make the provision entirely pointless. Not surprisingly, other courts have rejected the Missouri Supreme Court's reading of *McVeigh*. The Third Circuit, for example, recently held that *McVeigh* dealt only with federal "jurisdiction over a FEHBA plan's subrogation-based claim for reimbursement against a plan enrollee." *Pellicano* v. *Blue Cross Blue Shield Ass'n,* 540 F. App'x 95, 99 (3d Cir. 2013) (per curiam). *McVeigh*, the Third Circuit explained, "considered the scope of" Section 8902(m)(1) "only for purposes of evaluating whether it was broad enough to be 'jurisdiction-conferring.'" *Ibid.* (citation omitted). It thus had no bearing on whether FEHBA preempted state tort law that would have interfered with a carrier's administration of benefits under its OPM contract. *See id.* at 98-99 (affirming dismissal of claims of "'emotional distress' based on the improper processing of health benefits" as preempted by FEHBA); *see also Maple* v. *United States ex rel. OPM*, 2010 WL 2640121, at *2 n.2 (W.D. Okla. June 30, 2010) (*McVeigh* irrelevant

to whether state-law breach-of-contract and similar claims against carrier were preempted by FEHBA).[9]

These cases confirm what is clear from the face of *McVeigh* itself. In endorsing a "modest reading of the provision," *McVeigh* was simply rejecting a reading of the statute so sweeping as to confer federal jurisdiction. 547 U.S. at 698. That is not a mandate that, as between any two readings of Section 8902(m)(1), the narrower one always prevails, even where, as here, such a reading would render the provision pointless.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S AND FEDERAL COURTS OF APPEALS' PRECEDENT BY REFUSING TO ACCORD ANY WEIGHT TO OPM'S WELL-REASONED VIEW.

Even if Section 8902(m)(1)'s text and purpose left room for doubt that it preempts state antisubrogation laws, it is resolved by according respect to OPM's reasoned, and reasonable, interpretation. OPM, the agency charged by Congress to administer FEHBA, has consistently maintained that the statute preempts application of state laws barring subrogation by FEHBA plans. The court below, however, gave OPM's long-settled view zero weight. That holding conflicts with this Court's teaching and case law from numerous federal courts.

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[9] The Eighth Circuit, in *Jacks*, also concluded that *McVeigh* actually supports the view that state antisubrogation laws are preempted. 701 F.3d at 1235 (*McVeigh* makes such a claim "colorable").

A. OPM's Consistent Interpretation Of Section 8902(m)(1) Merits Deference Under This Court's Case Law.

"When faced with a problem of statutory construction," courts should "sho[w] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Indeed, the reasonable interpretation of a statute by the agency charged with administering it is often dispositive. *See Chevron USA, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218 & n.4 (2009). To be sure, the deference described in *Chevron* ordinarily is reserved for agency interpretations articulated in "administrative action with the effect of law," such as "notice-and-comment rulemaking or formal adjudication." *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). But that is not categorically true. The Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 231; *cf. Reno* v. *Koray*, 515 U.S. 50, 61 (1995) (deferring to Bureau of Prisons' interpretation, in internal guideline, of statute affecting duration of incarceration).

Even where *Chevron* is inapplicable, moreover, it does not follow that the agency's view is "outside the pale of any deference whatever." *Mead*, 533 U.S. at 234. An agency's statutory interpretation based on its "experience and informed judgment" is still "entitled" at a minimum "to a measure of respect under" *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (internal quotation marks omitted); *see*, *e.g.*, *Kasten*, 131 S. Ct. at 1335-36. "*Chevron*," in short, "did noth-

ing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form." *Mead*, 533 U.S. at 234.

As petitioners and the government argued below, OPM's reasonable reading of Section 8902(m)(1) was entitled to substantial deference here. GHP Br. 17-23; Pet. App. 124a-125a. OPM, authorized to issue implementing regulations under FEHBA, 5 U.S.C. § 8913(a), has long included in its contracts clauses mandating subrogation. It has done so even in "State[s] in which subrogation is prohibited." 2000 Standard Contract § 2.5. And OPM has "consistently recognized that the FEHBA preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts." Pet. App. 84a. It advanced that view in *McVeigh* itself. U.S. *Amicus* Br. 19-20, *McVeigh*, 547 U.S. 677 (No. 05-200). And it has "continue[d] to maintain" that position since. Pet. App. 84a.

OPM's explanation of its view is also well-reasoned. A carrier's "right to subrogation and/or reimbursement recovery," it has explained, "is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for their benefits." Pet. App. 83a. Subrogation thus "necessarily relates to the [participant's] coverage or benefits (including payments with respect to benefits)." *Ibid.* Moreover, "for experience-rated carriers and most-community-rated carriers, subrogation and reimbursement recoveries serve to lower subscription charges" for FEHBA-plan participants. *Ibid.* Whether a carrier can pursue subrogation (as required by its OPM contract) thus affects the price that participants pay for a given level of benefits—the bang that they get for their buck.

The decision below, however, accorded OPM's interpretation no weight whatsoever. It dismissed deference in a single footnote. Pet. App. 10a-11a n.2. Nearly all of its analysis addressed only *Chevron* deference. *Ibid.* The court acknowledged in passing that "informal agency interpretations of statutes are relevant." *Ibid*. But it brushed aside OPM's interpretation on the erroneous assumption that Congress has not "delegated to [OPM] the authority to make binding interpretations" of Section 8902(m)(1). *Ibid.* Congress, as noted, *has* given OPM rulemaking authority. *See* 5 U.S.C. § 8913(a). Authority to adopt *binding* interpretations, moreover, is unnecessary to offer input meriting respect.

The court's other reasons for disregarding OPM's view—that the 2012 Letter was "recent" and "drafted in response to litigation," Pet. App. 10a-11a n.2—are equally unfounded. As the court noted, the 2012 Letter "reiterate[d]" OPM's already-existing "position." *Ibid.*; *see also id.* at 84a. That OPM issued the Letter in response to some States' refusal to "allo[w] [carriers] to collect subrogation and/or reimbursement recoveries" (*id.* at 82a) likewise does not disentitle its view to respect. Agency interpretations issued to correct lower courts' misunderstanding of statutes can merit even *Chevron* deference. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-86 (2005). Here, apparent confusion concerning a law OPM administers showed that additional guidance was necessary.

B. The Missouri Supreme Court's Refusal To Accord OPM's View Any Weight Conflicts With Federal-Court Rulings.

By refusing to accord respect to OPM's view because it was articulated informally, the Missouri Su-

preme Court also diverged from the rule that prevails in other lower courts. Its decision directly conflicts with the holdings of two federal courts of appeals that informal OPM interpretations merit substantial deference. And the rationales the court below gave for ignoring OPM's understanding only deepen the divide.

1. In *Blue Cross & Blue Shield of Florida, Inc.* v. *Department of Banking & Finance*, 791 F.2d 1501 (11th Cir.), *reh'g denied*, 797 F.2d 982 (11th Cir. 1986), the Eleventh Circuit deferred to OPM's informal interpretation of the prior version of Section 8902(m)(1) in holding a state law preempted. *See* 791 F.2d at 1506. At issue was whether Section 8902(m)(1) preempted a state law regulating unclaimed federal-benefit checks. *Id.* at 1503. The court deferred to OPM's view that the state law was preempted, even though that view was expressed only in a FEHBA contract and in advocacy in court. *See id.* at 1506, *aff'g* 613 F. Supp. 188, 190-94 (M.D. Fla. 1985). "OPM, which administers the federal health benefit program, found that preemption of the unclaimed property law was permitted under section 8902(m)." 791 F.2d at 1506. "To sustain OPM's application of section 8902(m)," the court explained, it "need only find that OPM's determination that the unclaimed property law 'relates to' health insurance or plans is reasonable." *Ibid.* Because OPM's view was "reasonable," it was "entitled to deference," and the state law was preempted. *Ibid.*

Similarly, in *Dyer* v. *Blue Cross & Blue Shield Association (In re Bolden)*, 848 F.2d 201 (D.C. Cir. 1988), the D.C. Circuit affirmed a decision according deference to OPM's reasonable interpretation of another FEHBA provision, 5 U.S.C. § 8909(b). *See* 858

F.2d at 205-08, *aff'g Bolden* v. *Blue Cross & Blue Shield Ass'n*, 669 F. Supp. 1096, 1101-03 (D.D.C. 1986). Deference was warranted, the D.C. Circuit held, even though OPM articulated its interpretation of the statute *not* in a regulation or formal adjudication, but in a memorandum issued after litigation had commenced. *See* 848 F.2d at 206-07; *Bolden*, 669 F. Supp. at 1099, 1101-03.

The decision below, in contrast, refused to accord *any* deference to OPM's interpretation of Section 8902(m)(1). Pet. App. 10a-11a n.2. Although the court acknowledged that the 2012 Letter "reiterates" OPM's settled view, it accorded OPM's view zero weight. *Ibid.*

2. The Missouri Supreme Court's primary rationale for withholding deference only compounds the conflict. Numerous federal courts of appeals have held that, notwithstanding *Mead*, agencies' readings of statutes that they are charged to administer "are entitled to great weight," even when articulated in "interpretive letters," "amicus briefs," or other informal means. *Cmty. Bank of Ariz.* v. *G.V.M. Trust*, 366 F.3d 982, 987 (9th Cir. 2004) (interpretive letters); *see*, *e.g.*, *Sai Kwan Wong* v. *Doar*, 571 F.3d 247, 260-62 (2d Cir. 2009) (manual); *Doe* v. *Leavitt*, 552 F.3d 75, 79-86 (1st Cir. 2009) (guidebook and informal decision); *see also State Farm Bank, FSB* v. *Reardon*, 539 F.3d 336, 341 n.3 (6th Cir. 2008) (opinion letter). Only last year, a district court reversed its *own* prior interpretation of Section 8902(m)(1) in light of the 2012 Letter, holding that, regardless whether the Letter merits *Chevron* deference, it is "persuasive" and thus entitled to deference under *Skidmore*. *Calingo*, 2013 WL 1250448, at *3-4.

The decision below conflicts with this well-settled understanding. It summarily rejected GHP's and the government's contention that, even if OPM's view does not merit *Chevron* deference, it is still entitled to substantial weight under *Skidmore*. Pet. App. 10a-11a n.2. By treating deference as an all-or-nothing inquiry, and giving OPM's view no weight because it was informal, the decision below sharply diverged from other courts' case law.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION CONCERNING STATES' INTERFERENCE WITH FEDERAL EMPLOYEE BENEFITS.

The question presented holds immense significance for the FEHB Program—and thus for numerous FEHBA carriers, more than eight million FEHBA-plan enrollees, and the government.

1. Most immediately, the Missouri Supreme Court's decision imposes severe burdens on FEHBA carriers. Carriers "are *required* to seek reimbursement and/or subrogation recoveries" under their OPM contracts, even where state law forbids it. Pet. App. 83a (emphasis added); *see also id.* at 94a. Yet the decision below bars carriers that administer the two dozen FEHBA plans available in Missouri from fulfilling this obligation. Carriers are thus faced with an untenable choice between complying with state law and honoring their federal-law duties. Indeed, participants might seek sanctions against carriers who, as required by their contracts with OPM, seek subrogation in States where state law clearly forecloses it. Yet a carrier's *failure* to pursue such recovery may jeopardize its standing with OPM.

Nor will the effects of the decision below be limited to Missouri. The ruling guarantees that carriers will be subjected to different law in different States. Because FEHBA plans are governed by federal law, plans often include enrollees from multiple states.[10] Plans operating across state lines will have to account for differences in state laws regarding subrogation, as well as different holdings with respect to the scope of FEHBA preemption. And such complexities are magnified exponentially for the fifteen FEHBA plans that operate *nationwide*.

2. Ultimately, the burdens imposed by the decision below will fall on federal employees and taxpayers. As the government has explained, subrogation recoveries "tend to reduce the premiums" that plan participants pay. Pet. App. 131a. Allowing a privileged few employees who are compensated by third parties to retain redundant federal benefits—solely because of their State of residence—unfairly punishes all *other* employees covered by the same plan, who must subsidize their coworkers' windfalls. And the taxpaying public, which pays the lion's share of benefits, will be unjustly compelled to pay for benefits that, by definition, are duplicative. Moreover, as administrative costs spiral in response to a lack of national uniformity, those costs, too, will be passed on to participants, the government, and the public.

This is no trivial matter. The FEHB Program covers over 8.2 million individuals, at an annual cost of tens of *billions* of dollars. *See*, *e.g.*, *2013 Hearing*

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[10] *See*, *e.g.*, OPM, Insurance Programs—2014 Plan Information for Missouri, http://www.opm.gov/healthcare-insurance/-healthcare/plan-information/plan-codes/2014/states/mo.asp (last visited April 27, 2014).

at 5 (statement of Jonathan Foley, Director, Planning and Policy Analysis, U.S. Office of Personnel Management). The government's share of premiums in 2012 exceeded $30 billion. Pet. App. 131a. Delay in this Court's review—allowing uncertainty to linger—would only magnify the cost and complexity of administering the Program.

3. This case provides an excellent vehicle for review of this important, recurring question. The question presented was thoroughly pressed and passed upon below, and the Missouri Supreme Court's decision represents the definitive, unequivocal judgment of the State's highest court. The fact that the United States has already expressed its view that the conclusion reached by that court is both important and wrong further assures that all relevant arguments were considered below.

That the court remanded for further proceedings regarding the merits of Nevils's state-law claims does not deprive the decision below of finality required by 28 U.S.C. § 1257(a). The requirement that a state-court decision be "final" is satisfied, notwithstanding a remand, "where the federal issue has been finally decided," where "reversal of the state court on the federal issue would be preclusive of any further litigation," and where "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). The examples *Cox* cited, notably, involved review of state-court decisions rejecting claims of federal preemption. *See ibid.* (citing *Constr. Laborers* v. *Curry*, 371 U.S. 542 (1963), and *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963)). The Court has followed the same course since. *See*, *e.g.*, *Miss. Power & Light Co.* v. *Mississippi ex rel. Moore,*

487 U.S. 354, 370 n.11 (1988); *see also Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769 (2013).

There can be no question here that the preemption issue has been "finally decided" and that "reversal … would be preclusive of any further litigation." *Cox*, 420 U.S. at 482-83. Nor is there any doubt that delaying review "might seriously erode federal policy." *Id.* at 483. On remand, petitioners will be compelled to defend a putative class action seeking to impose potentially massive liability. Whatever the result, the litigation itself will consume significant plan resources and disrupt its administration—harming plan participants, the government, and taxpayers—all because GHP honored its contractual obligations to OPM.

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This Court should grant certiorari now to bring much needed clarity to the law. The FEHB Program—a *national* program for the workforce of the Nation's government—requires national rules. Congress recognized as much in Section 8902(m)(1), the central aim of which is to ensure national uniformity under standards prescribed by OPM. The decision below, if allowed to stand, will ensure just the opposite, subjecting carriers to a patchwork of divergent rules that vary from one State (and now from one forum) to another. The cost for enrollees, insurers, and the public is too great for uncertainty regarding this important question to be allowed to persist.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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