No. 13-1467

In The
Supreme Court of the United States

AETNA LIFE INSURANCE CO.,

Petitioner,

v.

MATTHEW KOBOLD,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Arizona

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

This is the Federal Employee Health Benefit Act's preemption statute, 5 U.S.C. § 8902(m)(1):

> The terms of any contract under this chapter which relate to the nature, provision, 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.

Do the plain words of that statute preempt Arizona's common-law anti-subrogation doctrine?

(Arizona's common-law anti-subrogation doctrine prohibits an insurer from asserting a reimbursement or subrogation claim against an insured's tort settlement for tort-related healthcare benefits that the insurer has paid for the benefit of that insured.)

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Reasons for Denying the Petition

1. The Arizona Court of Appeals has reasonably construed the plain words of FEHBA's preemption statute.

This appeal concerns the plain words of the Federal Employee Health Benefit Act's preemption statute, 5 U.S.C. § 8902(m)(1):

> The terms of any contract under this chapter which relate to the nature, provision, 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.

This Court once wrote that FEHBA's preemption statute is "a puzzling measure, open to more than one construction." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006). But when deciding what the preemption statute means in respect to Arizona's common-law anti-subrogation doctrine, the preemption statute's plain words suffice. In fact, the Arizona Court of Appeals reasonably interpreted the preemption statute's plain words by focusing on the statute's three most relevant terms: "coverage," "relate to," and "benefits."

"*Coverage*" is a term the Arizona Court of Appeals found referred to the scope of the risks under the FEHBA plan or policy. *Kobold v. Aetna Life Ins. Co*., 233 Ariz. 100, 103 ¶ 11, 309 P.3d 924, 927 ¶ 11 (App. 2013). Since nothing in the FEHBA plan's subrogation

provision purported to affect the scope of Aetna's risk, the subrogation provision did not relate to coverage. So the "coverage" term was not relevant to this dispute.

"*Relate to*" is a term the Arizona Court of Appeals held required "'a direct and immediate relationship'" because, if the term were extended "'to the furthest stretch of its indeterminacy,'" for all practical purposes preemption would never end, since relationships have no theoretical end. *Id*. at 103 ¶ 10, 309 P.3d at 927 ¶ 10 (quoting *Roach v. Mail Handlers Benefit Plan*, 298 F.3d 847, 849-50 (9th Cir. 2002) (FEHBA did not preempt a covered employee's state-law malpractice claims.)). The fact that Aetna's payment of benefits to Kobold triggered Aetna's contract right of reimbursement did not mean that the reimbursement right related to the separate factor of the "nature, provision, or extent" of benefits. *Kobold*, 233 Ariz. at 104 ¶ 13, 309 P.3d at 928 ¶ 13.

"*Benefits*" was the final relevant term. The Arizona Court of Appeals held that "benefits" meant the financial help that Kobold had received, through payment of his medical expenses, because of the Aetna FEHBA policy's coverage. *Id*. at 104 ¶ 12, 309 P.3d at 928 ¶ 12. Thus, the term "benefits" included payments Aetna had made on behalf of the insured – but "*not* payments to the insured by third parties." *Id*. (emphasis added). In other words, the benefits Kobold was entitled to receive under the FEHBA plan did not depend on recovering money from a third party. After all, "Kobold would have been entitled to the same

benefits had he never even brought an action for damages." *Id*. at 104 ¶ 13, 309 P.3d at 928 ¶ 13.

Aetna accuses the Arizona Court of Appeals of failing to interpret the preemption statute as a whole because it did not separately analyze the phrase "including payments with respect to benefits." But in a statute talking about the effect of the terms of a FEHBA "contract," the term "payments" must be referring to contract payments made by the FEHBA plan for the insured person's benefit. The statute's words contain no hint that they apply to payments that a third party might make to the plan participant. "Payments" thus does not refer to a settlement or recovery obtained from a third-party tortfeasor. And there is no preemption.

The interplay of the relevant words "coverage," "relates to," and "benefits" means that 5 U.S.C. § 8902(m)(1) applies only to contract terms having a direct and immediate relationship to the nature, provision, or extent of benefits that Aetna provided under the FEHBA policy. Those contract terms thus supersede and preempt state law related to the nature, provision, or extent of benefits under health insurance or health plans. They do not preempt Arizona's common-law anti-subrogation doctrine.

The "plain meaning of legislation should be conclusive." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Thus, when a statute's words are clear, administrative interpretation of the statute is not entitled to deference. *Demarest v.*

Manspeaker, 498 U.S. 184, 190 (1991). Because Matthew Kobold's receipt of a tort settlement from a third party falls outside the scope of the FEHBA preemption statute, the trial court and Arizona Court of Appeals properly found that the statute did not apply. And the trial court properly granted summary judgment in Kobold's favor.

2. Aetna is inviting this Court to undertake a search for legislative history and ignore the preemption statute's plain words.

The plain words of 5 U.S.C. § 8902(m)(1) do not preempt Arizona's common-law anti-subrogation doctrine. Despite that – or rather because of that – Aetna spends much of its petition asking this Court to look outside the plain words of the preemption statute to find its meaning. Among other things, Aetna asks this Court to consider:

- the executive branch's "view" (Pet. at 2);
- the preemption statute's "purpose" (Pet. at 19);
- "dispositive sources of statutory meaning" (Pet. at 28);
- Congress's intent and "purpose" (Pet. at 2-3, 25-26, 28);
- the statutory history of FEHBA's preemption statute as Congress sporadically revised it (Pet. at 26);

- the government's supposedly "well-established and well-reasoned views" and "interpretation" (Pet. at 3, 13); and
- OPM's views and "reasonable statutory interpretation," especially as they appear in a 2012 "guidance letter" from OPM to FEHBA insurance carriers (Pet. at 8, 11, 28-32).

But when a statute's plain words are clear, a court need not meander into legislative history or speculate about "purpose" and "intent." The plain words do the work. In 1929, Supreme Court Justice Pierce Butler offered plain-language statutory-interpretation principles that were as valid then as they are now:

(1) "It is elementary that, where no ambiguity exists, there is no room for construction." *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 277 (1929).

(2) If the words are clear and following them leads to nothing plainly unreasonable or impossible, judges may not "conjure up conditions to raise doubts in order that resort may be had to construction." *Id*.

(3) When a statute's language "is clear, and construction according to its terms does not lead to absurd or impracticable consequences," the statute's words are "the final expression" of the intended meaning. *Id*. at 278.

(4) In cases like that, legislative history may not be used to support a construction adding to or subtracting from the significance of the words the legislators used. *Id*.

(5) "Construction may not be substituted for legislation." *Id*.

(6) If any inconvenience or hardships result from following the statute as written, the solution is legislative. *Id*. at 277-78.

Justice Butler's principles have become even more important over the following decades as legislators, lobbyists, legislative staff members, and executive-branch personnel have increasingly manufactured materials meant to create "legislative history."

See also Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005, 1017 (1992) (Because they know that judges will refer to legislative history when interpreting statutes, "legislators, staffers, and lobbyists have great incentives to introduce comments in the record solely to influence future interpretations" and to insert statements that could not win majority support in the legislature.); David S. Law & David Zaring, *Law versus Ideology: The Supreme Court and the Use of Legislative History*, 51(5) Wm. & Mary L. Rev. 1653, 1662 (2010) ("That is to say, given the vast quantity and range of legislative history materials from which they have to choose, it is all too tempting for a judge to take only what is convenient – namely,

that which helps to achieve the desired result – and to ignore the rest.").

In 2005, Justice Anthony Kennedy reaffirmed that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). Kennedy advised that extrinsic materials can *only* have a role in statutory interpretation when they shed some reliable light on the legislature's understanding of otherwise ambiguous terms. *Id*.

"Not all extrinsic materials are reliable sources of insight into legislative understandings," Kennedy warned, with legislative history being "vulnerable to two serious criticisms." *Id*. First, legislative history is "often murky, ambiguous, and contradictory." *Id*. Second, judicial reliance on legislative materials like committee reports "may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.*

Kenneth Starr has likewise observed that it is "well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute." Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 377 (1987).

The basic problem is that, as Justice Robert Jackson wrote in 1953, the search for legislative history can turn from an analysis of words into "psychoanalysis" of the legislative body. *United States v. Public Utilities Commission of California*, 345 U.S. 295, 319 (1953). The quest for elusive legislative history requires inherently suspect judicial roleplaying:

> When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

Id. See also Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

In this case, the Court can avoid Justice Jackson's "weird endeavor" of legislative psychoanalysis by acknowledging that the FEHBA preemption statute's plain words and meaning "cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference

in every direction." *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). *See also Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (Justice Thurgood Marshall) (Unless exceptional circumstances require otherwise, judicial inquiry ends when a statute's terms are unambiguous.).

In his concurring remarks in the 2014 *Lawson* opinion, Justice Antonin Scalia summarized some of the flaws with relying on legislative history when the words of a statute are clear. With some formatting for purposes of expository ease, these are Justice Scalia's verbatim remarks:

> I do not endorse, however, the Court's occasional excursions beyond the interpretative terra firma of text and context, into the swamps of legislative history. Reliance on legislative history rests upon several frail premises.
>
> - First, and most important: That the statute means what Congress intended. It does not. Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law says.
> - Second: That there was a congressional 'intent' apart from that reflected in the enacted text. On most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever

> on how the issues should be resolved – indeed, were unaware of the issues entirely.
>
> • Third: That the views expressed in a committee report or a floor statement represent those of all the Members of that House. Many of them almost certainly did not read the report or hear the statement, much less agree with it – not to mention the Members of the other House and the President who signed the bill.

Lawson v. FMR LLC, 134 S.Ct. 1158, 1176-77 (2014) (Scalia, J., concurring).

In this case, where the FEHBA preemption statute's plain words do not preempt Arizona's common-law anti-subrogation doctrine, there is no need or right to consult any other sources to hunt the elusive quarry of congressional intent. The words themselves convey that intent. If Congress has a different intent than the intent its plain words disclose, the solution is not judicial, but legislative.

3. The trial court's reliance on this Court's *McVeigh* opinion was proper, although Circuit Judge Sonia Sotomayor's reasoning in the underlying Second Circuit opinion in *McVeigh* is even more relevant and instructive.

The trial court had relied on the U.S. Supreme Court's 2006 *McVeigh* opinion in granting summary

judgment for Matthew Kobold. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006). The Arizona Court of Appeals' statutory-interpretation approach resolved the *Kobold* appeal clearly and concisely – without relying on *McVeigh*. In fact, the Arizona Court of Appeals concluded that this Court's *McVeigh* opinion did not resolve the issues in the *Kobold* case. *Kobold*, 233 Ariz. at 102-03 ¶ 8, 309 P.3d at 926-27 ¶ 8.

But there are six aspects of this Court's *McVeigh* opinion that actually support the result that the Arizona Court of Appeals reached:

- *First*, if Congress meant for "a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *McVeigh*, 547 U.S. at 698.
- *Second*, 5 U.S.C. § 8902(m)(1)'s "text does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans." *Id*. (emphasis in original).
- *Third*, state law "plainly" governs any claim underlying a personal-injury recovery. *Id*.
- *Fourth*, 5 U.S.C. § 8902(m)(1) does not necessarily displace every condition that state law might place on a tort recovery. *Id*.

- *Fifth*, state law, and neither 5 U.S.C. § 8902(m)(1) nor the FEHBA plan, governs the liability of a tortfeasor who injures a plan beneficiary. *Id*. at 699.
- *Sixth*, 5 U.S.C. § 8902(m)(1) accommodates state law bearing on FEHBA plans in general and on "carrier-reimbursement claims in particular." *Id*.

This Court's *McVeigh* opinion is thus actually more helpful on the role of state common law and on the preemption issue in this case than the Arizona Court of Appeals realized. But even more instructive on applying state common law to a FEHBA plan participant's tort recovery is Second Circuit Judge Sonia Sotomayor's 2005 underlying *McVeigh* opinion. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2nd Cir. 2005), *aff'd*, 547 U.S. 677 (2006).

In *McVeigh*, a FEHBA plan sought to enforce a subrogation and reimbursement clause against a FEHBA plan participant who had obtained a $3.175 million tort settlement from an accident. The FEHBA plan had paid over $157,000 in medical benefits. When the plan participant refused to capitulate, the FEHBA plan sued him in federal district court, which dismissed the lawsuit for lack of subject-matter jurisdiction. *McVeigh*, 396 F.3d at 139-40.

Judge Sotomayor wrote that, "regardless of the strength or importance of the federal interests at stake, [the FEHBA plan] has failed to demonstrate that the operation of New York state law creates 'an

actual, significant conflict' with those interests." *Id*. at 141 (quoting *Woodward Governor Co. v. Curtiss-Wright Flight System, Inc.*, 164 F.3d 123, 127 (2d Cir. 1999)). The FEHBA plan's "speculations" that "uncertainties" that are associated with applying state law "'might' reduce the source of funds available to defray overall costs of paying benefits" was not enough to create an actual, significant conflict between a federal interest and state law. *Id*. at 141. (In our case also, yet another FEHBA plan ruminates, with no substantive financial analysis, on economic ruination.)

Far more important, Judge Sotomayor indicated that, if Congress had wanted to preempt all state law, it "could have quite easily provided that 'federal law shall govern the interpretation and enforcement of contract terms under this chapter which relate to the nature, provision, or extent of coverage or benefits.'" *Id*. at 146 n. 10. Because Congress did not do that, the terms of 5 U.S.C. § 8902(m)(1) leave room for state common law.

Significantly, much as the Arizona Court of Appeals did, Judge Sotomayor restrictively interpreted the "vague term 'relates to'" in the preemption statute. *Id*. at 147. In fact, she stressed that courts must presume Congress did *not* intend to preempt state common law because 5 U.S.C. § 8902(m)(1) indicates no clear and manifest intent to do that. *Id*.

Judge Sotomayor also emphasized the fact that the United States Supreme Court had warned against over-broad interpretation of "relates to"

because, if the "relates to" term "'were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere.'" *Id*. (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

Defining "relates to" too broadly would reduce Congress's words of limitation to a "'mere sham'" and take the "presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.'" *Id*. (quoting *Travelers Ins. Co.*, 514 U.S. at 655)). Finally, Judge Sotomayor found that the FEHBA preemption provision did *not* "manifest an intent to supplant all state law with federal common law in cases involving FEHBA-authorized contract provisions." *Id*. at 150.

Judge Sotomayor's analysis is consistent with the Arizona Court of Appeals' reasoning. This Court affirmed Judge Sotomayor's opinion. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 702 (2006) ("For the reasons stated, the judgment of the Court of Appeals for the Second Circuit is *Affirmed*.") (emphasis in original). It should do the same with the opinion the Arizona Court of Appeals crafted.

4. If true, the financial doom Aetna predicts is something Congress can avert by legislative action. The OPM cannot avert the predicted financial doom by trying to amend the preemption statute itself.

If the Arizona Court of Appeals' opinion threatens financial ruin for FEHBA plans, Aetna should be able to produce an objective economic study of the supposed threat that would accurately state its magnitude. Instead of concrete proof of economic disaster, Aetna sprinkles its petition with homilies such as: "The stakes of this conflict are difficult to overstate." Pet. at 14. But Aetna never tells us what the actual "stakes" are, in any specific dollars-and-cents way.

In place of proof, Aetna implies that letting states like Arizona apply their state anti-subrogation laws will cause FEHBA plans and their participants to lose millions or billions of dollars. Aetna's unsupported and dramatic references to vast sums of money bring to mind Senator Everett Dirksen's observation about the federal budget: "A billion here and a billion there, and pretty soon you're talking about real money." Hugh Rawson & Margaret Miner, eds., *The New International Dictionary of Quotations* 184 (1986). But rhetoric is no substitute for objective, fact-based analysis of financial calamity. Aetna has provided none.

In any event, if financial disaster looms, Congress can prevent that by amending 5 U.S.C. § 8902(m)(1)

to make it explicitly apply to and overrule all state statutory and common-law principles and doctrines.

The Office of Personnel Management's desire to create a stronger and broader FEHBA preemption statute than the one Congress actually enacted does not matter. On several occasions, OPM has apparently written letters and other documents promoting its belief that the FEHBA preemption statute preempts all state laws, including state anti-subrogation laws of general application. But when, as here, a statute is clear, courts must interpret it to give effect to Congress's words, regardless of the interpretation an administrative agency with responsibility for its enforcement may supply for the statute. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

As a result, an "agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted).

No deference is due an agency interpretation that fails to incorporate a statute's plain meaning. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989). OPM must accept the FEHBA

preemption statute as Congress wrote it – and cannot conjure more by wishful thinking. The measure of preemption is neither agency pique nor executive fiat.

5. When interpreting FEHBA's preemption statute, the Arizona Court of Appeals properly declined to rely on cases construing ERISA's preemption provision.

ERISA cases offer scant guidance. As the Second Circuit's *McVeigh* opinion held, a court "should be especially reluctant to rely on ERISA-based precedent to justify an expansive interpretation of FEHBA's preemption provision, given the fundamental differences between ERISA and FEHBA." *McVeigh*, 396 F.3d at 147. After all, "ERISA is significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme intended to completely supplant state law." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

In a recent opinion, the First Circuit held that, while FEHBA's preemption clause was "nearly identical" to ERISA's preemption provision, it was still not the same. *Lopez-Munoz v. Triple-S Salud, Inc.*, ___ F.3d ___, 2014 WL 1856769 at *5 (1st Cir. May 9, 2014). After all, FEHBA's preemption clause, unlike ERISA's preemption clause, did not attempt to make inoperative any and all state laws that related in some way to employee-benefit plans. *Id*. Under

FEHBA's preemption clause, state law still has a role to play.

In light of ERISA's "comprehensive civil enforcement mechanisms" and a legislative history confirming that ERISA's remedies were meant to be exclusive, Second Circuit Judge Sonia Sotomayor rejected the "suggestion that we should rely on ERISA-related precedent to determine the preemptive reach of FEHBA." *McVeigh*, 396 F.3d at 148. We ask this Court to do the same.

6. If there are competing plausible interpretations of a preemption statute, the nod goes to the interpretation disfavoring preemption.

We submit that the Arizona Court of Appeals' plain-word interpretation of FEHBA's preemption is the only plausible interpretation. But even if Aetna's contrary statutory interpretation is plausible, when there are two plausible interpretations of a federal law – one favoring preemption and one not – the tie goes to state law. *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 449 (2005).

That approach honors federalism. After all, the general presumption against preemption exists because respect for the states as "independent sovereigns in our federal system" leads courts to assume that "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, any consideration of preemption

"starts with the basic presumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "It has long been settled," this Court recently wrote, "that we presume federal statutes do not . . . preempt state law." *Bond v. United States*, 134 S.Ct. 2077, 2088 (2014).

The presumption against preemption increases "where federal law is said to bar state action in fields of traditional state regulation." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (The presumption "applies with particular force when Congress has legislated in a field traditionally occupied by the State.").

Because of the time-honored "primacy of state regulation of matters of health and safety," *Medtronic*, 518 U.S at 485, courts assume "that state and local regulation related to [those] matters . . . can normally coexist with federal regulations," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). Therefore, just as there is a presumption against preemption, there is a presumption in favor of the validity of state law. *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 661 (2003).

The possible existence of two plausible interpretations matters because courts "have a duty to accept the reading that disfavors preemption." *Bates*, 544 U.S. at 449. That duty applies even if there is an

express preemption clause. *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 240 (3rd Cir. 2009), *aff'd*, 131 S.Ct. 1068 (2011). Courts cannot favor one plausible interpretation over another plausible interpretation. "Tie, in that case, goes to the state." *Ter Beek v. City of Wyoming*, 495 Mich. 1, 3, ___ N.W.2d ___, ___, 2014 WL 486612 (Mich. Feb. 2, 2014). Thus, even if this Court finds that Aetna's interpretation of FEHBA's preemption statute is plausible, it should favor the competing plausible interpretation that favors state law. That is the interpretation that the Arizona Court of Appeals has advanced.

7. Arizona and Missouri are right and other courts and jurisdictions are wrong. FEHBA's preemption statute does not preempt state common-law anti-subrogation doctrines.

On February 4, 2014, the Missouri Supreme Court held that the FEHBA preemption statute did not preempt Missouri common law barring the subrogation of personal-injury claims. *Nevils v. Group Health Plan, Inc.*, 418 S.W.2d 451, 457 (Mo. 2014).

In reaching that conclusion, the Missouri Supreme Court heavily relied on the Arizona Court of Appeals' reasoning in the *Kobold* case. On April 28, 2014, this Court docketed a petition for writ of certiorari concerning the Missouri Supreme Court's opinion under the title of *Coventry Health Care of Missouri, Inc., fka Group Health Plan, Inc. v. Nevils*, Docket No. 13-1305. We understand that, because of an extension

in that case, the response to the petition for writ of certiorari will appear on June 30, 2014 – *after* the briefing on the petition for writ of certiorari in this matter will have ended.

The Arizona Court of Appeals has reasonably interpreted FEHBA's preemption statute. The Missouri Supreme Court, by following the example that the Arizona Court of Appeals has provided, has similarly interpreted that statute. It appears that the Arizona and Missouri plain-language approach to interpreting FEHBA's preemption statute may, at this time, be the minority approach. But a minority approach often later proves to be the right one.

Plain-language interpretation is the approach this Court has consistently advocated as the proper way to construe statutes. *See*, *e.g.*, *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1165 (2014) (In determining a statute's meaning, this Court first looks to its language and gives its words their ordinary meaning.); *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 876 (2014) (Courts interpret statutory words using their ordinary, contemporary, and common meaning, unless the legislature supplies a different definition.).

When, as here, a statute's plain words reveal its meaning, courts must apply those plain words. They may not meander into the alleys of legislative history or stroll through the byways of statutory interpretation. The plain words control.

Conclusion

The Court should deny the petition for writ of certiorari because the plain words of FEHBA's preemption statute do not preempt Arizona's anti-subrogation law.

Respectfully submitted,

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