No. 13-1467

IN THE
Supreme Court of the United States

AETNA LIFE INSURANCE CO.,

Petitioner,

v.

MATTHEW KOBOLD,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Kobold's brief in opposition only confirms that this case readily satisfies this Court's criteria for review. Kobold candidly concedes that state and federal courts are split regarding whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, preempts state laws barring subrogation or reimbursement by FEHBA plans pursuant to their FEHBA contracts. The Arizona Court of Appeals here and the Missouri Supreme Court in *Nevils* v. *Group Health Plan, Inc.*, 418 S.W.3d 451 (Mo. 2014) (en banc), *petition for cert. filed*, No. 13-1305, Kobold argues, "are right" (but in the "minority"), and "other courts and jurisdictions"—including a federal circuit and another state supreme court—"are wrong." Opp. 20-21. This admitted conflict on a question of federal preemption suffices by itself to merit certiorari.

Kobold's defense of the decision below on the merits does nothing to obviate this conflict, and only underscores how far one must stray from this Court's teaching to reach the court of appeals' implausibly narrow view of FEHBA preemption. Although Kobold claims that that court's conclusion follows from FEHBA's "plain words" (Opp. 1), in reality it requires ascribing a contrived meaning to one statutory term and reading another out of the statute entirely. Kobold's submission that the Court should disregard "Congress's intent and purpose" and the Office of Personnel Management's ("OPM") "'reasonable statutory interpretation'" (Opp. 4-5 (citation omitted)) runs headlong into this Court's case law. And his claim that either the "presumption against preemption" or *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006)—which expressly *re-*

served judgment on the question presented here—compels the conclusion reached below strains this Court's decisions beyond recognition.

Kobold offers nothing to refute the importance of the question presented. The United States has already explained the stakes of hobbling a nationwide federal program that expends tens of *billions* of dollars annually on federal-employee benefits. The government's active participation in the state courts here and in *Nevils* itself powerfully demonstrates the issue's urgency. Kobold's sole response—that the Court must demand statistical analysis quantifying the harms caused by the decision below before granting certiorari—has no basis in this Court's Rules, its settled practice, or common sense.

Kobold's opposition, in short, confirms that the question presented warrants review. And he does not and cannot dispute that this case provides a prime opportunity to decide this important and recurring issue of federal preemption. This Court should grant Aetna's petition to resolve the direct lower-court conflict and restore the nationwide uniformity that Congress crafted FEHBA to ensure.

I. RESPONDENT CONCEDES THAT THE DECISION BELOW IMPLICATES A DIRECT CONFLICT AMONG STATE AND FEDERAL COURTS.

Far from refuting the direct conflict concerning FEHBA's preemptive scope (*cf.* Pet. 14-19), Kobold *admits* that the lower courts are divided. Opp. 20-21. He does not deny that the decision below and the Missouri Supreme Court's ruling in *Nevils*, 418 S.W.3d 451, contradict other state and federal decisions—including *Thurman* v. *State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448, 450-51 (Ga.

2004), and *MedCenters Health Care* v. *Ochs*, 26 F.3d 865, 867 (8th Cir. 1994)—holding that FEHBA preempts state laws barring subrogation or reimbursement. Instead, Kobold states flatly that the "Arizona and Missouri" courts "are right and other courts and jurisdictions are wrong." Opp. 20.

Kobold does not offer any basis to distinguish *Thurman* and *Ochs* from this case or *Nevils* because none exists—a fact illustrated by the patently insubstantial grounds to which the respondent in *Nevils* resorts to dispute the split. *See* Br. in Opp. 8-15, *Coventry Health Care of Mo., Inc.* v. *Nevils*, No. 13-1305 (June 30, 2014) ("*Nevils* Opp."). Contrary to Nevils's claim (*id.* at 13-14), *Thurman* explicitly decided that FEHBA preempts state laws barring subrogation or reimbursement, as a necessary predicate to deciding the state-law issue presented there. *See* 598 S.E.2d at 450-51. And although *McVeigh* abrogated the *jurisdictional* ruling affirmed in *Ochs*, it casts no doubt at all on *Ochs*'s separate holding on the question presented here whether FEHBA preempts state anti-subrogation and anti-reimbursement laws—an issue on which *McVeigh* expressly reserved judgment. *See* 547 U.S. at 698; Pet. 16 n.5; *see also infra* at 9-10.

Kobold further concedes that the Arizona and Missouri courts' decisions represent "the minority approach." Opp. 21. He claims that these outliers nevertheless do not warrant review because "a minority approach often later proves to be right one." *Ibid.* But the remote prospect that the Arizona and Missouri courts' mistaken position might ultimately be adopted is beside the point. The lower-court conflict on this recurring preemption issue demonstrates

the need for this Court to intervene precisely to decide which reading of FEHBA is correct.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH FEHBA OR THIS COURT'S PRECEDENT.

Kobold devotes the lion's share of his opposition to defending the decision below on the merits. Opp. 1-14, 16-20. Even if his arguments were well-taken, they could not justify withholding review of an issue that has driven a wedge between the lower courts and threatens the efficient administration of a nationwide federal program. Kobold's arguments, moreover, are baseless and reflect a fundamental misunderstanding of this Court's case law.

A. Kobold insists that FEHBA's preemptive scope must be judged based solely on its "plain words." *E.g.*, Opp. 1, 4-5, 8, 10, 18, 21. But, like the court below, he does not seriously grapple with the clear import of Section 8902(m)(1)'s whole text.

1. Kobold recites (at 1-3) the court of appeals' conclusion that subrogation and reimbursement do not "relate to … benefits" (5 U.S.C. § 8902(m)(1)) because "benefits" means only initial payments a FEHBA participant receives. But he never addresses the flaws in that contorted reading of the text. As Aetna and the government have explained, FEHBA's "relate to … benefits" language sweeps broadly and comfortably encompasses state laws barring subrogation and reimbursement—which at a minimum affect the amount of benefits a FEHBA participant may *keep*. Pet. 20-25; Pet. App. 58a-60a.

Kobold simply elides this problem. And he offers no answer to this Court's recent preemption decisions that foreclose the court of appeals' artificial dis-

tinction between benefits that a participant receives initially and *net* benefits that he may *retain*. *See Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1431 (2014); *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1952 (2013); Pet. 23-25.[1]

2. Kobold also does not persuasively explain why subrogation and reimbursement do not "relate to … *payments with respect to* benefits." 5 U.S.C. § 8902(m)(1) (emphasis added). The court of appeals ignored that phrase, which independently encompasses state laws barring subrogation and reimbursement. *Cf.* Pet. 25. Kobold acknowledges this text, but brushes it aside with ipse dixit. Opp. 3.

Kobold asserts, without authority or explanation, that "'payments' must be referring to contract payments made by the FEHBA plan for the insured person's benefit." Opp. 3. That invented limitation has no footing in FEHBA's text or context. Indeed, Kobold's reading would render "payments with respect to benefits" mere surplusage—which this Court must strive to avoid, *see Milner* v. *Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011). On that reading, "payments with respect to benefits" is wholly subsumed by "benefits" simpliciter—which Kobold and the decision below define as "financial help that [a FEHBA participant]

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[1] Kobold argues (at 17-18) that the court below correctly disregarded other decisions of this Court construing ERISA because of differences between ERISA and FEHBA. But the only difference Kobold identifies is that ERISA *completely* preempts state law and thus confers federal jurisdiction. That difference stems not from a difference in the scopes of ERISA's and FEHBA's preemption provisions, but from ERISA's *additional* provision of an exclusively federal cause of action, which FEHBA lacks. Pet. 23 n.6.

receive[s]," "includ[ing] *payments … made* on behalf of the insured." Opp. 2 (emphasis added); Pet. App. 8a-9a. If that were correct, then "payments with respect to benefits" would add nothing.

B. As Aetna and the United States have shown, Congress's purpose in enacting FEHBA's preemption provision—preventing States from imposing a patchwork of restrictions that destroy uniformity and hinder cost-saving efforts—reinforces the natural reading of the text. Pet. 25-26; Pet. App. 61a-62a. Kobold does not dispute this congressional purpose, but urges the Court to ignore it—and to turn a blind eye to evidence, including FEHBA's history, that elucidates Congress's intentions. Opp. 4-10. Kobold's position flies in the face of this Court's teaching.

"Congressional purpose," this Court has held, is not only an appropriate consideration, but "the ultimate touchstone of pre-emption analysis." *Wis. Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 290 (1986) (internal quotation marks omitted). Of course, courts "begin with … the assumption that the ordinary meaning" of the statutory "language accurately expresses the legislative purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation marks omitted); *see also Chamber of Commerce of United States* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011). If the Court agrees with Aetna, the United States, and the majority of lower courts that FEHBA's text unequivocally preempts state laws barring subrogation or reimbursement, Pet. 15-17, 20-25; Pet. App. 58a-60a, that indeed ends the analysis.

But even assuming arguendo that the court of appeals' contrary construction were textually possible, that reading assuredly is not "the *only* plausible

interpretation." Opp. 18 (emphasis added). At a minimum, Section 8902(m)(1) would be ambiguous as to whether state laws barring subrogation or reimbursement are preempted. In that event, this Court has held, considering evidence of Congress's purpose beyond the text—including FEHBA's history—would be appropriate. *See United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 139 (1989) ("statutory language" was not "dispositive," so Court "must therefore look beyond the statute's language to the legislative history, purposes, and operation"); *see*, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 104-05 (2004).

Here, FEHBA's history powerfully demonstrates that, in enacting the preemption provision, Congress sought to eradicate "disuniformity" created by a state-by-state patchwork of restrictions and to "'prevent carriers' cost-cutting initiatives from being frustrated.'" Pet. App. 62a (quoting H.R. Rep. No. 105-374, at 9 (1997)); *see also* Pet. 25-26. Kobold offers nothing to disprove this account of Congress's purpose, or that allowing States to impose idiosyncratic restrictions on subrogation and reimbursement is antithetical to that congressional aim.

C. Unable to show that the court of appeals' "interpret[ation]" of FEHBA's preemption provision is *correct*, Kobold claims that it was at least a "*reasonabl[e]*" reading. Opp. 1, 21 (emphasis added). That is false. Any statutory interpretation that directly contradicts the statutory text, like the court of appeals' here, is necessarily *not* reasonable. *See Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) ("if Congress has directly spoken to an issue then any … interpretation contradicting what Congress has said would be unreasonable").

In any event, the reasonableness *vel non* of the court of appeals' construction is irrelevant. If a federal statute is ambiguous, it is not the reasonable interpretation of a *state court* that merits deference, but the reasonable reading of the *federal agency* charged with implementing the law. *See Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008). As Aetna has shown (Pet. 29-30), OPM's well-reasoned and consistently expressed view that FEHBA preempts state laws barring subrogation or reimbursement merits considerable weight.

Kobold, like the court below (Pet. App. 10a-11a), denies that OPM's view deserves any consideration. Opp. 5, 16-17. But he fails to address any of the errors in the court of appeals' reasoning for according OPM no deference. *Cf.* Pet. 30-32; Pet. App. 64a-65a. And, aside from repeating his incorrect refrain that FEHBA's text is clear in his favor (*see* Opp. 16), Kobold offers no other reason for ignoring OPM's position.

D. Kobold finally contends that, notwithstanding FEHBA's text, its purpose, and OPM's view, *this* Court's precedent compels the court of appeals' crabbed reading of FEHBA. That is wrong.

1. Like the court of appeals (Pet. App. 7a), Kobold argues that the "presumption against preemption" requires resolving any ambiguity in FEHBA's preemption clause against preemption of state laws barring subrogation and reimbursement. Opp. 18-20. Even if that presumption applied to express-preemption clauses, *but see CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., concurring in part and concurring in the judgment), it is irrelevant here because FEHBA's text unambig-

uously preempts such laws, Pet. 27. Kobold also does not confront this Court's cases making clear that the presumption "is not triggered" where, as here, there is "a history of significant federal presence," *United States* v. *Locke*, 529 U.S. 89, 108 (2000), and the "interests at stake are 'uniquely federal,'" *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (citation omitted).

2. Kobold also asserts (at 10-14) that *McVeigh*, 547 U.S. 677, supports the court of appeals' narrow reading of Section 8902(m)(1). Even the court of appeals rejected this claim, correctly recognizing that *McVeigh* has no bearing. Pet. App. 5a-7a; *see also id.* at 62a-64a. *McVeigh* did not decide whether FEHBA preempts state laws barring subrogation or reimbursement—or *any* particular state law. It addressed only whether FEHBA *completely* preempts *all* state laws touching FEHBA plans, so as to establish federal *jurisdiction* over FEHBA-related disputes. *See* 547 U.S. at 689-701. As the First Circuit recently explained, it is "transparently clear" that *McVeigh*'s resolution of that question "did not hinge in the slightest degree" on whether Section 8902(m)(1) preempts anti-subrogation or anti-reimbursement laws. *López-Muñoz* v. *Triple-S Salud, Inc.*, __ F.3d __, 2014 WL 1856769, at *4 (1st Cir. May 9, 2014). *McVeigh* itself said so explicitly, explaining that it "*need not choose* between" competing constructions of Section 8902(m)(1) because whether that provision preempted state anti-subrogation and anti-reimbursement laws made no

difference in that case. 547 U.S. at 698 (emphasis added).[2]

III. THE SCOPE OF FEHBA PREEMPTION IS EXCEPTIONALLY IMPORTANT.

The United States' submissions and active participation below in this case and in *Nevils* illustrate the tremendous importance of the question presented. *See*, *e.g.*, Pet. App. 52a; App. to Pet. for Cert. 109a, 120a, 131a, *Nevils*, No. 13-1305. The interpretation of FEHBA adopted below will increase the premiums paid by FEHBA participants and taxpayers. And both that interpretation and the lower-court conflict it deepens will greatly increase the costs of administering FEHBA plans and the unfairness to federal employees. Pet. 33-34.

Kobold denies the issue's importance, but he does not attempt to disprove the harmful consequences that will follow if the decision below stands. Opp. 15-16. Instead, he argues that the absence of an "objective economic study" measuring the "magnitude" of the adverse effects with precision proves that those harms do not exist. *Id.* at 15. Nonsense. Rule 10 does not require regression analysis or expert testimony corroborating an issue's practical significance—especially an issue of preemption that bears directly on a federal program that expends tens of billions of dollars each year, *see* Pet. App. 52a, 62a. Here, it more than suffices that the federal govern-

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[2] Kobold also relies (at 12-14) on the Second Circuit's decision affirmed in *McVeigh*, *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136 (2d Cir. 2005), but the cited passages of that opinion likewise address *complete* preemption, and, thus, only federal *jurisdiction*, *see id.* at 139-41, 146-47, 150.

ment has repeatedly explained the massive stakes, and took the extraordinary step of filing an unsolicited brief in support of discretionary state-court review below. *Id.* at 51a-65a.

That is particularly true here because, while the massive scale of the FEHBA program and the federal interest are indisputable, *see* Pet. App. 62a, some of the harms are difficult to measure. The costs of the court of appeals' ruling extend beyond forgone recoveries of redundant benefits, and include the inefficiencies created by forcing FEHBA plans to cope with parochial, state-by-state restrictions, and the unfairness of requiring some federal employees to "subsidiz[e]" windfalls to others, based solely on their state of residence. *Ibid.* Econometric modeling is scarcely necessary to grasp the issue's importance. And forestalling review until OPM could complete a costly, time-consuming nationwide study to quantify those harms would perversely exacerbate the burdens on the agency and taxpayers that Section 8902(m)(1) was enacted to avoid.

IV. THIS CASE IS AN IDEAL VEHICLE.

Kobold does not and cannot dispute that this case provides an excellent vehicle for addressing the question presented. The issue was cleanly presented and adjudicated below and is outcome-determinative. Pet. 34-35; Pet. App. 7a-11a. Nor does Kobold disagree that, if the Court grants certiorari in *Nevils*, it should at a bare minimum hold this case pending its decision in *Nevils*. *Cf.* Pet. 35.

The respondent in *Nevils* has asserted that *that* case does not provide a suitable vehicle because of its technically interlocutory posture and because the OPM contract in *Nevils* supposedly does not specifi-

cally confer a right on the FEHBA plan to seek *reimbursement*, as distinct from subrogation. *Nevils* Opp. 15-20. Those purported vehicle problems are spurious, but in any event they are entirely absent here. The decision below is indisputably final: The trial court granted summary judgment for Kobold and entered final judgment, the court of appeals affirmed, and the state supreme court denied review. Pet. App. 1a-18a. Nor is there any question regarding Aetna's right to seek reimbursement. Kobold's plan brochure spelled out in detail Aetna's right to seek reimbursement from Kobold directly—distinct from seeking recovery from third parties. *Id.* at 49a-50a.

Even if the supposed obstacles in *Nevils* were real, they thus pose no barrier to review in this case. Aetna's petition should be granted so that the Court can provide much-needed guidance regarding States' ability to interfere with the efficient administration of a federal program that provides tens of billions of dollars in benefits to millions of federal workers and their families across the country.

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be considered on the merits together with *Nevils*, No. 13-1305. At a minimum, the Court should hold this petition pending the Court's disposition in *Nevils*.

Respectfully submitted.

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