Nos. 13-1305 & 13-1467

IN THE
Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

AETNA LIFE INSURANCE CO.,
Petitioner,

v.

MATTHEW KOBOLD,
Respondent.

On Petitions For Writs Of Certiorari To The Supreme Court Of Missouri And The Court Of Appeals Of Arizona

SUPPLEMENTAL BRIEF FOR PETITIONERS COVENTRY HEALTH CARE OF MISSOURI, INC. AND AETNA LIFE INSURANCE CO.

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RULE 29.6 STATEMENT

The corporate disclosure statements included in the petitions for writs of certiorari remain accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States' brief confirms that the petitions in *Nevils* and *Kobold* meet all of this Court's criteria for certiorari and should be granted. As the government explains, "[t]he decisions of the Missouri Supreme Court" in *Nevils* "and Arizona Court of Appeals" in *Kobold* "are wrong, decide an important and recurring question of federal law, and open a conflict with decisions of other state and federal courts on the same preemption question." U.S. Br. 11. Both cases are prime vehicles for resolving that question, which concerns a massive federal program that provides benefits to 8.2 million federal employees and dependents, and which implicates more than $100 million in savings *every year*, yielding lower costs for the government and its workers. *Id.* at 16-20.

The government accordingly agrees that both petitions should be granted and that both decisions below "should be reversed." U.S. Br. 11-12. Yet it urges the Court, instead of setting the cases for briefing and argument, to vacate the decisions below and remand for further proceedings in light of a regulation adopted days ago by the Office of Personnel Management ("OPM") reiterating OPM's long-settled view on the question presented. *Id.* at 11-12, 20-22. The government is correct that, at a bare *minimum*, the Court should GVR in light of OPM's regulation, which erases any doubt that the decisions below contravene the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq*. Petitioners respectfully submit, however, that the more prudent course is for the Court to grant plenary review and to decide the important federal question these petitions present and provide the definitive guidance that lower courts and litigants badly need.

Unlike cases in which this Court has GVR'd instead of granting plenary review, because the Court was uncertain whether an intervening development ultimately warranted reversal, here there is no question that the decisions below cannot stand. Both rulings rest on the erroneous conclusion that FEHBA does not preempt state laws precluding carriers from seeking subrogation or reimbursement pursuant to the terms of their contracts with OPM. That conclusion was foreclosed by FEHBA's plain text, bolstered by its purpose and precedent, long before OPM adopted its new regulation. *See Nevils* Pet. 17-30; *Kobold* Pet. 19-32. The regulation eliminates the state courts' only arguable basis for refusing to defer to OPM's established, well-reasoned interpretation.

Vacating and remanding without deciding the question presented also would needlessly prolong the uncertainty that the state courts' aberrant rulings in these cases created. Although a GVR would (at least temporarily) wipe out those rulings, the Missouri and Arizona courts might reach the same result again *despite* OPM's regulation. Both courts already rejected the consensus view of other courts notwithstanding FEHBA's text and OPM's view, and might give equally short shrift to OPM's new rule. Moreover, the question presented continues to arise in state and federal courts across the country. Without a definitive ruling from this Court, carriers (and ultimately taxpayers) will bear the cost of litigating this issue in any forum that has not yet decided it—until either every circuit and each State's highest court has embraced OPM's view or this Court intervenes. Carriers also face the risk that honoring their contractual duties to OPM to seek subrogation and reimbursement will subject them to costly class-action litigation, as in *Nevils* itself. *Nevils* App. 2a.

The resulting uncertainty and the costs and burdens it thrusts on carriers are anathema to FEHBA's purposes. This Court can and should avert them by granting both petitions, setting them for briefing and argument together, and resolving the important question of FEHBA's preemptive scope once for all.

I. THE GOVERNMENT'S BRIEF CONFIRMS THAT CERTIORARI IS WARRANTED IN BOTH CASES.

As the United States demonstrates, *Nevils* and *Kobold* "squarely present" an "important question of federal law" that has divided the lower courts and that the Missouri and Arizona courts each answered incorrectly. U.S. Br. 16, 18; *id.* at 12-17. Both cases provide a perfect opportunity for the Court to answer that indisputably certworthy question. *Id.* at 18-20.

A. The government agrees that the holdings below in *Nevils* and *Kobold*—that FEHBA does not preempt state laws preventing FEHBA carriers from seeking subrogation or reimbursement pursuant to their OPM contracts—directly conflict with precedential decisions of the Eighth Circuit in *MedCenters Health Care* v. *Ochs*, 26 F.3d 865 (8th Cir. 1994), and the Georgia Supreme Court in *Thurman* v. *State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448 (Ga. 2004). U.S. Br. 16; *cf. Nevils* Pet. 13-17; *Kobold* Pet. 14-19. The government explains why, contrary to Nevils's assertion (Opp. 13-14), the question presented was critical to *Thurman*'s holding, and that *Thurman* and *Ochs* "remain binding precedent in their respective jurisdictions" notwithstanding *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), which addressed a different issue concerning federal jurisdiction. U.S. Br. 16-17; *cf. Nevils* Reply 2-5.

The United States also underscores the importance of this recurring preemption issue, U.S. Br. 17, refuting Nevils's (Opp. 27-28) and Kobold's (Opp. 15-17) spurious claims that the question is insignificant. More than 8 million federal workers and dependents are insured under the FEHBA program, for which the federal government pays the lion's share (more than $30 billion in 2014). U.S. Br. 2-3, 17. Uniform subrogation and reimbursement rules are vital to ensuring the fair and efficient operation of that program. Subrogation and reimbursement recoveries totaled $126 million last year alone, and those "recoveries 'translate to premium cost savings for the federal government and FEHB enrollees.'" *Id.* at 15, 17 (citation omitted).

Allowing States to erect obstacles to such recoveries would wipe out those savings and "destroy the uniformity Congress intended Section 8902(m)(1) to establish." U.S. Br. 17. That in turn would "increase plan costs" and "create a cross-subsidy problem," as participants in States that allow subrogation or reimbursement would "cross-subsidize participants in the same plan who live in States that prohibit" them. *Ibid.* The massive stakes of the question presented thus amply justify this Court's intervention.

B. The government also persuasively shows, as it did in the state courts, that the Missouri and Arizona courts' holdings "are wrong and should be reversed." U.S. Br. 12; *see Nevils* App. 116a-26a; *Kobold* App. 58a-65a.

1. Before one reaches OPM's new regulation, the government shows that "by far the best" and most "natural reading of the *statutory* language" is that FEHBA preempts state laws barring subrogation and reimbursement because subrogation and reim-

bursement do "'relate to the nature, provision, or extent of coverage or benefits,'" and at the very least to "'payments with respect to benefits.'" U.S. Br. 13-15 (emphasis altered) (quoting 5 U.S.C. § 8902(m)(1)). As the government explains, "subrogation and reimbursement rights ensure that, when a carrier makes a payment of benefits, some portion of the payment may need to be returned to the carrier at a later date if a third party is responsible for the same costs." *Id.* at 14.

The state courts in *Nevils* and *Kobold* rejected that plain-text reading. U.S. Br. 7-10. Each court distorted the statute by applying an inapposite presumption against preemption, *Nevils* App. 4a-6a, 8a; *Kobold* App. 7a, appropriate (if ever) to resolve *ambiguities* in statutes, not to trump clear text, *see Nevils* Pet. 22-24. *Nevils* also misread this Court's decision in *McVeigh* as somehow dictating the answer to the very question that the Court explicitly reserved. U.S. Br. 7, 13-14; *Nevils* App. 5a-7a, 9a. Both *Nevils* and *Kobold*, moreover, relied on a contrived, artificial distinction between the amount of benefits a participant receives *initially* and the amount he or she ultimately *keeps*—a distinction that the government demonstrated below is "simply untenable," "implausible," and "illusory." *Nevils* App. 9a-10a, 123a-24a, 128a; *Kobold* App. 8a-9a, 59a. And both courts' conclusion that FEHBA allows States to impose their own parochial limitations on subrogation and reimbursement is antithetical to "'longstanding Federal policy'" and "'Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts.'" U.S. Br. 15 (citation omitted).

2. Any doubt that the decisions below are erroneous is laid to rest by OPM's new regulation, which makes unmistakably clear that a right of subrogation or reimbursement "'constitutes a condition of and a limitation on the nature of benefits or benefit payments'" and thus "'relate[s] to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. § 8902(m)(1).'" U.S. Br. 13 (quoting 5 C.F.R. § 890.106(b)(1), (h)). The regulation reaffirms OPM's longstanding view, *id.* at 6; *Nevils* App. 84a; 80 Fed. Reg. 931, 931-32 (Jan. 7, 2015), to which the state courts here should have deferred.

Both courts, however, refused to accord OPM's view any weight, deeming OPM's settled position (reflected in the 2012 Carrier Letter, carrier contracts, and appellate briefs) too "informal." *Nevils* App. 10a-11a n.2; *Kobold* App. 10a. Even if that assertion were plausible then, *but see Nevils* Pet. 28-30; *Kobold* Pet. 28-32, it is untenable today in the face of a binding, notice-and-comment rule issued by the agency charged to administer the statute. U.S. Br. 12-16; *see Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Because the state courts' only arguable basis for declining to defer to OPM's view has been eviscerated, the decisions below cannot stand.

C. The government's brief also confirms that *Nevils* and *Kobold* are excellent vehicles to resolve this important question. U.S. Br. 18-20. Both cases "squarely present the preemption question," *id.* at 18, which is dispositive in each one. Kobold does not allege any obstacles to review, and the supposed vehicle problems Nevils asserts are illusory. *Ibid.*

As the government explains, Nevils's tardy claim that the subrogation provision in his carrier's OPM contract did not give the carrier a right of reimbursement comes far too late. U.S. Br. 18. Indeed, Nevils waived it by asserting the *opposite* below. *See Nevils* Reply 12. And it is meritless because the subrogation provision "encompasse[d] the right to reimbursement." U.S. Br. 18. Nevils's contrary view would allow subrogation provisions to be "readily thwarted," as a participant might frustrate any subrogation recovery by the carrier "by simply suing (or settling [with])" the responsible third party and thus "unilaterally eliminat[ing] the carrier's subrogation rights." *Id.* at 19. In all events, this purported problem is not even arguably present in *Kobold*. There is thus no barrier to this Court's considering the issue.

Nor does the posture of *Nevils* pose any problem. The Missouri Supreme Court's "judgment is 'final' within the meaning of [28 U.S.C. §] 1257(a)" and this Court's precedents. U.S. Br. 19. And denying review would needlessly "[f]orc[e] a FEHB carrier to defend against a putative state-law class action" simply for "perform[ing] its contractual commitments to OPM," which "would plainly undermine OPM's policy that carriers should exercise their subrogation rights unimpeded by such parochial state laws." *Id.* at 20.

II. THE COURT SHOULD GRANT PLENARY REVIEW TO PROVIDE GUIDANCE ON THIS RECURRING ISSUE AND TO AVOID WASTEFUL LITIGATION.

Despite demonstrating that the question presented is certworthy, that these cases provide ideal vehicles to resolve it, and that the decisions below "are wrong and should be reversed," the government suggests vacating and remanding instead of affording plenary review so that the state courts can "con-

sider in the first instance the question presented in light of [OPM's] new regulations." U.S. Br. 12; *id.* at 20-22. Vacatur is certainly justified in light of OPM's regulation, and necessary at an absolute minimum to correct the state courts' errors. As the government explains, "if this Court denied certiorari, the problems that OPM intended its regulations to ameliorate would persist to the detriment of OPM, carriers, federal employees, and their families." *Id.* at 22.

Remanding, however, is entirely unnecessary, and doing so without ruling on the question presented would only prolong the costly uncertainty that lower courts' confusion has caused. The more prudent course is to grant plenary review and decide this important and recurring federal issue.

A. Remanding *Nevils* and *Kobold* would serve no purpose because the correct disposition of each case, especially in light of OPM's new regulation, is clear. This Court's "practice" has been to GVR—rather than reverse outright—only where the Court was "not certain that the case was free from all obstacles to reversal on an intervening precedent" or other development. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam); *see* Stephen M. Shapiro et al., *Supreme Court Practice* 349-50 (10th ed. 2013). That is why the Court typically requires as a prerequisite to a GVR only a "reasonable probability" that an intervening event would reveal that the lower court's decision is wrong. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). In such cases, a GVR may conserve resources by avoiding this Court's consideration of a question that may not ultimately matter to the case's outcome. *See ibid.*; *cf. id.* at 177-78 (Scalia, J., dissenting) (vacatur and re-

mand "is the appropriate course whenever the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation").

In contrast, where it *is* clear in light of a new development that the lower court's judgment cannot stand, there is no reason to send the case back to the lower court to mull things over. That is true here: It is not merely reasonably probable, but now *certain*, that the state courts' judgments are incorrect. Even before OPM's regulation, the state courts' rulings in *Nevils* and *Kobold* were untenable because they contradicted FEHBA's pellucid text and purpose, controlling precedent, and OPM's established view. *Supra* pp. 4-5. OPM's regulation obliterates any doubt, placing the agency's formal imprimatur on the interpretation that it has espoused for many years and that is entitled to dispositive deference. *Id.* at 6; U.S. Br. 12-16.

Nor is there any question that correcting the Missouri and Arizona courts' misreading of FEHBA compels reversal, as the government itself has made clear. U.S. Br. 12 (both decisions "should be reversed"). Both *Nevils* and *Kobold* hinge completely on the state courts' erroneous view that FEHBA does not preempt state laws barring subrogation and reimbursement. On that basis, the Arizona Court of Appeals affirmed summary judgment for Kobold, *Kobold* App. 11a, and the Missouri Supreme Court reversed a summary-judgment ruling against Nevils, *Nevils* App. 3a, 10a—a "judgment [that] would be reinstated if this Court reversed," U.S. Br. 19.

B. Remanding without a definitive ruling on the question presented not only would yield no benefit, but would come at a significant cost. The decisions below upended the settled consensus among lower courts and created harmful uncertainty as to whether FEHBA carriers will be deemed to violate state law by fulfilling their contractual duties to OPM. Although a GVR would erase those rulings, it would provide carriers no assurance that they may safely resume honoring their contractual commitments.

Indeed, vacatur alone would not even prevent the courts below from arriving at the same erroneous conclusion notwithstanding OPM's regulation. Both courts erroneously held that the presumption against preemption overcame FEHBA's text and purpose, relevant precedent, and OPM's longstanding view, and the *Nevils* court thought that *McVeigh* reinforced that conclusion. *Supra* pp. 4-6. It is entirely possible that one or both might mistakenly hold again on remand that those same principles eliminate any ambiguity in FEHBA and that OPM thus has no delegated authority to adopt a different view.

A GVR, moreover, would provide no guidance or certainty in the many circuits and States that have not yet squarely addressed the issue. Subrogation and reimbursement disputes arise everywhere, and often. Until this Court provides an authoritative answer to the question presented, carriers must continue to litigate the issue in every jurisdiction where they operate. Indeed, just in the time since petitioners filed their reply briefs, two more district courts have ruled on the issue—each holding that FEHBA preempts state subrogation and reimbursement laws—and appeals in each case are now pending. *See Helfrich* v. *Blue Cross & Blue Shield Ass'n*,

36 F. Supp. 3d 1056, 1059-67 (D. Kan. 2014), *appeal docketed*, No. 14-3179 (10th Cir. Sept. 2, 2014); *Bell* v. *Blue Cross & Blue Shield of Okla.*, 2014 WL 5597265, at *5-8 (W.D. Ark. Nov. 3, 2014), *appeal docketed*, No. 14-3731 (8th Cir. Dec. 5, 2014). Such cases will continue to wend their way through the lower courts until this Court steps in.

In the meantime, carriers not only must shoulder the cost of those wasteful parallel proceedings, but also face an ongoing threat of lawsuits, including class actions, by participants who allege that subrogation and reimbursement violate local law. *Nevils* is just such a case—a putative state-court class action seeking damages from a carrier simply for performing its contractual obligation to seek subrogation or reimbursement. *Nevils* App. 2a. While such claims are plainly preempted by FEHBA, that will not save carriers from protracted proceedings commenced by class plaintiffs who seek to use the cost of litigating as settlement leverage. These added costs ultimately will be borne by federal employees and the government (and thus taxpayers), in the form of higher premiums.

Allowing this "'uncertainty and litigation'" to continue unimpeded runs directly counter to Congress's aims of "'avoid[ing]'" State-by-State "'disparities,'" "'enhanc[ing] the ability of the Federal Government to offer its employees a program of health benefits governed by a uniform set of legal rules,'" and "'prevent[ing] carriers' cost-cutting initiatives from being frustrated by State laws.'" U.S. Br. 15 (citations omitted). There is nothing to be gained, and much to be lost, by delaying definitive resolution of this important issue that affects millions of federal workers and their families and the public fisc.

CONCLUSION

The petitions for writs of certiorari in *Nevils* and *Kobold* should be granted and the cases considered together on the merits. At a minimum, the Court should grant each petition, vacate the decisions below, and remand each case for further consideration in light of OPM's new regulation.

Respectfully submitted.

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