No. 13-1305

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JODIE NEVILS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

OPM's unprecedented decision to issue a final rule expanding the scope of an express preemption clause raises many novel and interesting questions of constitutional and administrative law. To pose just few: (1) Can an agency's interpretation of the scope of an express preemption clause ever be entitled to *Chevron* deference? (2) Can an agency override, by fiat, longstanding canons of statutory interpretation like the presumption against preemption? (3) Can an agency adopt a construction of a statute that would raise serious constitutional problems and then insulate that decision through deferential review? (4) Can an agency issue a rule expanding express preemption in the absence of either clear Congressional intent or an explicit delegation?[1]

None of these questions, however, can be resolved in *this* case. Despite the fact that GHP "asserted a lien . . . against the settlement proceeds," U.S. Br. 6, GHP's contract contains no contractual reimbursement clause. As a result, OPM's rule—authorizing "FEHB contract terms . . . to control, notwithstanding contrary state laws" (U.S. Br. 19-

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[1] *See generally Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38 (2007) (Stevens, J., dissenting) (discussing unanswered questions concerning agency's ability to preempt state law); *Texas v. U.S.*, 497 F.3d 491, 502 (5th Cir. 2007) (addressing agency efforts to interpret ambiguous statutes in the absence of clear congressional delegation); *Commonwealth of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 896 (D.C. Cir. 1996) (noting the uncertainty over whether an agency can ever obtain *Chevron* deference when interpreting an express preemption clause and refusing to allow agency interpretation to override presumption against preemption).

20)—will not change anything about the preemption analysis here. There is simply no "control[ling]" FEHB "contract term[]" that conflicts with state law.

The government's effort to evade this difficulty is exceedingly weak. It concedes the main point—that the FEHB contract here gave GHP only a "right of subrogation," U.S. Br. 6—but nonetheless claims that "a right to subrogation . . . encompasses the right to reimbursement from the proceeds if the insured does sue." U.S. Br. 18. That is not only wrong as a matter of law, but it is flatly contradicted by OPM's own definition of these terms in its newly-issued rule. And it makes no sense. Subrogation and reimbursement are distinct rights that require different words; they are not interchangeable.

There will be plenty of opportunity, and soon, for lower courts to pass on the validity and effect of OPM's new rule. The issue is currently pending in the Eighth and Tenth Circuits. *See Helfrich v. Blue Cross & Blue Shield Ass'n*, No. 14-3179 (10th Cir. argued May 5, 2015); *Bell v. Blue Cross & Blue Shield of Okla.*, appeal docketed, No. 14-3731 (8th Cir. Dec. 2, 2014). The government is an active participant in both of those cases, and the FEHB contracts at issue indisputably contain reimbursement clauses. This Court should not embrace the government's distorted justifications for a GVR here.

OPM'S RULE DOES NOT AFFECT THIS CASE.

The government's recommendation that this Court GVR this case presupposes that OPM's new rule will impact the outcome. It will not. As the government itself admits (U.S. Br. 6, 18-19), GHP's

FEHB contract does not contain a reimbursement clause—a prerequisite for preemption under both § 8902(m)(1) and OPM's newly-issued rule, which *only* authorizes "control[ling]" "FEHB contract terms" to displace "contrary state laws." U.S. Br. 11, 19-20. Here, GHP "asserted a lien . . . against [Mr. Nevils'] settlement proceeds," U.S. Br. 6, arguing that a Missouri state law prohibiting this practice should be preempted. But this state law cannot be displaced where there is no "control[ling]" reimbursement clause to the contrary.[2]

Put another way: Under OPM's new rule, state law is preempted where it would defeat a carrier's contractual right to recover—if, and only if, the carrier's FEHB contract contains the specific contractual right to recovery. But OPM's rule cannot insert a new contractual right into GHP's FEHBA contract where none existed before. And there is no dispute that GHP's contract neither mentions nor provides for any right to be reimbursed "from the proceeds if the insured does sue." U.S. Br. 18; *see* Pet.

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[2] It is more than a little ironic that, given the contract's deficiencies here, the government nonetheless asks this Court to grant the petition. In uncannily similar circumstances just last term, the government told this Court that the presence of a "logically antecedent" and "case-specific question of plan interpretation" regarding whether particular contract language in an insurance policy "is sufficient to create a claim for [reimbursement] at all," made a petition a "poor vehicle" for addressing the underlying questions. *See* U.S. Br. at 5, 15, *Thurber v. Aetna Life Ins. Co.*, (No. 13-130), 2014 WL 1783200 (U.S. May 2, 2014) (recommending denial of certiorari of ERISA statutory question where policy did not contain "clear and mandatory obligation" to reimburse plan). This Court denied the petition there; it should do the same here.

App. 93a-94a; BIO 5 n.1 (explaining that even GHP's brochure language states only that "[i]f you do not seek damages you must agree to let us try. This is called subrogation."). This scenario means that, by its terms and under OPM's own rule, GHP's contract cannot displace Missouri's law prohibiting an insurer from placing a lien on an insured's recovery.

Faced with this problem, the government suggests that the Court rewrite the contract, to read an implied term into GHP's plan. "In this context," it argues, "a right to subrogation . . . encompasses the right to reimbursement." U.S. Br. 18. That way, the subrogation clause can be treated as "control[ling]" and used to displace a "contrary" state law. U.S. Br. 11. This position utterly distorts the doctrine governing the distinct remedies of subrogation and reimbursement, fails to square even with OPM's own rule, and does violence to basic rules of contract law. It should not be accepted.

First, "[w]hile subrogation and reimbursement may have similar effects, they are distinct doctrines." *Unisys Medical Plan v. Timm*, 98 F.3d 971, 973 (7th Cir. 1996). As a "matter of logic and case law, a party can have one right but not the other." *Id.* A contractual right to subrogation "allows the insurer to stand in the shoes of another and assert that person's rights against" a third party. *See* 1 Dan B. Dobbs, Law of Remedies § 4.3(4), at 406 (2d ed. 1993). A contractual right to reimbursement, by way of contrast, "technically refers to any payment back of what has been expended, without regard to the reason for the recovery or the underlying theory for repayment." 16 Couch on Insurance § 222:2 (Lee R. Russ & Thomas F. Segalla eds., 3d ed. 2011).

Notwithstanding its about-face here, the government has repeatedly drawn just this distinction. The "basis" for an enforceable right to reimbursement, the government told this Court three terms ago, "is in the agreement itself." U.S. Br. at 15, *US Airways, Inc. v. McCutchen*, (No. 11-1285), 2012 WL 3864275 (U.S. Sept. 5, 2102). Reimbursement rights are "created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation." *Id.* at *16 (internal quotation omitted). And for that reason, the government made clear that "[t]he plan terms . . . define the parties' rights and responsibilities." *Id.* A contract with no (or insufficient) reimbursement language does not create an enforceable right to recover. *See* U.S. Br. at 19, *Thurber v. Aetna Life Ins. Co.*, (No. 13-130), 2014 WL 1783200 (U.S. May 2, 2014) (courts must "carefully examine and apply plan terms as written").

Indeed, *Empire HealthChoice Assur., Inc. v. McVeigh*, itself confirms that these two doctrines are independent, and require distinct clauses. 547 U.S. 677 (2006). Reviewing the carrier's FEHB contract there, the Court explained that it contained both contractual rights of recovery. First, just like here, the contract included a right to subrogate—providing that "[i]f you do not seek damages for your illness or injury, you must permit us to initiate recovery on your behalf (including the right to bring suit in your name). This is called subrogation." *Id.* at 685. But, the carrier also included a right to reimbursement—a distinct provision in the contract requiring that "[a]ll recoveries you obtain (whether by lawsuit, settlement, or otherwise) . . . must be used to

reimburse us in full for benefits we paid." *Id.* at 684. This Court treated the two rights separately. Though "linked together" because both hinge on an underlying tortious act, they involve distinct remedies and are governed by distinct terms in the contract. *Id.* at 692.

Second, if the government's position was right, OPM's new rule would be inexplicably duplicative. It *requires* all FEHB contracts to "provide" that a "carrier is entitled to pursue subrogation *and* reimbursement recoveries." 5 CFR § 890.106(a) (emphasis added). And it clearly draws a distinction between the two rights, defining them separately and making no reference (either express or implied) to the government's novel definition (in which subrogation subsumes reimbursement). *See* 5 CFR § 890.101(a), (b). Why would OPM need this belt-and-suspenders approach in a world where a contractual right to subrogation also encompasses a contractual right to reimbursement? *See United States v. Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a [regulation] that renders some words altogether redundant."). The fact is that OPM's approach squares not at all with the government's results-oriented argument here.

Third, the government's suggestion that this Court should impliedly grant one of its carriers a right that the carrier itself chose not to include in its contract—just to suit its current interests—upends blackletter contract law. "Where the parties' agreement either expressly addresses a matter or is intentionally silent on the matter, a court should not imply a duty that the contract does not contain." *Kansas City Power & Light Co. v. Ford Motor Credit*

Co., 995 F.2d 1422, 1428 (8th Cir. 1993). Under both the interpretive canons of *expressio unius est exclusio alterius* and *contra preferentum*, an interpretation of GHP's contract to "encompass" an unexpressed right (that virtually all other carrier's contracts do express) is wholly unjustified.

And make no mistake: The government's only proffered reason why absent terms must be implied here comes nowhere close to passing muster. It says that reimbursement must be encompassed by a subrogation clause because, "[o]therwise, the subrogation right could be readily thwarted" because "[c]arriers are often unaware that a claim for benefits results from the allegedly tortious action of a third party, so an insured could often unilaterally eliminate the carrier's subrogation rights by simply suing (or settling) himself." U.S. Br. 19. There is actually a much simpler answer to this concern—one that OPM has already provided—which is to require that carriers include *both* subrogation and reimbursement clauses in their contracts. 5 CFR § 890.106(g). Most carriers already did this (see, *e.g.*, the Blue Cross plan in *McVeigh*); now, all carriers must. *Id.*

In a case involving whether privately-negotiated contract terms can displace duly-enacted state laws, the government's suggestion that this Court should play fast-and-loose with the meaning of those terms is particularly disturbing. The government—no less than a court—has "no right to torture language in an attempt to force particular results" that "the contracting parties neither intended or imagined." *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989). To the "exact contrary,

straightforward language . . . should be given its natural meaning." *Id*. Here, that straightforward language in GHP's contract means that OPM's new rule will have no effect. The Court should decline the government's invitation to prolong this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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