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

SUPPLEMENTAL BRIEF FOR RESPONDENT MATTHEW KOBOLD

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RULE 29.6 STATEMENT

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

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SUPPLEMENTAL BRIEF FOR RESPONDENT MATTHEW KOBOLD

1. The Solicitor General is right about the importance of the preemption issue and is right about the conflict among lower courts. But granting certiorari, vacating the Arizona Court of Appeals' opinion, and asking it to reconsider the statute's plain words in light of a federal agency's unchanged position will merely delay justice and return the case to this Court.

Preemption is disfavored. When two plausible readings of a statute are possible, "we would nevertheless have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

On May 22, 2015, the Solicitor General filed an amicus curiae brief ignoring that principle. The amicus curiae brief supports the Petitioners and asks this Court to grant certiorari, vacate the Arizona Court of Appeals opinion, and remand for further action in light of a "new" rule construing the subject preemption clause. The "new" rule supposedly changes everything.

Indeed, the "new" rule is allegedly so important that the Solicitor General crafted the entire 28-page amicus curiae brief based on the "new" rule and then delayed filing that brief until the day *after* the "new" rule appeared. Of course, the Solicitor General's Office *and* the Office of Personnel Management jointly

wrote the amicus curiae brief – so its enthusiastically pro-OPM slant is not surprising.

But nothing relevant has changed.

True, on May 21, 2015, OPM promulgated a supposedly "new" rule that purported to "interpret" the preemption clause of the Federal Employees Health Benefit Act. The preemption clause is 5 U.S.C. § 8902(m)(1). For ease of reference, this is what 5 U.S.C. § 8902(m)(1) provides:

> 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.

The "new" rule appears as OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80(98) Fed. Reg. 29203 (May 21, 2015) (5 CFR 890.106).

Like OPM's previous pronouncements, however, OPM's "new" rule just restates its position that 5 U.S.C. § 8902(m)(1) preempts contrary state law. That would include Arizona's common-law anti-subrogation doctrine, which, among other things, bars an insurance company from asserting a lien against a medical patient's personal-injury recovery. *See Estate of Ethridge v. Recovery Mgmt. Sys., Inc.*, 235 Ariz. 30, 32 ¶ 4, 326 P.3d 297, 299 ¶ 4 (2014), *cert. denied*, 135 S.Ct. 1517 (2015).

On Page 8 of its June 9, 2014 Petition for Writ of Certiorari, Petitioner Aetna Life Insurance Company argued that:

> OPM has "consistently recognized that the FEHBA preempts state laws that restrict or prohibit . . . reimbursement and/or subrogation." Pet. App. 46a. OPM reiterated that view in 2012, explaining in a guidance letter addressed to FEHBA carriers (the "2012 Letter") that it "continue[s] to maintain" that view. *Ibid*.

For three main reasons, the Arizona Court of Appeals was unimpressed by OPM's arguments about the preemption statute's meaning:

- First, the 2012 Letter was not the result of a formal rulemaking process.
- Second, nothing in FEHBA indicated that Congress meant to delegate to OPM the authority to make determinations with the force of law.
- Third, there is no need to defer to an agency's statutory interpretation unless: (a) it has conducted a careful analysis; (b) its position has been consistent; (c) its position reflects agency-wide policy; and (d) its position is reasonable.

Kobold v. Aetna Life Ins. Co., 233 Ariz. 100, 104-05 ¶ 15, 309 P.3d 924, 928-29 ¶ 15 (2013).

The May 21, 2015 "new" rule is the result of a formal rulemaking process, but there is still nothing

in FEHBA indicating that Congress meant to delegate to OPM any authority to make determinations having the force of law concerning any of FEHBA's provisions. And even if one were to characterize the "new" rule as resulting from a careful analysis, resting on a consistent position, and reflecting an agency-wide policy, the "new" rule lacks an essential ingredient. The position the "new" rule adopts is not "reasonable."

The "new" rule – and the text accompanying it in the Federal Register – is not "reasonable" because it ignores the plain words of 5 U.S.C. § 8902(m)(1), the FEHBA preemption statute. The Arizona Court of Appeals founded its analysis on the statute's plain words. Those plain words do not preempt Arizona's anti-subrogation common-law doctrine. Based on its plain-language analysis, the Arizona Court of Appeals held that the Aetna Plan's subrogation and reimbursement contract provision fell outside the scope of 5 U.S.C. § 8902(m)(1) because it did not relate to the state's anti-subrogation common law – common law that applies universally and that does not "relate" to health-insurance plans as such. *Kobold v. Aetna Life Ins. Co.*, 233 Ariz. 100, 104 ¶ 14, 309 P.3d 924, 928 ¶ 14 (2013). Nothing in the "new" rule construes that statute's plain words in any way or helps us understand what that statute's plain words mean.

We trust that the Arizona Court of Appeals will remain true to its plain-language interpretation of the preemption statute, and will once again decide that the FEHBA preemption statute does not preempt

Arizona's common-law anti-subrogation doctrine. If that trust is well-founded, this case will simply return to this Court after the passage of a year or two. And we will be right back where we are now.

2. OPM crafted a "new" rule that seeks to amend the preemption statute – not to interpret it.

The proposed "new" rule that emerged from OPM on May 21, 2015 rests on the OPM's own self-interested analysis and on comments from a total of three sources. All three commentators were pro-lien and pro-subrogation. The first commentator was an unnamed association of FEHBA carriers. The second was an unnamed association serving subrogation and recovery professionals. The third was an unnamed provider of subrogation and recovery services. 80(98) Fed. Reg. 29203. The comments had no counterbalance because OPM apparently received no comment from any FEHBA-insured consumers or from any consumer advocates.

Although the "new" rule is aimed at state anti-subrogation doctrines such as the one Arizona courts follow, OPM asserted in the "Federalism" section of the May 21, 2015 Federal Register that it had examined the "new" rule and that it supposedly "restates existing rights," including state rights. 80(98) Fed. Reg. 29204. The "new" rule, however, seeks to nullify existing Arizona anti-subrogation state common-law rights, at least as far as FEHBA plans are concerned.

And although OPM and Aetna have perpetually argued that upholding the interpretation of the Arizona Court of Appeals would cause economic devastation, in the "Regulatory Flexibility Act" section of the May 21, 2015 Federal Register, OPM certified that the "new" rule "will not have a significant economic impact on a substantial number of small entities because the regulation only affects health insurance benefits of Federal employees and annuitants."

The "key" provision of the "new" rule is 5 CFR § 890.106(h), which provides that:

> A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate 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). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

A side-by-side comparison of the statute and the "new" rule demonstrates that 5 CFR § 890.106(h) is *not* an interpretation of 5 U.S.C. § 8902(m)(1). Instead, it seeks to amend the statute and change its plain meaning.

The Preemption Statute 5 U.S.C. § 8902(m)(1)	**The Key Part of the "New" Rule** 5 CFR § 890.106(h)
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.	A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate 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). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

- The statute talks about contract terms; the "new" rule talks about a carrier's rights and responsibilities pertaining to subrogation and reimbursement under a FEHBA contract.
- The statute talks about how contract terms that relate to the nature, provision, or extent of coverage or benefits supersede and preempt State or local law that relates to health insurance or plans; the "new" rule makes a carrier's rights and responsibilities pertaining to subrogation and reimbursement "effective" notwithstanding any state or local law relating to health insurance or plans.

- The statute speaks of the relationship of the contract's terms to State or local law; the "new" rule makes a carrier's rights and responsibilities effective notwithstanding any state or local law.

OPM wants to change 5 U.S.C. § 8902(m)(1)'s focus on contract terms that relate to the nature, provision, or extent of FEHBA coverage or benefits to an obsessive focus on the carrier's subrogation and reimbursement rights and responsibilities – although the word "responsibilities" seems surplus. What the "new" rule actually seeks is to create and bestow crushing subrogation and reimbursement rights on FEHBA plans. But 5 U.S.C. § 8902(m)(1)'s plain words cannot support that interpretation. OPM has gone too far.

In fact, the Solicitor General is wrong that OPM's "new" rule somehow resolves the preemption issue. *First*, courts have never accepted a federal agency's ability to define the scope of preemption under an express preemption clause. *Commonwealth of Massachusetts v. U.S. Department of Transportation*, 93 F.3d 890, 894 (D.C. Cir. 1996). And courts have never let a federal agency override the "assumption that the historic police powers of the States were not to be superseded" unless that was "the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Second, OPM's "new" rule raises constitutional concerns. By supposedly delegating complete federal preemptive effect to contractual reimbursement terms

in private contracts, the "new" rule implicates the Supremacy Clause, under which only "Laws," "treaties," and the "Constitution" may displace state laws. U.S. Const. Art. VI, cl. 2. It does not say that private contracts, even contracts formed as part of private plans created under the auspices of federal law, can utterly preempt state statutory or common law. When "an otherwise acceptable construction of a statute would raise serious constitutional problems," courts must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

3. The Arizona Court of Appeals reached the right result.

The Arizona Court of Appeals correctly determined the meaning of 5 U.S.C. § 8902(m)(1) by construing its three most relevant terms: "coverage," "relate to," and "benefits." It concluded that the interplay of the terms meant that 5 U.S.C. § 8902(m)(1) applied 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.

We discussed that analysis in detail in the response to the petition for writ of certiorari, and need not repeat it here. The Arizona Court of Appeals performed a common-sense, plain-language interpretation

of the preemption statute. The interpretation is so sensible that the Missouri Supreme Court followed it. Other courts may disagree; Aetna may seethe; OPM may fulminate. But the Arizona Court of Appeals got it right.

The Arizona Court of Appeals' approach is consistent with this Court's warning against an expansive interpretation of 5 U.S.C. § 8902(m)(1)'s preemptive reach. In *Empire HealthChoice Assurance v. McVeigh*, this Court found that FEHBA's preemption provision was an "unusual" and "puzzling measure," open to more than one "plausible construction" – it could be read as either favoring or disfavoring preemption of state reimbursement laws. 547 U.S. 677, 697, 698 (2006).

This Court thus asked lower courts to adopt a "cautious interpretation" and "modest reading" when deciding its preemptive scope. *Id*. at 697-98. It also rejected a reading of 5 U.S.C. § 8902(m)(1) that would leave "no room for any state law potentially bearing on federal employee-benefit plans in general, or carrier-reimbursement claims in particular." *Id*. at 699. To the contrary, because insurance laws are traditionally a matter of state concern, they are presumed to escape preemption unless Congress makes "that atypical intention clear." *Id*. at 698. With 5 U.S.C. § 8902(m)(1), Congress did not do that. *Id*.

CONCLUSION

The grant-vacate-remand solution the Solicitor General proposes will not work. It will take years to run its course and will cost a lot in aggravation and money, but this case will simply return. And we will be right back where we are now.

We therefore ask that this Court either deny the petition for writ of certiorari with no qualifications – or grant the petition and consider the merits of this matter.

Respectfully submitted,

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