No. 13-1305

IN THE
# Supreme Court of the United States

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

*Petitioners,*

*v.*

JODIE NEVILS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri**

## REPLY BRIEF FOR PETITIONERS


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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 PETITIONERS

Nevils identifies no valid reason to withhold review of the question presented, which has divided state and federal courts and jeopardizes a multibillion-dollar program affecting millions of federal workers. Nevils denies the lower-court conflict, but his contentions distort both lower courts' and this Court's decisions. His assertion that a conflicting Georgia Supreme Court ruling did not decide the issue is contradicted by that court's opinion. And Nevils's claim that another directly conflicting ruling of the Eighth Circuit was abrogated by *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), misreads *this* Court's opinion, which explicitly *declined to decide* the question presented. Indeed, aside from the decision below, courts agree that *McVeigh* has no bearing on the issue here.

Nevils's merits arguments rest primarily on the same misreading of *McVeigh*, which he tenders in lieu of any analysis of the text or purpose of the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.* His other arguments, conversely, hinge on implausibly narrow readings of decisions of this Court that refute his crabbed view of FEHBA's preemptive scope. And, like the court below, Nevils argues—in the teeth of this Court's teaching—that the views of the Office of Personnel Management ("OPM") deserve no weight whatsoever.

Nevils's claim (at 27) that the issue's "impact" is "as limited as can be" is also contrary to the government's repeatedly expressed position. Indeed, the government has twice entered the state-court fray to oppose the interpretation of FEHBA Nevils defends.

And Nevils's own authority shows that the issue affects many States, not just Missouri.

Seeking to insulate the decision below from scrutiny, Nevils advances several purported vehicle problems. None has merit. Neither the case's posture nor its facts preclude this Court from providing much-needed guidance on this important and recurring issue.

The petition should be granted.

## I. RESPONDENT FAILS TO REFUTE THE SPLIT.

Nevils contends that "there is no split of any significance on the question presented." Opp. 8. But his claims that *Thurman* v. *State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448 (Ga. 2004), and *MedCenters Health Care* v. *Ochs*, 26 F.3d 865 (8th Cir. 1994), do not conflict with the decision below are meritless.

A. Nevils asserts (at 13-14) that *Thurman* "did not decide" the question presented. But as even the decision below recognized (Pet. App. 5a), that is incorrect. The ultimate issue in *Thurman* was whether a federal employee who settled with a tortfeasor—and whose FEHBA carrier asserted a subrogation lien over some of the settlement proceeds (to recoup benefits it had paid)—could recover from her underinsured-motorist insurer the proceeds the FEHBA carrier reclaimed. 598 S.E.2d at 450. In resolving that issue, the Georgia Supreme Court expressly and necessarily decided the question presented here. *Id.* at 451.

Georgia law ordinarily barred insurers from seeking reimbursement unless the insured was fully compensated. 598 S.E.2d at 451. But FEHBA, *Thurman* held, trumped state law, and thus the

FEHBA carrier "had [a] subrogation lie[n] and w[as] able to enforce [it], … regardless of" Georgia law. *Ibid.* On that basis, the court "conclude[d] that when a federal employee is required by … FEHBA to reimburse the provider of benefits and the federal employee has not been fully compensated … the amount reimbursed to the [FEHBA] provide[r] constitutes a reduction in" the tortfeasor's available coverage—rendering the tortfeasor underinsured. *Ibid.*

B. In any event, Nevils does not deny that the Eighth Circuit's ruling in *Ochs*, 26 F.3d 865, squarely decided the question presented and contradicts the decision below. The resulting direct conflict between a state supreme court and the federal court of appeals for the same circuit amply justifies review.

Nevils inaccurately asserts that "[p]etitioners concede[d]" that *Ochs* "was 'abrogated'" by *McVeigh*. Opp. 13 (quoting Pet. 14 n.7). That mischaracterizes both petitioners' submission and *McVeigh*. As petitioners explained, *McVeigh* addressed only whether FEHBA *completely* preempts state law, creating federal *jurisdiction* over FEHBA disputes. Pet. 24-27. Nevils himself concedes that *McVeigh* "did not decide" whether FEHBA preempts state laws barring subrogation or reimbursement (Opp. 9)—an issue on which *McVeigh* explicitly *reserved judgment*, 547 U.S. at 698. Thus, as petitioners explained, although "*McVeigh* abrogated [*Ochs*'s] jurisdictional holding," *McVeigh* did *not* undermine *Ochs*'s separate holding on the scope of defensive preemption. Pet. 14 n.7.

Nor does the *McVeigh* Court's rejection, a dozen years after *Ochs*, of the theory of jurisdiction *Ochs* embraced deprive *Ochs*'s merits holding of precedential force. Litigants cannot evade a controlling prec-

edent by collaterally attacking the jurisdiction of the rendering court based on a subsequent change in the law. Otherwise, every decision in which the basis for federal jurisdiction is undermined by later developments would be in doubt. It is clear, moreover, that the Eighth Circuit would not disregard *Ochs* on this contrived basis.[1]

C. Nevils alternatively argues that *McVeigh* "reconfigured the interpretive roadmap," and urges the Court to "sta[y] its hand" until lower courts confront the new "[m]ap." Opp. 9-13. But federal and state courts have *already* addressed *McVeigh*—and, contrary to the decision below, correctly recognized that *McVeigh* has no bearing. Nevils's own authority, *López-Muñoz* v. *Triple-S Salud, Inc.*, __ F.3d __, 2014 WL 1856769 (1st Cir. May 9, 2014), deemed it "transparently clear that [*McVeigh*'s] characterization of [Section 8902(m)(1)] did not hinge in the slightest degree on how squarely the clause applied to the claims at issue." *Id.* at *4. Even *Kobold* v. *Aetna Life Insurance Co.*, 309 P.3d 924 (Ariz. Ct. App. 2013), *petition for cert. filed*, No. 13-1467, agreed that *McVeigh* "declined to decide" the question presented here. *Id.* at 927. Petitioner's other post-*McVeigh* cases dealt only with complete

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[1] In analogous circumstances, the Eighth Circuit has continued to follow prior decisions whose jurisdictional basis was later undermined. For example, it has recognized that *Bowles* v. *Russell*, 551 U.S. 205 (2007), abrogated the basis for appellate jurisdiction in *Charles* v. *Barnhart*, 375 F.3d 777 (8th Cir. 2004). *See Dill* v. *Gen. Am. Life Ins. Co.*, 525 F.3d 612, 620 n.12 (8th Cir. 2008). Yet the Eighth Circuit has continued (after *Bowles*) to treat *Charles*'s holding on the *merits* as binding. *See*, *e.g.*, *Sidler* v. *Colvin*, 525 F. App'x 527, 528 (8th Cir. 2013) (per curiam); *Davidson* v. *Astrue*, 501 F.3d 987, 990 (8th Cir. 2007).

preemption, and say nothing about its relevance here. *See Pollitt* v. *Health Care Serv. Corp.*, 558 F.3d 615, 615-17 (7th Cir. 2009) (per curiam); *Blue Cross Blue Shield of Ill.* v. *Cruz*, 495 F.3d 510, 511-14 (7th Cir. 2007). The decision below therefore stands alone in viewing *McVeigh* as a game-changer.[2]

## II. THE DECISION BELOW CONTRAVENES FEHBA AND THIS COURT'S PRECEDENT.

Nevils's merits arguments elide the flaws in the Missouri Supreme Court's reasoning and do nothing to diminish the need for this Court's intervention.

A. Nevils never grapples with FEHBA's text, which unambiguously preempts state laws barring subrogation or reimbursement. He does not explain why subrogation and reimbursement do not "relate to … benefits" (5 U.S.C. § 8902(m)(1))—even though they may prevent FEHBA participants from receiving benefits at all, and also affect the *net* benefits participants may *keep*. Pet. 18; Pet. App. 124a; App. to Pet. for Cert. 59a, *Kobold*, No. 13-1467 ("*Kobold* App."). And Nevils does not mention "payments with respect to benefits" (5 U.S.C. § 8902(m)(1))—which independently encompasses laws like Missouri's. Pet. 20-21; Pet. App. 117a-18a.

Nevils also has no persuasive answer to this Court's decisions that foreclose the Missouri Supreme Court's crabbed construction of FEHBA's text. He dismisses *Hillman* v. *Maretta*, 133 S. Ct. 1943

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[2] *Calingo* v. *Meridian Resources Co.*, 2011 WL 3611319, at *8-10 (S.D.N.Y. Aug. 16, 2011), initially concluded that *McVeigh* altered the analysis of the issue, but that court later reversed itself in light of OPM's view, 2013 WL 1250448, at *4 (S.D.N.Y. Feb. 20, 2013).

(2013)—which repudiated an artificial distinction, closely analogous to the distinction drawn by the decision below, between laws dictating who receives benefits initially and laws governing who ultimately keeps them (*id.* at 1952)—because *Hillman* addressed a "different statute." Opp. 21. But Nevils identifies no relevant difference between the statutes, offering only the question-begging claim that FEHBA is less clear. *Ibid.* And he misses *Hillman*'s broader point—echoed recently in *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1430-31 (2014)—that such contrived distinctions invented to evade preemption do not wash. *See* 133 S. Ct. at 1952.

Nevils's effort (at 22-23) to distinguish *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990)—which held that ERISA's parallel preemption provision preempts state laws barring reimbursement (*id.* at 58-60)—is equally groundless. FEHBA and ERISA employ the same sweeping "relate to" phrase, which "expresses a 'broad pre-emptive purpose'" (*Northwest*, 134 S. Ct. at 1428 (citation omitted)) in any context. Nevils notes that the object of "relate to" in ERISA is benefit *plans*, rather than "coverage or benefits." Opp. 22. But *FMC* held that anti-reimbursement laws relate to plans *precisely because* they affect employees' benefits. *See* 498 U.S. at 60. Moreover, as the government has explained, "[i]t is exceedingly unlikely that Congress intended a broader role for state law," or "desired less uniformity," "in the case of federal em-

ployees than [for] private employees." *Kobold* App. 60a.[3]

B. Nevils claims that the decision below should stand because it was "grounded in *McVeigh*." Opp. 21. But the Missouri Supreme Court's misplaced reliance on a decision that undisputedly "did not decide" the issue here (*ibid.*) cannot save its misguided interpretation. Pet. 24-27. That the court below misread *McVeigh* is only more reason for this Court to intervene.

*McVeigh* is also Nevils's only answer (Opp. 23-24) to the evidence that Congress's purpose in enacting (and strengthening) FEHBA's preemption provision was to prevent a patchwork of state-law restrictions. *Cf.* Pet. 21-22; Pet. App. 119a-21a. But nothing in *McVeigh*—which itself noted Congress's goal of promoting nationwide "uniform[ity]" (547 U.S. at 686)—casts any doubt on Congress's aims.

C. Nevils defends the Missouri Supreme Court's heavy reliance on "the presumption against preemption" (Opp. 24), but again he is mistaken. Whether the presumption should *ever* apply to express-preemption provisions is debatable. *Cf. 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). The irrelevance of that presumption here, however, is not. Pet. 22-24.

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[3] Nevils's claim that FEHBA must be read more narrowly than ERISA because FEHBA "purports to give preemptive effect to *private contractual terms*" (Opp. 23) rests on a false premise. Properly construed, Section 8902(m)(1) provides that *federal law* preempts state laws within its scope. Pet. 11 n.6.

Nevils does not dispute the "history of significant federal presence" in regulating federal-employee benefits, which alone renders the presumption inapposite. *United States* v. *Locke*, 529 U.S. 89, 108 (2000). He urges the Court to limit *Locke* to foreign commerce (Opp. 25 n.7), but that invented limitation has no basis in *Locke*'s language or logic. *Locke* held that in areas where the federal government has long played a primary role—especially where Congress "ha[d] as one of its objectives a uniformity of regulation"—courts should not assume that Congress intended to allow local interference. 529 U.S. at 108. That is certainly true of benefits the federal government provides to its own employees.

Nevils's similar bid (at 24-25) to cabin *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), has no more merit. *Buckman*'s reasoning that the presumption is inapposite to laws governing "the relationship between a federal agency and the entity it regulates" (*id.* at 347) is fully applicable to FEHBA. The terms of FEHBA contracts—including subrogation and reimbursement clauses—directly govern the relationships, rights, and duties among OPM, FEHBA providers, and the federal workforce. Pet. 5-8.

Nevils again retreats to *McVeigh* (Opp. 24), but *McVeigh* did not even mention the presumption. And its holding that "all rights and duties stemming from" a FEHBA contract are not necessarily "'federal in nature'" (547 U.S. at 693 (citation omitted)) scarcely implies that the federal government's relationships with its workers and carriers that administer benefits on its behalf are primarily matters of state concern.

D. Nevils recites the Missouri Supreme Court's conclusion that OPM's longstanding interpretation of FEHBA deserves no deference (Opp. 25-26), without addressing the flaws in that court's reasoning. *Cf.* Pet. 28-30. He repeats the court's mistaken view that *Chevron* deference never applies to informal interpretations—a view *United States* v. *Mead Corp.*, 533 U.S. 218, 231 (2001), rejected. And "*Skidmore*" *does* demand "further analysis" (Opp. 26) beyond the lower court's back-of-the-hand dismissal of OPM's view—as numerous rulings according great weight to informal interpretations illustrate. Pet. 28-33.

## III. THE SCOPE OF FEHBA PREEMPTION IS EXCEPTIONALLY IMPORTANT.

Nevils fares no better in attempting to minimize the importance of the question presented. His assertion that "the issue … touches only … Missouri" (Opp. 27) is simply false. At stake is the meaning not of Missouri law, but of a federal preemption provision applicable nationwide.

Nor is it true, as Nevils suggests (at 27), that few States prohibit subrogation or reimbursement. At least seven other States generally bar subrogation or reimbursement in this context. *See* Conn. Gen. Stat. § 52-225c; N.Y. Gen. Oblig. Law § 5-335; Va. Code § 38.2-3405; *Allstate Ins. Co.* v. *Druke*, 576 P.2d 489, 491-92 (Ariz. 1978) (en banc); *Perreira* v. *Rediger*, 778 A.2d 429, 431 (N.J. 2001); Kan. Admin. Regs. § 40-1-20; 11 N.C. Admin. Code 12.0319. And *dozens* forbid subrogation or reimbursement in particular circumstances—for example, as Nevils's own authority explains, under the "made whole" doctrine, which bars subrogation unless the insured "has been fully compensated." Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the*

*Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 737 (2005); *id.* at 738-75; *see also* Ass'n of Fed. Health Orgs., *State Survey of Reimbursement Laws in the Health Insurance Context* (2014), http://tinyurl.com/podatzj.

Nevils also does not refute the massive practical stakes of the question presented (*cf.* Pet. 33-35)—which the government's submissions and participation here and in *Kobold* forcefully demonstrate. Pet. App. 109a, 120a-21a, 131a; *Kobold* App. 52a. Nevils claims that reimbursement is unimportant because (he says) "OPM has never mandated the inclusion of a reimbursement clause in its contracts with" FEHBA carriers. Opp. 28. But as he concedes (*ibid.*), OPM has said just the opposite: OPM generally does mandate reimbursement in the terms of "FEHB Program contracts," which "require enrollees to reimburse the plan in the event of a third party recovery." Pet. App. 83a. "Carriers" thus "are required to seek reimbursement and/or subrogation recoveries in accordance with the contract." *Ibid.*; *see also id.* at 111a ("[m]ost FEHB program contracts provide for a right of subrogation," which "requires … FEHB beneficiaries to reimburse the plan" if they recover from a third party).

## IV. RESPONDENT'S ALLEGED VEHICLE PROBLEMS ARE BASELESS.

Finally, Nevils asserts that this case is a poor vehicle to provide much-needed guidance. Opp. 15-20. He is wrong.

A. Nevils notes (at 20) the case's interlocutory posture, but he does not dispute this Court's jurisdiction, and offers no other reason why the posture precludes review. Indeed, this Court frequently grants

review where a trial court granted summary judgment but an appellate court reversed. *See*, *e.g.*, *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2127 (2014); *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1817-18 (2014); *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2188 (2012). It should do the same here. Any proceedings on remand are irrelevant to the question presented. And if this Court reverses the decision below, such proceedings would be unnecessary.

B. Nevils also quibbles (at 16-17) with the phrasing of the question presented, which he incorrectly argues covers only subrogation in a technical, common-law (or state-law) sense, but not *reimbursement* sought directly from a FEHBA participant. As the government has explained (Pet. App. 111a), and as Nevils's own authority demonstrates, "subrogation" often refers broadly to a right to "be substituted to the rights of the insured and seek recovery … directly from the third party responsible for the loss, *or when the insured has recovered from* the third party, *to be reimbursed* from that recovery." Parker, *supra*, at 726 (emphases added). "Subrogation" in the question presented thus encompasses GHP's claim for reimbursement here. Any theoretical difference between subrogation and reimbursement has no bearing on the preemption analysis. Whether a carrier recovers from the participant himself or from a third party liable to the participant, the recovery "relate[s] to … benefits" and "payments with respect to benefits." 5 U.S.C. § 8902(m)(1).[4]

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[4] Even if this contrived ambiguity were remotely an impediment to review, the Court could, of course, restyle the question presented to refer explicitly to reimbursement.

Nevils's claim (at 17-19) that the question presented is academic because GHP's OPM contract supposedly did not require GHP to seek reimbursement fails for the same reason. GHP's "right of subrogation" entitled GHP to be "reimburse[d]" by the "beneficiar[y]." Pet. App. 111a. The court below thus was correct that GHP's "contract directs GHP to seek reimbursement or subrogation when an insured obtains a settlement or judgment," and gave GHP a "contractual right to reimbursement." *Id.* at 2a, 10a.

Indeed, until now, Nevils agreed that GHP's contract required it to seek reimbursement. He conceded below that petitioners' subrogation lien was "based … on a provision of the contract between GHP and OPM … which *directed GHP to seek reimbursement/subrogation.*" Mo. S. Ct. Nevils Br. 3-4 (emphasis added). This purported vehicle problem is a mirage.

C. Even if Nevils's supposed vehicle problems had substance, none is even arguably present in *Kobold*, No. 13-1467. *Kobold* indisputably arises from a final judgment, and the FEHBA provider's right to seek reimbursement is beyond question. *Kobold* App. 1a-18a, 49a-50a. At a minimum, therefore, the Court should grant review in *Kobold* and hold this petition pending its decision in *Kobold*.

## CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be considered on the merits together with *Kobold*, No. 13-1467.

Respectfully submitted.

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July 16, 2014