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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, preempts state laws precluding carriers that administer FEHBA plans from seeking subrogation as required by their contracts with the Office of Personnel Management.

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INTRODUCTION

This case meets none of the criteria for certiorari review. First and foremost, there is no viable split in the federal appeals courts or state high courts on the issue presented in the petition. Since this Court's decision in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), which interpreted FEHBA's preemption provision for the first time, *no* other state high court or federal circuit court has decided the question presented—whether FEHBA expressly preempts a state law prohibiting subrogation—let alone disagreed with the Missouri Supreme Court's decision here.

Petitioners do not dispute this. Instead, they rely on two pre-*McVeigh* decisions that, they say, conflict with the Missouri Supreme Court's decision here. But even a quick glance at these two cases gives away the game. The first is a decades-old decision that Petitioners themselves concede was "abrogated" by *McVeigh*. Pet. 14 n.7. The second is a state high court ruling that *expressly* did not decide the question presented here.

Lack of split aside, this petition also presents an exceedingly poor vehicle to evaluate the question presented for two distinct reasons. First, the question presented bears no relationship to the facts of this case. Petitioners ask this Court to decide whether FEHBA authorizes insurance carriers to "seek[] subrogation as required by their contracts" notwithstanding state laws that would prohibit such claims. Pet. i. But Petitioners did not seek "subrogation" in this case; instead, they sought *reimbursement*—an entirely separate type of claim. (Whereas subrogation allows an insurer to recover

directly from a third party responsible for an insured's injury, reimbursement allows an insurer to seek recovery from an insured after he has recovered from a third party). That this case does not actually involve subrogation would render any decision this Court could offer on the question presented both advisory and irrelevant to the outcome here.

Second, even if Petitioners had accurately phrased the question presented—to ask this Court to decide the preemptive effect of a reimbursement provision in a FEHBA contract—this case would still be a poor vehicle for review because Petitioners' governing contract does not actually contain a reimbursement provision. Most FEHBA insurers, including the carrier in *McVeigh*, opt to include both a contractual right to subrogation and a separate right to reimbursement. That way, they have a choice about how to proceed in recovering legitimate expenses. Petitioners, however, elected not to include in their governing contract a separate right to seek reimbursement—yet another reason why any decision from this Court would be merely advisory.

Petitioners nonetheless insist that review is warranted because the decision below was wrong. Here too, Petitioners fail to persuade: The Missouri Supreme Court faithfully analyzed the preemption issue consistent with *McVeigh*'s lessons. In *McVeigh*, this Court found that FEHBA's preemption provision was "unusual," a "puzzling measure," and "open to more than one construction." 547 U.S. at 697. *McVeigh* directed courts to adopt a "cautious interpretation," and a "modest reading" when deciding the preemptive scope of this odd provision. *Id.* at 697-98. That is exactly what the Missouri

Supreme Court did here. It thoughtfully analyzed the provision and evaluated the impact of *McVeigh* before reaching its conclusion that FEHBA does not preempt Missouri's state law.

At any rate, there is no reason to believe that the question in this case is important enough to warrant this Court's attention. The decision below affects only one state, Missouri, and so is necessarily of limited significance. Moreover, there are only a handful of states that have laws like Missouri's—meaning that the preemption question, even if it were squarely presented here, lacks national scope. And if it were in fact true that reimbursement recoveries are so crucial to the government's coffers, as Petitioners contend, one would have expected the Office of Personnel Management to require that FEHBA insurers uniformly seek reimbursement. As this case itself shows, though, that has not happened.

STATEMENT OF THE CASE

1. In 1959, Congress enacted the Federal Employees Health Benefit Act ("FEHBA"), 5 U.S.C. § 8901 *et seq*., which established a program to administer health benefits to federal employees. The federal Office of Personnel Management ("OPM") has responsibility for administering the health benefits program and for negotiating and regulating the health-benefits plans that cover federal workers. *See* 5 U.S.C. §§ 8902(a), (d). To do this, OPM contracts with private health insurance carriers who agree to provide health insurance to federal workers in exchange for a "negotiated service charge that the [OPM] pays directly." *McVeigh*, 547 U.S. at 703 (Breyer J., dissenting). In Missouri, OPM has

entered into numerous contracts with different carriers; in 2006, one of those carriers was Petitioner Group Health Plan, Inc. ("GHP"). Pet. App. 85a-108a. Under GHP's contract, GHP agreed to provide health insurance to federal employees as a community-rated carrier. *Id.*

As a federal employee, Respondent Jodie Nevils was entitled to health insurance coverage and participated in a plan with GHP serving as Nevils' OPM-approved medical insurance carrier. Pet. App. 2a. On November 2, 2006, Nevils was injured in an automobile accident. *Id.* at 31a. He received treatment for his injuries from various healthcare providers, and, consistent with its obligations under the contract, GHP paid the resulting medical bills. *Id.* at 2a. At the time of Nevils' injuries, GHP's OPM-approved contract contained a section titled "SUBROGATION" which provided for GHP's subrogation rights, but did not grant any right for GHP to seek reimbursement directly from an insured. *See* Pet. App. 93a-94a.[1]

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[1] In full, the contractual subrogation clause states that:

> (a) The Carrier shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members, according to the following rules:
>
> (1) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is permitted, and in which the Carrier subrogates for non-FEHB members;
>
> (2) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at

(*Footnote continued*)

2. After Nevils recovered from his injuries, he initiated a tort action against the negligent driver who caused the motor vehicle accident. The parties reached a settlement, which was paid by the tortfeasor's automobile insurance policy. Pet. App. 31a. Some time after Nevils received the settlement, GHP, through its agent, ACS Recovery Services, Inc. ("ACS"), demanded reimbursement (via a lien) out of the settlement funds for the medical bills it paid—a total of $6,592.24. *Id.* at 2a. Nevils paid the reimbursement amount to GHP. *Id.*

In February 2011, Nevils filed suit against GHP on behalf of himself and others similarly situated in

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least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA);

(3) The Carrier shall not subrogate if it is doing business in a State that prohibits subrogation, and in which the Carrier does not subrogate for any plan covered under ERISA;

(4) For Carriers doing business in more than one State, the Carrier shall apply rules (1) through (3) of this subsection according to the rule applicable to the State in which the subrogation would take place.

(b) The Carrier's subrogation procedures and policies shall be shown in the agreed upon brochure text or made available to the enrollees upon request.

Pet. App. 93a-94a.

In addition, the "brochure text" referenced in GHP's contract states that "[i]f you do not seek damages you must agree to let us try. This is called subrogation." Group Health Plan, 93 (2006) *available at* http://archive.opm.gov/insure-/archive/06/brochures/pdf/73-104.pdf

Circuit Court for St. Louis County, Missouri, alleging that GHP had improperly obtained reimbursement for medical benefits it paid because, under Missouri law, health insurers are prohibited from demanding reimbursement from the settlement recoveries of injury victims. *Id.* at 30a, 31a-32a.

GHP removed the case to federal court for the Eastern District of Missouri, arguing that the claims involved distinctly federal interests and presented a conflict between federal interests and state law. *Id.* at 32a-33a (contending jurisdiction existed under 28 U.S.C. § 1442(a)(1) and arguing that Nevils' claims are expressly preempted by the terms of the OPM-GHP contract). Nevils moved to remand, and on June 15, 2011, the federal court sustained the motion. *Id.* at 42a.

On remand to Missouri state court, ACS intervened as an additional defendant and, together with GHP, sought summary judgment. Pet. App. 3a. ACS and GHP argued that FEHBA's preemption clause, 5 U.S.C. § 8902(m)(1), preempts Missouri's law prohibiting an insurer from obtaining reimbursement.[2] The trial court entered judgment for GHP and ACS, agreeing that § 8902(m)(1) preempted Missouri state law. Pet. App. 43a-47a. Nevils appealed to the Missouri Court of Appeals,

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[2] Section 8902(m)(1) provides that:

> The terms of any contract . . .which relate to the nature, provision, or extent of coverage or benefits. . . shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

which affirmed the decision of the trial court. *Id.* at 52a-58a.

3. Nevils then sought review in the Missouri Supreme Court, which held that § 8902(m)(1) does not preempt Missouri's state law prohibiting reimbursement. The Missouri Supreme Court first recognized that the Missouri Court of Appeals, in *Buatte v. Gencare Health Systems, Inc.*, 939 S.W. 2d 440 (Mo. App. 1996), had previously addressed this issue and held that FEHBA preempted Missouri's state law. Pet. App. 5a. The Missouri Supreme Court reasoned, however, that "[t]he continued validity of *Buatte*" had been "called into question" by *McVeigh*. *Id.* Although *McVeigh* ultimately held only that the FEHBA did not completely preempt state law so as to "confer federal jurisdiction" over "contract-based reimbursement claims," *McVeigh,* 547 U.S. at 698, the Missouri Supreme Court found *McVeigh*'s analysis of § 8902(m)(1) to be highly relevant to the question of whether FEHBA expressly preempts Missouri's state law prohibiting subrogation. Pet. App. at 6a-7a.

In finding that FEHBA does not preempt Missouri's antisubrogation law, the Missouri Supreme Court refused to defer to OPM's contrary position as articulated in its "recent, informal" carrier letter that was "drafted in response to litigation." Pet. App. 10a n.2. The Missouri Supreme Court held that the agency's informal view was not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id.* The Missouri Supreme Court held that while the informal view was "relevant," it was

insufficiently persuasive to "establish that FEHBA preempts state anti-subrogation law." *Id.*

REASONS FOR DENYING THE WRIT

I. There Is No Cert-Worthy Split on the Question Presented.

Contrary to Petitioner's contention, there is no split of any significance on the question presented. No other state high court or federal appellate court has decided this issue since *McVeigh*, and even the two pre-*McVeigh* decisions on which Petitioners hang their hat are easily distinguishable. That is reason enough to deny the writ. *See* Sup. Ct. R. 10.

To be sure, Petitioners spend some time window-dressing their "split" claim, pointing to a district court case in New York and a mid-level state appellate decision that discussed this issue, but none of this creates a compelling reason why *this* Court should weigh in before the question has percolated further in the lower courts.

A. *McVeigh* is Directly Relevant to the Issue in this Case.

Before this Court issued its 2006 ruling in *McVeigh,* the lower courts lacked any meaningful blueprint from this Court on how to interpret FEHBA's express preemption clause. In *McVeigh*, however, this Court explained—for the first time—how the clause should be construed. *See* 547 U.S. at 697-99. FEHBA's preemption provision is, in the Court's words, "unusual," a "puzzling measure," and "open to more than one construction." *Id.* at 697. The clause does not itself "declare[] . . . federal law preemptive," but instead purports to confer preemptive effect over "contract terms in health

insurance plans"—an odd prescription that, coupled with its two competing "plausible constructions," led the Court to apply a "cautious interpretation." *Id.* at 697-98 (observing that a "modest reading of this provision is in order").

In addition, although *McVeigh* did not decide whether "contract-based reimbursement claims are . . . covered by FEHBA's preemption provision," *id.* at 698, the Court thoroughly analyzed and rejected two basic principles that earlier courts had relied on when interpreting § 8902(m)(1). *First*, the Court disagreed with the notion that FEHBA reimbursement claims are, as Petitioners contend, "inherently federal" in nature. *See* Pet. 2. The United States had advanced this argument in *McVeigh*, arguing that "reimbursement rights under contracts contemplated by FEHBA" are "federal in nature" and so cannot be limited by state law. 547 U.S. at 693. The *McVeigh* Court was "not persuaded," *id.*, reasoning that, like all reimbursement claims, those arising out of FEHBA contracts "depend upon a recovery from a third party under terms and conditions ordinarily governed by *state law*." *Id.* at 692 (emphasis added); *id.* at 683 ("[C]laims of this genre, seeking recovery from the proceeds of state-court litigation, are the sort ordinarily resolved in state courts."). Thus, the Court refused to say that, under § 8902(m)(1), a FEHBA contract term "would displace every condition state law places on [a personal-injury] recovery." *Id.* at 698.

Second, *McVeigh* drew a distinction between FEHBA's interest in federalizing the provision of health insurance benefits for federal employees and the ability of FEHBA carriers to obtain subrogation

and reimbursement recoveries. The Court recognized that, on the one hand, in FEHBA, Congress had clearly indicated its desire "[t]o ensure uniform coverage and benefits" for federal employees. *Id.* at 686. Congress spoke of protecting the "extent of [federal employees'] benefits, coverage of family members, age limits for family members" and other similar matters from the vagaries of state law. *Id.* at 686 (quoting H.R. Rep. No. 95-282, at 1 (1977)). To this end, Congress assigned the responsibility "for negotiating and regulating" all of the health-benefit plans available to federal workers across the country to one federal agency. *Id.* at 683-84.

But *McVeigh* went on to recognize that nothing in FEHBA reveals a comparable desire to federalize reimbursement and subrogation claims. As a textual matter, the Court explained, "FEHBA contains a preemption clause . . . displacing state law on issues relating to 'coverage or benefits' afforded by health-care plans," but the "Act contains no provision addressing the subrogation or reimbursement rights of carriers." *Id.* at 683. It is in no way clear, then, that Congress intended to sweep this "genre" of state-law claims into the ambit of federal common law. *Id.*

Moreover, cutting starkly against this possibility, the Court explained that the reimbursement right at issue in *McVeigh* was "coupled" with a subrogation right that, undoubtedly, would not be governed by "uniform, court-declared federal law" and over which FEHBA's preemption provision would "have no sway." *Id.* at 692 & n.4, 699. In *McVeigh*, the insurer's plan "link[ed] together the carrier's right to reimbursement from the insured and its right to

subrogation." *Id.* at 698. As the Court explained, the carrier's subrogation right "allows the carrier, once it has paid an insured's medical expenses, to recover directly from a third party responsible for the insured's injury or illness." *Id.* at 698-99. Had the carrier "taken that course," opting to step into the insured's shoes and pursue relief directly from the tortfeasor, the Court had little doubt that the carrier's claim "would be governed not by [the FEHBA contract] to which tortfeasors are strangers, but by state law"—a sure sign that any recovery could not be considered a healthcare benefit. *Id.* at 699. In the Court's view, nothing in FEHBA suggests that these two rights—reimbursement and subrogation—should be "decoupled" or treated differently. *Id.*

These lessons reconfigured the interpretive roadmap for courts facing questions about the preemptive scope of § 8902(m)(1). Before *McVeigh*, a number of lower-level state and federal courts had looked at § 8902(m)(1) and concluded that it had "broad preemptive effect" and undoubtedly reached FEHBA-based reimbursement claims because, they reasoned, FEHBA "regulates all aspects of federal employee health benefit plans." *NALC Health Benefit Plan v. Lunsford*, 879 F. Supp. 760, 762-63 & n.3 (E.D. Mich. 1995) (collecting cases); *see also Buatte*, 939 S.W.2d at 442. But none of these courts had the benefit of this Court's thinking on the meaning and scope of § 8902(m)(1). In particular, these courts could not have known that *McVeigh* would expressly reject the notion that FEHBA reimbursement claims are inherently "federal in nature." 547 U.S. at 693. And none had the benefit of *McVeigh*'s warning that FEHBA's preemption clause must be approached

with caution and given a "modest reading." *Id.* at 698.

B. The Decision Below Is the Only State High Court or Federal Circuit Decision Ruling on the Scope of FEHBA Preemption Since *McVeigh*.

In the eight years since *McVeigh*, only three courts have decided whether § 8902(m)(1) preempts state laws prohibiting subrogation and reimbursement: the Missouri Supreme Court below, a mid-level appellate court in Arizona, and a district court in New York. *See* Pet. App. 1a; *Kobold v. Aetna Life Ins. Co.*, 309 P.3d 924 (Ariz. App. 2013); *Calingo v. Meridian Resource Co., LLC*, 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013). The paucity of decisions on this issue tips the scale even more heavily against this Court's review. This Court has previously stayed its hand where legal issues are still in their infancy—an approach that is appropriate here. *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (denying certiorari so that the "issue receives further study" in lower courts "before it is addressed by this Court").

Indeed, that cautious approach is all the more prudent given the view from other courts that have looked at this issue (but not decided it). Unlike Petitioners, these courts understand that *McVeigh* is now the "beacon" by which courts must "steer." *Lopez-Munoz v. Triple-S Salud, Inc.*, __F.3d__, 2014 WL 1856769, at *5 (1st Cir. May 9, 2014) (noting, in case involving preemption of state contract and tort law claims, that "the devil is in the detail" and "[*McVeigh*] is the beacon by which [the court] must steer"); *Pollitt v. Health Care Service Corp.*, 558 F.3d

615, 616 (7th Cir. 2009) (stating that *McVeigh* "holds that federal law does not completely occupy the field of health-insurance coverage for federal workers"); *cf. Blue Cross Blue Shield of Illinois v. Cruz*, 495 F.3d 510, 513 (7th Cir. 2007) (noting that *McVeigh* drew a distinction between health benefits and reimbursement).

C. Even Petitioners' Pre-*McVeigh* Cases Do Not Establish a Split of Authority on the Question Presented.

Even if *McVeigh* had never been decided, review would still be unwarranted. Petitioners rely exclusively on two pre-*McVeigh* cases to argue that there exists a conflict on this issue that "merit[s] certiorari." Pet. 16. But Petitioners concede that one of these decisions—the Eighth Circuit's perfunctory affirmance of a district court in *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994)—was "abrogated" by *McVeigh*. Pet.14 n.7. And the Eighth Circuit has never since cited *Ochs* as controlling law.[3]

In Petitioners' other case, *Thurman v. State Farm Mutual Automobile Ins. Co.*, 598 S.E.2d 448 (Ga. 2004), the Georgia Supreme Court simply did not

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[3] Petitioners contend that another Eighth Circuit case, *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224 (8th Cir. 2012), shows that the Eighth Circuit "continues to recognize that subrogation is closely related to FEHBA benefits." Pet. 14. But *Jacks* is not a preemption case, which is why Petitioners don't actually rely on it. Instead, the court decided whether an insurer met the "federal officer" exception in the removal statute. 701 F.3d at 1235 (explaining that the "sole question" before the court was "where the action will be adjudicated").

decide the issue here. The Georgia Supreme Court made clear that the *only* question in the case was whether "funds from an insurance policy that are used to cover the subrogation claims of the federal government, as claimant's employer, [are] counted in the calculation of 'available coverages' for purposes of the Georgia Uninsured Motorists Statute." *Id.* at 450 (explaining that "[w]e granted the Thurmans's petition for a writ of certiorari" to decide this question). The Georgia Supreme Court's answer to that state-law question has no bearing on the federal preemption question Petitioners have asked this Court to decide. *See id.* at 451.

And the lone sentence in *Thurman* regarding preemption that Petitioners seize on is pure dicta. *See* Pet. 15. In *Thurman*, both the carrier and the injured federal employee *agreed* that the carrier was entitled to reimbursement. 598 S.E.2d at 450. The court thus had no occasion to determine "when a federal employee is required by . . . FEHBA to reimburse the provider of benefits." *Id.* at 451.[4]

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[4] Although Petitioners do not explicitly rely on it for purposes of the alleged "split," they point to *Shields v. Gov't Emps. Hosp. Ass'n., Inc.*, 450 F.3d 643 (6th Cir. 2006) as evidence that other courts "recognize[]" FEHBA's preemptive effect on "state antisubrogation laws." Pet. 16. That case concerned a wholly unrelated issue—who was on the hook for medical bills, an insurer or an insured. *See Shields*, 450 F.3d at 644 (affirming district court's conclusion that that an insured's "no fault automobile insurance policy with State Farm obligates State Farm to cover the cost of Shields' medical expenses resulting from injuries sustained in an automobile accident"). It has no relevance to the question decided by the Missouri Supreme Court here.

In short, Petitioners' proffered split is a mirage. Although the question presented may warrant this Court's attention at some point in the future, the issue is plainly not ripe for review. Further percolation is needed to give the lower courts the opportunity to consider the impact of *McVeigh* on the question of whether FEHBA preempts state antisubrogation laws. Unless and until the lower courts split on this issue, this Court should stay its hand.

II. This Case Is A Poor Vehicle For Review.

Even if the petition posed a question warranting this Court's review, this case presents an extraordinarily poor vehicle for deciding it.

A. Deciding The Question Presented Would Be Advisory And Would Not Affect The Outcome Of This Case.

Two major flaws infect this case and make it a poor vehicle to consider the question Petitioners have asked this Court to resolve. First, Petitioners have asked this Court to decide "whether FEHBA preempts state laws precluding carriers that administer FEHBA plans from seeking *subrogation* as required by their contracts." Pet. i (emphasis added). That would be fine, if what was at issue here was a carrier's effort to seek subrogation under a contract. As this Court has explained, a carrier's "subrogation right allows the carrier, once it has paid an insured's medical expenses, to recover directly from a third party responsible for the insured's injury, or illness." *McVeigh*, 547 U.S. at 698-99; *see also US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1546 n.5 (2013) ("Subrogation simply means

substitution of one person for another." (quoting 1 Dobbs § 4.3(4)). So had Petitioners exercised their contractual right to "stand in the shoes of another and assert that person's rights against a third party," *US Airways*, 133 S. Ct. at 1546 n.5, and had the Missouri Supreme Court ruled that FEHBA trumped a Missouri law prohibiting this type of substitute action, granting the writ and answering the question presented might resolve this case.

But Petitioners did not seek "subrogation as required by their contracts." Pet. i. Instead, they sought reimbursement directly from Mr. Nevils, waiting until he settled with the tortfeasor and then demanding payment out of the settlement. *See* Pet. 8 ("GHP asserted—through a subcontracter, ACS—a lien on Nevils's settlement proceeds for $6,592.24 in benefits GHP had paid."). Reimbursement is a distinct right that involves a carrier "seeking recovery from the proceeds of state-court litigation," not stepping into the shoes of the insured to pursue recovery against a third party. *McVeigh*, 547 U.S. at 683. Because this case involves reimbursement, not subrogation, any answer to the question Petitioners have asked this Court to decide—whether FEHBA authorizes a carrier to "seek[] subrogation as required by their contracts" notwithstanding state laws prohibiting such conduct—will necessarily be advisory.[5]

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[5] Lest this problem appear overly technical, it is entirely possible that the Court could reach differing conclusions about the preemptive reach § 8902(m)(1) for contractual reimbursement rights compared with contractual subrogation rights. After all, in *McVeigh*, this Court appeared to shut the door entire-

(*Footnote continued*)

So if what's at issue in this case is an effort to seek reimbursement, why did Petitioners ask this Court to decide an unrelated question about the right to seek subrogation? Enter a factual flaw: Petitioners' FEHBA contract in this case *contains no contractual reimbursement clause*. *See* Pet. App. 93a-94a. Instead, all it includes is a section titled "SUBROGATION" which provides, in relevant part, that "[t]he Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited," so long as the Carrier "subrogates for at least one plan covered under [ERISA]." Pet. App. 94a. Given the absence of any language addressing reimbursement in the contract, even had Petitioners phrased the question presented accurately—and asked whether FEHBA preempts state laws prohibiting *reimbursement*—the answer would still make no difference here.

To be sure, Petitioners play loose with the terms "subrogation" and "reimbursement," repeatedly using "subrogation" when they mean "reimbursement." *See, e.g.*, Pet. 29, 33. But the two are neither synonymous nor interchangeable. To see why, contrast Petitioners' contract with the insurer's contract in *McVeigh*. There, as this Court explained, the Plan contained both a contractual "right to reimbursement from the insured and [a] right to

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ly on the possibility that § 8902(m)(1) could preempt state laws prohibiting subrogation. *See* 547 U.S. at 680-81 (explaining that, had the insurer pursued its subrogation right, "[t]he tort-feasors' liability, whether to the insured or the insurer, would be governed not by an agreement to which the tortfeasors are strangers, but by state law, and § 8902(m)(1) would have no sway").

subrogation." *McVeigh*, 547 U.S. at 698. Specifically, the Plan stated (in relevant part):

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. . . .
>
> If 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.
>
> If we pursue a recovery of the benefits we have paid, you must cooperate in doing what is reasonably necessary to assist us. You must not take any action that may prejudice our rights to recover.

McVeigh, 547 U.S. at 684-85.

The presence of the right to seek both subrogation and reimbursement gave the insurer in *McVeigh* a choice: Either step into the shoes of the insured to pursue relief directly from the tortfeasor or wait for the insured to recover and then seek reimbursement out of the recovery. *See id.* at 698-99 (discussing Empire's option to exercise its "subrogation right" instead of its reimbursement right). Many other FEHBA plans contractually authorize the same choice, including most of the very cases Petitioners discuss in their petition. *See, e.g.*, *Kobold*, 309 P.3d at 925 n.1 (explaining that Aetna's plan contained both a contractual subrogation clause and a

contractual reimbursement clause); *Calingo*, 2013 WL 1250448, at *1 (same, for Meridian plan); *NALC Health Benefit Plan*, 879 F. Supp. at 763 & n.5 (same, for NALC plan); *Buatte*, 939 S.W.2d at 441 (same for Gencare plan); *see also* Pet. 13 (describing the plan in *Ochs* as containing a "clause requiring [the Carrier] to seek reimbursement if participants recovered from other sources").

Petitioners, however, chose a different approach, electing not to include a reimbursement clause in their contract. That choice is certainly theirs to make; but it means that even were this Court to decide the *reimbursement* preemption question Petitioners really want this Court to decide (notwithstanding the deficient question presented), any answer would make no difference here. As Petitioners themselves argue, the FEHBA preemption question hinges on whether the "terms of any contract" can override state laws to the contrary. Pet. 2. The absence of any contractual term that even purports to grant Petitioners the right to seek reimbursement from its insureds renders this case a poor vehicle for deciding the question presented in the petition.[6]

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[6] The Missouri Supreme Court glossed over this point, treating the two terms, like Petitioners here, as synonymous. *See* Pet. App. 2a. But this Court couldn't do the same thing. According to Petitioners, the core question for the Court is whether the "terms of any contract" can override state laws to the contrary. Pet. 2. So whether the governing contract contains the alleged preemptive contractual term is an antecedent, and necessary, step on the way to answering that question. In other words, even if the Court agreed in the abstract that § 8902(m)(1) authorized terms in a FEHBA contract to preempt

(*Footnote continued*)

B. The Procedural Posture Of This Case Makes It A Poor Vehicle For Review.

Finally, this case is indisputably interlocutory, adding another reason why this Court to deny the petition. *See, e.g.*, *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). Petitioners offer no sound reason to overcome this Court's usual practice of denying review before a case has reached final resolution.

III. The Decision Below was Correct.

Nor is review warranted on the ground that the lower court got it wrong on the merits. Petitioners insist that the lower court's ruling affirmatively violated several of this Court's precedents and FEHBA's overriding goal of uniformity. Pet. 17-21. Making matters worse, say Petitioners, the lower court erred in applying a presumption against preemption and in refusing to defer to the OPM's informal letter regarding FEHBA preemption. *Id.* at 27-33. Not so, on all counts.

A. First, the lower court's conclusion that FEHBA does not preempt state laws prohibiting subrogation or reimbursement is fully consistent with this Court's precedents. To begin with, the lower court's reading of the statute squares with *McVeigh,* which

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state laws, the absence of the key contractual term here might mean the Court could never reach the underlying question.

recognized that one possible construction of FEHBA's "puzzling" preemption clause is that Congress did not intend to preempt "terms relating to the carrier's postpayments right to reimbursement." 547 U.S. at 697. This is, of course, precisely the interpretation adopted by the lower court here. Although *McVeigh* ultimately did not decide whether this interpretation is correct (because the jurisdictional question presented in the case did not require an answer), the fact that this Court recognized the viability of this reading of the statute cuts the legs out from under Petitioner's hyperbolic contention that the lower court's analysis "mangled" the plain language of FEHBA's preemption clause. Pet. 18.

Petitioners have no answer to the fact that the lower court's approach was grounded in *McVeigh*. Instead, they argue that the lower court's interpretation is contrary to this Court's more recent decision in *Hillman v. Maretta*, 133 S. Ct. 1943 (2103), which—say Petitioners—"refused to distinguish initial payment of [life insurance] benefits from a subsequent transfer of benefit payments." Pet. 19 (citing *Hillman*, 133 S. Ct. at 1952). For Petitioners, this shows that the Missouri Supreme Court's "distinction between benefits paid initially" and a subrogation claim "is mere sophistry." *Id.* at 19. This argument is curious, because *Hillman* was interpreting a different statute—the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U.S.C. § 8701 *et seq*.—and so has nothing at all to do with FEHBA. Indeed, unlike FEHBA, in FEGLIA, Congress "spok[e] with force and clarity in directing that the proceeds belong to the named beneficiary and no other," so a state law authorizing something else *was*

inconsistent with the federal law. *Hillman*, 133 S. Ct. at 1952. Congress spoke with no similar clarity in FEHBA about the federal importance of state-law based subrogation and reimbursement claims—that was one of *McVeigh*'s key points—so whatever the rule under FEGLIA is of no help here.

Petitioners' reliance on *FMC Corp. v. Holliday,* 498 U.S. 52 (1990), is also off the mark, because FEHBA's preemption clause differs from ERISA's both in wording and operation. The relevant clause in ERISA states that "the provisions of this . . . chapter supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan*." *Id.* at 57 (quoting 29 U.S.C. § 1144(a)) (emphasis added). In *FMC,* this Court construed this clause as expressly preempting state laws that "prohibi[t] plans from . . . requiring reimbursement." *Id.* at 58-60.

Seizing on this holding, Petitioners argue that the lower court erred in refusing to read FEHBA's preemption clause just as broadly. Pet. 20. But FEHBA's clause differs from ERISA's in at least in two crucial respects. First, ERISA's clause preempts state laws that "relate to any employee benefit *plan*," 29 U.S.C. § 1144(a), whereas FEHBA preempts only those state laws that "relate to the nature or extent of *coverage or benefits*." § 8902(m)(1). The latter limits the preemptive effect to a narrower subset of matters than the former. *See McVeigh*, 547 U.S. at 698 (comparing the two preemption clauses and observing that, unlike § 1144(a) in ERISA, § 8902(m)(1) "does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans").

Second, and equally important, FEHBA's preemption clause, unlike ERISA's, purports to give preemptive effect to *private contractual terms*—a highly unusual feature that raised the eyebrows of the *McVeigh* Court and prompted it to give FEHBA's preemption clause a "modest reading." 547 U.S. at 698. ERISA's clause, in contrast, affords preemptive effect to *ERISA itself*, rendering any analogy between the two contexts wholly inapt.

These differences between ERISA and FEHBA confirm what the lower court found here: The operation of § 8902(m)(1) "leaves[] room" both for "state law[s] potentially bearing on federal employee-benefit plans in general," and "carrier-reimbursement claims in particular." *McVeigh*, 547 U.S. at 699. Thus, while the "same issue," Pet. 19, arises under both ERISA and FEHBA, the two statutes do not take the same approach—in either language or operation—and do not have the same preemptive effect.

B. Petitioners also err in claiming that the lower court's reading of § 8902(m)(1) undermines FEHBA's overriding goal of maintaining uniformity over federal employees' actual health-care coverage and benefits. *See* Pet. 21-22. This argument is definitively rebutted by *McVeigh* itself. As explained above (*supra* in Part I.A), *McVeigh* recognized that, although FEHBA was based on Congress' desire to "[t]o ensure uniform coverage and benefits" for "federal employees," 547 U.S. at 686, nothing in FEHBA suggests a comparable desire to federalize reimbursement and subrogation claims. Petitioners' discussion of FEHBA's purposes is directly contrary to *McVeigh*'s express recognition

that these claims are firmly rooted in, and governed by, *state law*, not FEHBA. *Id.* at 699.

C. Petitioners' attack on the lower court's application of the presumption against preemption is equally meritless. Petitioners assert that the presumption against preemption "is not triggered *at all*" in this case because "the administration of benefits for workers the government itself employs . . . is inherently federal." Pet. 23. In so arguing, Petitioners forget that *McVeigh* expressly rejected the argument that FEHBA reimbursement claims are "federal in nature." 547 U.S. at 693. In fact, as explained above, *McVeigh* repeatedly emphasized that reimbursement claims are creatures of, and governed by, state law. *Id.* at 683 ("[C]laims of this genre, seeking recovery from the proceeds of state-court litigation, are the sort ordinarily resolved in state courts."). In light of this holding, it made perfect sense for the court below to employ the traditional presumption against presumption that applies to "field[s] which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Indeed, Petitioner's authority on this point does not support its position. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001)—Petitioners' principal case—refused to apply the presumption against preemption of a plaintiff's fraud claim because "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'" *Id.* at 347 (quoting *Rice*, 331 U.S. at 230). In so ruling, *Buckman* emphasized that "the relationship between a federal agency and the entity it regulates is inherently federal in character

because the relationship originates from, is governed by, and terminates according to federal law." *Id.*

The issue in this case is "poles apart" from *Buckman*. *McVeigh*, 547 U.S. at 700. It has nothing to do with "the relationship between a federal agency and the entity it regulates." *Buckman*, 531 U.S. at 347. To the contrary, it concerns the relationship between a FEHBA carrier and its beneficiary—specifically, whether the carrier has the right to seek reimbursement from a beneficiary who has recovered damages from a third party. And a "reimbursement right of the kind [FEHBA carriers] assert stems from a personal-injury recovery, and the claim underlying that recovery is plainly governed by state law." *Mcveigh*, 547 U.S. at 698. *Buckman* only goes to show why the court below was right to apply the presumption here.[7]

D. Finally, the lower court committed no error in failing to defer to OPM's informal letter regarding

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[7] Petitioner's remaining cases (Pet. 23) are just as unhelpful to its cause. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-09 (1988), does not even mention the presumption against preemption. That aside, it involves a subject matter that was inarguably federal in nature—the provision of military equipment to the federal government. *United States v. Locke*, 529 U.S. 89, 108 (2000) involves an issue that is about as federal as one can imagine: The operation and design of ocean-going oil tankers used in international commerce. *Id.* at 94. In rejecting the presumption, this Court expressed particular concern that state regulations governing international ocean-going oil tankers would undermine "the substantial foreign affairs interests of the Federal Government." *Id.* at 98. It almost goes without saying that the enforcement of "contract-based reimbursement claims" is not cut from the same cloth.

FEHBA preemption. Petitioners' contention that OPM's letter was entitled to "substantial" deference under *Chevron,* 467 U.S. at 865, runs headlong into this Court's consistent lesson that "interpretations, such as those "contained in an opinion letter . . . *do not* warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (emphasis added); *see also United States v. Mead Corp.*, 533 U.S. 218, 234 (informal classification rulings by federal government agency "are beyond the *Chevron* pale")

Nor is Petitioner correct in arguing that, at the least, the OPM letter should have been given "substantial weight under *Skidmore*." Pet. 33. Under *Skidmore*, opinion letters are "entitled to respect . . . only to the extent that those interpretations have the power to persuade." *Christensen*, 529 U.S. at 587. The court below considered OPM's letter and decided that, because it "is recent, informal and was drafted in response to litigation challenging the subrogation provision in its contract," it is not entitled to deference. Pet. App. 10a n.2. *Skidmore* requires no further analysis.[8]

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[8] Petitioners also urge that this Court grant review of the OPM-deference issue on the ground that the Missouri Supreme Court's treatment of the carrier letter "directly conflicts with the holdings of two federal courts of appeals." Pet. 31. Putting aside the fact that Petitioners failed to include a separate question presented on this issue, there is no true conflict on this point. *See Blue Cross & Blue Shield of Florida, Inc. v. Dep't of Banking & Fin.*, 791 F.2d 1501, 1506 & n.6 (11th Cir. 1986) (considering OPM's view only to address a question about an unclaimed property law, but "not, of course, hold[ing] that *any* determination of preemption by OPM is necessarily reasona-

(*Footnote continued*)

IV. This Case Does Not Present an Issue of Public Importance.

Finally, this case utterly lacks the distinctly broad significance typically present when the Court grants certiorari. First, the issue in this case—whether Petitioners legally obtained reimbursement in Missouri touches only one state: Missouri. And, the Missouri Supreme Court's decision here binds only the Missouri courts, not any others. The impact of this decision is about as limited as can be.

Second, most states do *not* have statutes, like Missouri's, that ban insurers from pursuing subrogation or reimbursement, dramatically curtailing the importance of any decision (one way or the other) over this question. *See* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 737-74 (2012) (conducting state-by-state analysis of these statutes). Indeed, only "[a] minority of jurisdictions continue to adhere to the view" that medical payment coverage is not subject to subrogation. *Id.* at 735.

Third, Petitioners' contention that "subrogation and/or reimbursement" is vital to managing costs within the federal benefits program is belied by both the contract here and OPM's own approach to these

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ble"); *Dyer v. Blue Cross & Blue Shield Assoc., Inc. (In re Bolden)*, 848 F.2d 201 (D.C. Cir. 1988) (deferring to a decisional memorandum submitted by OPM after the start of litigation because the document "merely illuminates reasons" already within the administrative record before the court).

claims. *See* Pet. 8, 29, 30. Despite statements from OPM to the contrary, Pet. App. 82a-84a, OPM has never mandated the inclusion of a reimbursement clause in its contracts with federal insurance plan providers. If these recoveries were so crucial, one would expect OPM to have left no room for carriers to decide, as Petitioners did, not to include a contractual right to reimbursement. As we've explained, the contract between OPM and GHP contains no reimbursement provision—only subrogation is required—and so there is little to support the idea that reimbursement recoveries are so crucial to the survival of the federal benefits program as to warrant this Court's premature decision to wade into this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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