No. SC93134

IN THE SUPREME COURT OF MISSOURI

JODIE NEVILS,

Plaintiff-Appellant,

v.

COVENTRY HEALTH CARE OF MISSOURI, INC.,
formerly known as Group Health Plan, Inc.,

Defendant-Respondent.

On Remand from the Supreme Court
of the United States
No. 13-1305

Appeal from the Circuit Court
of St. Louis County
No. 11SL-CC00535
Hon. Thea A. Sherry, Circuit Judge
(Transfer from No. ED98538)

RESPONDENT'S BRIEF ON REMAND

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INTRODUCTION

Few areas of law are more inherently federal than the benefits that the federal government provides to its own employees. Congress has made clear that the administration of employee benefits for employees of the *Nation's* government requires uniform, *national* rules. In the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, Congress empowered the Office of Personnel Management ("OPM") to establish, in contracts with private insurance carriers, the terms and conditions on which benefits are provided to millions of federal workers and their families. And to prevent variation in state laws from interfering with OPM's centralized oversight of FEHBA plans, Congress expressly preempted state laws that purport to trump "[t]he terms of any contract" under FEHBA "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." *Id.* § 8902(m)(1). Faithfully implementing that congressional directive, OPM has consistently taken the position that state law cannot prevent FEHBA carriers from recouping—pursuant to reimbursement and subrogation provisions of their FEHBA contracts—benefits that they have paid to plan participants who also recover for the same injuries from other sources. The Circuit Court and the Court of Appeals in this case each agreed with that conclusion.

In its prior (now-vacated) decision in this case, this Court declined to accept OPM's position. OPM's interpretation of FEHBA, the Court held, did not merit controlling deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), principally because OPM had not (yet) "use[d] notice and comment procedures to promulgate a rule." *Nevils v. Grp. Health Plan*, 418 S.W.3d 451, 457 n.2

(Mo. banc 2014) (Appendix to Respondent's Brief on Remand ("Resp't App.") A.7), *vacated and remanded*, No. 13-1305 (U.S. June 29, 2015) (Resp't App. A.37) (reported at 135 S. Ct. 2886 (2015)). This Court proceeded to interpret the statute *de novo*, and—applying a "presumption against preemption," *id.* at 455 (Resp't App. A.5)—construed Section 8902(m)(1) not to encompass Missouri's law barring respondent Coventry Health Care of Missouri, Inc. (formerly known as Group Health Plan, Inc.) from seeking subrogation or reimbursement from its insured, appellant Jodie Nevils.[1]

The U.S. Supreme Court, however, recently vacated this Court's 2014 judgment—and this Court further expressly vacated its prior opinion—because a critical legal premise of that ruling has vanished. OPM has now "formalize[d]" its "longstanding interpretation" that FEHBA does preempt antisubrogation and antireimbursement laws in a binding regulation, adopted after notice and comment, that carries the force of federal law. OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203, 29,204 (May 21, 2015) ("*Final Rule*") (Appellant's Appendix on Remand ("Appellant's App.") 17). The Supreme Court remanded the case for the express purpose of permitting this Court to give "further consideration" to the preemption issue in light of OPM's new regulation. Resp't App. A.37, *reported at* 135 S. Ct. 2886. Coventry respectfully submits that, especially in light of OPM's rule, this Court must hold that Missouri's law barring Coventry from seeking subrogation or

[1] For simplicity, this brief will refer to Group Health Plan, Inc. and Coventry interchangeably as "Coventry."

reimbursement *is* preempted, and on that basis this Court must affirm the judgment below for Coventry.

Under well-settled principles of federal law, OPM's interpretation of FEHBA—a statute Congress empowered OPM to administer—merits dispositive deference under *Chevron*. Even if the Court adheres to its prior view that a different reading of FEHBA is "possible"—indeed, even if the Court deems the narrower reading reflected in its vacated 2014 decision the "*most* reasonable"—under *Chevron* the Court still must defer to OPM's position. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). All that matters is whether that position is "reasonable," a threshold OPM's interpretation easily clears.

In his brief on remand, Nevils nevertheless contends that this Court should—indeed, he claims, *must*—disregard OPM's regulation and conclude that FEHBA has no effect on his claims. Nevils implausibly argues that this Court's prior, now-*vacated* decision is still controlling as the "law of the case," and that OPM's reasonable interpretation of the statute merits no deference. Appellant's Br. on Remand 26-54 (Mo. Oct. 6, 2015) ("Nevils Remand Br."). Nevils has things backwards. Under well-settled precedent, this Court's prior decision no longer has any precedential or preclusive effect because both the U.S. Supreme Court and this Court vacated it, precisely to clear the path for further consideration of the preemption question that Nevils brought to this Court. And in light of OPM's new regulation, the answer to that preemption question should now be beyond dispute.

Nevils's assertion that this Court's reasoning in its prior ruling warrants withholding deference under *Chevron* is equally meritless. This Court's reasons for declining to

defer to OPM's interpretation of FEHBA—which at the time OPM had not yet articulated in a notice-and-comment regulation—have no application to OPM's new rule: OPM has now completed notice and comment; under U.S. Supreme Court precedent, the fact that the regulation is recent and promulgated in response to litigation is irrelevant to the deference due to the agency's position. While Nevils emphasizes that this Court saw "no indication that Congress delegated to the OPM the authority to make binding interpretations" on the scope of FEHBA preemption, the introductory clause to that statement shows that the Court was referring to "informal agency interpretations." 418 S.W.3d at 457 n.2 (Resp't App. A.7). In any event, FEHBA *expressly* permits OPM to issue binding *regulations*, as it has now done. 5 U.S.C. § 8913(a). Withholding deference in these circumstances would directly contradict Supreme Court precedent.

Nevils's further attacks on OPM's regulation are similarly invitations to disregard the U.S. Supreme Court's clear teaching. The Supreme Court has flatly rejected Nevils's argument that this Court's determination that a different reading of the statute is *more* reasonable barred the agency from adopting a different, but also reasonable, position. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). Indeed, this Court recognized in its now-vacated opinion—and Nevils admits—that FEHBA *can* plausibly be construed to preempt state laws barring subrogation or reimbursement, which conclusively shows that OPM's position *is* entitled to deference. Under *Brand X*, the undisputed fact that OPM's interpretation is plausible is dispositive.

The Supreme Court also has expressly repudiated Nevils's contention that a presumption against preemption "trumps *Chevron*." *Smiley v. Citibank (S.D.), N.A.*,

517 U.S. 735, 743-44 (1996). And while Nevils relies heavily on *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), claiming that it forecloses OPM's interpretation of FEHBA, the plain language of the Court's opinion in *McVeigh* makes clear that it did *not* decide the issue addressed in OPM's new regulation. *Id.* at 698.

Nor does Nevils's constitutional-avoidance argument—or his direct attack on FEHBA as invalid under the Supremacy Clause—have merit. His avoidance argument fails because both of its essential predicates are absent: The constitutional doubt he alleges is nonexistent, and he offers no plausible, alternative interpretation of the statute that can *avoid* the purported constitutional issue—as Nevils all but admits. And his free-standing constitutional challenge to FEHBA *itself* is not properly before this Court because Nevils forfeited it—indeed, he repeatedly abandoned it below—and in any event it lacks merit.

Perhaps appreciating that he cannot prevail on the sole issue that he asked this Court to consider when he urged it to hear his appeal—*i.e.*, whether FEHBA preempts Missouri's law barring subrogation and reimbursement—Nevils now urges the Court to decide the case on an entirely different ground. Nevils argues that, even if Missouri law barring reimbursement is preempted, Coventry's contract does not authorize it to seek reimbursement at all. Like his tardy constitutional challenge, Nevils's claim based on the terms of Coventry's contract is clearly forfeited; indeed, he has repeatedly asserted just the opposite throughout this case, both below and in this Court.

Even if Nevils's fallback claim were properly before the Court, it is baseless. As the United States explained in its brief to the U.S. Supreme Court, given the close rela-

tionship between subrogation and reimbursement, the subrogation provision of Coventry's contract with OPM encompasses reimbursement. In fact, Coventry's contract with OPM—which is governed by, and which by its terms must be construed to comply with, federal law—must be read as authorizing Coventry to seek reimbursement. Nevils alludes to Coventry's benefits brochure that summarizes the parties' rights and obligations under Coventry's OPM contract, but it also does not help him. The brochure, too, is governed by federal law, but even if Missouri law somehow applied, it would foreclose Nevils's attempt to treat subrogation as wholly separate from reimbursement. State law, moreover, could not impose liability on Coventry for performing its duties under its federal contract.

Coventry recognizes that this Court disagreed with Coventry's interpretation of FEHBA in its prior decision. As Coventry made clear in its certiorari petition, it respectfully disagrees with the Court's prior ruling. But the legal landscape has now changed because the agency that Congress charged with administering and interpreting FEHBA in the first instance has authoritatively spoken. OPM's regulation eliminates the only obstacles the Court identified to according OPM's longstanding position dispositive deference. Nevils's attacks on that regulation are in reality challenges to U.S. Supreme Court precedent. The Court should now hold—based on the statute itself, and at a minimum based on OPM's regulation and *Chevron*—that FEHBA preempts state antisubrogation and antireimbursement laws, and on that basis it should affirm the judgment below.

STATEMENT OF FACTS

A. The Statutory Framework

The Federal Employees Health Benefits Program ("FEHB Program" or "Program"), established by Congress in 1959, provides health-insurance benefits for federal employees. *See* 5 U.S.C. §§ 8901-8914. The Program currently covers more than eight million current and former employees and dependents. *See Final Rule*, 80 Fed. Reg. at 29,203 (Appellant's App. 17). The Program pays out more than $45 billion in benefits annually.[2] The federal government pays the lion's share of that massive cost; its "share of FEHB premiums in 2014 was approximately $33 billion," and that figure "tends to increase each year." *Final Rule*, 80 Fed. Reg. at 29,203 (Appellant's App. 17).

Congress vested OPM with broad authority to administer the Program. FEHBA authorizes OPM to do so by "prescrib[ing] regulations necessary to carry out" the statute, 5 U.S.C. § 8913(a), and by entering contracts with private insurance carriers that administer plans on OPM's behalf, *id.* § 8902(a), in which OPM specifies the "limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable," *id.* § 8902(d).

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[2] *The Federal Employees Health Benefits Program: Is It a Good Value for Federal Employees?: Hearing Before the Subcomm. on Fed. Workforce, U.S. Postal Serv. & the Census of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 5 (2013) (statement of Jonathan Foley, Director, Planning & Policy Analysis, U.S. Office of Personnel Management).

The cost of premiums is split between the government (which typically pays 72%) and participants (who pay the remainder). *See* 5 U.S.C. § 8906(b)(1). Premiums are deposited into a special U.S. Treasury fund (the "Fund"). *Id.* § 8909(a). "Community-rated" carriers—which set premiums based on demographics or other attributes of a pool of insured persons—receive premiums from the Fund up front, from which they pay benefits. 48 C.F.R. §§ 1632.170, 1602.170-2. "Experience-rated" plans—which set premiums based on enrollees' "actual paid claims" and other costs—draw on the Fund to pay benefits case-by-case. *Id.* § 1602.170-7.

After more than a decade of experience with the Program, Congress concluded that state regulation of FEHBA plans interfered with the Program's efficient operation, "[i]ncreas[ing] premium costs to both the Government and enrollees" and injecting a "lack of uniformity of benefits," even "for enrollees in the same plan." H.R. Rep. No. 94-1211, at 3 (1976) (Resp't App. A.67). Congress responded in 1978 by enacting an express-preemption provision, now codified at 5 U.S.C. § 8902(m)(1). Act of Sept. 17, 1978, Pub. L. No. 95-368, 92 Stat. 606.

Further experience showed, however, that even that preemption provision did not go far enough. In 1998, Congress accordingly amended Section 8902(m)(1) to "strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 105-374, at 9 (1997) (Resp't App. A.81); *see also* Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c),

112 Stat. 2363, 2366; S. Rep. No. 105-257, at 9, 14-15 (1998) (Resp't App. A.111, 116-17). As amended, Section 8902(m)(1) provides:

> The terms of any contract under this chapter [*i.e.*, FEHBA, Chapter 89 of Title 5] 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.

5 U.S.C. § 8902(m)(1).

B. OPM's Contracts With FEHBA Carriers

OPM's contracts with carriers typically include clauses requiring carriers to seek reimbursement or subrogation from participants. OPM, *Proposed Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 931, 932 (Jan. 7, 2015) ("*Proposed Rule*") (Resp't App. A.61).[3] Where a beneficiary has received benefits under a FEHBA plan but also recovers from another source for the same injuries, such clauses generally require the beneficiary to reimburse his carrier for the federal benefits received. *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61).

[3] *See*, *e.g.*, Standard Contract for Community-Rated Health Maintenance Organization Carriers § 2.5 (2000), *available at* https://www.opm.gov/healthcare-insurance/healthcare/carriers/1999/99-058-fullcrcontract.doc ("2000 Standard Contract").

Where a beneficiary who receives FEHBA benefits has not yet recovered from another source but has a right to do so, the carrier is required to stand in the beneficiary's shoes and seek recovery of benefits directly. *Id.* Such reimbursement and subrogation recoveries by carriers tend to reduce (directly or indirectly) the premiums that the government and participants pay for the benefits that participants receive. *Id.* ("subrogation and reimbursement recoveries serve to lower subscription charges for individuals enrolled in the [FEHBA] Program").[4]

The subrogation and reimbursement provisions in OPM's contracts generally apply even where state law otherwise would preclude the carrier from seeking subrogation or reimbursement. OPM's Standard Contract, for instance, provides that, if a carrier "subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA)," it must subrogate for FEHBA plans it administers, state law notwithstanding. 2000 Standard Contract § 2.5(a)(2). This requirement puts public-sector FEHBA plans on equal footing with private-sector plans governed by ERISA, 29 U.S.C. § 1001 *et seq.*—which, as the U.S. Supreme Court has held, preempts state

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[4] Experience-rated carriers remit recoveries to the Fund; the recoveries are used to "increase [plan] benefits," reduce future premiums, or refund past premiums to participants and the government. 5 U.S.C. § 8909(a)-(b). Community-rated carriers may keep recovered funds but must take prior years' recoveries into account when calculating premiums. *See* OPM, Community Rating Guidelines 6, 11 (2015), *available at* https://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-16a1.pdf.

laws that preclude insurance administrators from seeking subrogation, *see FMC Corp. v. Holliday*, 498 U.S. 52, 58-60 (1990).

"OPM has consistently taken the position that the FEHB Act preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61). OPM reiterated that position in 2012, explaining in a guidance letter addressed to FEHBA carriers that it "continue[d] to maintain" that interpretation. OPM, FEHB Program Carrier Letter No. 2012-18, at 1-2 (June 18, 2012) ("2012 Carrier Letter") (Resp't App. A.63-64).

C. Nevils's Accident And This Litigation

OPM contracted with Coventry's predecessor to provide benefits to federal employees in Missouri under FEHBA as a community-rated carrier. 418 S.W.3d at 452 (Resp't App. A.2). Coventry's contract with OPM expressly incorporated "[t]he applicable provisions of … chapter 89 of title 5, United States Code," *i.e.*, FEHBA, and OPM's regulations, including part 890 of Title 5, Code of Federal Regulations. Def.'s Statement of Undisputed Material Facts in Support of Summ. J., No. 11SL-CC00535 (Mo. Cir. Ct. Sept. 7, 2011) ("Coventry S.J. Stmt."), Ex. 1: Contract for Federal Employees Health Benefits Between U.S. Office of Personnel Management and Group Health Plan, Inc. § 1.4(a) (Eff. Jan. 1, 2006) ("Coventry-OPM Contract") (Legal File ("L.F.") 42) (Resp't App. A.294). The contract provided that its provisions "shall be construed so as to comply with" those statutes and regulations, *id.*, and that any disputes over whether Coventry

complied with its contract are governed by "United States law," *id.* § 5.62 (L.F.111) (Resp't App. A.363).[5]

"The contract direct[ed] [Coventry] to seek reimbursement or subrogation when an insured obtains a settlement or judgment against a tortfeasor for payment of medical expenses." 418 S.W.3d at 452-53 (Resp't App. A.2-3); *see* Coventry-OPM Contract § 2.5 (L.F.57) (Resp't App. A.309). Missouri common law generally prohibits subrogation by insurers in personal-injury cases. 418 S.W.3d at 453 (Resp't App. A.3). Coventry's contract nevertheless required it to seek subrogation or reimbursement "in the same manner in which it subrogates claims for non-FEHB members," even in Missouri, because Coventry "subrogate[d] for at least one plan covered under" ERISA in Missouri. Coventry-OPM Contract § 2.5(a), (a)(2) (L.F.57) (Resp't App. A.309); *see also* Cir. Ct. Op. 2, No. 11SL-CC00535 (Mo. Cir. Ct. May 21, 2012) (L.F.853) (Appellant's App. 73); Coventry S.J. Stmt., Ex. 4 (L.F.218).

Appellant Jodie Nevils was a federal employee and participant in the Coventry plan. 418 S.W.3d at 453 (Resp't App. A.3). Nevils was injured in a car accident in 2006, and Coventry paid for his medical care. *Id.* Nevils pursued a tort action against the driv-

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[5] The contract also specifically contemplated that, if OPM's regulations were subsequently modified, those changes would apply to the contract. Coventry-OPM Contract § 1.4(b) (L.F.42) (Resp't App. A.294) ("[i]f the Regulations are changed in a manner which would increase the Carrier's liability under this contract, the Contracting Officer will make an equitable adjustment in accordance with the changes clause" of the contract).

er responsible for his injury and obtained a settlement. *Id.* The subrogation clause of the relevant OPM contract required Coventry to seek to recover the benefits it paid. *See id.* Accordingly, Coventry asserted—through a subcontractor, ACS Recovery Services ("ACS")—a lien on Nevils's settlement proceeds for $6,592.24 in benefits that Coventry had paid. *See id.* Nevils repaid that sum, satisfying the lien. *Id.*

Nevils then filed this putative class action against Coventry in the Circuit Court of St. Louis County, asserting various state-law claims. 418 S.W.3d at 453 (Resp't App. A.3). Nevils's claims alleged that, despite the subrogation provision in its OPM contract, Coventry's subrogation claim violated Missouri's common-law antisubrogation doctrine. *Id.*; *see also* First Am. Class-Action Pet. for Damages ¶¶ 29, 42-64, No. 11SL-CC00535 (Mo. Cir. Ct. Oct. 31, 2011) (Resp't App. A.376, A.380-83) ("Nevils Am. Class-Action Pet."). Coventry removed the case to federal court, but the case was remanded. U.S. Dist. Ct. Op. 10, No. 11-588 (E.D. Mo. June 15, 2011) (Resp't App. A.25).[6]

Coventry sought summary judgment, arguing that Nevils's claims are preempted under FEHBA. 418 S.W.3d at 453 (Resp't App. A.3). In opposing Coventry's motion, Nevils argued (as relevant) only that FEHBA should be read not to "preempt state law

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[6] On remand, ACS (now known as Xerox Recovery Services, Inc.) intervened as an additional defendant. 418 S.W.3d at 453 (Resp't App. A.3). ACS and Nevils subsequently settled the claims as between themselves, and ACS is no longer a party to this litigation. *See* Pet'r Letter re Settlement 1-2, No. 13-1305 (U.S. Dec. 17, 2014) (Resp't App. A.495-96). That settlement did not encompass Nevils's claims against Coventry at issue here.

regarding reimbursement" because "the FEHBA preemption clause relates only to benefits and not to reimbursement," invoking *McVeigh*, 547 U.S. 677, and subsequent lower-court case law. Pl.'s Opp. to Def.'s Mot. for Summ. J. 4-5, No. 11SL-CC00535 (Mo. Cir. Ct. Oct. 21, 2011) (L.F.243) ("Nevils S.J. Opp.") (emphasis omitted); *see id.* at 4-15 (L.F.243-54). He did not argue that Coventry's contract did not authorize it to seek reimbursement (as opposed to subrogation), and instead referred to subrogation and reimbursement interchangeably. *See*, *e.g.*, *id.* at 4, 13 (L.F.243, 252). Nor did he argue that FEHBA's preemption provision was unconstitutional, arguing instead that "[Coventry's] *construction* of the FEHBA statute is unconstitutional." *Id.* at 13 (L.F.252) (emphasis added) (capitalization omitted). The Circuit Court agreed with Coventry, holding that FEHBA does preempt Nevils's claims, relying on the Court of Appeals' prior decision in *Buatte v. Gencare Health Systems, Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996). Cir. Ct. Op. 3-4, No. 11SL-CC00535 (L.F.854-55) (Appellant's App. 74-75).[7]

Nevils appealed, arguing that "FEHBA's preemption provision," 5 U.S.C. § 8902(m)(1), "does not apply to subrogation." Appellant's C.A. Br. 8, No. ED98538 (Mo. Ct. App. Sept. 10, 2012). He conceded that "the contract between [Coventry] and OPM … directed [Coventry] to seek reimbursement/subrogation." *Id.* at 3; *see also*, *e.g.*,

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[7] Coventry also argued that Nevils's claims failed even under state law, *see* Def.'s Suggestions in Support of Mot. for Summ. J. 12-16, No. 11SL-CC00535 (Mo. Cir. Ct. Sept. 7, 2011) (L.F.24-28) ("Coventry S.J. Mot."), which Nevils disputed, *see* Nevils S.J. Opp. 15-21 (L.F.254-60), but the Circuit Court did not reach that issue.

id. at 8, 10, 16. On appeal Nevils again did not challenge FEHBA as unconstitutional. Indeed, he argued that his appeal did not fall within *this* Court's exclusive jurisdiction because it "d[id] *not* involve … the validity of a … statute of the United States." *Id.* at 2 (emphasis added). The Court of Appeals affirmed, agreeing with the Circuit Court that FEHBA preempts Missouri's law barring subrogation or reimbursement. C.A. Op. 3-10, No. ED98538 (Mo. Ct. App. Dec. 26, 2012) (Resp't App. A.28-35).

D. This Court's Prior Ruling

Nevils then applied for transfer of the appeal to this Court. He first asked the Court of Appeals to transfer the case "so that th[is] Court may consider one issue":

> Whether Missouri's anti-subrogation rule prohibiting an insurer from seeking reimbursement for benefits paid to its insured relates to the "nature, provision, or extent of coverage or benefits" provided under an insurance plan governed by the Federal Employee Health Benefits Act (FEHBA), making the Missouri rule preempted by 5 U.S.C. § 8902(m)(1).

Appellant's C.A. Appl. for Transfer 1, No. ED98538 (Mo. Ct. App. Jan. 9, 2013) (Resp't App. A.386). When the Court of Appeals denied Nevils's request, Order, No. ED98538 (Mo. Ct. App. Jan. 29, 2013) (Resp't App. A.36), Nevils renewed his request in this Court, asking this Court to grant review to decide the same question, which he described as "an issue of great consequence to thousands of Missourians." Appellant's Mo. Appl. for Transfer 1, No. SC93134 (Mo. Feb. 13, 2013) ("Nevils Mo. Transfer Appl.") (Resp't

App. A.396). This Court accepted the appeal. Transfer Order, No. SC93134 (Mo. Mar. 19, 2013). The U.S. Solicitor General authorized, and the United States filed, an *amicus* brief supporting Coventry's position that FEHBA preempted Nevils's claims. *See* U.S. *Amicus* Br. 10-23, No. SC93134 (Mo. May 23, 2013) ("U.S. Mo. 2013 Br."). The United States also presented oral argument in this Court.

On February 4, 2014, in a divided opinion, this Court reversed the Circuit Court's judgment. 418 S.W.3d at 453-57 (Resp't App. A.3-7); *see also id.* at 457-65 (Resp't App. A.7-15) (Wilson, J., concurring in judgment). The majority held that "[t]he subrogation provision in favor of [Coventry] creates a contingent right to reimbursement." *Id.* at 457 (Resp't App. A.7) (majority op.). But it held that Missouri's law barring insurers from seeking subrogation or reimbursement is not preempted by FEHBA. *Id.* at 453-57 (Resp't App. A.3-7).

The Court dismissed *Buatte*, 939 S.W.2d 440, and decisions of "[o]ther jurisdictions" that had held FEHBA preempts such laws, as "called into question" by *McVeigh*, 547 U.S. 677. 418 S.W.3d at 454 (Resp't App. A.4). In *McVeigh*, the U.S. Supreme Court had narrowly divided on the question whether Section 8902(m)(1) creates federal "arising under" jurisdiction over suits seeking reimbursement pursuant to the terms of a carrier's federal contract. *See* 547 U.S. at 689-701; *see also id.* at 702-14 (Breyer, J., joined by Kennedy, Souter, and Alito, JJ., dissenting). The *McVeigh* majority held that FEHBA does not create federal-court jurisdiction for claims by FEHBA carriers seeking subrogation and reimbursement. *Id.* at 689-701 (majority op.). In dictum, *McVeigh* stated that Section 8902(m)(1) could be interpreted in two ways—either as preempting

state laws barring subrogation and reimbursement, or instead as allowing them to stand. *Id.* at 697. But *McVeigh* explicitly reserved judgment on that issue, explaining that, "[t]o decide th[at] case, [the Court] need not choose between" those interpretations, because either way, federal-court "arising under" jurisdiction would not exist. *Id.* at 698.

In this Court's 2014 decision, all members of the Court recognized that *McVeigh* was "not dispositive" because it "expressly declined to determine whether the statute preempts state subrogation laws." 418 S.W.3d at 454-55 (Resp't App. A.4-5). Indeed, the majority described *McVeigh* as "recogniz[ing] that the FEHBA preemption clause is subject to plausible, alternate interpretations," one of which would preempt Nevils's claims, the other of which would not. *Id.* And the concurrence underscored that *McVeigh*'s discussion of different interpretations of Section 8902(m)(1) was dictum. *See id.* at 460-62 (Resp't App. A.10-12) (Wilson, J., concurring in judgment) ("it is clear that [*McVeigh*'s] statements" regarding Section 8902(m)(1)'s scope "had nothing to do with whether the Court believed Congress intended for contractual benefit repayment terms to preempt state law prohibitions of such terms"). But the majority nevertheless read *McVeigh* as compelling a "'cautious interpretation'" of Section 8902(m)(1), and as im-

plying that subrogation does not "relate to" coverage or benefits. *Id.* at 455 (Resp't App. A.5) (majority op.) (citation omitted).[8]

Turning to Section 8902(m)(1)'s text, the Court held that the provision's "operative terms are 'relate to,' 'coverage' and 'benefits.'" 418 S.W.3d at 455 (Resp't App. A.5) (citing *Kobold v. Aetna Life Ins. Co.*, 309 P.3d 924 (Ariz. Ct. App. 2013), *vacated and remanded*, 135 S. Ct. 2886 (2015)). Applying a "presumption against preemption," the Court held that those "operative terms" did not preempt laws barring subrogation or reimbursement. *Id.* at 455-57 & n.1 (Resp't App. A.5-7). The Court held that "relate to" is limited to "direct and immediate relationship[s]." *Id.* at 455-56 (Resp't App. A.5-6). It construed "coverage" as the "scope of the risks insured" without regard to subrogation, and "benefits" as *initial* payments a participant receives before subrogation recoveries. *Id.* at 456 (Resp't App. A.6). Applying these definitions, the Court held that FEHBA does "not preempt Missouri law barring subrogation" because subrogation "bears no immediate relationship to the nature, provision or extent of Nevils' insurance coverage

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[8] The concurrence referred incorrectly to Coventry as having argued that *McVeigh* bears on the scope of Section 8902(m)(1) and as having established that FEHBA is "*not* clear enough to overcome the presumption against preemption." 418 S.W.3d at 460 (Resp't App. A.10) (Wilson, J., concurring in judgment) (emphasis added). That was in fact Nevils's argument, *see* Substitute Br. of Appellant 11-14, No. SC93134 (Mo. Apr. 19, 2013) ("Nevils Mo. 2013 Br."), which Coventry explained at length was a misreading of *McVeigh*, *see* Resp't Substitute Br. 24-29, No. SC93134 (Mo. May 23, 2013) ("Coventry Mo. 2013 Br.").

and benefits." *Id.* at 457 (Resp't App. A.7). In a footnote, the Court rejected Coventry's and the government's argument that OPM's 2012 Carrier Letter, which "reiterate[d]" OPM's established and reasonable interpretation of FEHBA, merited deference. *Id.* at 457 n.2 (Resp't App. A.7). The Court remanded for litigation of the merits of Nevils's claims. *Id.* at 457 (Resp't App. A.7).

Judge Wilson, joined by Judge Breckenridge, concurred only in the judgment, disagreeing with the majority's statutory analysis. 418 S.W.3d at 451, 457-65 (Resp't App. A.1, 7-15) (Wilson, J., concurring in judgment). "[B]enefit repayment terms," the concurrence explained, "are *related* to benefits because" an insured "does not care what his 'benefits' are if he will not be allowed to keep them." *Id.* at 460 (Resp't App. A.10). And "terms requiring Nevils to *pay* benefits back to [Coventry] that [Coventry] previously had *paid* out … relate to 'payment with respect to Nevils' benefits.'" *Id.* (brackets omitted). The concurrence, however, would have held that Section 8902(m)(1) violates the Supremacy Clause, U.S. Const. art. VI, cl. 2. FEHBA, it reasoned, improperly "give[s] preemptive effect to the benefit repayment terms in [Coventry's] contract" themselves, rather than to "federal *law*." 418 S.W.3d at 463 (Resp't App. A.13).

E. Coventry's Petition For Certiorari And OPM's Regulation

Coventry timely filed a petition for a writ of certiorari with the Supreme Court of the United States. Pet. for Writ of Certiorari, No. 13-1305 (U.S. Apr. 28, 2014) (Resp't App. A.408). On October 6, 2014, the U.S. Supreme Court issued an order inviting the

Solicitor General to file a brief expressing the views of the United States. 135 S. Ct. 323 (2014).

While Coventry's certiorari petition was pending, in January 2015, OPM commenced a notice-and-comment rulemaking to address FEHBA preemption of state laws barring FEHBA carriers from seeking subrogation or reimbursement pursuant to their contracts with OPM. *Proposed Rule*, 80 Fed. Reg. at 931 (Resp't App. A.60). OPM proposed, and invited public comment on, a regulation that would make clear that subrogation and reimbursement provisions in FEHBA contracts do "relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits)," and that state laws barring enforcement of such rights are thus preempted by FEHBA. *Id.* at 933 (Resp't App. A.62).

After setting forth the relevant statutory text, OPM explained that the interpretation of FEHBA reflected in its proposed regulation "comports with longstanding Federal policy, lowers the cost of benefits, and creates greater uniformity in benefits and benefits administration." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61). OPM further noted that subrogation and reimbursement recoveries "serve to lower subscription charges for individuals enrolled in" the FEHBA program. *Id.* This interpretation of the statute, OPM explained, "is consistent with the definition of subrogation and reimbursement … and their relationship to benefits and the payment of benefits," and it "furthers Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." *Id.*

After receiving public comments—all of which "expressed support for the regulation"—OPM published its final rule in the Federal Register on May 21, 2015. *Final Rule*, 80 Fed. Reg. at 29,203 (Appellant's App. 17); *see* 5 C.F.R. § 890.106. The final rule mandates that "[a]ll health benefit plan contracts shall provide that the [FEHBA] carrier is entitled to pursue subrogation and reimbursement recoveries," and it makes clear that a carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments." 5 C.F.R. § 890.106(a), (b)(1).

With respect to preemption, the regulation states:

> 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.

5 C.F.R. § 890.106(h). This regulation, OPM explained, "formalizes OPM's longstanding interpretation of what Section 8902(m)(1) has meant since Congress enacted it in 1978." *Final Rule*, 80 Fed. Reg. at 29,204 (Appellant's App. 18). That interpretation, OPM clarified, "applies to all FEHBA contracts," including "existing contracts." *Id.*

F. The U.S. Supreme Court's Order Vacating This Court's Ruling

In light of OPM's new regulation, the United States urged the U.S. Supreme Court to grant Coventry's certiorari petition, vacate this Court's 2014 judgment, and remand the case to allow this Court "to consider in the first instance" the preemption issue with the benefit of OPM's regulation. U.S. *Amicus* Br. 11-12, Nos. 13-1305 & 13-1467 (U.S. May 22, 2015) ("U.S. S. Ct. Br.") (Resp't App. A.516-17). As the United States explained, "OPM's new regulations confirm that [this Court's] holdin[g]" in its 2014 decision "[is] wrong and should be reversed." *Id.* at 12 (Resp't App. A.517). Congress, the government noted, has authorized OPM to administer FEHBA, both by "vest[ing] OPM with broad authority to 'prescribe regulations necessary to carry out'" FEHBA, and by "direct[ing] that a FEHB contract with a carrier 'shall contain a detailed statement of benefits offered'" subject to terms that OPM "'considers necessary or desirable.'" *Id.* at 13 (Resp't App. A.518) (quoting 5 U.S.C. §§ 8902(d), 8913(a)). OPM's regulations exercising that authority, and construing FEHBA to preempt state laws barring carriers from seeking subrogation or reimbursement, "adopt by far the best reading of the FEHB Act" in light of its text, history, and purpose, "and, at a minimum, reasonably interpret a statute Congress charged OPM with administering." *Id*. OPM's interpretation in its rule, the United States explained, is therefore "entitled to the full measure of deference under *Chevron*." *Id.* at 12 (Resp't App. A.517).

While the United States made clear its view that this Court's prior decision was "wrong and should be reversed"—as "OPM's regulations resolve the only federal ques-

tion in th[i]s cas[e]"—the government recommended that the U.S. Supreme Court vacate and remand for this Court to address the issue in the first instance. U.S. S. Ct. Br. 12, 22 (Resp't App. A.517, 527). The government noted in particular that this Court had "recognized that Section 8902(m)(1) was susceptible to multiple constructions" and cited the "probability that [this Court] will reach a different outcome on remand in light of the regulations." *Id.* at 21 (Resp't App. A.526).

The U.S. Supreme Court adopted the government's suggestion. On June 29, 2015, that Court issued an order stating:

> The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Missouri for further consideration in light of new regulations promulgated by the Office of Personnel Management (OPM). See OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. 890.106).

Resp't App. A.37, *reported at* 135 S. Ct. 2886. The Court's mandate issued on July 31, 2015. Resp't App. A.38-42.

On remand, this Court issued an order stating that, "[i]n light of the mandate of the Supreme Court of the United States" vacating this Court's prior judgment, "the opinion issued" by this Court "on February 4, 2014 is vacated." Order on Remand (Aug. 14, 2015) (Appellant's App. 15). The Court recalled its own mandate previously issued to the Circuit Court and directed the parties to file supplemental briefs. *Id.*

POINTS RELIED ON

POINT 1: The trial court correctly granted summary judgment for Coventry, because FEHBA preempts the Missouri law on which Nevils's claim is based, which bars insurers from seeking subrogation or reimbursement for personal-injury claims, in that OPM reasonably determined that subrogation and reimbursement "relate to" benefits and benefit payments under FEHBA.

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,

467 U.S. 837 (1984)

Hillman v. Maretta,

133 S. Ct. 1943 (2013)

Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.,

545 U.S. 967 (2005)

Smiley v. Citibank (S.D.), N.A.,

517 U.S. 735 (1996)

5 U.S.C. § 8902(m)(1)

5 U.S.C. § 8913(a)

OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203 (May 21, 2015) (Appellant's App. 17), *codified at* 5 C.F.R. § 890.106

POINT 2: The trial court correctly granted summary judgment for Coventry, because Coventry was authorized to seek reimbursement from Nevils, in that Nevils forfeited any claim that Coventry's contract does not authorize reimbursement, and the subrogation provision of Coventry's contract encompasses reimbursement.

Burrus v. Cook,

215 Mo. 496 (1908)

Schweiss v. Sisters of Mercy,

950 S.W.2d 537 (Mo. Ct. App. 1997)

State v. Fassero,

256 S.W.3d 109 (Mo. banc 2008)

United States v. Seckinger,

397 U.S. 203 (1970)

ARGUMENT

POINT 1: The trial court correctly granted summary judgment for Coventry, because FEHBA preempts the Missouri law on which Nevils's claim is based, which bars insurers from seeking subrogation or reimbursement for personal-injury claims, in that OPM reasonably determined that subrogation and reimbursement "relate to" benefits and benefit payments under FEHBA.

I. FEHBA PREEMPTS STATE LAWS BARRING FEHBA CARRIERS FROM SEEKING SUBROGATION OR REIMBURSEMENT.

(Responds to Nevils Remand Br. Points 2 and 3, at pp. 26-58)

In enacting FEHBA's comprehensive scheme for federal-employee benefits, Congress explicitly "preempt[ed]" state laws that interfere with the contracts OPM enters with carriers to make the FEHBA program function. 5 U.S.C. § 8902(m)(1). FEHBA's express-preemption provision makes clear that any term in a FEHBA contract that "relate[s] 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 … which relates to health insurance." *Id.* As Coventry and the United States previously demonstrated, Section 8902(m)(1)'s text, purpose, and history all evince Congress's unambiguous intent to preempt state laws that bar FEHBA carriers from seeking subrogation or reimbursement pursuant to their OPM contracts. *See* Coventry Mo. 2013 Br. 9-17; U.S. Mo. 2013 Br. 10-17.

In its now-vacated 2014 decision, this Court—without the benefit of OPM's regulation—reached a different conclusion. The Court determined that Section 8902(m)(1)'s text does not clearly preempt state laws barring subrogation or reimbursement, but "is susceptible to alternate interpretations." 418 S.W.3d at 455 (Resp't App. A.5). The Court proceeded to resolve that ambiguity by applying a "presumption" that, "when two plausible readings of a statute are possible," courts should "'accept the reading that disfavors preemption.'" *Id.* (citation omitted). Coventry respectfully disagrees with that determination and urges the Court to hold, for all the reasons Coventry and the United States have previously shown, that Section 8902(m)(1) unambiguously preempts such state laws.

Even if Section 8902(m)(1) *were* ambiguous, however, the Court still must conclude that state laws barring subrogation or reimbursement are preempted because OPM's regulation codifying that position is dispositive under *Chevron*, 467 U.S. 837. Indeed, OPM's regulation eliminates the reasons this Court gave for declining to accord *Chevron* deference to OPM's position. OPM's position in its 2012 Carrier Letter, the Court held, was "not entitled to the deference described in *Chevron*" because OPM had not "use[d] notice and comment procedures" to adopt a formal regulation. 418 S.W.3d at 457 n.2 (Resp't App. A.7). This Court concluded that the 2012 Carrier Letter did not otherwise merit deference because it was recent and drafted in response to litigation, and doubted OPM's authority to pronounce on preemption through such informal means. *Id.*

As explicitly authorized by Congress, 5 U.S.C. § 8913(a), OPM has now formally and definitively addressed the subject. It has issued a regulation carrying the force of

law—after notice and comment—that confirms that state laws barring subrogation or reimbursement *do* "relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits)" and therefore *are* preempted by FEHBA. 5 C.F.R. § 890.106(h). Under well-settled precedent, OPM's interpretation of FEHBA in its regulation controls so long as it is "reasonable." *Entergy*, 556 U.S. at 218; *see Chevron*, 467 U.S. at 842-44.

OPM's interpretation of FEHBA's preemptive scope is at a minimum reasonable. This Court recognized as much in its now-vacated decision, stating that "the FEHBA preemption clause is susceptible to reasonable, alternate interpretations"—including OPM's interpretation that it does preempt antisubrogation and antireimbursement laws. 418 S.W.3d at 455 (Resp't App. A.5). Under *Chevron*, that "reasonable" interpretation is controlling. Moreover, independently of Section 8902(m)(1), OPM's authority under 5 U.S.C. § 8913(a) to "prescribe regulations necessary to carry out" FEHBA empowered OPM to determine that state antisubrogation and antireimbursement laws are incompatible with the federal statutory scheme and should therefore be preempted.

Because OPM's regulation interpreting and implementing FEHBA is reasonable, it is dispositive. Neither this Court's reasoning in its prior, vacated ruling, nor any of the grounds Nevils asserts to support his contrary reading, show that OPM's interpretation is unreasonable or otherwise not entitled to deference.

A. OPM's Reasonable Determination In Its Regulation That FEHBA Preempts State Laws Barring FEHBA Carriers From Seeking Subrogation Or Reimbursement Is Controlling.

It is blackletter law that a federal agency's reasonable interpretation of a federal statute it administers is controlling under *Chevron*. As the U.S. Supreme Court has explained, the agency's "view governs if it is a reasonable interpretation of the statute"—regardless of whether it is "the only possible interpretation" or "even the interpretation deemed *most* reasonable by the courts." *Entergy*, 556 U.S. at 218 (citing *Chevron*, 467 U.S. at 843-44).

"'The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron*, 467 U.S. at 843 (omission in original) (citation omitted). Congress may "express[ly] delegat[e]" an issue to an agency's discretion, or it may do so "implicit[ly]" by not directly addressing the issue in the statute's text. *Id.* at 843-44. Either way, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844; *accord Util. Serv. Co. v. Dep't of Labor & Indus. Relations*, 331 S.W.3d 654, 660 (Mo. banc 2011) (citing *Chevron*, 467 U.S. at 842-43); *Wimberly v. Labor & Indus. Relations Comm'n*, 688 S.W.2d 344, 349 (Mo. banc 1985) (plurality op.). At least where the agency articulates its reasonable interpretation through "administrative action with the effect of law," such as "notice-and-comment rulemaking," that interpreta-

tion controls. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). This principle applies to "*all* the matters the agency is charged with administering," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)—including the "meaning" of a provision that "pre-empts state law," *Smiley*, 517 U.S. at 744.

These fundamental tenets of federal law resolve this case. As Coventry and the United States have shown, Section 8902(m)(1) unambiguously preempts state antisubrogation and antireimbursement laws, a position that OPM—the agency charged by Congress to administer FEHBA—has long maintained. *See* Coventry Mo. 2013 Br. 9-17; U.S. Mo. 2013 Br. 9-19. Indeed, until the Arizona Court of Appeals' decision in *Kobold*, 309 P.3d 924—on which this Court's 2014 opinion extensively relied, 418 S.W.3d at 455-57 & n.2 (Resp't App. A.5-7), but which the U.S. Supreme Court vacated together with this Court's 2014 decision, 135 S. Ct. 2886—courts around the country agreed with the interpretation of FEHBA that OPM has long maintained. *See*, *e.g.*, *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994); *Calingo v. Meridian Res. Co.*, 2013 WL 1250448, at *3-4 (S.D.N.Y. Feb. 20, 2013);[9] *NALC Health Benefit Plan v. Lunsford*, 879 F. Supp. 760, 762-63 (E.D. Mich. 1995); *Thurman v. State Farm Mut. Auto. Ins. Co.*, 598 S.E.2d 448, 451 (Ga. 2004); *Aybar v. N.J. Transit Bus Operations, Inc.*, 701 A.2d 932, 937-38 (N.J. App. Div. 1997); *see also Shields v. Gov't Emps. Hosp.*

[9] *Calingo* initially reached a contrary view based on *McVeigh*, *see* 2011 WL 3611319, at *8-10 (S.D.N.Y. Aug. 16, 2011), but the court later reversed itself in light of OPM's position in the 2012 Carrier Letter, *see* 2013 WL 1250448, at *4.

Ass'n, 450 F.3d 643, 648 (6th Cir. 2006), *overruled on other grounds by Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (en banc). And since this Court's 2014 decision, courts in at least two other cases have similarly held that FEHBA does preempt antisubrogation and antireimbursement laws. *See Helfrich v. Blue Cross & Blue Shield Ass'n*, __ F.3d __, 2015 WL 6535140, at *12-17 (10th Cir. Oct. 29, 2015); *Bell v. Blue Cross & Blue Shield of Okla.*, 2014 WL 5597265, at *5-8 (W.D. Ark. Nov. 3, 2014), *appeal docketed*, No. 14-3731 (8th Cir. Dec. 5, 2014).

Even if a narrower reading of Section 8902(m)(1) that did not preempt such state laws were equally plausible, however, the result would be the same. That at most would mean that FEHBA is ambiguous, and that putative ambiguity itself would represent an "implicit" "legislative delegation" to OPM to resolve the issue. *Chevron*, 467 U.S. at 844. Congress, moreover, has expressly authorized OPM to issue regulations implementing FEHBA. 5 U.S.C. § 8913(a) ("The Office of Personnel Management may prescribe regulations necessary to carry out this chapter."). OPM has now exercised that authority by reiterating its longstanding position, in a notice-and-comment regulation, that state antisubrogation and antireimbursement laws are preempted. 5 C.F.R. § 890.106(h).

Under *Chevron*, OPM's interpretation of FEHBA controls so long as it is "reasonable." *Chevron*, 467 U.S. at 844. OPM's interpretation easily clears that threshold.[10]

1. OPM's Rule Reasonably Interprets The Text Of FEHBA's Express-Preemption Provision.

Preemption is fundamentally a question "of statutory intent." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). OPM's interpretation of FEHBA's preemptive scope represents the correct, and certainly a reasonable, interpretation of the best evidence of Congress's intent: the statutory text.

FEHBA "contains an express preemption clause," and thus the "plain wording of the clause … necessarily contains the best evidence of Congress's preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (internal quotation marks omitted); *see also State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 148 (Mo.

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[10] While the Court should conclude that FEHBA's text unambiguously resolves the preemption issue, the Court can decide the case without even revisiting the question whether FEHBA is unambiguous, because OPM's "reasonable interpretation" controls *regardless* of whether it is "the only possible interpretation" or one of multiple reasonable readings. *Entergy*, 556 U.S. at 218; *see also id.* at 218 n.4 (court may uphold agency's interpretation without a "prior inquiry of 'whether Congress has directly spoken to the precise question at issue,'" because "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable" (citation omitted)).

banc 2010) (where federal statute "contains an express preemption clause, this Court's task is to construe the plain language of the statute to determine the extent to which Congress intended for [the federal statute] to preempt state law"). In construing the statutory text, courts "must have regard to all the words used by Congress," *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (internal quotation marks omitted), and must "give effect, if possible, to every clause and word," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). OPM's interpretation faithfully implements these principles.

FEHBA's preemption clause states that "[t]he 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." 5 U.S.C. § 8902(m)(1). As OPM explained, that language encompasses subrogation and reimbursement clauses in FEHBA carriers' OPM contracts because "[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)." 5 C.F.R. § 890.106(h). "These rights and responsibilities," OPM concluded, "are therefore effective notwithstanding any state or local law … which relates to health insurance or plans." *Id.* That conclusion is sound, and certainly reasonable.

The phrase "'relat[e] to' expresses a 'broad pre-emptive purpose.'" *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (quoting *Morales*, 504 U.S. at 383). Con-

gress often employs that formulation (and indistinguishable variants) to reach everything that "has a connection with, or reference to," the things or topics Congress has enumerated in the statute. *Id.* (brackets and internal quotation marks omitted); *see*, *e.g.*, *id.* ("a claim 'relates to rates, routes, or services,'" and thus is preempted by the Airline Deregulation Act, "if the claim 'has a connection with, or reference to, airline rates, routes, or services'" (brackets and citation omitted)). Subrogation and reimbursement "relate to" both employee benefits and benefit payments in that sense.

a. OPM Reasonably Determined That Subrogation And Reimbursement Rights Relate To "Benefits."

As OPM explained, "[s]ubrogation and reimbursement clauses" relate to employees' *benefits* because they make payment of those benefits "conditional upon a right to subrogation or reimbursement of equivalent amounts, either from a third-party, or from the enrollee, in the event a third party is obligated to pay for the same injury or illness." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61). "[S]ubrogation and reimbursement rights ensure that, when a carrier makes a payment of benefits, some portion of the payment may need to be returned to the carrier at a later date if a third party is responsible for the same costs." U.S. S. Ct. Br. 14 (Resp't App. A.519). OPM's new regulation makes clear that such a right "constitutes a condition of and a limitation on the nature of benefits or benefit payments, and on the provision of benefits under the plan's coverage." 5 C.F.R. § 890.106(b)(1).

Coventry's right to subrogation or reimbursement here thus relates to Nevils's benefits because his right to *keep* those benefits has always depended on whether he receives a separate tort recovery. As this Court's prior ruling recognized, "[t]he subrogation provision in favor of Coventry creates a contingent right to reimbursement" from Nevils. 418 S.W.3d at 457 (Resp't App. A.7). When Coventry's "contingent right" is triggered by Nevils's recovery from third parties, it means that Nevils must *return* to Coventry part or all of what Coventry paid.

The U.S. Supreme Court, in fact, has recognized that subrogation and reimbursement rights do "relat[e] to" employee "benefits" in the closely analogous context of benefit plans for *private* employees governed by ERISA, 29 U.S.C. § 1001 *et seq.* *See FMC*, 498 U.S. at 58-60. ERISA contains a parallel preemption clause providing that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). In *FMC*, the Supreme Court held that this language preempts state laws that "prohibi[t] plans from … requiring reimbursement" because reimbursement affects a plan's calculation of benefits. 498 U.S. at 60. State laws barring reimbursement "requir[e] plan providers to calculate benefit levels in" States that have such laws "based on expected liability conditions that differ from those in States" that do not. *Id.* That disparity "frustrate[s] plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Id.*; *see also Hays v. Mo. Highways & Transp. Comm'n*, 62 S.W.3d 538, 540-41 (Mo. Ct. App. 2001) (recognizing that this "specific language" in ERISA creates an "exceptio[n] … to th[e] general rule" pro-

hibiting assignment of personal-injury claims because it "expressly preempts state law in this area").

FMC's analysis is fully applicable to FEHBA. As other courts have recognized, given the parallels between the texts and contexts of ERISA's and FEHBA's preemption provisions, "precedent interpreting the ERISA provision" is "authority for cases involving the FEHBA provision." *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 393-94 (9th Cir. 2002); *accord Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 299 n.2 (1st Cir. 2005) (per curiam) (because Section 8902(m)(1) "is nearly identical to ERISA's preemption provision," courts "look to ERISA precedent in determining the scope of the preemption provision under FEHBA"); *Aybar*, 701 A.2d at 935-36. If anything, *FMC*'s reasoning applies with even greater force to FEHBA. As the United States 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 employees than in the case of private employees." U.S. Mo. 2013 Br. 14 (emphases added).

In its vacated 2014 decision, this Court reasoned that the subrogation clause in Coventry's plan did not relate to Nevils's benefits because that clause did not affect the amount of benefits he received *initially*, and "Nevils would have been entitled to the same benefits had [he] never filed suit to recover damages" against the third parties responsible for his injury. 418 S.W.3d at 456 (Resp't App. A.6). Coventry respectfully submits that that distinction between benefits an employee is originally paid and benefits he ultimately can keep is untenable, and at a minimum OPM reasonably declined to adopt

it. Indeed, the U.S. Supreme Court has rejected very similar distinctions in other preemption contexts.

In *Northwest*, 134 S. Ct. 1422—decided after this Court's February 2014 opinion—the U.S. Supreme Court held that a state-law claim alleging a failure to provide benefits promised through a frequent-flyer program was expressly preempted by the Airline Deregulation Act's strikingly similar express-preemption provision, which nullified state laws "'relate[d] to'" an airline's "'rates, routes, or services.'" *Id.* at 1430-31 (citation omitted). *Northwest* reiterated the Court's earlier holdings that Congress's use of the phrase "'related to' expresses a 'broad pre-emptive purpose.'" *Id.* at 1428 (citation omitted). As the Court explained, "the frequent flyer program" was "connected to the airline's 'rates'" because it affected the net prices program participants paid for airline services. *Id.* at 1431. "When miles are used" to obtain "tickets and upgrades," "the rate that a customer pays, *i.e.*, the price of a particular ticket, is either eliminated or reduced." *Id.* "The program is also connected to 'services,' *i.e.*, access to flights and to higher service categories." *Id.* The Court saw no merit in the plaintiff's argument that his claim concerned only his frequent-flyer-program status and did not directly "'challenge access to flights and upgrades.'" *Id.* (citation omitted). That "proffered distinction," the Court held, "has no substance": The obvious purpose of the plaintiff's claim concerning his frequent-flyer status was precisely "to obtain reduced rates and enhanced services." *Id.*

Even without reliance on sweeping "related to" preemptive language—present in FEHBA, ERISA, and the Airline Deregulation Act—the Supreme Court has rejected similar distinctions advanced to support narrow views of preemption. In *Hillman v.*

Maretta, 133 S. Ct. 1943 (2013)—which addressed a federal law regarding the closely analogous context of federal employees' life-insurance benefits—the Court refused to distinguish initial payment of benefits from a later *transfer* of benefit payments. *See id.* at 1952. Federal law required that benefits be paid to the employee's named beneficiary. *Id.* at 1948. The respondent argued that state law requiring a subsequent transfer of benefit payments from the beneficiary to the employee's widow was not preempted. *Id.* at 1948-49. The Court rejected that distinction. It "makes no difference," *Hillman* held, whether state law withholds benefits in the first instance or instead takes them away after they have been paid. *Id.* at 1952. "In either case, state law displaces the beneficiary selected" under federal law. *Id.* Coventry respectfully submits that the reasoning of *Northwest* and *Hillman* confirms that OPM's position that subrogation and reimbursement do relate to benefits is correct, and at a minimum reasonable.

b. At A Minimum, OPM Reasonably Concluded That Subrogation And Reimbursement Rights Relate To "Payments With Respect To Benefits."

OPM also reasonably concluded that subrogation and reimbursement rights relate to *benefit payments*. 5 C.F.R. § 890.106(h). FEHBA preempts not only contract terms that "relate to" "benefits," but *also* terms that "relate to … *payments with respect to* benefits." 5 U.S.C. § 8902(m)(1) (emphasis added). As the United States previously explained, "[s]ubrogation rights relate to benefit payments because they require a beneficiary to return benefits to the extent the beneficiary has been separately reimbursed for

those benefits from a tort recovery." U.S. Mo. 2013 Br. 12. The point of subrogation and reimbursement provisions is to facilitate *repayments* of benefits back to carriers—effectively reducing or undoing a prior benefit payment. *See also Helfrich*, 2015 WL 6535140, at *14 (holding that "subrogation and reimbursement requirements" in carrier's plan were "tied directly to 'payments with respect to benefits'").

This Court did not specifically address FEHBA's "payments with respect to benefits" phrase in its prior opinion, but that phrase independently demonstrates that OPM's interpretation of FEHBA's preemptive scope is reasonable. Nevils offers no answer to that language in his brief on remand. And his only answer to that phrase when the case was last before the Court was the assertion that "'payments with respect to benefits'" must refer to payments made by the carrier "to the provider" in light of Section 8902(m)(1)'s "earlier focus on coverage and benefits." Appellant's Reply Br. 8-9, No. SC93134 (Mo. June 17, 2013). That interpretation deprives "payments with respect to benefits" of any independent effect and renders it surplusage, effectively reading it out of the statute—a result that the Court must avoid if possible. *See*, *e.g.*, *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011); *see also Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. banc 2009).

On Nevils's reading, "payments with respect to benefits" would add nothing to "benefits" simpliciter, which this Court previously construed as "the financial assistance that the insured receives as a consequence of the coverage." 418 S.W.3d at 456 (Resp't App. A.6). Nevils's interpretation cannot explain why Congress would have separately enumerated "payments with respect to benefits" in the statute. Under OPM's interpreta-

tion, in contrast, there is no superfluity because both "benefits" and "payments with respect to benefits" have meaning, and Congress's choice of language makes perfect sense: "Benefits" encompasses enrollees' entitlements under the applicable FEHBA plan's terms, while "payments with respect to benefits" denotes actual transfers of funds among the plan, the beneficiary, and others concerning those benefits. Subrogation and reimbursement "relate to" both.

*****

OPM's determination in its regulation that subrogation and reimbursement rights relate to benefits and benefit payments—and that laws nullifying such rights are therefore preempted, 5 C.F.R. § 890.106(h)—is a persuasive, and at least a permissible, interpretation of Section 8902(m)(1)'s text. Indeed, although this Court in its vacated 2014 opinion found a different reading more persuasive, it acknowledged that OPM's position is "reasonable" and "plausible." 418 S.W.3d at 455 (Resp't App. A.5). Under *Chevron*, that reasonable interpretation by the agency charged to administer FEHBA "governs." *Entergy*, 556 U.S. at 218.[11]

[11] Even if the Court were to conclude that OPM's regulation is not entitled to the full measure of deference applicable under *Chevron*, it still should accept OPM's position in its regulation because, as the Tenth Circuit recently concluded, OPM's "longstanding and persuasively explained view" is "of sufficient weight" to satisfy even a "less deferential standard." *Helfrich*, 2015 WL 6535140, at *17; *see also Calingo*, 2013 WL 1250448, at *3-4.

2. Congress's Purpose In Enacting FEHBA Confirms That OPM's Interpretation In Its Regulation Is Reasonable.

The "ultimate touchstone of pre-emption analysis" is Congress's "purpose." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986) (internal quotation marks omitted). Congress's "purpose" in enacting FEHBA powerfully confirms that OPM's interpretation in its regulation is at least reasonable.

Congress enacted Section 8902(m)(1) to address concerns that States' imposition of divergent requirements on FEHBA plans—for example, laws mandating provision of specific benefits—could cripple uniformity and make administration of nationwide plans unmanageable. S. Rep. No. 95-903, at 7-8 (1978) (Appellant's App. 36-37); H.R. Rep. No. 95-282, at 3-7 (1977) (Appellant's App. 22-26); H.R. Rep. No. 94-1211, at 3 (Resp't App. A.67). Decades later, Congress *broadened* Section 8902(m)(1) "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 105-374, at 9 (Resp't App. A.81); *see also* S. Rep. No. 105-257, at 9, 14-15 (Resp't App. A.111, 116-17).

As OPM explained, construing Section 8902(m)(1) to preempt laws barring FEHBA carriers from seeking subrogation and reimbursement pursuant to their OPM contracts "furthers Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." *Final Rule*, 80 Fed. Reg. at 29,203 (Appellant's App. 17). "The FEHB program insures approximately 8.2 million federal employ-

ees, annuitants, and their families, a significant proportion of whom are covered through nationwide fee-for-service plans with uniform rates." *Id.* The federal government, and ultimately taxpayers, pays the lion's share of the enormous cost of providing those benefits—"on average approximately 70%"—"approximately $33 billion" in 2014, "a figure that tends to increase each year." *Id.* Subrogation and reimbursement recoveries yielded "approximately $126 million" in that year alone, and those "recoveries translate to premium cost savings for the federal government"—and thus taxpayers—"and FEHB enrollees." *Id.*; *see also Helfrich*, 2015 WL 6535140, at *15.

Construing FEHBA to preempt antisubrogation and antireimbursement laws also advances the "strong federal interest in national uniformity in coverage and benefits," which "include[s] uniform administration of the FEHB program across state lines." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp. App. A.61). As OPM explained, achieving that interest necessitates "uniform rules that affect the rights and obligations of enrollees in a given plan without regard to where they live." *Id.* As the government has previously argued, "Missouri's anti-subrogation rule is indistinguishable from the state mandated-benefit laws that Congress expressly targeted with the enactment of the FEHBA preemption provision." U.S. Mo. 2013 Br. 15.

Reading FEHBA *not* to preempt laws barring subrogation or reimbursement, in contrast, invites a diverse patchwork of State-specific restrictions that "is administratively burdensome, gives rise to uncertainty and litigation, and results in treating enrollees differently, although enrolled in the same plan and paying the same premium." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp. App. A.61). Such State-by-State inconsistency not only

hamstrings the cost-cutting efforts that Congress specifically intended to encourage, but also is unfair to FEHBA enrollees. As the United States previously explained, if state laws forbidding subrogation or reimbursement recoveries "surviv[e] preemption, then, the loser[s] will be FEHB enrollees in states that permit" those recoveries, "who will be subsidizing the more generous benefits that" such laws "effectively mandat[e] that FEHB carriers provide." U.S. Mo. 2013 Br. 15-16. The resulting "cross-subsidization" (*id.* at 16) unfairly advantages some federal employees and their families at the expense of others, simply by dint of the States in which they live. OPM reasonably construed FEHBA's express-preemption provision to avoid all of these harmful consequences that Congress never intended.

3. OPM Validly Exercised Its Rulemaking Authority To Preempt Laws Barring Subrogation Or Reimbursement Because They Conflict With The Federal Statutory Scheme.

OPM's regulation merits deference not only as a faithful interpretation of Section 8902(m)(1), but also as a valid exercise of OPM's explicit statutory rulemaking authority and as a recognition of the irreconcilable conflict between antisubrogation and antireimbursement laws with FEHBA's objectives. As the U.S. Supreme Court has explained, regulations issued by a federal agency acting within its authority "'have no less preemptive effect than federal statutes,'" for "'[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.'" *Capital Cit-*

ies Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982)); *accord Smith v. Calvary Educ. Broad. Network*, 783 S.W.2d 533, 535 (Mo. Ct. App. 1990). "[I]n the area of pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see also Capital Cities*, 467 U.S. at 700 (same).

Apart from express preemption, state laws may be impliedly preempted if they pose "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman*, 133 S. Ct. at 1950 (internal quotation marks omitted). Even where a statute *does* include an express-preemption clause, state law may *also* be impliedly preempted because it erects such an obstacle to Congress's purposes. *See*, *e.g.*, *id.* at 1949-55; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). In *Hillman*, for example, the Supreme Court held that state laws purporting to require a federally designated recipient of federal-employee benefits to transfer them to someone else were impliedly preempted because they would "'frustrat[e] the deliberate purpose of Congress,'" without even addressing the federal statute's express-preemption provision. 133 S. Ct. at 1952, 1954 (citation omitted). And, as Nevils's own authority explains, federal "'agencies … have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may

pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (citation omitted).

OPM's determination that preempting antisubrogation and antireimbursement laws is essential to implementing the federal statutory scheme falls comfortably within its broad statutory authority to "prescribe regulations necessary to carry out" FEHBA. 5 U.S.C. § 8913(a). And its determination represents a "'reasonable accommodation'" of the various "'policies that were committed to [its] care by the statute.'" *City of New York*, 486 U.S. at 64 (citation omitted). As Coventry and the United States have shown, antisubrogation and antireimbursement laws are incompatible with the statutory design and Congress's aims of fostering uniformity and encouraging cost-cutting measures that result in savings to federal employees and taxpayers alike. *Supra* pp. 41-43; U.S. Mo. 2013 Br. 14-17. OPM is particularly well-positioned to assess the obstacle that such state laws pose to Congress's purposes. As the Tenth Circuit recently explained in embracing OPM's position, "[a]s the agency that has negotiated FEHBA contracts for federal employees for years, OPM has deep knowledge of the impact and interrelationships of contractual provisions." *Helfrich*, 2015 WL 6535140, at *17.

OPM's exercise of its rulemaking authority under Section 8913(a) to deem such state laws preempted was well-founded. At a minimum, OPM's regulation—which carries the preemptive force of federal law—constitutes a "'reasonable accommodation of conflicting policies'" that the Court "'should not disturb.'" *City of New York*, 486 U.S. at 64 (citation omitted).

B. Neither This Court's Prior, Vacated Decision Nor Its Reasoning Supports Withholding Deference To OPM's Regulation.

Nevils nevertheless urges this Court to ignore OPM's reasonable interpretation of FEHBA in its regulation and to construe Section 8902(m)(1)—directly contrary to the agency's position—as *not* preempting state laws barring subrogation and reimbursement. Nevils Remand Br. 26-54. His primary argument is that this Court's 2014 decision "is law of the case" and "controls the outcome now." *Id.* at 26. That contention is spurious. The Court's prior decision cannot possibly constitute "law of the case" because that decision was *vacated*. While that decision may have persuasive value to the extent it correctly analyzed the preemption question—which Coventry respectfully submits is not the case—it is now devoid of any controlling or preclusive effect and cannot prevent this Court from reconsidering the preemption issue in light of current circumstances. Indeed, the U.S. Supreme Court remanded for this Court to give "further consideration" to the correct interpretation of FEHBA "in light of new regulations promulgated by" OPM. Resp't App. A.37, *reported at* 135 S. Ct. 2886. In any event, even the Court's reasoning in its vacated decision does not support Nevils's contention that the Court can or should disregard OPM's reasonable regulation.

1. This Court's Vacated Decision Is Not Law Of The Case.

Nevils perplexingly contends that this Court's prior, *vacated* decision is "the law of the case" and "precludes re-litigation of the issue" of whether FEHBA preempts anti-

subrogation and antireimbursement laws. Nevils Remand Br. 29-30; *see also*, *e.g.*, *id.* at 2, 26, 37, 39. That contention is fundamentally wrong.

As the U.S. Supreme Court has made clear, when that Court vacates a lower court's judgment, "the doctrine of the law of the case does not" apply on remand to the court below. *Johnson v. Bd. of Educ.*, 457 U.S. 52, 53-54 (1982) (per curiam). That is because, "[o]f necessity," a Supreme Court decision vacating a judgment "deprives that court's opinion of precedential effect, leaving [the Supreme] Court's opinion and judgment as the sole law of the case." *O'Connor v. Donaldson*, 422 U.S. 563, 577-78 n.12 (1975); *see County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (same). Indeed, the whole "point of vacatur" is to prevent an opinion "'from spawning any legal consequences.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2025 (2011) (citation omitted). By "'eliminat[ing] a judgment,'" vacatur "'clea[rs] the path for future relitigation of the issues between the parties.'" *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (citation omitted).

This Court has long adhered to the same sensible principle. As this Court held 90 years ago, "a ruling … is the law of the case, *unless and until reversed on appeal*." *Ex parte Ross*, 307 Mo. 1, 5 (1925) (emphasis added); *cf. Hermel, Inc. v. State Tax Comm'n*, 564 S.W.2d 888, 894 (Mo. banc 1978) (holding that a State Tax Commission's determination had no *res judicata* effect after that determination had been set aside). Likewise, where a "judgment [i]s vacated and the case [i]s remanded for further proceedings," there is "nothing … left upon which to preclude further litigation of the matter." *Lincoln Cnty. Ambulance Dist. v. Pac. Emp'rs Ins. Co.*, 15 S.W.3d 739, 746 (Mo. Ct. App. 1998).

That is no less true where, as here, the Supreme Court grants certiorari, vacates the decision below, and remands a case for further proceedings. The purpose of that procedure is to allow further consideration by the lower court because "intervening developments" have "reveal[ed] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 346-47 (10th ed. 2013).

The law-of-the-case doctrine is thus irrelevant here and cannot bar further consideration of the preemption question because this Court's prior ruling has been "vacated." Resp't App. A.37, *reported at* 135 S. Ct. 2886. Indeed, the U.S. Supreme Court expressly vacated this Court's judgment precisely to allow "further consideration in light of" OPM's new regulation. *Id.* This Court echoed that determination, stating further that its prior opinion also "is vacated." Order on Remand (Aug. 14, 2015) (Appellant's App. 15). That prior ruling no longer has controlling or preclusive force whatsoever. And it cannot possibly be viewed, as Nevils urges, as foreclosing further litigation of the very issue that the prior decision was vacated to enable this Court to "conside[r]" "further."

Nevils never addresses this fatal flaw in his misguided invocation of the law-of-the-case doctrine. Nor do any of the cases he cites support applying that doctrine in this setting. Not one extended preclusive effect to a holding that had been vacated. All but one either did not involve a vacated judgment at all, *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. banc 2011); *Mo. Land Dev. I, LLC v. Raleigh Dev., LLC*,

407 S.W.3d 676 (Mo. Ct. App. 2013), or else involved a determination that law of the case did not apply, *see Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999).

The one case Nevils offers that involved a partially vacated judgment, *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc 2007), extended law-of-the-case effect to a portion of a prior ruling that had *not* been set aside. *Id.* at 127-29. In *Walton*, the Court of Appeals had overturned a circuit-court judgment regarding an equitable "wrongful removal" claim, and remanded for further proceedings on that claim, but it *affirmed* dismissal of a separate breach-of-contract claim. *Id.* at 127-28. The plaintiff on remand sought to relitigate that breach-of-contract claim, on which the Court of Appeals had not disturbed the circuit-court judgment; this Court held that relitigation of *that* claim was barred by the law-of-the-case doctrine. *Id.* at 129. Nothing in the decision suggests that the circuit court's vacated ruling regarding the plaintiff's other, equitable claim remained law of the case and precluded relitigation.

Even if the law-of-the-case doctrine could possibly apply to a prior decision that has been vacated in its entirety, it would not apply here. The law-of-the-case doctrine, this Court has explained, is not absolute, but is subject to certain exceptions consistent with its purpose. *See Walton*, 223 S.W.3d at 130. In particular, the doctrine does not apply "where a change in the law intervened between the appeals" or "where the issues or evidence on remand are substantially different from those vital to the first adjudication and judgment." *Id.* If the doctrine were relevant here at all, both of those exceptions would apply. OPM, the agency charged with administering FEHBA, promulgated a new regulation interpreting the statute; the Supreme Court issued an order vacating this

Court's decision in light of OPM's regulation; and the question on remand is whether OPM's new regulation is at least reasonable and entitled to *Chevron* deference, an issue this Court did not previously address. Thus, even if law of the case could apply to a vacated decision, it cannot control whether OPM's regulation compels a different outcome on remand.

2. The Court's Reasoning In Its Vacated Decision Does Not Warrant Withholding Deference To OPM's Regulation.

To the extent Nevils means to argue that the Court should adopt the same reasoning of its vacated 2014 opinion, nothing in its prior analysis supports withholding deference to OPM's position. Quite the opposite, the Court's prior analysis confirms that OPM's interpretation of FEHBA is "reasonable," 418 S.W.3d at 455 (Resp't App. A.5)—which means that it *does* merit *Chevron* deference, *see Chevron*, 467 U.S. at 843-44. This Court did not defer to OPM's position only because it concluded that OPM's 2012 Carrier Letter did not merit deference, and so the Court construed the statute *de novo*. But the Court's reasons for declining to defer to the 2012 Carrier Letter do not apply to OPM's new notice-and-comment regulation. And neither this Court's contrary reading of FEHBA nor the interpretive principle it applied—a presumption against preemption—precluded OPM from adopting a different, reasonable interpretation of the statute.

a. This Court's Reasons For Declining To Defer To The 2012 Carrier Letter Do Not Apply To The Regulation.

Although Coventry and the United States each urged the Court to defer to OPM's position that FEHBA preempts state antisubrogation and antireimbursement laws, *see* Coventry Mo. 2013 Br. 17-23; U.S. Mo. 2013 Br. 21-23, the Court declined to do so (in a footnote) because of the *manner* in which OPM had then articulated that position: in an "informal" guidance letter to FEHBA carriers, not a notice-and-comment regulation. 418 S.W.3d at 457 n.2 (Resp't App. A.7). OPM's new regulation directly addresses that concern and eliminates any basis for declining to defer to OPM's position.

i. OPM's Binding Regulation, Adopted After Notice And Comment, Is Entitled To *Chevron* Deference.

This Court acknowledged in its prior decision that, "[u]nder *Chevron*, an agency has the power to form policy and make necessary rules when the statute is either silent or ambiguous on an issue." 418 S.W.3d at 457 n.2 (Resp't App. A.7). But it explained that "*Chevron* deference is typically applied where an agency rule sets forth important rights and duties, where the agency focuses fully and directly on the issue, where the agency uses notice and comment procedures to promulgate a rule, and where the resulting rule falls within the statutory grant of authority." *Id.* (brackets and internal quotation marks omitted). Because OPM's 2012 Carrier Letter did not meet that description, the Court held, it did not merit deference. *Id.*

OPM's regulation now supplies what the Court concluded was missing. Unlike the "informal" 2012 Carrier Letter, 418 S.W.3d at 457 n.2 (Resp't App. A.7), OPM's new rule is a binding federal regulation, issued after notice and comment, pursuant to OPM's express statutory authority to "prescribe regulations necessary to carry out" FEHBA. 5 U.S.C. § 8913; *see Final Rule*, 80 Fed. Reg. at 29,203-04 (Appellant's App. 17-18) (citing 5 U.S.C. § 8913 as authority for regulation). As the product of "notice-and-comment rulemaking" that carries "the effect of law," that regulation is entitled to the full measure of deference described in *Chevron*. *Mead*, 533 U.S. at 230.

ii. The Impetus For OPM's New Regulation Is Irrelevant Under *Chevron*.

This Court recognized that even *informal* agency interpretations of statutes may merit deference. 418 S.W.3d at 457 n.2 (Resp't App. A.7); *cf. Mead*, 533 U.S. at 228, 234-35 (an informal agency interpretation may merit deference, "'depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to per-suade'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). But the Court concluded that OPM's 2012 Carrier Letter did not qualify for deference on that basis

because it was issued "recent[ly] … in response to litigation challenging" subrogation and reimbursement recovery efforts by FEHBA carriers.[12]

Nevils tries to impugn OPM's new *regulation* on the same basis, suggesting that the regulation does not deserve deference because it was adopted in response to litigation and judicial decisions—including this Court's prior ruling—holding that FEHBA does not preempt such laws. *See*, *e.g.*, Nevils Remand Br. 2, 20, 26, 54. His attacks on OPM's motive for adopting its rule are misdirected. Whatever relevance the impetus of the 2012 Carrier Letter might have had, the U.S. Supreme Court has made clear that an agency's reason for adopting a "*full-dress regulation* … adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" has no bearing on the deference due under *Chevron*. *Smiley*, 517 U.S. at 741 (emphasis added). It does not "matter," *Smiley* held, "that the regulation" at issue "was prompted by litigation, including th[e] very suit" before the Court. *Id.* Whether or not "it was litigation which disclosed the need for the regulation is irrelevant." *Id.* Indeed, an agency's determination that some courts have misinterpreted a statute the agen-

[12] This Court did not question that the 2012 Carrier Letter reflected OPM's long-established, consistent position. 418 S.W.3d at 457 n.2 (Resp't App. A.7). To the contrary, the Court noted that "[t]he OPM letter *reiterates* the agency's position that FEHBA preempts state anti-subrogation rules." *Id.* (emphasis added). Indeed, that has been OPM's position "since Congress enacted [Section 8902(m)(1)] in 1978." *Final Rule*, 80 Fed. Reg. at 29,204 (Appellant's App. 18); *see also infra* pp. 73-77.

cy administers is if anything more reason why the agency should take action to provide greater clarity—precisely what OPM's regulation seeks to do, *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61) (rule's purpose is to "clarif[y] this provision of law").

iii. OPM Has Authority To Issue Regulations Interpreting FEHBA's Preemptive Scope.

This Court also declined to defer to OPM's informal 2012 Carrier Letter because it stated that "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause." 418 S.W.3d at 457 n.2 (Resp't App. A.7). Nevils now contends that OPM's new regulation is unlawful for the same reason, asserting that "FEHBA contains no express grant of authority for OPM 'to pre-empt state law directly.'" Nevils Remand Br. 41 (citation omitted). That assertion is untenable. Even if it were true that Congress did not grant OPM authority to make such determinations through *informal* guidance such as carrier letters, it is clear on the face of FEHBA that OPM *can* make such determinations by issuing binding *regulations*.

Congress broadly and explicitly authorized OPM to "prescribe regulations necessary to carry out" FEHBA. 5 U.S.C. § 8913(a). That broad grant of authority encompasses the power to issue regulations regarding the scope of FEHBA's preemption provision. When a statute gives an agency this "broad power to enforce all provisions of the statute," Congress's delegation to the agency of the authority to interpret that statute is "clear." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). And because "the whole in-

cludes all of its parts," the "general conferral of rulemaking authority" in Section 8913(a) "validate[s] rules for *all* the matters the agency is charged with administering." *City of Arlington*, 133 S. Ct. at 1874. There are "no exception[s]" to *Chevron*'s deferential standard of review for any "legal question[s] concerning the coverage of an Act." *Id.* at 1871 (internal quotation marks omitted).

Section 8913(a)'s broad grant of rulemaking power closely resembles statutes that the U.S. Supreme Court has construed to confer authority to an agency to adopt interpretations of all parts of a statute it administers, which are entitled to full *Chevron* deference. For example, in *Brand X*, the Court confronted a similar provision of the Communications Act of 1934 that delegated to the Federal Communications Commission the authority to "'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of th[at] Act." 545 U.S. at 980 (quoting 47 U.S.C. § 201(b)). The Court held that this provision evinced a congressional delegation to the FCC of "the authority to promulgate binding legal rules" to resolve statutory ambiguities, which were entitled to *Chevron* deference. *Id.* at 980-81; *see also*, *e.g.*, *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (Federal Reserve Board was "primary source for interpretation" of statute that "delegated to [it] authority to prescribe regulations … [as] 'are necessary or proper to effectuate the purposes of' the statute" (quoting 15 U.S.C. § 1604(a); other internal quotation marks omitted)); *Sullivan v. Everhart*, 494 U.S. 83, 87-89 (1990) (*Chevron* deference applied where statute "confer[red] upon the [agency] general authority to 'make rules and regulations and to establish procedures … necessary or appropriate to carry out such provisions'" (quoting 42 U.S.C. § 405(a)).

In these cases and many others, the Supreme Court has held that general grants of rulemaking authority empowered agencies to issue regulations about specific subjects even though those particular topics were not individually enumerated in the statute. Indeed, there has not been "a single case" in which a court held "a general conferral" of rulemaking authority "insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington*, 133 S. Ct. at 1874. "[T]he preconditions to deference under *Chevron* are satisfied," in short, so long as "Congress has unambiguously vested [an agency] with general authority to administer [the statute] through rulemaking … , and the agency interpretation at issue was promulgated in the exercise of that authority." *Id.*

That is equally true, the Supreme Court has further held, of an agency's interpretation of the "meaning" of a statutory provision that "pre-empts state law." *Smiley*, 517 U.S. at 744. In *Smiley*, the Court confronted a regulation issued by the Comptroller of the Currency construing a provision of the National Bank Act, 12 U.S.C. § 85, that the Supreme Court had previously held preempted state laws limiting the maximum interest rates that national banks may charge their credit-card customers. 517 U.S. at 737, 744. As *Smiley* explained, the Comptroller was "charged with the enforcement of banking laws to an extent that warrants the invocation of the rule of deference with respect to his deliberative conclusions as to the meaning of these laws." *Id.* at 739 (brackets and inter-

nal quotation marks omitted). The Comptroller's statutory authority included a similar general grant of power to prescribe regulations implementing the federal banking laws.[13]

Exercising that authority, the Comptroller issued a regulation construing the term "'interest'" in 12 U.S.C. § 85 to include "late-payment fees" that banks charged credit-card customers. *Smiley*, 517 U.S. at 737, 740 (quoting 61 Fed. Reg. 4869 (1996)). Because "there [was] no doubt that § 85 pre-empts state law" in light of the Supreme Court's prior precedent, *id.* at 744, the Comptroller's regulation bore directly on the *scope* of the state laws that were preempted. The Supreme Court unanimously concluded that the Comptroller's interpretation of the statute in its regulation was "reasonable" and therefore "entitled to deference" under *Chevron*, *even though* it had the effect of determining the extent to which state laws were preempted. *Id.* at 745, 747. The Court reserved judgment on whether *Chevron* applies to an agency's view on "the question of *whether* a statute is pre-emptive." *Id.* at 744. But where, as in *Smiley*, "there is no doubt" that the federal statute preempts *some* state laws—and the regulation concerns only the "substantive … *meaning* of [the] statute," and thus addresses only *which* state laws are preempted—*Chevron* applies with full force. *Id.* And so long as the agency's interpretation of the statute's "meaning" is "a reasonable one," that interpretation con-

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[13] *See* 12 U.S.C. § 93a (1996) ("Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office," with specific, enumerated exceptions); *see also id.* § 1 (1996).

trols—regardless of whether a court believes that "it represents the best interpretation." *Id.* at 744-45.

That is precisely the case here. In this case, as in *Smiley*, "there is no doubt that" FEHBA "pre-empts state law" to *some* extent. 517 U.S. at 744. Section 8902(m)(1) explicitly "supersede[s] and preempt[s]" at least *some* state laws. 5 U.S.C. § 8902(m)(1). The only dispute is *which* state laws are preempted. OPM's reasonable conclusion on that question concerns only FEHBA's "substantive … *meaning*," and therefore is "entitled to deference" under *Chevron*. *Smiley*, 517 U.S. at 744, 747.

Nevils urges this Court to create an exception to the U.S. Supreme Court's clear teaching, contending that general grants of rulemaking power do not authorize agencies to interpret express-preemption provisions in the statutes they administer. Nevils Remand Br. 47-48. That claim cannot be reconciled with *Smiley* or subsequent Supreme Court precedent. Nevils cites *Smiley*'s reservation of judgment on whether *Chevron* deference applies to "'the question of whether a statute is pre-emptive.'" Nevils Remand Br. 47-48 (quoting *Smiley*, 517 U.S. at 744). But when a statute, like FEHBA, contains an express-preemption clause, the answer to that question is clear: By definition, such a clause makes clear that the statute "is preemptive," *Smiley*, 517 U.S. at 744 (citation omitted); the only question is *to what extent*. As *Smiley* expressly held, *Chevron* deference *does* apply to that question, and the agency's reasonable position controls. *Id.*

Indeed, the Supreme Court has since applied *Chevron* deference to an agency's determination of the scope of statutes that expressly address preemption. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), decided only weeks after *Smiley*, the Court deferred to

the Food and Drug Administration's ("FDA") determination in a regulation that the preemption provision of the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a), "'does not preempt [certain] State or local requirements'"—namely, those that are "'equal'" or "'identical'" to requirements imposed by the statute or by the FDA. 518 U.S. at 496-97 (citation omitted). Citing *Chevron*, *Medtronic* held that "[t]he ambiguity in the statute—and the congressional grant of authority to the agency on the matter contained within it—provide a sound basis for giving substantial weight to the agency's view of the statute." *Id.* at 496 (internal quotation marks omitted). "[T]he FDA," the Court explained, "is the federal agency to which Congress has delegated its authority to implement the provisions of the Act," and is "uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"—and "therefore, whether [state law] should be pre-empted." *Id.* (citation omitted). Here, too, any ambiguity in FEHBA's express-preemption provision would provide a "'sound basis'" (*id.* (citation omitted)) to defer to OPM's reasonable position on the scope of its preemptive effect. Despite citing a *dissenting* opinion in *Medtronic* (at 48), Nevils never addresses this aspect of the *majority's* holding in *Medtronic*.

Nevils further suggests that subsequent cases have cast doubt on whether *Chevron* applies to agencies' interpretations of express-preemption provisions. Nevils Remand Br. 48. But Nevils distorts the cases he invokes. Nevils claims that *Wyeth*, 555 U.S. 555, casts doubt on *Smiley*'s continuing validity. Nevils Remand Br. 48. But he fails to mention that *Wyeth* did not address *Chevron* deference at all, let alone whether it applies to

regulations construing the scope of an express-preemption provision. In *Wyeth* there was "no such regulation" addressing whether the relevant statute preempted the claims at issue; nor was there even an express-preemption provision. 555 U.S. at 567, 576. *Wyeth* is thus entirely inapposite to the principle articulated and applied in *Smiley*.

The closest that *Wyeth* came to addressing deference to agency positions on preemption was its discussion of whether a *preamble* to a regulation promulgated by the FDA—which did not purport to construe any express-preemption clause—merited deference regarding whether certain state laws posed an obstacle to Congress's purpose. 555 U.S. at 575-76. *Wyeth* deemed that preamble undeserving of deference due to several "procedural failure[s]" that do not apply to OPM's regulation: The preamble (unlike a regulation) did not "bea[r] the force of law"; the FDA had failed to provide notice or opportunity for comment on the preamble; the preamble in fact contradicted the FDA's own notice that its regulation would "'*not* contain policies that have federalism implications or that preempt State law'"; and the preamble reversed the "FDA's own longstanding position without providing a reasoned explanation." *Id.* at 577, 580 (emphasis added) (citation omitted). OPM's regulation suffers none of these defects.

Moreover, although *Wyeth* rejected a claim that state law was impliedly preempted because it posed an obstacle to Congress's objectives, the Court's reasoning has no application to FEHBA. In *Wyeth*, the Court held, there was no evidence that Congress regarded state law as an obstacle to achieving its purpose; to the contrary, Congress had "'indicated its awareness of the operation of state law in [that] field of federal interest'" and "surely would have enacted an express pre-emption provision at some point during the

[statute's] 70-year history" had it wanted to preempt those laws. 555 U.S. at 574-75 (citation omitted). In FEHBA, in contrast, Congress *did* enact an express-preemption provision to preempt conflicting state law. 5 U.S.C. § 8902(m)(1). And Congress "clear[ly]" delegated to OPM the authority to interpret FEHBA's provisions by entrusting it with the power to prescribe regulations necessary to carry out the statute. *Gonzales*, 546 U.S. at 258; *see* 5 U.S.C. § 8913(a). As *Wyeth* itself recognized, when such authority is "delegat[ed] by Congress" to an agency, the agency has the "authority to pronounce on pre-emption." 555 U.S. at 577.

Cuomo v. Clearing House Association, LLC, 557 U.S. 519 (2009), on which Nevils also relies, is even less helpful to him. In *Cuomo*, the Supreme Court *did* apply "the familiar *Chevron* framework." *Id.* at 525. It explained that the agency at issue—the Comptroller of the Currency—"*can* give authoritative meaning to the statute within the bounds of [the statute's] uncertainty," and "[t]he question presented" was therefore "whether the Comptroller's regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act." *Id.* at 523-25 (emphasis added). The Court ultimately did not defer to the Comptroller's interpretation of that statute solely because his interpretation contradicted the statute's "clear" meaning. *Id.* at 525. Although there was some narrow ambiguity in the key statutory term—the "visitorial powers" that state regulators may exercise over national banks—the "Comptroller's expansive regulation" strayed far beyond the "outer limits of [that] term." *Id.*

The agency's interpretation of the statute in *Cuomo*, in short, was not ineligible for *Chevron* deference because it affected the scope of preemption, but because the statute

unambiguously foreclosed the agency's interpretation. *See Helfrich*, 2015 WL 6535140, at *17 (citing *Cuomo* as an instance in which "the Court has applied *Chevron*" "to an agency interpretation of a preemption provision in a statute it administers," but did not defer to the "agency's construction … because [the] statute's ambiguity did not stretch so far"); *cf. Entergy*, 556 U.S. at 218 n.4 ("if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"). Here, in contrast, Nevils *concedes* that "FEHBA's limited preemption clause is susceptible to two plausible readings," including the interpretation articulated by OPM in its regulation. Nevils Remand Br. 36; *cf. McVeigh*, 547 U.S. at 697 (observing in dictum "Section 8902(m)(1) is … open to more than one construction").[14]

[14] Even if *Wyeth* or *Cuomo* could plausibly be read as casting doubt on *Smiley* or *Medtronic* (and they cannot), *this* Court could not accept Nevils's invitation to refuse to follow the earlier cases based solely on Nevils's prediction that they are "likely to be rejected by the Supreme Court." Nevils Remand Br. 48. The U.S. Supreme Court has emphatically held that it "alone" has the "prerogative" to invalidate one of its own past decisions, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and lower courts may not conclude that a U.S. Supreme Court precedent has been overruled "by implication," *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

b. This Court's Prior Analysis And Conclusion Did Not Preclude OPM From Adopting A Different Position.

Nevils further contends that, notwithstanding *Chevron*, the fact that this Court (interpreting the statute *de novo*) previously found a different reading of FEHBA more reasonable is dispositive, and that "[n]o federal agency may override [this Court's] conclusion" based on the presumption against preemption. Nevils Remand Br. 20, 26-29, 37-38. Both contentions run headlong into controlling U.S. Supreme Court precedent.

i. This Court's View That A Different Reading Of FEHBA Is More Reasonable Did Not Bar OPM From Adopting Another Reasonable Position.

Nevils's claim that the mere fact that this Court interpreted FEHBA differently prevented OPM from taking another position is a non-starter. As the U.S. Supreme Court has explained, an agency's "view governs if it is a reasonable interpretation of the statute"—*regardless* of whether it is "the only possible interpretation" or "even the interpretation deemed *most* reasonable by the courts." *Entergy*, 556 U.S. at 218 (citing *Chevron*, 467 U.S. at 843-44). It follows from that bedrock principle of federal law, the Court has held, that a prior judicial decision does *not* preclude the agency from subsequently adopting a different interpretation, unless the prior decision held that the court's interpretation was the *only possible* reading of the statute. *See Brand X*, 545 U.S. at 983. "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *Id.* "A court's prior judicial construc-

tion of a statute," therefore, "trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982 (emphasis added). Nevils never mentions *Brand X*, but it forecloses his claim.

Even if this Court's 2014 decision had not been vacated, under *Brand X* it could not "displac[e] [the] conflicting agency construction" in OPM's new regulation because that decision cannot be construed as "holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Brand X*, 545 U.S. at 982-83. This Court did *not* hold in its 2014 ruling that FEHBA's plain language "unambiguously expressed" the "intent of Congress" (*Chevron*, 467 U.S. at 843) to leave state antisubrogation and antireimbursement laws standing or that OPM's contrary position was unreasonable. Nothing in the opinion suggested that the statutory text can *only* be read as not preempting state laws barring subrogation and reimbursement. Nor could the Court have done so; even if OPM's position were not the only fair interpretation of the statute, it is least a permissible one. *See supra* pp. 32-40.

Indeed, as Nevils repeatedly concedes (at 1, 31-32, 36), this Court's vacated decision expressly stated the opposite, *i.e.*, that Section 8902(m)(1) "is susceptible to reasonable, *alternate* interpretations"—OPM's and Coventry's interpretation that the statute does preempt antisubrogation and antireimbursement laws, and Nevils's view that it does not. 418 S.W.3d at 455 (Resp't App. A.5) (emphasis added); *see also id.* at 454 (Resp't App. A.4) ("the FEHBA preemption clause is subject to plausible, alternative interpretations"). Nevils himself asserts, in fact, that Section 8902(m)(1) "is susceptible to two

plausible constructions," including OPM's. Nevils Remand Br. 36. That putative ambiguity was precisely why the Court resorted to a "presumption against preemption," which it explained is applicable only "[w]hen two plausible readings of a statute are possible." 418 S.W.3d at 455 (Resp't App. A.5) ("The fact that the preemption clause is susceptible to alternate interpretations implicates the presumption against preemption[.]").

Coventry respectfully disagrees with this Court's prior determination that Section 8902(m)(1) is ambiguous. But even taken at face value, that conclusion—which Nevils himself embraces—means (under *Brand X*) that the Court's vacated ruling did not prevent OPM from adopting a different position. And the Court's recognition that the interpretation of Section 8902(m)(1) codified in OPM's regulation is "reasonable" and "plausible" (418 S.W.3d at 455 (Resp't App. A.5)) demonstrates that OPM's regulation is entitled to dispositive *Chevron* deference.

ii. The Presumption Against Preemption This Court Applied Does Not Trump *Chevron*.

U.S. Supreme Court precedent likewise forecloses Nevils's claim that the interpretive principle this Court applied—a "presumption against preemption," 418 S.W.3d at 455 (Resp't App. A.5) (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005))—barred OPM from construing FEHBA to preempt antisubrogation and antireimbursement laws. *See* Nevils Remand Br. 27, 44-45. That presumption, in fact, does not properly apply to FEHBA at all, and in any event does not override *Chevron* deference.

As *Bates* itself makes clear, the presumption against preemption this Court applied is merely a starting "assum[ption]" that, "[i]n areas of traditional state regulation," state law is not preempted "unless Congress has made such intention clear and manifest." 544 U.S. at 449 (internal quotation marks omitted). It thus is overcome where, as here, Congress *has* clearly swept aside state law. Even "state laws 'governing'" issues of paradigmatic state concern—such as "family law"—"'must give way to clearly conflicting federal enactments.'" *Hillman*, 133 S. Ct. at 1950 (citation omitted).

Moreover, the benefits available to federal employees pursuant to federal contracts can scarcely be described as an "are[a] of traditional state regulation." The presumption "is not triggered" in the first place "when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), or where the "interests at stake are 'uniquely federal' in nature," *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (citation omitted). Both are true of "the relationship between a federal agency and the entity it regulates." *Id.* That relationship "is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Id.*

As the Tenth Circuit explained in *Helfrich*—which squarely rejected application of a presumption against preemption to Section 8902(m)(1) based on *Locke* and *Buckman*, *see* 2015 WL 6535140, at *12-14—the federal government's contracts with carriers to provide benefits for its own workers are "both matters of uniquely federal interest," *id.* at *7. In contrast, "[t]he federalism concern (respecting state sovereignty) behind the presumption against preemption has little purchase" with respect to FEHBA's preemption

provision, which "does not affect the relationships between private citizens," and "governs only contracts for the benefit of federal employees." *Id.* at *14. And "[i]t is an understatement to say that 'there has been a history of significant federal presence' in the area of federal employment"—a subject on which "Congress has legislated … from the outset." *Id.*[15]

Even assuming *arguendo*, however, that the presumption *Bates* described for resolving ambiguities in statutes otherwise applied to FEHBA, it has no bearing here because OPM's regulation authoritatively resolves any ambiguity that Section 8902(m)(1) could be read to contain regarding preemption of antisubrogation and antireimbursement laws. In *Smiley*, discussed above, *supra* pp. 56-58, the Supreme Court held that the agency's position warranted deference under *Chevron* despite any "'presumption against … pre-emption,'" expressly rejecting the argument that that "'presumption' … in

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[15] *Helfrich* found the federal interest so strong, and the conflict between that interest and state laws barring FEHBA carriers from seeking subrogation and reimbursement so significant, that it held that such state laws are also preempted by federal common law independently of FEHBA's preemption provision. 2015 WL 6535140, at *7-12. *Helfrich* relied on *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which held that state law that is "precisely contrary to [a] duty imposed by [a] Government contract" is preempted if it would create a "significant conflict" with a "federal policy or interest" and the "federal interest requires a uniform rule." *Id.* at 507-09; *see also Clearfield Trust Co. v. United States*, 318 U.S. 363, 365-66 (1943).

effect trumps *Chevron*." *Smiley*, 517 U.S. at 743 (citation omitted; first omission in original). That "argument," *Smiley* held, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. Even if agencies' views on whether a federal statute preempts state law *at all* were due no deference—a question on which *Smiley* expressly reserved judgment—the Court held that *Chevron* deference *does* apply to agencies' positions on the former question of what a federal statute (including one with preemptive consequences) *means*. *Id.* The Supreme Court has since reiterated that the question whether an agency's action preempts state law—"*i.e.*, whether federal power may be exercised in an area of pre-existing state regulation"—"does *not* involve a 'presumption against pre-emption,' … but rather requires [courts] to be certain that Congress has conferred authority on the agency." *New York v. FERC*, 535 U.S. 1, 18 (2002) (emphasis added). Because it is clear that OPM *does* have authority to construe FEHBA in notice-and-comment regulations, therefore, no presumption against preemption is applicable here.

Nevils's assertion that this Court should nevertheless reject even OPM's *regulation* based on a presumption against preemption is a frontal assault on the Supreme Court's clear teaching. His claim that an agency's interpretation of a statute "is not 'permissible' if it conflicts with 'the strong presumption against preemption in matters traditionally regulated by the state'" (Nevils Remand Br. 45 (citation omitted)) would mean precisely that the presumption *does* "trum[p] *Chevron*," *Smiley*, 517 U.S. at 743, for it would mean that an agency interpretation otherwise entitled to deference does *not* control. That is the very proposition that the U.S. Supreme Court expressly rejected in *Smi-*

ley, *id.* at 744, and *New York v. FERC*, 535 U.S. at 18. This Court cannot and should not accept Nevils's invitation to disregard controlling precedent.

C. None Of The Additional Grounds Nevils Asserts For Disregarding OPM's Reasonable Interpretation Of FEHBA Has Merit.

Unable to show that this Court's vacated ruling or its reasoning (adopted without the benefit of OPM's regulation) justifies rejecting OPM's sensible interpretation of the statute, Nevils urges the Court to ignore that interpretation on several additional grounds. None of his contentions has merit. His assertion that dictum in *McVeigh* decides this case disregards the Supreme Court's explicit statements that it did *not* decide the question now before this Court. Nevils's claim that OPM's position is inconsistent with that of its predecessor in administering federal employee benefits is both incorrect and in any event irrelevant. And his contention that the Court either should distort FEHBA's plain text to avoid a purported but nonexistent constitutional problem—or alternatively should hold that FEHBA is in fact unconstitutional (an argument Nevils has forfeited)—turns the constitutional-avoidance principles he invokes upside-down. Nevils does not come close, in short, to showing that OPM's interpretation of FEHBA is unreasonable.

1. *McVeigh* Casts No Doubt On OPM's Regulation.

Nevils attempts throughout his brief to portray the U.S. Supreme Court's decision in *McVeigh*, 547 U.S. 677, as dictating the answer to the question whether Section 8902(m)(1) preempts antisubrogation and antireimbursement laws, *see* Nevils Remand

Br. 1, 31, 34-37, 46, and assails OPM's regulation as an attempt to "overrule" the Supreme Court's decision, *id.* at 29. The Supreme Court's opinion in *McVeigh*, however, makes unmistakably clear that it did *not* decide that question, as it had no need to do so. 547 U.S. at 698.

As this Court recognized in its prior, now-vacated ruling, the only issue in *McVeigh* was whether FEHBA "provide[s] for *complete* preemption of state law so as to confer federal *jurisdiction*," 418 S.W.3d at 454 (Resp't App. A.4) (emphasis added)—that is, "the proper *forum*" for FEHBA carriers to seek reimbursement of duplicative benefits—not *whether* they may do so notwithstanding state law, *McVeigh*, 547 U.S. at 682 (emphasis added). Indeed, as this Court explained, *McVeigh* "expressly *declined to determine* whether the statute preempts state subrogation laws." 418 S.W.3d at 454 (Resp't App. A.4) (emphasis added); *see* 547 U.S. at 698.

In *McVeigh*, a FEHBA carrier filed suit in federal court seeking reimbursement from a participant who had received benefits but also recovered from a third party. 547 U.S. at 683. The carrier argued that federal-court jurisdiction lay because its claims "'ar[ose] under'" federal law. *Id.* at 683, 688. (quoting 28 U.S.C. § 1331). Ordinarily, "[t]he presence or absence of federal-question jurisdiction" is judged based on the "face of the plaintiff's properly pleaded complaint," and "federal pre-emption is … a *defense*." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasis added). But "the pre-emptive force of" some statutes "is so 'extraordinary'" that it not only displaces all state law in the field but also "'converts'" any purported state-law claim into a federal one, providing a federal forum for its adjudication. *Id.* at 393 (citations omitted). The carrier

in *McVeigh* argued that its complaint "'state[d] a federal claim'" under this doctrine. 547 U.S. at 693 (citation omitted). Over the forceful dissent of four Justices, the Court held federal jurisdiction lacking. *See id.* at 689-701; *see also id.* at 702-14 (Breyer, J., joined by Kennedy, Souter, and Alito, JJ., dissenting).

In addressing the subject-matter-jurisdiction issue, the *McVeigh* majority observed in dictum that Section 8902(m)(1) plausibly might be read as shielding from state interference only terms of OPM contracts that relate to the initial payments that FEHBA beneficiaries receive without regard to the carrier's "postpayments right to reimbursement." 547 U.S. at 697. But the Court also noted that the statute can be read to preempt state laws that purport to preclude carriers from seeking reimbursement. *Id.* *McVeigh* did not probe either possibility because the issue was academic. As the Court made clear, it "*need not choose* between those plausible constructions" because they had no bearing on the jurisdictional question before the Court. *Id.* at 698 (emphasis added). *Regardless* of which interpretation was correct, Section 8902(m)(1) did not confer federal jurisdiction. *Id.* Nevils's reading of *McVeigh* as controlling the outcome here thus requires construing the case as *deciding* the very issue that the Supreme Court explicitly *reserved*.

There is quite a bit of distance between the view that a preemption statute does not provide a federal forum and the conclusion that it does not preempt at all. The latter would make the provision entirely pointless. Not surprisingly, other courts have rejected Nevils's view that *McVeigh* compels his reading of FEHBA. *See*, *e.g.*, *López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 6 (1st Cir. 2014) (deeming it "transparently clear that [*McVeigh*'s] characterization of [Section 8902(m)(1)] did not hinge in the slightest de-

gree on how squarely the clause applied to the claims at issue"); *Pellicano v. Blue Cross Blue Shield Ass'n*, 540 F. App'x 95, 98-99 (3d Cir. 2013) (per curiam) (*McVeigh* "considered the scope of" Section 8902(m)(1) "only for purposes of evaluating whether it was broad enough to be 'jurisdiction-conferring'"); *Bell*, 2014 WL 5597265, at *7 n.3 (same); *Maple v. United States ex rel. OPM*, 2010 WL 2640121, at *2 n.2 (W.D. Okla. June 30, 2010) (same). Even the Arizona Court of Appeals in *Kobold* agreed that *McVeigh* "declined to decide" the question presented here. 309 P.3d at 927; *see also* 418 S.W.3d at 460-62 (Resp't App. A.10-12) (Wilson, J., concurring in judgment) (*McVeigh*'s "statements" regarding Section 8902(m)(1)'s scope "had nothing to do with whether the Court believed Congress intended for contractual benefit repayment terms to preempt state law prohibitions of such terms").

These cases confirm what is clear from the face of *McVeigh* itself. In endorsing a "modest reading of the provision," *McVeigh* was simply rejecting an interpretation of the statute so sweeping as to confer federal jurisdiction. 547 U.S. at 698. That is not a mandate that, as between any two readings of Section 8902(m)(1), the narrower one always prevails, even where, as here, such a reading would render the provision pointless.

In all events, even if *McVeigh*'s dictum asserting ambiguity in FEHBA *were* a holding, it would only confirm that Congress "implicit[ly]" "delegat[ed]" the question whether such laws fall within Section 8902(m)(1)'s ambit to OPM's discretion. *Chevron*, 467 U.S. at 844. "[U]nder *Chevron*," courts "presum[e] that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than

the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 740-41. To the extent that *McVeigh*'s dictum is relevant at all, in short, it only confirms that Congress intended for OPM to address the question and that OPM's answer is entitled to deference.

2. OPM's Regulation Reflects Its Consistent, Longstanding Position That FEHBA Preempts State Laws That Prohibit Subrogation Or Reimbursement.

Nevils further attacks OPM's regulation because he claims the agency has "flip-flopped" from the position of OPM's predecessor. Nevils Remand Br. 39. Nevils's claim of inconsistency in the agency's position is baseless and rests on a severely distorted view of the historical record. In any event, even if that purported inconsistency were real, it would be irrelevant to the deference due to OPM's regulation under *Chevron*.

As OPM explained in proposing its new rule, it "has consistently taken the position that the FEHB Act preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61). The final regulation thus reflects OPM's "longstanding interpretation of what Section 8902(m)(1) has meant since Congress enacted it in 1978." *Final Rule*, 80 Fed. Reg. at 29,204 (Appellant's App. 18); *see also* 2012 Carrier Letter 1-2 (Resp't App. A.63-64). Indeed, OPM has long "require[d] carriers" in their contracts "to seek reimbursement and/or subrogation recoveries" regardless of variations in state law. *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61); *see*, *e.g.*, 2000 Standard Contract

§ 2.5(a)(2) (requiring carriers to seek subrogation and reimbursement even in "State[s] in which subrogation is prohibited").

Nevils's claim that OPM has "flip-flopped" relies not on any statements by OPM, but statements by lawyers for OPM's predecessor, the now-defunct U.S. Civil Service Commission, who did not believe the Commission had authority to issue regulations preempting state insurance law. Nevils Remand Br. 3, 17, 27, 39, 42. Those statements—summarized in a 1975 report to Congress by the Comptroller General—were made three years *prior to the enactment* of FEHBA's preemption provision in 1978, and decades before Congress expanded that provision in 1998 to preempt a broader array of state laws. *See Report of the Comptroller General of the U.S.: Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* 15-16 (Oct. 17, 1975) (Appellant's App. 62-63) ("*Comptroller General 1975 Report*"); *see also supra* pp. 8-9. Those statements thus do not remotely undermine OPM's position that the statute as it stands *today*—including the subsequently enacted and expanded express-preemption provision, 5 U.S.C. § 8902(m)(1)—does authorize OPM to determine in a binding regulation that antisubrogation and antireimbursement laws are preempted.

Nevils, moreover, distorts even the history of the Civil Service Commission's pre-1978 position on preemption. Properly understood, that history—as reflected in materials Nevils himself has tendered to the Court—only further shows that, even before Section 8902(m)(1)'s enactment, the Commission understood FEHBA to preempt state laws that

interfere with FEHBA plans' terms, and was uncertain only about its authority to prescribe by regulation the precise scope of preemption.

In the early 1970s, Congress had become concerned that state health-insurance legislation affecting FEHBA plans was resulting in "[i]ncreased premium costs to both the Government and enrollees" and a "lack of uniformity of ben[e]fits for enrollees in the same plan." H.R. Rep. No. 94-1211, at 3 (Resp't App. A.67). As Congress was considering the proposal that became FEHBA's preemption provision, it sought the views of the Commission. H.R. Rep. No. 95-282, at 6 (Appellant's App. 25). The Commission responded (in letters to both the relevant House and Senate committees) by explaining its view—and the view of its General Counsel—that, even without an express-preemption provision, "the Federal Employees Health Benefits Act *preempts state laws in this area*." *Id.* at 3, 7 (Appellant's App. 22, 26) (emphasis added); *see also* S. Rep. 95-903, at 3, 8 (Appellant's App. 31, 38) (same).

The Commission further explained, however, that "enforcement of this preemption policy will almost inevitably lead to time consuming and costly litigation with the states until its position is finally upheld by the courts," which was not "necessary or desirable." H.R. Rep. No. 95-282, at 3, 7 (Appellant's App. 22, 26). And, while the Commission believed that FEHBA itself did preempt state laws, *see id.*, it did not understand FEHBA—which, again, did *not* at that time contain an express-preemption provision—as affording the Commission "clear authority to issue regulations" delineating the scope of preemption of state laws. S. Rep. 95-903, at 4 (Appellant's App. 32). The Commission's General Counsel and his deputy had echoed this view in the correspondence with carriers

on which Nevils relies, summarized in the Comptroller General report that Nevils cites. *Comptroller General 1975 Report* 15-16 (Appellant's App. 62-63); *cf.* Nevils Remand Br. 3, 27, 39, 42, 51 n.18. The Commission "strongly urge[d]" Congress to enact the proposed express-preemption provision to bring clarity to this area. S. Rep. 95-903, at 7 (Appellant's App. 36); H.R. Rep. No. 95-282, at 3, 7 (Appellant's App. 22, 26).

Congress did just that, enacting in 1978 the express-preemption provision now codified (as amended) at 5 U.S.C. § 8902(m)(1). Act of Sept. 17, 1978, Pub. L. No. 95-368, 92 Stat. 606. Congress explained that it was enacting the provision precisely to "clear up the doubt and confusion" about the scope of preemption and to "clarify the Federal Government's and the Civil Service Commission's authority to regulate implementation of [FEHBA]," citing the Commission's view that FEHBA "'d[id] not give [the agency] clear authority to issue regulations restricting the application of state laws when their provisions parallel the provisions in [the agency's] health benefits contracts.'" S. Rep. No. 95-903, at 4 (Appellant's App. 32). OPM—which was created the same year and assumed the Commission's role in administering FEHBA—has understood FEHBA ever since to preempt state laws in this area, including antisubrogation and antireimbursement laws. *Final Rule*, 80 Fed. Reg. at 29,204 (Appellant's App. 18). And it has now exercised its authority to codify that position in a notice-and-comment regulation. 5 C.F.R. § 890.106(h).

In sum, far from supporting Nevils's claim (at 39) that the agency has "flip-flopped," the history of Section 8902(m)(1)'s enactment and of the agencies' positions refutes Nevils's claim of administrative inconsistency and further supports OPM's regu-

lation. OPM and its predecessor have always understood FEHBA to preempt state laws in this area. And precisely because the Civil Service Commission was unsure, before Section 8902(m)(1)'s enactment, of its authority to prescribe the scope of preemption in regulations, Congress enacted that provision to remove any doubt. In the decades since, OPM has consistently construed the statute—which Congress subsequently expanded—to preempt state laws barring subrogation and reimbursement and to authorize OPM to resolve any doubts about the scope of preemption.

In any event, whether a regulation reflects the issuing agency's consistent, longstanding position is ultimately irrelevant to *Chevron*. "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Brand X*, 545 U.S. at 981. "'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *Id.* (citation omitted). "'An initial agency determination'" thus "'is not instantly carved in stone.'" *Id.* (quoting *Chevron*, 467 U.S. at 863). So long as "the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating.'" *Id.* (quoting *Smiley*, 517 U.S. at 742). "That is no doubt why in *Chevron* itself, th[e] [Supreme] Court deferred to an agency interpretation that was a recent reversal of agency policy." *Id.* at 981-82. Accordingly, although OPM's interpretation of FEHBA has been nothing but consistent, it would not matter if OPM *had* changed course. This Court must "'leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *Id.* at 981 (citation omitted); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009).

3. Neither Nevils's Constitutional-Avoidance Claim Nor His Direct Challenge To FEHBA's Constitutionality Has Merit.

Nevils finally contends that—notwithstanding FEHBA's text and purpose, and the deference due to OPM's interpretation of it—Section 8902(m)(1) must be construed not to preempt state antisubrogation and antireimbursement laws to avoid a violation of the U.S. Constitution. Nevils Remand Br. 57-58. And if the Court cannot bend the statute enough to avoid that result, Nevils contends, the Court must hold that Section 8902(m)(1) itself is in fact unconstitutional. *Id.* at 55-57. Neither Nevils's bid to rewrite the statute on constitutional-avoidance grounds nor his tardy attack on the statute's validity has merit. The latter claim, in fact, is not even properly before the Court.

a. The Constitutional-Avoidance Canon Is Inapplicable And Cannot Justify Nevils's Rewriting Of FEHBA.

Invoking the principle that courts should "'construe [a] statute to avoid'" constitutional "'problems,'" Nevils urges this Court to reject OPM's position that FEHBA preempts state laws barring subrogation or reimbursement to avoid a clash with the U.S. Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2. Nevils Remand Br. 57-58 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The Supremacy Clause, Nevils notes, provides that "'the Laws of the United States … shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,'" but FEHBA (he claims) improperly gives preemptive effect to "*contractual terms*." *Id.* at 56 (quoting

U.S. Const. art. VI, cl. 2). Nevils's argument misunderstands both the avoidance canon and the statute.

"The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *Fox*, 556 U.S. at 516. "That doctrine enters in only 'where a statute is susceptible of two constructions,'" and only where one of those constructions raises "'grave and doubtful constitutional questions'" that the other construction would "avoid." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). Unless a statutory interpretation "raise[s] *serious* constitutional questions," the avoidance canon is irrelevant. *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 (1967) (emphasis added); *cf. Edward J. DeBartolo*, 485 U.S. at 574 (canon implicated by "serious doubts" of statute's constitutionality). And even if one interpretation of a statute does raise constitutional questions, the canon "'does not give [courts] the prerogative to ignore the legislative will'" by adopting another interpretation that is contrary to the statute's plain meaning. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (citation omitted) (holding that "plain text" of statute did not "leav[e] any room for the canon of avoidance"); *see also Yeskey*, 524 U.S. at 212. Nevils's avoidance argument fails for both reasons.

OPM's interpretation of Section 8902(m)(1) raises no grave or serious constitutional doubts under the Supremacy Clause. To the contrary, OPM's rule correctly reads FEHBA to avoid the only concern Nevils advances. It is the text of Section 8902(m)(1) *itself* that declares that the state and local laws it covers are "supersede[d] and preempt[ed]." 5 U.S.C. § 8902(m)(1). It is thus the *statute* Congress enacted—*i.e.*, one

of "the Laws of the United States … made in Pursuance" of the Constitution, U.S. Const. art. VI, cl. 2—that displaces state law.

That FEHBA's preemption provision defines the *scope* of laws it preempts partly by reference to OPM's contracts is immaterial, and indeed unremarkable. Statutes can prescribe the scope of preemption in a variety of ways. Sometimes Congress supersedes all state laws addressing a general topic. *See*, *e.g.*, *Morales*, 504 U.S. at 383 (applying statute that preempted "'any law, rule, regulation, standard or other provision … relating to rates, routes, or services of any air carrier'" (quoting 49 U.S.C. app. § 1305(a)(1))). In other contexts, Congress preempts state laws that differ from or add to requirements in specific federal statutes. *See*, *e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316 (2008) (applying 21 U.S.C. § 360k(a), which preempts any state-law requirement "which is different from, or in addition to, any requirement" under certain federal statutes if it "relates to the safety or effectiveness of" a medical device).

Critical here, Congress also can and does enact statutes that expressly preempt state laws that relate to a particular type of contracts or other instruments. *See*, *e.g.*, *Hillman*, 133 S. Ct. at 1948 (discussing 5 U.S.C. § 8709(d)(1), which preempts state laws "inconsistent with" the terms of "any contract under" federal law governing federal life-insurance benefits); *FMC*, 498 U.S. at 57 (applying ERISA's preemption provision, 29 U.S.C. § 1144(a), which preempts "any and all State laws insofar as they … relate to any employee benefit plan"); *see also*, *e.g.*, 5 U.S.C. §§ 8959, 8989, 9005(a) (contracts regarding federal dental, vision, and long-term-care benefits); 10 U.S.C. § 1103(a) (contracts relating to military service-members' benefits); 9 U.S.C. § 2 (limiting grounds for

denying enforcement of arbitration provisions). Indeed, on Nevils's view, a number of statutes—including the Federal Arbitration Act—would be unconstitutional. In each instance, however, as in Section 8902(m)(1), it is the statute—not the types of contracts it identifies—that preempts state law.

That is exactly how OPM interprets FEHBA's preemption provision. As OPM explained in proposing its regulation, "*the FEHB Act preempts* state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts." *Proposed Rule*, 80 Fed. Reg. at 932 (Resp't App. A.61) (emphasis added). OPM's regulation accordingly provides that, because carriers' subrogation and reimbursement rights under their OPM contracts fall within Section 8902(m)(1)'s scope, they "are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 C.F.R. § 890.106(h).

OPM's regulation thus raises no constitutional concern because it properly reads the *statute*, not OPM contracts by their own force, as preempting state law. Indeed, OPM's position not only makes perfect sense of FEHBA's text and context, but *avoids* rather than creates any possible constitutional quandary. Even if Section 8902(m)(1) *could* be read to violate the Supremacy Clause, it certainly can fairly be read not to do so, and therefore must be so construed under the very avoidance canon Nevils invokes.

That is precisely what the Second Circuit concluded in its opinion in *McVeigh*, on which Nevils relies. *See* Nevils Remand Br. 27-28, 46, 57. That court interpreted Section 8902(m)(1) "as requiring that, in cases involving the 'terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits,' *federal*

law 'shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.'" *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 144-45 (2d Cir. 2005) (Sotomayor, J.) (alteration in original) (quoting 5 U.S.C. § 8902(m)(1)), *aff'd*, 547 U.S. 677. Even the dissent in the Second Circuit agreed on this point. *See id.* at 156 (Raggi, J., dissenting) ("I read § 8902(m)(1) to mean that any terms in a FEHBA plan that relate to coverage or benefits are to be construed according to uniform federal law, and that *law* will, in turn, supersede any state or local law that relates to health insurance or health plans."). OPM's phrasing, in fact, eliminates any conceivable constitutional concern by stating simply that, by dint of FEHBA, subrogation and reimbursement provisions in OPM contracts are "effective notwithstanding any state or local law," 5 C.F.R. § 890.106(h), eliminating any suggestion that something *other* than federal law has preemptive force.[16]

Even if Nevils were correct, moreover, that defining the scope of preemption by reference to contractual terms raised a serious constitutional question, the constitutional-avoidance canon cannot help him because Nevils offers no plausible alternative reading of Section 8902(m)(1)'s text that *avoids* that purported problem. It is Section 8902(m)(1)

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[16] Coventry respectfully disagrees with the concurrence's view that this reading of FEHBA "is not a valid 'construction.'" 418 S.W.3d at 464-65 (Resp't App. A.14-15) (Wilson, J., concurring in judgment). That interpretation in fact hews faithfully to Section 8902(m)(1)'s text, for it is FEHBA itself that explicitly accomplishes the preemption of state law. That reading is far more faithful than an interpretation that excises any reference to contracts.

itself that refers explicitly to carriers' "contract[s]" in identifying the state and local laws that FEHBA supersedes. Construing the statute to define the scope of preemption on some *other* basis would contradict its "plain text," a result the avoidance canon does not authorize. *Stern*, 131 S. Ct. at 2605. Indeed, blue-penciling Section 8902(m)(1) to excise its reference to FEHBA contracts would mean that it "supersede[s] and preempt[s]" (5 U.S.C. § 8902(m)(1)) *nothing*, a view that flagrantly defies the "'legislative will'" clearly expressed in the statute that some state and local laws shall be preempted. *Stern*, 131 S. Ct. at 2605 (citation omitted).

Nevils all but admits as much. He acknowledges as a "fair argument" the reality that his proposed interpretation of Section 8902(m)(1) "does not solve the problem, as the statute already preempts state law regarding benefits and coverage," Nevils Remand Br. 58—*i.e.*, regardless of whether that provision preempts state laws restricting subrogation or reimbursement, it undoubtedly preempts *some* state laws based on their relationship to the terms of OPM contracts. Nevils dismisses this as beside the point, *id.*, but it is in fact central to the constitutional-avoidance analysis: Because Nevils does not and cannot offer a different, plausible reading of Section 8902(m)(1) that avoids his purported constitutional problem, the avoidance canon has no role to play.

b. Nevils's Challenge To FEHBA's Constitutionality Is Forfeited And Meritless.

Evidently recognizing that the avoidance canon cannot justify rewriting the statute as he proposes, Nevils claims that "Section 8902(m)(1) *is* unconstitutional" because the

statute itself "runs afoul of the Supremacy Clause." Nevils Remand Br. 55 (emphasis added) (capitalization omitted). Nevils cannot be heard to attack FEHBA's constitutionality now because he never properly raised that claim below. In any event, it is baseless.

For more than a century, this Court has made clear that "a party on appeal 'must stand or fall' by the theory on which he tried and submitted his case in the court below." *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008) (quoting *Walker v. Owen*, 79 Mo. 563, 568 (1883)). "[I]ssues that are not raised in the trial court are waived." *Id.* Where a party loses on summary judgment, "it is improper for this Court to comment upon the merits" of an "argument [not] presented" to the court below. *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 598 n.12 (Mo. banc 2013); *see also Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 311 n.1 (Mo. banc 2009) (an argument "raise[d] … for the first time on appeal … is waived"). That is especially true of a constitutional claim, which is "waived unless raised in the trial court *at the earliest opportunity*." *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997) (emphasis added); *see also State v. Strong*, 142 S.W.3d 702, 714 (Mo. banc 2004) ("A constitutional argument must be raised before the trial court or it is waived.").

Here, Nevils did *not* assert in the trial court at any point—let alone at his earliest opportunity—that FEHBA was actually unconstitutional because it ties the scope of preemption to the terms of OPM contracts. In his class-action petition for damages, Nevils discussed FEHBA at length, and he argued (citing *McVeigh*) "that FEHBA's preemption clause — 5 U.S.C. § 8902(m)(1)" does not preempt "Missouri state law" regarding "the reimbursement rights of an insurer" because Section 8902(m)(1) "does not

apply to subrogation or reimbursement rights." Nevils Am. Class-Action Pet. ¶ 28 (Resp't App. A.376) (emphasis added); *see also id.* ¶¶ 4-10, 24-30 (Resp't App. A.372-73, 376-77). Yet the petition never asserted that FEHBA could not displace Missouri law because it was *unconstitutional*. Likewise, in opposing Coventry's motion for judgment on the pleadings when the case was in federal court, Nevils argued that FEHBA did not preempt his claims based on his interpretation of the statute and case law, not that FEHBA itself violated the Supremacy Clause. Pl.'s Opp. to Def.'s Mot. for J. on Pleadings 2-8, No. 11-588 (E.D. Mo. Apr. 25, 2011) ("Nevils Pleadings Opp."); *see also* Pl.'s Reply in Support of Mot. to Remand 2, No. 11-588 (E.D. Mo. May 23, 2011) (urging remand from federal court because Nevils "assert[ed] no federal claims").

Even in opposing Coventry's motion for summary judgment when the case returned to the Circuit Court, Nevils did not argue that FEHBA is unconstitutional. Instead, Nevils (inaccurately) characterized Coventry's argument as "asserting that the language of its private contract … preempts Missouri law," and he claimed—based on a misreading of the Second Circuit's opinion in *McVeigh*—that *that* "*construction* of the FEHBA statute" which Nevils mistakenly imputed to Coventry "is unconstitutional." Nevils S.J. Opp. 13 (L.F.252) (emphasis added) (capitalization omitted). Coventry's position, in fact, is and has been that FEHBA itself preempts the state law underlying Nevils's claims. *See*, *e.g.*, Coventry S.J. Mot. 1 (L.F.13) ("Plaintiff's claims are preempted by … 5 U.S.C. § 8902(m)(1)"). And, contrary to Nevils's contention in the Circuit Court, the Second Circuit in *McVeigh* did not hold that Section 8902(m)(1) "is likely unconstitutional." Nevils S.J. Opp. 13 (L.F.252). The Second Circuit held instead

that interpreting Section 8902(m)(1)—as Coventry and OPM do—as establishing that "*federal law*" preempts state law *avoids* the purported constitutional problem that Nevils now asserts. *McVeigh*, 396 F.3d at 144. In all events, Nevils did *not* ask the Circuit Court to hold that FEHBA's explicit reference to contract terms in defining the scope of preemption causes FEHBA itself to violate the Supremacy Clause.

Nevils's submissions on appeal confirm that he did not press his broadside constitutional attack on FEHBA itself until now. Nevils argued in the Court of Appeals that the case did not lie within this Court's exclusive jurisdiction precisely because the case "d[id] *not* involve … the validity of a … statute of the United States." Appellant's C.A. Br. 2 (emphasis added). In his prior briefs in this Court, Nevils did not contend that Section 8902(m)(1) contravenes the Supremacy Clause. The question that he claimed merited discretionary review was "[w]hether Missouri's anti-subrogation rule … relates to the 'nature, provision, or extent of coverage or benefits'" and thus is preempted by FEHBA, not whether FEHBA's preemption provision is invalid. Nevils Mo. Transfer Appl. 1 (Resp't App. A.396). Even in the U.S. Supreme Court, both before and after OPM's regulation was issued, Nevils never asserted that FEHBA is unconstitutional. *See generally* Resp't Br. in Opp., No. 13-1305 (U.S. June 30, 2014) ("Nevils Cert. Opp.") (Resp't App. A.459); Resp't Supp. Br., No. 13-1305 (U.S. June 5, 2015) (Resp't App. A.529).

Nevils, in sum, not only failed to assert his purported constitutional claim at the earliest opportunity, but repeatedly elected not to assert that claim. This Court should not entertain Nevils's tardy attack on a federal statute that he chose not to assert until now. "A party with two possible arguments to support its position cannot hold one in reserve

and raise it on appeal only after losing on the other." *Helfrich*, 2015 WL 6535140, at *17 (expressing "skeptic[ism]" for same constitutional challenge to FEHBA, but declining to address it because plaintiff "did not raise this argument below").[17]

If the Court nevertheless reaches the merits of Nevils's constitutional claim, it should reject that claim for the reasons explained above. *Supra* pp. 79-82. Indeed, Nevils's theory would necessarily mean that an array of other federal statutes that tether the scope of preemption to contract terms are unconstitutional—such as the Federal Arbitration Act, *see* 9 U.S.C. § 2; ERISA, *see* 29 U.S.C. § 1144(a); and various statutes governing public employees' and military members' benefits, *see* 5 U.S.C. §§ 8709(d)(1), 8959, 8989, 9005(a); 10 U.S.C. § 1103(a). Nevils's crabbed view of Congress's power has no basis in law or logic and should be rejected.

[17] *Helfrich* rejected the plaintiff's assertion that "'[i]t [was] the district court's *interpretation* of § 8902(m)(1) that pits the text of FEHBA's preemption provision against the Supremacy Clause,'" such that the issue of "the constitutionality of the provision 'only arose when the district court rejected the narrow interpretation urged … below.'" 2015 WL 6535140, at *17 (first alteration and omission in original) (citation omitted).

POINT 2: The trial court correctly granted summary judgment for Coventry, because Coventry was authorized to seek reimbursement from Nevils, in that Nevils forfeited any claim that Coventry's contract does not authorize reimbursement, and the subrogation provision of Coventry's contract encompasses reimbursement.

II. COVENTRY'S CONTRACT WITH OPM AND ITS BENEFITS BROCHURE AUTHORIZE IT TO SEEK REIMBURSEMENT.

(Responds to Nevils Remand Br. Point 1, at pp. 20-25)

Nevils cannot prevail on the sole issue he tendered to this Court in seeking transfer of the appeal—whether Missouri's law barring subrogation and reimbursement is preempted—so he now tries to inject another question into the case that he claims provides an alternative basis for reversal. Indeed, despite imploring this Court to grant discretionary review to decide the preemption issue—a question Nevils cast as "an issue of great consequence to thousands of Missourians" necessitating this Court's guidance, Nevils Mo. Transfer Appl. 1 (Resp't App. A.396)—Nevils now insists that the Court need not decide that issue after all. He claims that this Court can and should instead reverse the Circuit Court's judgment on the entirely different basis that Coventry's contract purportedly did not authorize it to seek reimbursement—which Nevils now distinguishes from a right of subrogation—and that, whether or not Missouri's law is preempted, Coventry could not seek reimbursement from Nevils here. Nevils Remand Br. 20-25.

This Court should not entertain Nevils's new argument at all, which he not only failed to advance below, but waived by asserting just the *opposite* in the courts below and even in this Court. In any event, Nevils's claim is meritless.

A. Nevils Forfeited Any Argument That Coventry's Contract Did Not Permit It To Seek Reimbursement.

This Court's case law is clear that arguments that Nevils did not raise in the Circuit Court are now off-limits. *See Farrow*, 407 S.W.3d at 598 n.12; *supra* p. 84. Nevils thus "'must stand or fall' by the theory on which he tried and submitted his case in the court below." *Fassero*, 256 S.W.3d at 117. This well-settled principle forecloses Nevils's alternative argument that Coventry's contract does not authorize it to seek reimbursement because he never advanced it below, and in fact argued just the opposite.

In the Circuit Court, Nevils never distinguished subrogation from reimbursement. Instead, he treated them interchangeably, referring collectively to "reimbursement/subrogation" and "subrogation/reimbursement." Nevils S.J. Opp. 4-7 (L.F.243-46). And Nevils did not argue that Coventry's contract permitted one but not the other; he argued that Missouri law barred both, and that FEHBA did not preempt that state law. *See*, *e.g.*, *id.* at 1 (L.F.240) (Missouri law barring "reimbursement" precluded Coventry's claim); *id.* at 11 (L.F.250) (arguing that "Missouri's anti-subrogation law" is not preempted); *id.* at 4 (L.F.243) ("state law prohibiting subrogation/reimbursement" not preempted); *id.* at 5-7 (L.F.240-46) (same). Even if Nevils believed that reimbursement and subrogation were meaningfully distinct in this setting, he recognized that Coventry's

claim was based on a right to reimbursement. *See*, *e.g.*, *id.* at 1 (L.F.240); Nevils Pleadings Opp. 1 (same); Pl.'s Mot. to Remand 1, No. 11-588 (E.D. Mo. May 2, 2011) (same) ("Nevils Remand Mot.").

Indeed, Nevils claimed that this case involved "precisely the same material facts [and] the same legal issues" as *McVeigh*, where "'the reimbursement right in question [was] predicated on a FEHBA authorized contract.'" Nevils Remand Mot. 7 (citation omitted). And he argued that the "subrogation or reimbursement claims" in *McVeigh* were in fact "identical to the issues of the present case." Nevils Pleadings Opp. 3. Nevils confirmed this view in his submissions in the Court of Appeals, where he said in so many words that the "provision of the contract between [Coventry] and OPM … directed [Coventry] to seek reimbursement/subrogation." Appellant's C.A. Br. 3; *see also*, *e.g.*, *id.* at 8 ("[T]he only issue before the Court is whether an insurance carrier's asserted right to reimbursement/subrogation of health benefits paid relates to the 'coverage or benefits' of the insurance plan."); *id.* at 10 ("[T]he reimbursement was sought pursuant to a FEHBA contract with OPM."); *id.* at 16 (recognizing the "contract provision relating to reimbursement/subrogation").

Nevils previously maintained that view even in *this* Court. His application for transfer stated that Coventry's contract with OPM "directed [Coventry] to seek reimbursement/subrogation." Nevils Mo. Transfer Appl. 2 (Resp't App. A.397). And his prior brief reiterated that Coventry's contract contained "reimbursement/subrogation terms" that "directed [Coventry] to seek reimbursement/subrogation" and "require[d] that the insured accept [among other things] the carrier's right to reimburse-

ment/subrogation." Nevils Mo. 2013 Br. 3, 23, 25. The disputed recovery, Nevils made clear, was a form of "reimbursement/subrogation," *id.* at 3-4, 13-14, 16-18, 20, 23-25, and "was sought pursuant to a FEHBA contract with OPM," the contract that he now disclaims contains such a provision. *Id.* at 12. In Nevils's own words, "[t]he simple question before the Court [wa]s this: Does the 'coverage or benefits' language in FEHBA's preemption provision … encompass an insurance carrier's claimed right to reimbursement/subrogation?" *Id.* at 11-12.

Despite this lengthy string of admissions in every court in this State to consider the case, Nevils now argues that "reimbursement and subrogation are separate legal and contractual rights" and that Coventry's contract "contains no reimbursement clause" at all. Nevils Remand Br. 22. By not raising this argument in the trial court or at any other point in these proceedings, however, Nevils has forfeited it. *See Farrow*, 407 S.W.3d at 598 n.12; *Coffer*, 281 S.W.3d at 311 n.1.

Indeed, by expressly and repeatedly advancing the *opposite* view in prior stages of this litigation—that subrogation and reimbursement are indistinguishable and that any possible distinctions between them are irrelevant—Nevils affirmatively disavowed the argument he now presents. Even if the distinction that Nevils now advances were tenable, it is well-settled that "a party may not invite error and then complain on appeal that the error invited was in fact made." *Hellmann v. Sparks*, __ S.W.3d __, 2015 WL 1021307, at *14 (Mo. Ct. App. Mar. 6, 2015); *see Soehlke v. Soehlke*, 398 S.W.3d 10, 16 n.3 (Mo. banc 2013) ("[N]o valid reason would appear to prevent application of invited error doctrine to self-invited error in whatever form it may have appeared." (alterations

omitted)). Nevils cannot be heard to complain of purported error by the court below in treating subrogation and reimbursement collectively because, even if the Court below *did* err, it was "an error of [Nevils's] own creation." *Sprague v. Sea*, 152 Mo. 327, 339 (1899).

B. Coventry's Contractual Right And Obligation To Seek Subrogation Authorize It To Seek Reimbursement.

If the Court nonetheless considers the alternative argument that Nevils until now affirmatively disavowed, it should reject that argument as meritless. Nevils's attempt to construe Coventry's contract as authorizing subrogation but not reimbursement runs directly counter to both federal and Missouri law, this Court's vacated ruling that Nevils himself urges the Court to follow, and Nevils's own arguments.

1. Under Federal Law, Coventry's Contract With OPM Required Coventry To Seek Reimbursement.

Nevils's claim that Coventry is not authorized to seek reimbursement is premised on his reading of Coventry's contract with OPM. The contract states that "[t]he carrier shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members," even in a State that bars subrogation, if "the carrier subrogates for at least one plan covered under [ERISA]" in that State. Coventry-OPM Contract § 2.5(a), (a)(2) (L.F.57) (Resp't App. A.309). At relevant times, Coventry did subrogate for at least one ERISA plan in Missouri. Coventry S.J. Stmt., Ex. 4 (L.F.218). Nevils argues

that the term "subrogate" should be read *not* to encompass reimbursement, in light of OPM's regulation that describes subrogation and reimbursement separately. Nevils Remand Br. 22. He is incorrect. To be sure, the interpretation of Coventry's contract with OPM is governed by federal law. *See*, *e.g.*, *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970) ("federal law controls the interpretation of [a] contract" to which United States is a party because "the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution"); *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004) ("Federal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party."); *see also Clearfield Trust*, 318 U.S. at 365-66. But federal law, including OPM's regulation, in fact refutes Nevils's reading of the agreement.

Coventry's contract not only expressly incorporates FEHBA and OPM's regulations, but states that it "shall be construed so as to comply therewith," including subsequent changes in OPM's regulations. Coventry-OPM Contract § 1.4(a) (L.F.42) (Resp't App. A.294). And any disputes over whether Coventry complied with its contract—for example, if Coventry failed to seek reimbursement, and OPM asserted that by failing to do so Coventry breached its contractual obligations—are governed by "United States law." *Id.* § 5.62 (L.F.111) (Resp't App. A.363). The final rule mandates that "[a]ll health benefit plan contracts shall provide that the … carrier is entitled to pursue subrogation and reimbursement recoveries." 5 C.F.R. § 890.106(a); *see also id.* § 890.106(b)-(c), (g). As a matter of federal law, therefore, the subrogation clause of Coventry's contract must be interpreted to encompass *both* subrogation and reimbursement.

Indeed, the United States has confirmed in this case, in a brief filed in the Supreme Court (jointly submitted by OPM and the Department of Justice) after OPM's regulation was issued, that the subrogation provision in Coventry's contract *does* "encompas[s] the right to reimbursement from the proceeds if the insured does sue." U.S. S. Ct. Br. 18 (Resp't App. A.523). The agency's understanding of its own regulation is entitled to considerable, and in this circumstance controlling, judicial deference. *See Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

2. Coventry's Benefits Brochure Does Not Preclude Coventry From Seeking Reimbursement Under State Law.

Despite relying primarily on federal law, Nevils briefly suggests (at 23-24) that whether Coventry is entitled to seek reimbursement is somehow governed by *state* law rather than federal law. That cannot be true of Coventry's rights and duties under its contract with OPM; the interpretation and application of the federal government's agreements with contractors is quintessentially a question of federal law. *Supra* p. 93. Nevils alludes (at 9-10 n.2) to Coventry's benefits brochure, which he claims does not permit Coventry to seek reimbursement because it mentions only "subrogation." But that brochure merely "summariz[es]" the parties' rights and obligations under Coventry's OPM contract. 5 U.S.C. § 8907(b). The brochure, moreover, is likewise governed by federal law, and even under state law it lends no support to Nevils's position.

Whatever aspects of FEHBA carriers' relationships with plan participants are subject to state law, *cf. McVeigh*, 547 U.S. at 698, the interpretation of a term concerning

participants' benefits and benefit payments is undoubtedly governed by federal law. The brochure itself underscores that "Federal law governs" participants' "benefits" and "payment of benefits." Def.'s Notice of Removal, No. 11-588 (E.D. Mo. Mar. 31, 2011), Ex. E: *GHP, Group Health Plan* 89 (2006) ("Coventry Brochure") (Resp't App. A.269). A contrary view, moreover, would effectively nullify FEHBA's preemption provision: It would be futile for Congress to preempt state laws that interfere with "[t]he terms of any contract" under FEHBA that "relate to … benefits" or "payments with respect to benefits" (5 U.S.C. § 8902(m)(1)) if States were completely free to determine the *meaning* of those contract terms.

Even if state law did control the interpretation of Coventry's brochure, that would not help him because Missouri law refutes Nevils's effort to divorce subrogation from reimbursement. Missouri courts have repeatedly rejected attempts to treat reimbursement—"the assignment of the *proceeds*" of a claim—separately from subrogation, the "assignment of the *claim*" itself. *Schweiss v. Sisters of Mercy*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997). Both are in substance rights to recover the proceeds of prior payments from the insured—either from the insured himself (if he has already recovered from a third party), or from the responsible third party directly. The line Nevils seeks to draw is thus "a distinction without a difference." *Id.* In other words, as this Court has explained, subrogation is simply "'one of the means of obtaining reimbursement.'" *Burrus v. Cook*, 215 Mo. 496, 511-12 (1908) (citation omitted). As a *Missouri Law Review* article that Nevils himself previously relied upon (in unsuccessfully opposing certiorari) explains, "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." Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 726 (2005) (emphases added); *see also* Nevils Cert. Opp. 27 (Resp't App. A.492) (citing Parker, *supra*).

Missouri law on this issue accords with pronouncements of several other state and federal courts that have rejected Nevils's contrived, hairsplitting approach. Even *McVeigh*, on which Nevils heavily relies, declined to differentiate between reimbursement and subrogation, finding no reason to "decoupl[e]" these two related concepts. 547 U.S. at 692 n.4. Other federal courts and state supreme courts have similarly concluded that a subrogation right *includes* a contingent right to reimbursement, and vice-versa. *See*, *e.g.*, *New Orleans Assets, LLC v. Woodward*, 363 F.3d 372, 377 (5th Cir. 2004) ("The mixture of subrogation language and reimbursement language is unsurprising; because 'the object of conventional subrogation is reimbursement,' subrogation rights will commonly *subsume* reimbursement." (emphasis added)); *Cont'l W. Ins. Co. v. Swartzendruber*, 570 N.W.2d 708, 712 (Neb. 1997) ("[A] right to reimbursement is *encompassed* within the concept of subrogation." (emphasis added)); *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, 25 (Mont. 2008) ("The term 'reimbursements' encompasses (and indeed, seems to specifically contemplate) money the Board receives from insurers or other liable third parties, whether by subrogation or other agreement.").

This Court itself, in the since-vacated ruling that Nevils claims (erroneously, *see supra* pp. 46-50) controls here, recognized that Coventry's right to subrogation encompassed a right to seek reimbursement if Nevils happened to recover from a third party. The majority found that "[t]he contract directs [Coventry] to seek reimbursement or subrogation when an insured obtains a settlement or judgment against a tortfeasor for payment of medical expenses," and squarely held that "[t]he subrogation provision in favor of [Coventry] creates a contingent right to reimbursement." 418 S.W.3d at 452-53 (Resp't App. A2-3); *see id.* at 456 (Resp't App. A.6) (Coventry had a "contractual right to reimbursement"). Likewise, the concurrence explained how the U.S. Supreme Court has "refused to distinguish between terms requiring subrogation and terms requiring employees to repay benefits received before the employee recovered from a third party." *Id.* at 459 n.3 (Resp't App. A.9) (Wilson, J., concurring in judgment). Unlike the issues surrounding the preemption question—where, since this Court's earlier ruling, the U.S. Supreme Court's judgment in this case and OPM's new regulation have fundamentally altered the legal landscape—on this subject there have been no changes in the law.

Nevils's attempt to nullify Coventry's right to recover redundant benefits here, in fact, contradicts Nevils's own submission in this Court on remand. As Nevils explains, Missouri courts "historically" have "treated reimbursement as an indirect form of subrogation." Nevils Remand Br. 23. And this approach of treating reimbursement and subrogation as interrelated "ma[k]e[s] sense" because they both "dives[t] [a person] of some part of their interest in [a] recovery." *Id.* Indeed, Nevils argues "there [i]s *little reason to make distinctions* between" the concepts because (he claims) they both "violat[e] public

policy in the same way—they allo[w] an insurer to have an interest in an injury claim." *Id.* (emphasis added). Yet in the same breath he urges the Court to draw just such a distinction because it happens to advance his individual interests.

Moreover, as the United States has previously explained, distinguishing subrogation rights from reimbursement rights would be senseless because it would make the former worthless without the latter. U.S. S. Ct. Br. 19 (Resp't App. A.524). Construing a right to subrogation *not* to include a right to reimbursement would mean that subrogation rights "could be readily thwarted." *Id.* "Carriers 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." *Id.*

Here, it makes perfect sense to interpret Coventry's brochure as encompassing a right to reimbursement. The brochure states that "[i]f you do not seek damages you must agree to let us try. This is called subrogation." Coventry Brochure 93 (Resp't App. A.273). The obvious import of that language is that, while Nevils himself could seek damages from a third party—in which case Coventry could recover redundant benefits from Nevils—if Nevils did *not* do so, Coventry could stand in his shoes to assert his claim against that third party. If Coventry were *unable* to exercise a contingent right to reimbursement under its contract, its subrogation right would be effectively rendered meaningless because Nevils could simply sue (or settle) before Coventry became aware of the claim. That result would reflect precisely the "form-over-substance approach that

this Court ordinarily disdains" in this context. 418 S.W.3d at 459 (Resp't App. A.9) (Wilson, J., concurring in judgment).

Nevils's resort to state law, moreover, is ultimately beside the point. Even if Coventry's brochure were governed by state law, and even if under Missouri law that brochure could be read not to permit reimbursement, Nevils's suit against Coventry still would be foreclosed because Coventry, as a federal contractor, is immune from suit for actions taken on behalf of the government within the scope of its authorization. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). If "authority to carry out [a] project" is "validly conferred" on a government contractor—"that is, if what was done was within the constitutional power of Congress"—then "there is no liability on the part of the contractor for executing [the government's] will." *Id.*; *see also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity"); *cf. Boyle*, 487 U.S. at 505 (state-law claim against federal contractor preempted by federal common law). Here there is no question that Congress may validly authorize carriers to administer benefit plans, including by seeking reimbursement of redundant benefits. Even if Nevils were correct that as a matter of state law Coventry could not seek reimbursement, federal law would provide Coventry a complete defense to Nevils's claim and would require affirming the Circuit Court's decision granting summary judgment to Coventry.

Nevils's alternative argument, in short, is untimely and foreclosed by both federal and Missouri law. It should not be entertained at all, and in any case should be rejected.

CONCLUSION

The Circuit Court's judgment should be affirmed.

Dated: November 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03, (2) complies with the limitations contained in Rule 84.06(b), and (3) contains 27,883 words, exclusive of the sections exempted by Rule 84.06(b), based on the word-count function of Microsoft Word 2010.

Dated: November 16, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, I electronically filed the foregoing Brief with the Clerk of the Missouri Supreme Court using the Missouri eFiling system. I certify that all participants in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

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