IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,

Appellant,

v.

GROUP HEALTH PLAN, INC., ET AL Respondents.

ON REMAND FROM THE UNITED STATES SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

HONORABLE THEA A. SHERRY

DIVISON 5

APPELLANT'S BRIEF ON REMAND

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INTRODUCTION

For nearly a decade, the federal Office of Personnel Management has waged an unprecedented—and unsuccessful—battle against state law. This crusade began in *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006), where OPM argued to the U.S. Supreme Court that the meaning of FEHBA's express preemption clause, 5 U.S.C. § 8902(m)(1), is "clear" and "no doubt" displaces "state laws that would affect the right to reimbursement." The Supreme Court rejected this view, concluding that § 8902(m)(1)'s text is ambiguous, and open to "two plausible" constructions—one of which does not preempt state reimbursement law.

Undeterred, OPM first attempted to circumvent its loss in *McVeigh* through an informal 2-page "carrier letter"—drafted in response to ongoing litigation—reasserting that § 8902(m)(1) "preempts state laws prohibiting or limiting subrogation and reimbursement." FEHB Program Carrier Letter, at 1 (2012). In this Court, OPM coupled this letter with a recycled version of its argument in *McVeigh* that § 8902(m)(1) "unambiguously preempts" state insurance laws and judges should "defer" to that view.

Like the U.S. Supreme Court in *McVeigh*, this Court refused to buy in. *See Nevils v. Group Health Plan, Inc.*, 418 S.W. 3d 451 (Mo. 2014). Safeguarding centuries-old Missouri law prohibiting an insurer from seeking subrogation or reimbursement from injured parties who recover in tort, this Court held that FEHBA's preemption clause is ambiguous—susceptible to two "reasonable, alternate interpretations," one in favor of preemption and one against. *Id.* at 455. That "fact" meant that the longstanding

presumption against preemption applied and compelled "the reading that dis-favors preemption." *Id.* If Congress meant to preempt the "states' historic police powers," this Court explained, Congress's intent must be clear. *Id.* at 454.

Now OPM has dramatically raised the stakes. In a transparent bid to overrule this Court, OPM has issued a formal regulation that concedes that the text of FEHBA's express-preemption clause is ambiguous. *See* 5 C.F.R. § 890.106. Based on the newly admitted ambiguity, the regulation purports to choose an expansive preemption construction authorizing contractual provisions in FEHB carrier policies to displace state laws. *See* § 890.106(h). The question is now whether a federal agency can, through federal-regulation fiat, supply the necessary preemptive intent where Congress itself has not. The answer, in a word, is no.

To begin, OPM's rule has no effect here because GHP, the carrier seeking reimbursement, has no contractual right to reimbursement and therefore no claim to preemption. OPM's own rule (even if valid) authorizes preemption only in cases where a carrier's contract contains the relevant contractual clause. In those cases, according to OPM, the contract term will control notwithstanding contrary state law. But here, GHP's contract contains no controlling contract term—it does not grant the carrier a specific right to reimbursement—and so it cannot conflict with any state law.

OPM's new regulation also raises no new issues—so this Court's original decision is law of the case and controls now. In *Nevils I*, this Court squarely anticipated OPM's

move here and it concluded 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. That conclusion not only carries the day here, but it is consistent with OPM's *own* understanding of its authority when Congress passed FEHBA's express preemption clause in the first place. The agency specifically told Congress that "no legal basis exist[ed]" for it "to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15 (1975).

What's more, OPM's effort to override this Court's decision, if embraced, would free federal agencies from the rules of statutory interpretation that "bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). "Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles." *Id.* But OPM has sought to short-circuit this rule, arguing that the "presumption[s]" that might otherwise apply are "inapplicable" when an agency, rather than judge, interprets an express preemption clause. U.S. 28(j) Letter of May 26, 2015, at 2 filed in *Helfrich v. Blue Cross & Blue Shield Assoc.*, Case No: 14-3179 (10th Cir. 2015) (appeal pending). That is wrong. Interpretive principles—which include "[a]ll manner of presumptions, substantive canons and clear-statement rules"—"take precedence over conflicting agency views." *Carter*, 736 F.3d at 731. Because OPM's regulation is openly at war with these principles—indeed, it exists only to overturn them—no understanding of *Chevron* sanctions its enforcement.

Indeed, another reason to decline OPM's invitation to alter this Court's original decision is that FEHBA's limited preemption clause is likely unconstitutional, as Judge Wilson and Judge Breckenridge explained. Although this Court did not join in that view, the reasoning is sound, and suggests at a minimum, that deferring to OPM's rule is ill-advised. Adopting OPM's rule would not only run headlong into the text of the Supremacy Clause, but it would authorize federal agencies to skate past the constitutional avoidance doctrine—a rule of statutory interpretation that "trumps *Chevron* deference" by demanding that courts not defer to agency interpretations of statutes that implicate serious constitutional concerns. *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008).

For each of these reasons, Appellant Nevils prays this Court affirm its decision in *Nevils I,* reversing the trial court and remanding for further proceedings.

JURISDICTIONAL STATEMENT

This matter arises from an action brought by Appellant Jodie Nevils, on behalf of himself and others similarly situated, in the Circuit Court of the County of St. Louis, Missouri. Appellant suffered injuries in a motor vehicle accident in 2006 and received medical treatment from numerous health care providers. Legal File[1] at 292. Appellant was entitled to medical coverage through a federal employee health benefit plan governed

[1]Pages of the (original) Legal File will be abbreviated as "LF at [page number]."

by the Federal Employee Health Benefits Act ("FEHBA"). LF at 293. Appellant's health insurance plan was carried by Respondent Group Health Plan, Inc. ("GHP") pursuant to a contract between GHP and the federal government, and Appellant's medical bills resulting from the accident were paid pursuant to the plan. LF at 293.

Appellant subsequently made a negligence claim against the tortfeasor who caused the accident, and GHP and Respondent ACS Recovery Services, Inc. ("ACS") asserted a lien on Appellant's claim for payments made pursuant to the insurance plan. LF at 293. The lien was paid in full. LF at 293. Missouri's "anti-subrogation law" prohibits health insurers from subrogating their insureds' personal injury claims. LF at 293. In light of Respondents' policies to pursue subrogation and reimbursement in violation of Missouri law, Appellant brought suit against GHP (and later, intervener ACS) on behalf of himself and others similarly situated, alleging (1) violation of the Missouri Merchandising Practices Act ("MMPA"); (2) unjust enrichment; (3) conversion; and (4) seeking injunctive relief. LF at 289-302.

GHP filed a motion for summary judgment, as did ACS after intervening in the case. LF at 8-229 and 345-800. The trial court granted GHP and ACS's motions, relying solely on *Buatte v. Gen. Healthcare Sys. Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1996), and noting that reconsideration of *Buatte* would be appropriate in the Court of Appeals. LF at 855.

Appellant appealed the trial court's final judgment to the Missouri Court of Appeals for the Eastern District. The Court of Appeals affirmed, relying on *Buatte* and

citing principles of *stare decisis.* Appellant sought transfer to this Court. This Court accepted transfer, reversing the trial court.

On April 28, 2014, Respondent in this case filed a petition for a writ of certiorari to the United States Supreme Court (docketed as cause No. 13-1305).

On May 21, 2015, OPM issued a formal regulation conceding that the text of FEHBA's express-preemption clause is ambiguous. *See* 5 C.F.R. § 890.106. Based on the ambiguity, a new regulation purports to choose an expansive preemption construction authorizing contractual provisions in FEHB carrier policies to displace state laws that OPM has long fought to evade. *See* § 890.106(h).

On July 29, 2015, the U.S. Supreme Court entered the following order:

> 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).

On August 14, 2015, this Court issued this Order:

> Order issued: In light of the mandate of the Supreme Court of the United States dated June 29, 2015, the opinion issued in this cause on February 4, 2014 is vacated and the mandate issued on February 21, 2014, sent to the circuit clerk of

St. Louis County is hereby recalled. The parties shall file briefs pursuant to the briefing schedule set forth in Supreme Court Rule 84.24(i).

STATEMENT OF FACTS

As a federal employee, Respondent Jodie Nevils was entitled to health insurance coverage and participated in a plan with GHP serving as Nevils' OPM-approved medical insurance carrier. LF at 293. The plan was governed by the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901-8914 ("FEHBA"). LF at 293. Under FEHBA, the federal government's Office of Personnel Management ("OPM") contracted with Respondent Group Health Plan ("GHP") for GHP to act as an insurance carrier for federal government employees' health benefits, and GHP was the carrier for Appellant's benefit plan. LF at 293. Pursuant to the terms of the insurance plan with GHP, Appellant's medical bills related to the accident were paid by GHP. LF at 293.

On or about November 2, 2006, Appellant suffered injuries in a motor vehicle accident; he subsequently received treatment from numerous health care providers. LF at 292. Consistent with its obligations under the contract, GHP paid the resulting medical bills. *Id.*

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

677, 703 (2006) (Breyer J., dissenting). In Missouri, OPM has entered into numerous contracts with different carriers; in 2006, one of those carriers was GHP. LF at 290. Under GHP's contract, GHP agreed to provide health insurance to federal employees as a community-rated carrier. LF at 289, 293.

At the time of Nevils' injuries, GHP's OPM-approved contract contained a section titled "SUBROGATION" which provided for GHP's subrogation rights, but did not grant any right for GHP to seek reimbursement directly from an insured.[2]

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

(a) The Carrier shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members, according to the following rules:

(1) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is permitted, and in which the Carrier subrogates for non-FEHB members;

(2) The Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA);

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

Appellant made a claim for negligence against the tortfeasor who caused the motor vehicle accident. LF at 293. The parties reached a settlement, which was paid by the tortfeasor's automobile insurance policy. LF at 293. Through its agent, Respondent ACS Recovery Services, Inc. ("ACS"), GHP asserted a lien against Appellant's negligence claim for $6,592.24, seeking reimbursement for payment of medical bills related to the accident. LF at 293. Respondents based the assertion of this lien on a provision of the contract between GHP and OPM which directed GHP to seek subrogation. LF at 31. That provision notwithstanding, Missouri law has long prohibited insurers from acquiring the legal rights of an insured through subrogation or reimbursement of personal injury claims. LF at 293. In order to unencumber his personal injury claim and obtain a settlement, Appellant was instructed that he must remit $6,592.24 to GHP to satisfy the lien, which he did. LF at 263.

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

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

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

Appellant subsequently brought suit on behalf of himself and others similarly situated against GHP for asserting a right to reimbursement in violation of Missouri law. LF at 289-302. Appellant alleged counts for violation of the Missouri Merchandising Practices Act ("MMPA");[3] unjust enrichment; conversion; and seeking injunctive relief. LF at 289-302. He alleged that GHP had improperly obtained reimbursement for medical benefits it paid because, under Missouri law, health insurers are prohibited from demanding reimbursement from the settlement recoveries of injury victims. LF at 289. GHP removed the case to federal court citing federal question jurisdiction; Appellant sought remand. LF at 221.

GHP argued in the remand briefing that because the GHP-OPM contract directed GHP to seek subrogation, there was a conflict between the GHP-OPM contract and Missouri law that created federal jurisdiction. LF at 228. In granting Appellant's motion for remand, Judge Noce of the Eastern District noted that no conflict appeared to currently exist between Missouri law due to the 1996 decision of *Buatte v. Gen. Healthcare Sys. Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1996), which stated "Missouri state law prohibiting subrogation is preempted by the FEHBA." LF at 228. However, Judge Noce also noted in his remand order that "Missouri courts may want to revisit this holding in light of subsequent developments of the law." LF at 228.

On remand, ACS filed an unopposed motion to intervene, which was granted. LF at 4. GHP and ACS each filed motions for summary judgment making various legal and

[3] R.S.Mo. § 407.020 *et seq.*

policy-based arguments, principally arguing that *Buatte* mandated federal preemption of the Missouri anti-subrogation law and, therefore, judgment on their behalf. LF at 8-229 and 345-800. ACS and GHP argued that FEHBA's preemption clause, 5 U.S.C. § 8902(m)(1), preempts Missouri's law prohibiting an insurer from obtaining reimbursement.[4] The trial court entered judgment for GHP and ACS, agreeing that § 8902(m)(1) preempted Missouri state law. LF at 862, App 72. The trial court also relied on the holding in *Buatte*, stating, "[t]he court has thoroughly considered Plaintiff's claims that *Buatte* is no longer good law in light of more recent court decisions. However, no case has overruled *Buatte*, and it is still the law in Missouri . . . . Any reconsideration of the *Buatte* holding in light of recent decisions would be appropriate in the Court of Appeals." LF at 855.

The Missouri Court of Appeals for the Eastern District of Missouri then considered the issue, relying on *Buatte* and *stare decisis* in holding that Missouri's anti-subrogation law was preempted by the terms of the GHP-OPM contract.

Nevils then sought review in this Court, which held that § 8902(m)(1) does not preempt Missouri's state law prohibiting reimbursement. This Court first recognized that the Missouri Court of Appeals, in *Buatte* had previously addressed this issue and held

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

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

that FEHBA preempted Missouri's state law.[5] This Court reasoned, however, that "[t]he continued validity of *Buatte*" had been "called into question" by *McVeigh*. *Id*. Although *McVeigh* ultimately held only that the FEHBA did not completely preempt state law so as to "confer federal jurisdiction" over "contract-based reimbursement claims," *McVeigh*, 547 U.S. at 698, this Court found *McVeigh*'s analysis of § 8902(m)(1) to be relevant to the question of whether FEHBA expressly preempts Missouri's state law prohibiting subrogation or reimbursement.[6]

In finding that FEHBA does not preempt Missouri law, this Court refused to defer to OPM's contrary position as articulated in its "recent, informal" carrier letter that was "drafted in response to litigation."[7] This Court held that the agency's informal view was not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id*. This Court held that while the informal view was "relevant," it was insufficiently persuasive to "establish that FEHBA preempts state anti-subrogation law." *Id*.[8]

On April 28, 2014, Respondents filed a petition for a writ of certiorari with the United States Supreme Court in the above entitled case (United States Supreme Court Cause No. 13-1305).

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[5] Appendix on Remand, p. 4.

[6] Appendix on Remand, p. 4.

[7] Appendix on Remand, p. 6.

[8] Appendix on Remand, p. 6.

On January 7, 2015, OPM proposed an amendment to FEHBA's regulations in reaction to and in opposition to court rulings such as the 2014 Opinion of this Court:

> . . . Some state courts have interpreted ambiguity in Section 8902(m)(1) to reach a contrary result and thereby to allow state laws to prevent or limit subrogation or reimbursement rights under FEHB contracts. . . . [9]

On May, 2015, OPM issued a formal regulation including the above language and conceding that the text of FEHBA's express-preemption clause is ambiguous.[10] Based on the ambiguity, the new regulation purports to choose an expansive preemption construction authorizing contractual provisions in FEHB carrier policies to displace state laws that OPM has resisted.[11]

> On July 29, 2015, the U.S. Supreme Court entered the following order:
>
> 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;

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[9] See OPM Rule re 5 U.S.C. Section 8902(m)(l), 80 Fed. Reg. 29,203 (May 21, 2015). Appendix on Remand, p. 17.

[10] *Id.*

[11] *Id.*

Subrogation and Reimbursement Recovery, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. 890.106).[12]

On August 14, 2015, this Court issued this Order for further briefing:

Order issued: In light of the mandate of the Supreme Court of the United States dated June 29, 2015, the opinion issued in this cause on February 4, 2014 is vacated and the mandate issued on February 21, 2014, sent to the circuit clerk of St. Louis County is hereby recalled. The parties shall file briefs pursuant to the briefing schedule set forth in Supreme Court Rule 84.24(i).[13]

Additional Facts Concerning the Statutory History of FEHBA

In 1959, Congress enacted FEHBA, 5 U.S.C. § 8901 *et seq.*, which established a program to administer health benefits to federal employees. OPM is responsible for administering the health benefits program and for regulating the health-benefits plans that cover federal workers. 5 U.S.C. § 8902(a), (e). The federal government does not itself serve as the insurance provider. Rather, OPM negotiates and contracts with private insurance companies to establish health insurance plans. *Id.* § 8902(a), (d). These private insurance companies, known under the FEHBA program as "carriers," 5 U.S.C. §

[12] Appendix on Remand, p. 14.

[13] Appendix on Remand, p. 15.

8901(7), agree to provide health insurance to federal employees in exchange for a fee according to the terms of a negotiated benefits contract. 48 C.F.R. § 1602.170-11.

Under FEHBA, OPM contracts to provide two different types of insurance plans with carriers: "community-rated" plans and "experience-rated" plans. 48 C.F.R. §§1602.170-2, 1602.170-7, 1602.170-11.[14] FEHBA treats these two carriers the same with respect to the funding source used to pay insurance benefits. Under both plans, the federal government pays a share of the insurance premium and plan enrollees pay the remaining balance. 5 U.S.C. § 8906(b)(1), (b)(2), (f). These premiums are jointly deposited into a designated account with the U.S. Treasury known as the Employee Health Benefits Fund. 5 U.S.C. § 8909(a). Money from the Fund is then disbursed to the carriers, who use it to pay benefits claims and administrative costs. Both types of plans calculate premiums to cover carrier administrative costs, but "OPM does not ask for detailed administrative cost data." CRS, *FEHBP Report* at 19.

If a carrier chooses to include a right to subrogation or reimbursement in its benefits plan, OPM treats those recoveries differently depending on the carrier. In

[14] Experience-rated plan carriers include "[a]ll fee-for-service plans (and a small number of comprehensive plans)," whereas community-rated plan carriers "are basically the local HMOs." Annie L. Mach & Ada S. Cornell, Cong. Research Serv., *Federal Employees Health Benefits Program (FEHBP): Available Health Insurance Options*, 17-18 nn.50-51(2013), *available at* http://fas.org/sgp/crs/misc/RS21974.pdf (hereinafter CRS, *FEHBP Report*).

particular, experience-rated carriers must credit back to the government all funds recovered after deducting the expenses of obtaining the recovery. 48 C.F.R. §§ 31.201-5, 1631.201-70(a),(g),1652.216-71(b)(2). Funds are returned in one of two ways: "either as a cost reduction or by cash refund." 48 C.F.R. § 31.201-5. These regulations do not apply to community-rated carriers, however, which keep any recovered amounts. 48 C.F.R. § 1631.200.

When Congress passed FEHBA it chose a system in which state laws co-existed with the federal law governing federal employee health benefits. OPM's predecessor agency—the U.S. Civil Service Commission (CSC)—explained that, under FEHBA, "the States ha[d] the authority to both regulate and tax health insurance carriers" because "the FEHB Act was not designed to regulate the insurance business or to override any State regulatory scheme." Report of the Comptroller General of the United States, B-164562, *Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* 15 (1975) (hereinafter "Report of Comptroller General").[15]

During FEHBA's early years, there were "few if any problems" between the two regimes. S. Rep. No. 95-903, at 7 (1978) (Letter of Comptroller General). In 1977, however, Congress amended the law to add a narrow express preemption provision, 5 U.S.C. § 8902(m)(1). The clause provided:

[15] Appendix on Remand, p. 41.

> The provisions of any contract under [FEHBA] which relate to the nature 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 to the extent that such law or regulation is inconsistent with such contractual provisions.

5 U.S.C. § 8902(m)(1) (1996).

Congress added this provision to address the recent proliferation of state laws mandating health insurance coverage for certain kinds of benefits not typically covered by FEHBA carriers. *See* S. Rep. No. 95-903, at 2-4 (1978). Many states had begun requiring health insurers to cover medical services that FEHBA carriers preferred not to cover—things like chiropractor visits and acupuncture. *See* S. Rep. No. 95-903, at 3 (1978) (noting, as an example, that Nevada requires insurers to cover "chiropractic services"); *see also* Miriam J. Laugesen et al., *A Comparative Analysis of Mandated Benefit Laws*, 1949-2002, 41 Health Services Research 1081, 1090 (2006) (available at: http://www.ncbi.nlm.nih.gov/pmc/articles/ PMC1713218) (noting that, between 1949 and 1969, states passed only 19 laws mandating benefits, but that it increased to 169 by the mid-1970s).

In 1998, Congress made a small amendment to FEHBA's preemption provision by deleting the phrase "to the extent that such law or regulation is inconsistent with the provisions of the Federal employees' health benefits contract." 5 U.S.C. § 8902(m)(1) (1997). In its current form, it now reads:

> The terms of any contract under [FEHBA] 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).[16]

[16] Appendix on Remand, p. 16

POINT 1 ON APPEAL: The trial court erred in granting summary judgment because the contract at issue did not allow for reimbursement to GHP, in that OPM's new regulation makes clear that in the absence of such a clause, reimbursement cannot be pursued.

Case Primarily Relied Upon:

- *Nevils v. Grp. Health Plan, Inc.*, 418 S.W.3d 451 (Mo. 2014)

I. GHP's Policy Contains No Reimbursement Clause, and so, under OPM's New Regulation, It Cannot Preempt Missouri Law.

GHP (and any amici) are almost certain to argue that this case requires wading into thorny questions of constitutional and administrative law. But this Court need not weigh in on any of them.

As discussed in Point II, this Court already resolved *every single issue* needed to decide this case. It already concluded that the express preemption clause at issue should be read narrowly due to the presumption against preemption and the clause's "unusual" nature, and that this narrow reading means that subrogation and reimbursement claims are not preempted. No federal agency may override that conclusion. And this Court also decided that, even were OPM to try, the federal agency held no authority to do so. "[T]here is no indication that Congress delegated to the OPM the authority to make

binding interpretations of the scope of the FEHBA preemption clause." *Nevils*, 418 S.W.3d at 457 n.2.

But this case can also be resolved strictly on the record. Despite the fact that GHP asserted a lien against Ms. Nevils' settlement proceeds, GHP's contract contains no contractual reimbursement clause. As a result, OPM's rule—authorizing FEHB contract terms "pertaining to" reimbursement to control "notwithstanding any state or local laws"—will not change anything about the preemption analysis here. There is simply no controlling FEHB contract term that conflicts with state law.

A look at OPM's new regulations drives this home.

> (a) All health benefit plan contracts shall provide that the Federal Employees Health Benefits (FEHB) carrier is entitled to pursue subrogation and reimbursement recoveries, and shall have a policy to pursue such recoveries in accordance with the terms of this section.

890.106

At 890.1010, reimbursement and subrogation are defined.

> *Subrogation* means a carrier's pursuit of a recovery from any party that may be liable, any applicable insurance policy, or a workers' compensation program or insurance policy, as successor to the rights of a covered individual who suffered an illness or injury and has obtained benefits from that carrier's health benefits plan.

> *Reimbursement* means a carrier's pursuit of a recovery if a covered individual has suffered an illness or injury and has received, in connection with that illness or injury, a payment from any party that may be liable, any applicable insurance policy, or a workers' compensation program or insurance policy, and the terms of the carrier's health benefits plan require the covered individual, as a result of such payment, to reimburse the carrier out of the payment to the extent of the benefits initially paid or provided. The right of reimbursement is cumulative with and not exclusive of the right of subrogation.

These definitions leave no doubt that reimbursement and subrogation are separate legal and contractual rights. And OPM's requirement that both be included further affirms this fact. That is a problem for GHP. Its contract in this case contains no reimbursement clause of any kind. Instead, it contains a section titled "SUBROGATION" which provides, in relevant part, that "[t]he Carrier shall subrogate FEHB claims if it is doing business in a State in which subrogation is prohibited," so long as the Carrier "subrogates for at least one plan covered under [ERISA]." Under OPM's own rule, this provision neither authorizes GHP's demand for reimbursement nor preempts Missouri's law regulating insurer reimbursement rights.

It is not surprising this issue was not fully decided in *Nevils I*. It was not and could not be fully before the Court. OPM had not engaged in formal rulemaking, and it had not made clear that (in its view) insurers must include both a subrogation and a

reimbursement provision. And, in Missouri, historically, courts treated reimbursement as an indirect form of subrogation, since both violated public policy in the same way—they allowed an insurer to have an interest in an injury claim. *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660, 661 (Mo. Ct. App. 1990). This made sense, because in the context of whether or not reimbursement, assignment, or subrogation was allowed, there was little reason to make distinctions between the three concepts. All three deprive injured people of recovery by divesting them of some part of their interest in the recovery. All three threatened to produce a market in which people either speculated on claims, or as here, became profitable as debt collectors who pursued injured plaintiffs. There was simply no reason to parse out the differences.

Even when some insurers sought to exploit the difference between subrogation and reimbursement, it didn't matter much for public policy analysis. For example, in *Schweiss v. Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997), Sisters of Mercy attempted to require the plaintiff to sign a reimbursement provision. They argued the provision was enforceable because it "involve[d] the assignment of the *proceeds*, not an assignment of the *claim*." *Id.* (emphasis in original). The court acknowledged this was a distinction, but noted that in the context of whether it violated public policy it was "a distinction without a difference." *Id.*

This case, then, is unusual. For the first time in Missouri law, because OPM's regulation now makes clear that it is only through a reimbursement clause that a party may week the type of remedy GHP sought from Nevils here, the distinction matters, and

public policy requires it be considered. GHP could have exercised its right to pursue Nevils' claim and force him to assist (subrogation), but it did not. It waived that contractual right. Instead, it let him do all the work, then sought to recover from his efforts. That is reimbursement, and nothing in the contract allows for it.

Consequently, the simplest resolution to this case is to conclude GHP's own contract dooms its renewed bid for preemption. OPM has now made clear that subrogation and reimbursement are distinct contractual rights. As a result, GHP, has no right to seek reimbursement at all, and it certainly can't preempt Missouri law with a clause it doesn't have. This careful reading is particularly justified here, where giving GHP's contract a broader meaning than it bargained for would thwart public policy. As one court explained in 2010, Missouri has prohibited the assignment of personal tort claims since at least 1913, and "in all likelihood much longer, as the prohibition against the assignment of personal tort claims dates back to English common law and the Middle Ages." *Scroggins v. Red Lobster*, 325 S.W.3d 389, 392 (Mo. Ct. App. 2010). Or, as it was put over 100 years ago, "where the gist of the damages recovered is physical pain and mental anguish, should not be the subject of barter or trade, or a matter of profit to the creditors of the injured party." *Beechwood v. Joplin–Pittsburg Ry. Co.*, 173 Mo.App. 371, 158 S.W. 868, 870 (Mo.App.Spfd.D. 1913). This Court renewed a commitment to protecting injured parties from subrogation and reimbursement in *Nevils I*, holding that "insurance policies with reimbursement or subrogation clauses are invalid under Missouri law." 418 S.W.3d at 453.

This Court can again preserve Missouri's policy against reimbursement here merely by acknowledging that whatever the force of section 8902(m)(1), it certainly does not allow non-existent contract terms to implied preempt settled state law.

POINT ON APPEAL 2: The trial court erred in granting summary judgment because section 8902(m)(1) does not preempt Missouri reimbursement and subrogation law, in that it only covers benefits, coverage, and payments relating to benefits and OPM's new regulation does not alter the calculus, as it was enacted without authority, is an obvious and improper power grab, and runs counter to Congress' intent.

Cases Primarily Relied Upon:

- *Nevils v. Grp. Health Plan, Inc.*, 418 S.W.3d 451 (Mo. 2014)
- *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006)

II. OPM's Regulation Does Not Alter the Holding of *Nevils I.*

For nearly a decade, OPM has waged an unprecedented—and unsuccessful—battle against state law. Here, OPM first argued—in a brief—that § 8902(m)(1) "unambiguously preempts" state insurance laws and demanded that this Court "defer" to that view. This Court refused to buy in. *See Nevils v. Group Health Plan, Inc.*, 418 S.W. 3d 451, 464-65 (Mo. 2014). As we explain below, what this Court said then is law of the case—and it controls the outcome now.

But even on its own terms, OPM's remarkable effort to overrule this Court holds no sway. To begin, Congress has not delegated to OPM the authority to expand or interpret FEHBA's express-preemption clause. Quite the opposite: as OPM's predecessor

agency itself acknowledged at the time of § 8902(m)(1)'s enactment, "no legal basis exists" for it "to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15 (1975). Because agencies are creatures of Congress, an agency wishing to interpret an express-preemption clause to preempt state law may validly do so only if Congress has expressly "authorize[d]" it "to pre-empt state law directly." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). FEHBA contains no such command.

Further, in its zeal to short-circuit the legislative and judicial process, OPM's regulation tosses aside—without so much as a passing reference—bedrock principles of statutory construction that have long animated preemption jurisprudence. "Rules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). So when an agency's interpretation conflicts with an established rule of statutory construction, courts have consistently refused to accord the agency deference. That holds for agency efforts to override the longstanding presumption against preemption—a principle rooted in "respect for the States as independent sovereigns in our federal system," *id.* at 564 n.3, that compels a narrow interpretation of an ambiguous express-preemption clause and requires a court to "reject" an agency regulation that "runs afoul" of the canon. *Comm. of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996). And it holds where an agency advances an interpretation that "raises serious constitutional concerns," *U.S. West, Inc v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999)—an unavoidable consequence of OPM's "highly problematic, and

probably unconstitutional" choice here to "provide for preemption by contract." *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.). That OPM's regulation in this case flouts both of these principles—without explanation—further undermines its novel power grab.

Finally, OPM's expansive interpretation of FEHBA's express preemption clause cannot square with the considerable legislative history supporting a narrow interpretation. As we explain, Congress intended section 8902(m)(1) to be "purposely limited" and was designed to address a narrow subset of laws relating to benefits and coverage issues. To claim any serious entitlement to deference, an agency must take seriously its obligations to thoroughly analyze the questions and meaningfully engage with inconvenient facts or competing principles—an approach numerous agencies have followed. See, e.g., 74 Fed. Reg. 1770, 1792 (2009) (DOT regulation addressing applicability of presumption against preemption); 77 Fed. Reg. 36192, 26182 (2012) (addressing constitutional avoidance doctrine). OPM has sought to opt out of all of this in its regulation.

Taken together, these defects lay bare that the sum total of this regulation is merely to demonstrate that the agency "has a position." *Mayburg v. Sec'y of Health of Human Services*, 740 F.2d 100, 106 (1st Cir. 1984). But we all knew that before, which is why this regulation is "of marginal significance." *Id.*

This Point proceeds by first reviewing the settled issues in this case. This section focuses on the holdings of this Court and the United States Supreme Court. Then OPM's new regulation is addressed. This includes review of this Court's holding that OPM has

no authority to interpret the preemption clause at issue and the legislative history regarding FEHBA, which demonstrates that the limited preemption clause was never intended to, nor understood to, preempt state law regarding reimbursement and subrogation.

A. This Court Already Fully Decided this Case.

This case is unusual because all of the fundamental questions that drive its resolution have already been decided by this Court or the United States Supreme Court (or both). Regarding decisions by the United States Supreme Court, GHP cannot ask this Court to overrule that Court. And regarding the holdings of this Court, they constitute the "law of the case." Given the new regulation, it may sound at first blush like hyperbole to claim that "all" of the issues have been decided, but in fact it is not. In addition to parsing the language of 8902(m)(1) and concluding the presumption against preemption applies, this Court also dealt with whether OPM could somehow overrule this Court's reasoning through rulemaking. By the time *Nevils I* was decided, OPM had already issued a carrier letter asserting that 802(m)(1) preempted state laws regarding reimbursement and subrogation. This Court noted that fact, holding "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause." *Nevils*, 418 S.W.3d at 457 n.2. And this was precisely right, as explained in some detail in section II(B).

The conclusion reached in *Nevils* I decides this case. The "law of the case" doctrine provides that a previous holding in a case constitutes the law of the case and

precludes re-litigation of the issue on remand and *subsequent appeal*. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. 2007) (citing *Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999)) (emphasis added). The doctrine ensures uniformity of decisions, protects the parties' expectations, and promotes judicial economy. *Walton*, 223 S.W.3d at 129. This Court has final discretion in whether to apply the doctrine, particularly to itself. *Id.* at 130. This discretion is applied when a previous decision was based on mistaken facts or would result in "manifest injustice." *Id.*

Discretion or not, in the last few years, this Court has applied the law of case doctrine frequently, and with considerable rigor. *See e.g. Walton*, 223 S.W.3d at 130 (reversing a trial court's award of damages on a contract claim that was previously held properly dismissed by the Court of Appeals); *Missouri Land Dev. I, LLC v. Raleigh Dev., LLC*, 407 S.W.3d 676, 691 (Mo. Ct. App. 2013) (declining to consider factual findings regarding the status of a party); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 823 (Mo. 2011) (holding that an argument that an appeal was untimely was infirm because the Court previously ruled the appeal was appropriate).

There is no reason to depart from the law of the case doctrine here. The facts and law are the same. Although OPM will argue that its new regulation creates new issues, as discussed below, that is wrong. In fact, this Court *anticipated* the question of whether OPM could, without Congressional authority, interpret FEHBA's express preemption clause—and it conclusively answered it in the negative. That conclusion is no less sound today, and nothing OPM has done since requires this Court to revisit it. Following this

Court's earlier conclusions here promotes certainty, judicial efficiency, and protects the rights of Missouri citizens.

The following principles are *already established* in this case:

1. FEHBA's limited preemption clause is highly unusual, as it states that negotiated contract terms included in a private insurer's contract preempt state law. This requires a "cautious" reading of the clause. *Nevils*, 418 S.W.3d at 455 (Mo. 2014), citing *McVeigh*, 547 U.S. at 697, holding that "a prescription of that unusual order warrants cautious interpretation."

2. The FEHBA's express preemption clause, section 8902(m), expresses a "limited preemption" and does not displace all state insurance law. *McVeigh*, 547 U.S. at 689; *See generally Nevils*, 418 S.W.3d 451 (concluding that the preemption clause does not preempt Missouri subrogation and reimbursement law). Indeed, the entirety of FEHHA "contains no provision addressing subrogation or reimbursement rights of carriers." *McVeigh*, 547 U.S. at 683; 5 U.S.C. 8901 *et seq.*

3. Based on these facts, and the wording of section 8902(m), the clause is susceptible to two "plausible constructions," *id.* at 698, including a reading that "[t]he subrogation provision in favor of GHP creates a contingent right to reimbursement and bears no immediate relationship to the nature, provision or extent of Nevils' insurance coverage and benefits." *Nevils*, 418 S.W.3d at 457.

4. When there are two plausible readings of a clause, the presumption against preemption requires a court to select the narrower of the two. This is uniquely true when preemption would impact areas that states traditionally regulated. *Nevils*, 418 S.W.3d at 454 (holding that "when two plausible readings of a statute are possible, we would nevertheless have a duty to accept the reading that dis-favors preemption").

5. Congress did not delegate authority to OPM to interpret FEHBA's limited preemption clause. As this Court put it, "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause." *Nevils*, 418 S.W.3d 451 at 457 n2 (Mo. 2014).

As a result of these established principles, this Court's original holding is unaffected by the OPM's attempted power grab. The narrower reading of 8902(m)(1) adopted in *Nevils I* is not only the most appropriate reading, but OPM's effort to trump that reading cannot survive this Court's conclusion that the agency has no authority to "make binding interpretations of the scope of the FEHBA preemption clause." This conclusion allows FEHBA to create uniformity in benefits and just as Congress intended. What it does not do is displace all Missouri insurance and tort law, a result Congress never sought nor sanctioned.

These five conclusions are discussed below. The final issue regarding OPM's regulation, found at section (d), receives detailed attention, as the regulation was not final in *Nevils I.* The first four principles are reviewed only briefly, because of the lengthy treatment they received in *Nevils I.*

1. 8902(m)(1) is a "puzzling clause" requiring a "cautious interpretation."

FEHBA's preemption clause purports to make contract terms between a federal agency and private insurers preemptive in nature. That is "unusual" to say the least. *Nevils*, 418 S.W.3d at 463 (J. Wilson, dissenting) (noting that calling the clause unusual is a "graciously judicial understatement"). It is Federal law, not contract terms, that preempt. As discussed in Point III, there is a good argument that this delegation of preemption to a private contract is unconstitutional. But even if this Court does not reach that issue, this Court has already concurred with the United State Supreme Court that the unusual nature of the limited preemption clause counsels in favor of a "cautious interpretation." *Id.* at 454.

Reading the clause to broadly preempt would be far from cautious. And it is far from prudent. If private contract terms take on the force of federal law, the careful balance of allowing Congress to preempt state law through reasoned, debated legislation, would be delegated to private negotiations between private parties and a federal agency. That cannot be the law. Instead, the cautious reading is to narrowly interpret the FEHBA's limited preemption clause, thereby keeping the genie in the bottle.

2. 8902(m)(1) is "limited preemption clause" nested in a statutory framework that never contemplates or references reimbursement or subrogation.

GHP asked this Court in *Nevils I*, and again here, to read into 8902(m)(1) words that don't' appear in the preemption clause, or for that matter, in all of FEHBA. This Court properly rejected this position.

In *McVeigh*, Empire argued that FEHBA's preemption clause conferred federal jurisdiction. The Supreme Court disagreed and cited the Second Circuit's response to this argument with approval, in which the Second Circuit held that 8902(m) is a "a limited preemption clause that the instant dispute does not trigger." *McVeigh*, 547 U.S. at 689 (citing *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005)).[17] The Court found additional support for this conclusion, pointing out that

[17] Post *McVeigh*, others have recognized the limited nature of 8902(m)(1). .In *Blue Cross Blue Shield of Illinois*, Judge Posner wrote for a unanimous court, the proper reading of FEHBA's limited preemption clause is that "benefits are uniform, though the net financial position of the insured . . . is not but instead depends on the state liability rules . . . ." 495 F.3d 510, 514 (7th Cir. 2007). He rejected the broad reading of benefits advocated by Blue Cross (and GHP here), noting that "when 'benefits' are understood to include very financial incident of an illness or injury, national uniformity is unattainable without a federal takeover of the entire tort system." *Id.* Posner's holding recognized the

FEHBA "contains no provision addressing the subrogation or reimbursement rights of carriers," *McVeigh*, 547 U.S. at 683, and again that these are "matters FEHBA itself does not address." *Id.* at 684.

This is important, as it illustrates why OPM's regulation goes too far. Congress could have simply mentioned subrogation or reimbursement if they wanted to preempt them. These concepts, and the fact that they differ radically from state to state, was well-known. It is quite a stretch to assume Congress didn't think of this (as opposed to intentionally omitting it). The Supreme Court agrees. It noted that when discussing federal jurisdiction, "[h]ad Congress found it necessary or proper to extend federal jurisdiction further, in particular, to encompass contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough for Congress to say so. *McVeigh*, 547 U.S. at 696. The same is true here. Congress knew how to preempt reimbursement law, but it didn't. As explained in below in section B(3)(a), legislative history makes clear this was intentional.

"limited preemption" expressed in 8902(m)(1). And more broadly, it rejected the argument that somehow Congressional intent justified treading on state reimbursement law in order to produce national uniformity. Instead, uniformity as to benefit and coverage was sufficient.

This Court and the Supreme Court's reading of FEHBA's clause as one that creates "limited preemption" make clear why GHP's position must fail now, as it did in *Nevil I.* GHP's position would work a full preemption of Missouri insurance law. If all benefits and coverage are preempted, the method of payment of benefits is preempted, and the amount an insured will be required to pay to GHP in the event the plaintiff recovers from a third party is also preempted, there is no Missouri law left. This flies in the face of the "limited preemption" that everyone agrees FEHBA creates, and it treads on state rights unnecessarily. FEHBA ensures uniformity in benefits and coverage. It does not, cannot, and was never intended to establish uniformity in the ultimate financial outcome of the insured, as that depends on a myriad of things, including state tort law, the contract with the attorney who represents the insured, and the ability of the third party who caused injury to pay in the first place.

3. 8902(m)(1) is susceptible to two plausible constructions, including one that does not preempt Missouri subrogation and reimbursement law.

Both the United States Supreme Court and this Court concluded that FEHBA's limited preemption clause is susceptible to two plausible readings. Justice Ginsberg called it a "puzzling measure, open to more than one construction . . . ." *Mcveigh*, 547 U.S. at 698. According to Justice Ginsberg, one option is to read "the reimbursement clause . . . as a condition or limitation on 'benefits' received by a federal employee" so that the "clause could be ranked among 'contract terms relating to coverage or benefits'

and 'payments with respect to benefits.'" *Id.* This was the argument advanced by Empire. "On the other hand, a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved. . . ." And the accompanying "'payments with respect to benefits' have been made to the care provider or the insured." *Id.* This was the argument advanced by McVeigh. The Court ultimately decided that it did not need to choose between the two to determine that the clause was not sufficiently broad to confer federal jurisdiction.

This Court concurred, ultimately holding that the best reading of 8902(m)(1) is that the "provision in favor of GHP creates a contingent right to reimbursement and bears no immediate relationship to the nature, provision or extent of Nevils' insurance coverage and benefits." 418 S.W.3d at 457.

4. The presumption against preemption applies.

This Court unequivocally concluded that in this case – one uniquely focused on areas of unique state interest – the presumption against preemption applies. That holding was rooted in bedrock federal law and the rather pedestrian conclusion that tort law, insurance law, and more specifically, reimbursement and subrogation law, are matters of traditional state control.

This Court conducted a thorough examination of preemption precedent in *Nevils* I. Citing numerous Supreme Court cases, it held that the presumption against preemption applied in this case. This is the law of the case.

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Nevils,* 418 S.W.3d at 454, *citing Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, (1992). Further, "when a federal statute regulates an area that is traditionally subject to state authority, courts 'should be reluctant to find preemption.'" *Id.,* citing *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664, (1993). "Preemption analysis, therefore, 'is informed by two presumptions about the nature of preemption.'" *Id., citing City of Belton v. Smoky Hill Ry. & Historical Soc., Inc.,* 170 S.W.3d 429, 434 (Mo.App.2005), *quoting Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996). "First, it is presumed that the states' historic police powers are not preempted unless it is the clear intent of Congress. *Id.* "Second, a court's analysis of the scope of a statute's preemption is determined by the congressional purpose in enacting the statute." *Id.* "When two plausible readings of a statute are possible, 'we would nevertheless have a duty to accept the reading that disfavors preemption.'" *Id., citing Bates v. Dow AgroSciences, LLC,* 544 U.S. 431, (2005).

There is no reason to depart from this holding.

B. OPM's Attempt to Expand Section 8902(m) Is Invalid and Does Not Require Alteration of This Court's Previous Decision.

OPM asserts that, through rulemaking, it can accomplish what Congress never intended—an almost complete takeover of state insurance and tort law. OPM's position

is fatally flawed. *First*, OPM has no delegated authority to expand the preemptive reach of section 8902(m)(1). This Court has already decided this issue in *Nevils I*. 418 S.W.3d at 457 n2, stating "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause." It is the law of the case. *Second,* OPM's regulation seeks to bypass rules of statutory construction, but all actors are bound by those principles. *Finally*, OPM's power grab fails for a number of other reasons. Particularly, there is serious doubt *Chevron* deference could ever apply to a situation like this, and since legislative history makes clear that the regulation violates Congressional intent, it certainly isn't entitled to deference here.

1. OPM has no authority to interpret or expand the preemptive reach of section 8902(m)(1).

OPM's bid for *Chevron* deference in the absence of congressional authority is badly misguided. Congress has in no way delegated to the agency the authority to expand or interpret FEHBA's express-preemption clause. Quite the opposite: as OPM's predecessor agency itself acknowledged at the time of § 8902(m)(1)'s enactment, if FEHBA was to take on a more expansive form of preemption, it would have to be carried out by Congress, not the agency. "No legal basis exists to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15 (1975). Now OPM has flip-flopped completely, relying on nothing more than the same generic grant of authority that led it to tell Congress it had no preemptive rulemaking authority in the first place. Because agencies are creatures of Congress, an agency wishing to interpret

an express-preemption clause to preempt state law may validly do so *only if* Congress has expressly "authorize[d]" it "to pre-empt state law directly." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). FEHBA contains no such command.

The absence of any clear Congressional command authorizing OPM to preempt state law directly defeats its effort here. An agency may not confer power upon itself. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power on it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Were it otherwise, an agency would have the "power to override Congress"—a result flatly unfaithful to the Constitution. *Id.* at 374-75. When an agency undertakes a rulemaking via the Administrative Procedure Act, therefore, it "must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The need for express authority from Congress is especially acute when an agency's action implicates the federal-state balance. Hence, on issues of federalism, an agency's formal statements on preemption are only entitled to deference if Congress has *explicitly* "authorize[d]" the agency "to pre-empt state law directly." *Wyeth*, 555 U.S. at 576; *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Steven, J., dissenting, joined by Roberts, C.J. and Scalia, J.) (making this point).

What qualifies as express authorization? A statutory statement, for instance, that the FDA is empowered to "determine the scope of the Medical Devices Amendments'

pre-emption clause." *Wyeth*, 555 U.S. at 576 (discussing 21 U.S.C. § 360k). Or a congressional command that the FCC may "determine" that a state law violates an express preemption clause and "preempt the enforcement" of those state laws. *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1269, 1268. (10th Cir. 2000). In these contexts, agency rulemaking that interprets a statutory-preemption clause may qualify as a valid exercise of the agency's power precisely because Congress has clearly delegated that authority to the agency. *See, e.g.*, Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum. L. Rev. 1, 15 (2011) (explaining that *Wyeth* "insist[s] that conclusions of preemptive effect are ultimately for the courts to make in their independent judgment, at least absent an express delegation to an agency of preemptive authority"); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 771 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 754 n.67 (2004).

Applying these lessons here is straightforward. FEHBA contains no express grant of authority for OPM "to pre-empt state law directly," *Wyeth*, 555 U.S. at 576—a point OPM itself concedes. *See* 80 Fed. Reg. 29203 (2015) ("exercising its rulemaking authority under 5 U.S.C. § 8913"). Like many federal laws, FEHBA contains only a generic grant of agency authority to "prescribe regulations necessary to carry out this chapter." 5 U.S.C. § 8913. But this type of generic rulemaking authority says not a word about preemption, and so provides no textual foundation for OPM's assertion of preemption. Indeed, in similar contexts, the Supreme Court has refused to defer to agency

efforts to "declare the pre-emptive scope" of a federal law. *Cuomo v. Clearing House Ass'n L.L.C.*, 557 U.S. 519, 534-45 (2009); *Wyeth*, 555 U.S. at 576. Because FEHBA contains no command that OPM fill gaps in the express-preemption clause, it is the judiciary—not the agency—that has the final word on how to read the statute.

In truth, OPM knows that FEHBA grants it no license to preempt state law. In the run-up to § 8902(m)(1)'s passage, OPM's predecessor agency made clear that, given FEHBA's general grant of rulemaking authority, "no legal basis exists" for the agency to issue "regulation[s] restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15. And it told Congress that, despite FEHBA's generic grant to "prescribe regulations to implement th[e] law," it "does not give [the agency] clear authority to issue regulations restricting the application of state laws." S. Rep. No. 95-503, at 4 (1978).

Now, OPM has reversed course. Without any explanation for its shift, OPM asserts that the same generic grant of authority that precluded preemption by regulation forty years earlier now specifically authorizes it. The Supreme Court has specifically rejected similar "dramatic change[s] in [agency] position" before—especially when it centers on preemption. *See Wyeth*, 555 U.S. at 579. *See also Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) (agency's "contemporaneous construction" trumps later interpretation that is "in conflict with its initial position"). As the Supreme Court has explained, where Congress "has affirmatively acted" in reliance "on the representations of [an agency] that it had no authority" to regulate, the agency is "preclude[d] . . . from regulating" even if

the agency later opts for a "change in position." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (rejecting "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation").

Resolving disputes over a statute's meaning is ordinarily the job of the courts. Agency deference is the exception to this rule, but it is not something to which an agency is entitled simply through "[m]ere ambiguity in a statute," *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001), or because it has "expressed an interpretation in the proper form." *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 765 (D.C. Cir. 2012) (Brown, J., concurring). To the contrary, it is Congress's "delegation of authority to the agency to elucidate a specific provision of the statute" that permits an agency's interpretation to be given deference at all. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

It is crucial that courts safeguard this requirement, especially on questions directly implicating the delicate balance between state and federal sovereignty. OPM invites this Court to relax the limitations on its power and, in the process, radically expand the reach of administrative agencies to displace federalism. That invitation should be declined. OPM may assert that it can change its mind and still receive deference, and in rare cases this may be true. But "sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation," is a sign that the rule is "arbitrary,

capricious or an abuse of discretion." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742, (1996).

2. OPM's regulation discards principles of statutory construction.

OPM's regulation is particularly inappropriate given its blatant effort to override several longstanding canons of statutory interpretation by fiat. The "critical" point in any statutory interpretation case—one that "transcends debates about the mechanics of *Chevron*"—is that "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). "Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles." *Id.* But OPM has sought to short-circuit this rule, arguing that the "presumption[s]" that might otherwise apply are "inapplicable" when an agency, rather than judge, interprets an express preemption clause. U.S. 28(j) Letter of May 26, 2015, at 2 filed in *Helfrich v. Blue Cross & Blue Shield Assoc.*, Case No: 14-3179 (10th Cir. 2015) (appeal pending). That is wrong. Interpretive principles—which include "[a]ll manner of presumptions, substantive canons and clear-statement rules"—"take precedence over conflicting agency views." *Carter*, 736 F.3d at 731. Because OPM's regulation is openly at war with these principles—indeed, its *raison d'etre* is to overturn them—no understanding of *Chevron* sanctions its enforcement.

First, OPM straightforwardly contends that the presumption against preemption is "inapplicable" to its regulation. Not so. The "respect for the States as independent sovereigns in our federal system" is no less robust simply because an agency is involved.

See Wyeth, 555 U.S. at 565 n.3 (applying the presumption against preemption even in the presence of substantial federal regulation). An agency's interpretation of an express-preemption clause is not "permissible" if it conflicts with "the strong presumption against preemption in matters traditionally regulated by the state." *Massachusetts*, 93 F.3d at 894. Writing for the D.C Circuit, Judge Sentelle has explained that an agency regulation seeking to displace state law cannot stand if it "runs afoul" of "the established presumption against preemption in matters of traditional state control." *Id.* at 895. The reason is clear: An agency's decision to preempt state law in the absence of a "clear and manifest" command from Congress substitutes the agency's purpose for Congress's—a clear violation of the Supremacy Clause. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The "long-standing presumption against preemption" wards against this separation-of-powers breach and "demand[s]" that courts "reject an agency interpretation" that, like OPM's here, would simply override it. *Id.*; *see also Solid Waste Agency*, 531 U.S. at 166-67, 174 (where Congress "chose to 'recognize, preserve, and protect'" state authority to regulate, courts must "reject the request for administrative deference" of a statutory interpretation that would undermine that choice).

Second, agencies may not disregard the constitutional-avoidance doctrine. To the contrary, they are "obligated" to read statutes in a "manner that does not raise a serious constitutional question." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008). Yet OPM's proffered construction of § 8902(m)(1) indisputably authorizes private contractual "reimbursement clause[s]" in carrier contracts to preempt "any state law"—an

interpretation that requires a "highly problematic, and probably unconstitutional" reading of FEHBA's express preemption clause because it "provid[es] for preemption by contract" even though "it is a law, not a mere contract term, that carries preemptive force." *McVeigh*, 396 F.3d at 143. The Supreme Court has never "devised and applied a federal principle" of preemption based on terms contained in "an individually negotiated contract." *United States v. Yazell*, 382 U.S. 341, 353 (1966). And for good reason: "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a private contract." *American Airlines v. Wolens*, 513 U.S. 219, 243 n.4, 241 (1995) (O'Connor, J., concurring in part and dissenting in part) (noting that "the terms of private contracts are not laws").

OPM's contrary interpretation, therefore, cannot stand. "It is well established that the cannon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due." *See Solid Waste Agency*, 531 U.S. at 160-61; *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (rejecting "agency interpretations to which we would otherwise defer when they raise serious constitutional questions"). As a result, "deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *U.S. West*, 182 F.3d at 1231. And, were there any doubt, the constitutional avoidance doctrine "trumps Chevron deference" by demanding that courts not defer to agency interpretations of statutes that implicate serious constitutional concerns. *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C.

Cir. 2008); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that, when confronted with a statute with two possible constructions—one that raises constitutional problems, and another that does not—courts must adopt whichever reading avoids constitutional issues "unless such construction is plainly contrary to the intent of Congress"); *Union Pacific RR v. U.S. Dep't of Homeland Security*, 738 F.3d 885, 893 (8th Cir. 2013) ("Constitutional avoidance trumps even *Chevron* deference, and easily outweighs any lesser form of deference we might ordinarily afford an administrative agency . . .").

3. OPM's interpretation expanding the scope of § 8902(m)(1) is entitled to no deference.

Even if OPM had the clear statutory authority to promulgate this regulation (which it decidedly did not), its interpretation of FEHBA's preemption provision would merit no deference—*Chevron* or otherwise.

a. To begin, the Supreme Court has, in recent years, cast considerable doubt over the possibility that an agency's interpretation of a statute's express-preemption provision may *ever* receive *Chevron* deference. In *Smiley v. Citibank (S. Dakota), N.A.*, for example, the Court drew a distinction between questions concerning the "substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." 517 U.S. 735, 744 (1996). The majority "assume[d] (without deciding) that

the latter question must always be decided *de novo* by the courts." *Id.* Then, three years later in *Wyeth*, the Court explained that, in statutory preemption cases where an agency has issued a regulation designed to preempt state law, a court still must "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamation of pre-emption." 555 U.S. at 576. *See Medtronic*, 518 U.S. at 512 (1996) (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference."); *see also Watters*, 550 U.S. at 41 (Stevens, J., dissenting joined by Roberts, C.J. and Scalia, J.) (expressing the uncontradicted view that "a healthy respect for state sovereignty calls for something less than *Chevron* deference").

The message here is clear: conferring *Chevron* deference over agency interpretations of express-preemption clauses has no obvious support in the law, and reading between the lines, is likely to be rejected by the Supreme Court. That is especially true here, when dealing with a "puzzling clause" that attempts to give preemptive effect to contract terms. A "cautious reading" of this clause includes avoiding its rampant expansion by agency fiat.

b. Legislative history further supports the conclusion that OPM's rule deserves no deference. The preemption OPM embraces runs directly contrary to Congressional intent, as evidenced by legislative history, an essential tool for interpreting an ambiguous statute. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("Analysis of legislative history is, of course, a traditional tool of statutory

construction" that can make the purpose of a statute "pellucidly clear."); *Owner-Operator Indep. Drivers Ass'n v. Supervalu, Inc.*, 651 F.3d 857, 863 (8th Cir. 2011) (where a statute's language is "ambiguous," courts should use "legislative history and any other authorities" to "discern Congress's intent behind the particular statutory provision in question"); *AD Global Fund, LLC v. United States*, 67 Fed. Cl. 657, 676-77 (Fed. Cl. 2005) ("The most persuasive sort of legislative history are the reports from the committees that studied, drafted, and proposed the legislation."). Reference to the legislative history here demonstrates that when Congress passed the provision, it intended that it apply narrowly to only a subset of state laws regulating substantive benefits and coverage issues, and not more broadly to background state insurance laws that might affect FEHBA carriers.

When Congress passed H.R. 2931 (the bill containing the original version of § 8902(m)(1)), the Senate Report made clear that the preemption provision was "purposely limited." S. Rep. No. 95-903, at 4 (1978). Its aim was to provide "uniformity" in the provision and coverage of actual health benefits. S. Rep. No. 95-903, at 4(1978); *see also id*. (explaining that "[s]ome states have established health insurance requirements that conflict with provisions of the FEHB contracts, such as requiring recognition of certain practitioners not covered by" FEHBA plans); *id*. (explaining that the preemption clause would "provide an immediate and permanent statutory solution to the problem of maintaining uniformity of benefits"); *see also* H.R. Rep. No. 95-282, at 4-5 (1978) ("The effect of this amendment is to preempt the application of State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family

members, age limits for family members, or other matters relating to health benefits or coverage when such laws or regulations conflict with the provisions of contracts under [FEHBA]."). But, Congress also took pains to explain what § 8902(m)(1) would not preempt: It "will not provide insurance carriers under the program with exemptions from state laws and regulations governing other aspects of the insurance business." *Id.*

The distinction Congress drew here—wanting to preempt state laws that would compel FEHB carriers to cover certain types of health benefits or comply with certain coverage-related issues, while preserving traditional state laws governing other aspects of health insurance—makes eminent sense. When Congress began considering whether to amend FEHBA to include a preemption provision, it asked the Comptroller General to identify the problems FEHBA carriers were having with state laws. In general, the Comptroller General reported that the problems were limited. After all, when FEHBA was originally passed, Congress expected that carriers would have to comply with both federal and state law requirements. *See* S. Rep. No. 95-903, at 7 (Letter of Comptroller General) (explaining that "[a]ll states regulate the health insurance business in various and varying ways" and in FEHBA's "early years . . . state law offered few if any problems for our program").

One area of state law, however, did "present serious problems" for FEHBA carriers: state laws that mandated "the kinds of benefits and medical practitioners that carriers doing business in these states must cover." *Id.*; *see also* Report of Comptroller General at 3. These laws were problematic because they "placed carriers in serious jeopardy of loss of their license in a state unless they were to approve a payment for a

benefit not provided under our contract but required by state law." *See* S. Rep. No. 95-903, at 7 (Letter of Comptroller General). For example, in Nevada FEHBA plans were compelled to "pay[] for chiropractice services . . . as required by state law," but they "do not pay for such services in any other state." *Id*. at 3.[18]

To address this specific tension, Congress added a narrow preemption clause in § 8902(m)(1), thereby "guarantee[ing] that the provisions of [FEHBA] health benefits contracts . . . *concerning benefits or coverage*, would preempt any state and/or local insurance laws and regulations which are inconsistent with such contracts." *Id*. at 4 (emphasis added). But, it is simply wrong to assert that Congress (or the Comptroller General, for that matter) intended to preempt all state insurance laws impacting, even incidentally, FEHBA carriers or their plans. To the contrary, Congress understood that § 8902(m)(1) was "a form of limited preemption," overriding state laws "as they pertain to

[18] The Comptroller's report identifies other types of "benefits" that states were beginning to require insurers to cover, including acupuncture, and the treatment of mental illness, alcoholism, and drug addiction. Report of Comptroller General at 9-11. But the Comptroller also reiterated its view that FEHBA's preemption provision would not "regulate the insurance business" or "override any state regulatory scheme." *Id*. at 15. Indeed, even CSC took the position that "the States have the authority to both regulate and tax health insurance carriers operating under [FEHBA]." *Id.* at 15. And CSC's Deputy General Counsel at the time told FEHBA carriers that, based on FEHBA's legislative history, "State law should be controlling." *Id.* at 16.

benefits and coverage," but not preempting "other such regulations pertaining to the regulation of insurance within the state." *Id.* at 7 (Letter of Comptroller General).[19]

Nor did the 1998 amendments change this understanding. Like before, Congress made clear that the scope of the preemption provision was limited. Explaining the effect of the preemption clause edit, the House report states:

> Current law prohibits state and local governments from regulating the nature and extent of coverage and benefits for people covered by FEHB if the regulation or law is inconsistent with the contract provisions. The new language would preclude state and local governments from regulating the provision of coverage or benefits as well, and it removes the language dealing with inconsistencies, thereby giving the federal contract provisions clear authority.

H.R. Rep. 105-374, at 19 (1997). *See also* S. Rep. 105-297, at 15 (1998) ("These changes would affect states that have requirements governing what types of organization can

[19] As examples of these traditional state insurance laws, Congress identified laws concerning "state premium taxes," or "state requirements for statutory reserves." S. Rep. No. 95-903, at 7 (1978) (Letter of Comptroller General). Like laws regulating reimbursement or subrogation, these laws inevitably would affect FEHB carriers, but they do not regulate decisions about what substantive benefits a carrier must provide, or what risks it must cover.

provide health care when those requirements are different from those under federal contracts.").

If anything, § 8902(m)(1) was an afterthought in the 1998 FEHBA amendments, the central purpose of which was to "impose sanctions on" or to "bar" insurance providers, to "encourage full disclosure in discounted rate agreements," to "establish standards for readmitting discontinued health plans" and to credit financial reserves. Everything else—including the change to § 8902(m)(1)—was considered merely a "technical change[]." S. Rep. No. 105-257, at 1-2 (1998); *see also* H.R. Rep. No. 105-374, at 17 (1997) (making the same point).

Meanwhile, Congress did not delete the limiting phrase "coverage or benefits," and the legislative history of the amendment demonstrates that Congress was still focused on preventing State laws regulating benefits and coverage issues that were continuing to survive under the old provision. In Congress's view, "the only effect of the preemption would be to limit the application of state law in some circumstances." *Id.*; *see also* H.R. Rep. No. 105-374, at 8 (1998) ("For example, a carrier's effort to establish a preferred provider organization (PPO) across the country would not be jeopardized by State-mandated 'any willing provider' statutes."); *id*. at 19 ("These changes would affect states that have comparably higher requirements for types of medical coverage offered by health plans.").

In truth, the limiting principle embedded within § 8902(m)(1) for preemption purposes is exactly what Congress said it was when it passed the amendment in 1977: it was purposely limited to displacing those state laws that regulate substantive benefits and

coverage issues that would bind FEHB carriers to cover risks or provide benefits they otherwise would not.

c. OPM attempts to read words into 8902(m)(1) that not only don't exist in that clause, they aren't even mentioned in the statutory framework. And reading those words in is at war with Congressional intent and the agency's own past interpretation of the limited preemption clause. That sort of power grab, made in response to displeasure with litigation results, can't be tolerated, much less endorsed. For if it is, Federalism is in serious jeopardy. FEHBA is important, and OPM is a powerful federal agency, but it cannot short circuit the separation of powers built into our Constitution, and it cannot bypass Congress to tread upon Missouri law and Missouri citizens.

* * * *

Taken together, the fundamental principles already decided by this Court and the United States Supreme Court resolve this case. FEHBA "puzzling" preemption clause requires a "cautious construction" that promotes "limited preemption." That reading, in light of the language of 8902(m)(1) and the presumption against preemption, is that FEHBA creates uniformity regarding benefits and coverage, but it does go so far as to interfere in Missouri reimbursement law. This conclusion is unchanged by OPM's effort to overrule this Court through rulemaking. OPM had no authority to issue its rule, the rule ignores principles of statutory construction, it runs headlong into Congressional intent, and it would create dangerous precedent that would endanger basic principles of federalism.

POINT 3 ON APPEAL: The trial court erred in granting summary judgment because section 8902(m)(1) is unconstitutional in that it purports to allow contract terms to preempt state law, a result prohibited by the Supremacy Clause of the United States Constitution.

Cases Primarily Relied Upon:

- *American Airlines v. Wolens*, 513 U.S. 219 (1995)
- U.S. Const. Art. VI, cl. 2

III. OPM's Regulation—Like Section 8902(m)(1) Itself—Runs Afoul of the Supremacy Clause.

Judge Wilson, joined by Judge Breckenridge, reasoned that 8902(m) violates the United State Constitution, specifically the Supremacy Clause. He asserted that federal *law* may preempt, but contracts with a federal agency may not. Judge Wilson observed that in the *McVeigh* case at the Second Circuit, then-Judge Sotomayor stated "there is no constitutional basis for making the terms of contracts with private parties similarly 'supreme' over state law." *Id.* at 451, *citing McVeigh,* 396 F.3d. at 143. Sotomayor ultimately avoided the constitutional issue by reading through the clause, inserting "federal law" into it. The concurrence in *Nevils I* rejected this reading after carefully

considering it.

OPMs new regulation does nothing to remedy the infirmities of 8902(m)(1). Instead, it compounds them, attempting to expand the types of contract terms that can preempt Missouri law. For that reason, one thing is clear: if 8902(m)(1) is unconstitutional, so is the new regulation.

When the Supremacy Clause is given even a quick read the position that contract terms negotiated with a private party *cannot* preempt state law seems uncontroversial The Supremacy Clause states 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." U.S. Const. Art. VI, cl. 2. By its terms, § 8902(m)(1) provides that certain *contractual terms* will "supersede and preempt" state laws in a particular field. There is no constitutional authority for doing so.

The Supremacy Clause does not permit contract terms between private parties to reign "supreme" over state law. *See Arthur D. Little, Inc. v. Comm'r of Health and Hosps.*, 481 N.E. 2d 441, 452 (Mass. 1985) ("[T]his court has been unable to locate authority in this or any jurisdiction which supports the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for purposes of the supremacy clause."); *Yazell*, 382 U.S. 341 ("None of the cases in which [the Supreme Court] has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract."). A "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a

private contract." *Wolens*, 513 U.S. at 229, n.5 (1995); *see also id.* at 241 (O'Connor, J., concurring in part and dissenting in part) (noting "[t]o be sure, the terms of private contracts are not laws"). And, under FEHBA, contract terms are not government-imposed. Instead, OPM "negotiates the contract terms privately with insurance providers," who are "under no obligation to enter into the contracts in the first place." *McVeigh*, 396 F.3d at 144.

For this reason, court after court has viewed FEHBA's preemption provision with suspicion. *McVeigh*, 547 U.S. at 697 (§ 8902(m)(1) is "a puzzling measure, open to more than one construction" and "a prescription of that unusual order warrants cautious interpretation"); *West Virginia ex. Rel. McGraw v. CVS Pharm.*, 748 F.Supp.2d 580, 584 (S.D. W.Va. 2010) ("FEHBA's preemption clause is unusual inasmuch as section 8902(m)(1) provides that the terms of the FEHBA insurance plans shall preempt state law rather than giving the language of FEHBA itself preemptive effect."); *McVeigh,* 396 F.3d at 143 ("Though courts generally decide FEHBA cases as if § 8902(m)(1) were a preemption provision like any other. . .the provision is in fact quite unusual" and a "literal reading of the provision is highly problematic, and probably unconstitutional").

Embracing a "highly problematic, and probably unconstitutional" reading of FEHBA's preemption clause, as advocated by GHP, is not the solution. *McVeigh*, 396 F.3d at 143. Instead, this Court should "construe the statute to avoid such problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

GHP may argue that construing the statute as unconstitutional does not solve the problem, as the statute already preempts state law regarding benefits and coverage. This is a fair argument, but largely misses the point. This Court previously declined to rule the entire statute unconstitutional. It found a way to "avoid" this result, consistent with constitutional avoidance principles. Here, it faces a similar issue. It can construe a regulation as authority for making contractual terms preemptive, or it can avoid such a troubling result.

The easiest ways to do that are to 1) conclude that there is no reimbursement clause, and therefore no preemption, or 2) conclude that OPM's regulation does not alter the holding of *Nevils I*. This avoids producing any new constitutional issues, but also avoids voiding an entire statute on constitutional grounds.

CONCLUSION

At its core, this case asks whether a clause that doesn't exist – there is no reimbursement clause in the GHP contract – can preempt state law. That answer is pretty easy. And even if this Court read "subrogation" to mean "reimbursement," the case is still straightforward. It is governed by *Nevils I*. The OPM regulation does not change the conclusion. OPM cannot convert section 8902(m)(1) into a broad sweeping preemption clause instead of the "limited" clause that Congress and the Supreme Court agree it is.

For all these reasons, Nevils prays this Court reverse the trial court, affirm *Nevils I*, and remand this case to the trial court for further proceedings.

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CERTIFICATE OF COMPLIANCE AND SERVICE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellant states that this Brief is in compliance with the limitations of Rule 84.06(b). Word limit per this rule is 31,000. This brief contains 14,620 words, exclusive of the cover, certificate of

service, certificate required by Rule 84.06(c), signature block and appendix. This brief is in Microsoft Word format using Times New Roman 13 point font.

I further certify that on October 6, 2015, I electronically filed the foregoing Appellant's Brief on Remand and the corresponding Appendix on Remand with the Clerk of the Missouri Supreme Court by 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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