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 REPLY BRIEF ON REMAND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

At Coventry's request, this case was remanded to allow this Court "to consider" the question of preemption "in the first instance with the benefit of the OPM regulation." OPM Pet. Cert.[1] This case thus presents a narrow issue on remand. *Does OPM's regulation alter this Court's conclusion that section 8902(m)(1) does not preempt Missouri reimbursement law?*

Coventry answers this in a 124 page brief that advances dozens of different arguments, most of them already rejected by this Court, in an attempt to work a form of judicial alchemy. By sheer volume, hundreds of short, cherry-picked cites, and the recycling of rejected arguments (such as the argument that section 8902(m)(1) is so clear it can *only* be read to require preemption in this case), Coventry attempts to turn law that doesn't support its position into law that is purportedly "clear" to the benefit of Coventry (Resp. 26). To support this position, Coventry assumes that this Court suffers from amnesia, and that it will forget the conclusions it reached in *Nevils I*, even though almost

[1] See APP 14 for the June 29, 2015 letter to this Court from the Clerk of the U.S. Supreme Court: " . . . 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) . . ."

none of those conclusions are altered by the existence of this unprecedented OPM regulation.

Stepping back from Coventry's kitchen-sink approach to briefing gives clarity. Coventry's brief boils down to a singular unsupportable position. It asserts that in the absence of clear Congressionally-delegated authority, OPM can interpret the same statute this Court has already interpreted, but reach the opposite result by ignoring applicable canons of construction (such as the presumption against preemption) and overrule this Court's own reasoning and conclusions by invoking *Chevron* deference. The hubris doesn't stop there. For good measure, Coventry suggests that OPM may also trump the United States Supreme Court. For whatever else *McVeigh* may or may not stand for, at a minimum it holds that section 8902(m)(1) is a "limited" preemption clause that should calls for a "cautious interpretation." *McVeigh*, 547 U.S. at 697. OPM's interpretation badly misses this mark, ignoring a vast swath of established Missouri law by reading section 8902(m)(1) with reckless abandon.

Try as Coventry might, no quantity of wordsmithing encrusted with partial quotations can turn the tide. OPM's regulation does not alter this Court's decision in *Nevils I*. This is true for three principal reasons:

1. **OPM's interpretation of section 8902(m)(1) should receive no deference.**

- The best reading of Supreme Court precedent, scholarly literature, and the underlying reasoning for agency deference all suggest that an agency's interpretation of an express preemption clause should probably receive no

deference at all, and certainly not full *Chevron* deference. The Supreme Court said as much in *Smiley*, suggesting that deference is appropriate for substantive clauses, but not preemptive ones. *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 744 (1996). Many Constitutional scholars agree, suggesting that Congress alone can decide preemptive reach. Legal reasoning suggests the same, because an agency cannot possibly have more power than Congress – who delegates the power – or Courts who are in charge of checking it.

- Further, even if an agency had the power to interpret an express preemption clause, this would require clear delegation of explicit authority to do so. A general delegation to implement an Act is not enough to allow an agency to enlarge its power at will. No such extraordinary delegation exists here.
- Even if an agency could interpret an express preemption clause and there were proper delegation, the agency would still have to abide by the same rules of interpretation that bind the courts and Congress. Otherwise, agencies would have more power than the party that delegated the power, an absurd result. In this case, OPM ignored the presumption against preemption and an obligation to engage in constitutional avoidance, rendering its regulation a nullity.

2. **OPM injected a new issue in the case – namely OMP admitted through its regulation that subrogation and reimbursement are distinct legal concepts.** As a result, *according to OPM,* it is clear for the first time that the clause at issue

here does not preempt state law because there is no reimbursement clause to do the preempting.

3. **Constitutional Avoidance Requires Adopting a Reasonable Reading that Avoids Implicating or Creating Constitutional questions.** In this case, that means either ruling that there is no reimbursement clause to preempt state law, or that "benefits" and "coverage" don't mean subrogation and reimbursement. Any other reading compounds existing constitutional issues and creates new ones.

REPLY ARGUMENT

I. OPM's INTERPRETATION OF AN EXPRESS PREEMPTION CLAUSE SHOULD RECEIVE NO DEFERENCE.

OPM"s interpretation of section 8902 does not alter the outcome in this case because A) it is for courts, not federal agencies, to interpret express preemption clauses, B) even if agencies could interpret preemption clauses, they would need express authority to do so (and this Court already held OPM does not have such authority), and C) the interpretation, even if allowed and authorized, would have to follow the same rules as a court does (and OPM didn't).

A. It Is the Role of Courts to Interpret Express Preemption Clauses, Not Federal Agencies.

Coventry asserts in its brief that "[i]t is blackletter law that a federal agency's reasonable interpretation of a federal statute it administers is controlling under *Chevron*." Resp. 29. This is true enough. But that wouldn't advance Coventry's case because there is nothing to suggest that Congress intended for OPM to "administer" the express preemption clause found at section 8902(m)(1). In fact, there is no "blackletter law" that holds that agencies can interpret express preemption clauses at all. Indeed, although the Supreme Court has not settled the question, there is good reason to believe it would hold that courts – not agencies – interpret express preemption clauses. This is consistent with what many renowned constitutional scholars suggest too. And it is wholly consistent with reason, for neither the rationales underlying agency deference nor principals of federalism suggest that agencies can determine their own preemptive reach.

1. Supreme Court Precedent Suggests that Courts Review the Meaning of Preemptive Clauses *De Novo* and that a Presumption against Preemption Has to Apply.

Based on its extensive use of overly-truncated citation, Coventry asserts that an agency receives deference for all of its opinions, "including the 'meaning' of a provision that 'preempts state law.'" Resp. 29. It repeats this assertion yet again – again using pieced-together quotes - asserting, "[t]he Court reserved judgment on whether *Chevron* applies to an agency's view on 'the question of *whether* a statute is pre-emptive.'" 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." Resp. 57. One wonders what Coventry is hiding. Why can't it cite even one full sentence from *Smiley*, a case it says helps its position?

The answer is pretty clear when one actually reads *Smiley:* No reading of it supports Coventry's position. *Smiley* addressed the Comptroller's interpretation of the word "interest" in the National Bank Act. 527 U.S. at 737, where the word "interest" did not appear in a preemption clause. Smiley argued that the Court should apply a presumption against preemption in interpreting the meaning of "interest," thereby trumping the Comptroller's interpretation. *Id.* at 746. The Court disagreed, precisely because the clause at issue was substantive – and not preemptive. The Court held it would defer to the agency when dealing with substantive questions such as what "interest" means. But it made clear that if the clause were preemptive, the rules would be different.

> This argument [that the agency is not entitled to deference since its interpretation of interest could impact state law] 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. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that § 85 pre-empts state law.

Id. at 744.

Lest there remain any doubt that the Court was drawing a line between how it treats substantive clauses and preemptive clause, it makes this clear only one sentence later:

> What is at issue here is simply the meaning of a provision that does not (like the provision in *Cipollone*) deal with pre-emption, and hence does not bring into play the considerations petitioner raises."

Id. Those "considerations" that did not apply in *Smiley*, but would apply if a preemption clause were at issue, were that a *court* should interpret the clause and it should do so based on a presumption against preemption.

At its core, then, *Smiley* creates two categories of statutory clauses – substantive ones and preemptive. An agency can interpret a purely substantive clause. If all other *Chevron* conditions are met, the interpretation will receive deference. This is true even if the interpretation will cause some preemption by implication. However, when the question is not substantive, but preemptive – that is, when it asks "whether" state law is preempted - the Supreme Court assumed without deciding that the question "must always be decided *de novo* by a court." *Id.* at 744.

Coventry disagrees, arguing that 8902(m)(1) is a substantive clause. Coventry argues that the question is not "whether" it preempts, because it is clear it does, and that therefore the clause is not of the "preemptive" kind discussed in *Smiley.* Resp. 56-57. Coventry is engaging in sleight of hand, a clever semantic game.

Smiley doesn't suggest that "whether" a clause preempts is a one-time question, asked generically. The answer for any preemption clause would be yes. The appropriate

and more difficult question remains: whether the clause preempts specific state laws. If any doubt remains that this is the appropriate question, it is resolved by reading *Cipollone*, cited with approval by *Smiley*. This case doesn't appear in Coventry's brief at all.

Reading *Cipollone* makes clear why Coventry is allergic to it. *Cipollone* holds that when there is an express preemption clause, a court still asks "whether" the clause preempts specific state laws. Put another way, an express preemption clause is always in the "preemptive" category. In *Cipollone*, the Supreme Court considered the Federal Cigarette Labeling and Advertising Act. Later amended at 15 U.S.C. §§ 1331-1340. The Labeling Act contained an express preemption clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514 (U.S. 1992). It said that "no *statement* relating to smoking and health shall be required *in the advertising* of properly labeled cigarettes." *Id.* Despite the fact that it was clear at least some state law was preempted, the Courts still asked whether the clause preempted specific state common law tort claims. And in asking this "whether" question, it applied the presumption against preemption since the law would impact tort claims. The Court wrote:

> First, we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading . . . .

Id. at 518. Later in the same case, echoing this sentiment, the court wrote:

> [W]e must fairly but-in light of the strong presumption against pre-emption-narrowly construe the precise language of § 5(b) and we must look

> to each of petitioner's common-law claims to determine whether it is in fact pre-empted.

Id. at 523.

As such, *Cipollone* teaches the precise opposite of what Conventry suggests. Coventry claims that once it is clear a statute preempts some state law, the clause should be treated as substantive and the "whether" question disappears. This would mean the agency gets deference and there is no presumption against preemption. But *Cipollone* doesn't support Coventry's reading. Instead, even when it is clear a statute preempts to some degree, the question is still "whether" it preempts the specific state law at issue. As a result, by definition, an express preemption clause is "pre-emptive" not "substantive" under *Smiley*. Read together, *Smiley* and *Cipollone* teach that when reading an express preemption clause 1) a court should review the clause *de novo*, and 2) the presumption against preemption applies. These two principals destroy Coventry's arguments in this appeal, because without *Chevron* deference and the right to skip the presumption against preemption, this case is over. The issues were fully decided in *Nevils I.*

Wyeth v. Levine offers further support. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Although Coventry attempts to distinguish *Wyeth* because it does not directly address *Chevron* deference, the distinctions miss the mark. *Wyeth* matters in this case because it demonstrates that, contrary to what *Coventry* suggests, the Supreme Court does not fully defer to agencies when they opine on preemption.

> This Court has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements. In such cases, the Court has

> performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption.

Id. at 576.

Again, we can see the U.S. Supreme Court defers to the agency on substantive interpretations, even when those interpretations might impact preemption. But the Court does not defer to the agency's position on what the preemptive impact is. Put another way, it defers on the substantive issue, but not on the preemptive one. If the Court won't defer to an agency's position regarding when there is a conflict between state and federal law – something that is at least arguably in the realm of agency expertise – it certainly won't defer to an agency's position on what an express preemption clause means. Even *Medtronic*, offered by Coventry as additional support, does not accord *Chevron* deference to the interpretation of an express preemption clause, even when that interpretation is to read it narrowly. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996). Instead, the Court holds that the interpretation "substantially informs" the Court's interpretation, which the Court says it reached based primarily on the plain reading of the statute's text. *Id.*

Even the *Medtronic* dissent, who was upset the Court paid any attention at all to the agency's position, acknowledges this, noting that "apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'infor[m]' the Court's interpretation." The dissent also notes that "it is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (J. O'Connor dissenting). It cites *Smiley* for support.

In sum, the Supreme Court has not ruled directly and clearly on whether an agency can ever receive deference when interpreting an express preemption clause, but the best indications are that such interpretations will not receive *Chevron* deference. A *de novo* review by a Court is the appropriate method. Indeed, counting votes a few years back, one scholars observed that "five of the current Justices have joined opinions disclaiming deference to agency findings of preemption." Shutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?* 45 Tulsa L. Rev. 197, 207 (2009).

2. Concluding that Congress and Courts Should Create and Interpret Express Preemption Clauses is Supported by Respected Constitutional Authorities and Reason.

Both those who study constitutional issues and legal reasoning regarding the issue weigh in favor of refusing deference to OPM's interpretations.

"Shouldn't it be the Congress of the United States that would preempt something by statute . . . rather than a regulatory body . . . such as the OCC?" This was the first question directed to the Comptroller at a Congressional hearing in 2004. Some scholars who address agency power note that this question is the "most troubling frontier of *Chevron* deference." *Federal Preemption- Chevron Deference – Second Circuit Finds National Bank Operating Subsidiary Exempted from State Law*, 119 Harv. L. Rev. 1598, 1598 (2006). Indeed, members of Congress and scholars recognize that applying *Chevron* deference to decisions about whether state law is preempted, as opposed to what substantive statutes should mean, is not necessarily wise. An article in the Harvard Law

Review noted that when dealing with questions of preemption, it may not make sense to defer to agencies at all.

> A modestly sized but compelling scholarly literature has called into question whether *Chevron*'s rationales retain much persuasive force in preemption contexts. Upon inspection, both justifications for *Chevron* deference--the technical expertise of federal agencies and their superior political accountability vis-à-vis the federal judiciary--prove ambiguous when the balance between federal power and states' rights is implicated.

Id. at 1601.

This is true for at least two reasons. First, "when preemption issues arise, agencies lose much of their expertise advantage relative to courts." *Id.* Although they may retain an advantage regarding the technicalities of the substantive issues (there is no reason to believe such an expertise exists here given that OPM does not administer its own insurance plan and insurance is a legal issue that courts understand), the agency has no expertise regarding preemption itself.

> The benefits of preemption must be weighed against the value of preserving state autonomy and core regulatory functions, either out of respect for states qua sovereigns or in order to preserve state laboratories of policy innovation. Such concerns are both abstract and political, extending beyond the particularized expertise possessed by any agency.

Id. at 1602. Courts, on the other hand, are adept at considering such issues.

Second, although agencies are allegedly more accountable than Congress for their interpretations, that isn't true if they are allowed to determine their own powers. "[I]n the preemption context, the general consensus is that agencies are not designed to represent the interests of states." *Id.* Indeed, it seems OPM has no interest in representing Missouri's interests, or even considering them. Instead, it is hell bent on displacing them, even if doing so will produce only marginal gains, will completely displace state law, and will produce unfair results for federal employees in Missouri. This one-sided approach to preemption is prone to produce overreach precisely because "it interferes with the application of preexisting substantive canons of interpretation." *Id.* at 1603.

It cannot be that Congress is bound to consider the pros and cons of preemption, Courts are bound to a presumption against preemption, but agencies are able to do as they please. The created cannot be less checked than the creator. And agencies can't be given a way to bypass a court's role in curbing preemption, which you would never know it from Coventry's brief - is still disfavored activity.

Other respected Constitutional scholars go further, suggesting that the decision regarding when to preempt state law is a non-delegable duty of Congress. Cass Sunstein argues that allowing an agency to determine its own preemptive reach is always inappropriate, as it would displace an important role of federalism – that Congress has the power to preempt, and also the exclusive responsibility to decide when it does. Sunstein, Cass, *Nondelegation Canons,* 67 U. Chi. L. Rev. 315, 316 (2000).

Belonging in the same category is the idea that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law.

> The constitutional source of this principle is the evident constitutional commitment to a federal structure, a commitment that may not be compromised without a congressional decision to do so--an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress. Notice that there is no constitutional obstacle to national preemption; Congress is entitled to preempt state law if it chooses. But there is a constitutional obstacle of a sort: the preemption decision must be made legislatively, not bureaucratically.

Id. at 331. These well-reasoned positions are in-line with much of the United States Supreme Court's rulings, and are likely to inform any future final decision by that Court.

3. Prohibiting Agencies from Determining Their Own Preemptive Reach Is Consistent with Sound Policy.

Coventry's position, if accepted, violates the legal equivalent of the law of conservation of energy – energy in a system is constant. In law this means a principle cannot delegate to an agent more power than he has. And Congress cannot delegate more authority or flexibility to OPM than Congress itself has. Congress' express preemption clauses are subject to court review. And they are reviewed under accepted cannons, including constitutional avoidance and a presumption against preemption. The statutes are also interpreted first according to their plain meaning, and if there is ambiguity, based on Congressional intent.

If Coventry's position were accepted, however, an agency wouldn't be subject to these same rules. It could, as OPM has done here, interpret the statute without any presumption against preemption or effort to avoid implicating constitutional questions. And it could select a reading of the statute that is far less reasonable and far less plausible than another. Then, to cover these errors, it could simply claim *Chevron* deference. Whatever sense *Chevron* deference makes when interpreting what substantive statutes mean, it makes no sense when interpreting express preemption clauses. There isn't a loophole that lets agencies do what Congress cannot do.

Such a loophole would be deeply troubling. Agencies are immensely powerful, working as legislators (when they make regulations), the executive (when they enforce statutes and regulations), and the judiciary (when they hold administrative hearings to resolve complaints). As Justice Roberts explained in his dissent in *City of Arlington*, "[t]he administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1878 (2013) (J. Roberts dissenting) (internal citations and quotations omitted). And the bureaucracy is growing. "[I]n the last 15 years, Congress has launched more than 50 new agencies. And more are on the way." *Id.*

If these agencies can expand their preemptive reach unilaterally, and without being subject to the same checks that Congress would be, then the created becomes more powerful than the creator. That's dangerous for federalism and fundamentally inconsistent with the checks and balances established in the Constitution.

In addition to creating super-agencies that define their own powers and can expand their reach at will, there is another problem with adopting Coventry's position. It would invariably lead to results that would not be as fully considered as they would have been through a legislative process. For instance, in this case, if OPM were allowed to rewrite Missouri substantive law, it would not produce the uniformity OPM allegedly seeks. Instead, it would produce vast inequities for federal employees in Missouri - and other states. For example, what if Mr. Nevils' settlement was for $6,000? After fees and expenses, he might recover only $3,000. But Coventry would seek $5,200 because that it what it paid in medical bills. The result would be that Mr. Nevil's claim is a negative value lawsuit. He would lose money to pursue someone who injured him. Under OPM's new rules – Coventry would be *obligated* to seek reimbursement. Therefore, a law designed to promote uniformity would do just the opposite; it would subject Mr. Nevils to pressures entirely different from the pressures other non-federal litigants in Missouri face. And it would deter Mr. Nevils from bringing his claim at all, making reimbursement a hypothetical gain to OPM that in reality, is discouraged by its own policy. OPM might assert that some federal employees face this unfair situation already, and that is true, but that is hardly a reason to spread the inequity further.

* * *

OPM is not an expert at preemption, and it shows. This Court should not defer to OPM's rule, as the law, constitutional authorities, and reason don't support such deference. To accept OPM's power grab would be to encourage an unprecedented expansion of agency power that is inconsistent with our system of government.

B. Congress Did Not Delegate Authority to OPM to Interpret Section 8902(m)(1).

Although the question of whether an agency can receive *Chevron* deference when interpreting an express preemption clause is intriguing and presents a cutting edge legal issue for the Court, it may well prove academic. That is because this Court could "assume without deciding" – just as the United States Supreme Court did – that questions of preemption should be decided by a Court *de novo* and then promptly resolve this case on simpler grounds. In fact, it could resolve this case based solely on ground it has already considered. In *Nevils I* this Court held that "while informal agency interpretations of statutes are relevant, 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 v. Grp. Health Plan, Inc.*, 418 S.W.3d 451, 457 n.2 (Mo. 2014). And that is exactly right. A general delegation of authority to enact the purposes of FEHBA cannot be read as delegation of the extraordinary power to determine the scope of preemption.

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.

Coventry tries mightily to escape the conclusion that it lacks authority to interpret 8902(m)(1). To do this it attempts to rewrite this Court's own footnote 2. It reads this footnote primarily to say that this Court only refused to give deference to OPM because its position was laid out in an opinion letter, not a formal regulation. Coventry writes:

> Although Coventry and the United States each urged the Court to defer to OPM's position that FEHBA preempts state antisubrogation and antireimbursement laws, 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. OPM's new regulation directly addresses that concern and eliminates any basis for declining to defer to OPM's position.

This does not seem to capture the gist of what this Court found most problematic about the opinion letter – that OPM overstepped its authority. In response to this, OPM

clings to a general delegation of authority as somehow enabling it to interpret section 8902(m)(1). That delegation states, "[t]he Office of Personnel Management may prescribe regulations necessary to carry out this chapter." 5 U.S.C.A. § 8913(a) (2015). The remaining subsections of section 8913 contain other delegations, such as the right to determine when an employee enrolls in insurance, what employees qualify for insurance, and when coverage begins and ends. ." 5 U.S.C.A. § 8913(b)(c) (2015). As such, the most natural reading of section (a) is that it covers situations that might not have been thought of in sections (b) and (c). It seems far less likely that the general provision was meant to give expansive authority to implement FEHBA by any means necessary, including interpreting the express preemption clause. After all, if the delegation in (a) is that broad, for what reasons were (b) and (c) included?

Does the general delegation actually vest OPM with expansive power to interpret 8902(m)(1)? OPM's predecessor agency provided the answer years ago, and the answer is far more credible than OPM's recently announced position because it wasn't crafted in response to litigation (losses). OPM's predecessor agency itself acknowledged at the time of § 8902(m)(1)'s enactment that "no legal basis exists" for it "to issue a regulation restricting the applicability of State laws to FEHBA contracts." Comptroller Report, at 15 (1975). 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.

OPM's predecessor was precisely right. The type of generic delegation found in FEHBA has consistently been rejected by the Supreme Court as insufficient to cause the court to defer to the agency. *See e.g. Cuomo v. Clearing House Ass'n L.L.C.*, 557 U.S. 519, 534-45 (2009), concluding that in the absence of any express grant of authority, an OCC regulation that interpreted an ambiguous term in an express preemption clause impermissibly sought to declare the preemptive scope of the National Bank Act; *Wyeth*, 555 U.S. at 576 (holding that a generic authorization for FDA rulemaking under a statute does not "authorize[] the FDA to pre-empt state law directly" through a regulation); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650(1990) (refusing to read a delegation of authority that was silent on preemption as including the authority to decide the preemptive scope of the federal statute because "[n]o such delegation . . . is evident in the statute."

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.

And this is a good thing. In Coventry's world, cases and statutes don't necessarily mean what they say. A preemption clause that discusses benefits and coverage means "subrogation and reimbursement" and a delegation clause that is a general catch-all to allow OPM to deal with matters not specifically enumerated but essential to

implementing an insurance plan, really means the agency can determine its own power, even if it means dramatically expanding preemption in a way Congress never mentioned and didn't intend. Indeed, for Coventry and OPM, a general delegation clause, a reference to benefits, and a little *Chevron* deference is a recipe for ignoring the United States Supreme Court, so that a "limited" clause can become unlimited, and "cautious" reading can become an expansive one.

Fortunately, the law does not require this Court to defer to such readings. Nevils respectfully requests this Court affirm its previous holding and remand this case to the trial court for further consideration.

C. OPM's Regulation Should Not Receive Deference Because OPOM Did Not Apply Basic and Mandatory Cannons of Construction to Interpret Section 8902(m)(1).

Even if an agency could interpret express preemption clauses, and even if Congress expressly delegated authority to do so, that agency would have to interpret the statute according to the same principles that would bind a court. *Com. of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996). The most important is the presumption against preemption. As already discussed, it applies when federal law would intrude on traditional state domains. Although Coventry asserts that this case actually involves uniquely federal issues, that argument deserves little response. Missouri law regarding reimbursement dates back to before the civil war, is designed specifically to protect

Missouri citizens from unfair results from reimbursement or subrogation, and relates almost exclusively to state based tort claims is a state issue. Those are issues uniquely reserved to the state. The fact that the federal government wants badly to interfere, and will work very hard to do so, doesn't change that fact.

Indeed, this Court already concluded that the presumption against preemption applies. *Nevils* ,418 S.W.3d 455. And if it applies when this Court interprets the statute, it applies when OPM does. But OPM didn't apply the presumption, and it argues it doesn't have to. This is flatly wrong. *Commonwealth of Massachusetts. v. U.S. Department of Transportation,* 93 F.3d 890, 895 (D.C. Cir. 1996) is instructive. In that case, the DOT tried to interpret a statute to create broad sweeping preemption. The Court assumed that the DOT's interpretation could receive *Chevron* deference, then rejected the interpretation anyway. It concluded that an interpretation at war with the presumption against deference was plainly unreasonable. *Id.*

Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013), provides additional insight. The concurrence in that case considers what happens when the law of lenity, which requires resolving ambiguities in favor of criminal defendants, confronts *Chevron* deference. This happens only when a hybrid statute that creates civil and criminal penalties is subject to agency interpretation. Judge Sutton concludes that *Chevron* must give way to the rule of lenity. He comes to this conclusion simply, and ingeniously. One can do no better than to quote Judge Sutton:

> Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles. If you believe that

> *Chevron* has two steps, you would say that the relevant interpretive rule—the rule of lenity—operates during step one. Once the rule resolves an uncertainty at this step, there remains for *Chevron* purposes, no ambiguity ... for an agency to resolve.

Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 731 (6th Cir. 2013). He concludes this "means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Id.*

The same reasoning found in *Carter* and *Massachusetts* is sound in this case. OPM should first interpret the statute using appropriate tools, including a presumption against preemption and the constitutional avoidance doctrine. As discussed in full in Appellant's Opening Brief, and as this Court held in *Nevils I*, application of these doctrines resolves any ambiguity in the statute. The narrower reading must prevail; 8902(m)(1) does not preempt reimbursement and subrogation law. As a result, depending on how one views it, OPM's interpretation is either invalid because it is unreasonable, or because it isn't needed at all, as no ambiguity remains after applying cannons of construction.

II. ACCORDING TO OPM'S OWN REGULATION, THE ABSENCE OF A REIMBURSEMENT CLAUSE – WHICH IS DISTINCT FROM A SUBROGATION CLAUSE – MEANS THERE IS NO PREEMPTION OF MISSOURI LAW IN THIS CASE.

As discussed in detail in Appellant's Opening Brief, OPM's new regulation injects a new issue in this case. Namely, it makes clear that the only way Nevils would owe money to Coventry is if Coventry's contract terms with Nevils preempt Missouri law. Specifically, since OPM sought the money from Nevils after he did all the work of litigating the case and settling it, the contract would have to allow for reimbursement. *According to OPM*, reimbursement and subrogation are distinct contractual rights. This constitutes a waiver of any previous position by OPM that the clauses were interchangeable. The new regulations – that OPM says were enacted after careful consideration and public hearings – make clear that both a subrogation clause and a reimbursement clause must be included in all contracts. Since Mr. Nevils' insurance contract doesn't have a reimbursement clause, even if 8902(m)(1) did allow contract terms to preempt Missouri law, the clause couldn't do that here.

Coventry says this issue was waived by Nevils, but that isn't the case. Coventry injected this issue into this case when it established clearly, for the first time, that it construed the two terms as distinct. Further, the purpose of issue preservation at the trial court is to avoid ambushing that court. Here, there was no way to address the new regulation, or its implications regarding reimbursement, at that court. As a result, the issue is now ripe in this case.

According to OPM's regulation, it doesn't matter whether Missouri law applies, or some sort of federal common law applies, as neither would allow Coventry to escape the position it has taken. It cannot have it both ways. It can't say its regulations are reasoned and thought out, then say that they don't mean anything. Nevils contends they do not

have preemptive effect for all the reasons detailed in this brief, but that doesn't mean the positions taken by OPM and Coventry aren't binding on them. Coventry must sleep in the bed that OPM made for it.

III. READING SECTION 8902(m)(1) TO PRODUCE EVEN BROADER PREEMPTION THROUGH CONTRACT TERMS COMPOUNDS CONSTITUTIONAL PROBLEMS AND SHOULD BE AVOIDED.

Coventry says that Nevils abandoned, or didn't raise, a constitutional argument. However, as the concurrence makes clear, the issue is alive in the case. It couldn't appear in the concurrence in *Nevils I* yet be waived for *Nevils II.* Further, Coventry's waiver argument rests on a technical approach, designed (again) to cherry pick quotes to reach a desired result. Coventry writes that Nevils argues that "'*construction* of the FEHBA statute" which Nevils mistakenly imputed to Coventry "is unconstitutional.'" Resp. 85 (emphasis in original). It argues this doesn't preserve the issue since Coventry's position is that FEHBA itself preempts. It is a little difficult to even figure out what distinction Coventry is trying to make. In any event, Mr. Nevils still contends that the way Coventry reads the statute is unconstitutional. But more importantly, he asserts that reading the statute to reach reimbursement and subrogation compounds Constitutional problems. Namely, it allows contract terms to preempt more broadly while simultaneously vesting agencies with authority in excess of what the Constitution allows.

There is a simple way to avoid these results and at least cabin off constitutional issues. This Court should hold that there is no preemption because there is no reimbursement clause. This avoids all constitutional constructions. Alternatively, holding that OPM cannot interpret section 8902(m)(1) at least stems the tide of constitutional issues, even if this Court invalidates the clause entirely.

CONCLUSION

This Court has the opportunity to be one of the first in the nation to weigh in on OPM's regulation, and in doing so, to set precedent regarding how far agencies may bootstrap their own authority in order to intrude further on state law. All signs points to a straightforward answer: OPM overstepped. It overstepped by creating rule it had no authority to create, and then creating the rule without any regard to the presumption against preemption or constitutional avoidance doctrines. Compounding issues, OPM made clear through its own rulemaking that in this case, the clause that would preempt under Coventry's theory, isn't even at issue in this case. As such, accepting OPM's interpretation, and Coventry's position, would invite havoc, erode federalism, embolden agency overreach, and cause Mr. Nevils and others like him significant harm.

Nevils respectfully request this Court reaffirm its decision in *Nevils I*, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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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), is in Microsoft Word format using Times New Roman 13 point font and contains 6,866 words (of the word limit of 7,750 words), exclusive of the cover, certificate of service, certificate required by Rule 84.06(c) and signature block.

I further certify that on November 30, 2015, I electronically filed the foregoing Appellant's Reply Brief on Remand with the Clerk of the Missouri Supreme Court by using the Missouri eFiling system. I certify that all parties in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

/s/ John Campbell

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