IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,

Appellant,

v.

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

Respondent.

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

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

AMICUS CURIAE BRIEF OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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INTRODUCTION

The United States respectfully submits this *amicus curiae* brief in support of respondent.

Under the Federal Employee Health Benefits Act (FEHBA), the federal government contracts with insurance carriers to provide health insurance to federal employees and their families, and pays tens of billions of dollars of the program's premiums. If a FEHB contract term "relates[]" to "benefits" or "payments with respect to benefits," FEHBA preempts any state law that "relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The question here is whether this statute preempts state laws that prevent FEHB carriers from enforcing contractual rights of subrogation and reimbursement.

This Court previously concluded that this statute does not preempt Missouri's anti-subrogation law. *See Nevils* v. *Group Health Plan, Inc.*, 418 S.W.3d 451, 460 (Mo. 2014) (Appellant's App. 6). The U.S. Supreme Court granted certiorari, vacated this Court's decision, and remanded for consideration of the issue in light of a new regulation issued by the Office of Personnel Management (OPM), which is the federal agency responsible for administering the FEHB program. *See*

135 S. Ct. 2886 (2015). The new OPM regulation concluded that subrogation and reimbursement provisions in FEHB contracts relate to benefits and benefit payments, and therefore under the statute are effective notwithstanding contrary state law. *See* 80 Fed. Reg. 29,203 (May 21, 2015) (Appellant's App. 17).

OPM's regulation is, as both this Court and the U.S. Supreme Court have recognized, a "plausible," *Nevils*, 418 S.W.3d at 545; *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 698 (2006), and hence reasonable, interpretation of the statute. The Tenth Circuit recently upheld the same OPM regulation that is at issue here. *See Helfrich* v. *Blue Cross & Blue Shield Ass'n*, __ F. 3d __, No. 14-3179, slip op. (10th Cir. Oct. 29, 2015). Accordingly, FEHBA preempts Missouri's anti-subrogation law, and the judgment of the court of appeals should be affirmed.

POINT RELIED ON

POINT 1: FEHBA Preempts Missouri's Anti-Subrogation Law.

Helfrich v. *Blue Cross & Blue Shield Ass'n*, __ F. 3d __, No. 14-3179, slip op. (10th Cir. Oct. 29, 2015)

City of Arlington v. *FCC,* 133 S. Ct. 1863, 1874 (2013)

Empire HealthChoice Assurance, Inc. v. *McVeigh*, 547 U.S. 677 (2006)

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996)

OPM Final Rule, 80 Fed. Reg. 29,203 (May 21, 2005) (Appellant's App. 17)

5 C.F.R. § 890.106

ARGUMENT

POINT 1: FEHBA Preempts Missouri's Anti-Subrogation Law.

A. The Federal Employee Health Benefits Act provides: "The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1).

In *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), the Supreme Court left open the question whether the terms in FEHB contracts providing for subrogation and reimbursement "relate to the . . . extent of coverage or benefits" or "payments with respect to benefits," 5 U.S.C. § 8902(m)(1), and thus preempt state anti-

subrogation and reimbursement laws. On the one hand, the Supreme Court observed that "[r]eading the reimbursement clause" in a FEHB contract "as a condition or limitation on 'benefits' received by a federal employee," "the clause could be ranked among '[contract] terms . . . relat[ing] to . . . coverage or benefits' and 'payments with respect to benefits,' thus falling within § 8902(m)(1)'s compass." *McVeigh*, 547 U.S. at 697. "On the other hand," the Court continued, "a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved, and corresponding 'payments with respect to benefits' have been made to care providers or the insured." *Id.* "With that consideration in view, § 8902(m)(1)'s words may be read to refer to contract terms relating to the beneficiary's entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's postpayments right to reimbursement." *Id.* (emphasis omitted). The Court concluded that it "need not choose between those plausible constructions" of the preemption clause "[t]o decide this case." *Id.* at 698.

OPM recently resolved through notice-and-comment rulemaking the question left open by *McVeigh*. The OPM regulation provides that

"[a]ny FEHB carriers' right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. § 890.106(b)(1). Thus, "[a] carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1)." *Id.* § 890.106(h). "These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." *Id.*[1]

The OPM regulation is a reasonable interpretation of the statute that Congress charged OPM with administering through rulemaking,

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[1] OPM also created a prospective requirement that all FEHB contracts shall explicitly provide that benefits and benefit payments are conditioned on FEHB carriers' exercise of subrogation and reimbursement rights. *See* 80 Fed. Reg. at 29,204 (discussing 5 C.F.R. § 890.106(b)(2)) (Appellant's App. 18).

see 5 U.S.C. § 8913(a), and the regulation is therefore controlling here, *see City of Arlington* v. *FCC,* 133 S. Ct. 1863, 1874 (2013). As this Court observed in its prior decision, *Nevils*, 418 S.W.3d at 454-55, the Supreme Court in *McVeigh* expressly acknowledged that it is "plausible" to regard FEHB contract terms providing for subrogation and reimbursement "as a condition or limitation on 'benefits' received by a federal employee." 547 U.S. at 697. It therefore left OPM free to interpret the statute to preempt state anti-subrogation and reimbursement laws. *See National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). And as OPM explained, its interpretation "comports with longstanding Federal policy and furthers Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." 80 Fed. Reg. at 29,203 (Appellant's App. 17). "The FEHB program insures approximately 8.2 million federal employees, annuitants, and their families, a significant proportion of whom are covered through nationwide fee-for-service plans with uniform rates." *Id.* "The government pays on average approximately 70% of Federal employees' plan premiums." *Id*. (citing 5 U.S.C. § 8906(b), (f)). "The government's share of FEHB premiums in

2014 was approximately $33 billion, a figure that tends to increase each year." *Id.* OPM estimated that "FEHB carriers were reimbursed by approximately $126 million in subrogation recoveries in that year." *Id.* Accordingly, "[s]ubrogation recoveries translate to premium cost savings for the federal government and FEHB enrollees." *Id.*

The Tenth Circuit recently upheld the validity of this regulation in *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, __ F. 3d __, No. 14-3179, slip op. (10th Cir. Oct. 29, 2015). The court recognized that a right to reimbursement of FEHB benefits is "tied directly to 'payments with respect to benefits'" within the meaning of 5 U.S.C. § 8902(m)(1). *Helfrich*, slip op. at 31. The court correctly explained that "a carrier's contractual right to reimbursement and subrogation arises from its payment of benefits; and an enrollee's ultimate entitlement to benefit payments is conditioned upon providing reimbursement from any later recovery or permitting the Plan to recover on the enrollee's behalf." *Id.*

The court also concluded that OPM's regulation "strongly buttress[ed]" that conclusion. *Helfrich*, slip op. at 34. The court observed that OPM's views were entitled to weight because "[a]s the agency that has negotiated FEHBA contracts for federal employees for

years, OPM has deep knowledge of the impact and interrelationships of contractual provisions." *Id.* at 38. "Its longstanding and persuasively explained view that subrogation and reimbursement provisions are directly tied to employee health benefits and advance the congressional purposes served by § 8902(m)(1)," the court continued, "is, in our view, of sufficient weight to persuade us to agree with its conclusion regarding preemption." *Id.* at 38-39.[2]

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[2] Despite never advancing this argument at any stage in the prior Missouri court proceedings, plaintiff now contends that the contract contains no right to "reimbursement" because it only mentions "subrogation." Pl. Br. 20-25. The contract in this case provides that the carrier "shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members." Pl. Br. 9 n.2. It is OPM's understanding that, under this clause of the contract, the carrier was permitted to pursue both subrogation and reimbursement recoveries for FEHB members. While "subrogation" and "reimbursement" are indeed "separate legal and contractual rights," Pl. Br. 22 (citing OPM regulations), it is also true that the term "subrogation" is often in FEHB

Continued on next page.

B. Plaintiff provides no persuasive reason to disregard the OPM regulation and create a conflict with the Tenth Circuit.

1. Plaintiff argues that OPM's regulation is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), because OPM is interpreting the scope of an express preemption clause. Pl. Br. 39-44. The Tenth Circuit in *Helfrich* found it unnecessary to decide whether the OPM regulation was entitled to full *Chevron* deference, because it correctly upheld the validity of the agency's regulation even under the more demanding, less deferential standard of *Skidmore* v. *Swift*, 323 U.S. 134 (1944). *See Helfrich*, slip op. at 37-38. Likewise, this Court may uphold the regulation without reaching the question of *Chevron* deference.

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contracts used in a generic sense to encompass both a right of subrogation and a right of reimbursement, and that is the sense evidently meant here. *See New Orleans Assets, LLC* v. *Woodward*, 363 F.3d 372, 377 (5th Cir. 2004); *McVeigh*, 547 U.S. at 692 & n.4 (repeatedly observing that rights of subrogation and reimbursement are "linked").

If this Court reaches the issue, *Chevron* deference is appropriate. As this Court previously explained, *Chevron* deference is "typically applied 'where an agency rule sets forth important rights and duties, where the agency focuses fully and directly on the issue, where the agency uses notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority." *Nevils*, 418 S.W.3d at 457 n.2 (quoting *Long Island Care at Home Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007)). All of that is true of the regulation in question here. The Supreme Court has repeatedly applied the *Chevron* framework to an agency's construction of the preemptive scope of the statutes it administers, including express preemption clauses. *See Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 525 (2009); *New York* v. *FERC*, 535 U.S. 1, 28 (2002); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996).

In *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), for example, the Supreme Court was faced with the question whether a regulation of the Comptroller of the Currency interpreting Section 30 of the National Bank Act was valid. Section 30 was a preemption provision providing that a national bank may charge interest at the rate

allowed by the laws of the State where the bank is located. *See id.* at 737. The Comptroller's regulation interpreted this provision to supersede state laws that prohibit a national bank from charging late-payment fees that are lawful in the bank's home state. *See id.* at 740. The Supreme Court deferred to the agency's interpretation and held that this regulation was entitled to *Chevron* deference because it was a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act." *Id.* at 741.

Even more recently, in *City of Arlington*, the Supreme Court rejected the contention that the applicability of *Chevron* deference depends on a provision-by-provision analysis of the statute an agency is charged with administering. 133 S. Ct. at 1868-73. The Court held that "the whole includes all of its parts," and rejected the claim that "a general conferral of rulemaking authority does not validate rules for *all* the matters the agency is charged with administering." *Id.* at 1874. The Court noted, for example, that it had "deferred to the FCC's assertion that its broad regulatory authority extends to pre-empting conflicting state rules." *Id.* at 1871. Here, the matters OPM is charged

with administering likewise include FEHBA's preemption clause. *See* 5 U.S.C. §§ 8913(a), 8902(m)(1).

Nor is it surprising that Congress delegated OPM such authority. The statute provides for the preemption of state laws relating to health insurance or FEHB plans, where those state laws conflict with FEHB contract terms that relate to benefits or benefit payments. *See* 5 U.S.C. § 8902(m)(1). Congress, in turn, expressly delegated OPM authority to negotiate and interpret those contract terms in providing health benefits for the federal government's own employees. *See id.* § 8902(a); 5 C.F.R. § 890.105(a)(1). The preemption question here thus implicates issues at the core of OPM's specialized expertise over administration of the FEHB program. Deference to agency preemption determinations is especially appropriate when the "agency is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (internal quotation marks omitted).

FEHBA's legislative history confirms the point. As plaintiff repeatedly notes, OPM's predecessor entity, the Civil Service

Commission, had expressed doubt, before the enactment of FEHBA's preemption clause in 1978, whether the Commission had statutory authority to issue a regulation regarding FEHBA preemption. Pl. Br. 39, 42 (citing Report of the Comptroller General of the U.S.*: Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employee Health Benefits Carriers* at 15 (Oct. 15 1975) (Appellant's App. 62)). What plaintiff does not note is that this doubt led the Civil Service Commission to urge Congress to enact the preemption clause at issue in this case "giv[ing] the Commission clear authority to issue regulations restricting the application of State laws when their provisions do not parallel the provisions in the Commission's health benefits contracts." S. Rep. No. 95-903, at 4 (1978) (Appellant's App. 32). In response, Congress enacted § 8902(m)(1) to "clarify the Federal Government's and the Civil Service Commission's authority to regulate implementation of the law." *Id.* It has thus been clear since the enactment of the preemption clause in 1978 that the agency has authority to issue regulations regarding the scope of FEHBA preemption.

2. In arguing the contrary, plaintiff declares that "an agency's formal statements . . . are only entitled to deference if Congress has *explicitly* 'authorize[d]' the agency 'to pre-empt state law directly.'" Pl. Br. 40 (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 576 (2009)). But the Supreme Court has repeatedly rejected plaintiff's premise, Pl. Br. 41-42, that Congress is required to use particular magic words in order to make a delegation regarding preemption effective. *See, e.g.*, *City of Arlingon*, 133 S. Ct. at 1871; *Smiley*, 517 U.S. at 743-44. *Wyeth*, on which plaintiff heavily relies for that notion, certainly stands for no such proposition. *Wyeth* involved no notice-and-comment regulation, but rather a preamble that conflicted with the agency's traditional position on the matter. *Id.* at 576-77. The Court was careful to caution that it was not considering "the pre-emptive effect of a specific agency regulation bearing the force of law." *Id.* at 580.

Here, OPM has promulgated a formal regulation thorough notice and comment—which is within the heartland of agency action entitled to *Chevron* deference. *See City of Arlington*, 133 S. Ct. at 1868-73; *United States* v. *Mead*, 533 U.S. 218, 230 (2001). Congress, moreover, made FEHBA preemption turn on what FEHB contract terms require of

FEHB beneficiaries, which OPM has express authority not only to negotiate and interpret, but also to promulgate rules regarding. *See* 5 U.S.C. § 8902(a); 8913(a); 5 C.F.R. § 890.105(a)(1); *see also Wyeth*, 555 U.S. at 576 (citing 21 U.S.C. § 360k as an example of an explicit delegation of preemption authority) *Medtronic,* 518 U.S. at 484 n.5, 496-97 & n.15 (upholding delegation of preemption authority to the FDA under § 360k because Congress made preemption turn on what on "requirements" promulgated by the agency conflicted with state law). The effect of state law on the welfare of FEHBA beneficiaries under the terms of FEHB contracts that OPM itself negotiated falls squarely within OPM's specialized expertise, and it is clear that Congress delegated authority to the agency to speak to it through rulemaking.

Contrary to plaintiff's suggestions, Pl. Br. 44-54, OPM's rule reflects careful analysis of not only the underlying FEHB contracts, but also the text, purpose, and history of the FEHBA preemption provision. *See Helfrich*, slip op. at 34-35. As OPM, the Supreme Court, and this Court have all recognized, it is plausible to understand a condition or limitation on the receipt of benefit payments to be "related to" benefits and benefit payments on the face of the statute. 80 Fed. Reg. 931, 932

(Jan. 7, 2015); *McVeigh*, 547 U.S. at 697; *Nevils*, 418 S.W.3d at 545-55. And not even plaintiff questions OPM's further conclusion that state anti-subrogation laws, in turn, "relate to health insurance or plans" within the meaning of the statute and therefore are preempted. *See* 5 C.F.R. § 890.106(h).

FEHB contracts, moreover, concern the health benefits the federal government provides to its own employees. As OPM found, this interpretation of the preemption clause and the FEHB contract terms "furthers Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." 80 Fed. Reg. at 932 (citing FEHBA legislative history). OPM determined, in particular, that state anti-subrogation and reimbursement laws are unfair to FEHB beneficiaries because they make beneficiaries' entitlement to benefit payments, even under nationwide FEHB plans with uniform rates, depend on the accident of their state of residence. *See* 80 Fed. Reg. at 932. As the Tenth Circuit concluded, this "longstanding and persuasively explained view" is plainly entitled to deference. *Helfrich*, slip op. at 38-39.

3. Plaintiff argues that the OPM regulation contravenes the "presumption against preemption." Pl. Br. 44. The Tenth Circuit in *Helfrich*, however, correctly concluded that no such presumption applies to FEHBA. The court reasoned that "[t]he federalism concern (respecting state sovereignty) behind the presumption against preemption has little purchase in this case," given that FEHBA "governs only contracts for the benefit of federal employees." Slip op. at 30. Where contract terms relate to benefits, FEHBA expressly displaces conflicting state laws that, in turn, "relate[] to health insurance or plans." 5 U.S.C. § 8902(m)(1). "It is an understatement to say that there has been a history of significant federal presence in the area of federal employment." *Helfrich*, slip op. at 30 (internal quotation marks and citation omitted). The Court should not presume that Congress intended a patchwork of state laws to govern the provision of health insurance benefits to federal employees.

In any event, the Supreme Court has held that any presumption against preemption, even if otherwise applicable, cannot overcome an agency regulation adopting one of two plausible interpretations of an express preemption clause. The Court was faced with that question in

Smiley. In analyzing whether the agency reasonably interpreted the statute to preempt state law, the Supreme Court refused to apply a presumption against preemption, and rejected the argument that such a presumption "trumps *Chevron*" where, as here, an agency is interpreting a statute that unquestionably is preemptive. *See Smiley*, 517 U.S. at 743. The agency's rule, in short, authoritatively resolved any preexisting ambiguity in the statute. *See Brand X*, 545 U.S. at 980-86.

Plaintiff misreads the *Smiley* decision to leave open the question whether the presumption against preemption applies to an agency regulation construing an express preemption clause. Pl. Br. 47-48. But *Smiley* was clear that the presumption against preemption does not "trump[] *Chevron*" where, as is the case here, an agency promulgates a regulation construing the meaning of "a statute" that "is preemptive." 517 U.S. at 743-44. The question *Smiley* left open is whether that same rule applies to a regulation construing a statute that *does not* expressly preempt state law—an issue the Court noted was "*not* the question" before it because there was no doubt that the provision before it "pre-empt[ed] state law." *Id.* at 744; *see also id.* at 737 (discussing the

preemption clause in Section 30 of the National Bank Act). The question left open in *Smiley* therefore has nothing to do with this case, which, as in *Smiley*, concerns the substantive meaning of a clause that is expressly preemptive.

4. Plaintiff also contends that OPM overlooked the constitutional-avoidance doctrine in interpreting FEHBA to preempt state anti-subrogation law. Pl. Br. 45-47.[3] But the OPM regulation does avoid any constitutional issue. It interprets § 8902(m)(1), a federal statute, to preempt state law in certain circumstances. *See* 5 C.F.R. § 890.106(h); *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 144 (2d Cir. 2005) (Sotomayor, J.), *aff'd*, 547 U.S. 677 (2006). That is an eminently reasonable reading of the statute, which does not make contract terms themselves preemptive of state law, even where those

[3] Plaintiff's preferred interpretation, in any event, does not avoid the purported constitutional problem, because plaintiff apparently agrees that the statute preempts "state laws that would compel FEHB carriers to cover certain types of health benefits or comply with certain coverage-related issues." Pl. Br. 50.

terms may relate to benefits or benefit payments. Instead, preemption is triggered only if the relevant state law, in turn, "relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). It is therefore the statute itself that picks out which state laws are preempted. OPM's reading is a plausible interpretation of the preemption clause, and avoids the constitutional concerns expressed by Judge Wilson the last time this case was before this Court. *See Nevils*, 418 S.W.3d at 464-65 (Appellant's App. 11). Federal statutes routinely provide for preemption of state law based in part on the terms of contracts. *See, e.g.*, *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1948-49 (2013) (involving 5 U.S.C. § 8709(d)(1)); 5 U.S.C. §§ 8959, 8989, 9005(a); 9 U.S.C. § 2; 10 U.S.C. § 1103(a); 29 U.S.C. § 1144(a). Statutes of this kind present no Supremacy Clause problem.

CONCLUSION

The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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NOVEMBER 2015

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains the information required by Supreme Court Rule 55.03; complies with the limitations contained in Rule 84.06(b); and contains 3,702 words. This brief was prepared using Microsoft Word in Century Schoolbook 14-point font. The electronic version of this brief has been scanned and is free of viruses.

S/ Nicholas P. Llewellyn
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2015, I electronically filed the foregoing brief with the Clerk of the Court 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.

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