No. _____

In The

# Supreme Court of the United States

MATTHEW KOBOLD,

*Petitioner,*

v.

AETNA LIFE INSURANCE COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arizona**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This is the Federal Employee Health Benefit Act's preemption statute, 5 U.S.C. § 8902(m)(1):

> 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.

Arizona's common-law anti-subrogation doctrine, however, prohibits an insurer from asserting a reimbursement or subrogation claim against an insured's tort settlement for tort-related healthcare expenses that the insurer has paid for the benefit of that insured.

That leads to the issue: Do the plain words of the FEHBA preemption statute preempt Arizona's common-law anti-subrogation doctrine?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are named in the caption.

Pursuant to this Court's Rule 29.6, Petitioner is a private person. Respondent Aetna Life Insurance Co. is a wholly owned subsidiary of Aetna Inc. In turn, Aetna Inc. is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Kobold respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

## OPINIONS BELOW

The Opinion of the Arizona Court of Appeals is reported as *Kobold v. Aetna Life Ins. Co.*, 239 Ariz. 259, 370 P.3d 128 (App. 2016). Pet. App. 1. The Arizona Supreme Court's Order denying review is unreported. Pet. App. 13.

## JURISDICTION

The Arizona Court of Appeals entered its judgment affirming the final trial-court judgment on March 31, 2016. Pet. App. 1. The Arizona Supreme Court filed its Order denying Kobold's timely request for discretionary review on October 19, 2016. Pet. App. 13. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## RULE 29.4(b) STATEMENT

The decision below calls into question the validity of 5 U.S.C. § 8902(m)(1). The United States was not a party in the state-court proceedings (but participated as *amicus* below and previously in this Court). Section

2403(a) of Title 28, United States Code, thus may now apply.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

### 5 U.S.C. § 8902(m)(1)

> 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.

## STATEMENT

On October 9, 2006, Matthew Kobold crashed his motorcycle into piles of rock and gravel a builder and landscaper had negligently dumped into a Phoenix street. Kobold suffered severe injuries. He sued the builder and landscaper to recover damages arising from those injuries.

Kobold was a postal worker with health-insurance coverage under an Aetna Federal Employee Health Benefit Act ("FEHBA") Plan contract. FEHBA Plans provide partially-federally-subsidized health-insurance coverage for federal civilian employees through private contracts with companies such as Aetna. The Office of Personnel Management ("OPM"), a federal agency,

oversees the FEHBA program. Under the terms of Aetna's contract with Kobold, Aetna paid $24,473.53 for some of his collision-related medical bills, and then claimed a subrogation-and-reimbursement lien in that amount.

The landscaper obtained a judgment in its favor. But the builder agreed to settle and pay $145,000 to Kobold. Since Aetna was asserting a $24,473.53 FEHBA lien, the builder paid $120,526.47 of the settlement to Kobold and interpleaded the remaining $24,473.53 into the Maricopa County Superior Court in 2010.

We have been fighting over the $24,473.53 FEHBA lien ever since. On March 8, 2012, the trial court filed a Judgment directing payment to Kobold of the $24,473.53. Aetna appealed. The Arizona Court of Appeals held that the Aetna FEHBA contract's subrogation-and-reimbursement terms fell outside the FEHBA preemption statute, 5 U.S.C. § 8902(m)(1), since those contract terms:

- created only a contingent right to repayment favoring Aetna;
- bore no immediate relationship to Kobold's Plan coverage;
- bore no immediate relationship to Kobold's receipt of Plan benefits;
- had no effect on Kobold's entitlement to receive financial benefits from Aetna when he suffered a Plan-covered injury or illness;

- did not affect Kobold's right to coverage and receipt of benefits; and
- were not essential to uniformity of FEHBA coverage and benefits for eligible employees nationwide.

*Kobold v. Aetna Life Ins. Co.*, 233 Ariz. 100, 104 ¶ 15, 309 P.3d 924, 928 (App. 2013). The Arizona Supreme Court denied Aetna's petition for review.

In June 2014, Aetna filed a petition for writ of certiorari in *Kobold*.

Coincidentally, in April 2014, Aetna had filed a petition for writ of certiorari in the Missouri *Nevils* case. In *Nevils*, the Missouri Supreme Court had also held that an Aetna FEHBA Plan's subrogation-and-reimbursement terms did not fall within the FEHBA preemption statute – and did not preempt Missouri's common-law anti-subrogation doctrine. *Nevils v. Group Health Plan, Inc.*, 418 S.W.3d 451 (Mo. 2014).

On May 21, 2015, OPM issued a new rule that, without textual analysis, proclaimed that the FEHBA preemption statute preempted all state law. OPM, Final Rule, FEHB Program; Subrogation & Reimbursement Recovery, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. § 890.106).

On June 29, 2015, this Court granted the petitions for writ of certiorari in *Kobold* and *Nevils*, vacated the opinions in those cases, and remanded them to the Arizona Court of Appeals and to the Missouri Supreme Court "for further consideration in light of [OPM's]

new regulations." *Aetna Life Ins. Co. v. Kobold*, 135 S.Ct. 2886 (2015); *Coventry Health Care of Missouri, Inc. v. Nevils*, 135 S.Ct. 2886 (2015).

On remand, relying on the *Chevron* doctrine, the Arizona Court of Appeals reversed itself, deferring to OPM's new rule. *Kobold v. Aetna Life Ins. Co.*, 239 Ariz. 259, 370 P.3d 128 (App. 2016). The Arizona Supreme Court denied the petition for review on October 19, 2016. This timely petition for writ of certiorari followed.

## REASONS FOR GRANTING THE PETITION

### 1. This Court has already granted a petition for writ of certiorari for a Missouri Supreme Court opinion finding that the FEHBA preemption statute did not preempt state common-law anti-subrogation principles. Kobold's petition should be granted and consolidated with that one.

This case concerns the words of the Federal Employee Health Benefit Act's preemption statute, 5 U.S.C. § 8902(m)(1):

> 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.

This Court has already granted a petition for writ of certiorari that will determine the preemptive effect of the FEHBA preemption statute. *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S.Ct. 446 (2016).

The petition in *Nevils* arose from the Missouri Supreme Court's opinion holding that the FEHBA preemption statute did not preempt Missouri's state anti-subrogation law and that no *Chevron* deference applied to the Office of Personnel Management's regulation that would have "interpreted" the state common-law anti-subrogation doctrine out of existence. *Nevils v. Group Health Plan, Inc.*, 492 S.W.3d 918 (Mo. 2016).

Much like the Missouri Supreme Court, in its original 2013 opinion the Arizona Court of Appeals had also held that the FEHBA preemption statute did not preempt federal law. *Kobold v. Aetna Life Ins. Co.*, 233 Ariz. 100, 309 P.3d 924 (App. 2013). Then came the first petition for writ of certiorari. That resulted in a remand to the Arizona Court of Appeals to further consider its original opinion in light of new regulations that OPM had created as part of its interpretation of the FEHBA preemption statute. *Aetna Life Ins. Co. v. Kobold*, 135 S.Ct. 2886 (2015).

The second time around, the Arizona Court of Appeals held that the new regulations OPM had created were entitled to *Chevron* deference. *Kobold v. Aetna Life Ins. Co.*, 239 Ariz. 259, 370 P.3d 128 (App. 2016). Now that the Arizona Supreme Court has declined review, we are back for round two.

Because this Court has already granted the petition for writ of certiorari in the Missouri Supreme Court's case, and the issues almost the same, Matthew Kobold petitions the Court to grant a writ of certiorari in the present case as well and to combine his petition with the petition already granted.

**2. The plain words of the FEHBA preemption statute express no clear intent to preempt state anti-subrogation common-law principles.**

The FEHBA preemption statute provides that:

> 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).

Under that statute's plain words, preemption can only occur for FEHBA Plan contract "terms" that:

- relate to the nature of insurance coverage or benefits;
- relate to the provision of insurance coverage or benefits;
- relate to the extent of insurance coverage or benefits; or
- relate to payments with respect to benefits.

Unlike any other federal preemption statute, the FEHBA preemption statute's scope and effect depend *exclusively* on the "terms" of each individual private contract – here, of the contract between the FEHBA Plan provider (Aetna) and the FEHBA Plan participant (Kobold). Kobold remained entitled to the same coverage and benefits (and payments with respect to his coverage and benefits) despite any of the contract's subrogation and reimbursement terms, since those terms *only* related to a possible tort recovery.

The Arizona Court of Appeals 2016 opinion strains to conclude that "relate to" in the FEHBA preemption statute includes a connection between Kobold's "receipt of benefit payments" and Aetna's "contractual right to effectively recall the payments by subrogation or reimbursement after the insured has been compensated by a third party." *Kobold v. Aetna Life Inc. Co.*, 239 Ariz. 259, 262-63 ¶ 12, 370 P.3d 128, 131-32 (App. 2016). But there was no such contractual right. Kobold received nothing directly from Aetna.

Aetna paid the healthcare providers – not Kobold. And Aetna had no right to "recall" from Kobold any Aetna money. After all, under the Aetna FEHBA Plan's terms, Aetna never paid any money to Kobold and never would pay any money to Kobold. There was no relationship between the contract's subrogation-and-reimbursement terms and the benefits, coverage, or payments Kobold received.

The only reasonable interpretation of the Aetna FEHBA Plan's contract terms is that they do *not*

preempt Arizona's common-law anti-subrogation doctrine. That is what Division One decided in its 2013 *Kobold* opinion. *Kobold v. Aetna Life Ins. Co.*, 233 Ariz. 100, 104 ¶ 15, 309 P.3d 924, 928 (App. 2013). The only thing that changed since 2013 was OPM's May 21, 2015 new rule. But that change does not matter, since OPM's interpretation is not "reasonable."

### 3. The *Chevron* doctrine cannot transform a federal agency's "plausible" interpretation into a "reasonable" one.

The real problem is uncritical reliance on the *Chevron* doctrine, which requires lower courts to defer to a federal agency's interpretation of a statute the agency administers – if the interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Because of *Chevron*, courts "ordinarily defer" to a federal agency's interpretation of an ambiguous statute it administers. *Meyer v. Holley*, 537 U.S. 280, 287 (2003). Under the two-step *Chevron* framework for analyzing an agency's statutory interpretation, a reviewing court asks if the statute is ambiguous and, if so, whether the interpretation is "reasonable." *King v. Burwell*, 135 S.Ct. 2480, 2488 (2015). But as this Court has repeatedly held, even under *Chevron*'s deferential standard, federal agencies must work "'within the bounds of reasonable interpretation.'" *Utility Air Regulation Group v. EPA*, 134 S.Ct. 2427, 2442 (2014)

(quoting *City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013)).

If, as here, a statute is not ambiguous, *Chevron* deference never arises, and a reviewing court simply applies the statute as written.

But if a statute is ambiguous, a federal agency charged with interpreting that statute may choose among competing "reasonable" statutory interpretations. The federal agency, however, may not keep parts of a supposedly ambiguous statute that it likes and ignore the rest. *Michigan v. EPA*, 135 S.Ct. 2699, 2709 (2015). To receive *Chevron* deference, the "reasonable" interpretation a federal agency proffers for an ambiguous statute need not be the "best" interpretation. *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005). But always, the interpretation *must* be "reasonable." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

In this case, there are no competing "reasonable" statutory interpretations. The "interpretation" OPM created is not "within the zone of reasonable interpretation subject to deference under *Chevron*." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 501 (2002). No debate arises about which statutory interpretation is best, since there is only *one* "reasonable" interpretation – the one the Arizona Court of Appeals described in its original 2013 Opinion.

In its May 21, 2015 new rule, OPM simply declared that a FEHBA "carrier's rights and responsibilities pertaining to subrogation and reimbursement

under any FEHB[A] contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. § 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 C.F.R. § 890.106(h). In its new rule, OPM did not even try to explain *how* it analyzed 5 U.S.C. § 8902(m)(1) to devise an "interpretation" contrary to the statute's actual, plain words.

The Arizona Court of Appeals found OPM's interpretation "plausible" – equated "plausible" with "reasonable" – and reversed its first Opinion. *Kobold v. Aetna Life Ins. Co.*, 239 Ariz. 259, 262 ¶ 10, n. 3, 370 P.3d 128, 131 (App. 2016).

OPM's interpretation was implausible. But even if it were plausible, "plausible" is not the same as "reasonable." "Plausible" is to "reasonable" as fool's gold is to real gold. That is, a thing is "plausible" if it merely has "an appearance or show of truth, reasonableness, or worth" and is "apparently acceptable or trustworthy (but often with [an] implication of mere appearance)." 2 *Compact Edition of the Oxford English Dictionary* 2202 (1971). A thing is "plausible" if it is "superficially fair [or] reasonable." *Webster's Third New International Dictionary of the English Language Unabridged* 1736 (2002).

A thing is reasonable, however, when it accords with or is governed by "reason or sound thinking."

*American Heritage Dictionary of the English Language* 1465 (5th ed. 2011). OPM's "interpretation" reflects no reason or sound thinking. It only reflects an effort to defeat state anti-subrogation law by declaring victory – based on no analysis of the preemption statute and without addressing the fact that the FEHBA preemption statute only applies to the specific terms of each individual, private FEHBA Plan's contract. Otherwise, the "terms of any contract" phrase in the FEHBA preemption statute makes no sense.

No matter how "plausible" OPM's "interpretation" might be – it is only "plausible" by ignoring the FEHBA preemption statute's actual words. "Plausible" is not enough. *Chevron* deference requires a "reasonable" interpretation. *EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1603 (2014). Courts *only* "defer to an agency's reasonable interpretation of a statute it is charged with administering." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009). Agency interpretations that are not "reasonable constructions" get no *Chevron* deference. *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008).

**4. The *Chevron* opinion used the words "permissible" and "reasonable," but context and usage show that *Chevron* used "permissible" as a synonym for "reasonable."**

*Chevron* held that when a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based

on a permissible construction of the statute." 467 U.S. at 843. In *Chevron*'s context, "permissible" means "reasonable," since that is how *Chevron* repeatedly describes the essential quality of an agency's interpretation.

Not only in *Chevron* itself, but in later cases, this Court "offered no hint that it regards the terms as anything other than synonymous in that context." Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537, 1562 n. 119 (2006). The Supreme Court "uses 'permissible' and 'reasonable' interchangeably." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2253 n. 134 (July 1997). Indeed, in the many Supreme Court cases cited and quoted in this petition, "reasonable" overwhelmingly describes the required quality of federal-agency analysis.

Because the FEHBA preemption statute is not ambiguous, the "reasonableness" second-step of the *Chevron* inquiry never comes into play. But even if the statute were ambiguous, OPM's "interpretation" receives no deference because *Chevron* deference only applies "if the administrative interpretation is reasonable." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992). Unsurprisingly, legal commentators concur that *Chevron* deference *only* exists when a federal agency's interpretation of a federal statute is "reasonable." *See*, *e.g.*, Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 618 (Nov. 2014).

Plain-language interpretation is the approach this Court has consistently advocated as the proper way to construe statutes. *See*, *e.g.*, *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1165 (2014) (In determining a statute's meaning, this Court first looks to its language and gives its words their ordinary meaning.); *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 876 (2014) (Courts interpret statutory words using their ordinary, contemporary, and common meaning, unless the legislature supplies a different definition.). When, as here, a statute's plain words reveal its meaning, courts must apply those plain words.

This Court has whittled the *Chevron* doctrine over the years, trimming it to the point where deference is only proper when a federal agency's interpretation of an ambiguous statute is "reasonable." If so, what purpose does the *Chevron* doctrine really serve? Courts have the ability, experience, and right to interpret ambiguous federal statutes and fashion unbiased and reasonable interpretations of their meaning. Federal agencies, naturally enough, are inherently biased in their statutory interpretations, wanting them to be most beneficial for their own operations, goals, and self-interest. It is an unwise policy choice to defer to any person or entity harboring an inherent bias.

It is time for the *Chevron* doctrine to join the separate-but-equal doctrine in the dustbin of failed American judicial experiments. "In an appropriate case," and this one is as appropriate as any, "this Court should reconsider the fiction of *Chevron* and its

progeny." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131, 2148 (2016) (Thomas, J., concurring).

## CONCLUSION

The Court should grant the petition for writ of certiorari because the plain words of FEHBA's preemption statute do not preempt Arizona's anti-subrogation common law.

Respectfully submitted,

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January 13, 2017

**APPENDIX A**

IN THE
**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

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MATTHEW KOBOLD,
*Plaintiff/Counterdefendant/Appellee*,

*v.*

AETNA LIFE INSURANCE COMPANY,
*Third-Party Defendant/Appellant.*

No. 1 CA-CV 12-0315
FILED 3-31-2016

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Appeal from the Superior Court in Maricopa County
No. CV2008-023699
The Honorable John A. Buttrick, Judge (Retired)

**REVERSED AND REMANDED**
**WITH INSTRUCTIONS**

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**OPINION**

Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Patricia A. Orozco and Judge Kent E. Cattani joined.

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**SWANN,** Judge:

¶1 In *Kobold v. Aetna Life Ins. Co.*, 233 Ariz. 100 (App. 2013) ("*Kobold I*"), we held that 5 U.S.C. § 8902(m)(1) of the Federal Employee Health Benefits Act ("FEHBA") did not preempt Arizona law forbidding subrogation in personal injury cases. After the Arizona Supreme Court denied review, the Office of Personnel Management ("OPM") promulgated new regulations, set forth in 5 C.F.R. § 890.106, that construe § 8902(m)(1) to include subrogation and reimbursement terms in FEHBA contracts. In light of the new regulations, the United States Supreme Court vacated our opinion and remanded the case for reconsideration of the preemptive effect of the FEHBA. *Aetna Life Ins. Co. v. Kobold*,

135 S. Ct. 2886 (2015).[1] We hold that the statutory interpretation embodied in the new federal regulations is entitled to deference in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and, accordingly, we are bound to interpret the FEHBA as preempting Arizona anti-subrogation law. We therefore reverse the superior court's entry of summary judgment for Kobold, and remand with instructions to grant Aetna's cross-motion for summary judgment.

## FACTS AND PROCEDURAL HISTORY

¶2 Kobold was injured in a motorcycle accident in 2006. Aetna paid Kobold's medical providers almost $25,000 for his treatment related to the accident. Kobold later recovered $145,000 in a settlement with the parties allegedly responsible for the accident.

¶3 Under the terms of the insurance plan, and contrary to Arizona law, Aetna was entitled to subrogation and reimbursement in the event that Kobold recovered from a responsible third party. Relying on these contractual provisions, Aetna asserted a lien on the settlement proceeds for the medical expenses it had paid. The alleged tortfeasors deposited the disputed portion

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[1] In *Nevils v. Group Health Plan, Inc.*, the Missouri Supreme Court agreed with our decision in *Kobold I*, and held that the FEHBA did not preempt Missouri's anti-subrogation doctrine. 418 S.W.3d 451 (Mo. 2014). The United States Supreme Court similarly vacated and remanded that decision in the wake of the OPM's new regulations. *Coventry Health Care of Missouri, Inc. v. Nevils*, 135 S. Ct. 2886 (2015).

of the settlement sum with the superior court, and filed an interpleader action against Kobold and Aetna.

¶4 Kobold and Aetna filed cross-motions for summary judgment in which they disputed whether § 8902(m)(1) applies to subrogation and reimbursement provisions. The superior court ruled that the question had been resolved in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), and granted summary judgment for Kobold. Aetna appealed.

¶5 Concluding that *McVeigh* had not in fact decided the issue, we affirmed based on our own interpretation of the statute. Applying principles of statutory construction, we held that subrogation and reimbursement provisions do not fall within the scope of § 8902(m)(1). We rejected Aetna's argument that we were required to defer to a contrary interpretation set forth in a position letter sent from the OPM to FEHBA carriers, holding that the letter was not entitled to deference under *Chevron* or otherwise. We now reconsider the issue of § 8902(m)(1)'s reach in view of the new OPM regulations.

## DISCUSSION

¶6 Aetna and *amicus curiae* contend that the new regulations are entitled to *Chevron* deference and are dispositive. We agree.

¶7 As an initial matter, the regulations are procedurally eligible for *Chevron* deference. "[A]dministrative

implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), as the result of a formal adjudication or rule-making procedure, *Christensen v. Harris County*, 529 U.S. 579, 587 (2000). The OPM is specifically tasked with "prescrib[ing[ regulations necessary to carry out [the FEHBA]," 5 U.S.C. § 8913(a), and the regulations at issue here were the product of a formal notice-and-comment rule-making process.

¶8 The fact that the regulations postdate our decision in *Kobold I* does not deprive them of authority. An earlier judicial construction "trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). This is true even when the agency's interpretation of the same statutory language changes over time. *See Brand X*, 545 U.S. at 981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."). In view of the Supreme Court's own recognition of the statute's ambiguity in *McVeigh*, 547 U.S. at 698, it cannot be said that our

interpretation in *Kobold I* was the product of such clear statutory language.

¶9 Further, the OPM regulations qualify substantively for *Chevron* deference. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The relevant inquiry is whether the agency's interpretation is reasonable. *E.g.*, *Mead*, 533 U.S. at 229. The court must defer to an agency's reasonable interpretation even when the agency's interpretation is unwise or when it is not the *most* reasonable interpretation. *Id.*; *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013). *Chevron* deference therefore compels us to apply OPM's interpretation even though we view the analysis of *Kobold I* and *Nevils* as more faithful to the text of the statute.

¶10 Section 8902(m)(1) provides that the terms of an FEHBA contract "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."[2]

[2] Kobold briefly argues that § 8902(m)(1) is "probably unconstitutional" under the Supremacy Clause because it gives preemptive effect to contract terms rather than federal law. FEHBA contract terms are, however, circumscribed by the terms of the

The statute does not directly reference reimbursement or subrogation provisions. Accordingly, as *McVeigh* recognized, the statute is susceptible to multiple "plausible constructions" with respect to whether it encompasses such provisions. 547 U.S. at 698.[3]

¶11 The new regulations construe the statute expressly and expansively. The regulations provide 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," and that "[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)

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FEHBA and the standards prescribed by the OPM. *See* 5 U.S.C. § 8902. As relevant here, the OPM has now dictated that "[a]ll health benefit plan contracts shall provide that the Federal Employees Health Benefits (FEHB) carrier is entitled to pursue subrogation and reimbursement recoveries." 5 C.F.R. § 890.106(a).

[3] Kobold contends that *McVeigh*'s recognition of multiple "plausible" constructions does not equate to recognition of multiple "reasonable" constructions. We see no meaningful distinction between the quoted terms for purposes of the *Chevron* analysis. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (holding that under *Chevron*, "[t]he Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent"). But even assuming that *McVeigh*'s dictum reflects a more tentative characterization of § 8902(m)(1)'s ambiguity, such expression would not foreclose the existence of multiple reasonable interpretations.

within the meaning of 5 U.S.C. 8902(m)(1). . . . notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 C.F.R. § 890.106(b)(1), (h).

¶12 The regulations hinge upon a broad reading of § 8902(m)(1)'s use of the term "relate to." The regulations construe "relate to" to include connections beyond those that are direct and immediate. Though our interpretation in *Kobold I* differed, we cannot say that "relate to" may not reasonably be argued to include the relationship between an insured's receipt of benefit payments and an insurer's contractual right to effectively recall the payments by subrogation or reimbursement after the insured has been compensated by a third party. *Cf. Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428, 1430-31 (2014) (holding that "related to," as used in the Airline Deregulation Act's preemption provision, "expresses a 'broad pre-emptive purpose,'" and that its scope, defined as "related to a price, route, or service of an air carrier," included a claim seeking reinstatement in a frequent-flyer program that provided benefits such as mileage credits and upgrades (citation omitted)); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (holding that "relate to," as used in the Employee Retirement Security Act's preemption provision, is used in a "broad sense" to include state anti-subrogation laws (citation omitted)). The connection between issuing benefit payments and seeking subrogation and reimbursement is not so attenuated as to make the regulations' interpretation unreasonable. We further recognize that the regulations' interpretation

promotes uniform treatment of federal employees under FEHBA plans nationwide, and that one of the goals of § 8902(m)(1) is to assure uniformity of benefits and rates. H.R. Rep. No. 105-374 at 9 (1997); *see also Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1099 (10th Cir. 2015).

## CONCLUSION

¶13 In view of 5 C.F.R. § 890.106, we reverse the superior court's grant of summary judgment to Kobold. And because there is no genuine issue of material fact, we remand with instructions for the entry of summary judgment in favor of Aetna. *See Anderson v. Country Life Ins. Co.*, 180 Ariz. 625, 628 (App. 1994) (recognizing court of appeals' authority to vacate summary judgment for one party and enter it for another where the issues can be decided as a matter of law). We deny Kobold's request for attorney's fees and costs.

[SEAL]
Ruth A. Willingham • Clerk of the Court
FILED : ama

**APPENDIX B**

NEAL S. SUNDEEN, P.C.
1221 East Osborn Road Suite 105
Phoenix, AZ 85014
602-265-1200
State Bar No. 003475
*Attorney for Plaintiff/Counterdefendant*

**IN THE SUPERIOR COURT**
**OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

MATTHEW KOBOLD,
a single man

Plaintiff,

vs.

THE RYLAND GROUP, INC., et al.

Defendants.

---

The Ryland Group, Inc., a Maryland Corporation; RYLAND HOMES OF ARIZONA, INC., an Arizona Corporation dba RYLAND HOMES,

Counterclaimant,

vs.

MATTHEW KOBOLD,
a single man,

Counterdefendant.

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CV 2008-023699

**~~AMENDED PROPOSED FORM OF~~ JUDGMENT**

(Filed Mar. 8, 2012)

(Assigned to the Honorable John Buttrick)

The Ryland Group, Inc., a Maryland Corporation; RYLAND HOMES OF ARIZONA, INC., an Arizona Corporation dba RYLAND HOMES,

Third-party Plaintiffs,

vs.

The AETNA INSURANCE COMPANY, a foreign insurer;

Third-party Defendant.

This matter having come on before the Court on Plaintiffs Motion for Summary Judgment, Plaintiff's Response to Defendants' Motion for Summary Judgment, Plaintiff's Reply to Defendants' Response and Defendants' Motion for Summary Judgment, Defendants' Response to Plaintiff's Motion for Summary Judgment, and Defendants' Reply and the Court having reviewed same and finding good cause therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

A. Plaintiff, Matthew Kobold, be awarded Judgment against the Third-Party Defendant, The Aetna Insurance Company, and that the $24,473.53 that has been interpled into this Court by Defendant, the Ryland Group, be awarded to the Plaintiff, Matthew Kobold.

B. The Court further orders that Plaintiff be awarded his taxable costs, pursuant to A.R.S. § 12-341, in the amount of $24.00;

C. The Court further orders that Plaintiff be awarded attorneys' fees in the amount of $14,345.00, pursuant to A.R.S. § 12-341.01;

D. That Plaintiff be awarded interest on the attorneys' fees and costs at the rate of 4.25% per annum until paid ~~(1% plus the prime rate of 3.25% as published by the Federal Reserve H.15 on August 1st, 2011) (A.R.S. § 44-1201(B)~~; and

The Court further orders that there is no just reason for delay and that final judgment shall be entered pursuant to Rule 54(b) of the Arizona Rules of Civil Procedures.

DONE IN OPEN COURT this 7th day of ~~December, 2011~~ March 2012.

/s/ John Buttrick
THE HONORABLE
JOHN A. BUTTRICK

**COPY** of the foregoing mailed this 17th day of December, 2011, to:

John West
Brownstein Hyatt Farber Schreck, LLP
One East Washington Street, Suite 2400
Phoenix, AZ 85004
*Attorneys for the Aetna Insurance Company*

By: /s/ Lynn Freed

**APPENDIX C**

[SEAL]

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

**Supreme Court**
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

October 19, 2016

**RE: MATTHEW KOBOLD v AETNA LIFE INSURANCE COMPANY**
Arizona Supreme Court No. CV-16-0082-PR
Court of Appeals, Division One No. 1 CA-CV 12-0315
Maricopa County Superior Court No. CV2008-023699

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 18, 2016, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

**Chief Justice Bales did not participate in the determination of his matter.**

Janet Johnson, Clerk

TO:
Neal S Sundeen
David L Abney
John C West
Miguel A Estrada
Jonathan C Bond
Robert L Miskell
Henry Charles Whitaker
Amy M Wood
bp