IN THE

Supreme Court of the United States

HEALTH CARE SERVICE CORPORATION,

Petitioner,

v.

JULI A. POLLITT and MICHAEL A. NASH,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14, completely preempts -- and therefore makes removable to federal court -- a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA.

2. Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state court suits brought against persons "acting under" a federal officer when sued for actions "under color of [federal] . . . office," encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

STATEMENT PURSUANT TO RULE 29.6

Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, is not a publicly traded company, and no publicly held company owns ten percent or more of its stock. It has no parent corporation.

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Health Care Service Corporation ("HCSC"), an Illinois Mutual Legal Reserve Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix ("Pet. App.") 1a-4a) is reported at 558 F.3d 615. The order of the court of appeals denying HCSC's petition for rehearing and rehearing *en banc* is not reported. The opinion of the district court (Pet. App. 5a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2009. HCSC timely filed a petition for rehearing and for rehearing *en banc*. The court of appeals denied the petition for rehearing and for rehearing *en banc* on April 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of statutes and regulations involved in the case is set out in the accompanying Appendix.

STATEMENT

A. Overview

This case lies at the intersection of three recent decisions of this Court: *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), which examined when a private party may remove a state court case to federal court pursuant to the federal officer removal statute, 28 U.S.C.

§ 1442(a)(1); *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), which explored federal question jurisdiction in the context of health benefits plans governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14; and *Beneficial National Bank, N.A. v. Anderson*, 539 U.S. 1 (2003), which established the test for removal jurisdiction under the "complete preemption" doctrine.

Misinterpreting *Watson* and *Empire* and ignoring *Beneficial National Bank* entirely, the Seventh Circuit rejected complete preemption and severely limited application of the federal officer removal statute in a lawsuit involving enrollment and benefits with respect to the largest FEHBA plan, the Service Benefit Plan (or "the Plan"). Respondent Juli A. Pollitt, a federal employee enrolled in the Plan, commenced the lawsuit after the Department of Energy ("DOE") and Department of Labor ("DOL") mistakenly terminated the enrollment of her minor child in the Plan. In the original complaint, she sued to compel the enrollment of the minor in the Plan, as well as to challenge denials of benefits resulting from the termination of enrollment. Joining her in the lawsuit was the minor's father, Respondent Michael A. Nash, who is not a Plan enrollee. The DOE and DOL then fixed their error, resulting in the retroactive re-enrollment of the minor and reversal of the denials of benefits. Respondents nonetheless continued their lawsuit, seeking to collect millions of dollars in damages for alleged emotional distress caused by the enrollment termination.

All along, Respondents did not sue DOE, DOL, or any other government agency, notwithstanding that FEHBA and its regulations provide that the exclusive

remedy for enrollment or benefits grievances is an administrative appeal followed by a judicial review action *against the government in federal court.* Instead, they sued HCSC, the private party administering, pursuant to a government contract, the Plan in their state, and they did so in state court under state law. The district court saw through the ruse and, upon removal of the case, held that it had subject matter jurisdiction, dismissed the claims as preempted by FEHBA, and noted particularly that HCSC "was merely following the instructions of its principal, DOE." Pet. App. 8a. But the Seventh Circuit then vacated the district court's judgment, addressing just the district court's jurisdiction. Confusing complete preemption with occupation of the field preemption -- an obvious error in light of directions in *Beneficial National Bank* and *Empire* -- the Seventh Circuit rejected removal jurisdiction based on complete preemption. And contrary to *Watson*, it held that jurisdiction could be sustained under the federal officer removal statute, even in a government contractor situation, only if the government had specifically ordered each act about which Respondents complained.

The ultimate consequence of the Seventh Circuit's decision is to create Circuit splits on the availability of complete preemption generally, on the application of complete preemption in the FEHBA context specifically, and on the application of the federal officer removal statute to government contractors. The decision also has serious ramifications for the FEHBA program, a program that covers millions and costs billions: the court of appeals potentially has permitted an enrollee to evade -- in favor of a state court litigation alternative -- FEHBA's carefully calibrated federal

remedial scheme, simply by suing the wrong party. The Court should grant the petition for certiorari to correct a decision plainly at odds with this Court's precedents, to resolve the circuit conflicts, and to avoid litigation turmoil in a significant national federal program.

B. The Statutory, Regulatory, and Contractual Scheme

1. *The Service Benefit Plan*. *Empire* thoroughly summarized FEHBA's provisions and the workings of the Service Benefit Plan. With FEHBA, Congress "establishe[d] a comprehensive program of health insurance for federal employees." *Empire*, 547 U.S. at 682. The statute "authorizes the Office of Personnel Management (OPM) to contract with private carriers to offer federal employees an array of health-care plans." *Id.*; *see also* 5 U.S.C. § 8902(a). "Largest of the plans for which OPM has contracted, since 1960, is the Blue Cross Blue Shield Service Benefit Plan (Plan), administered by local Blue Cross Blue Shield companies." *Empire*, 547 U.S. at 682. Specifically, in recent years, the Blue Cross and Blue Shield Association ("BCBSA") -- the Plan's designated "carrier" -- has negotiated and signed the contract on behalf of local Blue Cross and Blue Shield companies, who then administer and underwrite the Plan in their respective localities. *See id.* at 683-84; *see also* Appellee's Separate Appendix in Ct. of Appeals ("C.A. App.") A88. HCSC is the local Blue Cross and Blue Shield company administering and underwriting the Plan in Illinois. The contract between OPM and BCBSA is known as "CS 1039." *See* C.A. App. A41.

2. *Enrollment*. Pursuant to OPM's regulations, federal employees enroll in the Plan through the particular federal agency for which they work. *See* 5 U.S.C. § 8905(a); 5 C.F.R. §§ 890.101(a), 890.102-.104, 890.301(d); *see generally* 5 C.F.R. Pt. 890, subpts. C, D, and K. CS 1039 emphasizes that the government, not the Blue Cross and Blue Shield companies, is responsible for enrollment. *See* C.A. App. A66 ("A person's eligibility for coverage, effective date of enrollment, the level of benefits (option), the effective date of termination or cancellation of a person's coverage, the date any extension of a person's coverage ceases, and any continuance . . . ceases, shall all be determined in accordance with regulations or directions of OPM given pursuant to [FEHBA].").

With respect to disputes about enrollment, OPM's regulations provide for administrative review within the pertinent employing federal agency. *See* 5 C.F.R. § 890.104. OPM's regulations also provide for judicial review thereafter, specifying that "[a] suit to compel enrollment . . . must be brought against the employing office that made the enrollment decision." *Id.* § 890.107(a).

Once enrolled in the Plan, enrollees are responsible for about 25% of the premium, with the government paying the remainder. 5 U.S.C. § 8906(b)(1), (b)(2), (f). The enrollees' and the government's contributions are placed in a fund in the U.S. Treasury, from which the Blue Cross and Blue Shield companies draw directly to pay benefits. *Id.* § 8909(a); *see also* 48 C.F.R. § 1632.170(b); *see generally Empire*, 547 U.S. at 684 (describing Plan's funding).

3. *Benefits Provisions*. OPM's "contracts with carriers, FEHBA instructs, 'shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable.'" *Empire*, 547 U.S. at 684 (quoting 5 U.S.C. § 8902(d)) (bracketed material added by Court); *see also* 5 U.S.C. § 8907(b). CS 1039, accordingly, instructs the carrier to provide benefits in accordance with an "appended brochure" -- or Statement of Benefits -- that outlines at length the panoply of medical costs the Plan will reimburse. *Empire*, 547 U.S. at 684; *see* C.A. App. A161-A287.

CS 1039 also outlines in detail the actions the Blue Cross and Blue Shield companies are required to take to recapture benefits erroneously paid. The contract provides: "If the Carrier or OPM determines that a Member's claim has been paid in error for any reason (except fraud and abuse), the Carrier shall make prompt and diligent effort to recover the erroneous payment to the member from the member or, if to the provider, from the provider." C.A. App. A68-A69. In so doing, "[t]he Carrier shall follow general business practices and procedures in collecting debts owed under the Federal Employees Health Benefits Program," which may include providing notice to affected members or providers, offsetting future benefits payable to the member or to a provider, and bringing collection actions. *See id.*

4. *Benefits Disputes*. In addition to establishing administrative and judicial review procedures for grievances regarding enrollment, FEHBA and OPM's regulations likewise establish the remedy for benefits

disputes. Under FEHBA, each contract that OPM enters must require the carrier "to pay for or provide a health service or supply in an individual case" if OPM "finds that the employee . . . is entitled thereto under the terms of the contract." 5 U.S.C. § 8902(j). OPM has implemented this provision by establishing a mandatory administrative remedy at OPM for those who believe that the carrier has wrongfully denied benefits. *See* 5 C.F.R. § 890.105; *see also id.* § 890.107(d)(1).

OPM's regulations also provide that any court litigation over benefits may be brought only as an action *against OPM* for judicial review of its administrative decision. *See id.* § 890.107(c). The regulations expressly state that litigation "must be brought against OPM and not against the carrier or carrier's subcontractors." *Id.* In addition, no suit whatsoever shall be commenced "prior to exhaustion of the [OPM] administrative remed[y]." *Id.* § 890.107(d)(1). "[T]he recovery in such a suit shall be limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute." *Id.* § 890.107(c). Any lawsuit against OPM must be commenced in federal court, since FEHBA specifies that only the federal district courts and the Court of Federal Claims have jurisdiction over any FEHBA-related action against the United States. *See* 5 U.S.C. § 8912.

CS 1039 incorporates OPM's benefits-dispute regulations, repeating the regulatory provisions in section 2.8 of the contract. *See* C.A. App. A71-A73. The contract also emphasizes application of the OPM administrative remedy where a Blue Cross and Blue Shield company seeks to recapture benefits erroneously paid.

On this point, CS 1039 notes that "the Carrier shall . . . [s]uspend recovery efforts for a debt which is based upon a claim that has been appealed as a disputed claim under Section 2.8, until the appeal has been resolved." *Id.* at A69.

5. *OPM's Police Power*. Pursuant to authority delegated by Congress under 5 U.S.C. §§ 8913(a) and 8902(e), OPM is responsible for policing a carrier's provision of benefits and other activities under a FEHBA plan. OPM may penalize any carrier that fails to satisfy OPM's standards. For example, "[a] pattern of poor conduct or evidence of misconduct" -- such as "[u]sing fraudulent or unethical business or health care practices or otherwise displaying a lack of business integrity or honesty" -- "is cause for OPM to withdraw approval of the carrier" and to "effect corrective action." 48 C.F.R. § 1609.7001(c), (c)(2), (d).

6. *FEHBA's Preemption Provision*. FEHBA contains an express preemption provision, 5 U.S.C. § 8902(m)(1). As amended in 1998, the preemption provision states:

> 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 enacting the current preemption language, which "broaden[ed]" an earlier version of the preemption clause (H.R. Rep. No. 105-374, at 9 (1997)), Congress sought "[t]o ensure uniform

coverage and benefits under plans OPM negotiates for federal employees." *Empire*, 547 U.S. at 686.

C. The Lawsuit

Respondent Juli A. Pollitt is an enrollee in the Service Benefit Plan. *See* C.A. App. A29, A313. Through her enrollment, HCSC also provides benefits to her minor son, as her dependent. *See id.* at A29-A30. In October 2003, Ms. Pollitt went on medical leave from her employer, the DOE, at which point her employer technically became the DOL. *Id.* at A312-A313. In June of 2007, the DOL instructed HCSC to change Ms. Pollitt's coverage from "Family" to "Self-Only," retroactive to October 19, 2003. *See id.* at A30. In light of the fact that HCSC had paid nearly four years of benefits on behalf of the minor despite (according to the DOL) his lack of coverage, and in accordance with its contractual duties, HCSC then requested that the providers who had rendered services to the minor after October 2003 refund any payments that HCSC had made on his claims. *See id.*

Ms. Pollitt, joined by the minor's father, Respondent Michael A. Nash, then commenced -- on September 10, 2007 -- this action in the Circuit Court for Lake County, Illinois. The original complaint sought reenrollment of the minor in the Plan, challenged the retroactive denial of benefits earlier paid on the minor's behalf, asserted that HCSC acted in bad faith in administering his coverage, and demanded more than $12 million in damages. *Id.* at A25-A26.

On October 3, 2007, HCSC received a copy of a letter from DOE to DOL indicating that the retroactive change the government earlier instructed had been a mistake and that the minor should be reinstated; two

days later, HCSC reinstated the minor. *Id.* at A30, A37. HCSC informed Ms. Pollitt that her son had been reinstated in the Plan and that it would rescind any refund requests concerning earlier benefits paid on her son's behalf. *See id.* at A289.

Based on the allegations in the original complaint, HCSC timely removed the case to the U.S. District Court for the Northern District of Illinois. Respondents proceeded *pro se* in the state court and subsequent federal proceedings.

D. Proceedings in the District Court

Once pending in federal court, HCSC moved to dismiss some of the claims in the original complaint as moot, because by then the minor had been re-enrolled and HCSC had reversed the retroactive denials of benefits. In addition, HCSC moved to dismiss all claims by both Respondents on the grounds that FEHBA preempted the claims and all claims of Mr. Nash for lack of standing (since he had no contractual relationship with HCSC).

The district court granted the motion to dismiss the original complaint, but also granted leave to amend the complaint, as Respondents sought an additional opportunity to draft a claim against HCSC that supposedly could survive FEHBA preemption. *See* Pet. App. 10a. In the amended complaint, and then a second amended complaint, which became the operative pleading, Respondents continued to challenge the alleged retroactive denial of benefits for their son. They alleged that HCSC had not rescinded earlier refund requests and requested an order from the District Court requiring HCSC to do so. *See* C.A. App. A306-A307, A309, A319-A320, A322. Respondents also

continued to raise a claim of bad faith under state law against HCSC. As with the bad faith claim in the original complaint, the bad faith claim in the second amended complaint contended, among other things, that HCSC breached a duty to protect Respondents' son from the federal government's purportedly wrongful enrollment determinations. *See id.* at A315-A316. In the second amended complaint, Respondents sought $1.8 million in compensatory and punitive damages. *See id.* at A322.

HCSC again moved for dismissal, and Respondents, in opposition, appeared to challenge, for the first time, the district court's jurisdiction. The district court then dismissed the second amended complaint, finding that "this case was properly removed from state court, that plaintiff Nash has no standing in this action, and that plaintiff Pollitt's claims are preempted and precluded by federal law." Pet. App. 8a.

In its dismissal order, the district court held that grievances concerning enrollment in and benefits under the Plan were subject exclusively to federal remedies, not state law. The district court noted that "Pollitt's remedy is governed by federal regulations that require[] suits to compel enrollment to be brought 'against the [federal agency] employing office that made the enrollment decisions.'" *Id.* at 7a (quoting 5 C.F.R. § 890.107(a)). The district court also emphasized that, on FEHBA benefits determinations, "Congress has delegated [OPM] . . . with the authority to procure and regulate the health benefits of federal employees, 5 U.S.C. § 8902(d), [and] OPM regulations expressly provide that all litigation involving benefits 'must be brought against OPM and not against the

carrier or carrier's subcontractors.'" Pet. App. 7a (quoting 5 C.F.R. § 890.107(d)(1)). The district court added that OPM has established "an administrative review mechanism to prosecute claims concerning FEHBA benefits and administration of FEHBA plans." *Id.* at 8a. Given these remedies, the district court ruled that "plaintiffs were required to prosecute their grievances through the administrative process." *Id.*

The district court then concluded by stating:

> The court shares plaintiffs' frustration about the course of conduct that led to their complaint, but notes that defendant was merely following the instructions of its principal, DOE. The temporary disenrollment of plaintiffs' son no doubt caused a great deal of anxiety and inconvenience to them. If they have a remedy . . . at all, however, it lies in the administrative process, not in this civil suit.

Id.

E. Proceedings in the Court of Appeals

On appeal, the Seventh Circuit, without oral argument, issued a published *per curiam* decision vacating the decision of the District Court and remanding for further proceedings. It reached only the question of the district court's jurisdiction.

The Seventh Circuit first rejected removal jurisdiction under "complete preemption," which the court described as a "misleadingly named doctrine that applies when federal law *has occupied a field*, leaving no room for any claim under state law." Pet. App. 2a-3a (emphasis added). The court then said: "But *Empire*

HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006), holds that federal law does not completely occupy the field of health-insurance coverage for federal workers." Pet. App. 3a. Thus, according to the court, "*Empire HealthChoice* shows that the district court erred in allowing removal under [28 U.S.C.] § 1441 and dismissing the suit as completely preempted." Pet. App. 3a.

The Seventh Circuit next addressed jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), "which says that 'any person acting under' a federal officer may remove a suit that depends on the defendant's following the directions issued by that federal officer." Pet. App. 3a. Rather than credit the district court's jurisdictional finding that HCSC "was merely following the instructions of its principal," *id.* at 8a -- a finding based on a sworn declaration, *see* C.A. App. A30 -- the Seventh Circuit emphasized allegations by Respondents that HCSC supposedly "drew an unwarranted inference [to terminate coverage] from the Department of Labor's failure to remit the self-and-family premium." Pet. App. 3a. The Seventh Circuit also cited Respondent's "contention" in the second amended complaint that "the Department did not direct HCSC to recoup four years' worth of benefits." *Id.* Because there was, in the Seventh Circuit's view, dispute over whether HCSC "did nothing but carry out the Department of Labor's instructions," the court ordered that "the district court must receive evidence, make appropriate findings, and then either retain or remand the case as the facts require." *Id.* at 3a, 4a.

The Seventh Circuit then gave instructions to the district court to guide the inquiry on remand. It said that,

"[t]o the extent HCSC was doing nothing but following the agency's orders, the case belongs in federal court." *Id.* at 4a. The court added that, in that instance, the case also "must be dismissed -- not because of 'complete preemption' but because suits related to a federal agency's health-benefit-coverage decisions must name the Office of Personnel Management or the employing agency rather than the insurance carrier. 5 U.S.C. § 8902(d); 5 C.F.R. §§ 890.104(a), 890.107(a), (c)." Pet. App. 4a. The Court also stated:

> But if the Department of Labor did not direct HCSC to change Pollitt's coverage, and just paid too little into the [Treasury] fund, then this case must be remanded to state court. There is no relevant federal 'directive,' just an agency's mistake to which the carrier overreacted. . . . Finally, if the Department directed HCSC to curtail future coverage, but did not direct it to recover past benefits from medical providers, then the claim for precipitate, mistaken recoupment should be remanded. 28 U.S.C. § 1367(c)(3).

Pet. App. 4a. While citing *Watson* once in its decision, the court in its guidance to the district court nowhere mentioned *Watson*'s teachings on removal by government contractors.[1]

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[1] Despite the remand of the case to the district court for further proceedings, there is no assurance that the removal jurisdiction issues can later be reviewed by this Court. In the event the district court remands the case to state court, the remand order is unappealable under 28 U.S.C. § 1447(c), even after completion of all state proceedings. Accordingly, this petition presents the

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision in this case patently contradicts several of this Court's precedents, creates conflicts in the Circuits in already doctrinally complicated jurisdictional areas, and disrupts the administration of a significant national program. The Court should grant certiorari to resolve the Circuit conflicts and prevent the damage caused by the court of appeals' erroneous determination.

A. The Court of Appeals' Decision Contravenes This Court's Precedents

1. The Court of Appeals' Complete Preemption Holding Is Inconsistent with *Beneficial National Bank* and *Empire*

The centerpiece of the court of appeals' complete preemption ruling is that the doctrine supposedly turns on whether federal law "has occupied a field." Pet. App. 2a. Indeed, its decision in this case is just one in a long string of Seventh Circuit precedents finding that complete preemption depends on a federal statute occupying a particular field. *See, e.g.*, *City of Joliet v. New West, L.P.*, 562 F.3d 830, 833 (7th Cir. 2009) ("The exception for 'complete preemption' . . . does not apply; no one argues that federal law occupies the fields of housing or municipal powers.") (internal citation omitted); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 787 (7th Cir. 2002) ("Complete, or field, preemption exists where Congress has so completely preempted a particular area that no room remains for

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Court with potentially its only opportunity to review the important jurisdictional questions presented.

any state regulation and the complaint would be necessarily federal in character.") (internal quotation marks omitted); *Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000) ("[T]he phrase 'complete preemption' has caused confusion -- evident in this case -- by implying that preemption sometimes permits removal. Unfortunately 'complete preemption' is a misnomer, having nothing to do with preemption and everything to do with federal occupation of a field."); *see also Covington v. Mitsubishi Motor Mfg. of Am., Inc.*, 51 Fed. Appx. 992, 994 (7th Cir. 2002) ("In matters related to removal under 28 U.S.C. § 1441, complete preemption means federal occupation of a field.").

The Seventh Circuit's repeated conflation of complete preemption and federal occupation of a field conflicts with this Court's leading precedent on complete preemption: *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003). There, the Court held that state law usury claims are completely preempted by the National Bank Act. In so holding, the Court stated that the test for complete preemption is whether federal law "provide[s] the *exclusive cause of action* for the claim asserted." *Id.* at 8 (emphasis added); *accord id.* at 9 ("[T]he dispositive question in this case [is]: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks?"); *id.* at 9 n.5 ("the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive"); *id.* at 11 ("Because §§ 85 and 86 [of the National Bank Act] provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.").

Beneficial National Bank made no mention at all of federal law occupying a field. Instead, the Court has used the phrase "occupation of the field" to describe a form of defensive, implied preemption existing where Congress pervasively regulates an area. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). The Court has, for example, found occupation of the field preemption in the areas of transportation and sale of natural gas (*see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988)), airline noise abatement and airport curfews (*see Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 639 (1973)), and alien registration (*see Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941)). But then the Court in *Beneficial National Bank* said there were only "two categories of cases where this Court has found complete preemption -- certain causes of action under the LMRA [Labor Management Relations Act] and ERISA [Employee Retirement Income Security Act]." 539 U.S. at 8. Having not included the federal laws governing natural gas, airport noise and curfews, and aliens among completely preemptive statutes, the Court plainly has not equated complete preemption with occupation of the field.

Applying in this case, then, the correct test for complete preemption -- namely, whether FEHBA "provide[s] the exclusive cause of action for the claim asserted" (*Beneficial Nat'l Bank*, 539 U.S. at 8) -- Respondents' claims are completely preempted. The original complaint, which governs for removal purposes (*see Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938)), challenged a

termination of enrollment and related denials of benefits and alleged bad faith in connection with the enrollment termination and benefits denials. *See supra* p. 9. The court of appeals itself recognized that FEHBA provides the exclusive enforcement mechanism for enrollment and benefits disputes, *see* Pet. App. 4a (citing 5 C.F.R. §§ 890.104(a), 890.107(a), (c)), and other courts agree that FEHBA's remedies are exclusive.[2]

Nor can Respondents escape FEHBA's exclusively federal remedies, and thus complete preemption, by casting their allegations as a bad faith claim, as they did in part in the original complaint and then in the second amended complaint. In *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the Court held that ERISA's remedy for denials of benefits completely preempted state tort claims that derived from the benefits denials. In language likewise apt in this case, the Court said: "[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over sub-

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[2] *See Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 398 (9th Cir. 2002) ("The federal remedies provided to aggrieved federal employees under the regulatory scheme are the only intended remedies under FEHBA; therefore, the federal remedies displace state remedies."); *Bryan v. OPM*, 165 F.3d 1315, 1318-19 (10th Cir. 1999) ("courts only have jurisdiction to review final actions, after exhaustion, and only one remedy is available": an administrative claim plus "judicial review" under "the Administrative Procedure Act"); *Bridges v. Blue Cross & Blue Shield Ass'n*, 935 F. Supp. 37, 41 (D.D.C. 1996) ("FEHBA sets forth an exclusive enforcement mechanism"); *see also Kight v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 34 F. Supp. 2d 334, 342 (E.D. Va. 1999) (same).

stance and allow parties to evade' the pre-emptive scope of [the federal statute] . . . simply 'by relabeling their contract claims as claims for tortious breach of contract.'" *Id.* at 214 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)); *accord Burkey v. Gov't Employees Hosp. Ass'n*, 983 F.2d 656, 660 (5th Cir. 1993) (same, in FEHBA context).

Contrary to the court of appeals' conclusion, *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), supports -- not detracts -- from a finding of complete preemption over Respondents' claims. In *Empire*, the Court held that there was no federal jurisdiction over a FEHBA plan's reimbursement claim, which is a species of subrogation claim, against an enrollee. A central reason for the Court's holding was that FEHBA's exclusively federal remedies did not "extend" to "reimbursement claims between carriers and insured workers." 547 U.S. at 696.

However, the Court was careful to distinguish reimbursement actions from claims to which FEHBA's exclusive remedies *do* apply. With respect to benefits disputes, to which the FEHBA enforcement scheme indisputably does apply, the Court said that FEHBA's "prescriptions 'ensur[e] that suits brought by beneficiaries for denial of benefits *will land in federal court.*'" *Id.* (quoting *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 n.7 (2d Cir. 2005) (Sotomayor, J.)) (emphasis added). Thus, *Empire* compels, not undermines, a finding that FEHBA's exclusively federal remedies (again, the linchpin for complete preemption) completely preempt state law claims involving benefits disputes, making them "land" in federal court.

To be sure, the Court in *Empire* then considered an alternative argument for federal jurisdiction over subrogation claims: whether FEHBA's express preemption provision, 5 U.S.C. § 8902(m)(1), was itself "a jurisdiction-conferring provision." 547 U.S. at 697. The Court found the preemption provision "not sufficiently broad to confer federal jurisdiction," at least with respect to subrogation disputes. 547 U.S. at 698; *cf.* H.R. Rep. No. 105-374, at 16, 9 (1997) (Congress stating intent to "completely displace" state law in "FEHB program claims disputes"). It was upon this aspect of the Court's decision in *Empire* that the court of appeals seized in finding that "federal law does not completely occupy the field of health-insurance coverage for federal workers." Pet. App. 3a. But the court of appeals failed to recognize that *Empire* turned to the scope of the preemption provision only *after* rejecting the usual route to complete preemption -- the availability of an exclusively federal cause of action. In contrast, in this case, FEHBA's enforcement scheme *does* apply to Respondents' claims, meaning that there is no reason to look elsewhere (such as to the preemption provision) for federal jurisdiction.

In sum, *Beneficial National Bank* unequivocally holds that complete preemption hinges on the existence of an exclusively federal cause of action, and *Empire* explains that FEHBA's exclusive remedies for benefits grievances necessarily "channel[] disputes over coverage or benefits into federal court." *Empire*, 547 U.S. at 686-87. Having held that a FEHBA enrollment and benefits dispute covered by FEHBA's exclusive remedies nonetheless belongs in state court for lack of "occupation of a field," the court of appeals breached both precedents.

2. The Court of Appeals' Holding on the Federal Officer Removal Statute Is Contrary to *Watson*

The court of appeals' other jurisdictional holding concerns the federal officer removal statute, which provides that a state court action may be removed to federal court if commenced against "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added). The court of appeals ruled that that statute would provide a basis for federal jurisdiction over Respondents' claims, but only "[t]o the extent HCSC was doing nothing but following the [federal] agency's orders." Pet. App. 4a. The federal government has to have "direct[ed] HCSC to change Pollitt's coverage" and then also "direct[ed] it to recover past benefits from medical providers." *Id.*

The court of appeals' search for specific government directives is contrary to *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007) -- in particular, *Watson*'s teachings regarding removal by government contractors. In *Watson*, the Court discussed § 1442(a)(1)'s application to government contractors, though the case did not actually involve a government contractor. *Watson* concerned a cigarette manufacturer's efforts to invoke the federal officer removal statute when it was sued under state law for actions it took in conformance with federal regulations on cigarette testing. The Court held that "a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone." 551 U.S. at 153.

In rejecting application of the federal officer removal statute to companies that simply are *regulated* by the government, the Court contrasted such companies with government contractors. The Court noted that "lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* But the Court said the "answer" to why government contractors should receive different treatment for purposes of § 1442(a)(1) than a merely regulated entity "lies in the fact that the private contractor in such cases is helping the Government to produce an item that it needs." *Id.* "The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* The Court then gave the example (from a lower court case) of a defense contractor -- Dow Chemical Company -- who "fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war." *Id.* at 153-54 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). "[A]t least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 154.

Watson, then, indicates that the relevant considerations for a government contractor to remove a case to federal court under § 1442(a)(1) include whether the relationship between the government and the contractor is a "close" one involving detailed oversight and whether the contractor is assisting the government in

responsibilities that otherwise would have been left to the government. The court of appeals paid no heed to these factors, instead focusing on the extent to which *specific* orders came from the government on both enrollment and benefits recoupment. Indeed, the Seventh Circuit found no special relevance at all in the fact that HCSC's conduct in the case stemmed from its obligations under a government contract. *See supra* p. 6.

Had the Seventh Circuit correctly applied *Watson*'s instructions concerning government contractors, it necessarily would have found jurisdiction under the federal officer removal statute. The relationship between FEHBA contractors and the government is an especially close one involving detailed supervision. At the time of FEHBA's inception, OPM's predecessor, the Civil Service Commission, described the "fundamental concepts underlying [FEHBA]" to include "mak[ing] the Commission responsible for the overall administration of the program while sharing day-to-day operating responsibilities with the employing agencies and the insurance carriers." H.R. Rep. No. 86-957, at 18 (1959) (statement of Civil Service Commission). Moreover, OPM has broad authority "for negotiating and regulating health benefits plans for federal employees" (*Empire*, 547 U.S. at 683), the FEHBA program is "comprehensive" (*id.* at 682), OPM sets the standards for carrier conduct (*see supra* p. 8), and contractors are bound to follow the federal employing agencies' directives on enrollment and OPM's determinations on disputed claims. *See supra* pp. 5, 7. Finally, absent FEHBA contracts, the government itself inevitably would be compelled to provide the health benefits administered and underwritten by FEHBA contractors,

in order to compete for talent with "[e]nlightened, progressive private enterprise [that] almost universally has been establishing and operating contributory health benefit programs for its employees." H.R. Rep. No. 86-957, at 2.

Given the close relationship between FEHBA contractors and the government on a matter critical to the government's day-to-day operations, it is enough to sustain jurisdiction under the federal officer removal statute that the claims arose in the context of HCSC "fulfill[ing] the terms of a contractual agreement." *Watson*, 551 U.S. at 153; *see also Maryland v. Soper*, 270 U.S. 9, 33 (1926) (the federal officer removal statute "does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority").

B. The Court of Appeals' Decision Creates Numerous Circuit Splits

The Court should grant certiorari in this case to resolve the several Circuit splits engendered by the Seventh Circuit's decision in this case -- on the complete preemption doctrine generally, on complete preemption in the FEHBA setting specifically, and on the availability of the federal officer removal statute to government contractors.

1. The Court of Appeals' Decision Conflicts with Other Circuits' Holdings on the Test for Complete Preemption

The Seventh Circuit is the only Circuit post-*Beneficial National Bank* to hold that complete preemption requires a finding that federal law occupies a field. At least six other Circuits have addressed com-

plete preemption after *Beneficial National Bank* and have concluded that the doctrine turns on the existence of an exclusively federal cause of action. *E.g.*, *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 45 (1st Cir. 2008) ("Complete preemption is a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim.") (emphasis removed); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 275-76 (2d Cir. 2005) ("*Beneficial National Bank* explained that to determine whether a federal statute completely preempts a state-law claim within its ambit, we must ask whether the federal statute provides 'the exclusive cause of action' for the asserted state-law claim.") (quoting *Beneficial Nat'l Bank*, 539 U.S. at 9); *King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) ("[T]he touchstone of complete preemption is 'whether Congress intended the federal cause of action' to be 'the exclusive cause of action' for the type of claim brought by a plaintiff.") (quoting *Beneficial Nat'l Bank*, 539 U.S. at 18); *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 564 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2426 (2008) ("Complete preemption requires a finding that 'the federal statutes at issue provided the exclusive cause of action for the claim asserted . . . .'") (quoting *Beneficial Nat'l Bank*, 539 U.S. at 7-8); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245 (9th Cir. 2009) ("[A] federal statute must provide the 'exclusive cause of action' for complete pre-emption to apply . . . .") (quoting *Beneficial Nat'l Bank*, 539 U.S. at 9); *Dunlap v. G&L Holding Group Inc.*, 381 F.3d 1285, 1291 n.9 (11th Cir. 2004) ("Jurisdiction based on complete preemption is . . . inapplicable here. . . .

[T]his federal banking regulation does not provide the exclusive cause of action for Dunlap's breach of contract claim . . . .").

The conflict between the Seventh Circuit's approach on complete preemption and the other Circuits' view is most starkly illustrated by the Second Circuit's *Sullivan* decision. There, the Second Circuit expressly rejected "equat[ing] the defense of field preemption, which defeats a plaintiff's state-law claim because federal law 'occupies the field' within which the state-law claim falls, with the doctrine of complete preemption, which creates federal subject-matter jurisdiction over preempted state-law claims." 424 F.3d at 273 n.7. The Second Circuit said: "[N]o Supreme Court case has ever held the two forms of preemption to be equivalent." *Id.* It cited with approval a scholar who has noted that "'another pathology attending field preemption lies in some courts' confusion of field preemption with complete preemption.'" *Id.* (quoting S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 687, 747 (1991)); *see also Fayard*, 533 F.3d at 45-46 (distinguishing complete preemption from situations where "Congress 'occupies the field'": though "[e]xclusive federal regulation alone might preempt state claims, . . . it is the further presence of a counterpart federal cause of action that allows the state claim to be transformed into a federal one").

In light of the divergence in tests for complete preemption between the Seventh Circuit and the other Circuits, this case -- had it arisen elsewhere -- would have had a different result. In the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits, courts

would have found complete preemption, because they would have looked to the exclusivity of FEHBA's remedies, not to any federal occupation of the field.[3]

2. The Court of Appeals' Decision Conflicts with Other Circuits' Holdings on Complete Preemption in the FEHBA Setting

Not only is the Seventh Circuit's decision contrary to the other Circuits' decisions on the test for complete preemption, it creates a Circuit split on the more specific question of whether FEHBA completely preempts state law claims. Contrary to the Seventh Circuit's ruling, the Ninth Circuit has held that FEHBA *does* completely preempt state law causes of action. In *Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390 (9th Cir. 2002), the Ninth Circuit held that "FEHBA completely preempts" -- and therefore made removable to federal court -- a Service Benefit Plan enrollee's "state-law fraud claim," which sought increased benefits. *Id.* at 399, 392. Central to the Ninth Circuit's holding was that "Congress intended to limit suits over benefits under a FEHBA plan to only one defendant: the United States. The federal remedies provided to aggrieved federal employees under the regulatory scheme are the only intended remedies

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[3] HCSC should not be understood to assert that federal occupation of the field is lacking in this case. HCSC maintains that federal law does, in fact, occupy the field of FEHBA enrollment and benefits, notwithstanding that it may not occupy the field of subrogation (as noted in *Empire*). The point here, however, is that federal occupation of the particular field of regulation has no place in a complete preemption analysis and that the proper test for complete preemption -- the availability of an exclusively federal cause of action -- is satisfied in this case.

under FEHBA." *Id.* at 398. The Ninth Circuit added: "The existence of a detailed administrative enforcement scheme, coupled with Congress's decision to vest OPM with the power to enforce remedies, weigh on the side of finding that FEHBA remedies displace state-law remedies." *Id.* at 397. The Ninth Circuit also relied on the legislative history to the 1998 amendment to the FEHBA preemption provision, where Congress stated an intention that FEHBA "'*completely displace* State or local law relating to health insurance or plans.'" *Id.* at 399 (quoting H.R. Rep. No. 105-374, at 16 (1997)) (emphasis in original).

The Ninth Circuit has reaffirmed *Botsford*'s vitality after *Empire*. *See Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters*, 497 F.3d 972 (9th Cir. 2007). In that case, a medical provider had sued a FEHBA-plan administrator seeking payment for services provided to a FEHBA enrollee. In deciding the issue, the Ninth Circuit noted that *Botsford* sets forth (at least in its Circuit) the standards for complete preemption under FEHBA, *see id.* at 975, but the court emphasized that "*Botsford* involved claims brought by a plan enrollee for reimbursement related to the benefits that *he* received from a medical provider." *Id.* at 977 (emphasis in original). Ultimately, the Ninth Circuit distinguished *Botsford* and declined to extend complete preemption to claims by medical providers because -- unlike an enrollee -- "a third-party hospital could not be considered a 'covered individual' or other relevant party under FEHBA or its implementing regulations. Consequently, Cedars-Sinai does not have a remedy under the statute." *Id.* (quoting 5 C.F.R. § 890.105(a)(1)).

This case is like *Botsford*, not *Cedars-Sinai*. Respondents have remedies under FEHBA for their enrollment and benefits grievances. Accordingly, a court in the Ninth Circuit would have held that this case "arises under federal law, and [a] . . . district court had jurisdiction." *Botsford*, 314 F.3d at 399. The Seventh Circuit found oppositely because, focusing incorrectly on occupation of the field preemption, it deemed FEHBA incapable of complete preemption.[4]

3. The Court of Appeals' Decision Conflicts with the Second Circuit's Holding on Application of the Federal Officer Removal Statute to Government Contractors

A final conflict engendered by the Seventh Circuit's decision involves the application of the federal officer removal statute to government contractors. Two Circuits have considered § 1442(a)(1)'s application to government contractors in the wake of *Watson* -- the Seventh Circuit in this case and the Second Circuit in *Isaacson v. Dow Chem. Co.*, 517 F.3d 129 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1523 (2009). The Seventh Circuit's view that HCSC can establish federal

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[4] The Seventh Circuit's decision also conflicts with a series of unpublished decisions of Circuit and district courts holding -- after *Empire* -- that FEHBA completely preempts state law claims disputing benefits denials. *See Russell v. Gennari*, No. 1:07cv793, 2007 U.S. Dist. LEXIS 83771, at *15 (E.D. Va. Nov. 8, 2007), *aff'd*, No. 08-1046, 2008 U.S. App. LEXIS 15012 (4th Cir. July 15, 2008); *Center for Restorative Breast Surgery, LLC v. Blue Cross Blue Shield of La.*, No. 06-9985, 2007 U.S. Dist. LEXIS 34833, at *29 (E.D. La. May 10, 2007); *Ala. Dental Ass'n v. Blue Cross Blue Shield of La., Inc.*, No. 2:05-cv-1230-MEF (WO), 2007 U.S. Dist. LEXIS 685, at *20 (M.D. Ala. Jan. 3, 2007).

officer removal jurisdiction only if the government specifically directed the termination of Respondents' son's Plan enrollment and the subsequent retroactive denials of benefits cannot be squared with a far more expansive approach adopted in *Isaacson*.

In *Isaacson*, the Second Circuit upheld removal under § 1442(a)(1) by a federal contractor producing agent orange for the government, in a case in which the contractor was sued in tort associated with that production. The Second Circuit noted that "[t]he hurdle erected" for a contractor under § 1442(a)(1) -- at least those who "'assist[]'" and "'help[] carry out[] the duties or tasks of' officers" (517 F.3d at 137 (quoting *Watson*, 551 U.S. at 153)) -- is "quite low" (*id.*), and it set out the test as follows:

> [Private] entities must demonstrate that the acts for which they are being sued -- here, the production of dioxin in Agent Orange -- occurred *because of* what they are asked to do by the Government. . . . Defendants must only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred *while* Defendants were performing their official duties. . . . *And even if Plaintiffs were to prove that the dioxin contamination occurred because of an act not specifically contemplated by the government, it is enough that the contracts gave rise to the contamination. Indeed, whether the challenged act was outside the scope of Defendants' official duties, or whether it was specifically directed by the*

> *federal Government, is one for the federal -- not state -- courts to answer.*

517 F.3d at 137-38 (initial two emphases in original; last emphasis added; citations and internal quotation marks omitted).

Thus, under *Isaacson*, a government contractor need not show that the government "specifically directed" any of the activity at issue in a lawsuit; it is sufficient that the acts for which the contractor is sued occurred "while" the contractor was performing its government contracting obligations. Here, it is not disputable that the termination of enrollment and retroactive denials of benefits occurred while, and as a result of, HCSC's obligations to perform administrative functions under the government contract creating the Plan. That would have been sufficient under *Isaacson* to sustain jurisdiction under the federal officer removal statute. The Seventh Circuit, in conflict with *Isaacson*, required still more: a factual finding that the government *specifically directed* the termination of enrollment and recoupment of earlier-paid benefits.[5]

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[5] HCSC also should not be understood to assert that specific directions are lacking in this case. In any remand proceedings in the district court, HCSC will seek to show that it received specific instructions from the DOE and DOL and otherwise through CS 1039. But HCSC's point here is that it should not be required to make any such showing, because it is sued for actions in the course of performing its government contract.

C. The Court of Appeals' Decision Causes Confusion in Important Jurisdictional Areas and Seriously Undermines the FEHBA Program

Because the Seventh Circuit's decision disregards this Court's precedents and creates various Circuit splits, the Court should grant the petition. Furthermore, the serious consequences produced by the decision both for the jurisprudence of federal jurisdiction and for the FEHBA program buttress the case for granting the petition.

The Seventh Circuit's decision in this matter -- and, indeed, its long string of similar decisions -- equating complete preemption with occupation of the field preemption adds disorder to an already complex jurisdictional area. The complete preemption doctrine is a creature of case law, developed incrementally over more than forty years beginning with *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). In the course of its evolution, the doctrine has been described as "confus[ing]" (*Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000)), "misleading" because of its name (*King v. Marriott Int'l, Inc.*, 337 F.3d 421, 425 (4th Cir. 2003)), and even "hopelessly muddled." Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: a New Rule, a New Justification*, 54 Drake L. Rev. 371, 471 (Winter 2006); *see also id.* at 373 ("[P]erhaps no permutation of federal question removal has provoked more confusion among courts and commentators than the doctrine of complete preemption.").

Beneficial National Bank "adds clarity and predictability" to the area (Pursley, *supra*, at 439-40), establishing what even the dissenters in the case a-

greed was a "straightforward" standard that "a federal statute is completely preemptive when it 'provides the exclusive cause of action for the claim asserted.'" 539 U.S. at 16 (Scalia, J., dissenting) (quoting *Beneficial Nat'l Bank*, 539 U.S. at 8). That standard also has sound justification: "Where a state law claim is preempted by an exclusive federal cause of action, that state law claim may be removed to federal court because it is more efficient to allow removal than to require state-court adjudication of the preemption defense, dismissal of the state law claim, and the subsequent filing of a removable federal claim." Pursley, *supra*, at 440.

The Seventh Circuit, by looking to federal occupation of the field for complete preemption rather than the exclusivity of a federal cause of action, generates anew the confusion that *Beneficial National Bank* effectively alleviated. The Court should grant the petition in order the preserve the clarity it established in *Beneficial National Bank*.

In a similar vein, with respect to the federal officer removal statute, *Watson* was the Court's first foray in over 75 years into the topic of when a private person may remove a case under 28 U.S.C. § 1442(a)(1). *Cf. Maryland v. Soper*, 270 U.S. 9 (1926). *Watson* explained that entities simply regulated by federal law cannot remove under the federal officer removal statute, and it set general parameters for a government contractor's removal under the statute. The Seventh Circuit and the Second Circuit have now addressed § 1442(a)(1) in *Watson*'s wake, and they have taken opposite approaches, with the Seventh Circuit requiring *specific* government orders on each act involved in

the complaint, and the Second Circuit instead holding to a "low" threshold of proof "persons who, through contractual relationships with the Government, perform jobs that the Government otherwise would have performed." *Isaacson*, 517 F.3d at 137, 133. The Court should grant the petition to prevent another jurisdictional area from devolving into a muddled state. In fact, in *Watson* itself, the Court suggested that it might need to revisit the circumstances under which government contractors may remove under § 1442(a)(1); this case presents the Court with the opportunity. *See Watson*, 551 U.S. at 154.

Finally, the Court should grant the petition because the jurisdictional questions presented are critically important to the administration of the FEHBA program, a program that covers nearly 10 million individuals, costs billions annually, and each year involves hundreds of millions of claims for benefits. As part of the program, Congress insisted in FEHBA itself on a federal remedy for disputes over benefits and coverage. *See* 5 U.S.C. § 8902(j). In turn, OPM -- the agency responsible for overseeing FEHBA -- has stated expressly that fidelity to that federal remedy is paramount in order to sustain OPM's "central role" and to maintain "the principle of uniformity in the FEHB[A] Program." 60 Fed. Reg. 16037, 16037 (Mar. 29, 1995). The Seventh Circuit's decision sets up the troubling scenario that FEHBA enrollees will seek to bypass the relevant administrative remedy and federal judicial review and instead sue their plan administrator -- the wrong party -- in state court under state law; if they do choose to do so, they can avoid removal to federal court, absent specific directives from OPM (or an employing agency) to the FEHBA plan, directives that the

enrollees will have gone a long way to prevent by evading the federal administrative process in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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