No. 16-149

IN THE
Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,

Petitioner,

v.

JODIE NEVILS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Missouri

REPLY BRIEF FOR PETITIONER

THOMAS N. STERCHI
DAVID M. EISENBERG
BAKER STERCHI COWDEN & RICE, LLC
2400 Pershing Road
Suite 500
Kansas City, MO 64108
(816) 471-2121

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
RYAN N. WATZEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Brief for Petitioner remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

TABLE OF AUTHORITIES *(continued)*

CASES *(continued)* **Page(s)**

CONSTITUTIONAL PROVISIONS

United States Constitution:

STATUTES

United States Code:

TABLE OF AUTHORITIES *(continued)*

REGULATIONS **Page(s)**

ADMINISTRATIVE MATERIALS

LEGISLATIVE HISTORY

REPLY BRIEF FOR PETITIONER

State laws like Missouri's that prevent Federal Employees Health Benefits Act ("FEHBA") carriers from seeking subrogation or reimbursement—as their contracts with the Office of Personnel Management ("OPM") require—directly threaten the uniform, fair, and efficient administration of FEHBA plans. Interpreting FEHBA's express-preemption provision (5 U.S.C. § 8902(m)(1)) to preempt such laws—as its text and purpose compel, and as OPM has reasonably construed it—neutralizes that threat.

Respondent Nevils, however, asks the Court to multiply exponentially the problems such state laws pose. He first proposes *striking down* FEHBA's preemption provision—eliminating express preemption altogether and inviting States to regulate *every* aspect of OPM's contracts. Alternatively, he urges a miserly construction of Section 8902(m)(1) that similarly invites state-law frustration of FEHBA-plan administration. Nevils's invalidate-first, interpret-later strategy is revealing, reflecting the extreme difficulty of squaring the decision below with the statute. Neither his statutory nor his constitutional arguments for allowing States to nullify federal-government contracts for federal-employee benefits have merit.

Nevils concedes that Section 8902(m)(1)'s text does not compel the Missouri Supreme Court's construction. He claims instead that it is ambiguous, and turns immediately to dice-loading default rules to read it narrowly. But Nevils never establishes that FEHBA is ambiguous in any relevant sense. He offers literally *no* analysis of the statutory text, and disregards or dismisses this Court's most pertinent

precedents. His argument hinges entirely on dictum in *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), which addressed only federal-court jurisdiction and expressly *reserved judgment* on Section 8902(m)(1)'s scope. *McVeigh* certainly did not hold that Nevils's construction is *equally* plausible. Whether *McVeigh* viewed Nevils's reading as colorable is immaterial; the question here is which reading is *correct*.

Whatever ambiguity FEHBA might be thought to contain, moreover, must be resolved in *favor* of preemption under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), given OPM's regulation reasonably construing it to preempt laws like Missouri's. Nevils proposes (at 46) an unprecedented exception to *Chevron* for preemption provisions unless they include a "clear statement" authorizing regulations on preemption. That invented carve-out contravenes this Court's holding that there are "*no* 'exception[s]'" to *Chevron* for particular topics, *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871 (2013) (emphasis added) (citation omitted), and its cases applying *Chevron* to preemption provisions lacking any such "clear statement."

Unable to escape *Chevron*'s framework, Nevils asserts that OPM's interpretation of FEHBA is undeserving of deference. Having admitted that OPM's reading is plausible, he faces an uphill climb, and never gains traction. Nevils invokes a presumption against preemption, but this Court's precedent makes clear that that presumption cannot supersede *Chevron*, and that in any event no such presumption even applies to this *express*-preemption provision addressing *federal*-employee benefits under *federal* contracts. Nevils impugns the pedigree of OPM's

decades-old position, but his argument rests on assertions by a prior agency's staff made *before* Section 8902(m)(1) *existed*. He finally tries to leverage his constitutional challenge to a different aspect of the statute to limit its preemptive scope. But his mislabeled constitutional-avoidance argument avoids nothing. As Nevils previously (and rightly) admitted, the question of Section 8902(m)(1)'s constitutionality "is unavoidable." Resp. Cert. Br. 20.

The answer to that constitutional question is clear. Nevils concedes that it is perfectly constitutional for Congress to do what Section 8902(m)(1) does: prevent state laws from applying to particular contracts. Despite his insistence that grand principles of the constitutional structure are at stake, Nevils's position amounts to a hollow drafting rule. In any event, the statute's text and context permit—and the avoidance canon and common sense compel—reading Section 8902(m)(1) as validly giving preemptive effect to federal law.

Nevils, in short, offers no sound reason for distorting or destroying FEHBA's preemption provision. The Court should reverse and hold that FEHBA—by its terms, and as OPM has reasonably construed it—validly prevents state law from nullifying FEHBA contracts' subrogation and reimbursement terms.

I. FEHBA Preempts State Laws That Bar Carriers From Seeking Subrogation Or Reimbursement Recoveries.

OPM's interpretation of Section 8902(m)(1) as preempting antisubrogation and antireimbursement laws is by far the best reading, and at least a reasonable one entitled to deference. Nevils offers no valid basis to reject it.

A. FEHBA Unambiguously Preempts State Laws Restricting Subrogation Or Reimbursement By FEHBA Carriers.

As Coventry showed, FEHBA's text and purposes point unmistakably in favor of preemption. Pet. Br. 23-35. Nevils has no persuasive answer to either.

1. Section 8902(m)(1)'s Text Covers Laws Restricting Subrogation And Reimbursement.

Nevils sidesteps the crucial starting point of preemption analysis: "'the language of the statute itself.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). He concedes (at 27) that Coventry's reading is "plausible," but makes no effort to show that his contrary reading is consistent with, let alone more faithful to, FEHBA's text.

a. Nevils does not deny that "relate to" in preemption clauses "'express[es] a broad pre-emptive purpose'" and requires only a "connection with, or reference to," the preempted topics. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (citation omitted). He neither engages with the definitions of "coverage," "benefits," "extent," and "provision" Coventry catalogued, nor explains how subrogation and reimbursement fall outside of them. *Cf.* Pet. Br. 23-24. And Nevils never confronts Section 8902(m)(1)'s separate text shielding from state law FEHBA-contract terms that relate to "*payments with respect to* benefits," 5 U.S.C. § 8902(m)(1) (emphasis added), which independently covers subrogation and reimbursement. *Cf.* Pet. Br. 31-32.

Nor does Nevils dispute this Court's holding that subrogation and reimbursement relate to benefits in

the context of private plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-60 (1990). He dismisses ERISA (at 29-30) because of differences between it and FEHBA, but none bears on *FMC*'s reasoning. Nevils notes (at 29) that ERISA preempts "*any and all* State laws" that relate to employee-benefit plans. 29 U.S.C. § 1144(a) (emphasis added). But FEHBA likewise applies to "*any* State or local law … which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1) (emphasis added). Although FEHBA shields from state law only certain FEHBA-contract terms, including those that "relate to" "benefits," *FMC* held that an antireimbursement law "'relate[d]' to an employee benefit plan" precisely *because* it affected "benefit levels." 498 U.S. at 58-60.

Nevils also never explains why Congress would desire *greater* state-law interference for *federal*-employee benefits than for private plans. He asserts (at 30) that Congress, in enacting FEHBA after ERISA, "opted for a narrower approach," but never explains how or why. And Nevils concedes (*ibid.*) that ERISA is *narrower* in a key respect: It generally *saves* from preemption state laws "regulat[ing] insurance, banking, or securities," 29 U.S.C. § 1144(b)(2)(A)—an exception FEHBA lacks.[1]

---

[1] Although ERISA completely preempts state-law *remedies* for claims concerning plans subject to ERISA, *see Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207-21 (2004), that is not because of its express-preemption provision's breadth; it is because a *separate* provision, 29 U.S.C. § 1132, provides an *exclusive federal cause of action* for ERISA claims. *See Metro. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63-67 (1987).

b. Coventry's textual arguments thus stand unrebutted. Nevils nevertheless insists (at 26-28) that FEHBA is "ambiguous" based solely on dictum in *McVeigh*, 547 U.S. 677, which he claims "rejected" Coventry's "textual arguments." But the sole question presented and decided in *McVeigh* concerned federal-court jurisdiction; the Court expressly *declined* to determine Section 8902(m)(1)'s scope—because it did not matter. 547 U.S. at 682-83, 688-701. Nevils recounts (at 26-27) *McVeigh*'s description of alternative interpretations pressed primarily by *amici*. But he omits the punchline: The Court concluded that it "*need not choose* between" them, because federal jurisdiction was lacking either way. *Id.* at 697-98 (emphasis added). *McVeigh* cannot plausibly be read as *resolving* the very question it explicitly *reserved*.

Nevils seizes (at 3, 27) on *McVeigh*'s passing description of those competing interpretations as "plausible" and of Section 8902(m)(1) as "open to more than one construction." 547 U.S. at 697-98. But neither comment constitutes a *holding* that the statute *is* ambiguous. Just as Section 8902(m)(1)'s meaning was immaterial, *a fortiori* its *clarity* was irrelevant also. *Id.* at 698. *McVeigh* should not be misread as gratuitously deciding a separate issue that the Court explained had no bearing on the jurisdictional issue at hand. In context, the Court's recitation of *amici*'s rival readings and its allusion to them *en passant* as "plausible" were merely part of its explanation why it was *not* deciding an issue the litigants disputed.

McVeigh assuredly did not establish that Nevils's and Coventry's constructions are in anything approaching equipoise. "[T]o acknowledge ambiguity"

in the sense that multiple readings of a statute are possible "is *not* to conclude that all interpretations are *equally* plausible." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (emphases added). Undoubtedly because Section 8902(m)(1)'s scope did not matter, *McVeigh* undertook no evaluation of the relative *merits* of either reading—never examining the words' ordinary meaning or pertinent precedents (such as *FMC*). *McVeigh* cannot be read as declaring FEHBA's text an inkblot, with one construction just as good as another.

2. Congress's Purposes Confirm That FEHBA Preempts Antisubrogation And Antireimbursement Laws.

Nevils's claim of ambiguity independently fails because his reading contravenes Congress's purposes. "Ambiguity is a creature not of definitional possibilities but of statutory context," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), including which reading of a statute that "seem[s] ambiguous … produces a substantive effect that is compatible" with Congress's objectives, *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Nevils does not come close to showing how his interpretation is faithful to Congress's aims.

Nevils does not deny that Congress enacted and expanded Section 8902(m)(1) to facilitate cost savings, or that subrogation and reimbursement recoveries yield more than $100 million annually that his position allows States to wipe out. *Cf.* Pet. Br. 33-35; U.S. Br. 19. He answers (at 37-38) that Congress did not pursue that purpose exclusively, but Nevils cites

no countervailing purpose that plausibly might have persuaded Congress to forgo these savings entirely.[2]

Nevils similarly does not deny Congress's goal of ensuring uniform rules to govern plans. *Cf.* Pet. Br. 33-34; U.S. Br. 19-20. He rejoins (at 37) that laws restricting subrogation and reimbursement are not among the specific examples mentioned in the legislative history, which he mistakenly holds out as the only permissible reach of Section 8902(m)(1). But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history"—especially where (as here) the statutory text "plainly embraces criteria of more general application." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). Nevils's revisionist history, moreover, ignores the government's showing that antisubrogation and antireimbursement rules are "indistinguishable … from the state mandated-benefit laws that Congress enacted the preemption provision to target" in relevant respects: They "creat[e] the same kind of disuniformity, increased costs, and unfair cross-subsidization" as laws mandating particular benefits. U.S. Br. 20; Pet. App. 179a. Nevils never shows otherwise; rather, he urges (at 35-36) ignoring

---

[2] Nevils incorrectly asserts (at 38) that cost savings are not implicated here because Coventry's plan was "community-rated" and did not remit recoveries directly to the Treasury. As the government has explained, community-rated carriers' recoveries *do* "lower subscription charges"; their premiums "generally depend on the expected cost of providing benefits," and recoveries "tend to reduce those expected costs, and thus the premiums." Pet. App. 170a-71a; *see also* OPM, *Community Rating Guidelines* 6, 11 (2015), http://tinyurl.com/zfwvhdt ("claims must be reduced by income attributed to FEHBP group enrollees from all other sources such as … subrogation").

OPM's insights because only Congress's purposes control. But the agency's expertise and experience administering FEHBA for decades surely are relevant in determining which state laws *implicate* Congress's undisputed practical concerns.

Nevils downplays the continuing importance of uniformity, observing (at 4) that "there is no single" provider or plan. He misunderstands the uniformity Congress desired: It was concerned not that different *plans* exist, but that the *laws* governing the *same* plan varied across state lines. *See*, *e.g.*, H.R. Rep. No. 94-1211, at 3 (1976) (J.A.338). It may well make sense to tailor plans to particular markets or participant pools; Congress left that choice to OPM, which has adopted many different plans. But Congress desired a single, stable set of *legal rules* against which OPM could craft plans to meet different needs.

This case illustrates why. Administering multi-State or nationwide plans is exceedingly difficult if every State's courts or legislature can impose parochial restrictions on whether and how carriers may pursue recoveries that their contracts with OPM require—restrictions subject to change at any time, with alleged violations potentially prompting (as here, J.A.262) class actions seeking punitive damages. And if plans are subject to different subrogation and reimbursement laws of multiple States—like Coventry's plan, available (contrary to Nevils's contention (at 38)) in parts of Missouri *and* Illinois (Pet. App. 145a), whose laws differ, AHIP Br. 18-20—some participants will unfairly bear the cost of special benefits afforded only to others. U.S. Br. 17-18, 20. *That* is the type of disuniformity Congress sought to eliminate, but which Nevils's reading would ensure.

B. OPM's Reasonable Interpretation Of FEHBA Is Entitled To Deference.

Nevils's attempt to manufacture ambiguity ultimately does not help him because, even if his construction were *also* plausible, *OPM's* interpretation in its regulation is at least reasonable and controls under *Chevron*. Nevils and his *amici* attempt to escape *Chevron* altogether, but their contentions run headlong into this Court's precedent. Nevils's fallback arguments that OPM's interpretation of *this* statute deserves no deference have no substance.

1. *Chevron* Applies To OPM's Rule Interpreting Section 8902(m)(1).

Nevils and a minority of States—Missouri notably *not* among them—contend that *Chevron* does not apply at all because (they say) Congress did not authorize OPM to issue regulations addressing preemption. That contention is foreclosed by the statute and this Court's precedent.

a. Nevils and his *amici* insist that OPM lacks authority to opine on preemption because FEHBA lacks a "clear statement" *specifically* authorizing regulations on preemption. Resp. Br. 44-46; States Br. 9-16; NGA Br. 11-20. That contravenes *City of Arlington*, which held that *Chevron* "validate[s] rules for *all* the matters the agency is charged with administering." 133 S. Ct. at 1874. Because "the whole includes all of its parts," that includes everything within the scope of a general grant of rulemaking authority. *Ibid.* There are "no 'exception[s]'" for particular topics, period. *Id.* at 1871 (citation omitted). Section 8913(a)'s authorization to OPM to "prescribe regulations necessary to carry out this

chapter," *i.e.*, *all* of FEHBA, thus includes Section 8902(m)(1).

Nevils dismisses *City of Arlington* (at 45) as inapplicable to "federalism" issues, but its central point was that there are *no* exceptions to *Chevron*. Creating a subject-specific carve-out to *City of Arlington itself* would eviscerate its holding. Nevils notes (*ibid.*) the Court's statement that the case had "nothing to do with federalism," but in context that statement further undermines his position: The Court *rejected* an argument that "*Chevron* deference [was] inappropriate" because the agency "'asserted jurisdiction over matters of traditional state and local concern.'" 133 S. Ct. at 1873 (citation and brackets omitted). That "faux-federalism argument" misunderstood the issue: The federal statute "explicitly supplant[ed] state authority" to *some* extent; the case was thus "'a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.'" *Ibid.* (citation omitted). Here, too, Section 8902(m)(1) "explicitly supplants state authority"; the only question is to what extent. *Ibid.* Whether this Court defers to OPM's view on that issue or decides FEHBA's scope *de novo* "has nothing to do with federalism." *Ibid.*

b. Nevils's contrived "clear statement" rule also contradicts this Court's decisions addressing preemption provisions specifically. He does not dispute that *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), accorded *Chevron* deference in addressing 12 U.S.C. § 85, which this Court had already held preempted state law. 517 U.S. at 743-44. Yet *Smiley* did not search for any statutory "clear statement" authorizing the agency to opine on preemption. The

statutes in force were general grants of authority. *See* 12 U.S.C. §§ 1, 93a (1996).

Citing the distinction *Smiley* drew concerning "question[s] of the substantive (as opposed to preemptive) *meaning* of a statute," 517 U.S. at 744, Nevils argues (at 46-47) that only "substantive regulation[s]" merit deference. But he fundamentally misconceives *Smiley*'s point. The Court explained that, where "there is no doubt that [a statute] preempts state law"—true in *Smiley* because this Court had already so held, and true here because Section 8902(m)(1) expressly displaces state law—the *extent* of preemption *is* a matter of its "substantive" rather than "preemptive" meaning, so *Chevron* indisputably *does* apply. 517 U.S. at 744. Nevils's assertion that "[s]ubstantive questions about the scope of an express preemption clause are still questions about 'whether a statute is preemptive'" (Resp. Br. 47 (citation omitted)) erases *Smiley*'s distinction, equating the two questions this Court distinguished.

Nevils's theory, moreover, contradicts *Smiley*'s result. He says (at 46) that "substantive regulation[s]" only "displace state law through some form of *implied* preemption." But there was nothing implicit about the regulation's preemptive effect in *Smiley*: It appeared in a subpart titled "Preemption," it defined "[t]he term 'interest' as used in 12 U.S.C. § 85" (which this Court had held preempted state law), and it was adopted specifically to clarify the scope of preemption in light of ongoing litigation, including *Smiley* itself. 61 Fed. Reg. 4849, 4858 & n.5, 4969

(Feb. 9, 1996). Yet *Smiley* had no difficulty deferring to that regulation.[3]

Nevils's clear-statement test similarly cannot be squared with *Cuomo* v. *Clearing House Association*, 557 U.S. 519 (2009). As he acknowledges (at 48), the regulation there determined the scope of preemption, because "any interpretation of 'visitorial powers' necessarily 'declares the preemptive scope of the [statute].'" 557 U.S. at 535. And "[b]y its clear text" the regulation barred certain actions by States. *Id.* at 525. Yet without identifying any grant of rule-making authority specifically addressing preemption, this Court expressly applied "the familiar *Chevron* framework." *Ibid.* Nevils writes off *Clearing House* (at 45-46) because the Court did not ultimately *accept* the agency's interpretation. But it did so only because, as the Court explained, that particular interpretation was *unreasonable*. 557 U.S. at 525. Nevils cannot explain why the Court applied "the familiar *Chevron* framework" in the first place.

Nevils seeks refuge in *Wyeth* v. *Levine*, 555 U.S. 555 (2009), but neither *Chevron* nor any express-preemption provision was at issue. *Id.* at 567-68. *Wyeth* acknowledged, moreover, that "an agency regulation with the force of law can pre-empt conflicting state requirements"; the case simply presented "no such regulation." *Id.* at 576. At stake instead was an agency's "mere assertion that state law is an

---

[3] Even if Nevils were correct (at 48) that an agency's "*conclusion*" on preemption does not merit deference, that would not matter here. While the second sentence of 5 C.F.R. § 890.106(h) concludes that certain state laws are preempted, its *first* sentence asserts only OPM's interpretation of Section 8902(m)(1)'s scope, and thus is entitled to deference even on Nevils's view.

obstacle to achieving its statutory objectives." *Ibid.* Only in addressing "what weight" to accord that "mere assertion" did the Court note that "Congress ha[d] not authorized the [agency] to pre-empt state law directly." *Ibid.* *Wyeth* has no bearing on whether *Chevron* applies to regulations construing express-preemption provisions.[4]

c. Nevils never addresses the incongruous consequence of his position: that agencies construing statutes that expressly preempt state law receive *less* deference than agencies issuing *freestanding* regulations that independently preempt state law. *Cf.* Pet. Br. 54-55. He does not dispute that "'[f]ederal regulations'" that preempt state law of their own force "'have no less pre-emptive effect than federal statutes.'" *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984) (quoting *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-54 (1982)). And he does not deny that no "'presumption against pre-emption'" applies in that setting. *New York* v. *FERC*, 535 U.S. 1, 18 (2002) (citation omitted).

Nor could Nevils claim that these principles apply only where Congress specifically authorizes preemptive regulations. *de la Cuesta* held that "[a] pre-emptive regulation's force does *not* depend on express congressional authorization to displace state law." 458 U.S. at 154 (emphasis added). And both *Capital Cities* and *New York* upheld preemptive

---

[4] Likewise, in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), the statute "d[id] not grant … broad authority to promulgate rules," *id.* at 259, and the regulations did not construe an express-preemption provision, *id.* at 256-69. The statute also disclaimed any "'intent … to occupy the field.'" *Id.* at 251 (citation omitted).

regulations based on the agency's general authority over a field, not based on statutes specifically addressing preemption. *See Capital Cities*, 467 U.S. at 699-700; *New York*, 535 U.S. at 18-19. Given the latitude agencies have in exercising general rulemaking authority to preempt state law where Congress has *not* spoken on preemption, it makes no sense to afford *less* deference where Congress *has* expressly chosen to preempt state law, and the agency merely interprets the scope of that preemption.

2. Nevils's Challenges To OPM's Interpretation Of FEHBA Fail.

Unable to escape *Chevron*'s settled framework, Nevils variously attacks OPM's interpretation as foreclosed at *Chevron*'s first step or unreasonable at its second. None of his attacks hits the target.

a. Nevils contends (at 31-35, 51-53) that a presumption against preemption precludes deferring to OPM. But as *Smiley* squarely held, that "'presumption'" does not "in effect trum[p] *Chevron*." 517 U.S. at 743-44. That presumption, moreover, has no application to Section 8902(m)(1).

This Court made clear last Term that no presumption against preemption applies in construing *express*-preemption provisions such as Section 8902(m)(1). *Franklin*, 136 S. Ct. at 1946; Pet. Br. 36-37; U.S. Br. 11; U.S. Chamber Br. 5-13. Nevils tries to rewrite *Franklin*, arguing that it merely deemed the presumption "unnecessary" because the statutory text was "'plain.'" Resp. Br. 33 (citation omitted). That reading contradicts this Court's opinion, which held that "because the statute '*contain[ed]* an express pre-emption clause,'" the Court "d[id] not invoke any presumption against pre-emption." 136 S. Ct. at

1946 (emphasis added). The *existence* of the express-preemption provision displaced the presumption, irrespective of its plainness. *Ibid.* Nevils cites (at 33) pre-*Franklin* cases that he says applied a different approach, but *Franklin*'s categorical holding put any uncertainty on this point to rest.

Nevils also does not deny the extensive history of *federal* involvement regulating *federal*-employee benefits, which independently precludes the presumption. *See United States* v. *Locke*, 529 U.S. 89, 108 (2000). He again distorts (at 34) this Court's precedent, misreading *Locke* as addressing only fields subject to "nearly exclusive federal regulation." *Locke* held, however, that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of *significant* federal presence," not near-*exclusive* federal control. 529 U.S. at 108 (emphasis added). That makes perfect sense: A "significant" history of federal involvement shows that Congress deliberately entered and remained in a field, removing any worry that preemption might be accidental.

Nevils similarly fails to refute the overriding *federal* interest in efficient and fair administration of *federal* workers' benefits—which further forecloses the presumption. *See Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). He concedes (at 34) that the federal interest in *Buckman*—regulating the "relationship between a federal agency and the entity it regulates," *ibid.*—renders the presumption inapplicable. Section 8902(m)(1) concerns that same relationship, between OPM and carriers with whom it contracts, and who are subject to OPM's regulations and guidance.

Nevils retreats again (at 34-35) to *McVeigh*, claiming that it establishes that FEHBA does not implicate overriding federal interests. But *McVeigh* held only that federal law did not *completely* displace all state law touching the field so as to create exclusive federal-court *jurisdiction*. 547 U.S. at 689-701. Nevils's view that the presumption applies unless federal law has already completely preempted *all* state law in the field is irreconcilable with *Buckman*, which did not involve complete preemption at all.

Nevils and his *amici* alternatively try to redefine the relevant field as state insurance or tort law. Resp. Br. 31-32; AAJ Br. 12-25; Professors' Br. 21-26; MATA Br. 5-9. But the field that the displaced *state* laws regulate is irrelevant. Preemption "is a question of *congressional* intent." *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (emphasis added). It is thus the field in which *Congress* legislates that matters in deciding whether to presume that Congress did not intend to displace state law. Thus, in *Buckman*, while the plaintiffs asserted "state tort law" claims, this Court held that "no presumption against pre-emption obtain[ed]" because the *federal* statute addressed an area of overwhelmingly federal concern. 531 U.S. at 343, 347-48.

FEHBA similarly regulates a distinctly federal field: federal-employee benefits. Section 8902(m)(1) does not sweep aside state insurance or tort law generally; it merely precludes those laws' application to FEHBA contracts. There is no reason to impute to

Congress apprehension about preempting state laws intruding on that inherently federal field.[5]

b. Nevils next asserts (at 53-54) that OPM has taken "inconsistent positions." "Agency inconsistency," however, "is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), nor a basis for more searching review of agencies' reasoning, *see FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). Nevils's claim of inconsistency, moreover, is pure fiction.

Nevils remarkably alleges (at 14) that until 2015 OPM "had consistently taken the position" that it lacked authority to construe FEHBA to preempt antisubrogation and antireimbursement laws. Yet he identifies not a single statement by OPM since Section 8902(m)(1)'s enactment in 1978 that remotely supports that claim. The only OPM statement he cites (*ibid.*) is its 2012 guidance letter to carriers. But that letter explained that OPM had "consistently

---

[5] Repackaging this argument, Nevils claims (at 49, 52-53) that OPM never "considered" its regulation's "federalism implications." But OPM addressed that issue, reasonably concluding that the regulation has no "federalism implications" because it merely "restates existing rights, roles and responsibilities of State … governments" and "formalize[d] [OPM's] longstanding interpretation of what Section 8902(m)(1) has meant since Congress enacted it in 1978." OPM, *Final Rule*, *Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203, 29,204 (May 21, 2015) (Pet. App. 162a-63a). Nevils and his *amici* can hardly complain about the length of the final rule's discussion of federalism: None elected to participate in the rulemaking to raise such concerns. *See id.* at 29,203-04 (Pet. App. 160a-63a).

recognized" that FEHBA *does* preempt antisubrogation and antireimbursement laws, and that OPM "continue[d] to maintain this position." OPM, FEHB Program Carrier Letter No. 2012-18, at 2 (June 18, 2012) (Pet. App. 118a). Contrary to Nevils's assertion (at 14), nothing in that letter "acknowledge[d] [OPM's] lack of authority to issue a regulation targeting state law." It did not address OPM's rulemaking authority; that OPM did not yet elect to *exercise* that authority is hardly an admission that no such authority existed.

Nevils's claim of supposed inconsistency rests instead (at 53) on statements by attorneys of OPM's predecessor (the now-defunct Civil Service Commission)—made *before Section 8902(m)(1)'s enactment*—doubting the Commission's ability to issue regulations regarding preemption. Those statements by another agency's staff before FEHBA's preemption provision *existed* do not remotely demonstrate any about-face by OPM. Indeed, it was precisely the Commission's doubts of its "clear authority" to issue regulations addressing preemption that prompted Congress in 1978 to enact Section 8902(m)(1), which Congress adopted to "clear up the doubt and confusion" by "clarify[ing] the Federal Government's and the Civil Service Commission's authority" on this question. S. Rep. No. 95-903, at 4 (1978) (J.A.369-70). OPM, created the same year, has interpreted the statute consistently ever since.

c. Nevils finally claims (at 30-31, 52) that the constitutional-avoidance canon compels rejecting OPM's interpretation. But that principle provides no basis for the distortion of FEHBA he proposes.

The avoidance canon applies only where one of two otherwise-plausible constructions of a statute

raises "'grave and doubtful constitutional questions'" that the other construction would "'avoid.'" *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). The putative constitutional concern Nevils asserts—that Section 8902(m)(1) violates the Supremacy Clause by stating that "terms of [FEHBA] contract[s] … shall supersede and preempt" state laws—is illusory. Pet. Br. 56-61; *see also infra* pp. 21-24. Even if that concern were real, it is easily resolved by construing that text as giving preemptive effect to "'*federal law*.'" *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 144-45 (2d Cir. 2005), *aff'd*, 547 U.S. 677; Pet. Br. 59-60. That sensible reading of the purportedly problematic statutory phrase obviates any constitutional concern.

Nevils, however, does *not* ask the Court to choose between competing interpretations of the statutory text he claims is unconstitutional. Rather, based on his concern about FEHBA's text linking preemption to contract terms, Nevils asks the Court (at 31, 52), to bend *other* language in the statute: the words defining *which* FEHBA contract terms are shielded from state law. Nevils cites no authority for distorting one statutory phrase that raises no constitutional concerns simply to sidestep a constitutional question about *other* language. That approach, moreover, makes no sense. The canon is "a means of giving effect to congressional intent," based on the "reasonable presumption that Congress did not intend" an "interpretatio[n] of a statutory text" that "raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381-82 (2005). There is no basis to presume that Congress intended courts to adopt a narrow, illogical reading of mundane terms like "benefits" and "coverage" that raise *no* "constitution-

al doubts," merely to forestall answering constitutional questions about *other* language.

Indeed, Nevils's supposed saving construction does not save Section 8902(m)(1) from the alleged infirmity. His Supremacy Clause claim encompasses *all* of Section 8902(m)(1)'s applications; if meritorious, it would mean FEHBA expressly preempts *no* state laws, not even those indisputably related to coverage and benefits. Reading Section 8902(m)(1) not to reach antisubrogation and antireimbursement laws would do nothing to avoid the supposed constitutional quandary. It would simply dodge that question in one case, leaving that constitutional issue that affects myriad aspects of FEHBA plans in dire need of an answer. The Court should not twist unrelated parts of Section 8902(m)(1) to delay the inevitable adjudication of its constitutionality, but should confront that constitutional question head-on.

II. FEHBA'S EXPRESS-PREEMPTION PROVISION COMPORTS WITH THE SUPREMACY CLAUSE.

Nevils's submission confirms that his constitutional attack is insubstantial. He contends (at 19-24) that Section 8902(m)(1) violates the Supremacy Clause because the FEHBA-contract terms it shields from state-law interference are not *themselves* "Laws of the United States." U.S. Const. art. VI, cl. 2. But Section 8902(m)(1) itself—which declares state laws "supersede[d] and preempte[d]"—*is* a "Law"; it thus is *Congress* that chose whether and what to preempt, referring to certain FEHBA-contract terms simply to make room for them to operate. Indeed, given that FEHBA concerns only federal-government contracts, States' authority over them is doubtful at best. Pet. Br. 59; U.S. Br. 30-31. Congress assuredly can confirm expressly the limit of States' ability to interfere.

Nevils's true complaint (at 22) is that Section 8902(m)(1) improperly "delegate[s] preemption to the content of future contract terms," which he repeatedly but misleadingly describes (at 2, 17, 21) as "privately negotiated" agreements. That supposed "delegat[ion]" to "privat[e] negotiat[ions]" is a fabrication. FEHBA concerns only particular terms (relating to coverage, benefits, and benefit payments) of contracts written by and entered into with *a federal agency*—within parameters set by statute and OPM regulations, 5 U.S.C. §§ 8902-8903, 8913(a), subject to "such maximums, limitations, exclusions, and other definitions of benefits" OPM deems "necessary or desirable," *id.* § 8902(d). Nevils admits (at 41-42) that Congress may validly empower federal agencies to decide the proper scope of preemption (and he has never asserted, below or in this Court, that FEHBA fails to supply an intelligible principle). He never explains why it causes greater constitutional concern for Congress to authorize OPM to make those same determinations in federal contracts.

In any event, Nevils concedes that Congress validly can and does shield even *private* contracts from state-law interference. He admits (at 22) that ERISA, 29 U.S.C. § 1144(a), and the Federal Arbitration Act, 9 U.S.C. § 2—each of which insulates particular private contracts from state laws—comply with the Supremacy Clause. Nevils asserts that those statutes differ because they give preemptive effect to a body of "'federal substantive law.'" Resp. Br. 22 (citation omitted). But he misses the critical common feature: Those statutes, like FEHBA, make preemption *contingent* on the existence and content of particular (future) contracts.

Nevils, moreover, gives the game away by admitting (at 23 n.4) that another federal-benefits statute, 10 U.S.C. § 1103(a)—addressing military servicemembers' medical and dental benefits—is perfectly constitutional. Section 1103(a) provides that "[a] law or regulation of a State or local government relating to health insurance, prepaid health plans, or other health care delivery or financing methods *shall not apply to any contract* entered into" by the Department of Defense under this federal program, so long as the agency determines either that the state law "is inconsistent with" the contract or that preemption is "necessary to implement or administer" the contract or to "achieve any other important Federal interest." *Id.* § 1103(a)(1)-(2) (emphasis added). Nevils concedes that Section 1103(a) is valid. Resp. Br. 23 n.4 ("Congress could have taken the same approach in" FEHBA). But Section 1103(a) does not explicitly state that "federal substantive law" displaces state law; it simply forbids state laws from "apply[ing]" to certain contracts. That undisputedly valid statute is substantively indistinguishable from FEHBA.

Nevils's Supremacy Clause challenge thus boils down to empty semantics, and his grand constitutional principle is a mere drafting rule: If Section 8902(m)(1) said state laws "shall not apply to" certain FEHBA-contract terms, rather than saying those terms "supersede and preempt" state law, his constitutional objection concededly collapses. His argument is not about the constitutional structure or fundamental limits of Congress's power, but a trifling, misplaced quibble over statutory syntax.

There is no reason to strike down Section 8902(m)(1) based on that superficial detail—and ample reason to read FEHBA sensibly to preserve its

validity, as every court besides the court below has done. Pet. Br. 60. Contrary to Nevils's assertion (at 25), construing the statute as giving preemptive force to federal law does not require "rewriting" it. The legal effect of its language is the same as the formulation Nevils approves: Prescribing that state laws "shall not apply to" certain contract terms is precisely what it *means* for those contract terms to "supersede" such laws. Section 8902(m)(1) does not displace state law generally, but merely shields specific contracts from those laws' operation.

Section 8902(m)(1) certainly *can* bear that construction—and the constitutional-avoidance canon Nevils champions thus compels adopting it. So does any rational view of Congress's intent. Nevils's position would mean that Section 8902(m)(1) expressly preempts *nothing*—not even laws at the core of "coverage" and "benefits," including mandated-benefits laws that prompted its enactment. That would leave the administration of millions of federal workers' and dependents' benefits at the mercy of fifty States' courts and legislatures. Unfettered state interference on that scale could make the FEHBA Program utterly unmanageable and incalculably costly. It is inconceivable that the Congresses that enacted and broadened Section 8902(m)(1) intended that result, which renders the provision a nullity. This is thus a paradigmatic case where the avoidance canon "give[s] effect to congressional intent" (*Martinez*, 543 U.S. at 382) by avoiding a construction Congress could not possibly have preferred.

CONCLUSION

The Missouri Supreme Court's judgment should be reversed.

Respectfully submitted.

THOMAS N. STERCHI
DAVID M. EISENBERG
BAKER STERCHI COWDEN & RICE, LLC
2400 Pershing Road
Suite 500
Kansas City, MO 64108
(816) 471-2121

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
RYAN N. WATZEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

February 16, 2017