No. 16-912

IN THE
Supreme Court of the United States

MATTHEW KOBOLD,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the express-preemption provision of the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8902(m)(1), preempts state laws barring subrogation or reimbursement by FEHBA insurance carriers pursuant to their contracts with the Office of Personnel Management.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent Aetna Life Insurance Company states that it is a wholly owned subsidiary of Aetna Inc. Aetna Inc. is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

BRIEF FOR RESPONDENT

The petition for a writ of certiorari in this case should be held for this Court's forthcoming decision in *Coventry Health Care of Missouri, Inc.* v. *Nevils*, No. 16-149, in which oral argument is scheduled for March 1, 2017. The question petitioner Matthew Kobold presents here is whether the express-preemption provision of the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8902(m)(1), encompasses state laws—including Arizona's common-law doctrine—that prevent insurance carriers (such as respondent, Aetna Life Insurance Company) that administer FEHBA plans under contracts with the Office of Personnel Management ("OPM") from seeking subrogation or reimbursement recoveries, which their contracts with OPM require them to pursue. That issue of statutory interpretation is also the first of two questions on which the Court has granted review in *Nevils*. Accordingly, although the Arizona Court of Appeals' decision of which Kobold seeks review here is correct, this petition should be held pending this Court's decision in *Nevils.*

While the overlap in the statutory-interpretation issue in this case and *Nevils* makes it appropriate to hold Kobold's petition, the correct disposition of the two cases may nevertheless differ because the arguments that Kobold presents—and those he has preserved and thus could present to this Court—diverge markedly from those at issue in *Nevils*. Kobold does not assert in his petition several of the arguments pressed by the respondent in *Nevils* for holding that FEHBA's express-preemption provision does not apply. In keeping with this Court's practice, that should preclude Kobold from raising those arguments in this Court if his petition is granted. *See*, *e.g.*, *Visa, Inc.* v.

Osborn, 137 S. Ct. 289, 289-90 (2016) (dismissing writ of certiorari as improvidently granted where petitioners, "[a]fter '[h]aving persuaded us to grant certiorari' on [one] issue, … 'chose to rely on a different argument' in their merits briefing" (quoting *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1772 (2015))). Kobold also either forfeited or affirmatively waived in the state courts below certain of the arguments raised in *Nevils* and at least one of the issues that his petition does assert. This Court ordinarily does not consider unpreserved arguments in any context. *See*, *e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397-98 (2016). And it is well settled that, in reviewing state-court judgments under 28 U.S.C. § 1257, with "'very rare exceptions,'" the Court will not consider federal questions not properly pressed or passed upon below. *Adams* v. *Robertson*, 520 U.S. 83, 86-90 (1997) (per curiam) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 533 (1992)); *see also*, *e.g.*, *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945); *Pa. R.R. Co.* v. *Ill. Brick Co.*, 297 U.S. 447, 462-63 (1936); *Herndon* v. *Georgia*, 295 U.S. 441, 442-46 (1935); *Jacobi* v. *Alabama*, 187 U.S. 133, 135-36 (1902). Kobold, tellingly, does not attempt to "specif[y]" with citations of the record—as this Court's rules require—when and how the federal-law arguments he asserts here were "timely and properly raised" in and "passed on" by the state courts. Sup. Ct. R. 14.1(g)(i). All of the arguments that Kobold either does not present here or failed to preserve would be unavailable to him in this Court were it to grant certiorari in this case.

Specifically, unlike the respondent in *Nevils*—who asserts that "[t]he text of § 8902(m)(1) is ambiguous," and urges resolving that putative ambiguity by applying a presumption against preemption or the canon of constitutional avoidance, *see* Resp. Br. 26-35, *Nevils*,

No. 16-149 (U.S. Jan. 18, 2017)—Kobold relies solely on his own reading of the statute's "plain words," which he contends unambiguously foreclose preemption here. Pet. 11, 14. By failing to raise in his petition any argument that, if Section 8902(m)(1) is ambiguous, his reading should still prevail based on the presumption against preemption, the avoidance canon, or any other interpretive principle, Kobold thus has forfeited those arguments in this Court.

In addition, although Kobold argues in his petition (at 9-15) that the principle of deference of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should not apply here, that argument is off-limits to him as well. Unlike the respondent in *Nevils*, Kobold did not argue below (and certainly does not identify where he did so) that the *Chevron* framework is categorically inapplicable in interpreting the scope of express-preemption provisions generally, or in construing OPM's interpretation of Section 8902(m)(1) specifically. *Cf.* Resp. Br. 39-49, *Nevils*, No. 16-149. Quite the opposite, Kobold conceded in the Arizona Court of Appeals that the *Chevron* framework *does* apply here, and that "[t]he issue is thus whether OPM's interpretation is reasonable." Kobold C.A. Supp. Br. 7-8 (Sept. 30, 2015). His petition for review to the Arizona Supreme Court similarly took as its starting premise that *Chevron* applies, and urged that court to address only the degree of deference *Chevron* requires. Kobold Ariz. S. Ct. Pet. for Review 1-8 (June 1, 2016). While Kobold now contends in this Court, for the first time in this case, that *Chevron* itself should be *overruled* entirely, *see* Pet. 14-15, that broadside contention was never asserted below and is directly contrary to his submissions in the state courts that *Chevron* does control.

The only deference-related argument Kobold's petition presents that he did raise below is his claim that the court of appeals misapplied *Chevron*'s second step by deferring to an agency's statutory interpretation without finding that it is "reasonable." Pet. 9-12. OPM's interpretation of Section 8902(m)(1), he argues, is "plausible," yet not "reasonable." *Id.* at 9-11. And, according to Kobold, "[t]he Arizona Court of Appeals found OPM's interpretation 'plausible'—equated 'plausible' with 'reasonable'—and reversed its [prior] Opinion" that had rejected OPM's reading of the statute. *Id.* at 11. That claim is doubly mistaken.

The semantic distinction Kobold strains to draw between "plausible" and "reasonable" has no substance in this setting. As the court of appeals explained, this Court has held that an agency's interpretation merits *Chevron* deference "'if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent.'" Pet. App. 7 n.3 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 184 (1991)). The court of appeals thus correctly "s[aw] no meaningful distinction between the … terms" "plausible" and "reasonable" "for purposes of the *Chevron* analysis." *Ibid*.

In any event, contrary to Kobold's assertion, the court of appeals did not rest its decision on "equat[ing] 'plausible' with 'reasonable.'" Pet. 11. The court expressly held that OPM's interpretation of Section 8902(m)(1) is *not* "unreasonable," Pet. App. 8, and it clarified that any possible daylight between "plausible" and "reasonable" did not matter to its conclusion here, *id.* at 7 n.3. Kobold's quibble over nomenclature thus is unfounded, and it is not properly presented because the court of appeals rendered no holding on that issue.

Kobold, finally, does not and cannot raise in this Court the second question presented in *Nevils*: whether FEHBA's express-preemption provision violates the Supremacy Clause, U.S. Const. art. VI, cl. 2. That distinct, constitutional question is mentioned nowhere in Kobold's petition. And it is not fairly included in his single question presented, which asks only whether "the plain words of the FEHBA preemption statute preempt Arizona's common-law anti-subrogation doctrine." Pet. i. Nor could Kobold challenge the constitutionality of Section 8902(m)(1) in this Court, having not "timely and properly raised" that separate issue (Sup. Ct. R. 14.1(g)(i)) in the state courts below. His petition for review in the state supreme court, for instance, neither raised the issue of Section 8902(m)(1)'s constitutionality nor even cited the Supremacy Clause. *See generally* Kobold Ariz. S. Ct. Pet. for Review 1-16.

All of these arguments that Kobold has failed to present in this Court, in the courts below, or both are now unavailable to him. Consequently, if and to the extent the Court has occasion to consider, after issuing its decision in *Nevils*, whether to grant review or render a summary disposition in this case, none of these procedurally foreclosed arguments could properly provide a basis for upsetting the state court's decision in this case. Likewise, if the Court were to grant plenary review in this case, all of these arguments are and should remain off the table.

CONCLUSION

The petition for a writ of certiorari in this case should be held pending this Court's decision in *Nevils*, No. 16-149, and disposed of appropriately in light of this Court's eventual ruling in that case.

Respectfully submitted.

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