No. 09-38

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

PETITIONER'S REPLY BRIEF

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

ARGUMENT

A. The Seventh Circuit's Complete Preemption Holding Warrants This Court's Review

In its petition, HCSC showed that the Seventh Circuit's complete preemption ruling, which conflated complete preemption with the defensive preemption concept of federal occupation of a field, contravened this Court's prior decisions in *Beneficial National Bank, N.A. v. Anderson*, 539 U.S. 1 (2003), and *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). It also created Circuit splits on the test for complete preemption generally, as well as on application of complete preemption in suits against plans governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14.

In response, Respondents do not defend the Seventh Circuit's notion that occupation of the field is the test for complete preemption; instead, they recognize that, in *Beneficial National Bank*, "this Court stated the test for complete preemption was 'whether Congress intended the federal cause of action to be exclusive.'" Resp. Br. at 9 (quoting *Beneficial Nat'l Bank*, 539 U.S. at 7). But Respondents then seek to avoid the problems the Seventh Circuit's ruling creates by asserting that, under the proper test for complete preemption, there still would be no federal jurisdiction in this case. The centerpiece of their presentation is that suppos-

edly none of their grievances are subject to FEHBA's exclusively federal remedies. On this score, Respondents widely miss the mark.

Respondents first contend that the case has never concerned their son's *enrollment* in the Service Benefit Plan ("the Plan"), which is the FEHBA plan at issue. *See* Resp. Br. at 6. With the case purportedly not involving an enrollment question, Respondents argue that their suit can steer clear of FEHBA's exclusive remedy for enrollment disputes. *See* 5 C.F.R. §§ 890.104, 890.107(a); Pet. at 5, 18. Yet, Respondents' original complaint in the case (the one that led to removal to federal court) quite plainly asked a court to do the following: "Enter judgment for Plaintiffs and against Defendant, directing Defendant to provide medical insurance coverage for Plaintiffs' minor child . . . from July 31, 2007 until such time as either he reaches 21 years of age or Plaintiff Juli A. Pollitt chooses to remove him from her policy." C.A. App. A25; *accord id.* at A23 ("On July 30, 2007 Defendant informed Plaintiffs for the first time that there *was no medical coverage* for their minor child") (emphasis added). And Respondents' current statement that their case involves no enrollment questions is at odds with both the district court's and the court of appeals' findings that the dispute centers on the "temporary dis-enrollment of plaintiffs' son." Pet. App. 8a (district court's decision); *see also id.* at 4a (court of appeals holding that, if jurisdiction could be sustained under the federal officer removal statute, the case must be dismissed, in part, because of FEHBA's remedy for enrollment disputes).

Next, Respondents maintain that their case can escape complete preemption because purportedly it likewise does not fit FEHBA's exclusive remedy for challenging benefits denials. *See* 5 U.S.C. § 8902(j); 5 C.F.R. §§ 890.105, 890.107(c). Again, their pleadings show otherwise. Emphasizing that their grievance concerns an alleged denial of benefits (resulting from a mistake about enrollment), Respondents' original complaint asked a court to "[e]nter judgment for Plaintiffs and against Defendant, directing Defendant to honor all medical insurance claims for their minor child . . . for the period of time from June 16, 1993 to July 30, 2007." C.A. App. A25. The second amended complaint (*i.e.*, the currently operative pleading) also alleges that, during the period relevant to the case, "Defendant, upon discovering the [enrollment] discrepancy in question, opted to *retroactively deny coverage* for [Respondents' son]," and the second amended complaint requests a court order directing HCSC to halt any efforts to recollect earlier paid, but now denied, benefits. *Id.* at A318, A322 (emphasis added). Additionally, contrary to Respondents' view that their case "is not a dispute over benefits" (Resp. Br. at 6), both the district court and the court of appeals found the dispute covered by FEHBA's denial-of-benefits remedy. *See* Pet. App. 4a (court of appeals noting applicability of 5 C.F.R. § 890.107(c)); *id.* at 7a (district court noting that "both the Plan contract and the OPM regulations establish a comprehensive administrative review procedure for resolving claims, *like plaintiffs'*, regarding benefits and administration of FEHBA plans") (emphasis added).

Just because the benefits denials were retroactive does not mean they fall outside of FEHBA's exclusive

remedial scheme for benefits disputes. FEHBA directs the U.S. Office of Personnel Management ("OPM") to adjudicate administratively any "individual case" where a carrier does not "pay for or provide a health service or supply" based on the "the terms of the contract." 5 U.S.C. § 8902(j). Here, after initially paying claims, HCSC determined it should not pay those claims because the federal employing agencies had indicated that Respondents' son was not enrolled, and the FEHBA contract mandates payment only to enrolled persons. *See* C.A. App. A67-A68. With payment now having been denied by HCSC based on its view of its contractual obligations, nothing prevented an administrative claim to challenge the benefits denial.[1]

Moreover, Respondents cannot avoid FEHBA's benefits remedy by couching their claims in terms of bad faith or estoppel. *See* Resp. Br. at 10. As explained in the petition, this Court in ERISA and other settings

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[1] An administrative claim could have been filed by Respondent Juli A. Pollitt as the enrolling federal employee. *See* 5 C.F.R. § 890.105(a)(2). Respondent Michael A. Nash is not enrolled in the Plan, but could have filed an administrative claim on his son's behalf, with appropriate documentation. *See id.* HCSC agrees with Respondents that Nash has no standing in his own right to pursue the OPM remedy. *See* Resp. Br. at 10-11. Indeed, the district court held that, because he had no contractual relationship with HCSC, he lacked Article III standing for the lawsuit. *See* Pet. App. 6a-7a. Nonetheless, though complete preemption for Nash's claims might become more complicated due to his lack of standing (but we do not concede complete preemption is inapplicable to him), Pollitt plainly was a Plan enrollee who could invoke FEHBA's remedies, thereby making her allegations completely preempted. The federal courts have removal jurisdiction so long as any one claim in a complaint is removable. *See* 28 U.S.C. §§ 1367, 1441(c).

and lower courts in the FEHBA context have rejected litigants' efforts to invoke tort theories of recovery in order to evade applicable denial-of-benefits remedies. *See* Pet. at 18-19 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Burkey v. Gov't Employees Hosp. Ass'n*, 983 F.2d 656, 660 (5th Cir. 1993)); *see also Hayes v. Prudential Ins. Co. of Am.*, 819 F.2d 921, 926 (9th Cir. 1987) (in FEHBA case, holding that "[t]ort claims arising out of the manner in which a benefit claim is handled are not separable from the terms of the contract"). In fact, in *Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390 (9th Cir. 2002), which is the principal decision here creating the Circuit split and which Respondents seek to distinguish as involving (supposedly unlike their claims) a "benefits determination" (Resp. Br. at 8), the FEHBA enrollee styled his claim as one for "state-law fraud." *Botsford*, 314 F.3d at 392. The Ninth Circuit still found complete preemption because a "dispute over benefits -- precisely the kind of dispute that FEHBA preempts -- underlies Botsford's claim." *Id.* at 395.

Nor can Respondents avoid FEHBA's benefits remedy by analogizing their state law claims to the "reimbursement" matters at issue in *Empire*. Reimbursement as addressed in *Empire* is a form of subrogation; it occurs where "a Plan beneficiary, injured in an accident, whose medical bills have been paid by the Plan administrator, recovers damages (unaided by the carrier-administrator) in a state-court tort action against a third party alleged to have caused the accident," and the Plan, as a result of the duplicative payments, seeks to recapture the earlier-paid

benefits. *Empire*, 547 U.S. at 682. In that instance, the Court said that a carrier's claim for reimbursement against an enrollee "plausibl[y]" -- though not necessarily -- might not involve a benefits issue because "a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved." *Id.* at 697 (quoting 5 U.S.C. § 8902(m)(1)).

In contrast, Respondents' lawsuit contests HCSC's re-examination of the *initial* right to benefits (as a result of a federal employing agency's retroactive termination of the minor's enrollment). To use *Empire*'s terms, Respondents' claims "relat[e] to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he . . . has received" and not to a carrier's "post payments right" to subrogation. 547 U.S. at 697 (emphasis in original). As a matter involving how "'coverage' and 'benefits' questions" were "resolved," Respondents -- as *Empire* directs -- should have pursued an administrative appeal at OPM, and FEHBA and OPM's regulations thereafter would "channel[] [any] disputes over coverage or benefits into federal court." *Id.* at 686-87; *see also id.* at 696 ("OPM's regulation, 5 C.F.R. § 890.107(c) (2005), instructs enrollees who seek to challenge benefits denials to proceed in court against OPM," and such a case will "land in federal court") (internal quotation marks omitted).

In sum, Respondents raise state law claims that are subject to FEHBA's exclusively federal remedies for enrollment and benefits disputes. The Seventh Circuit's holding that the claims nonetheless are not completely preempted -- because of the Seventh Circuit's erroneous focus on "occupation of the field" (*see*

Pet. App. 2a-3a) rather than the availability of an exclusively federal remedy -- is contrary to *Beneficial National Bank* and *Empire*. And by rejecting complete preemption in a FEHBA case arising from a benefits dispute, the Seventh Circuit has created a Circuit split with the Ninth Circuit's *Botsford* decision, as well as acted in conflict with numerous Circuit decisions utilizing the availability of an exclusively federal remedy as the touchstone for complete preemption. *See* Pet. at 24-27.

B. The Seventh Circuit's Holding on the Federal Officer Removal Statute Warrants This Court's Review

In its petition, HCSC also showed that the Seventh Circuit's holding on the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is inconsistent with *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). The Seventh Circuit's § 1442(a)(1) ruling also creates a Circuit split with *Isaacson v. Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1523 (2009). In particular, with respect to the Circuit split, the Seventh Circuit's insistence that HCSC can invoke § 1442(a)(1) only "[t]o the extent . . . HCSC was doing nothing but following the [relevant] agency's orders" (Pet. App. 4a) conflicts with the Second Circuit's view that a government contractor may remove a case whenever the private conduct at issue "occurred *while* Defendants were performing their official duties" and irrespective of "whether the challenged act . . . was specifically directed by the federal Government." *Isaacson*, 517 F.3d at 137, 138 (emphasis in original).

Respondents do not focus on the distinction between private contractors who receive specific government

direction and those simply fulfilling what they believe to be their contractual obligations. Instead, they assert that the federal officer removal statute can *never* apply to a FEHBA contractor because supposedly providing insurance -- even if done by the government itself -- is not a "governmental function." Resp. Br. at 13. In that sense, Respondents' argument is at odds even with the Seventh Circuit's decision, since the court of appeals at least would find § 1442(a)(1) applicable if HCSC, in exercising its FEHBA functions, acted pursuant to express directions from a federal agency. Ultimately, Respondents' effort altogether to exclude FEHBA cases from the federal officer removal statute's scope injects an entirely new concept into § 1442(a)(1) jurisprudence -- namely, whether some of the government's operations deserve protection under § 1442(a)(1) but others do not. Pressing for the adoption of a novel legal standard is more suited for merits briefing than an opposition to certiorari, with the defense in the latter typically being that the approach *actually* adopted by the court of appeals is correct or at a minimum is consistent with the other Circuits' viewpoints.

In any event, Respondents' assertion that FEHBA contractors, for purposes of § 1442(a)(1), perform "no 'official' duties" is unsustainable. Resp. Br. at 13. The contention derives from an official immunity decision -- *Houston Community Hospitals v. Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265 (5th Cir. 2007) -- not a removal case. This Court has held, and even the court in *Houston Community Hospitals* recognized, that "the test for removal" under § 1442(a)(1) is "broader . . . than the test for official immunity." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969); *accord*

Houston Cmty. Hosps., 481 F.3d at 273. Further, if providing insurance could not constitute "a necessary government function" (Resp. Br. at 13), then whole swaths of the federal government's endeavors do not involve official acts, including providing insurance to the elderly under Medicare, providing (with the states) insurance to the indigent through Medicaid, and providing insurance to flood victims under the National Flood Insurance Program. *Cf. Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72-74 (2d Cir. 1998) (holding that Medicare carrier enjoys official immunity); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1003-05 (8th Cir. 1998) (same); *Russell v. Gennari*, No. 1:07cv793, 2007 U.S. Dist. LEXIS 83771, at *17 (E.D. Va. Nov. 8, 2007), *aff'd*, 284 Fed. Appx. 98 (4th Cir. 2008) (holding that FEHBA carrier enjoys official immunity).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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