Nos. 13-1305 and 13-1467

In the Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC., FKA GROUP HEALTH PLAN, INC., PETITIONER

v.

JODIE NEVILS

AETNA LIFE INSURANCE CO., PETITIONER

v.

MATTHEW KOBOLD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND THE COURT OF APPEALS OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Federal Employees Health Benefits Act provides that "[t]he 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). The question presented is: Whether, when a federal employee health insurance contract gives a carrier a right of subrogation, that right is enforceable notwithstanding state laws that prohibit subrogation in health-insurance contracts.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Discussion:
- I. A FEHB carrier may exercise subrogation and reimbursement rights under a FEHB contract notwithstanding state anti-subrogation laws 11
- II. The petitions raise an important question of federal law on which there is a division of authority 15
- III. The state courts below should have the first opportunity to address OPM's new regulations 20

Conclusion 22

TABLE OF AUTHORITIES

Cases:

Allstate Ins. Co. v. *Druke*, 576 P.2d 489 (Ariz. 1978) 9

Bates v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005) 7, 9

Buatte v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996) 7, 16

Chevron U.S.A. Inc. v. *Natural Res. Def. Council*, 467 U.S. 837 (1984) 7, 12

City of Chi. v. *Environmental Def. Fund*, 506 U.S. 982 (1992) 21

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) 19

Dan's City Used Cars, Inc. v. *Pelkey*, 133 S. Ct. 1769 (2013) 19

Empire Healthchoice Assurance, Inc. v. *McVeigh*, 547 U.S. 677 (2006) .... *passim*

Greene v. *Fisher*, 132 S. Ct. 38 (2011) 21

Lawrence v. *Chater*, 516 U.S. 163 (1996) 21, 22

Cases—Continued: Page

Long Island Care at Home, Ltd. v. *Coke*, 546 U.S. 1147 (2006) 21
MedCenters Health Care v. *Ochs*, 26 F.3d 865 (8th Cir. 1994) 16
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) 19
National Cable & Telecomm'ns Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 14
New Orleans Assets, LLC v. *Woodward*, 363 F.3d 372 (5th Cir. 2004) 18
Schmidt v. *Espy*, 513 U.S. 801 (1994) 21
Schweiss v. *Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537 (Mo. Ct. App. 1997) 7
Slekis v. *Thomas*, 525 U.S. 1098 (1999) 21
Thurman v. *State Farm Mut. Auto Ins. Co.*, 598 S.E.2d 448 (Ga. 2004) 16
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 12
United States v. *Morton*, 467 U.S. 822 (1984) 21

Statutes and regulations:

Act of Sept. 17, 1978, Pub. L. No. 95-368, 92 Stat. 606 4
Federal Employees Health Benefits Act of 1959, Pub. L. No. 86-382, 73 Stat. 708 (5 U.S.C. 8901 *et seq.*) 2
5 U.S.C. 8902 2
5 U.S.C. 8902(d) 2, 13, 22
5 U.S.C. 8902(m)(1) .... *passim*
5 U.S.C. 8903 2
5 U.S.C. 8905(a) 2
5 U.S.C. 8906(b) 2
5 U.S.C. 8906(f) 2

Statutes and regulations—Continued: Page

5 U.S.C. 8913 10
5 U.S.C. 8913(a) 2, 10, 13, 22
Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2366 4
28 U.S.C. 1257(a) 18, 19
28 U.S.C. 1331 .... 5, 14
OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. 890.106) 2, 10, 11, 22
Section 890.106(b)(1) 11, 12, 13, 14
Section 890.106(h) 11, 12, 13, 22

Miscellaneous:

Black's Law Dictionary (9th ed. 2009) 4
H.R. Rep. No. 1211, 94th Cong., 2d Sess. (1976) 3, 17
H.R. Rep. No. 282, 95th Cong., 1st Sess. (1977) 3
H.R. Rep. No. 374, 105th Cong., 1st Sess. (1997) 4, 15, 17
OPM, *Proposed Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 931 (Jan. 7, 2015) .... *passim*
S. Rep. No. 903, 95th Cong., 2d Sess. (1978) 3
S. Rep. No. 257, 105th Cong., 2d Sess. (1998) 4

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States in the above-captioned cases. Both cases present the same question of preemption of state anti-subrogation rules under 5 U.S.C. 8902(m)(1). In the view of the United States, both petitions for a writ of certiorari should be granted, the judgments below vacated, and the cases remanded for further consideration in light of new regulations that the Office of Personnel Management (OPM) promulgated to interpret and prescribe rele-

vant contract terms and to address preemption of state anti-subrogation rules under Section 8902(m)(1). See OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. 890.106).

STATEMENT

1. In the Federal Employees Health Benefits Act of 1959 (FEHB Act or Act), Pub. L. No. 86-382, 73 Stat. 708 (5 U.S.C. 8901 *et seq.*), Congress "establishe[d] a comprehensive program of health insurance for federal employees." *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 682 (2006). The Act empowers OPM to contract with private insurance carriers to offer benefits to federal employees, annuitants, and dependents, and to "prescribe regulations necessary to carry out" the Act. 5 U.S.C. 8902, 8903, 8913(a).

Contracts between OPM and carriers must 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." 5 U.S.C. 8902(d). Federal employees may enroll in a FEHB plan under the terms of such a contract. 5 U.S.C. 8905(a). The government pays on average approximately 72% of the premium; the employee pays the rest. 5 U.S.C. 8906(b) and (f); OPM, *Proposed Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery,* 80 Fed. Reg. 931, 932 (Jan. 7, 2015) (*Proposed Rule*). In 2014, FEHB plans provided health insurance coverage for approximately 8.2 million federal employees, annuitants, and dependents. *Proposed Rule*, 80 Fed. Reg. at 932. The government's

share of premiums was approximately $33 billion. *Ibid.*

The Act contains an express preemption clause that provides:

> 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).

Congress enacted the original version of Section 8902(m)(1) in response to state laws "requiring not only specific types of care but the extent of benefits, family members to be covered, the age limits for family members, extension of coverage, the format and the type of informational material that must be furnished, including in some instances the type of language to be used." H.R. Rep. No. 282, 95th Cong., 1st Sess. 6-7 (1977); S. Rep. No. 903, 95th Cong., 2d Sess. 7 (1978). Congress was concerned that such state laws would result in "[i]ncreased premium costs to both the Government and enrollees," as well as "[a] lack of uniformity of ben[e]fits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States." H.R. Rep. No. 1211, 94th Cong., 2d Sess. 3 (1976) (*1976 House Report*). Congress accordingly provided, in the predecessor to the current version of Section 8902(m)(1), that any FEHB contract provisions that "relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law * * * which re-

lates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions." Act of Sept. 17, 1978, Pub. L. No. 95-368, 92 Stat. 606.

In the Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366, Congress expanded the preemption provision. First, Congress eliminated the need for the state law to be "inconsistent" with FEHB contract terms, "thereby giving the federal contract provisions clear authority." S. Rep. No. 257, 105th Cong., 2d Sess. 15 (1998). Second, Congress expanded Section 8902(m)(1) to cover not only contract terms relating to the "nature or extent of coverage or benefits," but also those relating to the "provision" of coverage or benefits. 5 U.S.C. 8902(m)(1). Congress thereby "strengthen[ed] the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and "prevent[ed] carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 374, 105th Cong., 1st Sess. 9 (1997) (*1997 House Report*).

2. OPM's FEHB contracts with carriers generally require the carrier to seek subrogation and reimbursement. See *Proposed Rule*, 80 Fed. Reg. at 932. These subrogation and reimbursement clauses prevent an insured from recovering twice for the same medical costs: once from his or her FEHB health insurer, and again from a third party, such as a tortfeasor, who is legally obligated to pay for the same costs. See *ibid.*; see also *Black's Law Dictionary* 1563-1564 (9th ed. 2009) (defining subrogation). Subrogation allows a carrier to pursue a recovery against such third parties on behalf of an insured, and reim-

bursement requires FEHB beneficiaries to reimburse the plan if they recover a tort judgment or settlement that compensates the insured, in whole or in part, for the injury or illness for which the FEHB plan paid insurance benefits. See *Proposed Rule*, 80 Fed. Reg. at 932.

In *McVeigh*, this Court held that a FEHB carrier could not bring an action for subrogation and reimbursement in federal court under the grant of federal-question jurisdiction in 28 U.S.C. 1331, because such a suit arose under state law. See *McVeigh*, 547 U.S. at 701. In reaching that result, *McVeigh* rejected the carrier's argument that Section 8902(m)(1) called for federal-question jurisdiction. The Court observed that Section 8902(m)(1) was "open to more than one construction." *Id.* at 697. A reimbursement clause in a FEHB contract could be read, the Court explained, as a "condition or limitation on 'benefits' received by a federal employee," in which case "the clause could be ranked among '[contract] terms . . . relat[ing] to . . . coverage or benefits' and 'payments with respect to benefits,' thus falling within § 8902(m)(1)'s compass." *Ibid.* (alterations in original). "On the other hand, a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved, and corresponding 'payments with respect to benefits' have been made to care providers or the insured." *Ibid.* "With that consideration in view," the Court stated, "§ 8902(m)(1)'s words may be read to refer to contract terms relating to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain healthcare services he or she has received, and not to terms relating to the carrier's postpayments right to reimbursement." *Ibid.* This Court did not

resolve that issue, however, because the Court concluded that under either reading there would be no federal-question jurisdiction: Section 8902(m)(1) is a "choice-of-law prescription," not a "jurisdiction-conferring provision." *Id.* at 697-698.

On June 18, 2012, the Director of OPM's Healthcare and Insurance Division issued a FEHB Program Carrier Letter (Carrier Letter) to all FEHB carriers. See *Kobold* Pet. App. 44a-46a. The Carrier Letter reaffirmed OPM's position that Section 8902(m)(1) "preempts state laws prohibiting or limiting subrogation and reimbursement" pursuant to a FEHB contract. *Id.* at 44a; see *id.* at 45a (a carrier's right of subrogation or reimbursement "is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits").

3. The two petitions here raise the same question.

a. *Coventry Health Care of Missouri, Inc., fka Group Health Plan, Inc.* v. *Nevils*, No. 13-1305, arises from a suit by respondent Jodie Nevils, a former federal employee who was injured in a car accident in 2006. *Nevils* Pet. App. 2a, 114a. Nevils was covered by a FEHB plan provided by petitioner Coventry Health Care of Missouri, Inc., then known as Group Health Plan, Inc. (GHP). *Nevils* Pet. 1; *Nevils* Pet. App. 48a. GHP paid approximately $18,000 for Nevils's medical treatment. *Nevils* Pet. App. 114a. Nevils sued the driver and recovered a settlement. *Id.* at 48a-49a.

Nevils's FEHB plan gave GHP a right of subrogation. *Nevils* Pet. App. 93a-94a. Pursuant to the subrogation clause, GHP asserted a lien in the amount of $6592.24 against the settlement proceeds. *Id.* at 49a. Missouri law, however, generally prohibits insurance

subrogation. See, *e.g.*, *Schweiss* v. *Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997). Nevils remitted the $6,592.24 to GHP, satisfying the asserted lien. *Nevils* Pet. App. 49a. Nevils subsequently brought a class-action suit against GHP in St. Louis County Circuit Court. The suit asserted multiple state-law causes of action, all premised on the theory that GHP had violated Missouri's anti-subrogation law. *Ibid.*

The trial court granted summary judgment to GHP, holding that under then-controlling state-court precedent, Section 8902(m)(1) preempted the State's anti-subrogation law. *Nevils* Pet. App. 43a-47a (citing *Buatte* v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996)). The Missouri Court of Appeals affirmed. *Id.* at 48a-58a.

The Missouri Supreme Court reversed. *Nevils* Pet. App. 1a-11a. The court noted that *McVeigh* "expressly declined" to resolve the ambiguity concerning the application of Section 8902(m)(1). *Id.* at 5a-6a. But the court applied a "presumption against preemption" to resolve the ambiguity in favor of preserving Missouri's anti-subrogation law. *Id.* at 4a-8a (citing *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). In the court's view, the subrogation provision in the OPM-GHP contract did not have preemptive effect under Section 8902(m)(1) because it created what the court characterized as a "contingent right to reimbursement" of benefits and therefore bore no "immediate relationship to the nature, provision, or extent of Nevils' insurance coverage and benefits." *Id.* at 10a.

The majority also declined to defer to OPM's Carrier Letter. *Nevils* Pet. App. 10a n.2. In particular,

the majority concluded that the Carrier Letter was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). *Nevils* Pet. App. 10a n.2. The court stated that the Carrier Letter was "recent, informal and * * * drafted in response to litigation," and the court saw "no indication" that OPM was authorized "to make binding interpretations" of Section 8902(m)(1). *Ibid.*

Judge Wilson filed a concurring opinion. *Nevils* Pet. App. 12a-29a. He concluded that subrogation clauses satisfy the relatedness test set forth in Section 8902(m)(1). *Id.* at 12a-13a. But he concluded that Section 8902(m)(1) had no effect because, in his view, Congress cannot give preemptive effect to the terms of a contract between the federal government and an insurance company regarding federal employee benefits. *Ibid.*

b. *Aetna Life Insurance Co.* v. *Kobold*, No. 13-1467, arises from a suit involving respondent Matthew Kobold, a federal employee, who was injured in a motorcycle accident in 2006. *Kobold* Pet. App. 2a. Kobold was enrolled in a FEHB plan that petitioner Aetna Life Insurance Co. (Aetna) administered. *Ibid.* The plan paid $24,473.53 in medical bills related to the accident. *Ibid.* Kobold sued the allegedly responsible parties and settled the case for $145,000. *Ibid.*

Kobold's FEHB plan included a subrogation clause. *Kobold* Pet. App. 3a n.1. That clause empowered Aetna to recover against any third-party tortfeasor for the medical expenses Kobold had incurred that were covered and paid for by the plan. *Ibid.* It alternatively gave Aetna a right to reimbursement for any medical expenses the plan had paid from amounts

Kobold recovered in a tort action or settlement he brought himself against any third party who tortiously caused his injuries. *Ibid.*

Aetna asserted a lien on Kobold's tort settlement for the $24,473.53 it had paid. *Kobold* Pet. App. 3a. Arizona law, however, prohibits medical-insurance subrogation. See *Allstate Ins. Co.* v. *Druke*, 576 P.2d 489, 492 (Ariz. 1978). The allegedly responsible parties paid Kobold $120,526.40 and filed an interpleader action in state court to determine whether Kobold or Aetna was entitled to the remaining $24,473.53. *Kobold* Pet. App. 3a.

The Arizona Superior Court granted summary judgment to Kobold. The court held that *McVeigh* had determined that state anti-subrogation laws are not preempted under Section 8902(m)(1) and, accordingly, that Aetna was not entitled to subrogation or reimbursement. *Kobold* Pet. App. 13a-14a.

The Arizona Court of Appeals affirmed, agreeing with the Superior Court's result but not its reasoning. *Kobold* Pet. App. 1a-11a. The Court of Appeals concluded that *McVeigh* had not decided whether state anti-subrogation laws are preempted. It noted that this "Court expressly declined to decide" that question in *McVeigh* and, indeed, "affirmatively recognized the potential for alternative statutory interpretations." *Id.* at 6a (citing *McVeigh*, 547 U.S. at 697-698). But the Court of Appeals then applied a "presumption against preemption" to "accept the reading that disfavors preemption." *Id*. at 7a (quoting *Bates*, 544 U.S. at 449). The court concluded that Aetna's subrogation right under the FEHB contract was not related to benefits, within the meaning of Section 8902(m)(1), because the court believed that the subrogation right

"has no effect on Kobold's entitlement to receive financial assistance from Aetna when he suffers injury or illness contemplated by the Plan." *Id.* at 9a.

The Arizona Court of Appeals declined to defer to OPM's Carrier Letter. *Kobold* Pet. App. 10a. The court concluded that the Carrier Letter was not entitled to *Chevron* deference because it was not issued pursuant to notice-and-comment rulemaking and the court did not see authority for OPM "to make determinations having the force of law." *Ibid.* The court also found the Carrier Letter unpersuasive because it did not reflect a "term-by-term analysis of the statute." *Ibid.*

Aetna petitioned the Arizona Supreme Court for review of the court of appeals' decision. The United States filed a brief as *amicus curiae* in support of that petition, explaining that the court of appeals had erroneously decided an important question of federal law. *Kobold* Pet. App. 51a-65a. The Arizona Supreme Court denied the petition. *Id.* at 18a.

4. On May 21, 2015, after notice and comment, OPM promulgated final regulations that address the question presented here. OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29,203 (May 21, 2015) (5 C.F.R. 890.106) (*Final Rule*); see *Proposed Rule*, 80 Fed. Reg. at 931-932. As authority, those regulations invoke 5 U.S.C. 8913, which authorizes OPM to "prescribe regulations as necessary to carry out" the Act. 5 U.S.C. 8913(a); *Final Rule*, 80 Fed. Reg. at 29,203. The regulations provide, among other things, that a FEHB carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the

nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1).

The regulations also expressly address preemption, providing:

> A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 C.F.R. 890.106(h). The final regulations are effective on June 22, 2015. *Final Rule*, 80 Fed. Reg. at 29,203.

DISCUSSION

The decisions of the Missouri Supreme Court and Arizona Court of Appeals are wrong, decide an important and recurring question of federal law, and open a conflict with decisions of other state and federal courts on the same preemption question. Plenary review is not warranted at this time, however. After the state courts entered judgment below, OPM issued formal regulations that unambiguously provide that subrogation and reimbursement clauses in FEHB contracts constitute a condition of and limitation on the nature and extent of benefits and payments under a FEHB plan, and that such clauses control notwithstanding state anti-subrogation laws. See 5 C.F.R. 890.106(h). The Court therefore should grant the petitions for a writ of certiorari, vacate the judgments

of the state courts, and remand to allow those courts to consider in the first instance the question presented in light of these new regulations.

I. A FEHB CARRIER MAY EXERCISE SUBROGATION AND REIMBURSEMENT RIGHTS UNDER A FEHB CONTRACT NOTWITHSTANDING STATE ANTI-SUBROGATION LAWS

The courts below both held that state anti-subrogation laws can be applied to prohibit a carrier from exercising its rights to subrogation pursuant to the terms of a FEHB contract between OPM and the carrier. *Nevils* Pet. App. 10a; *Kobold* Pet. App. 9a-11a. OPM's new regulations confirm that these holdings are wrong and should be reversed. The regulations provide that a carrier's right to pursue subrogation or reimbursement "constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits." 5 C.F.R. 890.106(b)(1). Interpreting Section 8902(m)(1), the regulations also expressly provide that a carrier's rights to subrogation and reimbursement under a FEHB contract are effective "notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 C.F.R. 890.106(h). Those regulations are entitled to the full measure of deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984); see *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001) ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). Accordingly, the decisions below should be reversed.

1. OPM's new regulations confirm that the decisions below are wrong. Congress has directed that a FEHB contract with a carrier "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." 5 U.S.C. 8902(d). Congress also has vested OPM with broad authority to "prescribe regulations necessary to carry out this chapter," which includes Section 8902(m)(1). See 5 U.S.C. 8913(a). Exercising its authority under those provisions, OPM's regulations provide that a FEHB carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1). The regulations further provide that "[a] carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1)." 5 C.F.R. 890.106(h). Finally, they provide that a carrier's rights to subrogation and reimbursement are "effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." *Ibid.* The Arizona and Missouri anti-subrogation laws here plainly relate to health insurance or plans, and they are therefore preempted under Section 890.106(h).

2. OPM's new regulations adopt by far the best reading of the FEHB Act and, at a minimum, reasonably interpret a statute Congress charged OPM with administering. In *McVeigh*, this Court stated that

Section 8902(m)(1) was a "puzzling measure" that was "open to more than one construction"—including the interpretation adopted by OPM, which the Court said was "plausible." 547 U.S. at 697-698. Specifically, *McVeigh* states that a carrier's right to reimbursement could be viewed as a "condition or limitation on 'benefits' received by a federal employee," and thus as contract terms "relat[ing] to . . . coverage or benefits' and 'payments with respect to benefits.'" *Id.* at 697 (alteration in original). This Court declined to adopt a definitive interpretation of the statute, however, because on either reading Section 8902(m)(1) would not confer jurisdiction under 28 U.S.C. 1331. *McVeigh*, 547 U.S. at 697.

McVeigh therefore left OPM with the authority to adopt regulations definitively interpreting the Act and contracts entered into under the Act. See *National Cable & Telecomm'ns Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). OPM has now done just that, issuing regulations providing that a FEHB carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1). This interpretation is the natural reading of the statutory language, because subrogation and reimbursement rights ensure that, when a carrier makes a payment of benefits, some portion of the payment may need to be returned to the carrier at a later date if a third party is responsible for the same costs. The rights of subrogation and reimbursement thus impose a condition and limitation on benefits and payments, and thereby "relate to the *nature, provision, or extent* of coverage

or benefits (*including payments with respect to benefits*)." 5 U.S.C. 8902(m)(1) (emphases added). Accordingly, they trigger preemption.

OPM's regulations also "comport[] with longstanding Federal policy" and "further[] Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." *Proposed Rule*, 80 Fed. Reg. at 932. First, one of Congress's goals in providing for preemption was to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." *1997 House Report* 9. In proposing the regulations, OPM explained that interpreting Section 8902(m)(1) to preempt anti-subrogation laws would further that interest: In 2014, carriers recovered approximately $126 million through subrogation and reimbursement. *Proposed Rule*, 80 Fed. Reg. at 932. Those recoveries "translate to premium cost savings for the federal government and FEHB enrollees." *Ibid.*

Second, OPM determined that preemption of state anti-subrogation laws would further "national uniformity in coverage and benefits." *Proposed Rule*, 80 Fed. Reg. at 932. OPM concluded that "[d]isuniform application of FEHB contract terms as they apply to enrollees in different states is administratively burdensome, gives rise to uncertainty and litigation, and results in treating enrollees differently, although enrolled in the same plan and paying the same premium." *Ibid.* "Congress enacted the preemption provision to avoid such disparities, and to enhance the ability of the Federal Government to offer its employees a program of health benefits governed by a uniform set of legal rules." *Ibid.*; see *1997 House Report* 9 (Congress "broaden[ed] the preemption provisions"

to "strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live").

II. THE PETITIONS RAISE AN IMPORTANT QUESTION OF FEDERAL LAW ON WHICH THERE IS A DIVISION OF AUTHORITY

1. The decisions below also create a conflict of appellate authority on this important question under the nationwide FEHB program. In *MedCenters Health Care* v. *Ochs*, 26 F.3d 865 (1994), the Eighth Circuit held that, by operation of Section 8902(m)(1), a state anti-subrogation law could not be applied to prevent a carrier from exercising its subrogation rights under a FEHB contract. *Id*. at 867. And in *Thurman* v. *State Farm Mutual Automobile Insurance Co.*, 598 S.E.2d 448 (2004), the Georgia Supreme Court held that funds from an insurance policy used to cover the subrogation claims of a FEHB carrier are not counted as "available coverages" within the meaning of Georgia's Uninsured Motorists Statute. *Id*. at 451-452. The necessary premise of that holding was that Section 8902(m)(1) preempted a Georgia law that otherwise would have limited the carrier's subrogation rights. See *ibid.* The court relied on *Ochs*, *supra*, and *Buatte* v. *Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. Ct. App. 1996), both of which held that FEHB subrogation provisions applied notwithstanding state anti-subrogation laws. See *Thurman*, 598 S.E.2d at 451. And if the Georgia law were not preempted, the motorist would not have been uninsured within the meaning of the Georgia statute, and the court could not have reached the conclusion it did.

Ochs and *Thurman* predated this Court's ruling in *McVeigh*, but both remain binding precedent in their

respective jurisdictions. As the respondent in *Nevils* recognizes (*Nevils* Opp. 9), *McVeigh* did not resolve the preemption question presented in *Ochs*, *Thurman*, or the decisions below. See *McVeigh*, 547 U.S. at 698. Nor did *McVeigh* "reconfigure[] the interpretive roadmap" for courts faced with this question. *Nevils* Opp. 11.

Congress enacted and expanded Section 8902(m)(1) to ensure that FEHB plans would be interpreted and applied uniformly nationwide. See *Proposed Rule*, 80 Fed. Reg. at 932; *1976 House Report* 3; *1997 House Report* 9. Reflecting that judgment of Congress, participants in many FEHB plans pay the same insurance premiums irrespective of where in the country they live. See *Proposed Rule*, 80 Fed. Reg. at 932. But if some States could prohibit subrogation under FEHB contracts while other States permit it, that would destroy the uniformity Congress intended Section 8902(m)(1) to establish, increase plan costs, and create a cross-subsidy problem: Participants who live in States that allow subrogation would effectively be forced to cross-subsidize participants in the same plan who live in States that prohibit it. See *Nevils* Pet. 34; *Kobold* Pet. 34. The disuniformity here thus results in unfairness and real-world financial harm to federal employees.

The question of whether States can prohibit subrogation under a FEHB contract is also important. Approximately 8.2 million people are insured under FEHB plans. *Proposed Rule*, 80 Fed. Reg. at 932. And in 2014 alone, carriers recovered approximately $126 million through subrogation and reimbursement. *Ibid.*

2. a. These cases both squarely present the preemption question. Respondent Kobold identifies no problems with *Kobold* as a vehicle for resolving that question.

Respondent Nevils claims, however, that *Nevils* is a poor vehicle. For the first time in this litigation, Nevils contends that the FEHB contract at issue in that case does not give GHP a right to reimbursement from the proceeds of the tort settlement that he recovered. *Nevils* Opp. 15-19. Instead, Nevils claims that the contract speaks only of "subrogation," which he asserts gives the carrier a right to sue on Nevils's behalf, but no right to reimbursement should Nevils choose to sue himself. *Ibid.* The Missouri Supreme Court, however, held that the FEHB contract here gave GHP a right of reimbursement. See *Nevils* Pet. App. 2a, 10a. The only question was whether that right was preempted. See *ibid.* There is no reason for this Court to consider respondent Nevils's disagreement with that ruling.

In any event, the Missouri Supreme Court's interpretation of the contract is correct. The contract provides that the carrier "shall subrogate FEHB claims in the same manner in which it subrogates claims for non-FEHB members." *Nevils* Pet. App. 93a. The benefits brochure provided to Nevils elaborated that "[i]f you do not seek damages you must agree to let us try. This is called subrogation." *Nevils* Opp. 5 n.1. In this context, a right to subrogation (allowing the carrier to sue on behalf of the insured if the insured does not sue) encompasses the right to reimbursement from the proceeds if the insured does sue. See *New Orleans Assets, LLC* v. *Woodward,* 363 F.3d 372, 377 (5th Cir. 2004) (noting that "subrogation

rights will commonly subsume reimbursement"). Otherwise, the subrogation right could be readily thwarted. Carriers are often unaware that a claim for benefits results from the allegedly tortious action of a third party, so an insured could often unilaterally eliminate the carrier's subrogation rights by simply suing (or settling) himself. Indeed, this Court in *McVeigh* repeatedly noted that the rights of subrogation and reimbursement are "linked." 547 U.S. at 692 & n.4, 698.

b. This Court also has jurisdiction in both cases under 28 U.S.C. 1257(a). *Kobold* arises from a final judgment for respondent, and thus this Court's jurisdiction is clear. In *Nevils*, the Missouri Supreme Court remanded for further state-law proceedings, but the judgment is "final" within the meaning of Section 1257(a): The Missouri Supreme Court finally decided the federal preemption question and a reversal of that decision "would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975). Indeed, the state trial court already granted summary judgment to the carrier on preemption grounds. *Nevils* Pet. App. 43a-47a. That judgment would be reinstated if this Court reversed.

A refusal to review the state-court decision on preemption would also "seriously erode federal policy." *Cox*, 420 U.S. at 483; see, *e.g.*, *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769 (2013); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988). Section 8902(m)(1) reflects Congress's judgment that it is important for FEHB contract terms "relat[ing] to the nature, provision, or extent of coverage or benefits (including payments

with respect to benefits)" to control, notwithstanding contrary state laws. And OPM recently promulgated regulations interpreting subrogation and reimbursement clauses in FEHB contracts and their role in the statutory scheme, and setting forth OPM's position that such clauses fall within Section 8902(m)(1)'s ambit, precisely because of the importance of this question as a matter of federal policy. Forcing a FEHB carrier to defend against a putative state-law class action seeking damages because the carrier performed its contractual commitments to OPM and exercised its subrogation rights would plainly undermine OPM's policy that carriers should exercise their subrogation rights unimpeded by such parochial state laws.

III. THE STATE COURTS BELOW SHOULD HAVE THE FIRST OPPORTUNITY TO ADDRESS OPM'S NEW REGULATIONS

Notwithstanding that the petitions here present an important and recurring question of federal law on which there is a division of authority, plenary review is not warranted at this time. This Court should instead grant the certiorari petitions, vacate the judgments of the state courts, and remand for further proceedings to afford the state courts the first opportunity to consider OPM's new regulations.

Under the standard this Court most frequently articulates, it is appropriate to grant certiorari, vacate the judgment below, and remand when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate out-

come of the litigation." *Greene* v. *Fisher*, 132 S. Ct. 38, 45 (2011) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

OPM's new regulations clearly constitute an intervening development. See *Lawrence*, 516 U.S. at 166-167, 171; cf. *id*. at 187 (Scalia, J., dissenting) ("If it were clear that respondent's change in position were entitled to [*Chevron*] deference, I would have no problem with the GVR."). Indeed, this Court has often granted, vacated, and remanded in light of less formal intervening agency action. *E.g., Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006) (agency advisory opinion explaining and defending a preexisting regulation); *Slekis* v. *Thomas*, 525 U.S. 1098 (1999) (agency interpretative guidance); *Lawrence*, 516 U.S. at 165-166 (agency re-examination of statutory interpretation); *Schmidt* v. *Espy*, 513 U.S. 801 (1994) (agency reinterpretation of federal statute); *City of Chi.* v. *Environmental Def. Fund*, 506 U.S. 982 (1992) (agency memorandum). Moreover, it "is of no consequence" that OPM promulgated regulations while these petitions were pending. *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984). "When OPM responded to this problem by issuing regulations it was doing no more than the task which Congress had assigned it." *Ibid.*

There is also a reasonable probability that the state courts will reach a different outcome on remand in light of the regulations. Consistent with *McVeigh*, both courts below recognized that Section 8902(m)(1) was susceptible to multiple constructions. See *Nevils* Pet. App. 5a-6a; *Kobold* Pet. App. 6a-7a. Both courts also declined to defer to OPM's Carrier Letter because it was informal and had not been the subject of

notice-and-comment rulemaking, and they did not see statutory authority empowering OPM to issue binding interpretations of Section 8902(m)(1). *Nevils* Pet. App. 10a n.2; *Kobold* Pet. App. 10a. OPM has now engaged in notice-and-comment rulemaking and issued formal regulations that provide that anti-subrogation laws cannot be applied. See 5 C.F.R. 890.106(h). And those regulations invoke OPM's express statutory authority to "prescribe regulations necessary to carry out th[e] chapter" that includes Section 8902(d) (authorizing OPM to define and impose limitations on benefits) and Section 8902(m)(1) (the preemption provision). 5 U.S.C. 8913(a); see *Final Rule*, 80 Fed. Reg. at 29,203. There is therefore a reasonable likelihood that the state courts will conclude that OPM's regulations alter the outcome.

OPM's regulations resolve the only federal question in these cases. See *Lawrence*, 516 U.S. at 168. A remand should not entail considerable delay, see *ibid.*, as the effect of the regulations on the question presented raises purely legal questions that can be resolved without factual development. And a remand could "conserve[] the scarce resources of this Court." *Id.* at 167. If the state courts in these cases accord deference to OPM's regulations, as they should, FEHB contracts in Missouri and Arizona would be applied as written without regard to those states' anti-subrogation laws. The current conflict of authority, inflated coverage costs, and state-by-state disuniformity would be eliminated without plenary review by this Court. Conversely, if this Court denied certiorari, the problems that OPM intended its regulations to ameliorate would persist to the detriment of OPM, carriers, federal employees, and their families.

CONCLUSION

The petitions for certiorari should be granted, the judgments of the Supreme Court of Missouri and the Court of Appeals of Arizona vacated, and the cases remanded to those courts for further consideration in light of OPM's new regulations.

Respectfully submitted.

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