IN THE SUPREME COURT OF THE UNITED STATES

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COVENTRY HEALTH CARE OF :

MISSOURI, INC., FKA GROUP :

HEALTH PLAN, INC., :

Petitioner : No. 16-149

v. :

JODIE NEVILS, :

Respondent. :

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Washington, D.C.

Wednesday, March 1, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

MIGUEL A. ESTRADA, ESQ., Washington, D.C.; on behalf of the Petitioner.

ZACHARY D. TRIPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, in support of the Petitioner.

MATTHEW W.H. WESSLER, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-149, Coventry Health Care Missouri v. Nevils.

Mr. Estrada.

ORAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE PETITIONER

MR. ESTRADA: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether FEHBA preempts State laws that forbid subrogation by insurance carriers. The Missouri Supreme Court upheld the State rule, but we believe that is wrong for at least three reasons.

Number one, antisubrogation laws relate to benefits and coverage, as this Court concluded in FMC v. Holliday, and at the very least, they relate to payments with respect to benefits.

Number two, if there's any ambiguity on this point, OPM's notice-and-comment regulation answers a question in favor of preemption.

And number three, although the majority of the Supreme Court of Missouri thought otherwise, we believe there's no constitutional infirmity in

Section 8902(m)(1) under the Supremacy Clause.

If I could turn to my first point, it seems to us that the antisubrogation rule in this case is preempted for basically the same reasons this Court considered in FMC in concluding that the same rule was preempted under ERISA. That is to say that it effectively requires plan administrators to calculate benefits on the basis of different liability conditions that vary from State to State; that very importantly, it undermines the statute's goal of uniformity; and third, that it could encourage plan sponsors, in this case, the Federal government, to reduce the scope of coverage.

In addition to those reasons, this statute gives you an additional reason to find that it is preempted, and that is that it also preempts those rules that relate to payments with respect to benefits.

It is quite clear to us that the subrogation and reimbursement claims that are at issue in these rules quite plainly refer to and relate to payments with respect to benefits; and therefore, the Supreme Court of Missouri was wrong in overlooking that part of the statute and also wrong in overlooking your decision in FMC v. Holliday.

JUSTICE GINSBURG: Is there any -- any room at all for State regulation of carriers who have these

contracts with OPM?

MR. ESTRADA: Well, to be sure, the -- the statute, if you focus on the last clause -- now, the statute appears in page 2 of the blue brief -- if you focus on the last clause, the statute only reaches those State laws that, quote, "relate to health insurance or plans." And there are any number of subjects that may not be reached by these laws, or by other laws, and also subjects that are not related to benefits, coverage or payments with respect to benefits.

Congress dealt separately in Section -- in Section 8909(f) with the subject of taxation in the context of these plans and generally provided that carriers may be subject to generally-applicable laws that are applicable to all businesses under profits and -- and the like, but that States, you know, may not tax, you know, the benefits and the payments.

And so Congress has, in fact, crafted a limited preemption provision that singles out those laws that are most likely to apply to the insurance plans at issue, and then only say that the scope of the preemption will be defined by particular terms of the contract. And so in our view, in some ways, the reach of this law is somewhat more limited than the -- that of the ERISA statute because, although your "relate"

language is identical and they should have identical scope with respect to benefits coverage and -- and payments with respect to benefits, it does not reach all laws of the State. It targets, to begin with, only the health insurance -- those laws that relate to health insurance or plans.

Now, if I could get to the second point, we recognize that --

JUSTICE KAGAN: Before you do, I mean, we appeared to find this a difficult question in McVeigh. We said there were two plausible readings. We said it was a hard statute. We didn't want to decide as between the two. You know, what do you make of that case?

MR. ESTRADA: I actually was going to be the headline on my second point, Justice Kagan. So thank you.

You know, we recognize that McVeigh considered the same statute and concluded that the statute did not give rise to a cause of action in Federal subject matter jurisdiction. And we believe that that question was indeed difficult, because unlike ERISA, where Congress expressly provided a cause of action in Section 502 of that statute, Congress had not done so here. And the Court was basically being asked to imply common law cause of action out of the terms of

what otherwise appears to be a defensive preemption prohibition, which is relatively rare.

The background rule in the Federal system is that Federal preemption is a defense only, as we learned in the Motley case. And the difficulty that the Court had was in transforming what it otherwise would be a defense into a cause of action and implying Federal jurisdiction.

I think that context is extremely important to understand the Court's caveat as to the text of the statute, because the question then was will the statute would bear a construction that was expansive indeed with respect to an entirely different subject matter.

With -- with respect to the question of whether the Court considered the statute as being susceptible on the merits of the defense to plausible alternative constructions, I think if you look at the relevant passage, what the Court said was that different constructions were being urged upon the Court; on the one hand, one by the United States, and on the other hand, another one by the Cruz plaintiffs out of the Seventh Circuit.

The Court described both of them generally as plausible and wrote to saying that it didn't have to pick either of them. We do not believe that that sort

of description of the litigants' position really rises to the finding that the statute is ambiguous as a threshold for even a Chevron analysis, because the Court was not considering any canon of construction, was not considering context, was not considering purpose. It was simply describing the position of litigants in front of this Court and concluding that it was unnecessary to pick one or the other.

JUSTICE KENNEDY: Counsel, in this case you have an express-preemption provision. You have a Federal entity that makes the contract. So that may be all you need to say in order to prevail. But there -- are there some limiting principles that we -- should just be in the back of our mind when we think about preemption? The case in Boyle was, I think, a close case. Completely different from this because there was no express preemption.

So it's not really your obligation to direct -- to address a parade of horribles that isn't in this case, but are there some general limiting principles that we should keep in mind when determining whether or not preemption, A, existed; B, is permitted?

MR. ESTRADA: Well, of course. You know, you have, really, three headings of preemption under this Court's doctrine. You have conflict where you take

the text of the statute and decide whether the State rule actually conflicts as a -- as the label says. And I think that's the common form that comes in front of the Court, and I think that's just a question of ordinary statutory interpretation applying all the relevant canons and considering as well the -- the purpose of Congress.

The harder cases are ones like Hillman v. Maretta where you're not dealing with actual language of the statute, but you're considering whether the State law is an obstacle to what Congress wanting -- wanted to get at. And this case does not involve that problem except as an a fortiori type argument as to how this would be out even under that rule.

But the issue in this case seems to me to be what you have here, where Congress had exercised an appropriate level of Federal power under Section -- under Article 1 Section 8, and then has gone further by itself declaring what it views as the consequences with a Federal/State balance. And in this context, it seems to us that it is especially inappropriate to consider what the conceivable limits would be of a doctrine that arises practically in every case.

CHIEF JUSTICE ROBERTS: Well, maybe one doctrine has to do with the delegation issue.

Suppose Congress passed a law that said, well, any professional responsibility -- any professional responsibility rule adopted by the ABA will preempt contrary State law.

Is that okay under preemption doctrine?

MR. ESTRADA: Well, it seems to me likely not, but let me take apart what I think are the key aspects of the consequence of the -- of that answer.

First, Congress has to identify a part of Article 1, Section 8 that gives it a head of constitutional authority to do what you just described.

Second, to my --

CHIEF JUSTICE ROBERTS: Are you just -- are you just saying this is beyond -- regulating the --

MR. ESTRADA: Well --

CHIEF JUSTICE ROBERTS: -- profession is beyond Congress's power?

MR. ESTRADA: -- as described, is not self-evidently connected to any one of the --

CHIEF JUSTICE ROBERTS: Right. Well, assume it is within Congress's power to legislate.

MR. ESTRADA: When -- then there's a question of identifying what it is that Congress is trying to do. It is, in fact, true that Congress has adopted what otherwise would be State -- State rules for

the government of certain issues. You know, you have things like you have -- like the assimilated crime statute, for example. And, you know, the question is how closely it is tied to the relevant heading of power and then whether Congress has provided enough governmental supervision for the activity so that it is subject to a delegated exercise of power under appropriate standards by an ultimately responsible authority.

CHIEF JUSTICE ROBERTS: I guess, is it -- you know, in some of those areas, you're talking about State governments. Is -- is it permissible for Congress to delegate the authority to decide what laws are preempted to a private entity?

MR. ESTRADA: I think it depends on how it does it. I would be reluctant to say that considering whatever crisis or problem Congress may be considering, that there's a particular avenue of dealing with them that is completely foreclosed. But to the extent that there are limits to the ability of Congress to do such things, it seems to me that a precondition for Congress' ability to do that would be to do something like has happened, for example, in the securities markets where you have what are called self-regulatory organizations where trade groups, in effect, have rules that apply to

parts of the industry, but they're strictly supervised and approved by the Securities and Exchange Commission and there is recourse for their violation to go in Federal court.

Now, those rules in some cases are considered preemptive, and so I don't want to foreclose, you know, the proposition that as a category using an industry group or a private group, so long as it is subject to appropriate government supervision, could not be a possible tool that Congress could use.

CHIEF JUSTICE ROBERTS: Well --

MR. ESTRADA: But in that event -- if I could just finish -- but in that event, you would also have the additional layer of involvement having to do with the limit that this Court itself has placed on the -- on the delegation by Congress -- Congress of any authority. You do have something called the Nondelegation Doctrine.

CHIEF JUSTICE ROBERTS: But what about two private parties, whether, you know -- whatever they are, a railroad and a shipper, in other words, and Congress says, whatever you agree to will preempt contrary State laws.

MR. ESTRADA: I believe --

CHIEF JUSTICE ROBERTS: I know you're going

to suggest --

MR. ESTRADA: No.

CHIEF JUSTICE ROBERTS: -- it's not this case --

MR. ESTRADA: No, no. I understand --

CHIEF JUSTICE ROBERTS: -- but assume it is.

MR. ESTRADA: I understand that, Mr. Chief Justice. I find it hard to believe that Congress could lawfully give a blank check to private individuals without any subject -- without any government supervision and/or without appropriate standards as to what it is that they may do or not do. But I want to distinguish the hypothetical that you posit from what's at issue in this case.

CHIEF JUSTICE ROBERTS: Well, before you get -- get to that, I mean, it would seem to me that you could deal with the concerns you have and still address the problem. In other words, it's not a blank check. You know, it -- any rate between, you know, $10 per mile and $30 per mile, but you, the parties, you know, we want to give the -- the free enterprise system a little more scope than having the government set it. So whatever rate you set between $10 and $30 a ton or a mile will preempt contrary State regulation.

MR. ESTRADA: Again, it seems to me that

this is a question to some extent of conceptualizing. I think I am agreeing with the basic premise of your question, Mr. Chief Justice, but there are, of course, limits to the ability of Congress to delegate to private individuals.

JUSTICE BREYER: The question, I think, which is perhaps truly speculative, but it is rather interesting, if we go back to the sick chicken, Schechter --

MR. ESTRADA: Well, I was going to go there.

JUSTICE BREYER: -- there first is a question --

MR. ESTRADA: Uh-huh.

JUSTICE BREYER: -- of whether Congress has this Article 8 power to legislate at all in the area.

MR. ESTRADA: Uh-huh.

JUSTICE BREYER: You assume the answer's yes.

The second is a nondelegation question. There, the delegation had run riot. But suppose they'd used the words "unfair competition" instead of "fair competition" and, therefore, they had satisfied the Nondelegation Doctrine.

Given the satisfaction of the -- of the source of power and satisfaction of the delegation

doctrine or nondelegation, is there additional requirement? Does the preemption matter, assuming there were parts of that that preempted as there must have been, is that a separate doctrine that imposes yet a further restriction, or once the first two are satisfied, have you automatically satisfied the third?

MR. ESTRADA: I find it hard to say that there's an independent limit on the basis of preemption, because, as I understand the power of Congress, Congress could pass a statute that displaces all law in a subject matter and renders it a law-free area, for example. And so I don't know that I would ever say that in dealing with a crisis like the Great Depression, for example, Congress could not turn to the type of remedies that it tried in the Schechter case and that those would be completely foreclosed to Congress. But --

CHIEF JUSTICE ROBERTS: Yeah. But the idea -- the concern is -- raised by your friend on the other side is, yes, Congress can do that.

MR. ESTRADA: Uh-huh.

CHIEF JUSTICE ROBERTS: But we're talking about the preemption of State law. And the question is whether or not they've authorized someone not subject to the political constraints that Congress is subject to to undertake that pretty significant step of telling State

law -- State legislators that they can't legislate.

MR. ESTRADA: But if I could just pivot to what -- why the -- the argument doesn't really fit what the problem is that we have in this case, even though it is preemption, is that it arises ostensibly because the statute literally says that the terms of its statute would supersede and preempt. It is quite evident from the statute that what Congress actually intended to say and the words will bear is that the terms of the statute shall be effective notwithstanding the contrary, et cetera, et cetera.

And that although I understand that the whole delegation going down, you know, the -- the road of delegation is very interesting, I will point out that nowhere has a delegation challenge as such been raised in this case in any of the lower courts, and that it was only in this Court that this was reconceptualized as that.

I think the proper way to conceptualize what Congress has done in this statute, as it has in many other statutes, is that it has displaced State law to create room for the operation unimpeded of certain contract terms that it believed should be encouraged for the public interest. The Federal Arbitration Act is one example of that, even though it is a purely private

statute. You know, the -- the statute that we're mentioning earlier, ERISA, is another.

I will simply say that if Congress can do that to make room for the operation of purely private contracts, a context that involves Federal benefits for the Federal workforce under Federal contracts administered by a Federal agency is something that Congress can clearly deal with, because under Clearfield Trust and its progeny, these contracts would be governed by Federal common law in any event, and that law would be preemptive, at least in certain circumstances.

So it is certainly appropriate for Congress to identify itself the outlines and limits of the preemption than to leave it to ad hoc adjudication of common law claims by the Federal courts in this country.

Thank you, Mr. Chief Justice. And I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Tripp.

ORAL ARGUMENT OF ZACHARY D. TRIPP

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. TRIPP: Mr. Chief Justice, and may it please the Court:

OPM's regulations answer the question

presented here, and I'd like to just make three points about how they work, why they're important --

JUSTICE SOTOMAYOR: Do you think the statute --

MR. TRIPP: -- and --

JUSTICE SOTOMAYOR: Do you think this is ambiguous?

MR. TRIPP: I guess --

JUSTICE SOTOMAYOR: Whether we get to Chevron deference at all.

MR. TRIPP: I guess our basic take is that the answer to that doesn't really matter because we've picked one of the two interpretations and it's really up to Respondent to show that our interpretation is not even reasonable. And we think that there's just no way that they can do that. Our interpretation, we think, is just a better interpretation, if you were choosing among the two.

JUSTICE SOTOMAYOR: So why is the agency better than a court suited to define its own jurisdiction?

MR. TRIPP: Right. And so that's what I was wanting to get at and explain how these regulations work. And I -- so I think the key point that I want to emphasize here is that in the preemption provision, the

crucial language is, is what is the nature and extent of the benefits and benefit payments available under one of the plans? And that is tied to something OPM is already administering under a different provision of the statute. 8902(d) says that each contract shall include such benefits and limitations and other definitions of benefits as it considers necessary or desirable.

So those two things go hand in hand. In the regulations, they work the same way. In Section B(1) of the regulations, it says that subrogation imposes a condition of and a limitation on benefits and benefit payments and that makes good sense. It's a clawback provision.

CHIEF JUSTICE ROBERTS: You -- you've already -- you just slid into the Chevron question; right? I -- I understood Justice Sotomayor to want to know if you -- well, at least as I would want to know, do you need Chevron to get around the ambiguity? Because once you say that, it's -- you get into somewhat serious questions about whether Chevron applies, basically, to the decisions of private entities to -- I mean, I think the concern is it's bad enough that they're preempting State law, but now they get deference. They can preempt State law so long as their terms are plausible.

MR. TRIPP: Right. So -- so I think we would win this case even without Chevron deference, without the regulations. I think we just have the better of the two readings of the statute. The application of the presumption against preemption here, I think, is really just fundamentally misguided. Not only do we have an express-preemption provision, we're talking about Federal benefits for Federal employees under Federal contracts entered into under a Federal statute. And the way this would work on the ground is if Missouri can prohibit subrogation, then what happens is that Federal workers in Illinois who are enrolled in the same plan and paying the same premiums are footing the bill for benefit payments they can't even keep, and it's not part of a State's traditional authority to impose those kinds of externalities on out-of-State Federal workers.

So what I was getting at, and the answer to Justice Sotomayor's question, is that we would clearly get deference here on -- on 8902(d) in determining what are -- what are the definitions and are there limitations on benefits available under a plan? And I think under Chevron, it doesn't make much sense for us to get less deference in determining what is the nature and extent of benefits and benefit payments, if it's

really just another way of saying the same thing.

So, on -- on why it's important -- I think I covered this a little before -- but to be very concrete about this, in the D.C. metro region, Virginia prohibits subrogation, but Maryland and the District of Columbia do not. Under Respondent's position, similarly-situated Federal workers working for the same agency, enrolled in the same plan, and paying the same premiums would have different benefits and -- and the different extent of benefit payments, depending on whether they lived in Bethesda or McLean. We think that's just clearly wrong.

And then on -- on -- on --

CHIEF JUSTICE ROBERTS: Now, you understand the problem, and I understand the argument that it's semantic, but sometimes semantics matter. If you wanted to take care of that problem, you just have to pass a law saying that the -- the State laws are preempted --

MR. TRIPP: Yeah. And then -- then --

CHIEF JUSTICE ROBERTS: But you don't. It says that the contract is what preempts the State laws.

MR. TRIPP: Sure. And I -- and I think what my -- my brother said was exactly right. If you just turn to the statute, I'd like to illustrate why I think it really proves as no constitutional problem at all. It's on page 2 of the blue brief or page 3 of the gray

brief.

It says that the terms of these Federal contracts shall supersede and preempt State or local law relating to health insurance or plans. What that clearly means is that the terms of the contract shall apply notwithstanding State or local law. It's a non obstante provision like the Supremacy Clause itself, and I think when you read it that way, it makes it crystal clear that the -- that the statute is doing all the preempting here. It's creating a protective umbrella to enable OPM --

CHIEF JUSTICE ROBERTS: If -- if you edit the statute, it's perfectly clear. It doesn't say -- I mean, it says preempt.

MR. TRIPP: And -- and I think what I was getting at is, I think it's a perfectly natural reading of shall supersede and preempt to interpret that to mean shall apply notwithstanding, because the -- the Supremacy Clause itself has similar language about notwithstanding. We think that's obviously what Congress was getting at here. Every other Federal benefits -- general -- general Federal benefits statute has this same language, so it's health insurance, life, dental, vision, long-term care; we don't think that there's any problem in -- in -- in picking this

particular language.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Wessler.

ORAL ARGUMENT OF MATTHEW W.H. WESSLER

ON BEHALF OF THE RESPONDENT

MR. WESSLER: Thank you, Mr. Chief Justice, and may it please the Court:

A decade ago in McVeigh, this Court stressed that FEHBA's express-preemption clause requires cautious interpretation. That instruction remains true today. Section 8902(m)(1) was, in Congress's own words, purposely limited and not designed to disturb the important role that States play in regulating those private insurers who participate in the FEHBA program. Indeed, that is why, when Congress first enacted the provision, it specifically warned that the clause would not preempt insurers from traditional State laws governing insurance.

Reading FEHBA's express-preemption clause narrowly here so that subrogation contract terms do not preempt otherwise applicable State law honors Congress's intent and accords respect for the States as independent sovereigns in their historic role in governing matters of insurance and tort law.

JUSTICE GINSBURG: Does the -- does the statute 8902(m)(1), does it preempt anything?

MR. WESSLER: Well, we think that the statute is unconstitutional under the Supremacy Clause, and so, as written, it has -- it should have no effect. I think if you carve that out for -- for one second, I think what Your Honor is asking is are there a subset of laws that Congress was attempting to displace by virtue of these contract terms, and I think the answer to that is yes and you can get that from the legislative history.

There were -- I think, just to back up for a second, when Congress first passed FEHBA in 1959, it did not attempt to enact a uniform area of Federal law. And you -- you know this because what Congress said when it first passed the law was, there's a problem with Federal workers. They don't have the same competitive Federal benefits packages that those in the private sector do; we want to create a competitive way to allow that to entice them to work for the government. But they also had a problem, because the government wasn't administering any sort of serious health program. And so what they chose to do was to tap into the private market.

They -- they explicitly said, we don't have

the expertise to administer this program. We'd like to act as a market participant and buy these plans from private insurers who are doing business in the States. And so from its inception, the FEHBA program was a dual-regulatory scheme. Congress intended States and their insurance laws to govern those participant -- those private insurers who are participating in the program.

Now, in the '70s what happened was that a number of the carriers and the agency administering the program, which was then at the time called CSC, found that there were a number of States that had begun to pass benefit laws; State laws that required, for instance, a carrier to cover acupuncture services or chiropractor services. And the carriers went to Congress and they said, these laws pose a problem. We need you to address this in some fashion. And that's what Congress did with 8902(m)(1), but it was very clear in the legislative history at the time it passed this statute in 1978, that it was purposely limited and not intended to displace the State background insurance laws that would apply to all of the carriers participating in this program.

JUSTICE ALITO: Before we get to the legislative history, could you say something about the

terms of this provision? Would you argue that the terms of a sub -- of a subrogation -- of a contract that has a subrogation provision do not relate to coverage? They do not relate to benefits, that they do not relate to payment of benefits? Could you explain how you would reach that conclusion?

MR. WESSLER: That's right, Your Honor. That -- that, we think, is the best reading for three reasons. First, the -- it makes sense to distinguish subrogation from benefits, because subrogation claims involve the proceeds of a distinct and separate tort cause of action that happens distinct in time and is highly contingent. It doesn't involve any -- it doesn't affect at all any payment for a benefit or a coverage that a Federal worker might receive --

JUSTICE ALITO: It doesn't -- it doesn't affect the benefits that the participant receives?

MR. WESSLER: That's right.

JUSTICE ALITO: If -- if it -- if there's no subrogation claim, the benefit receives a certain amount. If there is a potential, it's -- if there's requirement of subrogation, the participant receives that amount minus X?

MR. WESSLER: I don't think that's quite right, Your Honor. They get the MR -- a Federal worker,

let's say, who needs coverage for an MRI, gets -- gets that MRI covered and gets the coverage for that MRI paid for by her insurance plan regardless of any subrogation claim.

JUSTICE ALITO: Right.

MR. WESSLER: Because that claim is necessarily contingent, it may never occur. And -- and the money that -- that ultimately is involved in a subrogation claim isn't the money that is getting paid for, for the MRI coverage. It's money that comes out of a separate -- the proceeds of a separate tort claim from a personal injury action.

JUSTICE KAGAN: But money is money, and, you know, one dollar is as good as the next. And the question is -- I think what Justice Alito is saying; I'll just say it my way -- is one way -- say you're in a car accident. One way you get all the hospital and medical costs that you incur, and the other way you get those costs minus any recovery in a tort suit. So maybe a recovery won't happen in a tort suit, but a recovery might happen in a tort suit and then you get considerably less.

MR. WESSLER: Well, I think -- I think that that is certainly possible, although I do think the money matters. These are historically equitable claims

and the pots of money and the differences about from where those monies come matters in the way you conceive, at the outset, of what a benefit is and whether that benefit will be covered.

But I also think that part of understanding how to interpret the text of the statute requires understanding what Congress intended when it passed it in the first place. And I think the purpose here is that Congress was distinctly concerned with these kind of front-end benefit laws that made it difficult for carriers to know and provide for the coverage that they wanted and not to be required to cover for Arizona's acupuncture doctors' benefits and services that weren't offered under, for instance, a Blue Cross/Blue Shield plan.

JUSTICE BREYER: The point is, is your point. Look, what we're talking about here is subrogation. Has nothing to do with coverage. It has nothing to do with benefits. You're covered, you get the money, you get the CAT scan. You're covered, you get the hospital payment, you get the pain and suffering or whatever, you -- you're covered.

Now, there's a different thing that happens in the world. There's a tort suit. And our law affects the proceeds of that tort suit. The proceeds of that

tort suit are not benefits. The proceeds of that tort suit are not coverage. The proceeds of that tort suit are some money that our State and a judge decided should be paid to a victim of an accident. Is that the point?

MR. WESSLER: That's correct, Your Honor.

JUSTICE ALITO: Well, if that's the point, then what about payments with respect to benefits? The -- the sub -- those payments are not even with respect to benefits?

MR. WESSLER: Again, I don't think that's the best reading of the statute for largely the reasons that Justice Breyer gave. The -- the benefits and the payment of those benefits contemplates a front-end question about whether you are getting your MRI covered by the plan, not whether many years down the road there is some additional extra pot of money that is then available to be shared among a number of different entities.

JUSTICE ALITO: But the question isn't whether it's benefits; it's whether it relates to benefits, and not even whether it relates to benefits, whether it relates to payments with respect to benefits.

MR. WESSLER: I -- I -- yes. I think that's -- that's certainly right, but I think relates to, again, is -- is context-dependent in this -- in this --

for this statute as it is for every other statute.

And Congress had a laser focus when it passed this statute in 1978. It did not want to disturb otherwise applicable State insurance laws. And the reason it didn't want to disturb those laws is because it understood that the private carriers that were participating in this program should be governed by the same laws that would govern anybody in the private sector when it comes to insurance.

And that's why this distinction, I think, is a false one between a employer -- an employee in -- in Missouri and an employee in Kansas getting different rights because their State laws are different. That is precisely the kind of differences that Congress wanted to ensure controlled in the FEHB program.

I -- I think also, you know, what this points up, Justice Alito, is that there is, I think, this textual ambiguity that certainly can be read, based on just a -- a pure matter of --

JUSTICE BREYER: There is no ambiguity. The answer to the point, if I got the point right, is you say, you know, it's sort of like a lottery or something. There's some money floating out there. And what the contract says, different from what the State law says, is that money that's floating out there, maybe you won

it in a lottery or it came from Mars as far as this receiving benefits is concerned by the patient, but this contract says you take that money that came from Mars or wherever and you pay it to the insurance company.

Why do you pay it to the insurance company?

MR. WESSLER: Well, I think -- I mean, I think --

JUSTICE BREYER: Because what is it that the insurance company did that entitles them to receive that money from Mars? What is it that they did?

MR. WESSLER: Well, they -- they included in their contract this requirement --

JUSTICE BREYER: Whoa, whoa, whoa. I mean, just very simply, in three words, what did they do that entitled them to money from Mars?

MR. WESSLER: Sure. They paid the benefits.

JUSTICE BREYER: Exactly. So there we are.

Now, it relates to benefits because they get the money from this separate thing that happened because they paid benefits. So now how do you say that this contract does not relate to benefits?

MR. WESSLER: Well, Your Honor, I think, again, the question is -- is largely what did Congress intend when it passed this statute. The question -- "relates to" could be read uncritically broadly, or it

could be read narrowly, and -- and the -- the proper approach, I think, as this Court has explained in multiple different contexts, is to ask what did Congress intend when it passed this particular express-preemption clause. And here, we know that their goal was not to create an expansive form of preemption that could extend to cover laws that would fall within traditional areas of State insurance regulations.

JUSTICE ALITO: How do we know that?

MR. WESSLER: They said in the legislative history, it is purposely limited and not intended to displace otherwise applicable State insurance law.

JUSTICE ALITO: You know, our colleague Justice Scalia, is not here any longer, but he would be having a fit at this point, so maybe --

(Laughter.)

MR. WESSLER: Sure. I -- I understand, Your Honor. But again, I think in McVeigh, what -- one of the lessons in McVeigh is that there is this textual ambiguity that arises from precisely this colloquy that we've had. And the question then becomes what does -- what does the Court do in the face of this textual ambiguity when we don't quite know what Congress may have intended exactly.

And in the area of traditional State

regulation, as we are in when it comes to insurance, there's a -- when we're talking about State laws and whether Congress intended to displace those State laws, we require a clear statement from Congress before we undo a category, wipe away --

JUSTICE SOTOMAYOR: Mr. Wessler, what is -- how do you differentiate our holding in Hillman?

MR. WESSLER: I --

JUSTICE SOTOMAYOR: How is this --

MR. WESSLER: Yes.

JUSTICE SOTOMAYOR: -- any more or less "relates to" than in Hillman?

MR. WESSLER: Well, I --

JUSTICE SOTOMAYOR: Almost identical language. And we read it very, very broadly.

MR. WESSLER: Well, the critical distinction, Your Honor, in Hillman, is that Hillman was decided on an implied form of preemption. The Court said -- life insurance statute at issue there, including an express-preemption clause, but the Court didn't -- didn't address the effect or meaning of that clause at all and instead looked to the -- to the statutory language and the regulations that the agency promulgated and found that -- a Virginia State law that would have required something else other than what the -- the

statute required was in conflict.

Now we think implied preemption --

JUSTICE SOTOMAYOR: Why -- why isn't there a conflict here?

MR. WESSLER: We -- we think that there --

JUSTICE SOTOMAYOR: There's a direct conflict between what the benefits paid here demand -- it's benefits minus later subrogation -- and what the State law says, which is you can't honor that contractual term.

MR. WESSLER: I -- sure. So one thing to say, first -- I'll answer your question, Your Honor, but this is not an implied preemption case.

Neither the Petitioners nor the government have argued that there is a conflict that has -- that has been created that gives rise to a form of implied preemption. Their argument is focused solely on the meaning of scope of this express-preemption clause.

Now, there could be, down the road, if the government were to, in fact, enact a substantive regulation, some form of implied conflict that could give rise to the displacement of State law, but we're not in that world in this case today.

And I think that's actually a crucial point that -- that what we have here is the challengers are

asking for what is, in essence, an unprecedented expansion of Chevron at the same time while trying to smuggle in insurance laws through express-preemption clause, when they have available to them the possibility of arguing, as in Hillman, an implied form of preemption that would still allow the Court to do the -- the -- the -- to make the decision about whether there's indeed an irreconcilable conflict.

JUSTICE BREYER: But -- but --

JUSTICE KENNEDY: And so I do. That -- that gives me whip -- whiplash. All of a sudden you -- you have implied preemption, and that's the -- the preferred argument to express preemption? It should be just the other way around.

MR. WESSLER: Well, I think, Your Honor, that is what happened in Hillman v. Maretta. And there was an express-preemption clause like there was here, but the Court, you know, instead of considering whether that express-preemption clause displaced Virginia law, adopted a form of implied preemption to decide whether there was a conflict. But we don't have here a substantive regulation --

JUSTICE KENNEDY: Well, it just seems to me as orderly proceeding for us to ask the first question: Is there express preemption? And that displaces the

whole necessity for going through the very difficult exercise of implied preemption.

MR. WESSLER: Well, I --

JUSTICE KENNEDY: You seem to indicate it has some priority. That was my only comment.

MR. WESSLER: Well, I don't -- I don't know -- I wouldn't -- I don't think there's necessarily a priority, but I don't think the express-preemption clause in this case can bear the weight of the interpretation that the challenger is --

JUSTICE KENNEDY: Well, that's quite another thing.

MR. WESSLER: -- trying to place on it.

JUSTICE KAGAN: But, for example, just a couple of years ago, we said with respect to an express-preemption clause, we said that the presumption against preemption just didn't apply in a case like this -- like that; that it was only applicable in a case of implied preemption.

MR. WESSLER: Right. I -- well, I don't think this Court has overruled the 70 years of -- of precedent establishing that the presumption against preemption applies to express-preemption clauses. I think --

JUSTICE KAGAN: So that was just a careless

statement --

MR. WESSLER: No. I think that --

JUSTICE KAGAN: -- on our part?

MR. WESSLER: I think in that case, the point the Court was making was that where the language of an express-preemption clause is clear, where we know that Congress intended to displace a -- a particular State law, the presumption does not need to apply. And I think that's perfectly consistent with an interpretation here, that where the text is ambiguous, where we do not have a clear statement from Congress that it intended to displace some particular area of State law, that we would -- we would exercise caution and not cavalierly displace that State law unless and until Congress makes that intent clear.

I'd like, if I can, to just turn to Justice -- Chief Justice Roberts' question that he posed to the challengers about the very odd nature of this express-preemption clause, because I do think it raises some very serious constitutional problems that -- that if -- if this Court were to adopt the challengers' interpretation, would -- would allow these contract terms to really do the displacing of State law.

And I do think that there is -- it would be unprecedented -- Congress has never enacted another form

of this type of preemption that would actually authorize the terms of privately-negotiated contracts to step in and displace otherwise applicable sovereign decisions of States.

And there really is no way around this problem in the case, other than to adopt a narrow interpretation of what the -- what relates to benefits means, because Congress, when it wrote this statute in 1978, unambiguously intended to delegate the power to preempt to these terms of contracts. And these contracts are not laws under the Supremacy Clause.

JUSTICE ALITO: Does your -- does your argument depend on the wording of this provision? Does it depend on the fact that it says the terms of the contract shall supersede State or local law? Would -- would you have a -- would you make the same argument if it said this statute hereby supersedes and preempts any State or local law that conflicts with the terms of the contract?

MR. WESSLER: I think that is -- I think that is a -- a far better approach that would -- would likely not raise these problems, because it points back to a -- a statute that actually does the preempting.

JUSTICE ALITO: Well, boy, if you're willing to concede that, I don't see what there is to your

argument because that's, in essence, what this is -- what this is saying.

MR. WESSLER: But the difference, Your Honor, is that here the terms are -- the terms of these contracts are determining the scope of preemption. And the terms themselves are not known by Congress at the time it passes the law. What Your Honor suggested looks a lot more like what ERISA looks like where Congress said the subchapters of ERISA preempt any State law that might interfere with plans. But when this Court does a preemption analysis under ERISA, it refers back to the -- to the actual substantive provisions in ERISA to determine preemption.

JUSTICE ALITO: But Congress doesn't know the term -- doesn't know what's in all these plans. They didn't know what would be in all these plans when they enacted it.

MR. WESSLER: Well, that --

JUSTICE ALITO: It depends on the -- it -- on -- on the formulation. If you say the contract preempts anything that conflicts with State law, that's -- that's a problem. But if it -- this -- it says, this statute hereby preempts anything that conflicts with the contract, that's -- that's not a problem?

MR. WESSLER: Well, it depends on what the statute says. And in ERISA, when Congress passed ERISA, it included a series of substantive provisions that dictate which State laws are displaced. For instance, it has reporting requirements. It has disclosure requirements. It has a remedial scheme. All of those substantive provisions give force to the preemption of State law.

Here, there isn't any of that. All Congress has said is we're -- we are authorizing these contract terms sight unseen that are entered into by the government, not acting as regulator, but acting as -- as market participant, and the terms of those contracts are able to other -- to displace otherwise applicable sovereign State law.

And -- and there truly is no limiting principle if, in fact, that is authorized under the Supremacy Clause, because, as the Chief suggested, there would be nothing to stop Congress from doing the same thing for completely private contracts or the rules of some informal body.

When -- when the Supremacy Clause speaks of a law being capable of displacing the sovereign decisions of States, it requires that there be some accountability checkpoints, some procedural protections

that safeguard States from the kind of arbitrary decision making that could occur through an informal process where there's no public participation and no judicial oversight.

JUSTICE KAGAN: I think I don't quite understand your -- your answer to Justice Alito's first question. I think he gave you a statute something along the lines of this Federal law preempts and supersedes any State law that conflicts with these kinds of contracts. And you said that would not be subject to your constitutional concerns; is that right?

MR. WESSLER: I may have misheard -- I may have misheard Justice Alito.

JUSTICE KAGAN: Because those contracts are just as indefinite as the -- as the contracts in this --

MR. WESSLER: That's right.

JUSTICE KAGAN: -- statute written here.

MR. WESSLER: That's right. And -- and the key point, the one that I think might infect a -- would infect that -- that hypothetical is that where the contract terms themselves are determining the scope of preemption, where they, the terms, are actually requiring State law to yield, that is where I think the -- the Supremacy Clause comes into play because those contract terms themselves are not laws. They have

not been enacted by Congress. They come with no safeguards, procedural protections --

JUSTICE KAGAN: Well, but that -- that, again, is true of ERISA, too. ERISA is a statute that says this Federal law displaces these State laws because they conflict with a bunch of contract terms.

MR. WESSLER: Well, I think the difference is that when this Court does -- when this Court considers preemption in ERISA, the Court looks to the substantive provisions of the statute. It looks to, for instance, the remedial scheme. It says there is this remedial scheme in ERISA, and that substantive scheme displaces a State common law claim. The same would be true for a disclosure requirement.

JUSTICE ALITO: Doesn't -- doesn't specify everything that's in -- in a State -- in a -- in a plan. And things that are in a plan that are not required by ERISA supersede State law; isn't that true?

MR. WESSLER: That's true. But what happens then is you have Federal common law that comes in to fill the gap. What we know from McVeigh here is that we are not in a Federal common law context. These contract terms, the ones involving subrogation and reimbursement, are not governed by Federal common law. They are distinctly State law controlled. They arise after a

personal injury happens in a State and through a tort action in State court. They are governed by these distinct State law rules, not any Federal common law.

And so the difference here is that you have what is otherwise a State-focused area of law in which these terms in Federal contracts that go through no oversight, no public participation are being used to deflect those State laws in a way in which Congress itself does not have any control over.

And I think the Court ought be very careful before wading in to whether, in fact, that is something that is authorized under the Supremacy Clause. And I think it's what motivated this Court in McVeigh to look at this exact provision and express what is, I think, a quite concerned view over whether there is the Supremacy Clause problem.

JUSTICE ALITO: I think Mr. Estrada referred to this situation. What if Congress says that in this particular area, States cannot regulate it at all? The free market has to govern. So any State law that purports to regulate in this area is preempted.

Now, is there a problem with that?

MR. WESSLER: I think that -- I think if you are in a world where there's field preemption, where Congress has displaced everything, you -- you might not

run into this problem. But I don't think that's what we're talking about here.

JUSTICE ALITO: You might not run into the problem. You might run into the problem?

MR. WESSLER: I think, again, it depends specifically on what the Federal law says and how it's operating. But the closest example that the challengers have come to for -- for an analogue to what Congress has done here is ERISA, which refers specifically to the subchapters of the law as doing the preempting and the Federal Arbitration Act, which itself only establishes a Federal rule of nondiscrimination. It seeks to put arbitration agreements on the same plane as other contracts and have State law apply equally to both.

What's going on here is a rule of essentially priority in which -- which Congress has delegated to these contract terms the power to override State law and exist above what would otherwise apply to -- in the private sector. And I think that actually cuts strongly against what Congress intended when it first passed FEHBA, which was that this -- this statute and the -- and the -- and the insurance policies that are offered to Federal workers who are also State citizens should be subject to the State insurance regimes that have controlled these carriers from day one

in the private sector.

And when Congress has been asked to address specific problems in this area, it has reacted and responded repeatedly. The one thing that this agency here, OPM, has not done, as much as it's tried to argue for Chevron deference over an express -- its interpretation of an express-preemption clause, it has never, in fact, asked Congress to amend this law to address what it perceives as a problem.

And I would point the Court in this -- in this respect to the way preemption works under the -- the Department of Defense insurance regime. Because for all of the -- again, the challengers pointing to several copycat versions of this statute and several of their other insurance regimes, the Department of Defense insurance regime looks very different.

What Congress did there is that it first enacted an express-preemption clause that looked nearly identical to what the Court has in front of it here. And then five years later, it amended that law and it delegated the power to preempt not to terms of a contract, but to regulations promulgated by a Federal agency; there, the Secretary of Defense.

And I think if we're thinking about the democratically accountable ways that preemption should

work and the protections that States must have for their own law, allowing either Congress to do the preempting or delegating that power specifically and expressly to an agency are the only two ways that we can -- that are -- that are constitutionally permissible, and here we have neither.

Congress itself does not control the terms of these contracts, and it has not expressly delegated any authority to the agency to pronounce on preemption. And so the agency's effort to seek Chevron deference over what is explicitly a conclusion on the scope of an express-preemption clause just doesn't work. Congress well knows how, when it wants to, to delegate that power to the agency, and it has not done so here.

If there are no further questions, save the rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Three minutes, Mr. Estrada.

REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE PETITIONER

MR. ESTRADA: Thank you, Mr. Chief Justice.

I'd like to start with the last point counsel made about how Congress did not expressly delegate the power to preempt. I would point out this highlights one of the many oddities of the case on the

other side.

Under this Court's ruling in De la Cuesta, which held -- you know, this Court held that an agency may use general rulemaking authority to preempt State laws, and in those circumstances, of course, their regulations get deference.

And one of the contentions that this Court specifically rejected in De la Cuesta was that in order for the agency to use general rulemaking, Congress had specifically to specify that the power to preempt was one of the rules. That is at page 154 of this Court's opinion. The case is cited in page 54 of the blue brief.

It's very odd, therefore, that, under the conception that Respondent has, the agency could have done this conclusion on its own under its general regulatory power under 8913, and yet Congress cannot do so by expressly provided that this is the conclusion it wants.

The second point I would like to make is that -- one that addresses Justice Breyer's point, which is, keep in mind that this is not a fight as to who gets the money in the first place. This is a class action complaint brought in State court against my client under the theory that we were unjustly enriched by keeping the

benefits that we should have paid them because we got them back. It is inconceivable to me that in the context of a case in which the gravamen of the complaint is we took his benefits back, the case could not be related to benefits. The relevant parts of the complaint are Joint Appendix 62A and 63A.

The third point has to do with democratic accountability and whether you would leave this to agencies or bureaucrats as opposed to Congress. But as you recognize in City of Arlington, the choice that is being proposed is not between Congress or the agency, but between the Federal courts, which are certainly unelected and generally unaccountable in the democratic process and people that, at least in theory, are ultimately accountable to the elected representatives, that is to say, an agency.

And finally, to the extent that you believe that this statute has a constitutional doubt in the terms in which it was drafted, I can well believe that you have seen many cases in which you feel that you are the body shop for the roller derby across the street. This is not one of them. This requires no significant surgery. It is, at most, a little bit of buffing, because it is certainly easier than concluded that some -- concluding that something that Congress had

expressly labeled a penalty in the Affordable Care Act was, in fact, a tax or the construction that the Court invoked in Nabutinov, Bond and other cases.

It is certainly easy here to read shall supersede and preempt, to read shall be effective notwithstanding, and give effect to the evident purpose of Congress in dealing with these matters at the Federal level and not on a check board basis, State by State. For all these reasons, we ask that the judgment of the Supreme Court of Missouri be reversed.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)