No. 09-38

In the
Supreme Court of the United States

HEALTH CARE SERVICE CORPORATION,
Petitioner,
v.
JULI A. POLLITT and MICHAEL A. NASH,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR THE AMICI CURIAE ASSOCIATION OF FEDERAL HEALTH ORGANIZATIONS AND AMERICA'S HEALTH INSURANCE PLANS, INC. IN SUPPORT OF PETITIONER

DAVID M. ERMER
ERMER & BROWNELL, PLLC
1828 L St., N.W., Suite 640
Washington, D.C. 20036
(202) 833-3400
Counsel of Record for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

LEGISLATIVE MATERIALS

Rules

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Association of Federal Health Organizations ("AFHO") is a trade association whose regular membership is composed of nine employee organizations which are the carriers of the respective Federal Employees Health Benefits Act ("FEHBA") health benefit plans which their organizations sponsor. *See* 5 U.S.C. §§ 8901(6), (8), 8903(3).[2] Collectively, approximately 1,200,000 federal and postal employees and annuitants, including their dependents, are enrolled in AFHO member FEHB plans. *See* U.S. Office of Personnel Management, Federal Civilian Workforce Statistics, The Fact Book at 82 (2007).

---

[1] Counsel for the parties to this case have filed letters with the Clerk of the Court consenting, in a global manner, to the filing of all amicus briefs supporting either side in this case. *See* Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its regular members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] AFHO's regular members are carriers of the following FEHB plans: the American Postal Workers Union Health Plan, the Association Benefit Plan, the Foreign Service Benefit Plan, the Government Employees Health Association Benefit Plan, the Mail Handlers Benefit Plan, the National Association of Letter Carriers Health Benefit Plan, the Panama Canal Area Benefit Plan, the Rural Letter Carriers Benefit Plan, and the SAMBA Health Benefits Plan. The Blue Cross Blue Shield Association is an associate member of AFHO, but it did not make a monetary contribution to the preparation or submission of this brief.

America's Health Insurance Plans, Inc. ("AHIP") is a trade association representing the private health plan and insurer community. AHIP's mission is to advance healthcare quality and affordability through leadership in the healthcare community, advocacy, and the provision of services to its members. AHIP represents nearly 1,300 member companies that insure benefits, including health, pharmaceutical, long term care, disability, and supplemental coverage to more than 200 million Americans. Many AHIP members are FEHB plan carriers.

This case presents the issue of whether the FEHBA completely preempts -- and therefore makes removable to federal court -- a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA. Resolution of this issue will impact the administration and cost of the amici member plans in the same manner as it will the government wide service benefit plan of which the Petitioner is an integral part. Because the case presents an important issue of significant and direct impact on amici, they respectfully request that the Court entertain their views as to why the issues presented should be resolved in the Petitioner's favor.

SUMMARY OF ARGUMENT

Congress has created the FEHBA in the exercise of its Constitutional authority over federal employee compensation. Since at least 1975, Congress and the U.S. Office of Personnel Management ("OPM"), the federal agency that Congress made responsible for

the FEHB Program, have developed an exclusive, comprehensive federal remedy that federal employees must use to resolve FEHBA enrollment and benefit disputes.

Respondents filed a lawsuit against Petitioner in Illinois State court over FEHBA enrollment and benefit issues. In *Empire Healthchoice Assurance Inc. v. McVeigh*, 547 U.S. 677 (2006), this Court recognized that such cases must land in federal court. This Court should extend the complete preemption doctrine to this FEHBA case as it previously ruled in the analogous context of enrollment and benefit claim lawsuits under ERISA.

FEHB participants and the overall FEHB program objectives are best served by a nationally uniform, comprehensive, and efficient process for handling enrollment and benefit determinations, rather than submitting such decisions to a complex variety of state administrative and judicial processes, as Congress intended.

Alternatively, Petitioner was entitled to remove the case from state to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). This case meets the three jurisdictional prerequisites for removal – Petitioner, a closely supervised federal contractor, was acting under a federal officer; the acts of which Respondents complained to the State Court were undertaken by Petitioner in accordance with its federal contract obligations, and a colorable federal defense exists based on the exclusive federal remedy and the FEHBA, 5 U.S.C. § 8902(m)(1).

ARGUMENT

THE RESPONDENTS' CASE WAS REMOVABLE TO FEDERAL COURT BASED ON THE COMPLETE PREEMPTION DOCTRINE AND THE FEDERAL OFFICER REMOVAL STATUTE

1. Nature of the FEHB Program

Congress enacted the FEHBA, 5 U.S.C. §§ 8901 – 8914, in 1959. Congress thereby added to the then-existing federal employee compensation package a voluntary group health insurance program, the cost of which was to be shared by the federal government, as the employer, and the employees who decide to enroll in the FEHB Program. Congress established the FEHB Program to assure "that the federal government can compete in the recruitment and retention of competent personnel." *American Federation of Government Employees v. Devine*, 525 F. Supp. 250, 252 n. 2 (D.D.C. 1981), citing S. Rep. No 86-468, at 1-2 (1959); H.R. Rep. No. 86-957, at 1-2 (1959). Approximately eight million federal and postal employees, retirees, and their dependents currently are covered under the FEHB Program. *See Hearing on FEHBP's Prescription Drug Benefits Before the House Subcommittee on Federal Workforce*, at 1 (June 24, 2009) (statement of Nancy Kichak, Associate Director, OPM) (*available at* http://www.opm.gov/News_events/Congress/Testimony/index.asp).

As is the case with any legislation governing federal employee compensation, FEHBA's enactment was "historically and constitutionally within Congress' power" to the exclusion of state or local government authority. *Puglisi v. United States*, 564 F.2d 403, 409 (Ct. Cl. 1977), *cert denied*, 435 U.S. 968 (1978); *see also Bush v. Lucas*, 462 U.S. 367 (1983), *aff'g*, 647 F.2d 573 (5th Cir. 1981); *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). Congress' exclusive authority in this area stems from the appointment of inferior officers clause and the necessary and proper clause of the U.S. Constitution. U.S. Const. art. II, § 2, cl. 2 and art. I, § 8, cl. 18. *See, e.g., United States v. Will*, 449 U.S. 200 (1980); *Atkins v. United States*, 556 F. 2d 1028, 1060 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978)

Rather than establish a program under which the government assumed the risk of providing health insurance coverage to its employees, Congress chose to assign that task to a variety of private sector "carriers" under a specialized federal procurement arrangement. Under this arrangement, the U.S. Office of Personnel Management ("OPM") is granted broad responsibility to contract for four types of plans: one Government wide service benefit plan (in which Petitioner participates); one Government wide indemnity benefit plan; employee organization plans (in which class the AFHO regular member plans fall), and comprehensive medical plans (in which class several AHIP member plans fall). 5 U.S.C. §§ 8902, 8903, 8903a. Thus, FEHB plan carriers assist OPM in fulfilling a basic governmental task. *See*

Watson v. Philip Morris Cos., 551 U.S. 142, 143 (2007).

FEHBA creates a comprehensive regulatory scheme for establishing and operating FEHB plans. FEHBA specifies who may enroll for coverage and defines eligible family members. 5 U.S.C. §§ 8901, 8906, 8908, 8914. FEHBA expressly authorizes OPM to determine enrollment for coverage, *id.* §§ 8902(f), 8905, 8908, and sets standards for the termination of coverage, *id.* § 8902(g), (h). It further provides for certain extensions of coverage and for carriers to offer conversion coverage. *Id.* §§ 8902(g), (h), 8905(c), 8905a.

FEHBA establishes qualifications for FEHB plan carriers, *id.* § 8901 (7), (8), and it empowers OPM to set and enforce minimum standards for health benefit plans and their carriers, *id.* § 8902(e). It establishes benefit types and levels, and it prescribes the method for setting plan rates. *Id.* § 8902(d), (i) and 8904.

FEHBA requires the government wide plans, including the plan in which Petitioner participates, and the employee organizations plans, to be retrospectively experience rated. 5 U.S.C. § 8902(i). As experience rated plans, the price for each contract is based on their past "experience" which includes enrollees' actual paid claims, administrative expenses (such as benefits litigation expenses), retentions, and estimated claims incurred but not reported, adjusted for benefit modifications, utilization trends, and economic trends. 48 C.F.R. §§ 1602.170-7, 1652.216–71(b)(2)(iii).

FEHBA provides a generous government contribution toward the cost of coverage, *id.* § 8906, for the establishment of a dedicated fund in the U.S. Treasury for handling all Program funds, and for the establishment and OPM control of FEHB plan contingency and FEHB Program administration reserves. *Id.* § 8909.

FEHBA states that OPM must approve each health benefit plan contract and each plan's "detailed statement of benefits," which must include those "benefit maximums, limitations, exclusions, and definitions that OPM considers necessary or desirable." 5 U.S.C. § 8902(a), (d). It requires that every contract contain a provision requiring the carrier to pay any claim for a contract benefit at OPM's direction. *Id.* § 8902(j). It requires that each plan enrollee shall be issued "an appropriate document" describing the plan's benefits, claims procedures, and other principal provisions affecting the enrollee and any eligible family members. *Id.* § 8907.

FEHBA mandates that the plan contract shall require the carrier to make periodic reports on plan financing to OPM and to cooperate with the audit of plan records by OPM representatives and the Government Accountability Office. 5 U.S.C. § 8910.

FEHBA renders OPM responsible for policing a carrier's performance of its FEHB plan contract. 5 U.S.C. §§ 8902(e), 8913(a), For example, "[a] pattern of poor conduct or evidence of misconduct" -- such as "[u]sing fraudulent or unethical business or health

care practices or otherwise displaying a lack of business integrity or honesty" -- "is cause for OPM to withdraw approval of the carrier" and to "effect corrective action." 48 C.F.R. § 1609.7001(c)(2), (d). OPM may take remedial action in the event of a "significant event" impacting the carrier or its underwriter. *Id.* §§ 1622.103–70, 1652.222–70. OPM further is responsible for policing the conduct of the healthcare providers who treat FEHB plan enrollees. 5 U.S.C. § 8902a.

In sum, FEHBA places the FEHB Program under OPM's direct and extensive control, and it empowers OPM to make such contracts and to prescribe such regulations as it deems necessary to carry out for the FEHBA's purposes. *Id.* § 8913. The FEHBA expressly requires OPM to make regulations that "provide for the beginning and ending dates of coverage of employees, annuitants, members of their families, and former spouses under health benefit plans." *Id.* § 8913(c).

OPM has promulgated those comprehensive regulations at 5 C.F.R. Part 890 and 48 C.F.R. Ch. 16. Of particular note for purposes of this case are OPM's regulations governing family member enrollment and the resolution of FEHBP enrollment and benefit claim disputes. 5 C.F.R. §§ 890.103, 890.104, 890.105, 890.107, 890.302; 48 C.F.R. §§ 1604.7101, 1652.204–72**.** Such regulations promulgated by a federal agency pursuant to an act of Congress carry with them the force of law. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843-44 (1984).

Federal employees, including the Respondent, Juli Pollitt, have the unqualified right, if they desire, to enroll in the FEHB Program on a self-only or self and family basis through their employing agency. They do so by following the OPM approved process. *See* 5 U.S.C. § 8905(a): 5 C.F.R. §§ 890.101(a), 890.102, 890.301. Consequently, they obtain that coverage solely by enrolling in the statutory FEHBA fringe benefit program offered by their employer, the federal government. *See Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985):

> [F]ederal workers serve by appointment, and their rights are therefore a matter of "legal status" even where compacts are made. *Kania v. United States,* 650 F.2d 264, 268, *cert. denied,* 454 U.S. 895 (1981). In other words, their entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles. *United States v. Larionoff*, 431 U.S. [864] at 869 [1977)].

They thereby subscribe to the statement of benefits approved by OPM and submit to OPM's regulatory requirements. In so doing, they further agree with the federal government to share in the cost of that benefit through payroll deductions in an amount established by the FEHBA, 5 U.S.C. § 8906(c), (d).

2. Development of FEHBA Preemption of State Law and an Exclusive Federal Remedy

In 1975, the Comptroller General advised Congress that because the states were becoming increasingly "active in establishing and enforcing health insurance requirements," Congress should "clarify whether State requirements should be permitted to alter terms of contracts negotiated pursuant to the [FEHBA]. S. Rep. No. 95-903, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1413, 1420. The Civil Service Commission ("CSC"), OPM's predecessor as FEHB Program administrator, shared that view. In reliance on its general counsel's opinion, CSC took the position that:

> The Supremacy Clause [of the U.S. Constitution, art. VI, § 2] creates an immunity from state interference of federal operations. The principles underlying the need for national uniformity in the administration of Federal functions operate to supersede conflicts arising from State laws and apply with equal regard to the Commission's administration of the [FEHBA]. The McCarran-Ferguson Act by its terms and the interpretations of the courts in no way diminishes the supremacy of the [FEHBA] over State laws. If the Commission is to have a free hand it needs to administer the [FEHBA], no other conclusion can be reached.

Id. at 8. Concerned that "[t]hese [State] laws in effect presented serious problems from the standpoint of the uniformity of benefits under the

Program," *id.* at 7, CSC urged Congress to insure "that the [FEHB] Program – a program established by an Act of Congress – should not be subject to alteration or regulation by State legislatures or State insurance boards." H.R. Rep. No. 95-282, 1, 4 (1977).

Congress specifically recognized that imposition of State law requirements on FEHBA contracts would result in:

> Increased premium costs to both the Government and enrollees, and
>
> A lack of uniformity of benefits 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.

Id. *See also* S. Rep. No. 95-903, *supra*, at 2, 4, 9. Congress also recognized that, absent federal legislation affirming federal supremacy in this area,

> Enforcement of this preemption policy w[ould] almost inevitably lead to time consuming and costly litigation with the States until [the CSC's] position is upheld . . . .

H.R. Rep. No. 95-282, *supra*, at 3.

In 1978, Congress amended FEHBA to include 5 U.S.C. § 8902(m)(1), which read as follows:

> The provisions of any contract under this chapter which 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, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with contractual provisions.

As the legislative history confirms, Congress did not regard this provision as a statute which would restrict the reach of otherwise applicable state law. To the contrary, Congress recognized that the FEHBA, as a federal personnel statute, was from the outset beyond the reach of State law. Section 8902(m)(1) thus was added to FEHBA to state that proposition explicitly, and thereby hopefully to save the litigation costs required to affirm it judicially.[3]

Unfortunately, the enactment of Section 8902(m)(1) did not entirely avoid FEHBA litigation. Over the course of the next fifteen years, the lower federal courts established that the FEHBA

- required federal employees to exhaust their available administrative remedies before bringing a lawsuit against a carrier over a benefit dispute;

---

[3] The legislative history of this provision establishes that Congress elected to permit the States to regulate the operations of FEHBA plans in two respects – state taxation of health insurance company premiums and maintenance of state statutory reserves for those companies. H.R. Rep. No. 95-282, *supra*, at 4-5. In 1990, Congress added Section 8909(f) to the FEHBA. This provision severely restricted future state taxation of FEHBA plans.

- limited judicial review to the OPM decision on the disputed claim rendered pursuant to 5 C.F.R. § 890.105, and
- preempted state law based actions against carriers, such as claims for bad faith torts or intentional infliction of emotional distress because those claims were inextricably intertwined with the benefit disputes.

See, e.g., Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 804 (8th Cir. 1993); *Harris v. Mutual of Omaha Companies*, 992 F.2d 706 (7th Cir. 1993); *Caudill v. Blue Cross and Blue Shield*, 999 F.2d 74 (4th Cir. 1993); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588 (2nd Cir. 1993); *Burkey v. Government Employees Health Association*, 983 F.2d 656 (5th Cir. 1993); *Hayes v. Prudential Insurance Co.*, 819 F.2d 921 (9th Cir. 1989).

However, the Third Circuit ruled that the FEHBA did not create complete preemption over an FEHBA claim dispute because "FEHBA does not create a cause of action vindicating a beneficiary's interest in recovering his or her benefits under a plan." *Goepel v. Mail Handlers Benefit Plan*, 36 F.3d 306, 312 (3rd Cir. 1994). The court based its conclusion on the facts that the FEHBA's federal jurisdiction provision, 5 U.S.C. § 8912, quoted below, is limited to actions against the United States and OPM's regulations at the time "expressly provided that '[a]n action to recover on a claim for health benefits should be

brought against the carrier of the health benefits plan.' *See* 5 C.F.R. § 890.107." *Id.*[4]

In 1995, OPM filled this gap when modified its FEHBA regulations at 5 C.F.R. Part 890 and 48 C.F.R. Ch. 16 to expressly require employees to exhaust their available administrative remedy and bring any benefit claim lawsuit against OPM, rather than the carrier, under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the FEHBA, *id.* § 8912:

> The district courts of the United States have original jurisdiction, concurrent with United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

OPM explained in its regulatory preamble that

> Historically, OPM has required that covered individuals who want to bring suit because an FEHB carrier has denied their claim for health benefits must sue the carrier, not OPM. These interim regulations provide that legal actions arising out of a denial of FEHB benefits should be brought against OPM rather than the FEHB carrier that made the initial denial decision. * * *

---

[4] In contrast, OPM's regulations consistently have required that legal actions over enrollment disputes be brought against the employing agency. 5 C.F.R. § 890.107(a).

The legislative history of § 8902(j), title 5, United States Code, shows that Congress intended OPM (at that time the Civil Service Commission) to provide an administrative appeal process, binding upon the carriers, that would save covered individuals the expense and delay of being forced into the courts to recover on meritorious claims for benefits. Based upon this directive and its central role in the administration of the FEHB Program, OPM established a detailed administrative review process for benefits claims leading to a final decision on such claims by OPM. It is OPM's requirement that this administrative review process must be followed before legal action is pursued in the courts. Further, the matter to be reviewed by a court upon appeal is the OPM decision affirming the carrier's denial of benefits, with the court's review being limited to an examination of OPM's administrative decision to deny the claim for payment or services.

Health insurance contracts under the FEHB Program are Federal contracts under 5 U.S.C., chapter 89. Accordingly, legal actions concerning disputes arising or relating to those contracts are controlled by Federal, rather than State law. Congress, in the FEHB Act, mandated Federal uniformity for all matters that relate to (1) the nature or extent of coverage; (2) benefits; and (3) payment of benefits under the FEHB Program. By statute, all health insurance contracts require the carrier to agree to pay or provide a health

> service or supply in an individual case if OPM finds that the covered individual is entitled to the benefit under the terms of the contract. Congress also directed OPM to take a central role in determining whether a health service or supply should be provided in individual cases to covered individuals and, if it should be provided, to require carriers to pay for such health service or supply. These interim regulations reaffirm the principle of uniformity in the FEHB Program by providing that in judicial disputes regarding the denial of a health benefits claim, review is to be limited to the record that was before OPM and that was the basis of the OPM decision to disallow the benefit.

60 Fed. Reg. 16,037, 16,057 (March 29, 1995). The same principles apply to the resolution of FEHBA enrollment disputes under OPM's regulations, 5 C.F.R. §§ 890.104, 890.107(a). Moreover, OPM's views expressed in the notice and comment rulemaking process are entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

Soon thereafter, a federal district court recognized that this regulatory action cured the federal jurisdiction defect that the Third Circuit had identified in the *Goepel* case. This court held that the FEHBA created complete preemption over benefit claim disputes. *Hanson v. Blue Cross and Blue Shield of Iowa*, 953 F. Supp. 270, 275-76 & n. 4 (N.D. Iowa 1996). However, another federal district court reached the opposite result because the

FEHBA, 5 U.S.C. § 8902(m)(1) at the time required courts to determine as a threshold matter whether the state law was in conflict with the FEHBA health plan contract. *Arnold v. Blue Cross and Blue Shield of Texas*, 973 F. Supp. 726, 731-32 (S.D. Tex. 1997).

In 1998, Congress resolved this issue when it clarified 5 U.S.C. § 8902(m)(1) by deleting that final clause which predicated FEHBA preemption upon a conflict with state law. As now codified, FEHBA provides that

> The terms of any contract under this chapter [5 U.S.C. § 8901 et seq.] 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 House Report accompanying the bill explained that Congress intended the amendment

> to broaden the preemption provisions in current law, [and] to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they live. This change will strengthen the case for trying FEHB program claim disputes in Federal courts rather than State courts.

H.R. Rep. No. 105-374, at 9 (1997); *see also* S. Rep. No. 105-257, at 9 (1998) Additionally, Representatives Elijah Cummings and John Mica

pointed out on the House floor that, with the goal of ensuring uniform provision of benefits to federal employees across the country, the amendment would fortify FEHBA's preemptive effect over local and state law. 144 Cong. Rec. H9354 (daily ed. Oct. 5, 1998). In sum,

> This amendment confirm[ed] the intent of Congress (1) that FEHB program contract terms which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) completely displace State or local law relating to health insurance or plans

H.R. Rep. No 105-374, *supra*, at 16.

This history is intended to document and highlight for the Court the efforts undertaken by the legislative and executive branches to place the FEHB Program cases, such as the instant case, in the same posture as cases under the Labor Management Relations Act, 29 U.S.C. § 185, and the Employee Retirement Income Security Act, 29 U.S.C. § 1132, as construed by this Court in the *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) and *Metropolitan Life Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), cases.

Not surprisingly, therefore, in the wake of this FEHBA amendment, the Ninth Circuit and several lower federal courts concluded that the FEHBA created federal jurisdiction sufficient to remove FEHBA claim disputes from state to federal court under the complete preemption doctrine. *See*

Botsford v. Blue Cross and Blue Shield of Montana, 314 F.3d 390 (9th Cir. 2003): *Doyle v. Blue Cross Blue Shield of Illinois*, 149 F. Supp. 2d 437, 432-33 (N.D. Ill. 2001); *Rievley ex rel. Rievley v. Blue Cross Blue Shield of Tenn.,* 69 F. Supp. 2d 1028, 1033-34 (E.D.Tenn.1999); *Carter v. Blue Cross and Blue Shield of Florida*, 61 F. Supp. 2d 1237, 1240-41 (N.D. Fla. 1999); *Kight v. Kaiser Foundation Health Plan*, 34 F. Supp. 2d 334, 339 (E.D. Va. 1999).

In *Botsford*, the plaintiff, who like Respondent Juli Pollitt, was enrolled in the government wide service benefit plan, sued the carrier on various state law theories over a FEHBA claim dispute. 314 F.3d at 391. In its *Botsford* opinion, the Ninth Circuit reasoned that

> We conclude that Congress intended to limit the defendant in suits involving disputes over FEHBA benefits to the United States. Allowing suits against carriers would undermine the federal scheme in two ways. First, it would interfere with the uniform administration of FEHBA plans because it would create an alternative mechanism for enforcing FEHBA-created rights. This would weaken OPM's authority to interpret FEHBA and its own contracts and would create a patchwork of state regulations overlaying federal FEHBA contracts. Second, allowing suits against carriers in state court would inevitably drive up the cost of FEHBA health insurance by increasing carriers' costs. This is particularly true when, as in this case, state law allows for more extensive monetary

> damages than does FEHBA.
>
> * * *
>
> In light of the facts that FEHBA involves only one employer, the United States, and the United States contracts with a multiplicity of carriers and has millions of employees, imposing a uniform administrative scheme makes sense. Administering the many contracts between OPM and carriers uniformly, and resolving disputes over benefits in a procedurally regular manner, simplifies FEHBA administration. This, in turn, furthers the congressional goals of uniform administration and cost-savings underlying FEHBA. Requiring beneficiaries to exhaust administrative remedies before proceeding to court, and then to sue the agency that conducted the administrative actions, reinforces the importance and increases the efficiency of the administrative scheme.

314 F.3d at 397-98.

In 2006, this Court issued its opinion in *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677. This case raised the issue of whether federal removal jurisdiction existed over a case in which an FEHB plan carrier sought to enforce an FEHBA contract provision concerning reimbursement and subrogation rights against a plan enrollee. The Court found that federal removal jurisdiction was lacking because regardless of whether the FEHBA, 5

U.S.C. § 8902(m)(1) preempted state laws that otherwise would govern FEHB plan subrogation and reimbursement rights, the FEHBA, *id*. § 8912, did not provide any federal court jurisdiction over those cases. This Court reasoned in pertinent part that

> FEHBA's jurisdictional provision, 5 U. S. C. § 8912, opens the federal district-court door to civil actions "against the United States." * * * OPM's regulation, 5 CFR § 890.107(c) (2005), instructs enrollees who seek to challenge benefit denials to proceed in court against OPM "and not against the carrier or carrier's subcontractors." *See supra*, at 6. Read together, these prescriptions "ensur[e] that suits brought by beneficiaries for denial of benefits will land in federal court." 396 F. 3d, at 145, n. 7.

547 U.S. at 696 (closing quotation is drawn from *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 n. 7 (2d Cir. 2005)). Amici ask the Court to apply this sound reasoning to this case.

3. The Instant Case

In this case, the Respondent Juli Pollitt was enrolled in the government wide service benefit plan, the Blue Cross Blue Shield Federal Employees Program ("FEP"). *See* J.A. 96-97, 124. At the government's direction, Petitioner retroactively changed Respondent's FEP enrollment from self and family to self only. J.A. 97. Petitioner thereupon sought to recover benefits erroneously paid on behalf of Respondent's minor child. J.A. 128-129. The

OPM contract establishing Respondent's FEHB plan expressly obligated Petitioner to take these actions. J.A. 40.

Flouting OPM's governing regulations, discussed above, Respondent, joined by the minor child's father, Respondent Michael Nash, filed a lawsuit in Illinois state court against Petitioner challenging the enrollment change and retroactive benefit denials. *See* J.A. 77-82. Respondent also asserted claims under state-law theories of bad-faith conduct by insurers. *Id*. 79.

While the case was pending in state court, Petitioner was informed by Ms. Pollitt's employing agency that the original direction had been in error. *See id.* at 97, 102-103. Petitioner then expeditiously corrected the enrollment action and retroactive benefit decisions. *See id.* at 84. Respondents nevertheless continue to pursue their case.

Petitioner timely removed the Respondents' case from State to Federal court. Respondents did not move to remand the case to State court. The district court upon Petitioner's motion to dismiss the original complaint allowed the Respondents an opportunity to amend their pleading. Pet. App. 10a. The second amended pleading challenged Petitioner's retroactive benefit denials and sought $1.8 million in compensatory and punitive damages for insurer bad faith under state law. *See* J.A. 132

The district court dismissed the second amended complaint on the grounds that the Respondents' remedies are exclusively federal and that under

OPM's rules Ms. Pollitt was obligated first to exhaust her available administrative remedy and then to bring suit against OPM, not the Petitioner. Pet. App. 8a.

On appeal, the U.S. Court of Appeals for the Seventh Circuit vacated the district court's decision and remanded the case to that court. The Court of Appeals erroneously found a lack of federal removal jurisdiction. In a brief, fatally flawed analysis, it reasoned as follows:

> "Complete preemption" is not a defense; instead it represents a conclusion that all claims on the topic arise under federal law, so that 28 U.S.C. § 1441 permits removal. But *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), holds that federal law does not completely occupy the field of health-insurance coverage for federal workers. *Empire HealthChoice* shows that the district court erred in allowing removal under § 1441 and dismissing the suit as completely preempted.

Pet. App. 3a. The Court further concluded, in error, that removal under 28 U.S.C. § 1442(a)(1), the federal officer removal provision, would only be appropriate if Petitioner had been implementing a direct order of the federal government as opposed to acting under its supervision. *Id.*

4. The Case was Removable to Federal court based on the Complete Preemption Doctrine.

Respondents' causes of action go to the very heart of an employee benefits program – enrollment and benefit decisions. This particular employee benefits program, the FEHB Program, was established for federal employees by Congress acting on behalf of their employer, the federal government. Under the U.S. Constitution, Congress has the exclusive authority of setting and adjusting federal compensation.

The enrollment and benefit decisions made by Petitioner were subject to OPM review under its governing regulations. Those regulations further state that any OPM decision must be challenged in federal court under the Administrative Procedure Act. The FEHBA, 5 U.S.C. § 8912, creates federal court jurisdiction to those cases against the United States. *See Muratore v. OPM*, 222 F.2d 918, 920 (11th Cir. 2000): "We review OPM's actions pursuant to the FEHBA under the Administrative Procedure Act."

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003) is this Court's leading decision on the law of complete preemption. In that case, the Court held that the National Bank Act completely preempts state law usury claims. In so holding, the Court stated that the test for complete preemption is whether federal law "provide[s] the exclusive cause of action for the claim asserted" (*id.* at 8), not for any conceivable state law claim as the Court of Appeals erroneously ruled. *Accord*, *id.* at 9 ("[T]he dispositive

question in this case [is]: Does the National Bank Act provide the exclusive cause of action for usury claims against national banks?"); *id.* at 9 n.5 ("the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive"); *id.* at 11 ("Because §§ 85 and 86 [of the National Bank Act] provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank."). Unquestionably, as the Court recognized in its *McVeigh* opinion, the FEHBA and OPM's implementing regulations provide the exclusive cause of action for Respondent's erroneous FEHB plan enrollment and benefit decision claims.

We are aware that this Court has extended the complete preemption doctrine only to a limited number of circumstances in addition to National Bank Act regulated usury cases. In the Court' first opinion, on the doctrine, the Court applied complete preemption to the LMRA, 29 U.S.C. § 185. *Avco Corp. v. Machinists*, 390 U.S. 557 (1968). Subsequently, the Court applied the doctrine to ERISA, 29 U.S.C. § 1132. *Metropolitan Life Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), cases. In the *Metropolitan Life* and *Beneficial Finance* opinions, this Court noted the close relationship between the jurisdiction provisions in the LMRA and ERISA, thereby indicating that the statutes should be read *in pari materia*. *See* 539 U.S. at 7-8; 481 U.S. at 64-66. FEHBA's jurisdictional provision is necessarily narrower than the LMRA or ERISA provisions because it carves out an exception from the sovereign immunity doctrine.

See Bryan v. Office of Personnel Management, 165 F.3d 1315, 1318 (10th Cir. 1999):

> Congress clearly intended a limited waiver of sovereign immunity in [Federal Employees Health] Benefits Act disputes – courts only have jurisdiction to review final [OPM] actions, after exhaustion, and only one remedy is available.

As the Ninth Circuit recognized in *Botsford*:

> When considered in the context of the entire statute and its purposes, however, it is clear that FEHBA's jurisdictional statement is as broad as it can be. Thus, the jurisdictional statement ultimately weighs in favor of displacement.

314 F.3d at 397. Indeed, it is entirely logical to conclude that ERISA and FEHBA cases involving enrollment or benefit claim disputes should be treated alike. Cases involving the United States and its employee benefit interests must be heard in federal court.[5]

---

[5] In *Cedars Sinai Medical Center v. National League of Postmasters*, 497 F.3d 972 (9th Cir. 2007), the Court recognized that OPM's administrative remedies are binding on enrollees, such as Respondent. *Id.* at 976. However, the court held that those remedies are not applicable to a health care provider (absent receipt of authorization from the enrollee) and therefore a provider lawsuit against an FEHBA plan did not fall within the complete preemption doctrine.

Nor can Respondents escape FEHBA's exclusively federal remedies, and thus complete preemption, by casting their allegations as an insurer bad faith claim, as they did in part in the original complaint and then in the second amended complaint. In *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the Court held that ERISA's remedy for denials of benefits completely preempted state tort claims that derived from the benefits denials. In language also applicable to this case, the Court said: "[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of [the federal statute] . . . simply 'by relabeling their contract claims as claims for tortious breach of contract.'" *Id.* at 214 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)); *accord, Burkey v. Gov't Employees Hosp. Ass'n*, 983 F.2d at 660; *Hayes v. Prudential Insurance Co.*, 819 F.2d at 925 (same, in FEHBA context).

Based on this Court's interpretation of the FEHBA in *McVeigh*, the Court of Appeals ruling should be reversed, and federal removal jurisdiction over this case should be sustained. Affirmation of the Court of Appeals ruling would upend OPM's comprehensive regulatory scheme and open the floodgates to enrollment and benefits claims litigation in blatant contravention of Congressional intent that the FEHB Program should be administered in a nationally uniform manner.

Application of state law based causes of action to FEHB plan enrollment and benefit disputes would

frustrate the specific objectives of the FEHBA in general and 5 U.S.C. § 8902(m)(1) in particular. Achievement of the federal policy underlying the FEHBA requires a nationally uniform program of health benefits for federal employees that is administered on a nationally uniform basis. It further requires that enrollment and benefit claim disputes be heard and resolved exclusively in federal court.

5. The Case was Removable to Federal court based on the Federal Officer Removal Statute.

The federal officer removal statute permits removal of an action against "any officer (*or any person acting under that officer*) of the United States or of any agency thereof," 28 U. S. C. § 1442(a)(1) (emphasis added). There are three established requirements for removal under this section by a party, such as Petitioner, who is not a federal officer: (1) the removing party must have been acting under a federal officer; (2) the acts underlying the complaint were performed in the course of the removing party's responsibilities, and (3) a colorable federal defense exists. *See Willingham v. Morgan*, 395 U.S. 402 (1969).

Given the close relationship between FEHBA contractors and the government on a matter critical to the government's day-to-day operations, as discussed above, it is clear that Petitioner was acting under a federal officer. The second "triggering" requirement is met because the Respondent's claims arose in the context of Petitioner "fulfill[ing] the terms of a contractual agreement." *Watson*, 551 U.S.

at 153; *see also Maryland v. Soper*, 270 U.S. 9, 33 (1926) (the federal officer removal statute "does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority"). Finally, we have demonstrated that the Petitioner has colorable defenses under the FEHBA, specifically that the exclusive OPM disputed claim procedure, discussed above, required Ms. Pollitt to exhaust her available administrative remedies under 5 C.F.R. §§ 890.104, 890.105, and bring any lawsuit against her employing agency with respect to the enrollment issue and against OPM with respect to the benefit issues, 5 U.S.C. § 8912; 5 C.F.R. 890.107. Furthermore, if the FEHBA's general state law preemption provision is to be accorded any meaning, as it must under this Court's jurisprudence (*see Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 158 (2004), then it must be recognized to preempt state law tort claims such as those asserted by Respondents that are inextricably intertwined with the enrollment and benefit issues. Federal courts have recognized this core principle for over twenty years. *See, e.g., Hayes v. Prudential*, 819 F.2d at 925.

FEHB participants and the overall FEHB program objectives are best served by a nationally uniform, comprehensive, and efficient process for handling benefit determinations, rather than submitting such decisions to a complex variety of state administrative and judicial processes, just as Congress and OPM have intended. *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)(same in ERISA context).

CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Seventh Circuit under review.

Respectfully submitted,

DAVID M. ERMER
ERMER & BROWNELL, PLLC
1828 L St., N.W., Suite 640
Washington, D.C. 20036
(202) 833-3400
Counsel of Record for Amici Curiae

December 18, 2009