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 RESPONDENTS

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QUESTIONS PRESENTED

1. Whether administrative remedies under the Federal Employees Health Benefits Act of 1959 ("FEHBA"), 5 U.S.C. §§ 8901-8914, completely preempt – and therefore make removable to federal court – state-law claims challenging bad-faith insurance practices where (a) FEHBA creates no cause of action in federal court, (b) its administrative remedies are not exclusive and do not encompass bad-faith claims, and (c) other state-law claims that could have been resolved administratively were mooted by petitioner prior to removal.

2. Whether a private company that, as a licensee under a government contract, competes to provide health insurance for the personal use of government employees is "acting under" the control of a federal officer to fulfill a basic governmental function, and whether the company's bad-faith acts are taken "under color of such office," as required for removal under 28 U.S.C. § 1442(a)(1).

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INTRODUCTION

This case involves state-law claims for bad-faith insurance practices. Such cases are brought routinely in state courts, which long have decided federal-law defenses that may pertain to those claims.

Seeking to remove the case from state to federal court, petitioner Health Care Service Corporation ("HCSC") invoked two narrow exceptions to the well-pleaded complaint rule: the judicially created complete preemption doctrine and the federal officer removal statute, 28 U.S.C. § 1442(a)(1). In remanding the case to the district court, the court of appeals properly rejected the complete preemption basis for removal and mandated additional fact-finding for federal officer removal.

The complete preemption doctrine does not apply here for several reasons. Most importantly, Congress did not create any federal cause of action under FEHBA over which federal courts have original jurisdiction. Under this Court's complete preemption precedent, that forecloses HCSC's entitlement to removal. HCSC asks this Court to stretch an administrative remedy created by the federal Office of Personnel Management ("OPM") into a jurisdiction-conferring provision empowering federal courts to hear claims like respondents'. Such an expansion of the complete preemption doctrine finds no support in the logic of complete preemption removal and would conflict with this Court's well-settled precedent that complete preemption removal should be rare and that federal courts lack the power to expand their own jurisdiction through judicially created doctrines. Only Congress can expand federal removal jurisdiction, and it has not done so here.

The federal officer removal statute likewise does not support HCSC's effort to remove this case from state to federal court. That provision's "acting under" and "color of . . . office" requirements cannot be contorted to transform a private insurance carrier into a "federal officer" when it is alleged to have acted outside the scope of its federal contract in causing damage to an enrollee's family. The historical purpose of the statute – to ensure that federal operations would not be stymied by recalcitrant state judicial systems – finds no grounding in the federal health benefits context. And the individual actions that caused respondents to bring this suit – denying coverage precipitously and retroactively, and sending unwarranted recoupment notices to respondents' medical care providers – were actions undertaken by HCSC without the compulsion or instruction of the federal government. In the acts that gave rise to this suit, therefore, HCSC was neither "acting under" a federal officer nor conducting itself "under color of . . . office" of a federal agency.

STATEMENT

1. In 1959, Congress enacted the Federal Employees Health Benefits Act ("FEHBA") to put the federal government on a stronger footing with other employers in the competition for skilled workers. During the preceding decade, "a wide gap" had emerged between the government, which did not offer comprehensive health insurance as an employee benefit, and "[e]nlightened, progressive private enterprise," which "almost universally" did. H.R. Rep. No. 86-957, at 2 (1959). Proponents of the legislation argued that "[t]he addition of [a] health insurance program . . . to the existing fringe benefits package for Government employees" would "place the Govern-

ment on a substantially equal level with progressive industry in respect to employee fringe benefits." *Id.* Such benefits would "be of material assistance in improving the competitive position of the Government with respect to private enterprise in the recruitment and retention of competent civilian personnel." *Id.*

That fringe benefit program is now the largest employer-sponsored health insurance plan in the United States. In 2009, it covered more than eight million federal employees, retirees, former employees, and family members. The federal government offers a choice of approximately 269 insurance plans to its employees, and those plans are administered by approximately 111 carriers.[1] "With a number of options offered by different carriers, rather than one plan administered solely by the government, Congress created a system in which insurers compete vigorously for employees' subscription dollars." *Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 271 (5th Cir. 2007) (internal quotations omitted).

Since 1960, the largest of those plans has been the Blue Cross Blue Shield Service Benefit Plan ("Plan"), the terms of which OPM negotiates annually with the Blue Cross Blue Shield Association ("BCBSA"). *See* Pet. Br. 3. HCSC administers the Plan in Illinois as a licensee of BCBSA. *See id.*

2. Respondents Juli Pollitt and Michael Nash are the parents of Michael Pollitt. Ms. Pollitt – an

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[1] *See* Statement of Nancy H. Kichak, Associate Director for Strategic Human Resources Policy, OPM, on FEHBP's Prescription Drug Benefits, Before the House Subcommittee on Federal Workforce, Postal Service and the District of Columbia at 1 (June 24, 2009), *at* http://www.opm.gov/News_Events/congress/testimony/111th Congress/06_24_2009.asp.

employee of the Department of Energy ("DOE") – enrolled in the Plan in 1987. When her son Michael was born in 1993, she added him to her coverage, changing her enrollment status from "Self only" to "Self and family."[2] That change was reflected in HCSC's enrollment records. JA97, 99.

Beginning in October 2003, Ms. Pollitt took a medical leave from DOE. As a result, her employment status transferred from DOE to the Department of Labor ("DOL"). JA97, 102. From then until July 2007, Ms. Pollitt paid all health insurance premiums and submitted claims for herself and Michael. JA77. Until July 30, 2007, Ms. Pollitt had no indication of any problem with Michael's insurance coverage. JA78.

Sometime prior to July 18, 2007, HCSC attempted to reconcile its enrollment records (upon which benefits were paid) with those of DOL (upon which premiums were paid). JA97, 125-26.[3] As part of that process, DOL sent HCSC a form indicating that DOL records listed Ms. Pollitt's coverage status as "Self only." JA97, 100. Across the top of the form is a handwritten date – 10/19/03. JA100.[4]

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[2] In deciding whether the district court had jurisdiction, this Court may consider the allegations in the complaint, the status of the case at the time the notice of removal was filed, and the evidence offered in the district court. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 537-38 (1939); 14C Charles Alan Wright et al., *Federal Practice and Procedure* §§ 3734, 3739 & n.74 (4th ed. 2009) ("Wright").

[3] BCBSA performs these reconciliations on behalf of HCSC. *See* Pet. Br. 3, 6.

[4] One of HCSC's employees asserted that, in this form, DOL "instructed" HCSC to change Ms. Pollitt's coverage to "104" or "Self only" coverage retroactive to October 2003. JA97. This

Upon receiving that form, HCSC made no attempt to clarify the discrepancy between its records and DOL's, either by contacting Ms. Pollitt or by seeking clarification from DOL. JA124-27; *cf.* 5 C.F.R. §§ 890.110 (requiring carrier to compare its enrollment records with quarterly report from each employing office and to request documentation necessary to resolve discrepancies), 890.308(a)(1) (requiring carrier to provide written notice of enrollment discrepancies to individual seeking clarification). Instead, within two weeks of receiving the form indicating a possible discrepancy in enrollment status, HCSC simply terminated coverage for Michael. JA126-28.

Ms. Pollitt first learned of HCSC's actions on July 28, 2007, when she attempted to fill a prescription for Michael and was told by the pharmacist that her insurance would not pay. When Ms. Pollitt called HCSC on July 30 to find out why her claim was denied, she was told that Michael's coverage had been terminated. JA128. No one ever informed her that she had a right to appeal that decision. *Id.*

On August 1, 2007, she received a letter from HCSC enclosing a "new" identification card that supposedly reflected changes she had "recently" made to

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form appears in the record, however, and it contains no such instruction. Instead, it shows that Ms. Pollitt's payroll office (DOL) assigned her enrollment code "104" and appears to note a "Discrepancy" between the payroll office and insurance carrier records. With respect to "Corrective Action," it states only that the carrier is "WAITING FOR FAX RESPONSE." JA100. No contemporaneous fax appears in the record. Below, respondents requested discovery that would have shed light on DOL's role (if any) in resolving the discrepancy, but such discovery has not yet been ordered or provided. JA134-35; *see also* Mem. in Opp. to Def.'s Mot. To Dismiss 6 (Jan. 22, 2008).

her enrollment; the card was for herself only and was backdated to October 2003. JA129.

Meanwhile, HCSC had already sent notices to 10 of Michael's medical service providers, informing them that payments it had made since October 2003 were in error and demanding a refund. JA127. The providers in turn sought payment directly from respondents. *E.g.*, JA106-09, 121. In some cases, those providers threatened to refer the matter to a collection agency. JA137. At least one provider also expressed reluctance to treat Michael and requested cash payments for any future medical services. JA131-32. When respondents began receiving refund requests from providers, they realized that they would be billed – all at once – for the full cost of all the medical care Michael had received over the previous four years. JA131. The prospects of such a financial burden created enormous stress for respondents. *Id.*

3. Respondents filed this suit in the Circuit Court of Lake County, Illinois, on September 10, 2007. JA77. Their original complaint alleged that HCSC had acted in bad faith in administering Michael's coverage and that it was estopped to deny coverage because it had accepted premiums and paid claims for Michael. JA78-80. Respondents sought a judgment directing HCSC to re-enroll Michael in the insurance plan, honor claims for benefits concerning Michael's medical care, and pay damages – including reimbursement for amounts that respondents paid Michael's medical providers, compensation for respondents' emotional distress, and punitive damages. JA81-82.

Soon after the suit was filed, DOE sent a letter to DOL, stating that Ms. Pollitt's coverage included her

family when she was transferred to DOL's rolls and that coverage should have continued after her transfer. JA101-03. On October 3, 2007, HCSC received a copy of that letter. JA97. On October 17, HCSC informed Ms. Pollitt that Michael was being reinstated on her insurance policy and that the refund requests from his medical providers would be rescinded. JA84.

The matter did not end there. Notwithstanding HCSC's assurance that it would "rescind the refund request[s]," JA84, HCSC continued to seek refunds from Michael's doctors and therapists. On November 9, 2007, HCSC sent a letter to Children's Therapy and Rehab Specialists, stating that, "[a]fter reviewing the information you provided regarding a refund request . . . , we determined that . . . we must maintain our original request for [a] refund . . . (Our records indicate that the patient's membership ended on 10/18/2003)." JA107-08.

As HCSC continued to demand payment from the providers, the providers continued to demand payment from respondents. As late as December 11, 2007, Ms. Pollitt received letters with admonitions like: "YOUR ACCOUNT IS PAST DUE!" (JA121), and "If you are unable to pay in full PLEASE SEND PARTIAL PAYMENT" (JA122).

4. On October 22, 2007, HCSC filed a notice of removal to federal district court, citing the doctrine of complete preemption and the federal officer removal statute as bases for jurisdiction. JA85, 90-94. Then, even as it continued to send letters demanding refunds from Michael's doctors, HCSC filed a motion to dismiss, arguing that respondents' claims for reenrollment and benefits became moot prior to removal when Michael's coverage was reinstated and the

refund requests were rescinded. *See* Mem. in Support of Def.'s Mot. To Dismiss 2, 7-9 (Oct. 26, 2007). HCSC also argued that all of respondents' claims were preempted by FEHBA. *See id.* at 9-12.

The district court granted the motion without prejudice, giving respondents leave to amend their complaint. JA105. Respondents filed an amended – and later a second amended – complaint, which dropped the moot claims and focused on their claim for damages caused by HCSC's bad faith. JA110-20, 123-33.

Respondents' second amended complaint alleges that HCSC acted in bad faith by, among other things: failing to take reasonable steps to verify Michael's enrollment status beginning in 2003; failing to make reasonable efforts to find the source of the discrepancy regarding his enrollment when it came to light in 2007; terminating Michael's coverage without prior notice or explanation and without mentioning the right to appeal; choosing to deny Michael coverage retroactively instead of following the usual practice of seeking payment for back premiums; and failing to inform Michael's medical providers that it was no longer seeking refunds from them. JA124-30. Respondents claimed damages for the cost of a substitute insurance policy for Michael while he was not enrolled in HCSC's plan; the additional cost of paying four years' worth of back premiums for Michael at once; emotional distress (including professional treatment for Ms. Pollitt) due to the prospect of having to pay four years' worth of medical bills for Michael; the additional cost of up-front payments to some of Michael's medical providers who are reluctant to treat him given HCSC's conduct; and punitive damages. JA131-32.

HCSC then filed another motion to dismiss on FEHBA preemption grounds, which the district court granted with prejudice. Pet. App. 5a-8a. The court began its analysis by incorrectly stating that respondents' original complaint, which in part sought relief regarding enrollment and benefits, was filed *after* HCSC re-enrolled Michael. *Id.* at 6a. Instead, the complaint was filed first, and the requests for enrollment and benefits relief became moot before the case was removed to federal court. *See supra* pp. 6-7.

On the merits, the district court held respondents' claims preempted under FEHBA. Pet. App. 7a-8a. It also held that respondent Nash lacked standing because, although he was liable for Michael's medical bills, he had no relationship with HCSC. *Id.* at 6a-7a. Finally, it held (without analysis) that the case was properly removed from state court. *Id.* at 7a-8a.

5. On appeal, the Seventh Circuit reversed and remanded. Pet. App. 1a-4a. Without reaching the merits of the dismissal, it held that the district court erred in allowing removal without conducting an evidentiary hearing. The Seventh Circuit first rejected the argument that FEHBA supports removal, relying on this Court's decision in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), to hold that FEHBA does not completely preempt state law and thus cannot create federal removal jurisdiction. Pet. App. 2a-3a.

The Seventh Circuit next considered whether HCSC had proved that it "act[ed] under" a federal officer, which would authorize removal under 28 U.S.C. § 1442(a)(1). It observed that the parties disputed whether HCSC in fact followed instructions from DOL regarding Michael's coverage. Pet. App. 3a. Given that dispute, it held that "a district judge

cannot accept HCSC's say-so and use that as the basis of removal." *Id.* at 3a-4a. Instead, the Seventh Circuit instructed the district court to conduct an evidentiary "hearing under Fed. R. Civ. P. 12(b)(1)," "make appropriate findings" resolving the dispute, "and then either retain or remand the case as the facts require." *Id.*

SUMMARY OF ARGUMENT

I. FEHBA does not create federal removal jurisdiction through the judicial doctrine of complete preemption of respondents' state-law bad-faith claims. *First*, this Court has found complete preemption only when Congress created an exclusive cause of action in federal court for the claim asserted. FEHBA creates no such cause of action. While some administrative remedies are available under FEHBA and its implementing regulations, the logic of the complete preemption doctrine – which allows removal to federal *court* to pursue an exclusively federal cause of action there – does not extend to administrative remedies. Indeed, there would be nothing for the federal court to do following removal in such a case except to dismiss in favor of the administrative process – a task that state courts are equally capable of performing. Allowing administrative remedies to create complete preemption would substantially expand that narrow exception to the well-pleaded complaint rule, upsetting the jurisdictional balance between state and federal courts.

Second, even if administrative remedies could trigger complete preemption, nothing in FEHBA purports to make such remedies exclusive or to extinguish all state laws touching upon federal employee health benefits. FEHBA's preemption provision is narrow, reaching only state laws relating to certain

terms of health insurance contracts. FEHBA's legislative history confirms the limited preemptive reach of the statute: Congress evinced concern with preempting state laws requiring certain terms in health insurance policies, not with sweeping away all state insurance law. And FEHBA's jurisdictional provision merely gives federal courts concurrent jurisdiction over claims against the United States. This is not a suit against the United States.

Furthermore, nothing in the implementing regulations suggests that the administrative remedial scheme was intended to extinguish state-law claims of bad faith, or even claims regarding enrollment and benefits (which in any event were moot in this case prior to removal).

Nor does this Court's decision in *Empire* help HCSC: it addressed whether a FEHBA carrier's claim filed in federal court raised a federal question, not whether FEHBA authorized removal by completely preempting a state-law claim.

II. The federal officer removal statute also does not support federal jurisdiction here. To avail itself of the exceptional privilege of federal officer removal, a private party must, among other things, be a person "acting under" a federal officer and be sued for acts "under color of . . . office." 28 U.S.C. § 1442(a)(1). Neither condition is satisfied here.

First, this Court need not reach the question whether HCSC is a person "acting under" a federal officer because, as the Seventh Circuit properly concluded, HCSC has not established that it was sued for acts "under color of . . . office." Respondents allege that their injuries resulted from HCSC's bad-faith, unilateral conduct. HCSC contends that it was simply following DOL's direction. Under this Court's

precedent and ordinary principles of removal jurisdiction, that dispute of fact – regarding whether the challenged conduct was undertaken under "color of . . . office" – cannot be resolved simply on the basis of HCSC's naked allegations. The Seventh Circuit therefore correctly remanded this matter to the district court for limited fact-finding.

Second, at a more basic level, contracting to provide health insurance services to federal employees does not constitute "acting under" a federal officer within the meaning of § 1442(a)(1). HCSC was not assisting a federal officer in performing a sovereign, governmental function. The text and structure of the federal officer removal statute establish that, to the extent § 1442(a)(1) applies to private contractors at all, such contractors must be acting on delegated official authority or aiding the performance of a sovereign, governmental function. As this Court noted in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), to have any plausible claim to removal, a contractor must be assisting in performing a sovereign, "governmental" task. That reading of the "acting under" clause is strengthened by the "color of . . . office" clause, which evidences Congress's expectation that those defendants invoking the statute would have some claim to have been clothed with government authority.

Those standards foreclose HCSC's entitlement to removal here. In providing health insurance services to federal employees, HCSC is not acting on delegated authority, and it is not standing in the shoes of a federal officer. The most that can be said is that HCSC was complying with the terms of a contract voluntarily negotiated with OPM respecting the provision of a service to federal employees. The federal

officer removal statute was never intended to apply in such circumstances.

The government unquestionably may act in different capacities – *e.g.*, as regulator, market participant, or employer – and the legal privileges and implications of its conduct vary depending on the capacity in which the government is acting. In contracting for BCBSA and its licensees (including HCSC) to offer health insurance to federal employees, OPM was not engaged in a sovereign, governmental function. It was acting as an employer. Permitting a private contractor to invoke § 1442(a)(1) when it does no more than provide services to the government as an employer would stretch the statute past its breaking point. Virtually all contractors would lay claim to such a removal right. Such an expansion finds no support in the statute's history or purposes.

Finally, HCSC was not "acting under" a federal officer because it was not in a position of subordination to or control by a federal officer. Although HCSC goes to great lengths to show that it was acting under detailed and specific control of federal officers, the reality is that HCSC was acting according to voluntarily negotiated contract terms. Such a relationship cannot support removal.

ARGUMENT

Federal courts are courts of limited jurisdiction. *See* U.S. Const. art. III, § 2, cl. 1; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807). "'[T]wo things are necessary to create jurisdiction . . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is not taken, the power lies dormant.'" *Finley v. United States*, 490 U.S. 545, 547-48 (1989) (quoting *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868)) (emphasis omitted). Accordingly, federal jurisdiction should be "scrupulously confine[d] . . . to the precise limits which [a] statute has defined" to ensure "[d]ue regard for the rightful independence of state governments." *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941).

The well-pleaded complaint rule long has served as "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Because respondents' complaint raises claims only under Illinois law, HCSC invokes two narrow exceptions to the well-pleaded complaint rule – one judicially created (complete preemption), the other statutory (the federal officer removal statute). Neither exception supports removal in this case.

I. COMPLETE PREEMPTION DOES NOT PROVIDE A BASIS FOR REMOVAL JURISDICTION UNDER FEHBA

The general federal removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants" to federal court. 28 U.S.C. § 1441(a).

In certain exceptional circumstances, the doctrine of complete preemption works to transform a state cause of action into a federal cause of action over which a district court has "original jurisdiction," thereby supporting removal under § 1441(a). Complete preemption does not supply a basis for jurisdiction here, however, because FEHBA does not create a cause of action over which federal courts have original jurisdiction. Moreover, the administrative remedy created by OPM is not exclusive.

A. Complete Preemption Does Not Apply Because FEHBA Does Not Create A Judicial Cause Of Action Over Which Federal Courts Have Original Jurisdiction

1. *The preempting statute must contain a judicial cause of action*

This Court recently confirmed that complete preemption rests on a federal statutory cause of action created by Congress. In *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), the Court explained that complete preemption may supply a basis for removal jurisdiction where "the federal statute[] at issue provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action." *Id.* at 8. This Court has applied that principle to find complete preemption in only three statutory contexts.

First, the Court has held that § 301 of the Labor Management Relations Act, 1947 ("LMRA") completely preempts certain state-law claims. The LMRA creates a cause of action enforceable in federal district court for violations of collective bargaining agreements. *See* 29 U.S.C. § 185(a) ("[s]uits for violation of contracts between an employer and a labor organization representing employees . . . , or between

any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties"). That cause of action, in turn, supports complete preemption.

In *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557 (1968), this Court held that a state-court action to enjoin a union and its members from striking gave rise to removal jurisdiction. The Court explained that the dispute centered on a "'no-strike' clause in the collective bargaining agreement" and that § 301 created a federal cause of action governing violations of such agreements. *Id.* at 558, 559-60. Accordingly, "the claim under th[e] collective bargaining agreement [was] one arising under the 'laws of the United States' within the meaning of the removal statute." *Id.* at 560. *Avco* "stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23-24 (1983).

Second, this Court has held § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") completely preempts certain state-law claims. Like LMRA § 301(a), ERISA § 502(a) creates a cause of action over which federal courts have original jurisdiction for the recovery of benefits under ERISA plans. *See* 29 U.S.C. § 1132(a)(1)(B) ("[a] civil action may be brought . . . by a participant or beneficiary," among other things, "to recover benefits due to him under the terms of his plan").

This Court made clear that the § 502(a) cause of action, not ERISA's preemption provision, underlies

the complete preemption analysis. In *Taylor*, the Court addressed whether "state common law claims are not only pre-empted by ERISA," but also completely preempted by "ERISA's civil enforcement provision, § 502(a)(1)(B)." 481 U.S. at 60. The Court concluded that they were: the suit "f[ell] directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." *Id.* at 62-63. Based on the "unique preemptive force of ERISA" as well as ERISA's legislative history, the Court discerned a "clear [congressional] intention to make § 502(a)(1)(B) suits . . . federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA." *Id.* at 65, 66. *See also Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("[t]his integrated enforcement mechanism, ERISA, § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA"); *id.* at 209.

Third, this Court has held that § 86 of the National Bank Act ("NBA") completely preempts state-law usury claims. *See Beneficial Nat'l Bank*, 539 U.S. at 3-4. Section 86 creates a cause of action for usury claims over which federal district courts have original jurisdiction.[5] As with LMRA § 301 and ERISA § 502(a), the exclusive scope of NBA § 86 triggers complete preemption. The Court crystallized the central role played by the cause of action, noting "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive." *Id.* at 9 n.5. The Court then held – relying primarily on precedent interpreting the NBA as wholly displacing

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[5] *See* 12 U.S.C. § 86 (person who paid greater interest "may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same").

state law – that Congress "intended § 86 to provide the exclusive cause of action for usury claims against national banks." *Id.* at 9.

In sum, an essential element of complete preemption is that "the federal statute[] at issue provide[] the exclusive cause of action for the claim asserted" as a substitute for the displaced state cause of action. *Id.* at 8.

2. *FEHBA does not create a judicial cause of action*

FEHBA cannot completely preempt respondents' claims because, unlike the LMRA, ERISA, and the NBA, FEHBA does not create a substitute cause of action over which federal courts have original jurisdiction.

a. It is undisputed that FEHBA does not create a cause of action. *See* Def.'s Mem. in Support of Its Motion To Dismiss Pls.' Am. Compl. 15 (Dec. 19, 2007) ("[T]here is no judicial cause of action that Plaintiffs can invoke in order to challenge allegedly wrongful Plan administration by HCSC."); Pet. Br. 18 ("The precise cause of action available in the suit to compel enrollment is a judicial review claim under the [Administrative Procedure Act ("APA")].").

Under *Beneficial National Bank*, *Avco*, and *Taylor*, that should end the jurisdictional inquiry. Because no substitute federal cause of action under FEHBA covers respondents' state-law claims, no available mechanism exists for transforming those claims into claims "arising under" federal law to support federal jurisdiction. *See*, *e.g.*, *Aetna Health*, 542 U.S. at 209 ("Since LMRA § 301 converts state causes of action into federal ones for purposes of . . . removal, so too does ERISA § 502(a)(1)(B).") (citation omitted).

b. Section 8912 does not alter that analysis. That provision confers jurisdiction on "district courts of the United States . . . concurrent with the United States Court of Federal Claims" over "a civil action or claim against the United States founded on [FEHBA]." 5 U.S.C. § 8912. In addition to the dispositive fact that § 8912 supplies jurisdiction only in actions "against the United States" – and this is not such a case (*see infra* pp. 29-30) – § 8912 does not create a cause of action. Instead, it fulfills the narrow "purpose" – "evident from its reference to the Court of Federal Claims" – of "carv[ing] out an exception to the statutory rule that claims brought against the United States and exceeding $10,000 must originate in the Court of Federal Claims." *Empire*, 547 U.S. at 686. *Accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004) (Alien Tort Statute's jurisdiction provision was "simply . . . a jurisdictional grant," not "authority for the creation of a new cause of action").

Nor does this Court's discussion in *Taylor* of ERISA's jurisdictional provision, § 502(f), suggest that a jurisdictional provision alone can trigger complete preemption, as HCSC contends. *See* Pet. Br. 18, 21. Consistent with its unbroken line of complete preemption decisions, the *Taylor* Court stressed that the preemptive force of ERISA's cause of action – § 502(a)(1)(B) – drove the complete preemption analysis. *See* 481 U.S. at 60 ("[t]he question presented . . . is whether these state common law claims" are "displaced by . . . § 502(a)(1)(B)"); *id.* at 66. The Court viewed the jurisdictional provision in § 502(f) as simply verifying Congress's intent for § 502(a) to be so exclusive as to completely preempt state-law claims. *Id.* at 65. *Taylor* does not support the notion

that a stand-alone jurisdictional provision – such as § 8912 – is sufficient to compel complete preemption.

3. *This Court should not expand complete preemption to include statutes enforced through administrative remedies*

This Court has never held that a federal statute completely preempts a state-law cause of action absent a substitute federal-law cause of action over which federal courts have original jurisdiction. Thus, HCSC seeks to expand the complete preemption doctrine so that it applies whenever a statute authorizes administrative remedies subject to ultimate judicial review under the APA. *See* Pet. Br. 17-18. Such a substantial expansion is unwarranted.

a. First, the theoretical foundation of complete preemption will not support its expansion to encompass administrative remedies. Complete preemption rests on the fiction that, although a plaintiff has styled a claim as a state cause of action, no such cause of action exists because Congress has swept away all state substantive law and replaced it with an exclusive federal cause of action. Hence, the plaintiff really has pleaded a federal claim, and the doctrine accordingly substitutes a federal cause of action for the state cause of action. *See*, *e.g.*, *Franchise Tax Bd.*, 463 U.S. at 26; *Aetna Health*, 542 U.S. at 209.

In light of that conceptual foundation, "a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action"; "[w]here no discernible federal cause of action exists on a plaintiff's claim, there is no complete preemption." *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 425 (4th Cir. 2003). When a statute (such as FEHBA) does not create a substitute cause

of action over which a federal *court* has original jurisdiction, complete preemption cannot apply. HCSC's proposed expansion of complete preemption, therefore, finds no support in the conceptual logic of the removal doctrine.

The courts of appeals concur. In *Sullivan v. American Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005), the Second Circuit held that the Railway Labor Act ("RLA") did not completely preempt a state-law defamation claim brought by union workers and employees against American Airlines. Relying on *Beneficial National Bank*, the court explained that complete preemption requires that a federal statute create a cause of action over which federal courts have "original federal jurisdiction." *Id.* at 276. The RLA, however, did not permit the dispute to "be filed in the first instance in federal court," but required that it be resolved first by administrative "boards established pursuant to the [RLA]." *Id.* Indeed, the court noted that the defendant (like HCSC here) had removed the case "for the sole purpose of asking that court to dismiss [the] claim on the basis that the federal court could not hear it." *Id.* In such circumstances, complete preemption cannot apply: "Because . . . disputes [subject to the RLA] cannot be brought in federal court in the first instance, federal courts may not take jurisdiction over them simply to dismiss them on the basis that they are defensively preempted and belong before arbitral panels." *Id.* at 278; *see also Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245-46 (9th Cir. 2009) (no complete preemption under RLA); *Lontz v. Tharp*, 413 F.3d 435, 442-43 (4th Cir. 2005) (no complete preemption under National Labor Relations Act because "Congress has not chosen to create a cause of action" over which

district courts have original jurisdiction; "Congress's allocation of authority to an agency and away from district courts defeats a complete preemption claim"); *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1287 (9th Cir. 1987) (administrative remedy cannot support complete preemption).[6]

b. Second, an expansion of complete preemption to include administrative remedies would countermand the principle that complete preemption is a narrow exception to the well-pleaded complaint rule. In *Taylor*, for example, this Court explained that it is "reluctant to find" complete preemption even in statutes creating a federal cause with "unique[ly] preemptive force." 481 U.S. at 65. And, in *Beneficial National Bank*, the Court emphasized the "general rule" that "a case will not be removable if the complaint does not affirmatively allege a federal claim" and that only the "preemptive force" of "unusually powerful" causes of action will trigger complete preemption. 539 U.S. at 7. Courts of appeals properly have interpreted that precedent to mean complete preemption is an "extreme and unusual outcome," *Fayard v. Northeast Vehicle Servs., LLC*, 533 F.3d 42, 49 (1st Cir. 2008), and that "exacting standards" must be satisfied to trigger it, *Lontz*, 413 F.3d at 441.

Unmooring the complete preemption doctrine from a requirement that a statute create a cause of action over which federal courts have original jurisdiction

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[6] The Solicitor General previously has embraced that rationale: "Congress sometimes occupies a field in order to provide a comprehensive administrative remedy. . . . In those circumstances, there is no removal under complete preemption principles because there is no substitute federal cause of action that gives the federal district courts original jurisdiction." Brief for the United States as Amicus Curiae Supporting Petitioners at 19 n.3, *Beneficial Nat'l Bank*, *supra* (No. 02-306).

would substantially expand the doctrine and thus federal jurisdiction. As HCSC explains, "[t]he APA presumptively applies whenever an aggrieved party challenges final federal agency action." Pet. Br. 18 (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Under HCSC's theory, *any* federal statute that creates administrative remedies or *any* statute under which an agency has interpreted statutory silence to allow the creation of administrative remedies through regulation would become a candidate for complete preemption. HCSC offers no limiting principle to such a sweeping expansion of the doctrine. In any event, HCSC's assertion of complete preemption here cannot be squared with this Court's admonition that the doctrine should be an extreme and unusual basis for federal jurisdiction.

Furthermore, such an expansion of complete preemption would upset the jurisdictional division between state and federal courts. It has long been the rule that a plaintiff is the "master of [his or her] claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.). Consistent with the "paramount policies embodied in the well-pleaded complaint rule," this Court has held that a "defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Caterpillar*, 482 U.S. at 399 (emphasis omitted). Because such a rule would make the plaintiff "master of nothing[,] Congress has long since decided

that federal defenses do not provide a basis for removal." *Id.*

Indeed, HCSC's suggested expansion of the doctrine would disregard the principle that federal jurisdiction must be narrowly confined out of "[d]ue regard for the rightful independence of state governments." *Healy*, 292 U.S. at 270; *see Lontz*, 413 F.3d at 441 (because of "significant federalism concerns," "[t]he presumption . . . is against finding complete preemption"). Adherence to that principle is particularly appropriate here: HCSC has offered no theory (nor could it) for why state courts are not competent to enforce any exhaustion rules under FEHBA. This Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *see Lontz*, 413 F.3d at 442. No justification exists for ascribing to Congress an intent to burden federal courts with the task of superintending all administrative exhaustion rules through a *sub silentio* expansion of federal removal jurisdiction. *See*, *e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

B. FEHBA's Non-Exclusive Remedial Scheme Undermines Any Complete Preemption Claim

1. Even if FEHBA's administrative remedy were a potential candidate for complete preemption, that remedy is not "exclusive" and therefore cannot support complete preemption. *Beneficial Nat'l Bank*, 539 U.S. at 8. HCSC faces the high standard of establishing that FEHBA has "extraordinary preemptive power." *Aetna Health*, 542 U.S. at 209

(internal quotations omitted). FEHBA does not come close to satisfying that standard: no provision in FEHBA expressly creates administrative remedies; no provision purports to make any remedies created exclusive; and no provision extinguishes all state substantive and remedial law arguably touching upon federal employee health benefits issues.

FEHBA does contain a preemption provision and a jurisdictional provision. But those provisions – far from supporting a finding of exclusivity – make clear that FEHBA is *not* a comprehensive or exclusive regime of rights and remedies for all issues arguably relating to federal employee health benefits.

a. FEHBA's preemption provision is exceptionally narrow. It provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or 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). Unlike ERISA's preemption provision, § 8902(m)(1)'s "text does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans." *Empire*, 547 U.S. at 698.

Beyond that, § 8902(m)(1) – again unlike the LMRA's and ERISA's preemption provisions – purports to make *contract terms* between OPM and FEHBA carriers preemptive. The provision "declares no federal *law* preemptive." *Id.* (emphasis added). Referring to § 8902(m)(1) as a "choice-of-law prescription," this Court concluded that "[a] prescription of that unusual order warrants cautious interpretation." *Id.* at 697.

Notwithstanding HCSC's assertions to the contrary (at 27-29), the drafting history confirms the wisdom

of this Court's cautious approach. Section 8902(m)(1) was initially added to FEHBA in 1978, *see* Pub. L. No. 95-368, § 1, 92 Stat. 606, in response to an increase in state regulation of the insurance industry. In particular, during the early 1970s, "more and more States . . . legislated the kinds of benefits and medical practitioners that carriers doing business in these States must cover." H.R. Rep. No. 95-282, at 6 (1977) (reproducing Letter from Alan K. Campbell, Chairman of the United States Civil Service Commission, to Robert N.C. Nix, Chairman of the Committee on Post Office and Civil Service). Some of those requirements conflicted with the coverage and benefits provisions of the annual FEHBA contracts. Those conflicts caused confusion among carriers and threatened the uniformity of the federal health insurance program. As the Committee noted, "the Indemnity Benefit Plan . . . pays for chiropractic services in Nevada, as required by State law, but does not pay for such services in any other State." *Id.* at 3. And, because premiums are established uniformly at the national level, the proliferation of different state coverage mandates resulted "in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other states." *Id.* at 4. Congress responded by enacting a particularized solution – a preemption provision authorizing the coverage and benefits terms of the nationwide FEHBA contract to preempt state laws and regulations that mandated conflicting coverage and benefits terms. The original preemption provision read:

> 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 such contractual provisions.*

5 U.S.C. § 8902(m)(1) (1982) (emphasis added).

The 1998 amendment to § 8902(m)(1) eliminated the "conflict" portion of the preemption provision, but did not change its narrow focus on state laws and regulations relating to coverage and benefits. *See Empire*, 547 U.S. at 683 (preemption provision "displace[s] state law on issues relating to 'coverage or benefits'"). That amendment expanded the preemptive reach of contract provisions to displace state laws and regulations about coverage and benefits that did not expressly conflict with those nationwide terms as well as those that were in direct conflict. *See* H.R. Rep. No. 105-374, at 16 (1997). Thus, the provision's text and drafting history clarify that Congress did not intend FEHBA to "cover the entire subject" of federal employee health insurance such "that State law would have no bearing whatever." *Beneficial Nat'l Bank*, 539 U.S. at 10 (internal quotations omitted).

That conclusion also follows from this Court's presumption that Congress does not intend state substantive or remedial law to be rendered inoperative by federal law "unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (internal quotations omitted). Therefore, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* (quoting *Bates v. Dow Agro-*

Sciences LLC, 544 U.S. 431, 449 (2005)). That presumption against preemption compels construing any ambiguity in § 8902(m)(1) so as not to preempt all state law arguably touching upon issues of federal employee health benefits. *See Empire*, 547 U.S. at 698 ("[i]f Congress intends a preemption instruction completely to displace ordinarily applicable state law, . . . it may be expected to make that atypical intention clear," and § 8902(m)(1) "is not sufficiently broad" to satisfy that standard).

Furthermore, the limited preemptive scope of § 8902(m)(1) follows from the fact that the statute makes contracts, not "federal law," preemptive. *Empire*, 547 U.S. at 698. As explained, that anomaly led this Court to conclude that, at most, a "cautious" and "modest" reading of § 8902(m)(1) is appropriate. *Id.* at 697-98. Indeed, the provision itself arguably has no preemptive effect at all in this case. The Supremacy Clause of the United States Constitution makes "Laws of the United States . . . supreme." U.S. Const. art. VI, cl. 2. A contract between OPM and FEHBA carriers, however, is not a "Law[] of the United States." *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 241 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("the terms of private contracts are not 'laws'"). Accordingly, a serious constitutional question exists whether § 8902(m)(1) may be given *any* substantive preemptive effect. At the least, this Court should construe the preemption provision narrowly to avoid such constitutional concerns. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) ("Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a 'cardinal principle': They 'will first ascertain whether a

construction . . . is fairly possible' that will contain the statute within constitutional bounds.") (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). FEHBA's preemption provision, narrowly read, is insufficiently "powerful" to trigger complete preemption, particularly given that the subject matter of respondents' claims does not conflict with any contract terms to which HCSC agreed. *Taylor*, 481 U.S. at 64.

b. FEHBA's jurisdictional provision – § 8912 – also is limited and forecloses a conclusion that Congress intended any remedies under FEHBA to be exclusive. Section 8912 supplies "original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States." 5 U.S.C. § 8912. That grant of jurisdiction, of course, is not exclusive: "It is black letter law that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Tafflin*, 493 U.S. at 460-61 (internal quotations and alterations omitted). Indeed, this Court has held that § 8902(m)(1) serves only the narrow "purpose" of "carv[ing] out an exception to the statutory rule that claims brought against the United States and exceeding $10,000 must originate in the Court of Federal Claims." *Empire*, 547 U.S. at 686.

More fundamentally, FEHBA's jurisdictional provision – unlike the jurisdictional provisions in ERISA and the LMRA – applies only in the specific context of lawsuits brought "against the United States." 5 U.S.C. § 8912; *cf.* 29 U.S.C. §§ 185(a) (LMRA), 1132(f) (ERISA).

In *Finley*, this Court interpreted similar language in the Federal Tort Claims Act, which "confers juris-

diction over 'civil actions on claims against the United States.'" 490 U.S. at 552 (quoting 28 U.S.C. § 1346(b)(1)). The Court "conclud[ed] that 'against the United States' means against the United States and no one else" and thus that "[t]he statute . . . defines jurisdiction in a manner that does not reach defendants other than the United States." *Id.* at 552-53. The limited reach of FEHBA's jurisdictional provision, therefore, further shows that Congress did not intend FEHBA to create a comprehensive regime replacing all state law relating to federal employee health benefits. Indeed, in this case that jurisdictional limitation is crucial: respondents' complaint names HCSC – not the United States – as a defendant. Section 8912 therefore does not support HCSC's contention that respondents' claims are completely preempted.

2. Absent express textual or structural evidence that any remedies created under FEHBA are exclusive, and in the face of preemption and jurisdictional provisions that affirmatively foreclose any such conclusion, HCSC is left to cobble together a claim to exclusivity from several sources, none of which achieves HCSC's objective.

a. HCSC's principal argument for exclusivity is that OPM has promulgated "detailed regulations, including the administrative remedies for enrollment and benefits grievances." Pet. Br. 23-24. HCSC cites no OPM regulation making those remedies exclusive or preemptive of state law, however. Rather, it asserts that, because these remedies exist, "it would make no sense to deem the remedial regime anything but exclusive." *Id.* at 25. That argument has no merit.

First, complete preemption is a jurisdictional doctrine, and agencies are not free to expand or confine federal court jurisdiction through regulation. Although "Congress [may have] clearly envisioned, indeed expressly mandated, a role" for OPM "in administering the statute" by delegating authority to OPM to make rules, "[t]his delegation . . . does not empower" OPM "to regulate the scope of the judicial power vested by the statute." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990); *see AmSouth Bank v. Dale*, 386 F.3d 763, 777 (6th Cir. 2004) ("While the agency can create federal law, it cannot expand federal jurisdiction."). Courts of appeals have correctly interpreted those principles to mean that exclusivity giving rise to complete preemption must arise in "the enabling statute" and not in agency regulations. *AmSouth*, 386 F.3d at 776-77. Accordingly, this Court has said that complete preemption applies only "[w]hen the *federal statute* completely pre-empts the state-law cause of action" and only when "*Congress* [has] intended the federal cause of action to be exclusive." *Beneficial Nat'l Bank*, 539 U.S. at 8-9 n.5 (emphases added); *see Taylor*, 481 U.S. at 66.

Second, even if OPM could create an exclusive remedial regime that affected the removal jurisdiction of federal courts, it has not done so here. OPM's regulations are silent regarding the possibility of parallel state substantive and/or remedial law supplementing the administrative processes created. The strong presumption against construing federal law as displacing state law absent an express statement of such intent, therefore, forecloses interpreting OPM's regulations as exclusive. *See Altria*, 129 S. Ct. at 543; *supra* pp. 27-28.

Third, HCSC incorrectly asserts that the mere existence of administrative processes for benefits and enrollment claims means that all state substantive and remedial laws arguably relating to federal employee health benefits are extinguished. Merely because administrative remedies ensure that employees have timely access to benefits and enrollment does not suggest any intent to displace longstanding state-law causes of action that serve different ends. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating accident victims."). OPM's rules, for example, limit the remedies available to an "order directing OPM to require the carrier to pay the amount of benefits in dispute." 5 C.F.R. § 890.107(c). In addition, only "covered individual[s]" may file a claim for benefits, *id.* § 890.105(a)(1) – an exclusion that means, for example, that the administrative process is unavailable to Mr. Nash notwithstanding the direct harm inflicted upon him by HCSC's bad-faith conduct. By the time HCSC filed its notice of removal, it had already mooted respondents' claims related to benefits and enrollment decisions by reinstating Michael's coverage. Respondents' remaining claims seek to hold HCSC liable under well-established state-law claims of bad faith. Nothing in OPM's regulations evidences any intention of displacing such causes of action.

HCSC's reading of OPM's rules, therefore, requires ascribing to OPM the intent to extinguish *all* state substantive and remedial law protecting *all* persons (whether a covered individual or otherwise) from

bad-faith conduct by insurers and to eliminate covered parties' ability to recover anything more than "the amount of benefits in dispute" no matter the level of harm inflicted upon a party by a FEHBA carrier's wrongful conduct. Even if OPM could be given such sweeping authority to displace state law, this Court should decline to infer its exercise from mere silence. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

b. HCSC further argues that "[t]he Court's decision in *Empire* supports the exclusivity of the federal remedies for FEHBA enrollment and benefits grievances." Pet. Br. 30. HCSC asserts that the Court "anticipated" in *Empire* "that FEHBA coverage and benefits controversies . . . inevitably 'will land' in federal court." *Id.* at 31. HCSC's reading of *Empire* is unpersuasive.

In *Empire*, this Court addressed whether a claim brought by a FEHBA carrier in federal court raised a federal question under 28 U.S.C. § 1331. *See* 547 U.S. at 683. *Empire* had nothing to do with removal jurisdiction (or, necessarily, complete preemption). The Court's statement that federal courthouses would be open to benefits cases simply reflects that judicial review is available of OPM benefits determinations under the APA, an observation that says nothing about removal jurisdiction. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (it is a "canon of unquestionable vitality . . . 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used'") (quoting *Cohens v. Virginia*, 19 U.S. (6

Wheat.) 264, 399 (1821)).[7] Accordingly, nothing in *Empire* undermines the conclusion that FEHBA does not completely preempt respondents' claims.

II. THE FEDERAL OFFICER REMOVAL STATUTE DOES NOT SUPPORT REMOVAL

HCSC also has not established a basis for removal under the federal officer removal statute. That statute provides, in relevant part, that "[a] civil action . . . commenced in a State court against . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office," may be removed to federal court. 28 U.S.C. § 1442(a)(1). To satisfy that provision, a private party has the burden of establishing three elements.

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[7] HCSC also argues (at 31) that *Empire* supports the conclusion that complete preemption applies inasmuch as it recognizes that "[t]he case for exclusivity and complete preemption is stronger if federal law provides the substantive rules of decision over the controversy." According to HCSC, FEHBA benefits and enrollments disputes are governed by "federal common law," strengthening the case for removal jurisdiction. *Id.* at 32. That argument has no relevance in the context of removal jurisdiction. As this Court explained in *Empire*, the issue in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), was not jurisdictional but rather "a vertical choice-of-law issue" of whether state law or federal common law would govern a claim. 547 U.S. at 691. In cases brought in federal court under 28 U.S.C. § 1331, as was *Empire*, this choice-of-law issue may have jurisdictional significance: if a claim "arises under" federal common law, then it satisfies § 1331. This, however, is not a case involving the interpretation of § 1331; the question here is whether a *state-law* cause of action brought in state court is removable to federal court under the complete preemption doctrine and § 1441(a). *Empire*'s discussion of *Clearfield* does not concern that question.

First, a private party must be a person "acting under" a federal officer. *See Watson*, 551 U.S. at 151-53. Second, such a party must establish that the suit is for an "act under color of such office," 28 U.S.C. § 1442(a)(1), by showing a "'causal connection' between the charged conduct and asserted official authority." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)). Third, the defendant must assert a colorable federal defense. *See Mesa v. California*, 489 U.S. 121, 129 (1989). HCSC may not avail itself of the "exceptional" remedy of federal officer removal, *Maryland v. Soper*, 270 U.S. 9, 35 (1926), because it cannot meet two of those three elements. Part II.A addresses the "color of . . . office" element, because the court below remanded for fact-finding with respect to that element. Part II.B then explains why HCSC fails to meet the "acting under" element.

A. HCSC Was Not Sued For Acts "Under Color Of . . . Office"

1. HCSC is not entitled to federal officer removal because respondents' complaint does not seek to hold it liable "*for* a[n] act under color of office." *Acker*, 527 U.S. at 431 (internal quotations omitted). The court below properly remanded because of substantial doubts HCSC can meet that requirement as a factual matter.

This Court's decision in *Soper* – which involved a statutory antecedent to the current federal officer removal statute – shows how courts should analyze disputed facts in this context. There, the Court concluded that "the averments of the amended petition" were not "sufficiently informing and specific to make a case for removal." 270 U.S. at 34. Although the removing defendants (four federal officers and a chauffeur) averred that all of the alleged acts would

have occurred "at a time when [defendants] were engaged in the discharge of their official duties as Federal Prohibition Officers," the Court found those allegations of official-capacity conduct insufficient. *Id.* at 34-35 (internal quotations omitted). Averments suggesting that the wrongful acts occurred "at a time when [defendants] were engaged in performing their official duties" did not "negative the possibility that they were doing other acts than official acts at the time . . . or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty." *Id.* at 35.

Colorado v. Symes, 286 U.S. 510 (1932), confirms the Seventh Circuit's approach in remanding for an evidentiary hearing. A federal prohibition officer charged with murder in Colorado state court, Symes sought to remove the case to federal court. To support his motion to remove, Symes filed an affidavit claiming that the victim was killed while resisting arrest. *Id.* at 520. In rejecting the averments as "vague, indefinite and uncertain," *id.* at 520-21, the Court held that the district court had discretion to permit introduction of additional evidence to establish jurisdictional facts or to remand the case to state court, *id.* at 521.

The factual record here, like those in *Soper* and *Symes*, is insufficient to support removal. Respondents have alleged that HCSC engaged in bad-faith conduct not compelled by federal law in, among other things, changing Ms. Pollitt's enrollment status retroactively and seeking recoupment of past payments made to medical providers. *See* JA123-30; Pet. App. 3a ("Pollitt maintains that HCSC acted unilaterally in concluding that her coverage was for self only

rather than self and family"). Although HCSC has submitted an affidavit asserting that it made the enrollment change at the behest of DOL, that assertion is contradicted by the allegations of the complaint, *see* Pet. App. 3a ("the parties are at odds about what (if any) directions [DOL] issued to HCSC"), and the documentary evidence, *see supra* p. 4 n.4. Furthermore, respondents have had no opportunity to test HCSC's assertion through even limited discovery, nor has a court held an evidentiary hearing to test the limited evidence submitted to date. The assertion that DOL instructed HCSC to change Ms. Pollitt's status is the very type of conclusory factual averment that should be assessed through an evidentiary hearing and/or discovery. That allegation, like the averments in *Soper*, is not "sufficiently informing and specific to make a case for removal." *Soper*, 270 U.S. at 34; *see Symes*, 286 U.S. at 521.[8]

2. In response, HCSC erroneously contends that this Court's precedent establishes that – for jurisdictional purposes – the courts below were obliged to credit HCSC's naked assertions that the conduct forming the basis for respondents' complaint had a causal connection to official authority. *See* Pet. Br. 38, 46-48, 55-56. HCSC points to *Davis v. South Carolina*, 107 U.S. 597 (1883), for example, for the

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[8] There is nothing exceptional about the decision to require fact-finding by a district court with respect to jurisdictional facts underlying removal jurisdiction even in civil cases. *See* 14C Wright § 3739 ("When it plainly appears from the notice of removal that there is a basis for removal, a factual hearing is unnecessary. . . . [H]owever, federal courts often do conduct hearings on motions to remand, particularly when factual issues are present, and they permit the parties to introduce various types of material.").

proposition that there is no requirement that conduct alleged in a complaint have resulted from "specific federal directives." Pet. Br. 55. But, as the Court noted in *Watson*, the removing defendant in *Davis* – a U.S. Army corporal – unquestionably was acting in an official capacity when he "shot the [escaping] suspect" during a raid in which "several . . . soldiers helped a federal revenue officer try to arrest a distiller for violating the internal-revenue laws." 551 U.S. at 149. *Davis*, unlike this case, did not concern whether the defendant was assisting a federal officer in performing an official function.

The requirement that a removing party establish a factual basis for removal also is consistent with *Willingham* and *Acker*, contrary to HCSC's assertion. *See* Pet. Br. 45-48. *Willingham* involved state-law claims against the warden and chief medical officer of a federal penitentiary. *See* 395 U.S. at 403. This Court addressed whether "the record in [the] case . . . support[ed] a *finding* that respondent's suit grows out of conduct under color of office." *Id.* at 407 (emphasis added). The Court found that requisite met because the defendants had averred that their only contacts with the plaintiff arose "in performance of . . . official duties" at the federal penitentiary. *Id.* at 407-08. And, because the plaintiff had not "den[ied]" those "statements in his responsive affidavit," the Court deemed the record sufficient to show that the federal officers' "relationship to [the plaintiff] derived solely from their official duties." *Id.* at 408-09. Setting aside that *Willingham* was a case involving *bona fide* federal officers rather than private parties, *Willingham* is of no help to HCSC: this Court reviewed the entire record to determine whether the facts supported removal. *Willingham*

thus supports the Seventh Circuit's decision to require basic fact-finding with respect to a disputed jurisdictional fact.

Acker also is inapposite. That case, too, involved actual federal officers – federal judges who argued that tax collection suits by a county violated the intergovernmental tax immunity doctrine. 527 U.S. at 429. The heart of the removal dispute was purely legal: whether the tax was aimed at the judges for engaging in their "occupation" or whether the tax was aimed at them in their "personal[]" capacity. *Id.* at 432. In that circumstance, for the Court "[t]o choose between those readings of the [tax ordinance]" would be "to decide the merits of th[e] case." *Id.* To avoid that anomalous result, the Court "credit[ed] the judges' theory of the case for purposes of . . . [the] jurisdictional inquiry." *Id.* Here, HCSC, unlike the federal officers in *Acker*, is a private party. Moreover, the dispute here, unlike in *Acker*, is a question of fact, not of law, which can be decided independent of the merits defenses proffered by HCSC. *Acker* therefore does not compel the counterintuitive result that federal jurisdiction exists based solely on HCSC's untested claim that it was acting on DOL's instructions.[9]

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[9] Furthermore, even if *bona fide* federal officers enjoy a relaxed threshold for demonstrating that challenged conduct is causally connected to the officer's authority, a private party *not* cloaked with the imprimatur of federal authority by virtue of holding federal office stands in a very different position for which a presumption of causation is inappropriate. *See*, *e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124-25 (2d Cir. 2007); *Orthopedic Specialists of New Jersey PA v. Horizon Blue Cross/Blue Shield of New Jersey*, 518 F. Supp. 2d 128, 133 (D.N.J. 2007).

Unlike *Willingham* and *Acker*, in which defendants claimed official immunity as their colorable federal defense, here HCSC (a private entity) raised a preemption defense in the district court, and adds a sovereign immunity defense for the first time in this Court. Whereas resolving official immunity defenses in federal court is a core justification for the federal officer removal statute, state courts are presumed competent to resolve other federal issues. *See*, *e.g.*, *International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 85 (1991) ("The determination of an agency's immunity . . . [is] sufficiently straightforward that a state court, even if hostile to the federal interest, would be unlikely to disregard the law."). In addition, the preemption and sovereign immunity defenses are entirely distinct from HCSC's claim to be acting under a federal officer. FEHBA's preemption inquiry turns on the scope of § 8902(m)(1), not on whether HCSC acted pursuant to DOL's direction. The sovereign immunity defense requires HCSC to prove that any recovery against a FEHB carrier for state-law claims sounding in bad faith would impact the federal treasury. Thus, by remanding to the district court for resolution of the jurisdictional facts, the court below did not require HCSC to prevail on the merits to justify removal. Accordingly, compelling HCSC to substantiate its claim to have acted under color of office will serve, not frustrate, the purposes of the federal officer removal statute.

Here, HCSC stands in a different position from the defendants in *Willingham* and *Acker* based, in part, on assertions of immunity. HCSC has no plausible claim to official immunity. The "color of law" requirement of 42 U.S.C. § 1983 is instructive. In

American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999), this Court held that "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct." *Id.* at 50 (internal quotations omitted). To act under "color of law" requires that a private party have "exercis[ed] power 'possessed by virtue of . . . law and made possible only because the [party] is clothed with the authority of . . . law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Because HCSC has no claim to be clothed with the authority of law, *see Rendell-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982), it has no claim to be acting "under color of . . . office" here.

B. HCSC Was Not "Acting Under" A Federal Officer

If the Court concludes that fact-finding is appropriate with respect to the "color of . . . office" requirement, it need not address whether HCSC is a person "acting under" a federal officer. That question can be addressed (if necessary) by the lower courts on remand. If the Court reaches this question, however, it should hold that HCSC has not carried its burden of establishing that, as a private, commercial health insurer, it is "acting under" a federal officer. Although "the words 'acting under' are broad," they are not "limitless," and appropriate limits derive from the "language, context, history, and purposes" of the statute. *Watson*, 551 U.S. at 147. HCSC was not acting under a federal officer because it was neither "help[ing] officers fulfill [a] basic governmental task[]," *id.* at 153, nor in a relationship with an officer of "subjection, guidance, or control," *id.* at 151 (internal quotations omitted).

1. *HCSC was not assisting a federal officer in performing a sovereign, governmental function*

The federal officer removal statute does not provide a federal forum for resolving every action filed in state court against private contractors supplying the federal government with ordinary goods and services in the commercial marketplace. Instead, the text, structure, history, and purposes of the statute establish that private contractors are entitled to removal – if at all[10] – only insofar as they are acting on dele-

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[10] Although several lower courts have determined that Congress intended to include corporations when it authorized removal for a "person" acting under a federal officer in § 1442, *see*, *e.g.*, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008), this Court has not resolved the issue. Nor is it clear that Congress so intended. Although the Dictionary Act requires courts to presume that the legislative use of the word "person" includes corporations "unless the context indicates otherwise," 1 U.S.C. § 1, the context here does indicate otherwise. First, the version of the Dictionary Act in force when Congress used the word "person" in the federal officer removal statute said only that "the word 'person' may extend and be applied to . . . corporations." *Krangel v. Crown*, 791 F. Supp. 1436, 1439 (S.D. Cal. 1992). The presumption in the Act concerning Congress's intent has become more powerful over time, but Congress has not expressed any intent regarding the meaning of the word "person" in the federal officer removal statute since 1874. *Id.* at 1439-40. In fact, when Congress amended the statute in response to this Court's holding that the word "person" did not encompass federal agencies, it left in place the statutory protection for persons and officers and added federal agencies as a separate category of protected entity. Moreover, the history of the statute reveals a profound concern for the protection of vulnerable *individual* officers and employees of the federal government from prosecutions and lawsuits in unsympathetic state courts. *See Willingham*, 395 U.S. at 405-06; *Mesa*, 489 U.S. at 125-29; *International Primate Prot. League*, 500 U.S. at 85-86. That concern does not readily translate to corporations.

gated authority or directly assisting federal officers in fulfilling core governmental functions. HCSC did not act in those ways here.

a. Section 1442(a)(1) requires the defendant to be acting on delegated authority or assisting an officer in carrying out a sovereign, governmental function

Section 1442(a)(1)'s text and structure evince Congress's intent to extend the benefit of removal to private parties only insofar as those parties stand in the shoes of or assist the federal government in carrying out sovereign, governmental functions. As this Court explained in *Watson*, a contractor might be said to be "acting under" a federal officer when it "helps [the] officer[] fulfill . . . basic governmental tasks." 551 U.S. at 153. Giving effect to that limiting principle is crucial: otherwise, all private parties that provide services to the government may claim an entitlement to removal when sued for conduct arguably related to those services.

The text adjoining the "acting under" clause bolsters the conclusion that a contractor must have some claim to be acting on official authority or assisting in the performance of a sovereign function. The "acting under" clause is tied closely to the "color of office" element, requiring "a causal connection between the charged conduct and asserted *official authority*." *Acker*, 527 U.S. at 431 (internal quota-

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Moreover, the strong interests of the plaintiff in choosing a forum and of the States in adjudicating the rights and obligations of their citizens provide ample context for a conclusion that Congress did not intend the word "person" in the federal officer removal statute to include corporations such as HCSC. *See Krangel*, 791 F. Supp. at 1446.

tions omitted, emphasis added); *see also Willingham*, 395 U.S. at 406-07 (clause "cover[s] all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law"). Those decisions evidence Congress's understanding that removal is appropriate only in those circumstances involving the exercise of official authority or the performance of core sovereign functions, such as the enforcement of federal law. As explained above, HCSC has no such claim here.

b. HCSC does not act on delegated authority or assist the federal government in carrying out a sovereign, governmental function

HCSC's actions in providing health insurance benefits to federal employees are not sovereign, governmental functions that support an entitlement to removal under § 1442(a)(1).

First, HCSC can make no plausible claim to be acting on delegated authority as the licensee of a private contractor with OPM. FEHBA delegates authority *to OPM* to enter into contracts to provide health insurance, but OPM does not delegate or subdelegate *any* authority to FEHBA carriers in such contracts. *See*, *e.g.*, *Houston Cmty. Hosp.*, 481 F.3d at 272-73 (noting that, in Medicare context, portion of agency's statutory authority has been "delegate[d] . . . to private carriers," but that "[n]o analogous delegation of authority exists" under FEHBA). Indeed, as noted above, HCSC has no contractual relationship with the federal government. HCSC's compliance with voluntarily negotiated provisions of FEHBA contracts does not alter the analysis, any more than Philip Morris's compliance with a voluntary agreement with the Federal Trade Commission ("FTC")

made it "acting under" a federal officer in *Watson*. HCSC is not "clothed with the authority of . . . law," *Polk County*, 454 U.S. at 317-18 (internal quotations omitted), in its status as a private contractor.

Second, HCSC is not assisting in fulfilling a "basic governmental function" because the federal government itself, when contracting for health benefits for its employees, is not engaged in a sovereign, governmental task. Rather, HCSC is facilitating employment benefits in its role as employer.

It is well-settled that the government plays different roles in different contexts. In addition to acting in a sovereign capacity, the government acts in such roles as landowner, market participant, and employer. Governmental actions taken in those various roles have fundamentally different legal consequences than governmental actions taken as the sovereign. *See*, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) ("The basic distinction drawn . . . between States as market participants and States as market regulators makes good sense and sound law."); *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 229 (1993) ("[w]hen the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role").

That distinction is "particularly clear" when the government acts as an employer. *See Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008). This Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its

sovereign power to bear on citizens at large." *Id.*[11] Similarly, the Court has drawn a distinction between States acting as market participants and States acting as sovereigns. For example, when a State acts as a market participant rather than as a regulator, its actions are not constrained by the dormant Commerce Clause. *See*, *e.g.*, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.").

Those cases establish that not all governmental activity is of a sovereign, governmental nature. Applied here, that principle compels the conclusion that HCSC – in providing health insurance services to the government as it would to private-sector employers – is not fulfilling a sovereign, governmental function warranting the exceptional protection of the federal officer removal statute. Providing health

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[11] Those additional powers as an employer, however, do not logically expand the scope of the federal officer removal statute. By contrast with military contractors, which perform services that the government itself would have to perform to discharge the Constitution's command to provide for the Nation's defense, a health insurer is simply performing a role that enables the government to compete with other private sector employers. And, whereas the purposes of the federal officer removal statute – grounded in concerns about state interference with federal governmental duties – support the necessity of removal in those limited instances in which federal power is threatened, it is quite odd, if not completely anomalous, to think that removal is necessary to vindicate any federal power prerogative in this case. First, federal-state relations will not be adversely affected if respondents' lawsuit is decided by a state court. And, second, removal under the statute should not turn on the fortuity that HCSC's service is being provided to a federal – as opposed to a state or private-sector – employee.

insurance to its employees is neither a job that the government must perform nor a quintessential sovereign function. To conclude otherwise would ignore history: the Republic existed for nearly two centuries before the federal government provided generalized health benefits to its employees. And, instead of doing so now, the government could increase the pay of its employees and allow them to purchase their own insurance directly in the private marketplace. The discretionary actions of government-as-employer do not connote a core governmental mission: "Congress did not with the FEHBA hand off a government function; rather Congress decided to get into the insurance business." *Houston Cmty. Hosp.*, 481 F.3d at 271.

HCSC's assertion that, by administering a private health insurance plan for federal employees, it is "helping the Government to produce an item [here, a service] that it needs" and "perform[ing] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform," Pet. Br. 43-44, surely sweeps far too broadly.[12] To begin with, HCSC's claim is far-reaching in its scope. In fiscal year 2009, the federal government contracted with 176,422 private companies to provide goods and services valued at nearly $475 billion. *See* http://www.usaspending.gov/fpds/tables.php?tabtype=t2&subtype=t&year=2009. Each of these private contractors is helping the government produce an item that it needs and performing a job that the government

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[12] *Watson* did not hold that these criteria should be used to determine when a private contractor can invoke the federal officer removal statute. *See* 551 U.S. at 154. Instead, it simply cited them in explaining why a non-contractor's compliance with federal law was insufficient to support removal.

would have to do itself absent the contract. If HCSC could claim the protections of the federal officer removal statute on that basis, virtually *every* private contractor to the federal government sued in state court would be able to remove the case to federal court as well. Indeed, HCSC stands in a position no different from a private company chosen to provide cafeteria services to a federal agency. HCSC's theory would permit such a food services company to remove from state court a simple negligence suit brought by federal employees suffering from food poisoning.

In light of the exceptional nature of federal officer removal, establishing a firm limiting principle with respect to private contractors is crucial to prevent a dramatic expansion of federal officer removal jurisdiction. *See City of Greenwood v. Peacock*, 384 U.S. 808, 831-32 (1966); *Watson*, 551 U.S. at 153.[13] Yet HCSC offers none.

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[13] Moreover, HCSC's contention raises anomalies that make this situation a particularly poor one to expand federal officer removal beyond its historical moorings. It is extremely odd to think that federal officer removal turns on the *plaintiff*'s employment status – yet that is precisely the rule that HCSC implicitly seeks. If Ms. Pollitt were an Illinois state employee denied coverage by HCSC in precisely the same way she and her son were denied coverage here, HCSC would have no basis at all for invoking federal officer removal. Invocation by a *defendant* of federal jurisdiction to assert a federal defense should not rest on the employment status of the *plaintiff* unless the federal government itself compels the defendant in some way to undertake action under color of federal law.

c. The history and purposes of the federal officer removal statute foreclose HCSC's entitlement to removal

The history and purposes of the federal officer removal statute confirm that HCSC's expansive interpretation of the "acting under" clause should be rejected. *See*, *e.g.*, *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). The federal officer removal statute was enacted to protect weighty sovereign acts: customs officers enforcing the embargo against England during the War of 1812; federal revenue officers carrying out the Tariff of Abominations during the nullification crisis of 1833; and federal revenue officers ensuring compliance with the Nation's prohibition laws in the 1920s. It was also designed to provide protection to those private persons acting under the federal officer in carrying out these core sovereign functions. *See Watson*, 551 U.S. at 147-50. When the government itself is not engaged in a sovereign function, private entities that arguably assist it do not have a reasonable claim to federal officer removal.

That history underlies the important purposes to be vindicated by the statute, none of which is satisfied by HCSC's claim of removal. *First*, the federal officer removal statute rests on the premise that "the Federal Government 'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will

of one of its members.'" *Willingham*, 395 U.S. at 406 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)). The statute thus provides a federal judicial forum for federal officers, as well as those aiding or assisting them, for acts undertaken in enforcing federal law and in that way "to safeguard the exercise of legitimate federal authority." *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981).

That purpose reflects Congress's concern that state judicial proceedings might be used, in periods of national stress, to hinder federal officers in their enforcement of unpopular federal laws. *See id.* at 241-42 ("The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice."); *Gay v. Ruff*, 292 U.S. 25, 32 (1934). Thus, the statute reflects the "interest in protecting federal officials from possible local prejudice." *Clinton v. Jones*, 520 U.S. 681, 691 (1997).

That purpose is inapposite here. As HCSC acknowledges (at 36), the statute's "acting under" clause is designed to ensure that "a sub-delegation of authority" by a federal official to private persons does not "interfer[e] with government operations." But FEHBA carriers have not been "delegat[ed]" *any* "authority." *See Houston Cmty. Hosp.*, 481 F.3d at 272-73. Where a private entity has been delegated no authority to enforce or implement federal law and it is not assisting in carrying out a sovereign, governmental function, there is no basis for concluding that local or sectional prejudice against the federal government would arise such that state courts cannot be trusted to provide neutral forums for resolution of disputes.

Second, in addition to safeguarding those who act on delegated authority, "one of the most important

reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham*, 395 U.S. at 407; *see also International Primate Prot. League*, 500 U.S. at 86-87 (federal officers need protection of federal forum "because of the manipulable complexities involved in determining [federal officers'] immunity"); *Acker*, 527 U.S. at 447 (Scalia, J., concurring in part and dissenting in part) ("the main point" of federal officer removal statute "is to give officers a federal forum in which to litigate the merits of immunity defenses").

That purpose, too, weighs against reading the "acting under" clause to encompass FEHBA carriers. This Court has said that "qualified immunity . . . acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). Private actors – who "hold no office requiring them to exercise discretion" and are not "principally concerned with enhancing the public good" – are not entitled to the defense of qualified immunity. *Id.*; *see also Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997). Indeed, courts of appeals have rejected the theory that FEHBA carriers – because they are not assisting in carrying out core sovereign functions – are entitled to qualified immunity. *See Houston Cmty. Hosp.*, 481 F.3d at 269 (affirming district court decision that "BCBST, as a private insurance carrier, has no substantial defense of official immunity").

Ultimately, HCSC does not seek a federal forum to protect itself from local prejudice directed at the federal government or to resolve the complexities of an official immunity defense. Instead, it seeks a federal forum to raise a preemption defense. But that objective provides no basis for stretching the statute past

its breaking point. "[S]tate courts," this Court has held, "have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin*, 493 U.S. at 458-59; *see Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 n.12 (2006); *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005). And, indeed, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393; *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

2. *HCSC was not in a position of subordination or control to a federal officer*

HCSC also was not "acting under" a federal officer for a second, independent reason: OPM does not exercise sufficient control over HCSC's actions under the FEHBA contract to characterize their relationship as one of superior and subordinate. *See Watson*, 551 U.S. at 151; *but see* Pet. Br. 41-42.

HCSC is "the largest customer-owned health insurance company in the nation and the fourth largest health insurer overall." HCSC, *Operating as a Customer-Owned Health Insurer*, *at* http://hcsc.net/pdf/operating_customer_health_insurer.pdf. It provides Blue Cross and Blue Shield coverage to more than 12.4 million people. *See id.* Its Illinois division is one of at least 10 private health insurance providers competing for business among federal employees in Illinois. *See* OPM, *2010 Plan Information for Illinois*, *at* http://www.opm.gov/insure/health/planinfo/2010/states/il.asp#open (listing 10 nationwide fee-for-

services plans open to all federal employees in Illinois, as well as other plans open to specific groups of federal employees). In addition to offering coverage to federal employees, HCSC offers employer sponsored and individual plans. In all, HCSC's Illinois division insures 6.5 million people. *See generally* Blue Cross Blue Shield of Illinois, *Company Information*, *at* http://www.bcbsil.com/company_info/index.html.

As an independent licensee of BCBSA, HCSC has no direct contractual relationship with the federal government. *See* Pet. Br. 2-3. Annually, BCBSA and OPM negotiate the terms of several different plans that may be offered to federal employees. *See Empire*, 547 U.S. at 684. HCSC administers the BCBSA plan for federal employees in Illinois. *See* Pet. Br. 3. Thus, the terms under which HCSC offers health insurance to federal employees are set by a contract negotiated at arm's length between OPM and BCBSA.

FEHBA does not impose significant constraints on the contract terms negotiated by BCBSA and OPM. To the contrary, FEHBA permits OPM to approve six different types of health benefit plans: a service benefit plan; an indemnity benefit plan; an employee organization plan; and three different types of comprehensive medical plans. *See* 5 U.S.C. § 8903. FEHBA also permits OPM to contract with a broad range of insurance carriers, including "a voluntary association, corporation, partnership, or other nongovernmental organization," to offer those six plans to federal employees. *Id.* § 8901(7). Further, except for the requirement that service benefit plans and indemnity benefit plans "include benefits both for costs associated with care in a general hospital and for other health services of a catastrophic nature," *id.* § 8904(a),

OPM has broad latitude to negotiate benefits under the various plans. *See id.* ("The benefits to be provided under plans described [in this Act] *may be* of the following types") (emphasis added).

Nor do OPM regulations significantly constrain the bargaining strategy of either party. The regulations establish minimum standards in several basic areas,[14] but otherwise leave broad latitude for negotiation of virtually every aspect of the contract. The extent of that latitude is demonstrated by the significant reductions in mental health care coverage that BCSCA negotiated with OPM in the early 1980s. In 1975, BCBSA requested limitations on both inpatient and outpatient mental health benefits. *See Doe v. Devine*, 703 F.2d 1319, 1322 (D.C. Cir. 1983). OPM rejected that request. *See id.* BCBSA persisted. By 1982, OPM had agreed to a contract that reduced inpatient mental coverage from 365 days to 60 days, and outpatient mental health coverage from 70% of all medically necessary office visits to 70% of a maximum of 50 visits. *See id.* at 1322-23. In rejecting a challenge to the 1982 contract, the D.C. Circuit acknowledged the broad discretion afforded OPM in negotiating with potential carriers. *See id.* at 1325-26 & n.31. Indeed, FEHBA requires OPM to balance several conflicting goals, including the financial health of the carriers. *See id.* at 1330.

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[14] For example, plans are required to offer coverage in a nondiscriminatory fashion, provide each enrollee with an identification card, provide a standard rate structure, and maintain a special monetary reserve for the plan, *inter alia*. *See* 5 C.F.R. § 890.201(a). In addition, plans are prohibited from denying coverage for pre-existing conditions, requiring a waiting period for benefits, having more than two options and a high deductible plan, and imposing charges in addition to monthly enrollment rates. *See id.* § 890.201(b).

For these reasons, the terms of the contract under which HCSC offers health insurance to federal employees are determined in large part by arm's-length negotiations between BCBSA and OPM. BCBSA has contracted with OPM for 50 years to offer the largest nationwide health insurance plan available to federal employees. As a result, it has substantial influence over the terms and conditions of the contract that it negotiates on behalf of its affiliated carriers. In complying with the FEHBA contract, HCSC is nothing more than a subcontractor acting pursuant to market-based contractual terms set in negotiations between BCBSA and OPM. HCSC's attempt (at 41-42) to cast those terms as establishing an ongoing relationship of subordination to the federal government is unavailing. *See Watson*, 551 U.S. at 153, 156-57 (rejecting argument that company "acted under" federal officer by complying with regulations and voluntary agreement with FTC); *Orthopedic Specialists*, 518 F. Supp. 2d at 135 n.4; *Joseph v. Fluor Corp.*, 513 F. Supp. 2d 664, 672-73 (E.D. La. 2007) (compliance with minimum contractual standards did not support removal). For this additional reason, HCSC is not entitled to invoke the federal officer removal statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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1. Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), provides:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Section 502(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1), provides:

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * * *

3. The National Bank Act, 12 U.S.C. § 86, provides:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

4. The Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901 *et seq.*, provides in relevant part:

5 U.S.C. § 8902. Contracting authority

* * * * *

(j) Each contract under this chapter shall require the carrier to agree to pay for or provide a health service or supply in an individual case if the Office finds that the employee, annuitant, family member, former spouse, or person having continued coverage under section 8905a of this title is entitled thereto under the terms of the contract.

* * * * *

(m)(1) The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any

State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

* * * * *

5 U.S.C. § 8912. Jurisdiction of courts

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

5. Office of Personnel Management Regulations, 5 C.F.R. Pt. 890, provide in relevant part:

§ 890.105 Filing claims for payment or service.

(a) *General*. (1) Each health benefits carrier resolves claims filed under the plan. All health benefits claims must be submitted initially to the carrier of the covered individual's health benefits plan. If the carrier denies a claim (or a portion of a claim), the covered individual may ask the carrier to reconsider its denial. If the carrier affirms its denial or fails to respond as required by paragraph (c) of this section, the covered individual may ask OPM to review the claim. A covered individual must exhaust both the carrier and OPM review processes specified in this section before seeking judicial review of the denied claim.

(2) This section applies to covered individuals and to other individuals or entities who are acting on the behalf of a covered individual and who have the covered individual's specific written consent to pursue payment of the disputed claim.

*** * * * ***

§ 890.107 Court review.

(a) A suit to compel enrollment under § 890.102 must be brought against the employing office that made the enrollment decision.

(b) A suit to review the legality of OPM's regulations under this part must be brought against the Office of Personnel Management.

(c) Federal Employees Health Benefits (FEHB) carriers resolve FEHB claims under authority of Federal statute (5 U.S.C. chapter 89). A covered individual may seek judicial review of OPM's final action on the denial of a health benefits claim. A legal action to review final action by OPM involving such denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors. The recovery in such a suit shall be limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute.

(d) An action under paragraph (c) of this section to recover on a claim for health benefits:

(1) May not be brought prior to exhaustion of the administrative remedies provided in § 890.105;

(2) May not be brought later than December 31 of the 3rd year after the year in which the care or service was provided; and

(3) Will be limited to the record that was before OPM when it rendered its decision affirming the carrier's denial of benefits.

§ 890.110 Enrollment reconciliation.

(a) Each employing office must report to each carrier or its surrogate on a quarterly basis the names of the individuals who are enrolled in the carrier's plan in a format and containing such information as required by OPM.

(b) The carrier must compare the data provided with its own enrollment records. When the carrier finds in its total enrollment records individuals whose names do not appear in the report from the employing office of record, the carrier must request the employing office to provide the documentation necessary to resolve the discrepancy.