July 27, 2015

Elisabeth A. Shumaker, Clerk of Court
U.S. Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, Colorado 80257

Re: *Post-argument letter brief in Helfrich v. Blue Cross and Blue Shield Ass'n*, 10th Cir. No. 14-3179

Dear Ms. Shumaker:

For nearly a decade, the federal Office of Personnel Management has waged an unprecedented—and unsuccessful—battle against state law. This crusade began in *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006), where OPM argued to the Supreme Court that the meaning of FEHBA's express preemption clause, § 8902(m)(1), is "clear" and "no doubt" displaces "state laws that would affect the right to reimbursement." The Supreme Court rejected this view, concluding that § 8902(m)(1)'s text is ambiguous, and open to "two plausible" constructions—one in which state reimbursement laws are displaced and one in which they are not.

Undeterred, OPM first attempted to circumvent its loss in *McVeigh* through an informal 2-page "carrier letter"—drafted in response to ongoing litigation—reasserting that § 8902(m)(1) "preempts state laws prohibiting or limiting subrogation and reimbursement." FEHB Program Carrier Letter, at 1 (2012). In the lower courts, OPM coupled this letter with a recycled version of its losing *McVeigh* merits brief, arguing that § 8902(m)(1) "unambiguously preempts" state insurance laws and demanding that judges "defer" to that view. As in *McVeigh*, courts refused to buy in. *See Nevils v. Group Health Plan, Inc.*, 418 S.W. 3d 451, 464-65 (Mo. 2014); *Kobold v. Aetna Life Ins. Co.*, 309 P.3d 924, 928-29 (Ariz. App. 2013).

Now OPM has dramatically raised the stakes. In a transparent play for *Chevron* deference, OPM has issued a formal regulation that concedes that the text of FEHBA's express-preemption clause is ambiguous. *See* 5 C.F.R. § 890.106. Based on the ambiguity, the regulation purports to choose an expansive preemption construction authorizing contractual provisions in FEHB carrier policies to displace state laws that OPM has long fought to evade. *See* § 890.106(h).

OPM's bid for *Chevron* deference in the absence of congressional authority is badly misguided. As we explain below, Congress has in no way delegated to the agency the authority to expand or interpret FEHBA's express-preemption clause. Quite the opposite: as OPM's predecessor agency itself acknowledged at the time of § 8902(m)(1)'s enactment, "no

legal basis exists" for it "to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15 (1975). Now OPM has flip-flopped completely, relying on nothing more than the same generic grant of authority that led it to tell Congress it had no preemptive rulemaking authority in the first place. Because agencies are creatures of Congress, an agency wishing to interpret an express-preemption clause to preempt state law may validly do so *only if* Congress has expressly "authorize[d]" it "to pre-empt state law directly." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). FEHBA contains no such command.

Making matters worse, in its zeal to short-circuit the legislative and judicial process, OPM's regulation blithely tosses aside—without so much as a passing reference—bedrock principles of statutory construction that have long animated preemption jurisprudence. When an agency's interpretation conflicts with an established rule of statutory construction, courts have consistently refused to accord the agency deference. That holds for agency efforts to override the longstanding presumption against preemption—a principle rooted in "respect for the States as independent sovereigns in our federal system," *id.* at 564 n.3, that compels a narrow interpretation of an ambiguous express-preemption clause and requires a court to "reject" an agency regulation that "runs afoul" of the canon. *Comm. of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996). And it holds where an agency advances an interpretation that "raises serious constitutional concerns," *U.S. West, Inc v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999)—an unavoidable consequence of OPM's "highly problematic, and probably unconstitutional" choice here to "provide for preemption by contract." *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.). That OPM's regulation in this case flouts both of these principles—without explanation—further undermines its novel power grab.

Resolving disputes over a statute's meaning is ordinarily the job of the courts. Agency deference is the exception to this rule, but it is not something to which an agency is entitled simply through "[m]ere ambiguity in a statute," *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001), or because it has "expressed an interpretation in the proper form." *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 765 (D.C. Cir. 2012) (Brown, J., concurring). To the contrary, it is Congress's "delegation of authority to the agency to elucidate a specific provision of the statute" that permits an agency's interpretation to be given deference at all. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). It is crucial that courts safeguard this requirement, especially on questions directly implicating the delicate balance between state and federal sovereignty. OPM invites this Court to relax the limitations on its power and, in the process, radically expand the reach of administrative agencies to displace federalism. That invitation should be declined.

* * * *

1. *OPM Has No Delegated Authority from Congress to Issue a Regulation Expanding the Scope of § 8902(m)(1).* Although OPM now accepts that § 8902(m)(1)'s text is ambiguous, it is wrong about what that ambiguity means. An agency may not confer power upon itself. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power on it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Were it otherwise, an agency would have the "power to override Congress"—a result flatly unfaithful to the Constitution. *Id.* at 374-75. When an agency undertakes a rulemaking via the Administrative Procedure Act, therefore, it "must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The need for express authority from Congress is especially acute when an agency's action implicates the federal-state balance. Hence, on issues of federalism, an agency's formal statements on preemption are only entitled to deference if Congress has *explicitly* "authorize[d]" the agency "to pre-empt state law directly." *Wyeth*, 555 U.S. at 576; *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Steven, J., dissenting, joined by Roberts, C.J. and Scalia, J.) (making this point); *City of New York v. FCC*, 486 U.S. 57, 66 (1988) (upholding FCC's authority to preempt state law only because Congress explicitly "sanctioned" this type of regulatory authority). What qualifies as express authorization? A statutory statement, for instance, that the FDA is empowered to "determine the scope of the Medical Devices Amendments' pre-emption clause." *Wyeth*, 555 U.S. at 576 (discussing 21 U.S.C. § 360k). Or a congressional command that the FCC may "determine" that a state law violates an express preemption clause and "preempt the enforcement" of those state laws. *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1269, 1268. (10th Cir. 2000); *see also Massachusetts*, 93 F.3d at 891-97 (reviewing a DOT regulation construing the scope of an express preemption clause where Congress expressly delegated such authority to the agency). In these contexts, agency rulemaking that interprets a statutory-preemption clause may qualify as a valid exercise of the agency's power precisely because Congress has clearly delegated that authority to the agency.[1]

Scholars, no less than courts, have roundly acknowledged the requirement of an express congressional delegation before agencies may preempt state law. *See, e.g.*, Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum. L. Rev. 1, 15 (2011) (explaining that

[1] And there is little doubt that Congress knows how to explicitly delegate to an agency the authority to rule on the scope of an express-preemption clause when it believes that the agency should wield that power. *See, e.g.*, 30 U.S.C. § 1254(g) (preempting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49 U.S.C. § 5125(d) (authorizing the Secretary of Transportation to determine "whether [a state] requirement is preempted" by an express preemption clause and to "prescribe regulations for carrying out" that decision).

Wyeth "insist[s] that conclusions of preemptive effect are ultimately for the courts to make in their independent judgment, at least absent an express delegation to an agency of preemptive authority"); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 771 (2008) ("[T]he *Chevron* standard should apply to agency opinions about preemption in only one circumstance: where Congress has expressly delegated authority."); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 754 n.67 (2004) (A "prerequisite" to an "agency's express statement that it (as opposed to Congress) seeks to preempt state law . . . should be a congressional delegation that specifically includes the authority to preempt.").

Requiring that Congress be clear when it intends to give an agency authority to preempt state law serves crucial separation-of-powers interests. Administrative agencies are "clearly not designed to represent the interests of States," and lack any special authority on important issues of state autonomy and federalism. *Watters*, 550 U.S. at 41 (Stevens, J., dissenting). Yet, "with relative ease they can promulgate . . . regulations that have broad pre-emption ramifications for state law." *Id.* Because it is the "purpose of Congress"—not Executive-branch bureaucrats—that drives "every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), the Supreme Court has instructed courts not to assume that Congress "casually authorize[s] administrative agencies to interpret a statute to push the limit of congressional authority"—a lesson only "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corp of Engineers*, 531 U.S. 159, 172-73 (2000). These concerns counsel against a regime where nonspecific delegations of authority open the door to freewheeling agency decisions on issues of express preemption. As the Supreme Court cautioned in *Wyeth*, agencies "have no special authority to pronounce on pre-emption absent delegation by Congress." 555 U.S. at 577.

Applying these lessons here is straightforward. FEHBA contains no express grant of authority for OPM "to pre-empt state law directly," *Wyeth*, 555 U.S. at 576—a point OPM itself concedes. *See* 80 Fed. Reg. 29203 (2015) ("exercising its rulemaking authority under 5 U.S.C. § 8913"). Like many federal laws, FEHBA contains only a generic grant of agency authority to "prescribe regulations necessary to carry out this chapter." 5 U.S.C. § 8913. But this type of generic rulemaking authority says not a word about preemption, and so provides no textual foundation for OPM's assertion of preemption. Indeed, in similar contexts, the Supreme Court has refused to defer to agency efforts to "declare the pre-emptive scope" of a federal law. *Cuomo v. Clearing House Ass'n L.L.C.*, 557 U.S. 519, 534-45 (2009) (concluding that, in the absence of any express grant of authority, an OCC regulation that interpreted an ambiguous term in an express preemption clause impermissibly sought to "declare[] the pre-emptive scope of the [National Bank Act]"); *Wyeth*, 555 U.S. at 576 (holding that a generic authorization for FDA rulemaking under a statute does not "authorize[] the FDA to pre-empt state law directly" through a regulation); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650 (1990) (refusing to read a delegation of authority that was silent on preemption as including

the authority to decide the preemptive scope of the federal statute because "[n]o such delegation . . . is evident in the statute"). Because FEHBA contains no command that OPM fill gaps in the express-preemption clause, it is the judiciary—not the agency—that has the final word on how to read the statute.[2]

In truth, OPM knows that FEHBA grants it no license to preempt state law. In the run-up to § 8902(m)(1)'s passage, OPM's predecessor agency made clear that, given FEHBA's general grant of rulemaking authority, "no legal basis exists" for the agency to issue "regulation[s] restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15. And it told Congress that, despite FEHBA's generic grant to "prescribe regulations to implement th[e] law," it "does not give [the agency] clear authority to issue regulations restricting the application of state laws." S. Rep. No. 95-503, at 4 (1978). Now, OPM has reversed course. Without any explanation for its shift, OPM asserts that the same generic grant of authority that precluded preemption by regulation forty years earlier now specifically authorizes it. The Supreme Court has specifically rejected similar "dramatic change[s] in [agency] position" before—especially when it centers on preemption. *See Wyeth*, 555 U.S. at 579.

OPM's self-aggrandizing change of position on the scope of its own regulatory authority cannot override what the agency itself told Congress when § 8902(m)(1) was enacted in the 1970s. *See, e.g.*, *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) (agency's "contemporaneous construction" trumps later interpretation that is "in conflict with its initial position"). As the Supreme Court has explained, where Congress "has affirmatively acted" in reliance "on the

[2] None of this affects, of course, the principle that a properly promulgated regulation can preempt state law either *impliedly* or through *field* preemption. *See, e.g.*, *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). That was the basis of this Court's decision upholding a preemption regulation in *State of Kan. ex rel. Todd v. United States*, 995 F.2d 1505 (10th Cir. 1993). There, the Federal Crop Insurance Commission issued regulations preempting state insurance laws under a preemption clause that occupied the field. *Id.* at 1508 (discussing 7 U.S.C. § 1516(k), which preempts all "[s]tate and local laws or rules" that "are inconsistent with" federal crop insurance contracts). Despite the complete federal presence, the FCIC "encountered 'frequent occurrences of State agencies'" attempting to regulate insurance contracts. *Id.* This Court determined that Congress's decision to occupy the field was clear authority that FCIC could promulgate a preemption regulation. *Id.* at 1510. Nonetheless, in dicta, this Court suggested that "[e]ven if Congress did not expressly provide for preemption of state law," the FCIC's "decision to preempt state law" was "eminently reasonable" and entitled to *Chevron* deference. *Id.* at 1510-11 (stating that "[a]n agency can fill any gap left, implicitly or explicitly, by Congress if within its scope of authority"). Though not binding, that dicta is hard to square with the Supreme Court's later decisions doubting that *Chevron* deference applies to agency pronouncements on preemption, and has also been criticized for "skipp[ing] over the threshold issue whether Congress clearly delegated preemptive power to the FCIC." Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 840 n. 222 (1998). In any event, *Todd* made clear that, unlike here, there was no "authority that indicates Congress intended to allow states to regulate the private crop insurance contracts" governed by FCIC. *Todd*, 995 at 1511. Congress, in other words, unambiguously intended to completely displace state law—a reason why the FCIC's regulation posed no federalism concerns. The same is not true here.

representations of [an agency] that it had no authority" to regulate, the agency is "preclude[d] . . . from regulating" even if the agency later opts for a "change in position." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (rejecting "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation").

Ultimately, to accept OPM's unprecedented position here would overturn fundamental pillars of administrative law, contradict decades of established precedent on the bounds of agency authority, and usher in a new era of freewheeling rulemaking without regard for state sovereignty. Agencies would be emboldened to pursue their preemption agendas at any cost, safe in the knowledge that, under *Chevron*, a general grant of generic authority to administer a statute confers broad license to revise the delicate federal-state balance—unmoored from anything resembling clear congressional intent. Courts have consistently rejected "this kind of 'whatever-it-takes' approach to *Chevron*." *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 33 (D.C. Cir.1992). This Court should do the same here.

2. *OPM's Interpretation Expanding the Scope of § 8902(m)(1) Is Not Entitled to Any Deference.* Even if OPM had the clear statutory authority to promulgate this regulation (which it decidedly did not), its interpretation of FEHBA's preemption provision would merit no deference—*Chevron* or otherwise.

A. To begin, the Supreme Court has, in recent years, cast considerable doubt over the possibility that an agency's interpretation of a statute's express-preemption provision may *ever* receive *Chevron* deference. In *Smiley v. Citibank (S. Dakota), N.A.*, for example, the Court drew a distinction between questions concerning the "substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." 517 U.S. 735, 744 (1996). The majority "assume[d] (without deciding) that the latter question must always be decided *de novo* by the courts." *Id.* Then, three years later in *Wyeth*, the Court explained that, in statutory preemption cases where an agency has issued a regulation designed to preempt state law, a court still must "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamation of pre-emption." 555 U.S. at 576. Other cases have provoked vocal blocks of Justices to voice similar views. *See Medtronic*, 518 U.S. at 512 (1996) (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference."); *see also Watters*, 550 U.S. at 41 (Stevens, J., dissenting joined by Roberts, C.J. and Scalia, J.) (expressing the uncontradicted view that "a healthy respect for state sovereignty calls for something less than *Chevron* deference"). Counting votes a few years back, one scholar observed that, "five of the current Justices have joined opinions disclaiming deference to agency findings of preemption." Shutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 Tulsa L. Rev. 197, 207 (2009).

The message here is clear: conferring *Chevron* deference over agency interpretations of express-preemption clauses is, at best, a gambler's play. Although the Supreme Court has never squarely foreclosed the possibility that agency interpretations of express preemption clauses may ever receive *Chevron* deference, the Court's collective guidance has given good reason to believe that it would answer in the negative. In the face of this guidance, most lower courts have exercised restraint, refusing to afford *Chevron* deference to agency determinations that a federal statute preempts state law—even in cases (unlike here) in which an agency is at least properly exercising delegated authority from Congress. *See, e.g., Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 413-414 (5th Cir. 2010) (invoking *Wyeth* to hold, contrary to the opinion of a federal agency and earlier cases, that *Chevron* deference is inappropriate for an agency's "interpretation of the preemptive effect" of federal law); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214-15 (9th Cir. 2010) (deferring to HUD's "thoughtful consideration" of state law's impact on the federal regulatory scheme, but noting that deference was not required); *Do Sung Uhm v. Humana*, 620 F.3d 1134, 1155 (9th Cir. 2010) (observing that the agency's position on preemption, as expressed in its pronouncements on a final rule, "do not bind this court…").

Given the express ambiguity of FEHBA's preemption provision, this Court should heed that cautionary approach here. Conferring *Chevron* deference over OPM's interpretation of the preemptive scope of § 8902(m)(1) risks overriding Congress's own view on the scope of preemption, jeopardizes the independent role that courts play in statutory preemption cases, and discards the "respect for the States as independent sovereigns in our federal system." *Wyeth*, 555 U.S. at 565 n.3.

B. *Chevron* deference is even less appropriate here given OPM's effort to override several longstanding canons of statutory interpretation by fiat. The "critical" point in any statutory interpretation case—one that "transcends debates about the mechanics of *Chevron*"—is that "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). "Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles." *Id.* But OPM has sought to short-circuit this rule, arguing that the "presumption[s]" that might otherwise apply are "inapplicable" when an agency, rather than judge, interprets an express preemption clause. U.S. 28(j) Letter of May 26, 2015, at 2. That is wrong. Interpretive principles—which include "[a]ll manner of presumptions, substantive canons and clear-statement rules"—"take precedence over conflicting agency views." *Carter*, 736 F.3d at 731. Because OPM's regulation is openly at war with these principles—indeed, its *raison d'etre* is to overturn them—no understanding of *Chevron* sanctions its enforcement.

First, OPM straightforwardly contends that the presumption against preemption is "inapplicable" to its regulation. Not so. The "respect for the States as independent sovereigns in our federal system" is no less robust simply because an agency is involved. *See Wyeth*, 555 U.S. at 565 n.3 (applying the presumption against preemption even in the presence of substantial federal regulation). An agency's interpretation of an express-preemption clause is not "permissible" if it conflicts with "the strong presumption against preemption in matters traditionally regulated by the state." *Massachusetts*, 93 F.3d at 894. Writing for the D.C Circuit, Judge Sentelle has explained that an agency regulation seeking to displace state law cannot stand if it "runs afoul" of "the established presumption against preemption in matters of traditional state control." *Id.* at 895. The reason is clear: An agency's decision to preempt state law in the absence of a "clear and manifest" command from Congress substitutes the agency's purpose for Congress's—a clear violation of the Supremacy Clause. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The "long-standing presumption against preemption" wards against this separation-of-powers breach and "demand[s]" that courts "reject an agency interpretation" that, like OPM's here, would simply override it. *Id. see also Solid Waste Agency*, 531 U.S. at 166-67, 174 (where Congress "chose to 'recognize, preserve, and protect'" state authority to regulate, courts must "reject the request for administrative deference" of a statutory interpretation that would undermine that choice).[3]

Second, agencies may not disregard the constitutional-avoidance doctrine. To the contrary, they are "obligated" to read statutes in a "manner that does not raise a serious constitutional question." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008). Yet OPM's proffered construction of § 8902(m)(1) indisputably authorizes private contractual "reimbursement clause[s]" in carrier contracts to preempt "any state law"—an interpretation that requires a "highly problematic, and probably unconstitutional" reading of FEHBA's express preemption clause because it "provid[es] for preemption by contract" even though "it is a *law*, not a mere contract term, that carries preemptive force." *McVeigh*, 396 F.3d at 143. The Supreme Court has never "devised and applied a federal principle" of preemption based

[3] OPM first told this Court that the presumption against preemption was inapplicable here because "Congress clearly superseded state law in this field." U.S. Amicus Br., at 26. Even then, that view was hard to take seriously given Congress's own statement that § 8902(m)(1) was "purposely limited and will not provide insurance carriers . . . with exemptions from state laws and regulations governing other aspects of the insurance business." S. Rep. No. 95-903, at 3 (1978) (Letter of Comptroller General). Now, OPM has recognized the impossibility of that initial claim given the ambiguity of the express-preemption clause itself. So, the agency has opted for a new theory: that the presumption is "inapplicable" under *New York v. FERC*, 535 U.S. 1, 18 (2002). U.S. 28(j) letter. This claim is just as weak as the old one. In *New York*, the Court explained that the presumption is "not involve[d]" when resolving "whether Congress has given [an agency] the power to act as it has." *Id.* That issue is implicated here, as we've discussed above, but it's not the issue to which the presumption applies. Instead, as the Court made abundantly clear in *New York*, the presumption applies to "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority"—i.e., "the validity of a conflicting state law or regulation." *Id.* at 17-18. OPM's demand for *Chevron* deference directly implicates this second question, and hence directly implicates the presumption against preemption.

on terms contained in "an individually negotiated contract." *United States v. Yazell*, 382 U.S. 341, 353 (1966). And for good reason: "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a private contract." *American Airlines v. Wolens*, 513 U.S. 219, 243 n.4, 241 (1995) (O'Connor, J., concurring in part and dissenting in part) (noting that "the terms of private contracts are not laws").

OPM's contrary interpretation, therefore, cannot stand. "It is well established that the cannon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would *otherwise* be due." *See Solid Waste Agency*, 531 U.S. at 160-61; *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (rejecting "agency interpretations to which we would otherwise defer when they raise serious constitutional questions"). As a result, "deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *U.S. West*, 182 F.3d at 1231. And, were there any doubt, the constitutional avoidance doctrine "trumps *Chevron* deference" by demanding that courts not defer to agency interpretations of statutes that implicate serious constitutional concerns. *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that, when confronted with a statute with two possible constructions—one that raises constitutional problems, and another that does not—courts must adopt whichever reading avoids constitutional issues "unless such construction is *plainly contrary* to the intent of Congress"); *Union Pacific RR v. U.S. Dep't of Homeland Security*, 738 F.3d 885, 893 (8th Cir. 2013) ("Constitutional avoidance trumps even *Chevron* deference, and easily outweighs any lesser form of deference we might ordinarily afford an administrative agency . . .").

C. Nor is OPM's regulation entitled to any lesser degree of deference. Under *Skidmore v. Swift & Co.*, an agency regulation is only as good as its "power to persuade." 323 U.S. 134, 140 (1944). That power, in turn, "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.*

As we've explained at length in our merits briefs, since the Supreme Court first rejected OPM's claim that § 8902(m)(1) "unambiguously" preempts state reimbursement laws, no appellate court has agreed with OPM's take on the scope of 8902(m)(1), its reading of the relevant legislative history, or its bid to override standard canons of statutory interpretation. This regulation is only the most recent iteration of the same set of arguments, and it adds nothing to the mix. Instead, it simply takes the losing legal arguments that OPM put before the Supreme Court in *McVeigh* and recycles them into the Federal Register. The regulation contains no discussion of the substantial competing interests weighing against expansive preemption of state law; it makes no effort to explain how an expansive interpretation of FEHBA's express-preemption clause squares with the considerable legislative history

supporting both a narrow interpretation and the conclusion that OPM has no rulemaking authority to displace state law; and it fails even to *flag*—let alone meaningfully address—the applicability of canons of statutory interpretation that should have led the agency to reach a narrow, no-preemption construction.

To claim any serious entitlement to deference, an agency must take seriously its obligations to thoroughly analyze the questions and meaningfully engage with inconvenient facts or competing principles—an approach numerous agencies have followed. *See, e.g.*, 74 Fed. Reg. 1770, 1792 (2009) (DOT regulation addressing applicability of presumption against preemption); 77 Fed. Reg. 36192, 26182 (2012) (addressing constitutional avoidance doctrine). OPM has sought to opt out of all of this in its regulation. Taken together, these defects lay bare that the sum total of this regulation is merely to demonstrate that the agency "*has* a position." *Mayburg v. Sec'y of Health of Human Services*, 740 F.2d 100, 106 (1st Cir. 1984). But we all knew that before, which is why this regulation is "of marginal significance." *Id.*

Respectfully Submitted,

/s/ Matthew Wessler
Matthew Wessler
Counsel for Plaintiff-Appellant

cc: All Counsel of Record