No. ___

In the Supreme Court of the United States

TERESA BELL,

Petitioner,

v.

BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, and BLUE CROSS AND BLUE SHIELD OF TEXAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD ANDREW BRIGHT
Taylor King & Associates, P.A.
320 Main Street
Arkadelphia, AR 71923
(870) 246-0505

MATTHEW WESSLER
Counsel of Record
RACHEL S. BLOOMEKATZ
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Does FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), preempt state laws that restrict carriers from seeking subrogation or reimbursement under their FEHBA contracts?

2. Does FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), violate the Supremacy Clause?

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INTRODUCTION

This case is substantially similar to *Coventry Health Care of Missouri, Inc. v. Nevils*, No. 16-149, which is awaiting this Court's review. In both cases, the question is whether the express-preemption clause in the Federal Employee Health Benefits Act (FEHBA), 5 U.S.C. § 8902(m)(1), preempts state repayment and subrogation laws. The Eighth Circuit interpreted this provision—despite its undisputed ambiguity—to expressly preempt Arkansas state law. App. 2a. In so holding, the panel recognized that its decision not only deepened the disagreement among the lower courts on this question but also opened a split with Missouri Supreme Court—creating an untenable conflict between state and federal courts in the same state. App. 7a; *compare Nevils v. Group Health Plan, Inc.*, 492 S.W.3d 918 (Mo. 2016) (en banc) ("*Nevils II*") *with Kobold v. Aetna Life Ins. Co.*, 370 P.3d 128 (Ariz. Ct. App. 2016) ("*Kobold II*"); *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090 (10th Cir. 2015).

The Eighth Circuit's decision also cannot be reconciled with this Court's precedent. In *Empire HealthChoice Assurance, Inc. v. McVeigh,* 547 U.S. 677, 697–98 (2006), this Court specifically warned that, given its "unusual" and "puzzling" nature, FEHBA's express-preemption clause "warrants cautious interpretation" and demands a "modest reading." Yet the Eighth Circuit rejected what it acknowledged was a plausible "narrower reading" in favor of a "broad" one that precludes the operation of longstanding state insurance and tort law. App. 12a.

That "broad" interpretation, moreover, cannot coexist alongside the Supremacy Clause. The Eighth Circuit held that § 8902(m)(1) "gives preemptive effect to contractual terms" in private insurance policies. App. 10a.

But a "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a private contract." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995); *see also id.* at 241 (O'Connor, J., concurring in part and dissenting in part) ("[T]he terms of private contracts are not laws").

To restore certainty over the preemptive reach of § 8902(m)(1) and resolve the growing split among the lower courts, petitioners respectfully request that this Court grant the petition in *Nevils* (an admittedly better vehicle that cleanly tees up both the statutory and constitutional questions) and hold this petition pending the disposition of that case. Alternatively, the Court should grant this petition for plenary review.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 823 F.3d 1198 and reproduced at 1a. The district court's decision was not reported and is reproduced at App. 14a.

JURISDICTION

The court of appeals entered its judgment on May 26, 2016. Justice Alito granted an order extending the time to file this petition for certiorari until October 11, 2016 (No. 16-A-163). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 8902(m)(1) of Title 5, United States Code, states:

§ 8902. Contracting authority

* * *

> (m)(1) The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including pay-

> ments 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.
>
> * * *

Section 8913(a) of Title 5, United States Code, provides:

> **§ 8913. Regulations**
>
> (a) The Office of Personnel Management may prescribe regulations necessary to carry out this chapter.
>
> * * *

Section 890.106(h) of Title 5, Code of Federal Regulations states:

> **§ 890.106. Carrier entitlement to pursue subrogation and reimbursement recoveries.**
>
> (h) A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.
>
> * * *

The Supremacy Clause of the U.S Constitution, Article VI, Clause 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance there-

> of; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

1. In 1959, Congress enacted the Federal Employee Health Benefits Act (FEHBA), 5 U.S.C. § 8901 *et seq.*, to establish a program to administer health benefits for federal employees. In recognition that "[a]ll states regulate the health insurance business in various and varying ways," S. Rep. No. 95-903, at 7 (1978), Congress intentionally did "not design[]" the federal program "to regulate the insurance business or override any State regulatory scheme." Report of the Comptroller General of the United States, B-164562, *Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* 15 (1975) ("Comptroller Report"). Instead, states continued to hold the "authority to both regulate and tax" those health insurance carriers who participated in the federal program. *Id.* And Congress recommended that the Office of Personnel Management (OPM)—then known as the U.S. Civil Service Commission, or CSC—"take appropriate action to inform carriers that the fact that they are administering a Federal contract is no reason for circumventing compliance with applicable State laws." *Id.* at 16.

FEHBA's dual-regulatory design worked well. During the law's "early years," carriers had "few if any problems" complying with both federal and state requirements. S. Rep. No. 95-903, at 7. But in the mid-1970s some states began mandating health-insurance coverage for certain "kinds of benefits and medical practitioners"—"chiropractic[] services" or acupuncture, for in-

stance—not typically covered by FEHB carriers. *See id.* at 2–4. These laws "presented serious problems" for FEHB carriers because they "placed carriers in serious jeopardy of loss of their license in a state unless they were to approve a payment" for a specific type of coverage "not provided under [a FEHB] contract but required by state law." *See id.* at 7.

To address this tension, the carriers urged the CSC to "issue a regulation restricting the applicability of State law to FEHB contracts." Comptroller Report at 15. The agency refused. It made clear that its "position has been that 'the States have the authority to both regulate and tax health insurance carriers operating under [FEHBA].'" *Id.* Specifically, it explained to carriers that (1) "the FEHB Act was not designed to regulate the insurance business or to override any State regulatory scheme," and (2) "no legal basis exists for CSC to issue a regulation restricting the applicability of State laws to FEHB contracts." *Id.* The agency's lawyers informed the carriers that they did "not agree[]" that "the FEHB Act is exempt from State regulation." *Id.* To the contrary, as CSC's Deputy General Counsel explained, "the legislative history of the FEHB Act . . . indicates that State law should be controlling." *Id.* at 16.

Though the agency considered broader preemption strategies, it ultimately recommended that Congress adopt a narrow express-preemption provision that "has more limited applicability." H.R. Rep. No. 95-282, at 3 (1977). Such a provision would, in the agency's view, "provide an immediate and permanent statutory solution to the problem of maintaining uniformity of benefits to all enrollees in [FEHB plans]." *Id.* In 1978, Congress responded by adding a narrow express-preemption provision to FEHBA. 5 U.S.C. § 8902(m)(1) (1994). The provision was then amended in 1998 to clarify that states could not limit the types of health care organizations that

FEHBA carriers could use to provide benefits. *See* S. Rep. No. 105-257, at 15 (1998). In its current form, the clause states:

> The terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

In amending FEHBA to include this provision, Congress explained its intent: Because FEHBA did not give CSC "clear authority to issue regulations restricting the application of state laws when their provisions parallel the provisions in the [agency's] health benefits contracts," the express-preemption clause would "guarantee[] that the provisions of health benefits contracts made under [FEHBA] concerning benefits or coverage[] would preempt any state and/or local insurance laws and regulations which are inconsistent with such contracts." S. Rep. No. 95-903, at 4.

In Congress's view, "[s]uch a preemption [clause]" was nevertheless "purposely limited and [would] not provide insurance carriers under the program with exemptions from state laws and regulations governing other aspects of the insurance business." *Id.*

2. On October 2, 2010, Teresa Bell was rear-ended in Fayetteville, Arkansas. She suffered serious injuries as a result of this automobile crash and needed substantial medical treatment. App. 15a. Ultimately, her medical costs rose to more than $88,000, and time away from work cost her more than $60,000 in lost wages. *Id.* Because Ms. Bell was a nurse at a Department of Veterans

Affairs hospital, her medical coverage came through a federally sponsored health insurance plan, administered by Blue Cross Blue Shield of Oklahoma and Blue Cross Blue Shield of Texas (collectively "Blue Cross"). *Id.*

After the crash, Ms. Bell hired a lawyer and asserted a claim against the driver who caused the accident. *Id.* She eventually reached a compromise settlement with the driver's insurer. *Id.* Before she received the settlement payment, however, Blue Cross demanded that it be reimbursed for the benefits it paid for Ms. Bell out of her settlement, based on reimbursement provisions in its policy. *Id.*

3. In November 2013, Ms. Bell sued Blue Cross in Arkansas state court. App. 16a. She asked the court for an order declaring Blue Cross's claim for reimbursement void and unenforceable under Arkansas law because her settlement with the tortfeasor did not make her whole. *Id.*; *see Riley v. State Farm Mut. Auto. Ins.*, 381 S.W.3d 840, 848 (Ark. 2011) (state law forbids carrier claims for reimbursement when tort victim has not been made whole).

After Blue Cross removed the case to federal court (based on the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1)), the district court granted Blue Cross judgment as a matter of law. *See* App. 19a–22a. The court held that FEHBA § 8902(m)(1) "mandates" that the *terms* of Blue Cross's health benefits plan preempt Arkansas's made-whole rule. App. 27a–29a. The district court "recognize[d] the potential for harsh and inequitable results" stemming from its ruling. App. 28a, 29a. Interpreting FEHBA's express-preemption clause expansively, the court explained, "effectively enjoin[s] Bell—and others similarly situated—from making a full recovery for injuries caused by third-party tortfeasors" and allows Blue Cross to recover its money as the result

of Ms. Bell's lawyers' "time, expense, and work product." App. 29a. Yet, the court saw no way to "ameliorate these inequities," and therefore granted Blue Cross's motion. *Id.*

4. The Eighth Circuit affirmed. It began by observing that, in *McVeigh*, this Court identified two "plausible" interpretations of § 8902(m)(1)—one that favored preemption of state anti-subrogation laws and one that did not. App. 5a. Given this recognized ambiguity, Ms. Bell argued that the presumption against preemption should compel a court to read the clause narrowly. *Id.* The Eighth Circuit disagreed. Although it acknowledged that health care "is an area of traditional state regulation," App. 7a, it concluded that the presumption "should not apply" here, where, in its view, "'considerable federal interests' are at stake." App. 6a (quoting *United States v. Locke*, 529 U.S. 89, 94, 108 (2000)).

The court turned next to Blue Cross's (and the government's) claim that "if the preemption statute is ambiguous," *Chevron* required deference to OPM's recently promulgated rule interpreting § 8902(m)(1) to preempt state anti-subrogation law. *Id.* But the Eighth Circuit did not agree there either, observing that the "law concerning application of *Chevron* deference to an agency's view on preemption is unsettled." App. 8a. Instead, the court concluded that it was "unnecessary to decide" the issue because "the better reading of the statute is that Arkansas law is preempted" "[e]ven without deference to the agency under *Chevron*." App. 9a.

To support this conclusion, the court principally relied on one line in a 1994 Eighth Circuit decision that affirmed a district court's conclusion that § 8902(m)(1) "preempts state law that is inconsistent with a contract under [FEHBA]." *Id.* (holding that "[our] court already ruled" on the issue in *MedCenters Health Care v. Ochs*,

26 F.3d 865, 867 (9th Cir. 1994)). The panel readily admitted that the prior decision "was abrogated" by *McVeigh*, but it viewed the abrogation as only "in part" and inapplicable. App. 9a–10a. The court also thought that the "structure of the Act likewise favors giving preemptive effect to the contractual terms concerning reimbursement and subrogation." App. 11a–12a (concluding that "[n]othing about the context here . . . suggests a narrower meaning").

Finally, the Eighth Circuit refused to reach the question whether "§ 8902(m)(1) violates the Supremacy Clause." App. 12a. Because "Bell did not raise th[e] constitutional argument" below, the panel held that "the point is therefore forfeited." *Id.* Nonetheless, it mused that "[o]thers have been skeptical that § 8902(m)(1) presents a constitutional problem" and suggested that—despite its own specific interpretation to the contrary—"the statute can reasonably be construed to mean that federal law (either the Act itself or federal common law), not the contractual terms, has the preemptive force." *Id.*

REASONS FOR GRANTING THE PETITION

I. The lower courts are openly divided over the reach of FEHBA's express-preemption clause.

In the decision below, the Eighth Circuit held that § 8902(m)(1) should be "given a broad meaning," such that "the contractual terms concerning reimbursement and subrogation" in FEHBA-carrier insurance policies have "preemptive effect" over state laws restricting subrogation and reimbursement. App. 11a–12a. In doing so, it expressly acknowledged that it was taking one side of a sharp disagreement over this question. *Id.*

Like the Eighth Circuit, the Tenth Circuit also held that § 8902(m)(1) preempts any state law restricting health insurers from pursuing these tort remedies. *Helfrich*, 804 F.3d at 1104–06.[1] And like the Eighth Circuit, the Tenth Circuit's conclusion rested largely on revisiting the "statute's text" to ascertain the "better reading." App. 10a; *see also Helfrich*, 804 F.3d at 1106 (relying on a straightforward "interpretation of the language of § 8902(m)(1)"). Both courts, despite acknowledging that § 8902(m)(1) "is ambiguous regarding the preemptive effect of reimbursement clauses," nonetheless refused to apply the presumption against preemption to interpret the clause narrowly, reasoning instead that the preemption question here falls within a "federal-interest exception" to the general rule. *Helfrich*, 804 F.3d at 1104 (holding that the "presumption does not apply here"); App. 12a (same). Neither of these courts, however, squarely addressed either OPM's bid for *Chevron* deference over its express-preemption regulation or how § 8902(m)(1)'s delegation of preemptive power to contract terms could square with the Supremacy Clause. *See* App. 11a–12a (holding that the issue was "forfeited"); *Helfrich*, 804 F.3d at 1110 (declining to "address it").

The Arizona Appeals Court, for its part, reached the same result but through different means. When it first addressed the issue, it relied upon the presumption against preemption and held that § 8902(m)(1) should be construed narrowly to avoid sweeping state laws re-

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[1] The Tenth Circuit also ruled that, FEHBA's express-preemption clause notwithstanding, this Court's analysis in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) mandates that "federal common law" displaces any state laws restricting subrogation and reimbursement. *See Helfrich*, 804 F.3d at 1095–1104. It stands alone in this view.

stricting subrogation and reimbursement within "the scope" of the provision's reach. *See Kobold II*, 370 P.3d at 130. But it later ruled (after this Court asked it to reconsider its opinion in light of OPM's newly promulgated rule) that its interpretation was trumped by OPM's bid for *Chevron* deference. *See id.* at 131. It deferred to the agency's expansive interpretation despite a continued belief—in contrast to the Eighth and Tenth Circuits, and in agreement with the Missouri Supreme Court—that a narrower reading is "more faithful." *Id.*

The Missouri Supreme Court, by contrast, has twice held that § 8902(m)(1) does not preempt state laws restricting insurers from pursuing subrogation or reimbursement. *See Nevils II*, 492 S.W.3d at 919. In doing so, it has considered and decided every question at issue in this split: it construed the meaning of § 8902(m)(1) under standard canons of statutory interpretation, including the presumption against preemption; it refused to permit OPM to play a *Chevron* trump card for a regulation designed to expand the scope of an express-preemption clause; and, unlike any of the other lower courts, it also squarely addressed the Supremacy Clause implications of § 8902(m)(1), ruling that delegating preemptive power to contractual terms in insurance policies is unconstitutional. *See id.* at 922–25.

Taken together, these decisions lay bare the confusion—and fundamental disagreement—that has taken root over FEHBA preemption. Yet only one pending case—*Nevils*—offers this Court a clear path toward resolution. Because the Missouri Supreme Court in that case squarely reached and decided every potential issue necessary to resolve this split, this Court should grant the petition in *Nevils* and hold this petition pending the disposition of that case. Alternatively, given the intolerable divide between the federal and state courts in Mis-

souri (and elsewhere), the Court should grant this petition for plenary review.

II. The questions are important.

The questions at issue in this growing split implicate core principles of federalism and agency power. Unsurprisingly, then, all sides agree that review is warranted. Given the divergence of opinion over the preemptive effect of § 8902(m)(1), Coventry told this Court in its petition in *Nevils* (at 4, 33) that "the need for definitive guidance" over the "important" "statutory and constitutional questions" is warranted. And the government, too, has explained that this "important and recurring" issue has produced a "division of authority." *See* Br. of U.S. as Amicus Curiae in support of petitions for certiorari at 20, *Coventry Health Care v. Nevils* and *Aetna Life Ins. v. Kobold* (Nos. 13-1305, 13-1467). That much is clear.

Beyond that agreement, the rest is a muddle. As things stand, state laws restricting subrogation and reimbursement have been held preempted in Arkansas, Kansas, and Arizona. But, in other states, the matter is unsettled. In Missouri state court, for instance, an injury victim who happens to be a federal employee will be treated no differently than other residents of that state when it comes to insurer-driven efforts to pursue subrogation or reimbursement. But if that same litigant finds herself in federal court, like Ms. Bell here, she will lose her state-law protection. Other states will undoubtedly face similar difficulties.

Perhaps more critically, these diverging opinions reveal deep uncertainty about fundamental questions that strike at the heart of the delicate balance between state and federal authority. The courts are not only split over the outcome—*i.e.*, whether § 8902(m)(1) blocks state laws that restrict insurers from pursuing subrogation and reimbursement tort remedies—but they are also at

odds over the reasons why. Allowing the confusion to fester benefits no one.

III. The Eighth Circuit's expansive preemption interpretation is wrong.

Review here is also warranted because the decision below cannot be squared with this Court's precedents or the Constitution itself.

In *McVeigh*, after calling § 8902(m)(1) "unusual" and "puzzling," this Court issued a cautionary directive: Given the clause's ambiguity and its declaration that terms in private contracts are preemptive, FEHBA's express-preemption clause "warrants cautious interpretation" and should be given a "modest reading." 547 U.S. at 697–98. The Eighth Circuit, however, concluded just the opposite: that nothing about § 8902(m)(1) justified "plac[ing] a thumb on the scales against preemptive effect." App. 7a. That flies in the face of *McVeigh* and settled principles of statutory interpretation.

The Eighth Circuit thought that it could disregard *McVeigh*'s command because, in its view, the case involved "considerable federal interests." App. 6a. But in *McVeigh* this Court recognized the very same thing and nonetheless refused to counsel an expansive reading of the provision. *See* 547 U.S. at 679 ("While distinctly federal elements are involved here, countervailing considerations control."). Why? Because subrogation and reimbursement issues—regardless of the source of insurance—all "stem[] from a personal-injury recovery and the claim underlying that recovery is plainly governed by state law." *Id.* at 698. Even a FEHBA carrier's "contract-derived reimbursement claim," in other words, "is not a creature of federal law." *Id.* at 696 (alterations and internal quotations omitted); *see also id.* at 692 n.4 (explaining that no "court-declared federal law would

govern the carrier's subrogation claim against [a] tort-feasor").

The Eighth Circuit's flawed belief that it, not Congress, possessed the authority to weigh the balance between state and federal interests also led it to casually discard the presumption against preemption. That was wrong. As this Court has explained, when courts are called to determine if the presumption against preemption applies, they must consider only two questions: (1) whether the text of the statute is ambiguous; and (2) whether the area of law is one in which the states have traditionally regulated. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). If the answer to both questions is "yes" courts must "accept the reading that disfavors preemption." *Id.*

The presence of a "long history of federal involvement" in the regulatory arena does not, as the lower court reasoned, compel a different result. App. 6a. To the contrary, preemption questions most frequently arise in cases where both the federal government and the states have regulated in the field. And this Court has specifically rejected the idea that the presumption against preemption should not apply because a "case involves federal interests" or because there is a strong federal presence in the field. Indeed, the petitioners unsuccessfully pressed precisely this argument in *Wyeth v. Levine*, arguing that the presumption "should not apply" because the federal government had "regulated drug labeling for more than a century." 555 U.S. 555, 565 n.3 (2009). That theory, the Court explained, "misunderstands the principle." *Id.* The presumption against preemption "accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* Given the Eighth Circuit's recognition that the general area of regulation—health care—"is an area of traditional state

regulation," it should not have cast the presumption aside. App. 6a.

What's more, the Eighth Circuit's decision to reject a "modest reading" of § 8902(m)(1) contradicts the overwhelming evidence demonstrating that FEHBA—from its inception—was designed precisely to avoid trampling state regulatory regimes. Both Congress and CSC repeatedly made clear that FEHBA was "not designed to regulate the insurance business or override any State regulatory scheme." Comptroller Report, at 15. Instead, states continued to hold the "authority to both regulate and tax" those health insurance carriers who participated in the federal program. *Id.* And Congress itself even told carriers that they had "no reason for circumventing compliance with applicable State laws." *Id.* at 16.

The legislative history of § 8902(m)(1) likewise reflects Congress's desire to preserve state authority under FEHBA. The provision was "purposely limited" and, beyond the specifically identified benefit and provider laws, not intended to "provide insurance carriers . . . with exemptions from state laws and regulations" governing other matters. S. Rep No. 95-903, at 3. Tellingly, the Eighth Circuit said nothing about this commentary.

Finally, although the Eighth Circuit (unlike the Missouri Supreme Court) did not reach the Supremacy Clause implications of its conclusion that § 8902(m)(1) "gives preemptive effect to contractual terms" in insurance policies, its holding sparks constitutional problems it should have avoided. App. 9a. The Supremacy Clause does not permit contract terms between private parties to reign "supreme" over state law. *See Arthur D. Little, Inc. v. Comm'r of Health and Hosps.*, 481 N.E.2d 441, 452 (Mass. 1985) ("[T]his court has been unable to locate authority in this or any jurisdiction which supports the proposition that a contract to which the Federal gov-

ernment is a party somehow constitutes Federal law for purposes of the supremacy clause."); *United States v. Yazell*, 382 U.S. 341, 353 (1966) ("None of the cases in which [the Supreme Court] has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract.").

A "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a private contract." *Wolens*, 513 U.S. at 229 n.5; *see also id.* at 241 (O'Connor, J., concurring in part and dissenting in part) (noting that, "[t]o be sure, the terms of private contracts are not laws"). And "FEHBA-authorized contracts" "are not" laws. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 144 (2nd Cir. 2005). They are instead "privately" negotiated agreements "with insurance providers . . . who are under no obligation to enter into the contracts in the first place." *Id.*

By adopting a broad reading of § 8902(m)(1), the Eighth Circuit embraced, in then-Judge Sotomayor's words, a "highly problematic, and probably unconstitutional" reading of FEHBA's preemption clause. *Id.* at 143. That should have given the lower court pause. It certainly justifies this Court's review.

CONCLUSION

The Court should grant the petition in *Coventry Health Care of Missouri v. Nevils*, No. 16-149, and hold this petition pending the disposition of that case. Alternatively, the Court should grant plenary review in this case.

Respectfully submitted,

MATTHEW WESSLER
Counsel of Record
RACHEL S. BLOOMEKATZ
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

RICHARD ANDREW BRIGHT
Taylor King & Associates, P.A.
320 Main Street
Arkadelphia, AR 71923
(870) 246-0505

Counsel for Petitioners

October 11, 2016