No. 16-149

In the Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
fka Group Health Plan, Inc.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases and other civil actions which seek to vindicate the rights of individuals under both federal statutory law and state tort law.

AAJ is concerned that the OPM rule at issue in this case undermines both the important policies underlying state tort law and Congress's purpose in providing insurance for federal workers.[1]

SUMMARY OF ARGUMENT

1. One of the cornerstones of this Court's preemption jurisprudence is the principle that a federal statute does not supersede state law unless Congress has stated its intent to do so clearly and unambiguously. When an express preemption provision is susceptible of more than one plausible interpretation, the Court accepts the reading that disfavors preemption. The assertion that the Court's reliance on this presumption has waned is incorrect. This Court has consistently applied this principle in express preemption cases. Where the text of the statute is plain, there is no need

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[1] The parties have consented to the filing of this brief. The undersigned counsel for amicus curiae affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than amicus curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

to rely on the presumption. But where the statute is ambiguous, the Court must determine whether a state law is within the preempted domain. In those cases, the presumption guides the Court to favor the nonpreemptive reading of the statute.

In this case, the Court has already determined that the express preemption provision at issue is ambiguous. The Missouri Supreme Court properly accepted the interpretation that disfavors preemption of Missouri's antisubrogation law.

2. The presumption against preemption, particularly in areas traditionally occupied by the states, safeguards the role of the sovereign states in the federalist system. This Court has held that protection of the interests of the states is entrusted to their representatives in Congress. For that reason, to avoid unintended incursion into state governance, courts must insist that Congress speak plainly when it intends to preempt state law.

This Court has long recognized that the states have traditionally exercised their police power authority to protect the health and safety of their citizens through the application of state tort law. The OPM rule interferes with state tort rules, upsetting the complex balancing of state interests and policies that is reflected in the tort law of each state.

For example, the OPM rule is not directed solely at reimbursement out of payments by parties responsible for the beneficiary's injuries. The rule specifically requires reimbursement out of any applicable insurance or workers' compensation benefits paid to the beneficiary, including proceeds of insurance

coverage paid for entirely by the federal employee or beneficiary, thereby undermining state policies that encourage individuals to insure themselves against unexpected illness or injury. The rule also requires that FEHBA carriers be reimbursed first, before the injured victims is compensated for his or her injuries, essentially shifting the burden of paid medical expenses from FEHBA carriers, who have received premiums to provide coverage for such expenses, to other insurers who have compensated the plaintiff for other losses.

Most importantly, the OPM rule is not directed at repaying FEHBA carriers out of a "double recovery" by injured beneficiaries. In fact, it is more likely that injury victims will not receive a single recovery of full compensation so that reimbursement of the FEHBA carrier may leave the federal employee or family member undercompensated for their loss.

The rule's assumption that tort awards fully compensate plaintiffs is plainly erroneous. It is well established that seriously injured plaintiffs generally are awarded only a portion of their financial losses. Secondly, payment of tort awards or settlements is often limited to the amount available under the tortfeasor's liability insurance coverage. Finally, most states have reduced recoveries for plaintiffs, sometimes substantially, through "tort reform" measures. For example, many states impose caps on recoverable damages, which can significantly reduce compensation for plaintiffs with severe injury. Nonetheless, the OPM rule entitles the carrier to 100 percent reimbursement out of a tort judgment or settlement.

Many states have also eliminated or modified the doctrine of joint and several liability. As a result, plaintiff's recovery will be reduced by the percentage of liability assigned to a joint tortfeasor who is immune from suit, insolvent, or otherwise unavailable to respond for their share of damages. Yet the OPM rule requires 100 percent reimbursement for the FEHBA carrier.

Most states have also abolished or restricted the collateral source rule, under which the tortfeasor was required to compensate the plaintiff for medical expenses due to wrongful injury, even though the plaintiff's health insurance paid those expenses. To eliminate the possibility of double recoveries, states have authorized the jury or trial judge to subtract the plaintiff's health insurance benefits from the tort award. By definition, those plaintiffs receive no more than a single recovery. It makes no economic sense to require reimbursement out of plaintiff's compensation for other harms, leaving the plaintiff worse off than if he or she had not sued at all.

States' efforts to protect their citizens from the harsh consequences of subrogation and reimbursement reflect individual state policy decisions. Some, like Missouri, prohibit subrogation in personal injury cases. Other states seek to mitigate the harsh impact of subrogation by adopting the made-whole doctrine or the common-fund rule. Congressional lawmakers are cognizant of these important state policies and would not have intended to undermine them by overriding state limitations on subrogation.

Congress also would not have intended to discourage victims of wrongful conduct from holding

tortfeasors accountable, thereby undermining a central objective of state tort law – deterrence of unreasonably dangerous behavior. The increase in accidental injury will necessarily increase the medical expenses paid out by FEHBA carriers.

3. Subrogation/reimbursement is not the effective or appropriate cost-containment measure that OPM suggests. First, although FEHBA carriers may have obtained $126 million in subrogation recoveries, there is no showing that this sum was used to reduce the federal government's portion of the cost of the program or to reduce the premiums paid by enrollees. Community-rated carriers, such as the carrier in this case, are not required to remit any of their subrogation recoveries to the Treasury Fund which funds the program. The fact that recoveries may reduce a carrier's costs does not translate into a direct causal connection with lower premiums. In the private sector, health insurers generally do not take the speculative possibility of future subrogation into account when setting rates.

Experience-rated carriers are required to place such recoveries into the Treasury Fund, net of expenses incurred to obtain those recoveries. Those expenses, such as the percentage of recoveries turned over to third-party collection services, can be substantial. The claim that subrogation saves significant amounts for the federal government and enrollees should not be credited in the absence of quantification. In any event, even if the entire $126 million recovery were devoted to reducing premiums, the savings would be vanishingly small.

More fundamentally, this justification for subrogation is inconsistent with Congress's intent in establishing the health insurance program for federal employees. It is true that the intent of Congress is the touchstone in ascertaining the scope of federal preemption. But the Court does not look to the express preemption provision in isolation. Rather, the Court looks to the purpose of the statute as a whole and the way Congress intended the statute to operate.

Congress enacted the FEHBA to provide federal government employees with protection against the financial burden of high medical costs through a program of insurance paid for by the federal government and federal workers. Insurance provides such protection by allowing a large pool of individuals who have not yet suffered loss to pay a relatively modest premium so that the few individuals among them who do suffer loss can be provided with compensation. The OPM rule operates on the opposite premise. It takes away compensation from those individuals who have suffered loss in order to provide a very small financial benefit to the pool of uninjured individuals. This was not the purpose of Congress in establishing an insurance program for federal employees. This is insurance running in reverse.

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION COUNSELS THE COURT TO READ EXPRESS PREEMPTION STATUTES NARROWLY AND ACCEPT THE READING THAT DISFAVORS PREEMPTION.

One of the "cornerstones of [this Court's] preemption jurisprudence" is the guiding principle that "[i]n *all* pre-emption cases, and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotations and citations omitted).

The U.S. Chamber of Commerce as amicus urges this Court to upend this longstanding principle in express preemption cases, suggesting that this Court's reliance on the presumption "has waned in the express preemption context." Brief for the Chamber of Commerce of the United States of America ("Chamber Br.") 5, quoting *Altria Group, Inc. v. Good,* 555 U.S. 70, 99 (2008) (Thomas, J., dissenting). In the Chamber's view, "there is neither need nor basis for a presumption against preemption when interpreting statutes that expressly reflect a Congressional judgment to preempt state law." *Id*. *See also* Brief for Petitioner ("Pet. Br.") 36 ("The presumption against preemption is irrelevant because Section 8902(m)(1) is an express preemption provision.").

This Court has already rejected the Chamber's argument.

> Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the scope of its intended invalidation of state law, we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone* [*v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)].

Medtronic, 518 U.S. at 485 (internal citation omitted). This Court has consistently instructed that the presumption applies "[w]hen addressing questions of *express* or implied preemption." *Altria Group*, 555 U.S. at 77 (emphasis added).

Although the burdens may differ, the question facing a court when a defendant raises express preemption as a defense to enforcement of state law is not different in kind from an implied preemption defense. In either case, the court must determine whether the particular federal statute supersedes a particular state law. Congress may have expressed its intent to supersede state law to some extent, but whether the state law at issue falls within the scope of that preemption is often unclear. As this Court has explained, when "presented with the task of interpreting a statutory provision that expressly pre-empts state law" the Court "need not go beyond that language to determine whether Congress intended . . . to pre-empt at least some state law," but "must nonetheless 'identify the domain expressly pre-empted"

by that language,'" *Medtronic,* 518 U.S. at 484, quoting *Cipollone,* 505 U.S. at 517. *See also Altria Group.,* 555 U.S. at 76 (Even where Congress has expressly preempted some state law, "the question of the substance and scope of Congress' displacement of state law still remains.").

Thus, where the text of the statute clearly and unambiguously shows that Congress intended to preempt the state law at issue, "the courts' task is an easy one." *English v. General Elec. Co.,* 496 U.S. 72, 79 (U.S. 1990). The presumption cannot save an unambiguous expression of Congress' intent. But "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.'" *Altria Group,* 555 U.S. at 77 (2008), quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005).

This Court has consistently applied this principle in express preemption cases. In addition to *Altria Group*, *Bates*, *Medtronic,* and *Cipollone*, *supra*, *see Riegel v. Medtronic, Inc.,* 552 U.S. 312, 334 (2008); *Lorillard Tobacco Co. v. Reilly*, 553 U.S. 525, 54 (2001); *New York Conference of Blue Cross v. Travelers Insurance*, 514 U.S. 645 (1995); and *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 668 (1993). *See also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (Kennedy, J., concurring) (terming the principle of accepting the reading of an express provision that disfavors preemption one of this Court's "well-established presumptions about the nature of preemption").

The Chamber, however, contends that this Court discarded the presumption in practice in several recent

cases. Chamber Br. 6-8. To the contrary, the Court in those cases adhered to its cornerstone preemption principle that where the statutory text is ambiguous and susceptible of more than one plausible reading, the presumption favors the non-preemptive interpretation. For example, in *Riegel v. Medtronic, Inc*., 552 U.S. 312 (2008), the Court found it unnecessary to rely on the presumption "because we think the statute itself speaks clearly to the point." *Id*. at 326. Similarly in *Bruesewitz v. Wyeth LLC,* 562 U.S. 223 (2011), Wyeth relied on the express preemption provision in the National Childhood Vaccine Injury Act. Although the majority and the dissent disagreed over the meaning of the statutory text, neither suggested that the text was ambiguous. The majority stated that because "our interpretation of [the express preemption provision] is the only interpretation supported by the text and structure of the NCVIA," there was no need to rely on the presumption for statutory interpretation. *Id*. at 240.

Nor does *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), support the Chamber's contention. The Court there held that plaintiff's state law cause of action against the manufacturer of a generic drug for failure to warn was preempted because if the manufacturers had altered the FDA-approved warnings, "they would have violated federal law." *Id*. at 618. *Mensing* was an instance of conflict preemption due to impossibility, and the Court had no occasion to rely on the presumption against express preemption.

The Chamber also looks to *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016), which involved a Vermont law requiring ERISA health plans to submit

detailed reports concerning enrollees and claims to a state agency. Although Justice Kennedy discussed the presumption against preemption, he did not focus on ambiguity in the statutory text. Rather, the Court held that the Vermont law was preempted by ERISA because it constituted "direct regulation of a fundamental ERISA function." *Id*. at 946.

Finally, in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016), the issue was whether Puerto Rico is a "State" for purposes of the preemption provision in the federal Bankruptcy Code. This Court found it unnecessary to "invoke any presumption against preemption" because "the statute's language is plain." *Id*. at 1946.

In this case, the preemption provision in the Federal Employee Health Benefit Act ["FEHBA"] is far from plain. The provision states:

> 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. § 8902(m)(1).

This Court previously examined this provision and found it "a puzzling measure, open to more than one construction." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006). However, the Court determined that to decide that case, "we need not choose between those plausible constructions." *Id*. at 698. The Missouri Supreme Court in this case was

required to make that choice, and properly accepted the reading that disfavors preemption. *Nevils v. Group Health Plan, Inc.*, 418 S.W.3d 451, 455 (Mo. 2014) (en banc). That interpretation faithfully followed this Court's cornerstone preemption principle.

II. THE OPM RULE DISTURBS THE ALLOCATION OF TORT LIABILITY IN AN AREA TRADITIONALLY OCCUPIED BY THE STATES AND UPSETS THE STATES' BALANCE OF COMPETING POLICIES AND INTERESTS.

A. Preempting State Law Only Where Congress Has Unambiguously Stated Its Intent To Do So Safeguards the Role of the States In the Federalist System.

The presumption against preemption is not merely a rule of statutory construction, but a principle "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *CTS Corp.,* 134 S. Ct. at 2189 (Kennedy, J. concurring), quoting *Medtronic,* 518 U.S. at 485.

This principle "has two dimensions: Courts must be careful not to give an unduly broad interpretation to ambiguous or imprecise language Congress uses. And they must confine their opinions to avoid overextending a federal statute's pre-emptive reach." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2261 (2013) (Kennedy, J., concurring). Error on either front "may put at risk the validity and effectiveness of laws that Congress did not intend to disturb and that a State has deemed important to its scheme of governance." *Id*.

For this reason, "the assumption 'that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group,* 555 U.S. at 77, quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). In this way, the presumption in favor of non-preemption "provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). *See also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (The presumption against preemption preserves healthy federalism by "avoiding unintended encroachment on the authority of the States.").

Requiring Congress to make the scope of preemption clear and unambiguous is the natural corollary to this Court's rejection of judicially managed protection of the integrity of the states in the federalist system. In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this Court held that the role of the sovereign states is instead "more properly protected by the procedural safeguards inherent in the structure of the federal system," that is, by the representation of their interests by elected members of Congress when crafting federal statutes. *Id*. at 551-52. If it is the responsibility of Congress to avoid undue federal interference with the states' protection of the health and wellbeing of their citizens, then it is incumbent upon the courts to insist that Congress speak plainly when it legislates in that area. As Justice O'Connor observed,

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of states against intrusive exercises of Congress's Commerce Clause powers, *we must be absolutely certain that Congress intended such an exercise*. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1992), quoting Lawrence Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988) (emphasis added). *See also United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

The Chamber does not entirely disagree. It acknowledges that the rationale for the presumption against preemption is respect for the principles federalism and for state sovereignty. Chamber Br. 12. The Chamber insists, however, that "the forum for addressing federalism questions is the Capitol, not the courthouse." *Id*. As this Court made clear in *Gregory v. Ashcroft*, if Congress is to strike the proper balance between federal government and the states, courts must require that Congress speak plainly and unambiguously when it exercises its preemptive authority.

B. The OPM Rule Interferes with the Balancing of Policies and Interests Reflected in State Tort Law.

1. The compensation of wrongfully injured individuals is an area traditionally occupied by the states.

The United States, while conceding that there is a strong presumption against preemption when Congress legislates in an area traditionally occupied by the states, argues this is not such a case. Rather, "this dispute concerns benefits from a federal health insurance plan for federal employees that arise from a federal law." Brief for the United States ("U.S. Br.") 26. In the Solicitor General's view, "there is hardly an area in which a state would have less of a legitimate interest than this employment relationship." *Id*. at 27, quoting *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1100 (10th Cir. 2015).

To the contrary, barring or limiting reimbursement of a private insurer out of damages awarded in a state tort suit hardly interferes with the federal employment relationship. But preempting such state law across the board does interfere with the complex balancing of competing policies and interests that each state undertakes in developing its law of torts. "Throughout our history," this Court has stated, "the several States have exercised their police powers to protect the health and safety of their citizens." *Medtronic,* 518 U.S. at 475. "In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *Wos v. E.M.A.,* 133 S. Ct. 1391, 1400 (2013), quoting *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 248 (1984). Hence,

federal law must take into account the "legitimate and substantial interest of the State in protecting its citizens" through tort liability. *Farmer v. United Bhd. of Carpenters & Joiners of America*, 430 U.S. 290, 304 (1977).

2. The OPM rule undermines the states' interest in encouraging individuals to insure against harm.

The United States appears to argue that the OPM rule does not undermine the goal of state tort law in compensating victims of wrongful conduct. In the stated view of the Solicitor General, subrogation, which under the OPM contract encompasses reimbursement, U.S. Br. 4, "occurs when the insurer demands repayment from an insured who has recovered twice for the same injury, once from the insurer and again from a third party who caused the loss." *Id*. This is a fundamentally erroneous representation of both the OPM contract and state tort rules.

First, the OPM contract does not limit carriers to reimbursement from funds "from a third party who caused the loss." Indeed, OPM in response to carrier comments on the proposed rule, removed the limitation that reimbursement be obtained from funds paid by a "responsible third party." *See* Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery, 80 Fed. Reg. 29,203, 29,203 (May 21, 2015) ("*Final Rule*"). Instead, the final rule requires carriers to seek reimbursement not only from "payment from any party that may be liable" but also from "any applicable insurance policy, or a workers' compensation program or insurance policy." 5 C.F.R. § 890.101(a). *See also id.* at § 890.106(c) (providing that

contracts must provide that the carrier's right to subrogation or reimbursement arises when the covered individual "is entitled to receive compensation or recovery on the basis of the illness or injury," from any source, "including from insurers of individual (non-group) policies of liability insurance that are issued to and in the name of the enrollee or a covered family member."). This change was specifically directed at allowing reimbursement from uninsured or underinsured motorist coverage paid for entirely by the injured individual. *Final Rule*, 80 Fed. Reg. at 29203. To the extent that the proceeds of plaintiff's own insurance coverage may be diverted to reimburse FEHBA carriers, the rule operates as a disincentive for individuals to insure themselves.

The rule also provides that the carrier may take its reimbursement from a judgment or settlement "first (before any of the rights of any other parties are effectuated) and is not impacted by how the judgment, settlement, or other recovery is characterized, designated, or apportioned. 5 C.F.R. § 890.106(c). In other words, the carrier is entitled to recoupment from the entire judgment or settlement before the plaintiff receives any compensation. Also, it may recoup paid medical expenses from those portions of plaintiff's tort award that were intended to compensate for pain and suffering, lost wages, or property damage. Essentially, the OPM rule shifts the cost of medical expenses paid by the FEHBA carrier to other insurers that did not cause the plaintiff's medical expense or to plaintiff's compensation for other, nonmedical losses.

3. The OPM rule is not addressed to the relatively rare occurrence of "double recovery."

The claim that subrogation or reimbursement simply comes out of the pocket of "an insured who has recovered twice for the same injury," U.S. Br. 4, is a misrepresentation of the reality of state tort liability. Double-recovery is a rare occurrence. In fact, it is far more likely that a seriously injured plaintiff who prevails at trial will not receive even a single recovery for the full extent of his or her injuries.

First, "scholarly research documents that more seriously injured victims tend to recover only a part of their total financial losses, notwithstanding the supposed legal entitlement to full compensation." Kenneth S. Abraham, Robert L. Rabin, and Paul C. Weiler, *Enterprise Responsibility for Personal Injury: Further Reflections,* 30 San Diego L. Rev. 333, 340 (1993). In fact, the consistent "undercompensation [of personal injury plaintiffs] at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System-And Why Not?* 140 U. Pa. L. Rev. 1147, 1218 (1992).

Second, whether the plaintiff has obtained a verdict or a settlement, he or she is often limited to the amount available from the defendant's liability insurer. Far from double recovery, a plaintiff must often settle for a fraction of a single recovery.

Finally, most states have enacted tort rules that limit compensation in order to serve other state

objectives, such as mitigating a perceived liability insurance "crisis," or shielding a group that the state seeks to attract, such as physicians, from full liability for misconduct. *See generally*, Avraham Ronen, *Database of State Tort Reforms*, Northwestern L. & Econ. Res. Paper No. 06-08 (2014) (extensive state-by-state compilation of tort reform legislation enacted after 1980), available at http://ssrn.com/abstract=902711. The effect of these "tort reform" measures is to reduce amount a plaintiff may recover, sometimes far below his or her actual damages.

For example, many states impose a ceiling on the amount of damages that may be awarded to a plaintiff in certain cases. *See* Ronen, *supra*, listing 34 states that limit recoverable damages, most commonly noneconomic damages in medical malpractice cases. These caps significantly reduce both verdicts and settlements. *See* David A. Hyman, Bernard Black, Charles Silver, William M. Sage, *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. Legal Analysis 355, 405-06 (2009). In addition, they often disproportionately undercompensate those plaintiffs who can least afford it. *See* Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. Dayton L. Rev. 307, 337-41 (2006). The OPM rule allows the FEHBA carrier to insist on reimbursement "first" from plaintiffs who have not received a double recovery, but who may have been significantly undercompensated for their actual losses.

Another frequent target of tort reform legislation is the doctrine of joint and several liability. At common law, where two or more persons are liable for a single

and indivisible harm, the plaintiff can recover the entire amount of damages from any of them. Restatement (Second) of Torts § 875 (1979). The plaintiff is entitled to only one recovery, but the fact that one joint tortfeasor is immune from suit, insolvent, or otherwise unavailable does not reduce the liability of another joint tortfeasor for the full amount. *See Id*. at § 880.

Most states have at least partially abolished this common-law doctrine. *See* Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 Ark. L. Rev. 437, 441 (2007) (indicating that 35 states have done so). A typical tort reform measure limits a joint tortfeasor's liability to the percentage of fault allocated by the jury. *See, e.g*., Thomas A. Eaton, *Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. S 51-12-33*, 64 Mercer L. Rev. 15 (2012) (Georgia law). Some states allow allocation of some percentage of fault to nonparties, including those immune from suit. *See id*. at 15 & n. 14. The result is to shift to the plaintiff the risk that one or more joint tortfeasors is not answerable in damages. Yet, even if the plaintiff can recover only a fraction of her actual damages, the OPM rule provides that the carrier be reimbursed for 100 percent of its paid medical benefits, leaving plaintiff with little or no compensation for her other losses.

Limitations on the collateral source rule are also of particular import. The prevailing rule at common law required a tortfeasor to compensate the plaintiff for medical expenses resulting from wrongful injury, regardless of whether those expenses were also covered

by the plaintiff's health plan or insurer. Restatement (Second) of Torts § 920A(2) (1979). *See generally*, Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962). Most states have abolished or altered that rule as well. The American Tort Reform Association, which tracks such legislation, reports that 27 states have done so. See ATRA, Phantom Damages Reform, available at http://www.atra.org/issue/phantom-damages-reform/.

State legislation restricting the collateral source rule closely tracks the state's policy judgments. Some statutes are applicable in all personal injury cases, while others affect specific tort actions. *See*, *e.g.*, Cal. Civ. Code § 3333.1 (medical malpractice cases). Some admit evidence of collateral source payments for the jury's consideration in determining damages. *E.g.,* Colo. Rev. Stat. § 13-21-111.6. Others require the court to deduct such amounts from the verdict before entering judgment. *E.g.*, N.J. Stat. Ann. §2A:15-97 (2000); 40 Pa. Cons. Stat. Ann. § 1303.508.

The purpose of abolishing or restricting the collateral source rule is a state policy decision "to shift the burden, at least to some extent, from the liability and casualty insurance industry to health and disability third-party payers," overriding insurers' right to subrogation. *Perreira v. Rediger*, 778 A.2d 429, 436-37 (N.J. 2001). With these state policy decisions in mind, the OPM rule makes little economic or equitable sense. The rule takes a state tort verdict or settlement from which plaintiff's paid medical benefits have been deducted, then requires plaintiff to reimburse her FEHBA insurer out of that reduced award. *Cf.*

2 American Law Inst., Reporters' Study: Enterprise Responsibility for Personal Injury 182 (1991) (In its thorough examination of the tort system, the ALI states that, for its recommendation to abolish the collateral source rule to make economic sense, "there must be a bar to any subrogation or reimbursement rights exercised by loss insurers against the tort award.").

Lawmakers in Congress surely were aware of these tort reform policy decisions in their states. They could not have intended broad preemption of state antisubrogation laws which would upset those policy decisions without any discussion of subrogation. In addition, Congress could not have intended that federal workers who have been wrongfully injured could face the prospect of recovering little or even becoming financially worse off after successfully holding the tortfeasor liable.

4. The OPM rule undermines state efforts to protect their citizens from the harsh consequences of subrogation and reimbursement.

Due to the harsh impact on victims of wrongful injury, courts at common law prohibited subrogation of personal injury recoveries to recoup medical expenses, until relatively recently. *See* Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D.L. Rev. 237, 239-40 (1996). *See*, *e.g.*, *Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981), and *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986) (both holding plan provisions requiring reimbursement of medical payments void as against public policy). A number of states also banned

subrogation legislatively. *See* Brief For Amici Curiae America's Health Insurance Plans and Association of Federal Health Organizations ("AHIP Br.") 16 (citing anti-subrogation statutes).

Nearly all states that permit subrogation/reimbursement have taken steps to shield their citizens from subrogation's harshest effects. Unsurprisingly, each state strikes a different balance between the interests of injured plaintiffs and first-party insurers, resulting in a "patchwork" of legal and equitable doctrines designed to serve each state's policy judgments. AHIP Br. 16. The two most common doctrines that protect consumers are the "made-whole" doctrine and the "common-fund" rule. Roger M. Baron & Anthony P. Lamb, *The Revictimization of Personal Injury Victims by ERISA Subrogation Claims*, 45 Creighton L. Rev. 325, 330 (2012).

The made-whole doctrine sensibly requires that the plaintiff be compensated for his or her losses before the insurer is repaid for benefits provided. Currently, the overwhelming majority of states that allow reimbursement have adopted the made-whole doctrine. *See* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723 (2005) (summarizing the laws of 32 states applying the doctrine); *see also* David M. Kono, *Unraveling the Lining of ERISA Health Insurer Pockets--A Vote for National Federal Common Law Adoption of the Make Whole Doctrine*, 2000 B.Y.U.L. Rev. 427, 437 (2000).

It is unlikely Congress would have intended to authorize carriers providing health insurance to federal employees to institute actions that were historically

prohibited at common law and which are so antithetical to public policy that the overwhelming majority of states either ban such actions or permit them only after the insured has been made whole. Certainly Congress would not have taken such a drastic step without discussion.

Many states also apply the "common-fund" rule in reimbursement/subrogation cases. *See generally* Association Of Federal Health Organizations, State Survey of Reimbursement Laws in The Health Insurance Context (Feb. 2014), available at http://ermerlaw.com/PDFs/Feb2014%20FHOStateSurveyWithMap.pdf at 1 (map identifying "common-fund" states).

Under this rule, "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *US Airways, Inc. v. McCutchen,* 133 S. Ct. 1537, 1545 (2013) (internal quotation marks and citation omitted). By not requiring FEHBA carriers who are reimbursed out of a judgment or settlement to pay a portion of the plaintiff's attorney fee, as Chief Judge Posner has pointed out, the carrier is allowed "to free ride on the efforts of the [beneficiary's] attorney." *Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Wells,* 213 F.3d 398, 402 (7th Cir. 2000). It might also leave a plaintiff "worse off . . . than she would have been had she not sued" at all. *Id*.

By discouraging FEHBA beneficiaries from pursuing meritorious tort lawsuits, the OPM rule undermines the other policy objective of state tort law: the deterrence of unreasonably dangerous conduct and

the promotion of investment in safety. *See* American Bar Association, Towards a Jurisprudence of Injury 4-3 (1984) (deterrence of misconduct is "a strong thread running through tort law"); Guido Calabresi, The Costs of Accidents 68-129 (1970) (tort liability acts as specific and general deterrent to accidents); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages,* 56 S. Cal. L. Rev. 133, 137 (1982) ("There is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers.").

The OPM rule undermines this deterrence, leading inevitably to an increase in accidental injuries. Some of the resulting medical expenses, of course, will be paid by FEHBA carriers and paid for by the federal government and federal workers.

In sum, the issue here is not a matter of undoing double recoveries. Rather, the question is: Who shall bear the risk that a tort recovery will not be sufficient to make the plaintiff whole for his or her injuries? *See, e.g.*, Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997). Amicus submits that the medical benefits plan, which has accepted payment for coverage of the beneficiary's medical expenses and is in the business of spreading the costs of medical expenses, is the appropriate party to bear that risk. This is consistent with the intent and purpose of Congress in creating a program to provide insurance to federal employees.

III. SUBROGATION/REIMBURSEMENT IS NOT AN EFFECTIVE OR APPROPRIATE COST-CONTAINMENT MEASURE.

A. Savings To the Federal Government and Federal Employees Is Vanishingly Small.

The primary policy argument advanced in support of the broad subrogation/reimbursement rule promulgated by OPM is that the income recovered back from injured beneficiaries reduces the costs that must be borne by the federal government and health plan participants. Pet. Br. 33 (Such recoveries "translate to premium cost savings for the federal government" (thus taxpayers) and FEHB enrollees."), quoting OPM, *Final Rule*, 80 Fed. Reg. at 29,203. *See also* U.S. Br. 19 (similar); AHIP Br. 12-14 (similar).

In support of its subrogation rule as a cost-savings measure, OPM boasts that in 2014, "FEHB carriers were reimbursed by approximately $126 million in subrogation recoveries." *Final Rule*, *supra*. However, neither OPM nor the Solicitor General indicate how much of those recoveries actually went to the Treasury Fund or was used to reduced premiums.[2]

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[2] AHIP erroneously states that "that reimbursement and subrogation recoveries save the FEHB Program – and the enrollees and taxpayers who fund it – over $125 million per year." AHIP Br. 14. In fact, OPM explicitly states that its figure represents the amount recovered by carriers. It is unknown how much of that amount, if any, was savings to the federal government and enrollees.

AHIP explains that FEHBA carriers charge for health coverage in two ways. Petitioner in this case is a community-rated entity which "receives a 'per member per month capitation rate' for each member enrolled in the plan." AHIP Br. 8, quoting 42 C.F.R. § 1602.170-2. Community-rated carriers are not required to return any money recovered in subrogation to the Treasury Fund *See* Pet. Br. 11. Nevertheless, AHIP contends that subrogation/reimbursement by community-rated carriers results in savings because the "premiums that community-rated carriers charge generally depend on the expected cost of providing benefits," and subrogation recoveries "tend to reduce those expected costs, and thus the premiums." AHIP Br. 14.

AHI offers no documentation of any direct relationship between subrogation recoveries and reduced premiums. In the private sector, as one authority states, "simply because an insurer has the opportunity to recover reserves and become financially healthy, this opportunity does not directly translate into premium reductions." Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595, 630 (2004).

Professor Baron explains:

> The prospect of a successful subrogation collection is not a factor in the insurer's rate determination. In fact, the conjectural and remote nature of subrogation militates against its inclusion as a factor for consideration in the setting of premium rates.

Roger M. Baron, *Pandora's Box*, 41 S.D.L. Rev. at 244. *See also* Keith E. Edeus, Jr., *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*, 17 N. Ill. U. L. Rev. 509, 515 (1997) (Health insurance "premiums themselves are calculated based upon the losses actually incurred, . . . and do not take subrogation recoveries into account."). The fact is, there are other uses for subrogation receipts. *See* Scott M. Aronson, *ERISA's Equitable Illusion: The Unjustice of Section 502(a)(3)*, 9 Employee Rights & Employment Policy J. 247, 286 (2005) ("Subrogation recoveries are used to increase executive compensation or shareholder dividends, not to decrease premiums.").

Experience-rated plans, by contrast, receive premiums based on "actual paid claims." AHIP Br. 8. Such plans "must return all reimbursement and subrogation recoveries (net of the expenses in obtaining the recoveries) directly to the Treasury Fund set up to finance the FEHB Program." AHIP Br. 13.

Of course, "net of the expenses in obtaining the recoveries" can diminish the amount returned to the Treasury Fund substantially. The task of recovering such reimbursements is often outsourced to third party collectors. In this case, for example, the carrier retained ACS Recovery Services, Inc. for that purpose. Indeed, a recoupment industry has developed to pursue those who have received health insurance benefits for possible reimbursement. Most companies specializing in obtaining reimbursement for health benefit plans "charge based on a tiered pricing model, which can range from 20-40%" of the recovery. Sedgwick Claims Management Services, *Central Subrogation* (2012), *available at* https://www.sedgwickcms.com/services/

docs/SubrogationOverview.pdf. In addition, the carrier is entitled to cover its own administrative costs and attorney fees. Neither Petitioner nor supporting amici provide figures that would support the proposition that experience-rated carriers return substantial amounts to the program's Treasury Fund out of subrogation/reimbursement recoveries or that community-rated carriers have appreciably reduced their premiums.

Even if the entire $126 million recovery were applied to the program, with no deductions for the carriers' costs and fees, the savings would be vanishingly small. OPM states that the federal government's 70 percent share of the program's cost amounted to about $33 billion in 2014, so the entire cost for the government and enrollees was approximately $47.1 billion. $126 million would represent a savings for the program of about $2.60 annually for every $1,000 in premiums.

B. The OPM Rule Requiring Injured Individuals To Bear the Financial Burden of Injury In Order To Allow Uninjured Enrollees a Small Savings Is Inconsistent With the Health Insurance Plan Congress Put In Place.

Even accepting for the moment the contention that the OPM rule would result in a small reduction in the premiums paid by federal workers and the federal government, the rule is inconsistent with Congress's purpose in enacting the FEHBA.

It is a truism that in ascertaining the scope of federal preemption of state law, "the purpose of

Congress is the ultimate touchstone." *Medtronic,* 518 U.S. at 485, citing *Cipollone*, 505 U.S. at 516. The United States argues that "Section 8902(m)(1) advances Congress's goals of 'reducing health care costs,'" U.S. Br. 19, quoting OPM, *Final Rule*, 80 Fed. Reg. at 29,203.

This is too narrow a view. The inquiry into the intent of Congress does not focus on the preemption provision in isolation. As this Court has explained, congressional intent is discerned not only from the text of the preemption provision but also from "the structure and purpose of the statute as a whole." *Medtronic*, 518 U.S. at 486. The reviewing court must bring to this inquiry its "reasoned understanding of the way in which Congress intended *the statute and its surrounding regulatory scheme* to affect business, consumers, and the law." *Id*. (emphasis added).

Congress's stated goal when it enacted FEHBA in 1959 was to provide

> [P]rotection for civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical services through a comprehensive government-wide program of insurance for federal employees . . . the costs of which will be shared by the Government, as employer, and its employees.

H.R. Rep. No. 86–957, at 1 (1959), reprinted in 1959 U.S.C.C.A.N. 2913, 2914.

The principle of insurance allows a large pool of individuals who have not yet suffered loss to pay a relatively modest amount so that a few individuals among them who do suffer loss will be compensated.

OPM's subrogation rule is quite the opposite. It takes away compensation from those who have suffered loss in order to confer a very small financial benefit on the pool of uninjured individuals This was not the intent of the FEHBA and its surrounding regulatory scheme. This is insurance running in reverse.

Congress certainly did not intend for its insurance program for federal employees to operate this way. Congress did not intend to save money by shifting costs to workers compensation or other insurance. It did not intend to discourage individuals from holding tortfeasors accountable for the harms they cause.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Missouri Supreme Court.

Respectfully submitted,

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January 24, 2017