No. 09-38

IN THE
Supreme Court of the United States

HEALTH CARE SERVICE CORPORATION,

Petitioner,

v.

JULI A. POLLITT and MICHAEL A. NASH,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14, completely preempts -- and therefore makes removable to federal court -- a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA.

2. Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state court suits brought against persons "acting under" a federal officer when sued for actions "under color of [federal] . . . office," encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

STATEMENT PURSUANT TO RULE 29.6

Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, is not a publicly traded company, and no publicly held company owns ten percent or more of its stock. It has no parent corporation.

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JURISDICTION

The judgment of the court of appeals was entered on March 10, 2009. Petitioner timely filed a petition for rehearing and for rehearing *en banc*. The court of appeals denied the petition on April 8, 2009. The petition for a writ of certiorari was filed on July 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutes and regulations are reprinted in Appendix E to the petition for a writ of certiorari, at Pet. App. 11a-19a.

STATEMENT

This case presents questions concerning the federal courts' removal jurisdiction. The critical event leading to the underlying lawsuit was the federal government's mistaken direction to terminate retroactively the enrollment of Respondents' minor child in one of the government's health benefits plans for federal employees. Petitioner Health Care Service Corporation ("HCSC"), an administrator of the relevant plan, followed the government's instruction and began the process of recouping benefits previously paid on the minor's behalf, as required by the government contract detailing HCSC's obligations. A short time later, the

government corrected its error, the minor was re-enrolled, and HCSC rescinded the recoupment requests.

Respondents in the meantime had commenced an action to compel the minor's re-enrollment, to stop the retroactive denials of benefits, and for $12 million in damages for alleged emotional distress. Although the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14, and its implementing regulations, in conjunction with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, set forth federal remedies for Respondents' grievances to be pursued solely against the government in federal court, Respondents sued *HCSC* in *state court* under *state law*. HCSC removed the case to federal court, and the district court thereafter found jurisdiction and dismissed the case as preempted by FEHBA. The court of appeals, however, erroneously reinstated the lawsuit, rejecting two different meritorious grounds for removal. First, the available federal remedies "completely preempt" state law and therefore make Respondents' case removable to federal court. Alternatively, the federal officer removal statute, 28 U.S.C. § 1442(a)(1), authorizes removal because HCSC was acting in furtherance of its duties under a federal program supervised by a federal agency.

A. Statutory, Regulatory, and Contractual Regime

1. *The Service Benefit Plan*. As described in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 682 (2006), the Court's only prior decision involving FEHBA, Congress in FEHBA "establishe[d] a comprehensive program of health insurance for federal employees." The statute "authorizes the Office of

Personnel Management (OPM) to contract with private carriers to offer federal employees an array of health-care plans." *Id.*; *see also* 5 U.S.C. § 8902(a). "Largest of the plans for which OPM has contracted annually, since 1960, is the Blue Cross Blue Shield Service Benefit Plan (Plan), administered by local Blue Cross Blue Shield companies." *Empire*, 547 U.S. at 682. In recent years, the Blue Cross and Blue Shield Association ("BCBSA") -- the Plan's designated "carrier" -- has negotiated and signed the contract, known as "CS 1039," on behalf of local Blue Cross and Blue Shield companies, who then administer the Plan in their respective localities. *See id.* at 683-84; *see also* J.A. 12, 57-58. HCSC is the local company administering the Plan in Illinois.

2. *Enrollment Procedures*. FEHBA specifically addresses enrollment in FEHBA plans, including an express delegation to OPM to issue governing regulations. *See* 5 U.S.C. §§ 8905, 8913(b)-(c). Under OPM's regulations, federal employees enroll in the Plan through the particular federal agency for which they work. *See id.* § 8905(a); 5 C.F.R. §§ 890.101(a), 890.102, 890.104; *see also* 5 C.F.R. Pt. 890, subpts. C, D, and K. CS 1039 emphasizes that the government, not the carrier, is responsible for enrollment. *See* J.A. 34 (comprehensive listing of coverage issues that "shall all be determined in accordance with regulations or directions of OPM given pursuant to [FEHBA].").

Once enrolled in the Plan, enrollees are responsible for about 25% of the premium, with the government paying the remainder. *See* 5 U.S.C. § 8906(b)(1), (b)(2), (f). The enrollees' and the government's contributions are placed in a fund in the U.S. Treasury, from

which the Blue Cross and Blue Shield entities draw directly to pay benefits. *See id.* § 8909(a); 48 C.F.R. § 1632.170(b); *see generally Empire*, 547 U.S. at 684.

3. *Enrollment Disputes*. With respect to enrollment disputes, OPM's regulations provide for administrative review within the pertinent federal employing federal agency. *See* 5 C.F.R. § 890.104. The employing agency first makes an "initial decision" on any enrollment issues, and then an affected individual may seek reconsideration, which yields a "final decision . . . in writing." *Id.* OPM's regulations also address judicial review thereafter, specifying that "[a] suit to compel enrollment . . . must be brought against the employing office that made the enrollment decision." *Id.* § 890.107(a).

4. *Benefits Provisions*. OPM's "contracts with carriers, FEHBA instructs, 'shall contain a detailed statement of benefits offered.'" *Empire*, 547 U.S. at 684 (quoting 5 U.S.C. § 8902(d)); *see also* 5 U.S.C. § 8907(b). CS 1039, accordingly, instructs the carrier to provide benefits in accordance with an "appended brochure" that outlines at length the panoply of medical costs the Plan will reimburse. *Empire*, 547 U.S. at 684.

CS 1039 also details the actions the carriers are required to take to recapture benefits erroneously paid. The contract provides: "If the Carrier or OPM determines that a Member's claim has been paid in error for any reason (except fraud and abuse), the Carrier shall make prompt and diligent effort to recover the erroneous payment to the member from the member or, if to the provider, from the provider." J.A. 40.

5. *Benefits Disputes*. FEHBA and OPM's regulations likewise demarcate the remedy for benefits disputes. Under FEHBA, OPM contracts must require the carrier to cover a health service if OPM "finds that the employee . . . is entitled thereto under the terms of the contract." 5 U.S.C. § 8902(j). OPM has implemented this provision by establishing a mandatory administrative remedy at OPM for those who believe that a FEHBA plan has wrongfully denied benefits. *See* 5 C.F.R. §§ 890.105, 890.107(d)(1).

OPM's regulations also provide that any court litigation over benefits may be brought only as an action *against OPM* for judicial review of its administrative decision. *See id.* § 890.107(c) (emphasis added). The regulations state that litigation "must be brought against OPM and not against the carrier or carrier's subcontractors." *Id.* In addition, no suit whatsoever shall be commenced "prior to exhaustion of the [OPM] administrative remed[y]." *Id.* § 890.107(d)(1). "The recovery in such a suit shall be limited to a court order directing OPM to require the carrier to pay the amount of benefits in dispute." *Id.* § 890.107(c). A jurisdictional provision in FEHBA ensures that these suits, and the suits to compel enrollment described earlier, may proceed in federal court: "The district courts of the United States have original jurisdiction, concurrent with the United States Court of [Federal] Claims, of a civil action or claim against the United States founded on this chapter." 5 U.S.C. § 8912.

6. *FEHBA's Preemption Provision*. FEHBA contains an express preemption provision. As amended in 1998, 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). In enacting the current preemption language, which "broaden[ed]" an earlier version (H.R. Rep. No. 105-374, at 9 (1997)), Congress sought "[t]o assure uniform coverage and benefits under plans OPM negotiates for federal employees," *Empire*, 547 U.S. at 686, and to "confirm" that FEHBA contract terms on benefits and coverage "completely displace" state law. H.R. Rep. No. 105-374, at 16.

B. The Lawsuit

Respondent Juli Pollitt is an enrollee in the Service Benefit Plan. *See* J.A. 96-97, 124. Through her enrollment, HCSC also had, from 1993 to July 2007, provided benefits to her minor son, as her dependent. *See id.* at 96-99. In October 2003, Ms. Pollitt went on medical leave from her employer, the Department of Energy ("DOE"), at which point her employer technically became the Department of Labor ("DOL"). *Id.* at 124.

In June 2007, in response to an "enrollment reconciliation report" conducted by BCBSA comparing its enrollment data with data provided by employing agencies, the DOL sent BCBSA a form instructing that, since "10-19-03," Ms. Pollitt's coverage had actually been under "Enroll Code 104" or "Self" coverage, not "Enroll Code 105" or "Self and Family" coverage.

J.A. 97, 100; *see generally* 5 C.F.R. § 890.110(b) (outlining carrier's obligation routinely to conduct enrollment data reviews and seek employing agency's direction on discrepancies). Consistent with the DOL's instructions from the form, Ms. Pollitt thereafter received a new Plan identification card reflecting the retroactive termination of the minor's enrollment, *see* J.A. 129; and HCSC, pursuant to its government contract obligations (*see supra* p. 4), began the process of requesting from providers who had rendered services to the minor after October 2003 refunds of any Plan payments. *See* J.A. 128-29.

Ms. Pollitt, joined by the minor's father, Respondent Michael Nash, who is not an enrollee in the Plan, then commenced the underlying action in state court. The original complaint sought re-enrollment of the minor in the Plan, challenged the retroactive denial of benefits earlier paid on his behalf, asserted that HCSC acted in bad faith in administering his coverage, and demanded more than $12 million in damages. *Id.* at 81-82.

A few weeks later, HCSC received a copy of a letter from DOE to DOL directing that the minor should be reinstated because the earlier instruction had been a mistake; two days later, the minor was reinstated. *Id.* at 97, 102-03. HCSC informed Ms. Pollitt that her son had been reinstated in the Plan and that it would rescind any refund requests. *See id.* at 84.

Based on the allegations in the original complaint, HCSC timely removed the case to the U.S. District Court for the Northern District of Illinois.

C. Proceedings in Federal Court

Once pending in federal court, HCSC moved to dismiss some of the claims in the original complaint as moot, because by then the minor had been re-enrolled and HCSC had reversed the retroactive denials of benefits. HCSC also moved to dismiss all claims on grounds of FEHBA preemption and to dismiss Mr. Nash's claims for lack of standing.

The district court granted the motion to dismiss the original complaint, but also granted leave to amend the complaint. Pet. App. 10a. In the amended complaint, and then in a second amended complaint that became the operative pleading, Respondents continued to challenge the alleged retroactive denial of benefits for their son, alleging that HCSC had not rescinded earlier refund requests. *See* J.A. 116-17, 119, 129-30, 132. Respondents also continued to assert bad faith, seeking $1.8 million in compensatory and punitive damages. *See id.* at 132. Respondents at no time moved to remand the case to state court.

The district court then dismissed the second amended complaint, finding that "this case was properly removed from state court, that plaintiff Nash has no standing in this action, and that plaintiff Pollitt's claims are preempted and precluded by federal law." Pet. App. 8a.

The district court explained that grievances concerning enrollment in and benefits under the Plan are subject exclusively to federal remedies. The court noted that "Pollitt's remedy is governed by federal regulation[s] that require[] suits to compel enrollment to be brought 'against the [federal agency] employing office that made the enrollment decisions.'" *Id.* at 7a

(quoting 5 C.F.R. § 890.107(a)). The court also emphasized that "all litigation involving benefits 'must be brought against OPM and not against the carrier or carrier's subcontractors.'" Pet. App. 7a (quoting 5 C.F.R. § 890.107(d)(1)). Pointing to OPM's establishment of "an administrative review mechanism to prosecute claims concerning FEHBA benefits and administration of FEHBA plans" (*id.* at 8a), the court ruled that "plaintiffs were required to prosecute their grievances through the administrative process." *Id.*

Summing up its analysis, the district court said it "share[d] plaintiffs' frustration about the course of conduct that led to their complaint, but note[d] that defendant was merely following the instructions of its principal, DOE." Pet. App. 8a. It added: "The temporary disenrollment of plaintiffs' son no doubt caused a great deal of anxiety and inconvenience to them. If they have any remedy . . . at all, however, it lies in the administrative process, not this civil suit." *Id.*

On appeal, the court of appeals vacated the decision of the district court and remanded for further proceedings. It reached only the question of the district court's jurisdiction.

The court of appeals first rejected removal jurisdiction under "complete preemption," which the court described as a "misleadingly named doctrine that applies when federal law *has occupied a field*, leaving no room for any claim under state law." *Id.* at 2a-3a (emphasis added). The court then concluded that this Court's decision in *Empire* precluded removal because it "holds that federal law does not completely occupy the field of health-insurance coverage for federal workers." *Id.* at 3a.

The court of appeals next addressed jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which it characterized as allowing "'any person acting under' a federal officer [to] remove a suit that depends on the defendant's following the directions issued by that federal officer." Pet. App. 3a. Rather than credit the district court's finding that HCSC "was merely following the instructions of its principal," *id.* at 8a -- a finding based on a sworn declaration, *see* J.A. 97 -- the court of appeals emphasized Respondents' allegations, including that HCSC "acted unilaterally" in terminating Ms. Pollitt's family coverage. Pet. App. 3a. The court accordingly remanded the case for evidentiary proceedings to determine whether HCSC "did nothing but carry out the Department of Labor's instructions." *Id.* at 3a-4a.

The court of appeals then gave instructions to guide the inquiry on remand. It said that, "[t]o the extent HCSC was doing nothing but following the agency's orders, the case belongs in federal court." *Id.* at 4a. In that event, the court advised that the case "must be dismissed . . . because suits related to a federal agency's health-benefit-coverage decisions must name the Office of Personnel Management or the employing agency rather than the insurance carrier." *Id.* By contrast, the court stated, if there was no specific directive from DOL to change Pollitt's coverage, "this case must be remanded," and if there was no specific DOL directive to recover past benefits, "the claim for precipitate, mistaken recoupment should be remanded." *Id.*

SUMMARY OF ARGUMENT

I. This case raises a federal question under the complete preemption doctrine. Under this Court's

clarifying decision in *Beneficial National Bank v. Andersen*, 539 U.S. 1, 8 (2003), a state court action is completely preempted, and therefore removable to federal court, if federal law provides the exclusive cause of action for the claim asserted. Here, a combination of FEHBA provisions, OPM's regulations, and the APA create an intricate federal enforcement regime for disputes regarding FEHBA-plan enrollment and benefits. Moreover, all of the claims in the original complaint, which was the pleading in effect at the time of removal and is therefore the focus for removal jurisdiction, were cognizable under the federal remedies. Because Respondents sought to compel enrollment in the Plan for their son, they could have, under the federal enforcement scheme, filed an administrative appeal at the employing agency, followed by judicial review against that agency in federal court; likewise, given that they disputed HCSC's decision retroactively to deny benefits to the minor as a result of the enrollment termination, Respondents could have filed an administrative appeal at OPM, followed by judicial review against OPM in federal court.

In light of a variety of considerations, the Court should deem these federal remedies to be exclusive. The complexity of the remedies indicates that they are exclusive, for Congress and OPM would not have created them with such care had they expected alternative state law causes of action to be available. Next, Congress's intent behind FEHBA's express preemption clause signifies that the federal remedies are exclusive. The timing and circumstances surrounding the amendment of the preemption clause show that Congress acted specifically to ensure complete preemption. And the Court's decision in *Empire HealthChoice*

Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006), bolsters exclusivity, both because the Court there stated that FEHBA benefits disputes properly are adjudicated in federal court and because, under the test for the application of federal common law noted in *Empire*, federal substantive law (the application of which is a relevant consideration for determining if a federal remedy is exclusive) governs controversies over enrollment and benefits under the Plan.

II. In the alternative, the federal officer removal statute, 28 U.S.C. § 1442(a)(1), authorizes removal jurisdiction in this case. This statute is liberally construed to effectuate its purpose of protecting the federal government from the interference that might ensue if potentially hostile state courts rule on federal defenses associated with the government's operations. HCSC meets the three requirements for removal under § 1442(a)(1): (1) it was "acting under" a federal officer; (2) the acts underlying the complaint were performed in the course of HCSC's duties; and (3) HCSC has colorable federal defenses.

HCSC has the requisite "triggering relationship" that allows it to invoke the statute as someone "acting under" a federal officer because its administration of the government's health benefits program for federal employees is "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson v. Phillip Morris Cos.,* 551 U.S. 142, 149, 152 (2007). Congress established the FEHBA program as a joint effort in which OPM is the chief actor that, among other things, determines benefits and enrollment criteria, issues regulations, and contracts with private carriers for day-to-day administration. The carrier's

administration role includes implementing the government's enrollment directives and making initial benefit determinations that are subject to review and final decision by OPM.

HCSC acted under color of federal office because there is a causal connection between the acts underlying Respondents' allegations and HCSC's performance of its duties. Taking actions concerning enrollment and benefit determinations are at the core of HCSC's contractual obligations under the Plan.

HCSC has at least three colorable federal defenses: (1) conflict preemption based on the incompatibility of state law claims with the federal rules and procedures for resolving enrollment and benefits disputes; (2) express preemption under 5 U.S.C. § 8902(m)(1); and (3) sovereign immunity because the relief sought by Respondents would expend itself on the federal Treasury.

ARGUMENT

The jurisdictional questions presented in this case arise in the removal setting. To determine whether removal jurisdiction exists, the federal courts are "to look at the case as of the time it was filed in state court." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 390 (1998). "[T]he plaintiff's complaint is controlling," and an "amendment of [the] pleadings . . . does not deprive the district court of jurisdiction." *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 291, 292 (1938). In this case, the original complaint (and, in any event, the second amended complaint as well) fell within the federal courts' removal jurisdiction both because it raised a federal question and because of the federal officer removal statute.

I. Removal Jurisdiction Exists Because the Case Raises a Federal Question

A. Under the Complete Preemption Doctrine, There Is a Federal Question if an Exclusively Federal Cause of Action Is Available for the Claims Asserted

The district court got it right, and the court of appeals got it wrong: HCSC properly removed this case because the suit raises a federal question. Under 28 U.S.C. § 1441(a), removal jurisdiction extends to state court suits over which "the district courts of the United States have original jurisdiction," such as federal question cases under 28 U.S.C. § 1331. Further, if one claim in a state court case raises a federal question and is therefore removable, the federal court has supplemental jurisdiction to adjudicate any other claims. *See* 28 U.S.C. §§ 1367, 1441(c); *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164-65 (1997).

The general rule is that federal question jurisdiction is determined under the "well-pleaded complaint" rule. *See, e.g.*, *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). Therefore, "a case may not be removed to federal court on the basis of a federal defense." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 14 (1983). One "exception," however, is the "complete pre-emption" doctrine. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). "'[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption,' the state claim can be removed." *Id.* (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, (2003)). "Although federal preemption is ordinarily a defense, 'once an area of state law has been completely pre-empted, any claim

purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law.'" *Rivet*, 522 U.S. at 476 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)).

The Court first authorized removal under complete preemption in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), which involved claims governed by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Next, the Court found that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, can completely preempt state law claims. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987); *see, e.g.*, *Aetna*, 542 U.S. at 214. Most recently, the Court found that the National Bank Act, 12 U.S.C. §§ 85-86, completely preempts state law usury claims against national banks. *Beneficial Nat'l Bank*, 539 U.S. at 9-11.

Beneficial National Bank, now the leading decision on complete preemption, established what even the dissenters in that case termed a "straightforward" test for removal under the doctrine. *Id.* at 16 (Scalia, J., dissenting). There, the Court explained that, in light of the "framework" adopted in *Avco* and *Metropolitan Life*, "the dispositive question" was "[d]oes the National Bank Act provide *the exclusive cause of action* for usury claims against national banks?" *Id.* at 9 (emphasis added). "If so, then the cause of action necessarily arises under federal law and the case is removable." *Id.* "If not, then the complaint does not arise under federal law and is not removable." *Id.*

In concluding that the National Bank Act set forth an exclusively federal remedy for usury claims, the

Court looked to the statutory framework and other sources. The Court noted that the statute contained a substantive provision specifying what constitutes a usurious level of interest for national banks and a second remedial provision mandating forfeiture and allowing a person who pays excessive interest to recover double the amount by filing "an action in the nature of an action of debt." *Id.*; *see* 12 U.S.C. § 86. Then the Court stated that it had previously "endorsed" the exclusivity of the federal remedy in its precedents by holding "that 'federal law . . . completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.'" 539 U.S. at 10 (quoting *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 114 (1919)). Finally, the Court emphasized the policy necessity for exclusivity, stating that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" *Id.* (quoting *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)).

Because the National Bank Act "provide[s] the exclusive cause of action for such claims," the Court concluded, "there is . . .no such thing as a state-law claim of usury against a national bank." 539 U.S. at 11. Accordingly, "[e]ven though the complaint makes no mention of federal law," the case "only arises under federal law" and can "be removed under § 1441." *Id.*

B. Federal Law Establishes Exclusive Causes of Action for the Claims Here Asserted

The dispositive question, then, in a case in which a defendant removes based on complete preemption is whether "federal law provides the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank*, 539 U.S. at 8. For purposes of analysis here, the question divides into three parts: (1) does federal law provide a relevant cause of action? (2) do the claims asserted by Respondents fit that cause of action? and (3) if so, is the cause of action exclusive?

1. FEHBA, in Conjunction with the Administrative Procedure Act, Establishes Causes of Action for Enrollment and Benefits Disputes

Federal law authorizes two remedies relevant to this case: one for disputes about enrollment and one for disputes concerning benefits.

With respect to enrollment, Congress in FEHBA delegated to OPM the authority to prescribe regulations (*see* 5 U.S.C. § 8913(b)), which specify a detailed administrative process for disputes over enrollment. *See* 5 C.F.R. § 890.104. The relevant agency's employing office makes an initial decision regarding enrollment matters, an aggrieved party may seek reconsideration from the agency, and the agency must issue a final decision setting forth its findings. *See supra* p. 4. After that, an aggrieved individual may commence "[a] suit to compel enrollment" against the employing office of the relevant agency. 5 C.F.R. § 890.107(a). FEHBA's jurisdictional section expressly authorizes that suit to be brought in federal court. 5 U.S.C. § 8912.

The precise cause of action available in the suit to compel enrollment is a judicial review claim under the APA. *See* 5 U.S.C. §§ 701-06. The APA presumptively applies whenever an aggrieved party challenges final federal agency action. *See Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review."); *accord Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 n.9 (1987).

With regard to benefits disputes, Congress in 5 U.S.C. § 8902(j) instructed OPM to adjudicate individual grievances over benefits. Under the administrative regime established by OPM, carriers make initial benefits determinations, and the enrollee may seek reconsideration from the carrier and then file an administrative appeal with OPM. *See supra* p. 5. Once OPM issues a final decision, the enrollee, if still aggrieved, "may seek judicial review" under the APA, but that suit "must be brought against OPM and not against the carrier or the carrier's subcontractors." 5 C.F.R. § 890.107(c). Again, because of FEHBA's jurisdictional section, the federal courts have jurisdiction over the lawsuit against OPM. *See Muratore v. OPM*, 222 F.3d 918, 920 (11th Cir. 2000) ("We review OPM's actions pursuant to the FEHBA under the Administrative Procedure Act"); *accord Bryan v. OPM*, 165 F.3d 1315, 1318-19 (10th Cir. 1999).

2. The Federal Remedies for Enrollment and Benefits Disputes Apply to the Claims Asserted in This Case

On enrollment, the original complaint, filed just after termination of the minor's coverage, alleged that Ms. Pollitt had family coverage under the Plan and that HCSC wrongfully "removed her minor child . . . from coverage"; additionally, the original complaint sought a court order "directing Defendant to provide medical coverage for Plaintiffs' minor child." J.A. 81. Respondents could have used the federal remedy to pursue their enrollment grievance -- filing an administrative claim at Ms. Pollitt's employing agency under 5 C.F.R. § 890.104, followed by a federal suit to compel the minor's enrollment if no administrative relief was forthcoming.

As to benefits, the original complaint alleged that HCSC "deemed to be improper" the payments made on the minor's behalf during the retroactive period and insisted that the benefits "would have to be returned." J.A. 78, 79. Respondents requested, in their prayer for relief, that a court "[e]nter judgment for Plaintiffs and against Defendant, directing Defendant to honor all medical insurance claims for their minor child . . . for the period of time from June 16, 1993 to July 30, 2007." *Id.* at 81. Because HCSC had determined that benefits should not be paid for the retroactive period, Respondents were entitled to file an appeal with OPM under 5 C.F.R. § 890.105 to challenge that benefits determination and, if unsuccessful, to seek "judicial review of OPM's final action on the denial of [the] health benefits claim[s]." *Id.* § 890.107(c).

The last category of claims in the original complaint alleged bad faith by HCSC in its handling of the enrollment and benefits matters (J.A. 79), and these allegations too are subject to the federal remedies for enrollment and benefits controversies. This Court, in other benefits contexts, has consistently refused to permit litigants to avoid otherwise applicable federal remedies by recasting their claims in tort. For instance, in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the Court held that ERISA's remedies completely preempted state law tort claims deriving from benefits denials. The Court explained that "distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of [the federal statute] . . . simply 'by relabeling their contract claims as claims for tortious breach of contract.'" *Id.* at 214 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (LMRA context)); *see also United Steelworkers v. Rawson*, 495 U.S. 362, 371 (1990) (LMRA context).

The Court should apply the same principle in the FEHBA setting. Here, the original complaint's bad faith allegations are just a different gloss on the challenges concerning enrollment and retroactive benefits denials. Respondents rely on the same predicate facts, add some averments that HCSC engaged in "intentional, willful and wanton acts," and then request compensatory and punitive damages. J.A. 81-82; *cf. Allis-Chalmers*, 471 U.S. at 219 ("nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract"). Since the tort claim is "derivative" of the

claims challenging the enrollment and benefits determinations, it must be subject to the very same remedies. *Id.*[1]

3. The Federal Remedies for Enrollment and Benefits Disputes Are Exclusive

The next inquiry is whether the federal remedies for FEHBA enrollment and benefits grievances, which apply to Respondents' claims, are exclusive. The Court in *Beneficial National Bank* did not establish a rigid formula for determining when a federal cause of action shall be deemed exclusive. There, for its exclusivity finding, the Court relied on its prior constructions of the statute and the need for uniform regulation of national banks. Elsewhere, in *Avco*, the Court rested on the LMRA's jurisdictional provision to find complete preemption, *see* 390 U.S. at 559; in *Metropolitan Life*, the Court relied on ERISA's legislative history indicating that Congress sought to copy the jurisdictional rules applicable to the LMRA. *See* 481 U.S. at 65-66.

Just as with the federal remedies under the National Bank Act, the LMRA, and ERISA, the federal causes of action with respect to FEHBA enrollment and benefits

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[1] Though we here have centered on the original complaint, given that the allegations at the time of removal govern for removal jurisdiction purposes, the claims in the second amended complaint equally fall within the scope of the federal causes of action. The second amended complaint continued to assert wrongful benefits denials, maintaining that HCSC has not halted efforts to recoup benefits. J.A. 130. And the rest of the allegations address the bad faith claim. *Id.* at 128-30. Hence, the jurisdictional analysis would be the same even if the currently operative pleading were the focus.

disputes are exclusive. Their exclusivity derives from the statute's delegation of authority to OPM, OPM's detailed regulations creating administrative procedures, the APA, and FEHBA's jurisdictional section -- all of which combine to form an intricate enforcement scheme that cannot countenance alternative remedies. Congress's intent with respect to FEHBA's express preemption clause also strongly favors a finding that the federal remedies are exclusive. *See Metropolitan Life*, 481 U.S. at 66 ("[T]he touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress."); *see also Beneficial Nat'l Bank*, 539 U.S. at 9 (the "proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive"). In addition, this Court's decision in *Empire Health-Choice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), confirms the exclusive nature of the federal remedies.

Before turning to the indicia of exclusivity, it helps set the stage to note that every lower court recently to have addressed the issue has held that the FEHBA enforcement scheme is exclusive. *E.g.*, *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 398 (9th Cir. 2002); *Bryan*, 165 F.3d at 1318-19; *Kight v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 34 F. Supp. 2d 334, 342 (E.D. Va. 1999); *Bridges v. Blue Cross & Blue Shield Ass'n*, 935 F. Supp. 37, 41 (D.D.C. 1996). The court of appeals in this case did not think otherwise. It said that -- if a jurisdictional basis could be found -- Respondents' case should be dismissed because their suit, under OPM's regulations, "*must* name as the defendant the Office of Personnel Management or the employing agency rather than the insurance carrier" (Pet. App. 4a (emphasis added)), a

signal that the court of appeals recognized the FEHBA administrative scheme plus judicial review as the only available enforcement mechanism. The court of appeals went astray only because it miscomprehended the complete preemption test by focusing on occupation of a field rather than exclusivity. *See infra* pp. 33-34.

a. The Relevant Statutory Provisions and Regulations Creating the Federal Remedies Compel Exclusivity

FEHBA's civil enforcement regime is "complex," interweaving various statutory and regulatory provisions. *Botsford*, 819 F.3d at 396. The starting point is Congress's delegation of authority to OPM not just to "prescribe regulations necessary to carry out [FEHBA]," 5 U.S.C. § 8913(a), but even more specifically on enrollment to "prescribe the time at which and the manner and conditions under which an employee is eligible to enroll." *Id.* § 8913(b). On benefits, Congress provided that "each [FEHBA] contract . . . shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as *the Office* considers necessary or desirable." *Id.* § 8902(d) (emphasis added). Still further, Congress amended FEHBA in 1974 to require that "[e]ach [FEHBA] contract shall require the carrier to agree to pay for or provide a health service or supply in an individual case if *the Office* finds that the employee [or] . . . family member . . . is entitled thereto under the terms of the contract." *Id.* § 8902(j) (emphasis added); *see* Pub. L. 93-246, § 3 (1974).

OPM has responded to Congress's instructions with detailed regulations, including the administrative

remedies for enrollment and benefits grievances. In establishing those remedies, OPM plainly sought to implement Congress's intent. For example, at the time it established the current regime for administrative review of benefits denials, OPM said: "The legislative history of § 8902(j), title 5, United States Code, shows that Congress intended OPM (at that time the Civil Service Commission) to provide an administrative appeal process, binding upon the carriers, that would save covered individuals the expense and delay of being forced into the courts to recover on meritorious claims for benefits." 60 Fed. Reg. 16,037 (1995) (interim regulations); *see also* H.R. Rep. No. 93-459, at 7 (1973); 61 Fed. Reg. 15,177 (1996) (final regulations). OPM added: "Based upon this directive and its central role in the administration of the FEHB Program, OPM established a detailed administrative review process for benefits claims leading to a final decision on such claims by OPM." 60 Fed. Reg. at 16,037.

With the establishment of those administrative review mechanisms for enrollment and benefits grievances (within the employing agency for the former, and within OPM for the latter), Congress and OPM collectively triggered the presumptively applicable APA right to judicial review where disputes remain after completion of the respective administrative processes. *See supra* p. 18; *see also* 60 Fed. Reg. at 16,037 (OPM noting that its final decisions on benefits claims would be subject to "court review" and would be "upheld unless the court concludes that the OPM decision affirming the carrier's denial of benefits was inconsistent with the standard for a final agency action *under applicable Federal law*.") (emphasis added). FEHBA's jurisdictional section, 5 U.S.C. § 8912, completes the

enforcement scheme by providing that judicial review actions may occur in two federal forums (the district courts or the Court of Federal Claims).

What emerges from these statutory and regulatory provisions is a cohesive, workable, federal mechanism for resolving enrollment and benefits controversies. The remedial regime is consistent with Congress's desire that OPM take the lead under the FEHBA program; it helps avoid court litigation through administrative processes; it takes into account the traditional APA mechanism for review of agency action; and, where litigation is required, the litigation is necessarily against the United States and therefore within the confines of the jurisdictional section that Congress enacted.

Against this backdrop, it would make no sense to deem the remedial regime anything but exclusive. Congress and OPM would not have gone to such lengths to create the FEHBA enforcement scheme if they expected state law causes of action likewise to be available. Were state law claims an alternative, the administrative process might never be invoked; the employing agencies under OPM's regulations (on enrollment) or OPM itself (on benefits) would not have opportunity to exercise their expertise, replaced instead by juries deciding enrollment and benefits matters under state law; and FEHBA's jurisdictional section would not at all come into play.

Indeed, state law would likely be the *preferred* enforcement vehicle. State law usually offers lucrative monetary relief and other penalties for infractions in insurance situations (as Respondents, in fact, seek), whereas the FEHBA enforcement scheme provides

limited relief, such as limiting "the recovery . . . to a court order directing OPM to require the carrier to pay the amount of benefits in dispute." 5 C.F.R. § 890.107(c)). Furthermore, the APA does not permit the award of monetary relief. *See* 5 U.S.C. § 706 (APA authorizing court to "hold unlawful and set aside" agency action).[2]

And OPM certainly has made obvious its view that the federal remedies for FEHBA enrollment and benefits cases are exclusive. Its regulations state that the lawsuit against the employing agency on enrollment "*must* be brought against the employing office." 5 C.F.R. § 890.107(a) (emphasis added). Its rules on benefits cases state that lawsuits "*must* be brought against OPM and not against the carrier or the carriers subcontractors." *Id.* § 890.107(c) (emphasis added). OPM contemplates just one remedy: suits against the government presumptively governed by the APA. Having opined in published regulations, after notice-and-comment rulemaking invited by Congress (*see* 5 U.S.C. § 8913(a)), OPM's views are entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

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[2] To suggest that Congress intended to allow state court causes of action is even more curious in light of ERISA, where Congress created an exclusive federal remedy (recognized in *Metropolitan Life* as completely preemptive) that routes health benefits disputes between private employer plans and their participants into federal court. It would be anomalous for Congress then to leave the government's own health benefits controversies to the vagaries of state law and state courts.

b. Congressional Intent Underlying the Preemption Provision Supports the Federal Remedies' Exclusivity

The Congressional intent underlying FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1), further bolsters the conclusion that the FEHBA enforcement scheme is exclusive. In *Empire*, the Court held that the preemption clause, on its own, is "not sufficiently broad to confer federal jurisdiction" over a suit by the carrier seeking a portion of an enrollee's state court tort recovery as reimbursement for earlier-paid benefits. 547 U.S. at 698. Instead, the provision's "unusual" focus on contract terms as the basis for preemption necessitates a "cautious" and "modest" interpretation. *Id.* at 697, 698.

Nonetheless, the circumstances surrounding the preemption provision's most recent amendment provide support for deeming the *federal causes of action for contesting FEHBA enrollment and benefits determinations* to be exclusive and thus "jurisdiction-conferring." *Id.* In fact, in *Beneficial National Bank*, the Court said it would set the standard too high to inquire specifically "whether Congress intended that the cause of action *be removable*," as opposed to just "whether Congress intended the federal cause of action to be exclusive." 539 U.S. at 9 n.5 (emphasis added). Yet, in the FEHBA context, there is, through the preemption provision's amendment, specific intent of Congress's desire to make removable to federal court disputes over enrollment and benefits. Given that Congress and OPM have elsewhere established the federal remedies that provide a basis for complete preemption (remedies that were not at issue in *Empire*, *see infra* p.

30), the Court should honor the legislative intent on removability displayed at the time of the preemption clause's amendment by recognizing the remedies as exclusive and thereby capable of complete preemption.

Though FEHBA did not contain a preemption section when enacted in 1959, Congress added one in 1978. As originally adopted, the section stated:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans *to the extent that such law or regulation is inconsistent with such contractual provisions*.

5 U.S.C. § 8902(m)(1) (1994) (emphasis added). With this provision, Congress intended "to establish uniformity in benefits and coverage under the Federal employees' health benefits program." S. Rep. No. 95-903, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1412, 1413.

Over time, several courts pointed to the text of FEHBA's preemption clause as a basis for *rejecting* complete preemption. *E.g.*, *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994); *Arnold v. Blue Cross & Blue Shield of Tex., Inc.*, 973 F. Supp. 726 (S.D. Tex. 1997); *Transitional Hosps. Corp. v. Blue Cross & Blue Shield of Tex., Inc.*, 924 F. Supp. 67 (W.D. Tex. 1996). These courts saw the clause's closing phrase preserving state law not "inconsistent" with FEHBA contract terms as narrowing language incom-

patible with the *complete* preemption of state law. In particular, the decisions rejected analogies to complete preemption under ERISA, on the ground that the ERISA preemption clause contains no proviso exempting from preemption state laws not inconsistent with the statute. *See*, *e.g.*, *Goepel*, 36 F. 3d at 312 & n.7; *Arnold*, 973 F. Supp. at 731-32; *Transitional Hosps.*, 924 F. Supp. at 70; *see generally* 29 U.S.C. § 1144(a)(1) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

These decisions sent Congress back to the drafting table. In 1998, it amended FEHBA's preemption clause to take out the final phrase requiring inconsistency between state law and FEHBA contract provisions. Congress explained that the amendment "broadens the preemption provisions in current law to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live." H.R. Rep. No. 105-374, at 9 (1997). Alluding to its concern over the court decisions that had rejected complete preemption, Congress said: "The amendment confirms the intent of Congress . . . that FEHB program contract terms which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) *completely displace* State or local law relating to health insurance or plans." *Id.* at 16 (emphasis added). In the same vein, Congress added that the "change will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts." *Id.* at 9.

Accordingly, "legislative history from the amendment of FEHBA's preemption clause strongly supports con-

gressional intent to create complete preemption, which includes displacement [of state law remedies]." *Botsford*, 314 F.3d at 399; *see also Beneficial Nat'l Bank*, 539 U.S. at 8 (referencing *Metropolitan Life*'s reliance on unambiguous intent shown in "the legislative history of ERISA" to achieve complete preemption). While Congress might have used a different tactic to reach its goal if it could have foreseen this Court's later decision in *Beneficial National Bank*, it acted reasonably in trying to achieve complete *preemption* by amending the *preemption* provision that had been identified by courts as an obstacle to that goal. As it did with ERISA's efforts to copy the LMRA, this Court should give effect to Congress's intent and recognize FEHBA's enrollment and benefit remedies as exclusive ones that justify complete preemption.

c. *Empire* Supports a Finding that the Federal Remedies Are Exclusive

The Court's decision in *Empire* supports the exclusivity of the federal remedies for FEHBA enrollment and benefits grievances. In *Empire*, the Court held that there was no federal jurisdiction over a FEHBA plan's reimbursement claim, which is a species of subrogation claim, against an enrollee. A central reason for the Court's rejection there of federal jurisdiction was that the FEHBA enforcement scheme did not "extend" to "reimbursement claims between carriers and insured workers." 547 U.S. at 696.

But the Court was careful to distinguish reimbursement actions from claims to which FEHBA's remedies *do* apply. With respect to benefits disputes, the Court noted:

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

Empire, 547 U.S. at 696 (last quotation from *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 n.7 (2d Cir. 2005)) (emphasis added) (citations omitted).

Thus, the Court in *Empire* anticipated that FEHBA coverage and benefits controversies -- the category of disputes into which Respondents' claims fall -- inevitably "will land" in federal court. That is exactly the result under complete preemption: Enrollment and benefits suits filed in state court become removable to federal court because of the exclusivity of FEHBA's enforcement regime. Consistent with *Empire*, the Court should now hold that the exclusive nature of the available federal remedies "channels disputes over coverage or benefits into federal court." *See id.* at 686-87.

Empire also supports the exclusivity of the federal remedies in a second way. The case for exclusivity and complete preemption is stronger if federal law provides the substantive rules of decision over the controversy. *See Beneficial Nat'l Bank*, 539 U.S. at 11 (because of

need for national uniformity, National Bank Act's provisions "supersede both the substantive and remedial provisions of state usury laws"); *Avco*, 390 U.S. at 560 ("An action arising under [LMRA] § 301 is controlled by federal substantive law even though it is brought in state court"); *Metropolitan Life*, 481 U.S. at 66 (same, under ERISA). In *Empire*, the Court referenced the framework for determining when "a uniform federal common law" will control FEHBA disputes, based on the "pathmarking precedent" in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and its progeny. *Empire*, 547 U.S. at 690. Under the applicable test, disputes over FEHBA enrollment and benefits *are* governed by federal common law, making exclusive federal remedies all the more necessary.

The *Clearfield* line of decisions mandates that federal common law will control in "areas of uniquely federal interest" where there is a "significant conflict . . . between an identifiable federal policy or interest and the operation of state law." *Empire*, 547 U.S. at 692, 693 (internal quotations omitted). FEHBA enrollment and benefits cases involve "distinctly federal interests" because they "directly affect[] the United States Treasury and the cost of providing health benefits to federal employees." *Id.* at 696, 688; *see also Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 77-79 (4th Cir. 1993) (as alternative to complete preemption, finding removal jurisdiction in FEHBA benefits dispute because it is governed by federal common law).

Furthermore, applying state law in FEHBA enrollment and benefits controversies significantly conflicts with Congress's determination that it is *OPM* -- not state courts and juries -- that should regulate enroll-

ment and benefits. *See Botsford*, 314 F.3d at 397-98; *Caudill*, 999 F.2d at 78-79. Relatedly, Congress's delegation of authority to OPM, as well as its enactment of the preemption provision, were designed to "assure uniform coverage and benefits under plans OPM negotiates." *Empire*, 547 U.S. at 686; *see* 60 Fed. Reg. at 16,037 (OPM stating that its regulations establishing the administrative appeals process for benefits disputes "reaffirm the principle of uniformity in the FEHB Program by providing that in judicial disputes regarding the denial of a health benefits claim, review is to be limited to the record that was before OPM and that was the basis of the OPM decision to disallow the benefit"). A necessity for "[u]niform rules" so as to "protect[] from possible unfriendly State legislation" warrants the application of federal substantive law and even "prescribing exclusive remedies." *Beneficial Nat'l Bank*, 539 U.S. at 10 (internal quotation marks omitted); *accord Avco*, 390 U.S. at 559-60.

C. The Court of Appeals' Rejection of Complete Preemption Is Unsound

All of the requirements for complete preemption, consequently, are satisfied in this case: FEHBA's enforcement scheme "creates a federal remedy for [enrollment and benefits disputes] that is exclusive," and Respondents raise "a claim which comes within the scope of that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 11, 8. The court of appeals reached a contrary conclusion because it erroneously believed that complete preemption depends not on the existence of exclusively federal causes of action, but instead on whether "federal law has occupied a field." Pet. App. 2a.

In contrast to complete preemption, the term "occupation of the field" describes a form of defensive, implied preemption existing where Congress pervasively regulates an area. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). It does not turn on the existence of a federal remedy, and the Court has not suggested a relationship between the two. The Court has, for example, found occupation-of-the-field preemption in the areas of transportation and sale of natural gas (*see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988)), airline noise abatement and airport curfews (*see Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 639 (1973)), and alien registration (*see Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941)). Yet, this Court in *Beneficial National Bank* did not reference any of those decisions, instead remarking that there were only "two categories of cases where this Court has found complete preemption -- certain causes of action under the LMRA and ERISA." 539 U.S. at 8.

The court of appeals also mistakenly believed that *Empire* precluded complete preemption, because supposedly *Empire* holds that "federal law does not completely occupy the field of health-insurance coverage for federal workers." *See* Pet. App. 3a. That observation is irrelevant in the first instance, because it incorrectly looks to occupation of the field, but it is also an erroneous distillation of *Empire*'s teachings. The statement in *Empire* upon which the court of appeals apparently seized -- that is, that FEHBA's preemption provision was not broad enough "completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby," 547 U.S. at 698

-- was not a pronouncement that FEHBA never can completely preempt state law claims. The statement came only *after* the Court noted that the remedy imposed by FEHBA, the APA, and OPM's regulations for benefits disputes was inapplicable to subrogation matters. Here, the typical route for complete preemption (*i.e.*, the existence of an exclusive cause of action that *is* applicable to the controversy) is available, negating any need to resort to the preemption provision to confer jurisdiction.

II. Removal Jurisdiction Exists Under the Federal Officer Removal Statute

A. The Federal Officer Removal Statute Is Liberally Construed to Advance Its Purpose of Allowing Those Who Assist Federal Officers to Have Their Federal Defenses Heard in Federal Court

Alternatively, the court of appeals' decision must be reversed because removal was proper under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). That statute permits a defendant to remove to federal court an action brought in state court against "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity *for any act under color of such office*." *Id.* (emphasis added).

The Court has previously summarized the long history of the federal officer removal statute, which dates back to 1815. *See Watson v. Philip Morris Cos.,* 551 U.S. 142, 147-49 (2007); *Willingham v. Morgan*, 395 U.S. 402, 405-06 (1969). The scope of the statute has broadened over time, in a continuing effort to serve its

"'basic' purpose, [which] is to protect the Federal Government from the interference with its 'operations' that would ensue" if state courts, which might be susceptible to "local prejudice," ruled on federal defenses associated with those operations. *Watson*, 551 U.S. at 150 (quoting *Willingham*, 395 U.S. at 406). Section 1442(a)(1), therefore, is "an incident of federal supremacy" designed "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties." *Id.* at 405; *see Arizona v. Manypenny*, 451 U.S. 232, 241 (1981).

From the beginning, Congress recognized that the jurisdictional protection of this statute would be incomplete if it were limited only to persons who are formally federal government officers. The government "can act only through its officers and agents." *Tennessee v. Davis*, 100 U.S. 257, 263 (1880). In many situations, practicalities demand that private persons be enlisted to assist government officers. If those persons are not afforded the "protection of a federal forum" like federal employees (*Willingham*, 395 U.S. at 407), the removal statute's underlying purpose of avoiding interference with government operations would be defeated simply because of a sub-delegation of authority. *See, e.g.*, *Colorado v. Symes*, 286 U.S. 510, 517 (1932) (removal statute needed "to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority" against potential state court obstruction). Hence, the original 1815 statute authorized removal by federal customs officers and "any other person aiding or assisting" them. Customs Act of 1815, ch. 31, § 8, 3 Stat. 195, 198; *see Watson*, 551 U.S. at 148. And the current version of the statute authorizes removal by a

federal officer "or any person acting under that officer." 28 U.S.C. § 1442(a)(1).

To obtain removal under § 1442(a)(1), a defendant must demonstrate that it satisfies three basic requirements. The first requirement examines the defendant's status -- that is, whether the defendant falls within the class of persons covered by the statute. If the defendant is a federal officer, this requirement is automatically satisfied. In the case of a private entity, however, the defendant must show that it is a "person acting under" a federal officer. As stated in *Watson*, the words describing this "triggering relationship between a private entity and a federal officer" are "broad," albeit not "limitless." 551 U.S. at 149-50. Generally, the defendant must show that it is involved in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. The statute therefore does not extend to "a company [that] is subjected to intense regulation," but is not actually assisting the government in carrying out its functions. *Id.* at 153. By contrast, the Court noted approvingly in *Watson* that the lower courts have frequently applied the statute to government contractors that are subject to "detailed regulation, monitoring, or supervision," though the Court there did not have occasion to specify the precise circumstances that give such contractors the necessary status to invoke the statute. *Id.*

The second requirement focuses on the acts that are the subject of the lawsuit in question. The defendant must establish that there is a "'causal connection' between the charged conduct and asserted official authority." *Willingham*, 395 U.S. at 409; *see also Jefferson County v. Acker*, 527 U.S. 423, 432 (1999)

(addressing 28 U.S.C. § 1442(a)(3)); *Maryland v. Soper*, 270 U.S. 9, 33 (1926). This requirement establishes that the removal right does not extend to activities unrelated to the federal duties sought to be protected. For example, a federal border patrol agent may remove a suit charging him with assault for shooting a fleeing suspect who failed to stop on command. *See Arizona v. Manypenny*, 451 U.S. at 240-43. On the other hand, the same border patrol agent would have no right of removal if he were charged with shooting someone in a bar fight while off-duty.

The "causal connection" test is expansive in that it looks only to whether the overall activity was in furtherance of the official duties; "the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority." *Soper*, 270 U.S. at 33. In this regard, the defendants in *Willingham* were federal prison officials who satisfied this requirement by showing that "their only contact with respondent occurred inside the penitentiary, while they were performing their duties." 395 U.S. at 409. It was unnecessary to conduct any further inquiry into the specific acts charged in the complaint before granting removal. Thus, as the Second Circuit has observed, "[t]he hurdle erected by this requirement is quite low." *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 137 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1523 (2009). Defendants "must demonstrate that the acts for which they are being sued . . . occurred *because of* what they were asked to do by the Government." *Id.* Moreover, the defendant is required to make a "threshold showing" of connection between the acts and its federal duties, but need not prove its case on the merits in order to obtain re-

moval. *Jefferson County*, 527 U.S. at 432; *see also id.* at 447-48 (Scalia, J., dissenting); *see generally Willingham*, 395 U.S. at 409.

The third requirement is that the defendant have a "colorable federal defense." *Jefferson County*, 527 U.S. at 431; *see Mesa v. California*, 489 U.S. 121, 129 (1989). This requirement flows from the "color of office" language of the statute, and it ties directly to its recognized purpose. *Id.* at 134-35. Since the removal statute is designed to ensure that a defendant will receive fair consideration of federal defenses to which a state court might be hostile, it would not serve the statutory purpose to allow removal where there is no colorable federal defense. In addition, allowing removal in the absence of a colorable federal defense would raise "serious constitutional doubt" about the basis for federal jurisdiction. *Id.* at 136-39.

The Court has emphasized that the defendant need show only that the defense is "colorable" in order to support removal. Requiring the defendant to show a clearly sustainable defense would be "anomalous" because the purpose of removal is to have the validity of the federal defense considered in federal court, not to decide it before the defendant "can have [the case] removed." *Willingham*, 395 U.S. at 407; *see also Jefferson County*, 527 U.S. at 431.

Overall, the Court has stated that the federal officer removal statute is to be "liberally construed to give full effect" to its purpose of providing a federal forum for the fair consideration of federal defenses. *Colorado v. Symes*, 286 U.S. at 517; *see also Watson*, 551 U.S. at 147. It has admonished that "the policy favoring removal 'should not be frustrated by a narrow, grudging

interpretation.'" *Arizona v. Manypenny*, 451 U.S. at 242 (quoting *Willingham*, 395 U.S. at 407). And this rule of liberal construction applies no matter which of the three requirements is at issue in the case. *See Watson*, 551 U.S. at 147 ("acting under"); *Willingham*, 395 U.S. at 407 ("causal connection"); *Jefferson County*, 527 U.S. at 531 ("colorable federal defense"). Nor does the well-pleaded complaint rule have application under § 1442(a)(1): a case is removable even if federal law arises only by way of defense, particularly since the federal officer removal statute's purpose is, in fact, to provide an unprejudiced forum for the litigation of such defenses. *Mesa*, 489 U.S. at 136-37.

This case satisfies all three requirements of 28 U.S.C. § 1442(a)(1), and the court of appeals therefore erred in rejecting the statute's applicability on the current record.

B. This Case Satisfies the Requirements for a Private Party to Remove a Case Pursuant to the Federal Officer Removal Statute

1. HCSC Is a "Person Acting Under" a Federal Officer

Although the Court in *Watson* did not squarely address the precise circumstances in which a government contractor may remove a case, it noted some considerations that are relevant to that determination. *See Watson*, 551 U.S. at 153-54. Additionally, the courts of appeals have further explored this issue in ruling on specific instances of removal sought by government contractors. *See, e.g.*, *Isaacson*, 517 F.3d at 135-40; *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 396-401 (5th Cir. 1998) (cited with approval in *Watson*). Because all of the considerations identified

in these authorities point to the conclusion that HCSC was "acting under" a federal officer, the Court should find that HCSC has the requisite "triggering relationship" with the government to satisfy the first requirement for removal under § 1442(a)(1). *Watson*, 551 U.S. at 149.

The basic inquiry into the nature of the relationship between a private entity and a federal officer focuses on whether the private entity is involved in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. HCSC's relationship with the federal government in connection with the FEHBA program is a paradigm of this sort of assistance relationship. First of all, OPM is the superior in the relationship, for Congress in FEHBA made OPM the chief actor in providing health benefits to federal employees: among other things, the agency negotiates contracts under the FEHBA program with *every* carrier; it selects the benefits in each plan; it has authority from Congress to issue all necessary regulations; it has established enrollment criteria and procedures; and it decides benefits disputes pursuant to express instruction from Congress. *See Empire*, 547 U.S. at 683; *see also* 5 U.S.C. §§ 8952(a), 8982(a) (OPM "establish[es] and administer[s]" supplemental dental and vision benefits for federal employees). Even the front page of each FEHBA plan's benefits brochure states that it is "authorized for distribution by the: United States Office of Personnel Management." J.A. 59.

OPM's superior position is also highlighted by its "detailed regulation, monitoring, [and] . . . supervision" of the manner in which FEHBA carriers administer

the FEHBA program. *Watson*, 551 U.S. at 153; *see Burkey v. Gov't Employees' Hosp. Ass'n*, 983 F.2d 656, 658 (5th Cir. 1993) (OPM "superintends" FEHBA program); *accord Muratore v. OPM*, 222 F.3d 918, 920-23 (11th Cir. 2000). OPM, again, reviews the carriers' benefits determinations and has the final word when an enrollee appeals a denial of benefits. Further, FEHBA provides for government oversight of plans, requiring regular reports and giving OPM and the General Accounting Office the authority to audit FEHBA plans. *See* 5 U.S.C. § 8910. Through still another delegation from Congress, OPM "prescribe[s] reasonable minimum standards for health benefits plans . . . and for carriers," 5 U.S.C. § 8902(e), and has issued detailed regulations on the topic. *See* 5 C.F.R. § 890.201-02; 48 C.F.R. § 1609.70. If OPM finds an insurer's performance wanting, it can withdraw approval of that carrier or terminate its contract. *See* 5 C.F.R. § 890.204-05.

Not only is OPM a "federal superior," but the role of the Blue Cross and Blue Shield entities such as HCSC that administer the Plan is properly characterized as "help[ing]" OPM "carry out" its duties of providing health benefits to federal employees. *Watson*, 551 U.S. at 152 (emphasis removed). When FEHBA was enacted, the Civil Service Commission (OPM's predecessor), described the "fundamental concepts underlying [FEHBA]" to include "mak[ing] the Commission responsible for the overall administration of the program while sharing day-to-day operating responsibilities with the employing agencies and the insurance carriers." H.R. Rep. No. 86-957, at 18 (1959) (statement of Civil Service Commission). More specifically, FEHBA authorizes OPM in 5 U.S.C. § 8903(1) to

contract for the "Service Benefit Plan," the single government-wide plan providing through "participating affiliates" health benefits based on provider networks. Pursuant to that statutory directive, OPM contracted with BCBSA and local Blue Cross and Blue Shield companies, including HCSC, to administer the Plan in their respective localities. *See Empire*, 547 U.S. at 682. By filling in the private role necessary to establish the Service Benefit Plan described in § 8903(1), HCSC is "helping the Government to produce an item [here, a service] that it needs." *Watson*, 551 U.S. at 153.

With respect to aiding the government on enrollment, HCSC's task is to carry out the directives of OPM or the employing agencies who are, under OPM's regulations, solely responsible for all enrollment matters. *See supra* pp. 3, 17. Emphasizing the Blue Cross and Blue Shield entities' supporting role on enrollment is the CS 1039 provision stating that "eligibility for coverage . . . shall . . . be determined in accordance *with regulations or directions of OPM* given pursuant to [FEHBA]." J.A. 34 (emphasis added).

On benefits, HCSC similarly plays an assisting role. OPM, to reiterate once more, established its administrative appeal regime for benefits disputes as a result of the Congressional instruction that "*the Office*" determine benefits to which an enrollee is entitled under a FEHBA contract "in an individual case." 5 U.S.C. § 8902(j) (emphasis added). Under OPM's regulations, FEHBA carriers make claims decisions in the first instance, with the enrollee having a right to appeal to OPM. *See supra* p. 18; *see also Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 398 (9th

Cir. 2002) (noting OPM's role as final adjudicator on claims and describing OPM as the "plan administrator" for FEHBA plans). Further underscoring that carriers act under OPM and in furtherance of federal policy, OPM's regulations expressly state that "Federal Employees Health Benefits (FEHB) carriers resolve FEHB claims *under authority of Federal statute* (5 U.S.C. chapter 89)"; OPM is thereafter responsible for "final action" subject to judicial review, and a court's reversal of a benefits denial decision shall result in "a court order *directing OPM to require the carrier* to pay the amount of benefits in dispute." 5 C.F.R. § 890.107(c) (emphasis added).

Last, the Blue Cross and Blue Shield companies meet another variation on the superior/assistant model set forth in *Watson* for determining when a private party is "acting under" a federal officer, because they are "perform[ing] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." 551 U.S. at 154. FEHBA's legislative history reveals that a primary motivation for enactment was to enable the government to compete in recruitment for workers with private companies who were offering health benefits to their employees. *See* H.R. Rep. No. 86-957, at 2. Congress explained that "[a]vailability of this health protection program to Government employees will be of material assistance in improving the competitive position of the Government with respect to private enterprise in the recruitment and retention of competent civilian personnel so urgently needed . . . [for] essential Government programs." *Id.* Given this identified need, had Congress and OPM not decided to enlist private parties to assist in offering health benefits to

federal employees, the federal government itself surely would have to provide the health benefits coverage and use its own employees to administer the Plan.

Administrators of FEHBA plans, therefore, fall comfortably within the class of private entities covered by § 1442(a)(1), as even the court of appeals here seemed to agree. It did not reject HCSC's invocation of § 1442(a)(1) outright, but instead added a legally erroneous requirement of an evidentiary showing for success on removal. *See infra* p. 55.[3]

2. There Exists the Requisite "Causal Connection" Between the Acts Challenged and the Official Duties with Which HCSC Assists

The Second Circuit correctly has observed that "[t]he hurdle erected by [the 'causal connection'] requirement

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[3] It is also worth noting that lower courts have long recognized the applicability of the federal officer removal statute to the closely analogous class of administrators who act as fiscal intermediaries under Medicare. *See Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 57 (5th Cir. 1975) ("indisputable" that the private administrator was "acting under" a federal officer); *Regional Med. Transp., Inc., v. Highmark, Inc.*, 541 F. Supp. 2d 718, 722-25 (E.D. Pa. 2008); *Neurological Assocs. v. Blue Cross/Blue Shield of Fla., Inc.*, 632 F. Supp. 1078, 1080 (S.D. Fla. 1986); *Group Health, Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 889-91 (S.D.N.Y. 1984). And notably, even a district court that took an unusually restrictive view of the statute's applicability to government contractors in denying removal to a manufacturer of Agent Orange recognized that private entities providing health insurance through government programs should be eligible for removal because they "act as continuing conduits for government policy." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

is quite low." *Isaacson*, 517 F.3d at 137. The defendant need show only that the acts that are the subject of the complaint occurred in the course of the defendant's performance of its official duties -- whether as a federal officer or as a private entity helping to carry out the duties of a federal superior -- rather than in the course of activity unconnected to the official duties.

The leading case on this prong of the § 1442(a)(1) test is *Willingham*, where the defendants were federal prison officials charged with assaulting and torturing an inmate. *See* 395 U.S. at 403. Although the charged acts clearly would not have been appropriate actions for such officials, and thus would not have been necessary to discharging their official duties, the Court held that the officials could remove the case to federal court under § 1442(a)(1). The defendants asserted without contradiction that their only contact with the inmate occurred within the walls of the prison in the course of performing their official duties. *Willingham*, 395 U.S. at 407-08. The Court held that this assertion was "sufficient" because the defendants needed to show only "that their relationship to [the inmate] derived solely from their official duties." *Id.* at 409. The inmate, by contrast, had focused on the inappropriateness of the charged acts, arguing that the defendants were on "a frolic of their own which had no relevancy to their official duties as employees or officers of the United States." *Id.* at 407. The Court explained, however, that this argument did not defeat removal because the question whether the officers were discharging their duties or were instead on a "frolic" should be resolved in federal court. *Id.* at 409.

The Court applied this principle again in *Jefferson County*, holding that federal judges could remove an action brought against them by a state county seeking to collect a municipal tax on their judicial earnings. Although the dissent argued that the cause of the lawsuit was the judges' refusal to pay the tax, a refusal that did not further performance of the defendants' official duties, the Court ruled that the "causal connection" test was satisfied. Citing *Willingham*, the Court reasoned that the inquiry must look to the overall "circumstances that gave rise to the tax liability," and the defendants had shown the "essential nexus" because it was the defendants' "holding court in the county and receiving income for that activity" that generated the dispute. *Jefferson County*, 527 U.S. at 433. Notably, although the dissent disagreed with this ultimate conclusion, it agreed that the defendant need not "prove that the act prompting suit is, beyond doubt, an official one." *Id.* at 447 (Scalia, J., dissenting). Rather, the "causal connection" test is satisfied if the defendant identifies "as the gravamen of the suit an act that was . . . closely connected with . . . the performance of his official functions." *Id.*; *see also Soper*, 270 U.S. at 33 ("It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.").

Under these authorities, this case satisfies the "causal connection" requirement. The acts that form the predicate for Respondents' original complaint (and the second amended complaint) unquestionably occurred in the course of HCSC's performance of its official duties under the Plan. The suit is grounded in HCSC's alleged temporary termination of an enroll-

ment in the Plan and in benefits determinations associated with that enrollment termination. These acts lie at the core of the services that HCSC performs for the government under CS 1039. This lawsuit is entirely a FEHBA dispute in which HCSC is ensnared as a result of the performance of its official duties under the FEHBA program.

3. HCSC Has Colorable Federal Defenses

The Court has emphasized that removal is authorized as long as the defendant has a "colorable" federal defense; the court considering removal need not determine whether the defendant would ultimately prevail on its federal defense. Thus, for example, in *Jefferson County*, the Court held that removal was proper even though it ultimately rejected the defendants' immunity defense on the merits. *See* 527 U.S. at 435-43. The Court explained that one must "credit the [defendants'] theory of the case" for purposes of the jurisdictional inquiry, which entails merely a "threshold showing that the suit is 'for an act under color of office.'" *Id.* at 432. Here, HCSC has at least three federal defenses that are considerably stronger than "colorable" and hence justify removal.

a. HCSC Has a Colorable Defense of Conflict Preemption

Under principles of ordinary conflict preemption, *see Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000), HCSC has an overwhelming defense that Respondents' claims in the original (and second amended complaint) conflict with, and are preempted by, FEHBA's enforcement scheme. As already shown, even if put in tort terms, Respondents' claims fit within the dual administrative procedures, followed by judicial

review, for enrollment disputes and benefits grievances. These remedies are not optional: OPM has said that enrollment matters "must" be pursued against the employing agency, and benefits suits "must" be brought against OPM rather than FEHBA contractors. *See supra* pp. 4-5. Both the district court and the court of appeals (when it stated that dismissal was appropriate in the event jurisdiction were sustained) agreed that Respondents' claims are incompatible with the federal remedies (Pet. App. 4a, 7a-8a), and other lower courts in the FEHBA setting have found state law preempted by the federal remedies, under conflict preemption principles. *E.g.*, *Corporate Health Ins., Inc. v. Tex. Dep't of Ins.*, 215 F.3d 526, 539 (5th Cir. 2000), *vacated on other grounds*, 536 U.S. 935 (2002), *reinstated in pertinent part*, 314 F.3d 784 (5th Cir. 2003); *Botsford*, 314 F.3d at 396.[4]

b. HCSC Has a Colorable Defense of Express Preemption

HCSC also has a colorable federal defense under FEHBA's preemption provision, which authorizes the terms of FEHBA contracts "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)" to supersede any state law "which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The "relates to" language at the

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[4] Closely related to conflict preemption, the court of appeals believed that HCSC also should have available to it the "government contractor" defense, first articulated by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *See* Pet. App. 4a (citing *Boyle*). That defense protects from liability under state law government contractors sued for actions taken pursuant to the government's "precise specifications." *Boyle*, 487 U.S. at 512.

front and back of § 8902(m)(1) creates two requirements for express preemption of state law claims: (1) the claim must implicate contract terms that relate to coverage, benefits, or benefits payments; and (2) the claim must invoke state law that relates to health insurance or plans. In light of the 1998 amendment to the preemption section, "state law -- whether *consistent or inconsistent* with federal plan provisions -- is displaced on matters of 'coverage or benefits.'" *Empire*, 547 U.S. 686 (emphasis added).

Satisfying the first condition, Respondents' original complaint implicates at least two provisions in CS 1039 relating to coverage, benefits, or benefits payments. First, Respondents' allegations challenging the temporary termination of the minor's coverage and seeking to compel enrollment directly implicate the contract provision stating that "[a] person's eligibility for coverage . . . [and] effective date of termination or cancellation of a person's coverage . . . shall all be determined in accordance with regulations or directions of OPM given pursuant to [FEHBA]." J.A. 34. HCSC, of course, maintains that the employing agency, to whom OPM's regulations give authority over enrollment, directed the minor's disenrollment. Second, Respondents' averments that HCSC wrongfully sought retroactively to deny benefits for the minor and to recoup amounts previously paid contest HCSC's actions taken pursuant to § 2.3(g) of the contract, which instructs that, "[i]f the Carrier . . . determines that a Member's claim has been paid in error for any reason (except fraud and abuse), the Carrier shall make prompt and diligent effort to recover the erroneous payment to the member from the member, or, if to the provider, from the provider." J.A. 40. The bad faith

allegations, being derivative of the enrollment and benefits challenges, likewise correlate to the same two CS 1039 provisions.

As to the other condition for express preemption, Respondents rest on state law that relates to health insurance or plans. To be sure, Respondents do not reference in their pleadings any specific Illinois statute, or, for that matter, any identifiable common law cause of action. Nevertheless, under this Court's precedents, all that is required -- given the preemption provision's language "relates to . . . plans" -- is that Respondents seek to use state law to dispute HCSC's administration of *a plan*. Interpreting ERISA's nearly identical preemption language under which ERISA preempts state laws that "relate to any employee benefit plan," 29 U.S.C. § 1144(a)(1), the Court has said that "the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). Or as the Court has put it in another ERISA case: "Because the court's inquiry must be directed to the plan, th[e] . . . cause of action 'relate[s] to' an ERISA plan"; "there simply is no cause of action if there is no plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990).

We recognize that the Second Circuit stated in *Empire* that only state laws specifically directed at health insurance or plans are encompassed within the second part of FEHBA's preemption clause. *See Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 146 (2d Cir. 2005); *but see Burkey*, 983 F.2d at 660; *Hayes v. Prudential Ins. Co.*, 819 F.2d 921, 926

(9th Cir. 1987). This Court did not endorse the Second Circuit's view when it affirmed in *Empire*. To the contrary, the Court indicated that § 8902(m)(1) would preempt general state contract law, assuming satisfaction of the first part of the preemption provision. *See* 547 U.S. at 697-98. In any event, at least with respect to their bad faith claim, Respondents should be deemed to have invoked state law specifically aimed at insurance. The Illinois Supreme Court has held that there exists no general tort of bad faith under Illinois law; rather, in insurance situations, a cause of action exists (if at all) solely under the Illinois Insurance Code, 215 Ill. Comp. Stat. 5/155. *See Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 904 (Ill. 1996).

c. HCSC Has a Colorable Defense of Sovereign Immunity

HCSC has a colorable defense of sovereign immunity. Because the United States has not consented to be sued under state law for actions taken in connection with FEHBA enrollment and benefit determinations, sovereign immunity would bar Respondents' claims if they were brought directly against the government. *See*, *e.g.*, *United States v. Nordic Village*, *Inc.*, 503 U.S. 30, 33 (1992); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). HCSC, of course, is not the government, but in some circumstances sovereign immunity principles can extend to private parties who are essentially standing in the government's shoes. In defining the scope of sovereign immunity, "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration.'" *Dugan v.*

Rank, 372 U.S. 609, 620 (1963) (*quoting Land v. Dollar*, 330 U.S. 731, 738 (1947)).

The lower courts have applied this principle in the context of private carriers that provide various types of health insurance on behalf of the government, concluding that they are entitled to sovereign immunity when the public treasury would bear the cost of any recovery. On this front, the courts of appeals have afforded sovereign immunity to Medicare carriers, recognizing that "[t]he United States is the real party in interest" in actions against them "because recovery would come from the federal treasury." *Anderson v. Occidental Life Ins. Co.,* 727 F.2d 855, 856 (9th Cir. 1984); *accord Matranga v. Travelers Ins. Co.,* 563 F.2d 677, 677 (5th Cir. 1977); *Pine View Gardens, Inc. v. Mut. of Omaha Ins. Co.*, 485 F.2d 1073, 1074-75 (D.C. Cir. 1973). And in the state analogue to the situation presented here, one court of appeals has held that suits against carriers administering health benefits plans for state government employees are barred by Eleventh Amendment sovereign immunity because "a judgment would ultimately affect the state treasury." *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1312 (11th Cir. 2000).

Similarly, in FEHBA litigation, "the real party in interest is the United States" because the federal government bears the financial burden of recoveries involving FEHBA plans. *Empire*, 547 U.S. at 709 (Breyer, J., dissenting); *see also id.* at 684 (majority explaining Plan's finances). Under FEHBA, the government contributes the majority of the premium cost, collects the balance from enrollees, and then deposits the total into a fund in the federal Treasury. *See su-*

pra pp. 3-4. Blue Cross and Blue Shield entities administering the Plan draw directly from the Treasury fund to pay benefits and to be reimbursed for "payments made and liabilities incurred on behalf of FEHB subscribers." J.A. 52; *see* 48 C.F.R. § 1632.170(b). In addition, the government reimburses FEHBA carriers for a variety of administrative expenses, including "legal expenses incurred in the litigation of benefit payments." 48 C.F.R. § 1652.216-71(b)(2)(i)-(ii).[5]

In light of this financial arrangement, the relief sought in this particular FEHBA case would, if granted, "expend itself on the public treasury" and is therefore barred -- or at a minimum colorably can be asserted to be barred -- by the United States' sovereign immunity. *Land v. Dollar*, 330 U.S. at 738.

C. The Court of Appeals Erred in Conditioning Federal Officer Removal on a Finding That HCSC Was Specifically Directed to Perform the Acts in Question, a Standard That in Any Event Was Satisfied Here

The court of appeals rejected federal officer removal jurisdiction on a ground that is entirely inconsistent with this Court's precedent. The court of appeals did not accept that removal is permitted if HCSC's actions occurred in the normal course of administering a government program; rather, it held that removal is

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[5] This is not to say that there is no private insurance component to the FEHBA program. As one example, the Blue Cross and Blue Shield companies carry risk because, in the event the Plan is terminated and the Treasury funds (including contingency reserves) are insufficient to cover all outstanding claims, the companies are responsible for the shortfall. *See Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.3d 520, 530 (D.C. Cir. 1982).

allowed only if "HCSC was doing nothing but following the agency's orders." Pet. App. 4a. Specifically, the court held that if the government "did not direct HCSC to change Pollitt's coverage . . . then this case must be remanded to state court." *Id.* Likewise, with respect to benefits, the court held that if the government "did not direct [HCSC] to recover past benefits from medical providers, then the claim for precipitate, mistaken recoupment should be remanded." *Id.*

The court of appeals erred in requiring these kinds of specific federal directives for the acts, notwithstanding that these acts occurred in the course of HCSC's performance of its administrative duties under the Plan. Most notably, the court of appeals' approach contravenes this Court's earliest jurisprudence concerning federal officer removal. In *Davis v. South Carolina*, 107 U.S. 597 (1883), the defendant charged with murder was an army officer who was enlisted to assist federal marshals in enforcing the revenue laws. The Court held that he could remove the prosecution to federal court even though he was not automatically covered by the statute, which at that time was limited to revenue officers. *Id.* at 600; *see Watson*, 551 U.S. at 148 (describing the federal revenue officer removal statute in effect at the time). The Court explained that the defendant was entitled to the protections of the statute because "he was a person 'who lawfully assist[ed]' a revenue officer 'in the performance of his official duty.'" *Watson*, 551 U.S. at 149 (quoting *Davis*, 107 U.S. at 600). There was no suggestion in *Davis* that the revenue officer had specifically directed the defendant to shoot the suspect, yet the Court held that he was "acting in [the] capacity" of assisting the officer. *Davis*, 107 U.S. at 600.

Similarly, in *Soper*, the state conceded that a chauffeur who was assisting the revenue officers was entitled to the same right of removal simply because he was acting as a "helper to the four officers under their orders and by direction of the Prohibition Director." 270 U.S. at 30. There was no inquiry into any specific directives given to the chauffeur, and certainly no suggestion that he had been directed to commit the murder with which he was charged. *See also Watson*, 551 U.S. at 151 (removal under 28 U.S.C. § 1443(2) available to "private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law'") (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)); *Jefferson County*, 527 U.S. at 447 (Scalia, J., dissenting) (defendant need not "prove that the act prompting suit is, beyond doubt, an official one").

In any event, even if the unduly restrictive standard proffered by the court of appeals were correct, that standard is satisfied on the record of this case. HCSC's Notice of Removal was supported by a sworn declaration of a BCBSA employee concerning the events that triggered the dispute in this case. J.A. 96-104. The declaration, which was uncontradicted by any evidence at all by Respondents, recites (with supporting exhibits) that the DOL "instructed [BCBSA and HCSC] on approximately July 18, 2007, to change Ms. Pollitt's enrollment . . . to 'Enrollment Code 104' or Self-only coverage from the date '10-19-03.'" *Id.* at 97. That evidence regarding the enrollment decision (which is wholly consistent with CS 1039's proviso that the government, not carriers, is solely responsible for enrollment) is sufficient to support removal even under the court of appeals' approach, especially given that

the removing party's theory of the case must be credited for purposes of determining the propriety of federal officer removal.

Moreover, § 2.3(g) of CS 1039 specifically *requires* HCSC to pursue recoupment in the case of "erroneous payments," like payments made on behalf of a person who was not actually enrolled. J.A. 40-42. Based on the declaration and the contract, the district court made a factual finding that HCSC "was merely following the instructions of its principal." Pet. App. 8a. Accordingly, even if the court of appeals' erroneous interpretation of the federal officer removal statute were correct, it was unjustified in reversing the district court's order upholding removal without finding "clear error." *See Knowles v. Mirzayance*, 129 S. Ct. 1411, 1421 (2009)).[6]

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[6] The court of appeals erred in suggesting that, if specific direction occurred on enrollment issues but not on benefits recoupment, then the latter automatically should be remanded to state court. *See* Pet. App. 4a. If the Court were to find that the now-moot claims associated with enrollment were the only causes of action to which the federal officer removal statute applied, it would still remain with the district court in its discretion to determine whether to keep the rest of the case. *See* 28 U.S.C. § 1367(c)(3).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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