

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COVENTRY HEALTH CARE OF :

4 MISSOURI, INC., FKA GROUP :

5 HEALTH PLAN, INC., :

6 Petitioner : No. 16-149

7 v. :

8 JODIE NEVILS, :

9 Respondent. :

10 - - - - - x

11 Washington, D.C.

12 Wednesday, March 1, 2017

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:09 a.m.

17 APPEARANCES:

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19 of the Petitioner.

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23 of the Petitioner.

24 MATTHEW W.H. WESSLER, ESQ., Washington, D.C.; on behalf
25 of the Respondent.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 16-149, Coventry Health Care
5 Missouri v. Nevils.

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONER

9 MR. ESTRADA: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The issue in this case is whether FEHBA
12 preempts State laws that forbid subrogation by insurance
13 carriers. The Missouri Supreme Court upheld the State
14 rule, but we believe that is wrong for at least three
15 reasons.

16 Number one, antissubrogation laws relate to
17 benefits and coverage, as this Court concluded in FMC v.
18 Holliday, and at the very least, they relate to payments
19 with respect to benefits.

20 Number two, if there's any ambiguity on this
21 point, OPM's notice-and-comment regulation answers a
22 question in favor of preemption.

23 And number three, although the majority of
24 the Supreme Court of Missouri thought otherwise, we
25 believe there's no constitutional infirmity in

1 Section 8902(m) (1) under the Supremacy Clause.

2 If I could turn to my first point, it seems
3 to us that the antisubrogation rule in this case is
4 preempted for basically the same reasons this Court
5 considered in FMC in concluding that the same rule was
6 preempted under ERISA. That is to say that it
7 effectively requires plan administrators to calculate
8 benefits on the basis of different liability conditions
9 that vary from State to State; that very importantly, it
10 undermines the statute's goal of uniformity; and third,
11 that it could encourage plan sponsors, in this case, the
12 Federal government, to reduce the scope of coverage.

13 In addition to those reasons, this statute
14 gives you an additional reason to find that it is
15 preempted, and that is that it also preempts those rules
16 that relate to payments with respect to benefits.

17 It is quite clear to us that the subrogation
18 and reimbursement claims that are at issue in these
19 rules quite plainly refer to and relate to payments with
20 respect to benefits; and therefore, the Supreme Court of
21 Missouri was wrong in overlooking that part of the
22 statute and also wrong in overlooking your decision in
23 FMC v. Holliday.

24 JUSTICE GINSBURG: Is there any -- any room
25 at all for State regulation of carriers who have these

1 contracts with OPM?

2 MR. ESTRADA: Well, to be sure, the -- the
3 statute, if you focus on the last clause -- now, the
4 statute appears in page 2 of the blue brief -- if you
5 focus on the last clause, the statute only reaches those
6 State laws that, quote, "relate to health insurance or
7 plans." And there are any number of subjects that may
8 not be reached by these laws, or by other laws, and also
9 subjects that are not related to benefits, coverage or
10 payments with respect to benefits.

11 Congress dealt separately in Section -- in
12 Section 8909(f) with the subject of taxation in the
13 context of these plans and generally provided that
14 carriers may be subject to generally-applicable laws
15 that are applicable to all businesses under profits and
16 -- and the like, but that States, you know, may not tax,
17 you know, the benefits and the payments.

18 And so Congress has, in fact, crafted a
19 limited preemption provision that singles out those laws
20 that are most likely to apply to the insurance plans at
21 issue, and then only say that the scope of the
22 preemption will be defined by particular terms of the
23 contract. And so in our view, in some ways, the reach
24 of this law is somewhat more limited than the -- that of
25 the ERISA statute because, although your "relate"

1 language is identical and they should have identical
2 scope with respect to benefits coverage and -- and
3 payments with respect to benefits, it does not reach all
4 laws of the State. It targets, to begin with, only the
5 health insurance -- those laws that relate to health
6 insurance or plans.

7 Now, if I could get to the second point, we
8 recognize that --

9 JUSTICE KAGAN: Before you do, I mean, we
10 appeared to find this a difficult question in *McVeigh*.
11 We said there were two plausible readings. We said it
12 was a hard statute. We didn't want to decide as between
13 the two. You know, what do you make of that case?

14 MR. ESTRADA: I actually was going to be the
15 headline on my second point, Justice Kagan. So thank
16 you.

17 You know, we recognize that *McVeigh*
18 considered the same statute and concluded that the
19 statute did not give rise to a cause of action in
20 Federal subject matter jurisdiction. And we believe
21 that that question was indeed difficult, because unlike
22 ERISA, where Congress expressly provided a cause of
23 action in Section 502 of that statute, Congress had not
24 done so here. And the Court was basically being asked
25 to imply common law cause of action out of the terms of

1 what otherwise appears to be a defensive preemption
2 prohibition, which is relatively rare.

3 The background rule in the Federal system is
4 that Federal preemption is a defense only, as we learned
5 in the Motley case. And the difficulty that the Court
6 had was in transforming what it otherwise would be a
7 defense into a cause of action and implying Federal
8 jurisdiction.

9 I think that context is extremely important
10 to understand the Court's caveat as to the text of the
11 statute, because the question then was will the statute
12 would bear a construction that was expansive indeed with
13 respect to an entirely different subject matter.

14 With -- with respect to the question of
15 whether the Court considered the statute as being
16 susceptible on the merits of the defense to plausible
17 alternative constructions, I think if you look at the
18 relevant passage, what the Court said was that different
19 constructions were being urged upon the Court; on the
20 one hand, one by the United States, and on the other
21 hand, another one by the Cruz plaintiffs out of the
22 Seventh Circuit.

23 The Court described both of them generally
24 as plausible and wrote to saying that it didn't have to
25 pick either of them. We do not believe that that sort

1 of description of the litigants' position really rises
2 to the finding that the statute is ambiguous as a
3 threshold for even a Chevron analysis, because the Court
4 was not considering any canon of construction, was not
5 considering context, was not considering purpose. It
6 was simply describing the position of litigants in front
7 of this Court and concluding that it was unnecessary to
8 pick one or the other.

9 JUSTICE KENNEDY: Counsel, in this case you
10 have an express-preemption provision. You have a
11 Federal entity that makes the contract. So that may be
12 all you need to say in order to prevail. But there --
13 are there some limiting principles that we -- should
14 just be in the back of our mind when we think about
15 preemption? The case in Boyle was, I think, a close
16 case. Completely different from this because there was
17 no express preemption.

18 So it's not really your obligation to
19 direct -- to address a parade of horrors that isn't in
20 this case, but are there some general limiting
21 principles that we should keep in mind when determining
22 whether or not preemption, A, existed; B, is permitted?

23 MR. ESTRADA: Well, of course. You know,
24 you have, really, three headings of preemption under
25 this Court's doctrine. You have conflict where you take

1 the text of the statute and decide whether the State
2 rule actually conflicts as a -- as the label says. And
3 I think that's the common form that comes in front of
4 the Court, and I think that's just a question of
5 ordinary statutory interpretation applying all the
6 relevant canons and considering as well the -- the
7 purpose of Congress.

8 The harder cases are ones like *Hillman v.*
9 *Maretta* where you're not dealing with actual language of
10 the statute, but you're considering whether the State
11 law is an obstacle to what Congress wanting -- wanted to
12 get at. And this case does not involve that problem
13 except as an a fortiori type argument as to how this
14 would be out even under that rule.

15 But the issue in this case seems to me to be
16 what you have here, where Congress had exercised an
17 appropriate level of Federal power under Section --
18 under Article 1 Section 8, and then has gone further by
19 itself declaring what it views as the consequences with
20 a Federal/State balance. And in this context, it seems
21 to us that it is especially inappropriate to consider
22 what the conceivable limits would be of a doctrine that
23 arises practically in every case.

24 CHIEF JUSTICE ROBERTS: Well, maybe one
25 doctrine has to do with the delegation issue.

1 Suppose Congress passed a law that said,
2 well, any professional responsibility -- any
3 professional responsibility rule adopted by the ABA will
4 preempt contrary State law.

5 Is that okay under preemption doctrine?

6 MR. ESTRADA: Well, it seems to me likely
7 not, but let me take apart what I think are the key
8 aspects of the consequence of the -- of that answer.

9 First, Congress has to identify a part of
10 Article 1, Section 8 that gives it a head of
11 constitutional authority to do what you just described.

12 Second, to my --

13 CHIEF JUSTICE ROBERTS: Are you just -- are
14 you just saying this is beyond -- regulating the --

15 MR. ESTRADA: Well --

16 CHIEF JUSTICE ROBERTS: -- profession is
17 beyond Congress's power?

18 MR. ESTRADA: -- as described, is not
19 self-evidently connected to any one of the --

20 CHIEF JUSTICE ROBERTS: Right. Well, assume
21 it is within Congress's power to legislate.

22 MR. ESTRADA: When -- then there's a
23 question of identifying what it is that Congress is
24 trying to do. It is, in fact, true that Congress has
25 adopted what otherwise would be State -- State rules for

1 the government of certain issues. You know, you have
2 things like you have -- like the assimilated crime
3 statute, for example. And, you know, the question is
4 how closely it is tied to the relevant heading of power
5 and then whether Congress has provided enough
6 governmental supervision for the activity so that it is
7 subject to a delegated exercise of power under
8 appropriate standards by an ultimately responsible
9 authority.

10 CHIEF JUSTICE ROBERTS: I guess, is it --
11 you know, in some of those areas, you're talking about
12 State governments. Is -- is it permissible for Congress
13 to delegate the authority to decide what laws are
14 preempted to a private entity?

15 MR. ESTRADA: I think it depends on how it
16 does it. I would be reluctant to say that considering
17 whatever crisis or problem Congress may be considering,
18 that there's a particular avenue of dealing with them
19 that is completely foreclosed. But to the extent that
20 there are limits to the ability of Congress to do such
21 things, it seems to me that a precondition for Congress'
22 ability to do that would be to do something like has
23 happened, for example, in the securities markets where
24 you have what are called self-regulatory organizations
25 where trade groups, in effect, have rules that apply to

1 parts of the industry, but they're strictly supervised
2 and approved by the Securities and Exchange Commission
3 and there is recourse for their violation to go in
4 Federal court.

5 Now, those rules in some cases are
6 considered preemptive, and so I don't want to foreclose,
7 you know, the proposition that as a category using an
8 industry group or a private group, so long as it is
9 subject to appropriate government supervision, could not
10 be a possible tool that Congress could use.

11 CHIEF JUSTICE ROBERTS: Well --

12 MR. ESTRADA: But in that event -- if I
13 could just finish -- but in that event, you would also
14 have the additional layer of involvement having to do
15 with the limit that this Court itself has placed on the
16 -- on the delegation by Congress -- Congress of any
17 authority. You do have something called the
18 Nondelegation Doctrine.

19 CHIEF JUSTICE ROBERTS: But what about two
20 private parties, whether, you know -- whatever they are,
21 a railroad and a shipper, in other words, and Congress
22 says, whatever you agree to will preempt contrary State
23 laws.

24 MR. ESTRADA: I believe --

25 CHIEF JUSTICE ROBERTS: I know you're going

1 to suggest --

2 MR. ESTRADA: No.

3 CHIEF JUSTICE ROBERTS: -- it's not this
4 case --

5 MR. ESTRADA: No, no. I understand --

6 CHIEF JUSTICE ROBERTS: -- but assume it is.

7 MR. ESTRADA: I understand that, Mr. Chief
8 Justice. I find it hard to believe that Congress could
9 lawfully give a blank check to private individuals
10 without any subject -- without any government
11 supervision and/or without appropriate standards as to
12 what it is that they may do or not do. But I want to
13 distinguish the hypothetical that you posit from what's
14 at issue in this case.

15 CHIEF JUSTICE ROBERTS: Well, before you
16 get -- get to that, I mean, it would seem to me that you
17 could deal with the concerns you have and still address
18 the problem. In other words, it's not a blank check.
19 You know, it -- any rate between, you know, \$10 per mile
20 and \$30 per mile, but you, the parties, you know, we
21 want to give the -- the free enterprise system a little
22 more scope than having the government set it. So
23 whatever rate you set between \$10 and \$30 a ton or a
24 mile will preempt contrary State regulation.

25 MR. ESTRADA: Again, it seems to me that

1 this is a question to some extent of conceptualizing. I
2 think I am agreeing with the basic premise of your
3 question, Mr. Chief Justice, but there are, of course,
4 limits to the ability of Congress to delegate to private
5 individuals.

6 JUSTICE BREYER: The question, I think,
7 which is perhaps truly speculative, but it is rather
8 interesting, if we go back to the sick chicken,
9 Schechter --

10 MR. ESTRADA: Well, I was going to go there.

11 JUSTICE BREYER: -- there first is a
12 question --

13 MR. ESTRADA: Uh-huh.

14 JUSTICE BREYER: -- of whether Congress has
15 this Article 8 power to legislate at all in the area.

16 MR. ESTRADA: Uh-huh.

17 JUSTICE BREYER: You assume the answer's
18 yes.

19 The second is a nondelegation question.
20 There, the delegation had run riot. But suppose they'd
21 used the words "unfair competition" instead of "fair
22 competition" and, therefore, they had satisfied the
23 Nondelegation Doctrine.

24 Given the satisfaction of the -- of the
25 source of power and satisfaction of the delegation

1 doctrine or nondelegation, is there additional
2 requirement? Does the preemption matter, assuming there
3 were parts of that that preempted as there must have
4 been, is that a separate doctrine that imposes yet a
5 further restriction, or once the first two are
6 satisfied, have you automatically satisfied the third?

7 MR. ESTRADA: I find it hard to say that
8 there's an independent limit on the basis of preemption,
9 because, as I understand the power of Congress, Congress
10 could pass a statute that displaces all law in a subject
11 matter and renders it a law-free area, for example. And
12 so I don't know that I would ever say that in dealing
13 with a crisis like the Great Depression, for example,
14 Congress could not turn to the type of remedies that it
15 tried in the Schechter case and that those would be
16 completely foreclosed to Congress. But --

17 CHIEF JUSTICE ROBERTS: Yeah. But the
18 idea -- the concern is -- raised by your friend on the
19 other side is, yes, Congress can do that.

20 MR. ESTRADA: Uh-huh.

21 CHIEF JUSTICE ROBERTS: But we're talking
22 about the preemption of State law. And the question is
23 whether or not they've authorized someone not subject to
24 the political constraints that Congress is subject to to
25 undertake that pretty significant step of telling State

1 law -- State legislators that they can't legislate.

2 MR. ESTRADA: But if I could just pivot to
3 what -- why the -- the argument doesn't really fit what
4 the problem is that we have in this case, even though it
5 is preemption, is that it arises ostensibly because the
6 statute literally says that the terms of its statute
7 would supersede and preempt. It is quite evident from
8 the statute that what Congress actually intended to say
9 and the words will bear is that the terms of the statute
10 shall be effective notwithstanding the contrary, et
11 cetera, et cetera.

12 And that although I understand that the
13 whole delegation going down, you know, the -- the road
14 of delegation is very interesting, I will point out that
15 nowhere has a delegation challenge as such been raised
16 in this case in any of the lower courts, and that it was
17 only in this Court that this was reconceptualized as
18 that.

19 I think the proper way to conceptualize what
20 Congress has done in this statute, as it has in many
21 other statutes, is that it has displaced State law to
22 create room for the operation unimpeded of certain
23 contract terms that it believed should be encouraged for
24 the public interest. The Federal Arbitration Act is one
25 example of that, even though it is a purely private

1 statute. You know, the -- the statute that we're
2 mentioning earlier, ERISA, is another.

3 I will simply say that if Congress can do
4 that to make room for the operation of purely private
5 contracts, a context that involves Federal benefits for
6 the Federal workforce under Federal contracts
7 administered by a Federal agency is something that
8 Congress can clearly deal with, because under Clearfield
9 Trust and its progeny, these contracts would be governed
10 by Federal common law in any event, and that law would
11 be preemptive, at least in certain circumstances.

12 So it is certainly appropriate for Congress
13 to identify itself the outlines and limits of the
14 preemption than to leave it to ad hoc adjudication of
15 common law claims by the Federal courts in this country.

16 Thank you, Mr. Chief Justice. And I would
17 like to reserve the remainder of my time for rebuttal.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Tripp.

20 ORAL ARGUMENT OF ZACHARY D. TRIPP

21 FOR UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE PETITIONER

23 MR. TRIPP: Mr. Chief Justice, and may it
24 please the Court:

25 OPM's regulations answer the question

1 presented here, and I'd like to just make three points
2 about how they work, why they're important --

3 JUSTICE SOTOMAYOR: Do you think the
4 statute --

5 MR. TRIPP: -- and --

6 JUSTICE SOTOMAYOR: Do you think this is
7 ambiguous?

8 MR. TRIPP: I guess --

9 JUSTICE SOTOMAYOR: Whether we get to
10 Chevron deference at all.

11 MR. TRIPP: I guess our basic take is that
12 the answer to that doesn't really matter because we've
13 picked one of the two interpretations and it's really up
14 to Respondent to show that our interpretation is not
15 even reasonable. And we think that there's just no way
16 that they can do that. Our interpretation, we think, is
17 just a better interpretation, if you were choosing among
18 the two.

19 JUSTICE SOTOMAYOR: So why is the agency
20 better than a court suited to define its own
21 jurisdiction?

22 MR. TRIPP: Right. And so that's what I was
23 wanting to get at and explain how these regulations
24 work. And I -- so I think the key point that I want to
25 emphasize here is that in the preemption provision, the

1 crucial language is, is what is the nature and extent of
2 the benefits and benefit payments available under one of
3 the plans? And that is tied to something OPM is already
4 administering under a different provision of the
5 statute. 8902(d) says that each contract shall include
6 such benefits and limitations and other definitions of
7 benefits as it considers necessary or desirable.

8 So those two things go hand in hand. In the
9 regulations, they work the same way. In Section B(1) of
10 the regulations, it says that subrogation imposes a
11 condition of and a limitation on benefits and benefit
12 payments and that makes good sense. It's a clawback
13 provision.

14 CHIEF JUSTICE ROBERTS: You -- you've
15 already -- you just slid into the Chevron question;
16 right? I -- I understood Justice Sotomayor to want to
17 know if you -- well, at least as I would want to know,
18 do you need Chevron to get around the ambiguity?
19 Because once you say that, it's -- you get into somewhat
20 serious questions about whether Chevron applies,
21 basically, to the decisions of private entities to -- I
22 mean, I think the concern is it's bad enough that
23 they're preempting State law, but now they get
24 deference. They can preempt State law so long as their
25 terms are plausible.

1 MR. TRIPP: Right. So -- so I think we
2 would win this case even without Chevron deference,
3 without the regulations. I think we just have the
4 better of the two readings of the statute. The
5 application of the presumption against preemption here,
6 I think, is really just fundamentally misguided. Not
7 only do we have an express-preemption provision, we're
8 talking about Federal benefits for Federal employees
9 under Federal contracts entered into under a Federal
10 statute. And the way this would work on the ground is
11 if Missouri can prohibit subrogation, then what happens
12 is that Federal workers in Illinois who are enrolled in
13 the same plan and paying the same premiums are footing
14 the bill for benefit payments they can't even keep, and
15 it's not part of a State's traditional authority to
16 impose those kinds of externalities on out-of-State
17 Federal workers.

18 So what I was getting at, and the answer to
19 Justice Sotomayor's question, is that we would clearly
20 get deference here on -- on 8902(d) in determining what
21 are -- what are the definitions and are there
22 limitations on benefits available under a plan? And I
23 think under Chevron, it doesn't make much sense for us
24 to get less deference in determining what is the nature
25 and extent of benefits and benefit payments, if it's

1 really just another way of saying the same thing.

2 So, on -- on why it's important -- I think I
3 covered this a little before -- but to be very concrete
4 about this, in the D.C. metro region, Virginia prohibits
5 subrogation, but Maryland and the District of Columbia
6 do not. Under Respondent's position, similarly-situated
7 Federal workers working for the same agency, enrolled in
8 the same plan, and paying the same premiums would have
9 different benefits and -- and the different extent of
10 benefit payments, depending on whether they lived in
11 Bethesda or McLean. We think that's just clearly wrong.

12 And then on -- on -- on --

13 CHIEF JUSTICE ROBERTS: Now, you understand
14 the problem, and I understand the argument that it's
15 semantic, but sometimes semantics matter. If you wanted
16 to take care of that problem, you just have to pass a
17 law saying that the -- the State laws are preempted --

18 MR. TRIPP: Yeah. And then -- then --

19 CHIEF JUSTICE ROBERTS: But you don't. It
20 says that the contract is what preempts the State laws.

21 MR. TRIPP: Sure. And I -- and I think what
22 my -- my brother said was exactly right. If you just
23 turn to the statute, I'd like to illustrate why I think
24 it really proves as no constitutional problem at all.
25 It's on page 2 of the blue brief or page 3 of the gray

1 brief.

2 It says that the terms of these Federal
3 contracts shall supersede and preempt State or local law
4 relating to health insurance or plans. What that
5 clearly means is that the terms of the contract shall
6 apply notwithstanding State or local law. It's a non
7 obstante provision like the Supremacy Clause itself, and
8 I think when you read it that way, it makes it crystal
9 clear that the -- that the statute is doing all the
10 preempting here. It's creating a protective umbrella to
11 enable OPM --

12 CHIEF JUSTICE ROBERTS: If -- if you edit
13 the statute, it's perfectly clear. It doesn't say -- I
14 mean, it says preempt.

15 MR. TRIPP: And -- and I think what I was
16 getting at is, I think it's a perfectly natural reading
17 of shall supersede and preempt to interpret that to mean
18 shall apply notwithstanding, because the -- the
19 Supremacy Clause itself has similar language about
20 notwithstanding. We think that's obviously what
21 Congress was getting at here. Every other Federal
22 benefits -- general -- general Federal benefits statute
23 has this same language, so it's health insurance, life,
24 dental, vision, long-term care; we don't think that
25 there's any problem in -- in -- in picking this

1 particular language.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Wessler.

5 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

6 ON BEHALF OF THE RESPONDENT

7 MR. WESSLER: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 A decade ago in *McVeigh*, this Court stressed
10 that FEHBA's express-preemption clause requires cautious
11 interpretation. That instruction remains true today.
12 Section 8902(m)(1) was, in Congress's own words,
13 purposely limited and not designed to disturb the
14 important role that States play in regulating those
15 private insurers who participate in the FEHBA program.
16 Indeed, that is why, when Congress first enacted the
17 provision, it specifically warned that the clause would
18 not preempt insurers from traditional State laws
19 governing insurance.

20 Reading FEHBA's express-preemption clause
21 narrowly here so that subrogation contract terms do not
22 preempt otherwise applicable State law honors Congress's
23 intent and accords respect for the States as independent
24 sovereigns in their historic role in governing matters
25 of insurance and tort law.

1 JUSTICE GINSBURG: Does the -- does the
2 statute 8902(m) (1), does it preempt anything?

3 MR. WESSLER: Well, we think that the
4 statute is unconstitutional under the Supremacy Clause,
5 and so, as written, it has -- it should have no effect.
6 I think if you carve that out for -- for one second, I
7 think what Your Honor is asking is are there a subset of
8 laws that Congress was attempting to displace by virtue
9 of these contract terms, and I think the answer to that
10 is yes and you can get that from the legislative
11 history.

12 There were -- I think, just to back up for a
13 second, when Congress first passed FEHBA in 1959, it did
14 not attempt to enact a uniform area of Federal law. And
15 you -- you know this because what Congress said when it
16 first passed the law was, there's a problem with Federal
17 workers. They don't have the same competitive Federal
18 benefits packages that those in the private sector do;
19 we want to create a competitive way to allow that to
20 entice them to work for the government. But they also
21 had a problem, because the government wasn't
22 administering any sort of serious health program. And
23 so what they chose to do was to tap into the private
24 market.

25 They -- they explicitly said, we don't have

1 the expertise to administer this program. We'd like to
2 act as a market participant and buy these plans from
3 private insurers who are doing business in the States.
4 And so from its inception, the FEHBA program was a
5 dual-regulatory scheme. Congress intended States and
6 their insurance laws to govern those participant --
7 those private insurers who are participating in the
8 program.

9 Now, in the '70s what happened was that a
10 number of the carriers and the agency administering the
11 program, which was then at the time called CSC, found
12 that there were a number of States that had begun to
13 pass benefit laws; State laws that required, for
14 instance, a carrier to cover acupuncture services or
15 chiropractor services. And the carriers went to
16 Congress and they said, these laws pose a problem. We
17 need you to address this in some fashion. And that's
18 what Congress did with 8902(m)(1), but it was very clear
19 in the legislative history at the time it passed this
20 statute in 1978, that it was purposely limited and not
21 intended to displace the State background insurance laws
22 that would apply to all of the carriers participating in
23 this program.

24 JUSTICE ALITO: Before we get to the
25 legislative history, could you say something about the

1 terms of this provision? Would you argue that the terms
2 of a sub -- of a subrogation -- of a contract that has a
3 subrogation provision do not relate to coverage? They
4 do not relate to benefits, that they do not relate to
5 payment of benefits? Could you explain how you would
6 reach that conclusion?

7 MR. WESSLER: That's right, Your Honor.
8 That -- that, we think, is the best reading for three
9 reasons. First, the -- it makes sense to distinguish
10 subrogation from benefits, because subrogation claims
11 involve the proceeds of a distinct and separate tort
12 cause of action that happens distinct in time and is
13 highly contingent. It doesn't involve any -- it doesn't
14 affect at all any payment for a benefit or a coverage
15 that a Federal worker might receive --

16 JUSTICE ALITO: It doesn't -- it doesn't
17 affect the benefits that the participant receives?

18 MR. WESSLER: That's right.

19 JUSTICE ALITO: If -- if it -- if there's no
20 subrogation claim, the benefit receives a certain
21 amount. If there is a potential, it's -- if there's
22 requirement of subrogation, the participant receives
23 that amount minus X?

24 MR. WESSLER: I don't think that's quite
25 right, Your Honor. They get the MR -- a Federal worker,

1 let's say, who needs coverage for an MRI, gets -- gets
2 that MRI covered and gets the coverage for that MRI paid
3 for by her insurance plan regardless of any subrogation
4 claim.

5 JUSTICE ALITO: Right.

6 MR. WESSLER: Because that claim is
7 necessarily contingent, it may never occur. And -- and
8 the money that -- that ultimately is involved in a
9 subrogation claim isn't the money that is getting paid
10 for, for the MRI coverage. It's money that comes out of
11 a separate -- the proceeds of a separate tort claim from
12 a personal injury action.

13 JUSTICE KAGAN: But money is money, and, you
14 know, one dollar is as good as the next. And the
15 question is -- I think what Justice Alito is saying;
16 I'll just say it my way -- is one way -- say you're in a
17 car accident. One way you get all the hospital and
18 medical costs that you incur, and the other way you get
19 those costs minus any recovery in a tort suit. So maybe
20 a recovery won't happen in a tort suit, but a recovery
21 might happen in a tort suit and then you get
22 considerably less.

23 MR. WESSLER: Well, I think -- I think that
24 that is certainly possible, although I do think the
25 money matters. These are historically equitable claims

1 and the pots of money and the differences about from
2 where those monies come matters in the way you conceive,
3 at the outset, of what a benefit is and whether that
4 benefit will be covered.

5 But I also think that part of understanding
6 how to interpret the text of the statute requires
7 understanding what Congress intended when it passed it
8 in the first place. And I think the purpose here is
9 that Congress was distinctly concerned with these kind
10 of front-end benefit laws that made it difficult for
11 carriers to know and provide for the coverage that they
12 wanted and not to be required to cover for Arizona's
13 acupuncture doctors' benefits and services that weren't
14 offered under, for instance, a Blue Cross/Blue Shield
15 plan.

16 JUSTICE BREYER: The point is, is your
17 point. Look, what we're talking about here is
18 subrogation. Has nothing to do with coverage. It has
19 nothing to do with benefits. You're covered, you get
20 the money, you get the CAT scan. You're covered, you
21 get the hospital payment, you get the pain and suffering
22 or whatever, you -- you're covered.

23 Now, there's a different thing that happens
24 in the world. There's a tort suit. And our law affects
25 the proceeds of that tort suit. The proceeds of that

1 tort suit are not benefits. The proceeds of that tort
2 suit are not coverage. The proceeds of that tort suit
3 are some money that our State and a judge decided should
4 be paid to a victim of an accident. Is that the point?

5 MR. WESSLER: That's correct, Your Honor.

6 JUSTICE ALITO: Well, if that's the point,
7 then what about payments with respect to benefits?
8 The -- the sub -- those payments are not even with
9 respect to benefits?

10 MR. WESSLER: Again, I don't think that's
11 the best reading of the statute for largely the reasons
12 that Justice Breyer gave. The -- the benefits and the
13 payment of those benefits contemplates a front-end
14 question about whether you are getting your MRI covered
15 by the plan, not whether many years down the road there
16 is some additional extra pot of money that is then
17 available to be shared among a number of different
18 entities.

19 JUSTICE ALITO: But the question isn't
20 whether it's benefits; it's whether it relates to
21 benefits, and not even whether it relates to benefits,
22 whether it relates to payments with respect to benefits.

23 MR. WESSLER: I -- I -- yes. I think that's
24 -- that's certainly right, but I think relates to,
25 again, is -- is context-dependent in this -- in this --

1 for this statute as it is for every other statute.

2 And Congress had a laser focus when it
3 passed this statute in 1978. It did not want to disturb
4 otherwise applicable State insurance laws. And the
5 reason it didn't want to disturb those laws is because
6 it understood that the private carriers that were
7 participating in this program should be governed by the
8 same laws that would govern anybody in the private
9 sector when it comes to insurance.

10 And that's why this distinction, I think, is
11 a false one between a employer -- an employee in -- in
12 Missouri and an employee in Kansas getting different
13 rights because their State laws are different. That is
14 precisely the kind of differences that Congress wanted
15 to ensure controlled in the FEHB program.

16 I -- I think also, you know, what this
17 points up, Justice Alito, is that there is, I think,
18 this textual ambiguity that certainly can be read, based
19 on just a -- a pure matter of --

20 JUSTICE BREYER: There is no ambiguity. The
21 answer to the point, if I got the point right, is you
22 say, you know, it's sort of like a lottery or something.
23 There's some money floating out there. And what the
24 contract says, different from what the State law says,
25 is that money that's floating out there, maybe you won

1 it in a lottery or it came from Mars as far as this
2 receiving benefits is concerned by the patient, but this
3 contract says you take that money that came from Mars or
4 wherever and you pay it to the insurance company.

5 Why do you pay it to the insurance company?

6 MR. WESSLER: Well, I think -- I mean, I
7 think --

8 JUSTICE BREYER: Because what is it that the
9 insurance company did that entitles them to receive that
10 money from Mars? What is it that they did?

11 MR. WESSLER: Well, they -- they included in
12 their contract this requirement --

13 JUSTICE BREYER: Whoa, whoa, whoa. I mean,
14 just very simply, in three words, what did they do that
15 entitled them to money from Mars?

16 MR. WESSLER: Sure. They paid the benefits.

17 JUSTICE BREYER: Exactly. So there we are.

18 Now, it relates to benefits because they get
19 the money from this separate thing that happened because
20 they paid benefits. So now how do you say that this
21 contract does not relate to benefits?

22 MR. WESSLER: Well, Your Honor, I think,
23 again, the question is -- is largely what did Congress
24 intend when it passed this statute. The question --
25 "relates to" could be read uncritically broadly, or it

1 could be read narrowly, and -- and the -- the proper
 2 approach, I think, as this Court has explained in
 3 multiple different contexts, is to ask what did Congress
 4 intend when it passed this particular express-preemption
 5 clause. And here, we know that their goal was not to
 6 create an expansive form of preemption that could extend
 7 to cover laws that would fall within traditional areas
 8 of State insurance regulations.

9 JUSTICE ALITO: How do we know that?

10 MR. WESSLER: They said in the legislative
 11 history, it is purposely limited and not intended to
 12 displace otherwise applicable State insurance law.

13 JUSTICE ALITO: You know, our colleague
 14 Justice Scalia, is not here any longer, but he would be
 15 having a fit at this point, so maybe --

16 (Laughter.)

17 MR. WESSLER: Sure. I -- I understand, Your
 18 Honor. But again, I think in *McVeigh*, what -- one of
 19 the lessons in *McVeigh* is that there is this textual
 20 ambiguity that arises from precisely this colloquy that
 21 we've had. And the question then becomes what does --
 22 what does the Court do in the face of this textual
 23 ambiguity when we don't quite know what Congress may
 24 have intended exactly.

25 And in the area of traditional State

1 regulation, as we are in when it comes to insurance,
2 there's a -- when we're talking about State laws and
3 whether Congress intended to displace those State laws,
4 we require a clear statement from Congress before we
5 undo a category, wipe away --

6 JUSTICE SOTOMAYOR: Mr. Wessler, what is --
7 how do you differentiate our holding in Hillman?

8 MR. WESSLER: I --

9 JUSTICE SOTOMAYOR: How is this --

10 MR. WESSLER: Yes.

11 JUSTICE SOTOMAYOR: -- any more or less
12 "relates to" than in Hillman?

13 MR. WESSLER: Well, I --

14 JUSTICE SOTOMAYOR: Almost identical
15 language. And we read it very, very broadly.

16 MR. WESSLER: Well, the critical
17 distinction, Your Honor, in Hillman, is that Hillman was
18 decided on an implied form of preemption. The Court
19 said -- life insurance statute at issue there, including
20 an express-preemption clause, but the Court didn't --
21 didn't address the effect or meaning of that clause at
22 all and instead looked to the -- to the statutory
23 language and the regulations that the agency promulgated
24 and found that -- a Virginia State law that would have
25 required something else other than what the -- the

1 statute required was in conflict.

2 Now we think implied preemption --

3 JUSTICE SOTOMAYOR: Why -- why isn't there a
4 conflict here?

5 MR. WESSLER: We -- we think that there --

6 JUSTICE SOTOMAYOR: There's a direct
7 conflict between what the benefits paid here demand --
8 it's benefits minus later subrogation -- and what the
9 State law says, which is you can't honor that
10 contractual term.

11 MR. WESSLER: I -- sure. So one thing to
12 say, first -- I'll answer your question, Your Honor, but
13 this is not an implied preemption case.

14 Neither the Petitioners nor the government
15 have argued that there is a conflict that has -- that
16 has been created that gives rise to a form of implied
17 preemption. Their argument is focused solely on the
18 meaning of scope of this express-preemption clause.

19 Now, there could be, down the road, if the
20 government were to, in fact, enact a substantive
21 regulation, some form of implied conflict that could
22 give rise to the displacement of State law, but we're
23 not in that world in this case today.

24 And I think that's actually a crucial point
25 that -- that what we have here is the challengers are

1 asking for what is, in essence, an unprecedented
2 expansion of Chevron at the same time while trying to
3 smuggle in insurance laws through express-preemption
4 clause, when they have available to them the possibility
5 of arguing, as in Hillman, an implied form of preemption
6 that would still allow the Court to do the -- the --
7 the -- to make the decision about whether there's indeed
8 an irreconcilable conflict.

9 JUSTICE BREYER: But -- but --

10 JUSTICE KENNEDY: And so I do. That -- that
11 gives me whip -- whiplash. All of a sudden you -- you
12 have implied preemption, and that's the -- the preferred
13 argument to express preemption? It should be just the
14 other way around.

15 MR. WESSLER: Well, I think, Your Honor,
16 that is what happened in Hillman v. Maretta. And there
17 was an express-preemption clause like there was here,
18 but the Court, you know, instead of considering whether
19 that express-preemption clause displaced Virginia law,
20 adopted a form of implied preemption to decide whether
21 there was a conflict. But we don't have here a
22 substantive regulation --

23 JUSTICE KENNEDY: Well, it just seems to me
24 as orderly proceeding for us to ask the first question:
25 Is there express preemption? And that displaces the

1 whole necessity for going through the very difficult
2 exercise of implied preemption.

3 MR. WESSLER: Well, I --

4 JUSTICE KENNEDY: You seem to indicate it
5 has some priority. That was my only comment.

6 MR. WESSLER: Well, I don't -- I don't
7 know -- I wouldn't -- I don't think there's necessarily
8 a priority, but I don't think the express-preemption
9 clause in this case can bear the weight of the
10 interpretation that the challenger is --

11 JUSTICE KENNEDY: Well, that's quite another
12 thing.

13 MR. WESSLER: -- trying to place on it.

14 JUSTICE KAGAN: But, for example, just a
15 couple of years ago, we said with respect to an
16 express-preemption clause, we said that the presumption
17 against preemption just didn't apply in a case like
18 this -- like that; that it was only applicable in a case
19 of implied preemption.

20 MR. WESSLER: Right. I -- well, I don't
21 think this Court has overruled the 70 years of -- of
22 precedent establishing that the presumption against
23 preemption applies to express-preemption clauses. I
24 think --

25 JUSTICE KAGAN: So that was just a careless

1 statement --

2 MR. WESSLER: No. I think that --

3 JUSTICE KAGAN: -- on our part?

4 MR. WESSLER: I think in that case, the
5 point the Court was making was that where the language
6 of an express-preemption clause is clear, where we know
7 that Congress intended to displace a -- a particular
8 State law, the presumption does not need to apply. And
9 I think that's perfectly consistent with an
10 interpretation here, that where the text is ambiguous,
11 where we do not have a clear statement from Congress
12 that it intended to displace some particular area of
13 State law, that we would -- we would exercise caution
14 and not cavalierly displace that State law unless and
15 until Congress makes that intent clear.

16 I'd like, if I can, to just turn to
17 Justice -- Chief Justice Roberts' question that he posed
18 to the challengers about the very odd nature of this
19 express-preemption clause, because I do think it raises
20 some very serious constitutional problems that -- that
21 if -- if this Court were to adopt the challengers'
22 interpretation, would -- would allow these contract
23 terms to really do the displacing of State law.

24 And I do think that there is -- it would be
25 unprecedented -- Congress has never enacted another form

1 of this type of preemption that would actually authorize
2 the terms of privately-negotiated contracts to step in
3 and displace otherwise applicable sovereign decisions of
4 States.

5 And there really is no way around this
6 problem in the case, other than to adopt a narrow
7 interpretation of what the -- what relates to benefits
8 means, because Congress, when it wrote this statute in
9 1978, unambiguously intended to delegate the power to
10 preempt to these terms of contracts. And these
11 contracts are not laws under the Supremacy Clause.

12 JUSTICE ALITO: Does your -- does your
13 argument depend on the wording of this provision? Does
14 it depend on the fact that it says the terms of the
15 contract shall supersede State or local law? Would --
16 would you have a -- would you make the same argument if
17 it said this statute hereby supersedes and preempts any
18 State or local law that conflicts with the terms of the
19 contract?

20 MR. WESSLER: I think that is -- I think
21 that is a -- a far better approach that would -- would
22 likely not raise these problems, because it points back
23 to a -- a statute that actually does the preempting.

24 JUSTICE ALITO: Well, boy, if you're willing
25 to concede that, I don't see what there is to your

1 argument because that's, in essence, what this is --
2 what this is saying.

3 MR. WESSLER: But the difference, Your
4 Honor, is that here the terms are -- the terms of these
5 contracts are determining the scope of preemption. And
6 the terms themselves are not known by Congress at the
7 time it passes the law. What Your Honor suggested looks
8 a lot more like what ERISA looks like where Congress
9 said the subchapters of ERISA preempt any State law that
10 might interfere with plans. But when this Court does a
11 preemption analysis under ERISA, it refers back to
12 the -- to the actual substantive provisions in ERISA to
13 determine preemption.

14 JUSTICE ALITO: But Congress doesn't know
15 the term -- doesn't know what's in all these plans.
16 They didn't know what would be in all these plans when
17 they enacted it.

18 MR. WESSLER: Well, that --

19 JUSTICE ALITO: It depends on the -- it --
20 on -- on the formulation. If you say the contract
21 preempts anything that conflicts with State law,
22 that's -- that's a problem. But if it -- this -- it
23 says, this statute hereby preempts anything that
24 conflicts with the contract, that's -- that's not a
25 problem?

1 MR. WESSLER: Well, it depends on what the
2 statute says. And in ERISA, when Congress passed ERISA,
3 it included a series of substantive provisions that
4 dictate which State laws are displaced. For instance,
5 it has reporting requirements. It has disclosure
6 requirements. It has a remedial scheme. All of those
7 substantive provisions give force to the preemption of
8 State law.

9 Here, there isn't any of that. All Congress
10 has said is we're -- we are authorizing these contract
11 terms sight unseen that are entered into by the
12 government, not acting as regulator, but acting as -- as
13 market participant, and the terms of those contracts are
14 able to other -- to displace otherwise applicable
15 sovereign State law.

16 And -- and there truly is no limiting
17 principle if, in fact, that is authorized under the
18 Supremacy Clause, because, as the Chief suggested, there
19 would be nothing to stop Congress from doing the same
20 thing for completely private contracts or the rules of
21 some informal body.

22 When -- when the Supremacy Clause speaks of
23 a law being capable of displacing the sovereign
24 decisions of States, it requires that there be some
25 accountability checkpoints, some procedural protections

1 that safeguard States from the kind of arbitrary
2 decision making that could occur through an informal
3 process where there's no public participation and no
4 judicial oversight.

5 JUSTICE KAGAN: I think I don't quite
6 understand your -- your answer to Justice Alito's first
7 question. I think he gave you a statute something along
8 the lines of this Federal law preempts and supersedes
9 any State law that conflicts with these kinds of
10 contracts. And you said that would not be subject to
11 your constitutional concerns; is that right?

12 MR. WESSLER: I may have misheard -- I may
13 have misheard Justice Alito.

14 JUSTICE KAGAN: Because those contracts are
15 just as indefinite as the -- as the contracts in this --

16 MR. WESSLER: That's right.

17 JUSTICE KAGAN: -- statute written here.

18 MR. WESSLER: That's right. And -- and the
19 key point, the one that I think might infect a -- would
20 infect that -- that hypothetical is that where the
21 contract terms themselves are determining the scope of
22 preemption, where they, the terms, are actually
23 requiring State law to yield, that is where I think
24 the -- the Supremacy Clause comes into play because
25 those contract terms themselves are not laws. They have

1 not been enacted by Congress. They come with no
2 safeguards, procedural protections --

3 JUSTICE KAGAN: Well, but that -- that,
4 again, is true of ERISA, too. ERISA is a statute that
5 says this Federal law displaces these State laws because
6 they conflict with a bunch of contract terms.

7 MR. WESSLER: Well, I think the difference
8 is that when this Court does -- when this Court
9 considers preemption in ERISA, the Court looks to the
10 substantive provisions of the statute. It looks to, for
11 instance, the remedial scheme. It says there is this
12 remedial scheme in ERISA, and that substantive scheme
13 displaces a State common law claim. The same would be
14 true for a disclosure requirement.

15 JUSTICE ALITO: Doesn't -- doesn't specify
16 everything that's in -- in a State -- in a -- in a plan.
17 And things that are in a plan that are not required by
18 ERISA supersede State law; isn't that true?

19 MR. WESSLER: That's true. But what happens
20 then is you have Federal common law that comes in to
21 fill the gap. What we know from *McVeigh* here is that we
22 are not in a Federal common law context. These contract
23 terms, the ones involving subrogation and reimbursement,
24 are not governed by Federal common law. They are
25 distinctly State law controlled. They arise after a

1 personal injury happens in a State and through a tort
2 action in State court. They are governed by these
3 distinct State law rules, not any Federal common law.

4 And so the difference here is that you have
5 what is otherwise a State-focused area of law in which
6 these terms in Federal contracts that go through no
7 oversight, no public participation are being used to
8 deflect those State laws in a way in which Congress
9 itself does not have any control over.

10 And I think the Court ought be very careful
11 before wading in to whether, in fact, that is something
12 that is authorized under the Supremacy Clause. And I
13 think it's what motivated this Court in McVeigh to look
14 at this exact provision and express what is, I think, a
15 quite concerned view over whether there is the Supremacy
16 Clause problem.

17 JUSTICE ALITO: I think Mr. Estrada referred
18 to this situation. What if Congress says that in this
19 particular area, States cannot regulate it at all? The
20 free market has to govern. So any State law that
21 purports to regulate in this area is preempted.

22 Now, is there a problem with that?

23 MR. WESSLER: I think that -- I think if you
24 are in a world where there's field preemption, where
25 Congress has displaced everything, you -- you might not

1 run into this problem. But I don't think that's what
2 we're talking about here.

3 JUSTICE ALITO: You might not run into the
4 problem. You might run into the problem?

5 MR. WESSLER: I think, again, it depends
6 specifically on what the Federal law says and how it's
7 operating. But the closest example that the challengers
8 have come to for -- for an analogue to what Congress has
9 done here is ERISA, which refers specifically to the
10 subchapters of the law as doing the preempting and the
11 Federal Arbitration Act, which itself only establishes a
12 Federal rule of nondiscrimination. It seeks to put
13 arbitration agreements on the same plane as other
14 contracts and have State law apply equally to both.

15 What's going on here is a rule of
16 essentially priority in which -- which Congress has
17 delegated to these contract terms the power to override
18 State law and exist above what would otherwise apply
19 to -- in the private sector. And I think that actually
20 cuts strongly against what Congress intended when it
21 first passed FEHBA, which was that this -- this statute
22 and the -- and the -- and the insurance policies that
23 are offered to Federal workers who are also State
24 citizens should be subject to the State insurance
25 regimes that have controlled these carriers from day one

1 in the private sector.

2 And when Congress has been asked to address
3 specific problems in this area, it has reacted and
4 responded repeatedly. The one thing that this agency
5 here, OPM, has not done, as much as it's tried to argue
6 for Chevron deference over an express -- its
7 interpretation of an express-preemption clause, it has
8 never, in fact, asked Congress to amend this law to
9 address what it perceives as a problem.

10 And I would point the Court in this -- in
11 this respect to the way preemption works under the --
12 the Department of Defense insurance regime. Because for
13 all of the -- again, the challengers pointing to several
14 copycat versions of this statute and several of their
15 other insurance regimes, the Department of Defense
16 insurance regime looks very different.

17 What Congress did there is that it first
18 enacted an express-preemption clause that looked nearly
19 identical to what the Court has in front of it here.
20 And then five years later, it amended that law and it
21 delegated the power to preempt not to terms of a
22 contract, but to regulations promulgated by a Federal
23 agency; there, the Secretary of Defense.

24 And I think if we're thinking about the
25 democratically accountable ways that preemption should

1 work and the protections that States must have for their
2 own law, allowing either Congress to do the preempting
3 or delegating that power specifically and expressly to
4 an agency are the only two ways that we can -- that
5 are -- that are constitutionally permissible, and here
6 we have neither.

7 Congress itself does not control the terms
8 of these contracts, and it has not expressly delegated
9 any authority to the agency to pronounce on preemption.
10 And so the agency's effort to seek Chevron deference
11 over what is explicitly a conclusion on the scope of an
12 express-preemption clause just doesn't work. Congress
13 well knows how, when it wants to, to delegate that power
14 to the agency, and it has not done so here.

15 If there are no further questions, save the
16 rest of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Three minutes, Mr. Estrada.

19 REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

20 ON BEHALF OF THE PETITIONER

21 MR. ESTRADA: Thank you, Mr. Chief Justice.

22 I'd like to start with the last point
23 counsel made about how Congress did not expressly
24 delegate the power to preempt. I would point out this
25 highlights one of the many oddities of the case on the

1 other side.

2 Under this Court's ruling in De la Cuesta,
3 which held -- you know, this Court held that an agency
4 may use general rulemaking authority to preempt State
5 laws, and in those circumstances, of course, their
6 regulations get deference.

7 And one of the contentions that this Court
8 specifically rejected in De la Cuesta was that in order
9 for the agency to use general rulemaking, Congress had
10 specifically to specify that the power to preempt was
11 one of the rules. That is at page 154 of this Court's
12 opinion. The case is cited in page 54 of the blue
13 brief.

14 It's very odd, therefore, that, under the
15 conception that Respondent has, the agency could have
16 done this conclusion on its own under its general
17 regulatory power under 8913, and yet Congress cannot do
18 so by expressly provided that this is the conclusion it
19 wants.

20 The second point I would like to make is
21 that -- one that addresses Justice Breyer's point, which
22 is, keep in mind that this is not a fight as to who gets
23 the money in the first place. This is a class action
24 complaint brought in State court against my client under
25 the theory that we were unjustly enriched by keeping the

1 benefits that we should have paid them because we got
2 them back. It is inconceivable to me that in the
3 context of a case in which the gravamen of the complaint
4 is we took his benefits back, the case could not be
5 related to benefits. The relevant parts of the
6 complaint are Joint Appendix 62A and 63A.

7 The third point has to do with democratic
8 accountability and whether you would leave this to
9 agencies or bureaucrats as opposed to Congress. But as
10 you recognize in City of Arlington, the choice that is
11 being proposed is not between Congress or the agency,
12 but between the Federal courts, which are certainly
13 unelected and generally unaccountable in the democratic
14 process and people that, at least in theory, are
15 ultimately accountable to the elected representatives,
16 that is to say, an agency.

17 And finally, to the extent that you believe
18 that this statute has a constitutional doubt in the
19 terms in which it was drafted, I can well believe that
20 you have seen many cases in which you feel that you are
21 the body shop for the roller derby across the street.
22 This is not one of them. This requires no significant
23 surgery. It is, at most, a little bit of buffing,
24 because it is certainly easier than concluded that
25 some -- concluding that something that Congress had

1 expressly labeled a penalty in the Affordable Care Act
2 was, in fact, a tax or the construction that the Court
3 invoked in Nabutinov, Bond and other cases.

4 It is certainly easy here to read shall
5 supersede and preempt, to read shall be effective
6 notwithstanding, and give effect to the evident purpose
7 of Congress in dealing with these matters at the Federal
8 level and not on a check board basis, State by State.
9 For all these reasons, we ask that the judgment of the
10 Supreme Court of Missouri be reversed.

11 Thank you very much.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 11:01 a.m., the case in the
15 above-entitled matter was submitted.)

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A				
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