No. 05-200

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC., doing business as Empire Blue Cross Blue Shield,
Petitioner,

v.

DENISE FINN MCVEIGH, as administratrix of the Estate of Joseph E. McVeigh,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce, on behalf of the United States, a provision in a health benefits plan for federal employees that is part of a government contract established pursuant to the Federal Employees Health Benefits Act.

PARTIES TO THE PROCEEDING

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

STATEMENT PURSUANT TO RULE 29.6

Empire HealthChoice Assurance, Inc., doing business as Empire Blue Cross and Blue Shield, is wholly owned by WellPoint, Inc., through WellPoint Holding Corp. and WellChoice Holdings of New York, Inc. WellPoint, Inc. is a publicly traded company, and no publicly held company owns ten percent or more of its stock. Empire HealthChoice Assurance, Inc., WellPoint Holding Corp., and WellChoice Holdings of New York, Inc. are not publicly traded.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 396 F.3d 136. The opinion of the court of appeals denying Petitioner's petition for panel rehearing (Pet. App. 46a-51a) is reported at 402 F.3d 107. The order of the court of appeals denying Petitioner's petition for panel rehearing and for rehearing en banc (Pet. App. 52a-53a) is not reported. The

opinion of the district court (Pet. App. 54a-62a) is not reported but can be found at 2003 U.S. Dist. LEXIS 16276.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2005. Petitioner timely filed a petition for rehearing and for rehearing en banc. The court of appeals denied the petition for rehearing and for rehearing en banc on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901-8914, provides in pertinent part:

5 U.S.C. § 8902(a):

The Office of Personnel Management may contract with qualified carriers offering plans described by section 8903 or 8903a of this title, without regard to section 5 of title 41 or other statute requiring competitive bidding. Each contract shall be for a uniform term of at least 1 year, but may be made automatically renewable from term to term in the absence of notice of termination by either party.

5 U.S.C. § 8902(d):

Each contract under this chapter 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.

5 U.S.C. § 8902(m)(1):

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. § 8903(1):

The Office of Personnel Management may contract for or approve the following health benefits plans:

(1) Service benefit plan. One Government-wide plan, which may be underwritten by participating affiliates licensed in any number of States, offering two levels of benefits, under which payment is made by a carrier under contracts with physicians, hospitals, or other providers of health services for benefits of the types described by section 8904(1) of this title given to employees, annuitants, members of their families, former spouses, or persons having continued coverage under section 8905a of this title, or, under certain conditions, payment is made by a carrier to the employee, annuitant, family member, former spouse, or person having continued coverage under section 8905a of this title.

STATEMENT

In this action, a divided court of appeals held that the federal courts lack subject matter jurisdiction over a suit to enforce the terms of a health benefits plan governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. The suit was commenced by Empire HealthChoice Assurance, Inc. ("Empire"), which administers, in parts of New York, the largest plan in the FEHBA program: the Service Benefit Plan (the "Plan"). Local Blue Cross and Blue Shield entities, including Empire, administer the Plan in their particular localities pursuant to a federal government contract entered on their behalf by the Blue Cross and Blue Shield Association ("BCBSA") with the United States Office of Personnel Management ("OPM"). The Service Benefit Plan provides health benefits to over 4 million federal employees and annuitants and their dependents nationwide.

The particular Plan terms involved in this controversy concern the reimbursement of benefits. Reimbursement is a method of enforcing subrogation rights and arises when the

Plan has paid benefits to an enrollee for injuries and the enrollee then also collects from a third party in connection with those same injuries. In such circumstances, the Plan's provisions mandate that the enrollee must reimburse the Plan for the benefits it has paid.

Here, after Empire brought suit to enforce the reimbursement terms against the estate of an enrollee who refused to comply with those terms, the court of appeals rejected federal question jurisdiction; it found instead that state law applied to the controversy. It so ruled notwithstanding that the reimbursement terms Empire seeks to enforce are part of the OPM-BCBSA government contract; FEHBA sets forth a pervasively federal regulatory regime; FEHBA contains a broad preemption provision that displaces state law and is designed to ensure the application of nationally uniform legal rules; and the money collected through reimbursement inures to the benefit of the United States itself.

A. The Statutory, Regulatory, and Contractual Scheme

1. *The Service Benefit Plan*. Congress enacted FEHBA in 1959 to provide "a measure of protection for civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical services through a comprehensive Government-wide program of insurance for Federal employees . . . , the costs of which [would] be shared by the Government, as employer, and its employees." H.R. Rep. No. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2914. Overall, Congress sought to "assure maximum health benefits for employees at the lowest possible costs to themselves and to the Government." *Id.* at 4, *reprinted in* 1959 U.S.C.C.A.N. at 2916.

To achieve these goals, FEHBA delegates expansive authority to OPM. Among its powers, OPM has the authority to contract with qualified carriers to offer a variety of health care plans, 5 U.S.C. § 8902, to distribute information on the available plans to eligible employees, *id.* § 8907, to promulgate

necessary regulations, *id.* § 8913(a), and to interpret the plans to determine the carrier's liability in an individual case. *Id.* § 8902(j).

Beginning in 1960, OPM's predecessor contracted with the BCBSA's predecessors to provide the Service Benefit Plan, a nationwide fee-for-service plan expressly described in FEHBA. *See* 5 U.S.C. § 8903(1). The contract has remained in force ever since, and currently OPM and BCBSA annually renegotiate it, including the premium rates and the scope of benefits to be provided under the Plan. In negotiating and signing annual amendments, BCBSA acts on behalf of the local Blue Cross and Blue Shield companies who administer the Plan in their respective localities.

2. *Plan Benefits Terms and Limitations*. By statute, each FEHBA contract, including the one for the Service Benefit Plan, "shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." 5 U.S.C. § 8902(d). The Statement of Benefits for the Service Benefit Plan is attached to and incorporated into the OPM-BCBSA contract and is the official description of benefits and other Plan terms. J.A. 89, 115, 158. Consistent with OPM's obligation to provide information about coverage, FEHBA mandates that a copy of the Statement of Benefits "shall be issued" to "[e]ach enrollee." 5 U.S.C. § 8907(b).[1]

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[1] When citing to the OPM-BCBSA contract, we generally cite first to the 1996 version of the contract, since it governed at the time the Plan (from 1997 to 2001) paid the benefits for which it here seeks reimbursement. Amendments were then added annually to the 1996 contract, and in 2002 OPM and BCBSA signed a new version. We also include a citation to the relevant parts of the 2002 contract, in addition to the 1996 contract. When referring to the Statement of Benefits, we cite to the Statement of Benefits issued for 2001. On all of the terms relevant to this case, the various versions of the contract and Statements of Benefits are not materially different.

Of particular relevance to this case are the terms in the Service Benefit Plan's Statement of Benefits concerning reimbursement. The Statement of Benefits provides (J.A. 165):

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise) . . . must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees . . . .

The OPM-BCBSA contract also elsewhere directly addresses the carrier's duties to collect reimbursement. It requires the carrier to make "a reasonable effort to seek recovery of amounts to which it is entitled to recover in cases which are brought to its attention." J.A. 95, 125. Furthermore, the contract mandates that all Blue Cross and Blue Shield entities "shall subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract." *Id.*

3. *Plan Funding*. The Plan's funding is delineated both in FEHBA and in OPM's regulations. By statute, the government and the enrollee share responsibility for premiums payable to the Plan. 5 U.S.C. § 8906. The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs that are funded by general appropriations. *Id.* § 8906(b)(1), (b)(2), (f). Premiums are deposited into a special Treasury fund called the Federal Employees Health Benefits Fund. *Id.* § 8909(a). A portion of each year's premiums are set aside for a "contingency reserve," which is also held in the Fund. *Id.* § 8909(b).

With respect to the Service Benefit Plan (and certain other FEHBA fee-for-service plans), the carrier draws against the

Fund on a "checks-presented" basis to pay for covered health care services. *Id.* § 8909(a); 48 C.F.R. § 1632.170(b). Any balance in the Fund is not the property of the carrier. Rather, the carrier's profit comes solely from a negotiated service charge, which is based on the carrier's performance. *See* 48 C.F.R. §§ 1615.404-4, .404-70; *see also Nat'l Ass'n of Postal Supervisors v. United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. . . . [The] carrier may not make a profit on the premium charges themselves."), *aff'd mem.*, 944 F.2d 859 (Fed. Cir. 1991). If the Plan's costs in a given year fall below expectations, the resulting surplus is placed in the contingency reserve. 5 C.F.R. § 890.503(c)(3). The Plan's contingency reserve may be used, at OPM's discretion, to defray future rates, reduce future government and employee contributions, increase plan benefits, or refund the monies to the government and plan enrollees. 5 U.S.C. § 8909(b); 5 C.F.R. § 890.503(c)(2). Additionally, the carrier is entitled to use the contingency reserve in the event a given year's premium funds are insufficient to cover the Plan's costs. 5 C.F.R. § 890.503(c)(3)(i).

Under this fiscal regime, money collected under the Plan's reimbursement terms does not belong to the carrier. Pursuant to the OPM-BCBSA contract, the carrier must, and does, credit all reimbursement amounts to the Treasury Fund, the source for the benefits in the first place. *See* J.A. 92, 118-19 (OPM-BCBSA Contract § 2.5(b)); J.A. 50-51; *see also* 48 C.F.R. § 1652.216-71(b)(2)(i) (authorizing carrier to charge to contract all benefits costs "less any refunds, rebates, allowances or other credits received"); 1996 & 2002 OPM-BCBSA Contracts § 3.2(b)(2)(i) (2d Cir. App. A36-A37, A 303) (same).

4. *FEHBA's Preemption Provision*. FEHBA contains an express preemption provision, codified at 5 U.S.C. § 8902(m)(1). As amended in 1998, the preemption provision currently provides:

> 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) (2000) (codifying Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363 (1998)).

In enacting the current preemption language, which "broaden[ed]" an earlier version of the preemption clause, Congress sought 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) (J.A. 24).

B. The Proceedings Below

Joseph McVeigh, a Plan enrollee living in New York, was injured in an accident in 1997. The Plan paid benefits of approximately $157,000 in connection with those injuries. Subsequently, Mr. McVeigh filed a state tort action against the third parties that allegedly caused his injuries, and his estate pursued that action after his death in 2001. His spouse and his child brought additional actions on their own behalf. In 2003, the parties to the state tort actions announced a settlement of $3,175,000.

When the estate refused to reimburse the Plan for the benefits paid to Mr. McVeigh, Empire brought suit in the United States District Court for the Southern District of New York. Seeking reimbursement of $157,000, Empire's complaint asserts claims for breach of the Plan terms and for declaratory relief. Empire invoked the district court's federal question jurisdiction, alleging that the "action is founded on [FEHBA]; on federal contracts and regulations established pursuant to FEHBA; and on federal common law." J.A. 41. The district court dismissed the case for lack of subject matter jurisdiction. Pet. App. 62a.

A divided court of appeals affirmed. Pet. App. 1a-45a. Judge Sotomayor wrote the majority opinion (*id.* at 2a-24a), with Judge Sack submitting a separate concurring opinion. *Id.* at 25a-26a. Judge Raggi dissented. *Id.* at 27a-45a.

The majority determined that federal question jurisdiction was absent because state law governed the controversy. The majority construed the "relates to" qualifier in the last phrase of FEHBA's express preemption provision as applying only to those state laws that *specifically* regulate health insurance or plans, excluding from FEHBA's preemptive scope state laws of general application, such as state contract law. Pet. App. 14a-19a. The majority recognized that, in interpreting similar language in the preemption provision in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), this Court had reached an exactly opposite conclusion – namely, that state laws of general application are preempted. But the court of appeals viewed ERISA precedent as irrelevant to construing FEHBA's preemptive scope. Pet. App. 19a-21a.

The majority also found that federal jurisdiction could not be founded on federal common law, because it believed Empire could not satisfy the test enunciated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The majority reasoned that, under *Boyle*, Empire needed to establish an "actual, significant conflict with [federal] . . . interests," but could not do so. Pet. App. 6a-7a (internal quotation marks omitted).

Judge Raggi dissented, concluding that federal jurisdiction existed because "FEHBA contracts are enforceable through common-law breach of contract actions" (*id.* at 29a-30a) and those action cannot rest upon state law due to the preemption provision. She explained that, by providing for preemption, "Congress has identified a unique federal interest in ensuring national uniformity in the construction and enforcement of [FEHBA contract] terms." *Id.* at 35a. In addition, by amending the preemption provision in 1998 to eliminate language that conditioned preemption on an inconsistency between the con-

tract terms and state law, "Congress has implicitly authorized courts to employ federal common law to resolve disputes concerning coverage and benefits, even in the absence of the conflict generally required by *Boyle*." *Id.* Judge Raggi also rejected the majority's position that ERISA precedent should not be used to determine the reach of FEHBA's preemption provision, noting that the "statutes' preemption clauses are notably similar" and "the objectives of the two [preemption] laws are virtually identical" – to ensure uniformity. *Id.* at 39a.

The panel denied rehearing by a 2-1 vote, issuing a supplemental opinion that reaffirmed its previous rulings on the preemption provision and the *Boyle* test. Pet. App. 46a-51a. The supplemental opinion also rejected arguments made by the United States in a brief as amicus curiae supporting Empire's petition for rehearing. Specifically, the majority ruled that the preemption provision does not express any Congressional intent that FEHBA contract disputes should be heard in federal court. *Id*. at 50a.

SUMMARY OF ARGUMENT

The issue for decision is whether Empire's complaint raises a federal question. That issue arises against a backdrop of factors establishing the intensely federal character of Empire's suit: (1) Empire sues to enforce reimbursement terms contained in a contract expressly described in a federal statute, namely FEHBA; (2) the United States is a party to the contract; (3) a federal agency, OPM, had final authority for selecting the reimbursement terms that Empire here seeks to enforce; (4) any relief obtained in this reimbursement action would be credited to the U.S. Treasury, and Empire has no financial stake in the recovery; (5) the suit is brought by Empire essentially on behalf of the United States, under a requirement in the contract that Empire make a reasonable effort to collect reimbursement funds; and (6) Congress expanded the preemption provision in FEHBA in 1998 for the very purpose of clarifying that state law is displaced in favor of uniform federal rules. Given these

factors, the case falls squarely within two lines of this Court's precedent supporting federal jurisdiction.

I. Suits to enforce contracts that are contemplated by federal statutes may set forth federal claims that must be heard in federal court. *See, e.g.*, *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, AFL-CIO-CLC, 457 U.S. 15, 22 (1982). The determining factor is whether Congress intended that the contracts be "creations of federal law . . . and that the rights and duties in those contracts be federal in nature." *Id*. at 23 (internal quotation marks omitted).

Empire's claim meets this standard. Empire's suit seeks to enforce the reimbursement provision contained in the contract establishing the Service Benefit Plan, a contract that OPM enters under authority conferred in FEHBA. 5 U.S.C. § 8902(a). Both the contract and the Statement of Benefits provided to Plan enrollees, which is incorporated into the contract and contains the reimbursement requirement, are specifically described in FEHBA. 5 U.S.C. §§ 8903(1), 8902(d). Thus, the contract at issue here is expressly contemplated by federal statute.

In addition, every indication from the statute is that Congress intended the contracts establishing FEHBA plans and governing their administration to be creatures of federal law. The statute sets forth a detailed framework for regulating FEHBA plans from cradle to grave that is exclusively federal. It describes plan terms and funding mechanisms, and it appoints OPM as the sole authority for regulatory oversight. Congress left no role for state regulation.

Congress also included in FEHBA a broad preemption provision displacing any state law that "relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The provision was first enacted in 1978 with the stated intent of establishing uniformity in benefits. It was then broadened in 1998 because Congress was concerned that courts were giving it an unduly narrow construction. The current provision closely parallels ERISA's

preemption clause, which this Court has interpreted expansively. Indeed, the legislative history of the 1998 amendment directly addresses the relevant question, describing "the intent of Congress . . . that FEHB contract terms . . . completely displace State or local law relating to health insurance or plans." H.R. Rep. No. 105-374, at 16 (1997) (J.A. 25). A specific goal of the provision was to facilitate "trying FEHB program claims disputes in Federal courts rather than State courts." *Id*. at 9 (J.A. 24). Hence, the preemption clause provides a specific statutory indication that Congress expected federal law to govern FEHBA contract matters.

Because FEHBA contemplates the contract establishing the Service Benefit Plan, and Congress in turn intended that the contractual obligations be treated as federal in nature, Empire's cause of action to enforce the contract is a federal claim. It can be assumed that Congress intended FEHBA contracts, "like ordinary contracts, to be enforceable by private suit upon a breach." *Jackson Transit*, 457 U.S. at 20-21. The statute as a whole and its preemption clause in particular, however, leave no room for the application of state law on which a contract claim for reimbursement could rest. Accordingly, the action to enforce contract terms must be grounded in federal law.

II. Even putting aside the *Jackson Transit* line of authority, federal jurisdiction exists under the general principles the Court has developed for applying federal common law to issues arising from federal programs. Under what is known as the "first holding" of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and its progeny, disputes in which important federal interests are at stake are resolved in federal courts applying federal common law. Under that case's "second holding," state law is displaced as the federal rule of decision when the federal interests demand uniformity. These principles apply with particular force when the federal interest at stake is enforcement of the United States' own contractual rights. *See*,

e.g., *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593-94 (1973).

This case, under *Clearfield Trust*'s first holding, must be resolved according to federal law. The dispute involves obligations arising under a contract to which the United States is a party. The dispute also arises under a nationwide federal program in which important interests of the United States are at stake. In this respect, reimbursement recoveries are credited to the U.S. Treasury and inure to the benefit of the United States, not the carrier. Because important governmental interests – contractual, programmatic, and financial – are present, *Clearfield Trust*'s first holding mandates here the application of federal common law. That essentially disposes of the jurisdictional issue, since a suit founded on federal common law, as much as a statute, raises a federal question.

Though the Court need not reach *Clearfield Trust*'s second holding, which invites a determination as to whether state law or a uniform federal rule should be adopted as the governing federal rule of decision, a uniform federal rule is required in this case. The preemption clause and other aspects of the FEHBA program establish Congress's desire for uniformity in resolving disputes involving FEHBA contracts. Consequently, under the second holding of *Clearfield Trust*, and under the slightly different analytical framework of *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), state law must be displaced, and federal courts must apply a uniform body of federal law.

ARGUMENT

The overarching issue in dispute is whether the federal courts have federal question jurisdiction over this case. Federal question jurisdiction is governed by 28 U.S.C. § 1331, which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A case plainly satisfies that statutory standard if federal law "'creates the cause of action.'" *Franchise Tax*

Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). Indeed, the "provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366 (2005).

Empire's complaint raises a federal cause of action. Empire sues to enforce the terms of a contract that is expressly set forth in a federal statute; the contract is also a government contract; Empire pursues the action on behalf of the United States, with any relief inuring to the United States' benefit; and the underlying federal program from which the contract derives is a pervasively federal scheme that Congress expected would be administered in a nationally uniform manner. Given all of these factors, Empire's claim is – under either of two theories – a federal claim and therefore "aris[es] under" federal law. 28 U.S.C. § 1331.

I. EMPIRE'S COMPLAINT RAISES A FEDERAL CLAIM BECAUSE IT SEEKS TO ENFORCE CONTRACTUAL OBLIGATIONS THAT ARE SET FORTH IN A FEDERAL STATUTE AND THAT CONGRESS INTENDED TO BE FEDERAL IN NATURE

A. An Action Raises a Federal Claim If It Seeks to Enforce Contractual Obligations That Are Contemplated by a Federal Statute and That Congress Intended to Be Federal in Nature

In a series of decisions, "the Court has determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights set forth by federal statutes." *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 22 (1982). *Jackson Transit* involved a suit between private parties for breach of a collective bargaining agreement, where a federal statute had made entry into such

an agreement a condition to receipt of federal assistance under the statute. Surveying its rulings in the area, the Court said its "decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." *Id.* at 22.

Jackson Transit ultimately found that, under the particulars of the statute at issue and its legislative history, Congress did not intend for actions alleging breach of the collective bargaining agreements to raise federal claims. Other decisions, however, have applied federal law to analogous contract enforcement actions brought by private parties. For instance, in *International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court held that a union had "a federally-created cause of action" to enforce an award of an airline adjustment board contained in a collective bargaining agreement entered pursuant to the Railway Labor Act. *Jackson Transit*, 457 U.S. at 22. That case, "for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act." *Int'l Ass'n of Machinists*, 372 U.S. at 696. Likewise, in *Norfolk & W. R. Co. v. Nemitz*, 404 U.S. 37 (1971), the Court "decided that a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act." *Jackson Transit*, 457 U.S. at 28 n.9; *see also Norfolk & W. R. Co.*, 404 U.S. at 45 (Blackmun, J., dissenting) (noting majority's holding "to the effect that federal district court jurisdiction exists here"). And in *American Surety Co. v. Shulz*, 237 U.S. 159 (1915), "the plaintiff's right of action . . . arose out of a Federal statute," because the plaintiff sued to enforce a bond "given by virtue of the laws of the United States" in order to pursue a federal appeal. *Id.* at 162, 160.

In each case, "the critical factor is the congressional intent behind the particular [statutory] provision[s]" from which the agreement springs. *Jackson Transit*, 457 U.S. at 22. "[I]f Congress intended that [the] . . . agreements . . . be 'creations of federal law,' . . . and that the rights and duties in those contracts be federal in nature, . . . then [the plaintiff's] suit states federal claims." *Id.* at 23 (quoting *Int'l Ass'n of Machinists*, 372 U.S. at 692). Another way of putting the inquiry is whether, in the statutory scheme, Congress "intend[ed] to create a body of federal law applicable" to the area. *Id.* at 27. A claim is federal in character where it falls in an area "'within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.'" *Int'l Ass'n of Machinists*, 372 U.S. at 693 n.17 (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

It bears emphasizing, however, that the inquiry is different than in a "private right of action case" (*Jackson Transit*, 457 U.S. at 20), where the Court focuses on Congress's intention to confer a private right and a private remedy. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). In those cases, the Court considers whether the suing party "can bring [a] suit at all." *Jackson Transit*, 457 U.S. at 21. In contrast, in situations where a statute contemplates a contract, "it is reasonable to conclude that Congress expected the . . . agreement . . ., like ordinary contracts, to be enforceable by private suit upon a breach." *Id.* at 20-21. The central issue instead is "whether Congress intended such contract actions to set forth federal, rather than state, claims." *Id.* at 21; *see also id.* at 30 (Powell, J., concurring) ("Congress here provided for the making of contracts that it must have intended to be enforced. The Court thus identifies the question correctly as whether Congress intended those contracts to be enforced in federal court.").

B. Empire Seeks to Enforce a Contract Contemplated by FEHBA

Empire seeks enforcement of contractual obligations contemplated by a federal statute and thus meets the threshold requirement for invoking the Court's case law on federal claims to enforce a contract. Empire brought suit for "Breach of Obligations under [a] FEHBA Plan" and sought monetary and declaratory relief. J.A. 40-48. More specifically, Empire seeks enforcement of the reimbursement terms contained in the Service Benefit Plan's Statement of Benefits. These terms mandate that enrollees who obtain recoveries from third parties for injuries, after having received benefits from the Plan for those same injuries, shall repay the Plan the benefits it has provided. *See supra* p. 6.

The Statement of Benefits is part of the contract between OPM and BCBSA establishing the Service Benefit Plan. The OPM-BCBSA contract provides that "[t]he Carrier shall provide the benefits as described in the Certified Brochure Text found in Appendix A" and that "[t]he Carrier's subrogation rights, procedures and policies, including recovery rights, shall be in accordance with the Certified Brochure Text." J.A. 89, 92; *see also id.* 115, 118-19. The Certified Brochure Text, in turn, is the contract's terminology for the "detailed statement of benefits offered" that "[e]ach contract . . . shall contain." 5 U.S.C. § 8902(d).

Empire's suit to enforce the reimbursement provisions of the Statement of Benefits, therefore, is a suit to vindicate the terms of a contract – namely, the OPM-BCBSA contract. OPM enters the contract to provide health benefits for its employees; the Blue Cross and Blue Shield entities agree to administer the Plan and to provide the specified benefits; and, "[b]y enrolling or accepting services under th[e] contract, Members [*i.e.*, federal employees] are obligated to all terms, conditions, and provisions of th[e] contract." J.A. 90, 116.

This contract, in turn, is one for which FEHBA expressly provides. FEHBA authorizes OPM to "contract with qualified carriers offering plans described by section 8903 or 8903a." 5 U.S.C. § 8902(a). Section 8301(1) then directs that OPM "may contract for . . . [o]ne Government-wide plan . . . under which payment is made by a carrier under contracts with [providers]," known as the "Service benefit plan." *Id.* § 8903(1). Likewise, again, the statute also expressly delineates that a "statement of benefits" shall exist and be contained in each FEHBA contract, including the contract for the Service Benefit Plan. *Id.* § 8902(d); *see also id.* § 8907(b).

As a consequence, Empire's suit is not merely one to enforce a contract, but one to enforce a contract specifically "set forth" in FEHBA. *Jackson Transit*, 457 U.S. at 15. In fact, while OPM may enter contracts for a number of other categories of FEHBA plans, such as "Employee organization plans" or "Comprehensive medical plans," the Service Benefit Plan is one of just two health benefits plans individually identified in the statute. 5 U.S.C. § 8903(3)-(4). The other is the "Indemnity benefit plan," *id.* § 8903(2), for which OPM currently has not entered a contract. *See Oversight of Federal Employees Health Benefits Program and the Federal Long Term Care Insurance Program: Hearing Before the Subcomm. on Civil Service and Agency Organization of the Committee on Government Reform*, 108th Cong. 9 (2004) (Stmt. of Dan G. Blair, OPM).

C. Congress Intended That the Obligations in FEHBA Contracts Be Federal in Nature

Because FEHBA contemplates the OPM-BCBSA contract and its Statement of Benefits, the Court must next determine whether Congress intended the contract to be a "creation[ ] of federal law and bound to the statute and its policy." *Int'l Ass'n of Machinists*, 372 U.S. at 692. That is, for jurisdictional purposes, the dispositive issue is whether Congress expected FEHBA contracts to create obligations that are federal in na-

ture. Here, FEHBA's statutory scheme, in particular its preemption provision and the policies it embodies, point to one conclusion: "Congress intended that federal rather than state law would govern [the] contract." *Jackson Transit*, 457 U.S. at 28 n.10.

1. FEHBA Establishes a Pervasively Federal Regime for the Creation and Regulation of FEHBA Contracts

In examining whether Congress expected FEHBA contracts to create federal obligations, the place to "begin [is] with the language of the statute itself." *Id.* at 23. Viewing first the statute as a whole, it sets forth a detailed, self-contained framework for the creation, financing, and regulation of FEHBA plans. Nowhere does it envision state regulation.

As already noted, the OPM-BCBSA contract and the Statement of Benefits themselves have their origin in FEHBA's statutory provisions, with the statute both authorizing OPM to enter contracts to create plans and mandating a statement of benefits in those contracts. The statute also sets out many other mandatory, as well as optional, terms to be included in FEHBA contracts, such as non-discrimination terms, reinsurance provisions, terms allowing for coverage for various types of medical services, and cost-containment measures. *See* 5 U.S.C. § 8902(c), (f), (n); *id.* § 8904. In decreeing the creation, structure, and content of FEHBA contracts, Congress nowhere in the statute mentioned any role for the states.

The Plan's funding is exclusively delineated in FEHBA. *See supra* pp. 6-7. Overall, the Plan is financed solely with federal funds, except for enrollee contributions. *See* 5 U.S.C. § 8906. And these funds are held in the U.S. Treasury in an account that Empire and other Blue Cross and Blue Shield entities can tap periodically to pay benefits on an ongoing basis. *See supra* pp. 6-7.

FEHBA delegates the oversight and regulation of FEHBA plans to a single, *federal* authority – OPM. In addition to authorizing OPM to enter FEHBA contracts, the statute tasks OPM with selecting benefits terms that "the Office finds necessary or desirable" (which then are reflected in a statement of benefits). 5 U.S.C. § 8902(d). Hence, the reimbursement terms at issue in this case are themselves terms that, by statute, fell within OPM's discretion to include. The statute also delegates to OPM responsibility for providing information about plans and their terms to enrollees "as may be necessary to enable the individual[s] to exercise an informed choice among the types of plans" (5 U.S.C. § 8907(a)); setting "reasonable minimum standards" for plans and for carriers (*id.* § 8902(e)); establishing enrollment criteria for federal employees and annuitants (*id.* §§ 8905, 8913(a)); determining premium rates (*id.* § 8906); auditing each plan's contract performance (*id.* § 8910); terminating contracts (*id.* § 8902(e)); and "prescrib[ing] regulations necessary to carry out [FEHBA]." *Id.* § 8913. Significantly, Congress vested OPM – and that agency alone – with the authority to adjudicate individual disputes over benefits and to insist in the contracts it enters that carriers agree to pay benefits the agency finds are due "in an individual case." *Id.* § 8902(j).

The "bare language" of the statute, then, indicates a legislative scheme that is pervasively federal in character. *Jackson Transit*, 457 U.S. at 23. From cradle to grave, FEHBA plans and the contracts creating them are subject to enumerated federal statutory requirements and federal regulation, not state control. This is not surprising, since FEHBA is designed to provide a fringe benefit to federal employees. The regulation and protection of the federal government's own workforce is hardly an area that one logically would expect Congress to delegate to the states, especially when the associated financial burdens are borne by the federal government. The statute's

general provisions and framework reflect that logic: they create "contracts [that] are creatures of federal law." *Id.*

2. FEHBA's Preemption Provision Signals a Broad Congressional Intent That FEHBA Contracts Shall Preempt State Law

The most specific indication of Congress's intent on the role of state law is FEHBA's preemption section, and it was this statutory provision that consumed much of the discussion in both the majority and dissenting opinions below. Like all of the other provisions in FEHBA, the preemption clause too envisions a regime dominated by federal, not state, law; it therefore is further strong indication that Congress anticipated FEHBA disputes would be controlled by federal law.

a. The Preemption Provision Is the Product of Repeated Congressional Efforts to Limit the Operation of State Law

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, *reprinted in* 1978 U.S.C.C.A.N. 1412, 1413. Prior to 1978, the Comptroller General had documented for Congress the manner in which states had begun to impose requirements with respect to FEHBA plans. *See id.* at 3, 1978 U.S.C.C.A.N. at 1414 (refer-

encing Report of Comptroller General entitled "Conflicts Between State Health Requirements and Contracts of the Federal Employee Health Benefits Carriers"). The states' activities particularly threatened inequities for FEHBA plans operating in more than one state, given that each enrollee pays the same premium. Absent preemption, the operation of state law could "be expected to result" in "increased premium costs to both the Government and enrollees, and [a] lack of uniformity in benefits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States." H.R. Rep. No. 95-282, at 4 (1977).

At the same time, with the final phrase of the original preemption provision, Congress preserved state law that was not "inconsistent" with FEHBA contract provisions relating to benefits and coverage. Congress expected that language, however, to be interpreted narrowly. It was simply meant to leave intact state regulatory legislation unrelated to benefits, such as "a State's authority to control the licensing of health practitioners," S. Rep. 95-903, at 4, 1978 U.S.C.C.A.N. at 1415, and "certain taxes or insurance reserve requirements." H.R. Rep. No. 95-282, at 5; *see also* 124 Cong. Rec. S14,591 (daily ed. Aug. 25, 1978) (Stmt. of Sen. Stevens) (provision would "preempt[ ] State law as applied to such Federal employee health benefit contracts," while leaving the states to be the "judge as to who is and who is not qualified to provide medical care").

Congress's contemporaneous actions with respect to other legislation also confirm the broad preemptive intent of FEHBA's original preemption clause. Four years earlier, Congress had enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, governing employee benefits for employees of private employers. ERISA, from its inception, has contained a preemption section providing for the preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit

plan." 29 U.S.C. § 1144(a). The Court has repeatedly viewed ERISA's preemption clause as "clearly expansive," though, of course, not to the point of "'indeterminacy.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). Having used similar "relates to" language in FEHBA's preemption clause so soon after enacting ERISA, Congress presumably had a similarly expansive intent with respect to the displacement of state law in FEHBA. If anything, Congress's actions in 1978 on FEHBA implied an even greater scope for preemption than ERISA. Whereas ERISA contains a clause saving insurance regulation from preemption, *see* 29 U.S.C. § 1144(b)(2), Congress took pains in FEHBA to preempt state law that "relates to *health insurance* or plans" where state law is inconsistent with FEHBA contract provisions. 5 U.S.C. § 8902(m)(1) (1994) (emphasis added).

Nonetheless, several courts interpreted FEHBA's preemption clause narrowly. *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); *Kincade v. Group Health Servs. of Okla., Inc.*, 945 P.2d 485 (Okla. 1997). Some of these decisions involved "complete preemption," a jurisdictional doctrine under which a statute with "extraordinary preemptive power" can "convert[ ] an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Resting on the FEHBA preemption clause's closing phrase preserving state law not "inconsistent" with FEHBA contract terms, these courts found that FEHBA did not completely preempt state law for jurisdictional purposes. The decisions rejected analogies to ERISA – which this Court had previously said does completely preempt state law (*see Metropolitan Life*, 481 U.S. at 65-66) – 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.

These decisions allowing state courts to resolve FEHBA disputes 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. As the preemption clause now reads, FEHBA contract provisions on benefits and coverage preempt state law merely if the state law "relates to health insurance or plans." 5 U.S.C. § 8902(m)(1) (2000). 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) (J.A. 24). Alluding to its concern over the court decisions on 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 *completely displace* State or local law relating to health insurance or plans." *Id.* at 16 (J.A. 25) (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 (J.A. 24).

The end result of Congress's efforts is a preemption provision designed to preempt all state law – not just inconsistent state measures – pertaining to benefits, coverage, and benefits payments. The timing of the provision's 1998 amendment, coming after a series of decisions rejecting complete preemption, shows that Congress intended the preemption section not only to thwart the application of state law but also to provide a federal jurisdictional basis for lawsuits concerning benefits and coverage. Likewise, the amendment's timing indicates that the courts should read FEHBA's preemption clause at least as

broadly as ERISA's. As it now stands, the critical "relates to" language at the end of FEHBA's preemption provision replicates ERISA's, except that its preemptive scope extends not just to a state law that "relates to" plans, but even to one that "relates to" health insurance.

Because FEHBA's preemption clause broadly preempts state law, it provides overwhelming evidence that Congress did not intend for disputes involving FEHBA contracts "to be governed by state law applied in state courts." *Jackson Transit*, 457 U.S. at 29. The issue is Congress's intent as to the nature of the obligations in FEHBA contracts. The text and lengthy history of the preemption clause show that Congress intended FEHBA benefits matters to be an exclusively federal domain and that the states, and state courts, had no role to play.

One other point about the preemption provision warrants specific mention: from the start, the clause has made the "terms of any contract" under FEHBA the trigger for preemption. The preemption provision therefore gives the contract terms themselves "'the imprimatur of . . . federal law,'" since Congress has provided that they – like a statute or regulation – may supersede state law. *Int'l Ass'n of Machinists*, 372 U.S. at 692 (quoting *Railway Dep't v. Hanson*, 351 U.S. 225, 232 (1956)). Consequently, Congress did not just intend for FEHBA contracts to be "creatures of federal law," it made them be tantamount to federal law. *Jackson Transit*, 457 U.S. at 23. With the contracts themselves having the force and effect of federal law, it follows that Congress would have anticipated that suits to enforce the contractual obligations would be federal in nature.

b. The Court of Appeals Misconstrued Congress's Intent with Respect to the Preemption Provision

The court of appeals disagreed that FEHBA's preemption provision should be read expansively. It said that the preemption clause's reference to a state law that "relates to health

insurance or plans" includes only state laws specifically targeted at health insurance or plans. In its view, the preemption clause does not cover "laws of general application," such as contract laws, even when those laws "are used in a given case to 'construe or enforce' FEHBA plans." Pet. App. 16a (quoting Raggi, J., dissenting (Pet. App. 39a)). Because the preemption provision supposedly does not cover contract laws, and those would be the laws necessary for Empire's enforcement of the reimbursement provisions, the court of appeals believed the "'critical factor' of congressional intent" did not favor "federal jurisdiction over Empire's claims." *Id.* at 48a.

The court of appeals' cramped construction cannot be reconciled with the history and development of FEHBA's preemption clause. Congress's actions show that it expected the courts to give the provision an expansive sweep, and it amended the provision when courts had begun to do otherwise. It instructed that both inconsistent *and* consistent state law shall be preempted, with only state laws at the periphery of plan administration – such as practitioner licensing, financial reserves, and certain tax laws – surviving. It would turn Congress's intent on its head now to construe the preemption clause as covering only those measures addressed expressly to insurers and health plans, leaving the provision powerless to block the vast majority of state laws, including state contract, tort, and other common law doctrines, consumer protection measures, and even anti-discrimination measures that might compel specific benefits for specified categories of individuals. *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88-89 (1983) (involving effort to use New York's general human rights statute to mandate benefits under an ERISA plan).

Furthermore, the court of appeals' interpretation is contradicted by this Court's decisions construing ERISA's similar preemption language. From the very start in its ERISA jurisprudence, the Court has held that the ERISA preemption clause's reference to state laws that "relate to . . . plans" is not

limited to "only state laws specifically designed to affect employee benefit plans." *Id.* at 98. In this regard, in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court straightforwardly ruled that ERISA "pre-empts state common law tort and contract actions," again "emphasiz[ing] that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'" *Id.* at 43, 47-48 (quoting *Shaw*, 463 U.S. at 98); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 219 n.6 (2004) (reaffirming holding in *Pilot Life* that the "causes of action were pre-empted").

To the same effect, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135 (1990), the Court held that ERISA preempts "a state common law claim" in which an employee alleged that he was wrongfully terminated because of the employer's desire to avoid paying pension benefits. The Court held: "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." *Id.* at 140. The Court also explained that Congress preempted state common law causes of action to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Id.* at 142. Without broad preemption, plans would be exposed to a "[p]articularly disruptive . . . potential for conflict in substantive law" because state courts "might develop different substantive standards applicable to the same employer conduct." *Id.* That would be "fundamentally at odds with the goal of uniformity that Congress sought to implement." *Id.*

It would make no sense to hold that ERISA's preemption clause can extend to laws of general application but that FEHBA's cannot. Such a conclusion would make futile Congress's recent effort amending FEHBA's preemption clause. As the Ninth Circuit has explained, "Congress amended the [FEHBA preemption] statute after numerous courts had found that FEHBA did not completely preempt state laws, but ERISA did. Thus, Congress replaced FEHBA's original preemption

clause with ERISA's." *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 399 (9th Cir. 2002). The concern for uniform plan administration that justifies ERISA's preemption provision is at least equally present in FEHBA.

The court of appeals drew a divide between ERISA and FEHBA because, in its view, "ERISA is significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme." Pet. App. 19a; *see* 29 U.S.C. § 1132 (ERISA's enforcement section). But it is, in fact, FEHBA that establishes more comprehensive federal regulation. FEHBA regulates the plans it creates from formation to termination and interposes a federal agency – OPM – to supervise all aspects of a carrier's administration of a plan. By contrast, ERISA largely leaves employers free to establish and terminate health benefits plans as they see fit, but sets forth fiduciary obligations in the event an employer does create a plan; also, the Labor Department, while responsible for oversight of ERISA, does not play an in-depth role comparable to OPM under FEHBA. *See Travelers*, 514 U.S. at 651; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

In the end, the court of appeals' determination that FEHBA does not preempt state laws of general application produces the anomalous result that state law plays a greater role in regulating the federal government's own health benefits plans than it does for private employer plans governed by ERISA. "[I]f Congress intended to preempt state law when regulating private employers, it would be strange to leave regulation to the individual states when the employer is the United States itself." *Blue Cross & Blue Shield v. Cruz*, 396 F.3d 793, 799 (7th Cir. 2005), *pet. for cert. filed*, No. 04-1657 (June 6, 2005). The exact opposite should be true: Congress logically would want federal law to play a greater role in regulating federal employees than in regulating private employees.

Finally, the court of appeals felt constrained to limit the reach of FEHBA's preemption provision because it mistakenly believed its analysis was governed by a "presumption against federal preemption." Pet. App. 15a. What the court of appeals was referring to is the presumption that "'in fields of traditional state regulation the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 18a (quoting *Roach v. Mail Handlers Benefit Plan*, 298 F.3d 847, 850 (9th Cir. 2002)) (brackets in original). That presumption, however, applies only in areas of *traditional* state regulation. Where the relationship state law would regulate "originates from, is governed by, and terminates according to federal law," then "no presumption against pre-emption obtains." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001); *accord Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988) ("the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can"). Here, the states have no interest in the regulation of fringe benefits for the federal government's own employees, and the relationships created among the United States, the FEHBA carrier, and federal employees with respect to the provision of health benefits should begin, continue, and end according to federal law.

The court of appeals, in sum, seriously misconstrued FEHBA's preemption clause. Interpreted correctly, the provision evinces a broad intention that FEHBA contract terms shall preempt state laws, whether general in application or specific to health plans. As such, the clause provides specific statutory indicia that Congress expected federal law to govern disputes involving a FEHBA contract's obligations and thus that suits to enforce those obligations present federal, not state, claims.[2]

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[2] The court of appeals correctly recognized (*see* Pet. App. 14a n.7) that another provision of FEHBA, 28 U.S.C. § 8912, was not unfa-

D. This Case Satisfies the Criteria for Treating a Claim to Enforce Contractual Obligations as a Federal Claim

Empire's case, then, satisfies the criteria described in *Jackson Transit* and similar cases for treating a contract enforcement action as a federal claim. Empire's complaint seeks enforcement of a contract contemplated by a federal statute. Indeed, FEHBA not only "contemplates" the contract at issue here, it also explicitly describes that contract in the text of the statute. Further, every indication in FEHBA and its history is that Congress expected FEHBA contracts to be governed exclusively by federal law. The statute creates no role for the states and broadly preempts state law, including the types of state laws that otherwise would be used to enforce FEHBA reimbursement terms. In the legislative history, Congress even went so far as to say that it wanted claims stemming from FEHBA benefits to be tried in the federal courts rather than state courts.

This analysis conforms to the approach of the Seventh Circuit in *Cruz* and of Judge Raggi in dissent here. As Judge Raggi observed in dissent, Congress in providing for FEHBA con-

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vorable to federal jurisdiction over Empire's claim. That provision states that "the district courts of the United States have jurisdiction, concurrent with the United States Court of Claims," over suits "against the United States founded on [FEHBA]." As the court of appeals stated: "Of course, the grant of federal jurisdiction over one category of claims does not necessarily strip federal courts of their jurisdiction over another category of claims." *Id.* (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 643 (2002)). In reality, Congress had a very limited purpose in mind with respect to § 8912. It "was enacted merely to enable making the United States a party to a court action in a district court, which would otherwise have been barred by the $10,000 limitation on suits against the United States in such court. 28 U.S.C. § 1346(b)." *Rosano v. United States*, 9 Cl. Ct. 137, 144 (1985), *aff'd*, 800 F.2d 1126 (Fed. Cir. 1986).

tracts surely intended that the parties would be able to enforce the contractual provisions. *See* Pet. App. 29a-30a, 43a. Therefore, "it is reasonable to conclude that FEHBA contracts are enforceable through common-law breach of contract actions." *Id.* at 29a-30a. That conclusion necessarily poses the question whether such contract actions present "federal, rather than state, claims." *Jackson Transit*, 457 U.S. at 21. Judge Raggi correctly found that the answer to that question flows from FEHBA's preemption provision, noting that it "contemplates that the coverage and benefits terms of FEHBA plans will always be construed *only* by reference to uniform federal common law." Pet. App. 40a. Given this displacement of state law, "it logically follows that Congress was thereby authorizing courts to look to federal common law both to construe those rights uniformly and to resolve insurance carriers' FEHBA claims." *Id.* at 43a.

The Seventh Circuit in *Cruz* similarly found that the express preemption clause, coupled with FEHBA's contemplation of health benefits contracts, inexorably leads an action to enforce the reimbursement provision of a FEHBA contract into federal court. "With no explicit statutory cause of action on which to rely and with state law preempted, Congress's clear intent to have uniform subrogation rules per the terms of the FEHBA-created contract require a 'judicially-crafted cause of action.'" *Cruz*, 396 F.3d at 800 (citation omitted); *see also Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 77 (4th Cir. 1993).

The court of appeals' majority in this case reached the wrong result largely because of its misguided reading of the preemption provision and its failure to acknowledge the pervasive federal nature of the entire FEHBA regulatory scheme, particularly the contract at issue here. Accordingly, the Court should reverse the court of appeals, hold that Empire has raised a federal claim, and find that Empire's case therefore "arises under" federal law.

II. EMPIRE'S COMPLAINT RAISES A FEDERAL CLAIM BECAUSE IT SEEKS ENFORCEMENT OF A GOVERNMENT CONTRACT AND INVOLVES A PROGRAM FOR WHICH CONGRESS HAS DEMANDED UNIFORM LEGAL RULES

Even if the *Jackson Transit* line of cases had never been decided, the conclusion that Empire has raised a federal claim also would follow from the general principles this Court has developed for applying federal common law to disputes in which important federal interests are at stake. When litigation under nationwide programs touches on significant federal interests, this Court has consistently held that the federal courts should resolve such disputes by applying federal law. Moreover, when the programmatic interests call for a uniform rule, the Court has held that the federal courts should develop federal rules of decision, rather than applying state law. The principles developed in these cases demonstrate, independent of the *Jackson Transit* analysis, that the court of appeals erred in finding that no federal jurisdiction exists over this case.

A. Federal Law Governs Litigation Involving Important Federal Programmatic or Contractual Interests, and the Federal Courts Determine the Content of That Law Independent of State Law if Uniformity Is Required

1. Litigation of Important Federal Programmatic Interests Is Governed by Federal Law

A well-settled line of precedent establishes that it is generally inappropriate for state law and state courts to be the arbiter of important federal interests that are related to federal programs. The seminal case is *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), where this Court held that federal law applied to a suit by the United States against a bank to recover funds paid on a forged check. The Court explained that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." *Id*. at

366. Thus, even though there was no rule of decision prescribed by federal statute, the Court declared that "it is for the federal courts to fashion the governing rule of law according to their own standards." *Id*. at 367.

The Court then addressed a related issue, whether the content of the federal law should reflect the otherwise applicable state law. The Court explained that there existed a need for a uniform federal rule that made it inappropriate for state law rules to play a part. The government's issuance of commercial paper "is on a vast scale" nationwide, and therefore application of state law "would subject the rights and duties of the United States to exceptional uncertainty." *Id*. There would be "great diversity in results" because of the "vagaries of the laws of the several states." *Id*. Because the "desirability of a uniform rule is plain," the Court held that the federal courts must resolve such cases by "fashioning federal rules" to resolve "these federal questions." *Id*.; *see generally* Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410, 411 (1964) (*Clearfield Trust* establishes that "the courts of the United States may formulate a rule of decision" when federal interests are at stake and create "a body of federal law on those issues where national uniformity is demanded").

The Court has since applied the principles of *Clearfield Trust* in a variety of settings, emphasizing the need for federal courts to adjudicate issues that arise under important government programs. In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), for example, the Court held that the priority of liens stemming from federally guaranteed lending programs "must be determined with reference to federal law" because "federal law governs questions involving the rights of the United States arising under nationwide federal programs." *See also United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (invoking the "federal judicial power to deal with . . . essentially federal matters" in adjudicating a tort suit brought

by the United States to recover for the loss of a soldier's services). Similarly, in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), the United States brought suit to quiet title to a parcel of land acquired in connection with a wildlife refuge program authorized by federal statute, which the Court identified as a land acquisition "arising from and bearing heavily upon a federal regulatory program." *Id*. at 592. The Court ruled that federal law governed under the "first" holding of *Clearfield Trust* – namely, a "recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." *Id*. at 593 (internal quotation omitted).

With respect to the second inquiry of *Clearfield Trust*, whether state law contributes to the content of the federal law to be applied or is completely displaced, the most important factor is the need for a uniform rule of decision. "[F]ederal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." *Kimbell Foods*, 440 U.S. at 728 (quoting *United States v. Yazell*, 384 U.S. 341, 354 (1966)); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988) ("where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules"). "Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Kimbell Foods*, 440 U.S. at 728. Hence, in *Kimbell Foods* itself, although the Court held that federal law applied, it went on to hold that the federal rule of decision should follow state law because "uniformity" was not contemplated for the administration of a federal program that involved individually negotiated loans. *Id*. at 730; *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (refusing to displace state law because "the interest in uniformity" is "not even at stake").

More often, however, the Court has determined that state law must be displaced when litigation affecting important federal interests calls for the federal courts to apply federal law. In *Standard Oil*, the Court rejected any use of state law because the issues were "appropriate for uniform national treatment" and should not "vary in accordance with the different rulings of the several states." 332 U.S. at 311, 310. In *Little Lake Misere*, the Court held that the state rule at issue could not apply because it was "hostile to the interests of the United States." 412 U.S. at 597. In *West Virginia v. United States*, 479 U.S. 305, 309 (1987), the Court held that a "single nationwide rule [governing prejudgment interest on disaster relief debts] would be preferable to one turning on state law" because "the incorporation of state law would not give due regard to the federal interest" embodied in the statute. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (pointing to "an overriding federal interest in the need for a uniform rule of decision"); *accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964).

2. The Case For Application of Federal Law Is Particularly Strong When the Suit Involves Enforcement of a Government Contract

The applicability of federal law under *Clearfield Trust* principles is particularly evident when the federal interest at stake is enforcement of a government contract. The Court has broadly stated that disputes involving the "validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, and the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944), *overruled on other grounds*, *United States v. City of Detroit*, 355 U.S. 466 (1958); *see also Boyle*, 487 U.S. at 504 ("obligations to and rights of the United States under its contracts are governed

exclusively by federal law"); *West Virginia v. United States*, 479 U.S. at 308-09; *Kimbell Foods*, 440 U.S. at 726-27; *Nat'l Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945). As the Court explained in *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970) (footnote omitted), "federal law controls the interpretation of [a federal] contract" because "the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution."

Little Lake Misere is particularly instructive on this point. In finding federal law applicable there to a suit to quiet title, the Court remarked that it had "consistently" ruled that "dealings which may be 'ordinary' or 'local' as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; *particularly is this so when transactions undertaken by the Federal Government are involved*, as in this case." 412 U.S. at 592 (emphasis added). With respect to the specific need for federal law, the Court emphasized both the broader federal programmatic interest that it sought to uphold and that the government was seeking to enforce its own contract: "We deal with the interpretation of a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself is a party." 412 U.S. at 594; *see also id*. at 604.

Important federal programmatic interests, particularly those embodied in a government contract, require application of federal law even when the United States is not a party to the litigation. Thus, in *Boyle*, the Court held that it was necessary to apply federal law to a wrongful death action brought against a government contractor in order to protect the federal interest in its procurement program. 487 U.S. at 504. Applying the principles of *Clearfield Trust*, the Court concluded that federal common law displaced state law and provided government contractors with a defense against suits based on design defects

that were called for by the government's contract specifications.

The Court in *Boyle* framed its inquiry in terms of preemption, observing that "[i]n most fields of activity" it "has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription . . . or a direct conflict between federal and state law." *Id*. at 504. The Court added, however, that where "uniquely federal interests" are at stake, it has also found state law "pre-empted and replaced" by "federal common law" even in the absence of a statutory preemption clause or a direct conflict between state and federal law. *Id*.

The Court applied a two-part analysis to conclude that the suit in *Boyle* fell into this third category of cases in which it was appropriate to apply federal common law in place of state law. First, the Court found that the litigation implicated a "uniquely federal interest" – namely, the government's "interest in the procurement of equipment." *Id*. at 504-06. The litigation would "directly affect the terms of Government contracts" because imposing liability on government contractors who adhered to contract specifications would impel contractors either to reject the government's proposed design or to raise their price. *Id*. at 507.

Second, the Court concluded that it was appropriate to displace state law to safeguard the federal interest. In the absence of any express preemption by statute, the Court looked to whether there existed a "significant conflict" between the federal interest and the operation of state law. *Id*. In *Boyle*, the state-imposed duty of care on which the tort suit was founded conflicted with the duty imposed by the federal contract specifications. *See id*. at 509. Because those specifications reflected an exercise of the federal government's discretion in military procurement, the Court concluded that imposing liability for adhering to the specifications would conflict with the federal policy embodied in the discretionary function exception of the Federal Tort Claims Act. *Id*. at 511-12. Accordingly, it ruled

that federal law must displace, not incorporate, state law by including a defense for federal contractors that would insulate them from liability associated with exercises of the government's discretionary functions. *Id*. at 512-13.[3]

The Court noted in *Boyle* that the situation in the case before it was at the "opposite extreme" (*id.* at 509) from *Miree v. DeKalb County*, 433 U.S. 25 (1977), where state law governed a private damages suit in which the plaintiffs claimed to be third-party beneficiaries of a contractual promise made by the county to the federal government that it would not allow a garbage dump adjacent to an airport. *Boyle*, 487 U.S. at 509. In *Miree*, there was no conflict between the federal interest and state law, and the federal interest was "'too speculative [and] far too remote . . . to justify the application of federal law.'" *Id*. at 506 (*quoting Miree*, 433 U.S. at 32-33). Moreover, in *Miree* the Court had found that the lawsuit would "have no direct effect upon the United States or its Treasury" (433 U.S. at 29) and that Congress had "chosen not to" "displace state law" in the underlying legislative scheme (*id*. at 32). Therefore, in contrast to *Boyle*, the general principles for applying federal law when important federal programmatic interests are at stake did not come into play in *Miree* despite the plaintiffs' attempt to rely upon a federal contract.

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[3] The form of the Court's analysis deviated slightly from the formulation of *Clearfield Trust* and its progeny. The Court framed the inquiry in terms of "displacement of state law," rather than "displacement of federal-law reference to state law for the rule of decision." 487 U.S. at 508 n.3. Thus, although its "conflict" analysis mirrored the second *Clearfield Trust* inquiry, the Court did not specifically answer the first inquiry – that is, whether federal law would have applied if the Court had concluded that state law was not displaced.

B. Empire's Claim Seeks Enforcement of a Government Contract and Implicates a Nationwide Program Requiring Uniformity

These precedents all require that Empire's suit be heard by a federal court applying federal law. Empire's action seeks enforcement of a government contract. The reimbursement terms contained in the Statement of Benefits are part of the OPM-BCBSA contract. *See supra* p. 6. Therefore, this case falls squarely within the general rule that "federal law controls the interpretation of [a federal] contract" (*Seckinger*, 397 U.S. at 209), and there is no reason to depart from that rule.

Even apart from the case being one to enforce a government contract, important interests of the United States are directly at issue in FEHBA reimbursement suits. That is because reimbursement recoveries inure to the benefit of the United States. Reimbursement collections are credited to the U.S. Treasury, where the premium funds are held. *See supra* p. 7. The FEHBA carrier has no interest in those funds; it does not obtain a "cut" of the recovery. Rather, its only profit under its plan is through a service charge allowance that the contracting parties negotiate. The reimbursement amounts add to the funds available to pay benefits, with any surplus in the funds being available to the United States for its purposes under the FEHBA program. *See supra* p. 7. Under these circumstances, the carrier is, in effect, the government's agent in reimbursement matters. The OPM-BCBSA contract requires Empire to make a "reasonable effort" to collect reimbursement, and that effort is for the government's benefit. J.A. 95, 125.[4]

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[4] This same analysis shows that the court of appeals erred in rejecting Empire's argument based on *Seckinger*, *County of Allegheny*, and the other authorities holding that government contracts are subject exclusively to enforcement under federal law. The court of appeals thought the rule applies only when the United States is a party to the suit or at least when the action is "to determine the rights of the

For these reasons, there should be little doubt that this case involves important federal programmatic interests – "uniquely federal interests" in the language of *Boyle* – akin to those that the Court has repeatedly recognized as appropriately governed by federal law. The suit has a direct financial effect on the government, and is essentially one on behalf of the government. Even the Second Circuit below did not seriously question that this case satisfied the "uniquely federal interest" prong of the *Boyle* analysis. Judge Sotomayor expressly did not address the issue (Pet. App. 6a), and Judge Sack stated that this aspect of the *Boyle* analysis had been met (*id*. at 25a). Under the "first holding" of *Clearfield Trust*, then, a federal court applying federal law should hear Empire's claim.

Because the issue here is federal court *jurisdiction*, that conclusion suffices to resolve this case without proceeding to the second *Clearfield Trust* inquiry. It is true that the focus of the *Clearfield Trust* line of cases was the substantive rule of decision, not jurisdiction. In most cases, the United States was the plaintiff, which established federal jurisdiction under 28 U.S.C. § 1345; in other cases, there already existed diversity jurisdiction. But as this Court has observed, the conclusions that federal law governed the claims in those cases are relevant to jurisdiction in a case like this one, where jurisdiction is invoked under 28 U.S.C. § 1331. *See Int'l Ass'n of Machinists, AFL-*

United States"; Empire supposedly "seeks to vindicate *its* rights against another private party." Pet. App. 47a (emphasis added). However, the court of appeals failed to recognize that a reimbursement recovery inures to the government's benefit and that, as a result, the enrollee's reimbursement obligation is owed, in effect, to the United States. Though Empire is the suing party, it is the rights of the United States, and obligations to it, that are being determined. *Cf. Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (action subject to government's defenses, such as sovereign immunity, even if government is not a party, where government "is the real, substantial party in interest").

CIO v. Central Airlines, Inc., 372 U.S. 682, 693 n.17 (1963) ("Although these decisions did not involve federal jurisdiction as such, . . . they are suggestive since they hold federal law determinative of the merits of the claim").

If the contract enforcement claim is governed by federal law, it necessarily follows that the claim can be brought in federal court. "It is well settled that [28 U.S.C. § 1331] 'will support claims founded upon federal common law as well as those of a statutory origin.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)); *see also Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 n.6 (1982); 15 Daniel R. Coquillette *et al.*, Moore's Federal Practice § 103.32[4], at 103-60.1 (3d ed. 2005) ("When federal common law governs a case, that case necessarily presents a federal question within the subject matter jurisdiction of the federal court system just as if the case were controlled by federal statute").[5]

In any event, the conditions for displacement of state law in accordance with the second *Clearfield Trust* holding are clearly met here as well. It is unnecessary for the Court to guess whether Congress would regard a uniform rule of decision as important to the FEHBA program. The need for uniformity, and the attendant displacement of state law, is unquestioned because Congress has specifically addressed the issue. Con-

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[5] Because Empire's complaint, under this analysis, is founded on federal common law, it raises a federal claim. But even if the cause of action were created by state law, it would still be subject to federal question jurisdiction. In *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367 (2005), the Court recently reconfirmed that "in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." It is incontrovertible that the enforcement of OPM's nationwide FEHBA contract "implicate[s] significant federal issues"; the court of appeals, again, essentially conceded as much. Pet. App. 6a, 25a.

gress included a preemption clause in FEHBA, and then amended that clause because of concern that it was not being given a sufficiently broad preemptive effect. The intent of the preemption clause, as already noted, was to "confirm" that FEHBA contract terms "completely displace" state law and to ensure that "national plans" can "offer *uniform* benefits and rates." H.R. Rep. No. 105-374, at 9, 16 (1997) (emphasis added) (J.A. 24, 25); *see supra* p. 24. Thus, this case falls squarely within the parameters of the cases applying the second holding of *Clearfield Trust*.

The court of appeals, however, focused exclusively on the *Boyle* formulation and rejected the application of federal law because of Empire's alleged failure to meet "the conflict prong of *Boyle*" by "demonstrat[ing] that the operation of New York state law creates an 'actual, significant conflict'" with federal interests. Pet. App. 6a-7a. Its conclusion, however, rests on a faulty understanding of the *Boyle* analysis and of the prior line of authority that it synthesizes.

The "actual, significant conflict" inquiry of *Boyle* is a straw-man in this case because it is not a prerequisite to application of federal law when Congress has affirmatively demonstrated its intent to displace state law. The Court addressed the conflict issue in *Boyle* only because of the absence of the more common justification for displacing state law – "a clear statutory prescription" for "federal pre-emption of state law" (487 U.S. at 504). Similarly, the absence of any expression of congressional intent was critical to the Court's ruling in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994), that federal common law could not apply because there was no need for uniformity and no conflict with state law. Before embarking on the conflict inquiry the Court emphasized that, "[i]n answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision." *Id*. at 85; *see also Kimbell Foods*, 440 U.S. at 728 (inquiry into state law "frustrat[ing] specific objectives of the

federal programs" arises only if state law is not displaced because of a need for uniformity); *Little Lake Misere*, 412 U.S. at 593 n.10 (the strongest case for displacement of state law is "where Congress explicitly displaces state law in the course of exercising clear constitutional regulatory power over a particular subject matter").

The "conflict prong" of the *Boyle* analysis, ultimately, is just a form of preemption inquiry that is unnecessary when preemption is expressly provided by statute. *See* Pet. App. 27a-28a (Raggi, J., dissenting); Martha A. Field, *The Legitimacy of Federal Common Law*, 12 Pace L. Rev. 303, 316 (1992) (federal common law must be applied "if federal law preempts state law"); Erwin Chemerinsky, *Federal Jurisdiction* § 6.2, at 372 (4th ed. 2003) (summarizing *Boyle* as an inquiry into whether "federal law is deemed to preempt state law," which can be shown either through a conflict between state and federal law "or if there is a clear congressional intent to preempt state law"). The ultimate "issue that must be determined in each instance is what heed Congress intended to have paid to state law." Friendly, 39 N.Y.U. L. Rev. at 410. Where Congress has spoken in the statute, it is unnecessary to try to divine its intent indirectly by examining areas of conflict between state law and federal interests. Therefore, state law must be displaced here irrespective of a specific conflict between New York law and federal policy.

But even if the express preemption clause did not obviate the need for a conflict inquiry, there exists the necessary conflict in this case. *Boyle* noted that "the conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates in a field which the States have traditionally occupied." 487 U.S. at 507 (quotation marks omitted). Here, the conflict is substantial. Applying the varied rules of the 50 states would conflict with the uniformity principle that the preemption provision embodies. In furtherance of that principle, the OPM-BCBSA contract expressly states that

the Blue Cross and Blue Shield entities administering the Plan "shall subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under th[e] contract." J.A. 95, 125. Uniformity is particularly critical in a nationwide plan such as the Service Benefit Plan, the one nationwide FEHBA plan expressly described in FEHBA and currently extant. If the Plan's subrogation policy varied from state to state, "the practical effect is that federal employees in different states paying the same premiums would not be required to repay benefits after recovery from third parties according to the same rules." *Blue Cross & Blue Shield v. Cruz*, 396 F.3d 793, 799 (7th Cir. 2005), *pet. for cert. filed*, No. 04-1657 (June 6, 2005). "Federal employees in different states would have different reimbursement obligations and hence different net benefits." *Id.*

This scenario is precisely what would occur if state law governed actions for reimbursement under a FEHBA contract. There is considerable variation in subrogation law across the country, and many states have strong anti-subrogation rules that prohibit or severely limit a carrier's ability to obtain reimbursement. *See* Patricia G. Tobin, *The Rawlings & Assocs. National Subrogation Law Manual 1998*, at 51-53 (1997). OPM has final authority over the selection of benefits terms in its contract with BCBSA (*see* 5 U.S.C. § 8902(d)), and the consistency in subrogation mandated there reflects a federal policy – one that furthers Congress's intent that FEHBA plans offer "uniform benefits." H.R. Rep. No. 105-374, at 16 (J.A. 24). Applying varied state laws to reimbursement actions thus presents a "conflict with federal policy" that meets any requirement imposed by the second prong of the *Boyle* analysis. 487 U.S. at 507.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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