QUESTION PRESENTED

Without clear Congressional authorization, should this Court (1) expand the subject matter jurisdiction of the federal courts to include all claims arising under the terms of a private contract providing health benefits to federal employees, even where the terms at issue do not involve health coverage or benefits and (2) find that those terms supersede and preempt state laws and regulations, even where there is no demonstrated conflict between federal and state law.

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In The

Supreme Court of the United States

No. 05-200

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

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BRIEF FOR RESPONDENT

STATUTORY PROVISIONS INVOLVED

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

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. § 8912:

The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

SUMMARY OF ARGUMENT

The Petitioner and the United States as amicus curiae argue that federal subject matter jurisdiction should be found to exist over, not only this simple reimbursement claim, but, without limitation, virtually all claims arising under any of the terms contained in the Statement of Benefits drafted by the Petitioner pursuant to its contract with the Federal Office of Personnel Management ("OPM"), as authorized by the Federal Employees Health Benefit Act ("FEHBA") . They additionally argue that all of the terms in the Statement of Benefits are, in effect, federal laws that should supersede and preempt state laws and regulations.

In essence they argue that such sweeping federal jurisdiction and preemption should be invoked by this Court because of general policy considerations and based upon what they believe to have been the intent of Congress in the drafting and adopting of the FEHBA statute.

In the abstract, accepting their view that the decision in this case will affect the entire health insurance benefit system provided by the U.S. government to its nine million federal employees nationwide, their policy argument for one unified federal judicial forum to determine all claims arising under this benefit plan, and for total preemption, becomes persuasive, indeed compelling.

There are multiple reasons, however, why these arguments must fail.

In the first place, this case does not involve, nor has it been shown in the record that this case will affect, the entire health insurance benefit system provided to federal employees, It does not involve a question of coverage or benefits and there is no showing in the record that a decision in this case will, in any manner or to any extent, affect the coverage or benefits provided to federal employees. Even in the limited context of the Petitioner's reimbursement claim, there is no evidence presented to show that the lower court's denial of jurisdiction will in any way, even marginally, affect this health benefit plan or the U.S. Treasury.

To put it simply, there is no showing that an adjudication of this reimbursement claim in state court, as opposed to federal court, will result in any detriment to the Petitioner or the U.S. Treasury.

Second, if Congress had intended, after due deliberation and consideration of the policy objectives behind the FEHBA statute, to provide for one unified federal judicial forum to hear all claims arising under any contracts authorized by FEHBA, it certainly could have expressly done so, as it has done with other statutes.

Congress did not do so. It did not confer "exclusive" jurisdiction in the federal courts to hear all "claims arising out of this chapter". What Congress did, by way of the express and specific language in FEHBA, was to explicitly limit federal district court jurisdiction for claims arising under FEHBA to actions or claims "against the United States".

The statutory jurisdictional language in FEHBA is express, clear and specific. As such, a strict construction of the statute requires a finding that federal jurisdiction is limited to "claims against the United States and no one else".

Furthermore, by comparing this specific and unambiguous statement with the jurisdictional statements contained in similar statutes, such as the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1001 et seq.*, there can be no mistaking Congressional intent to, when it wanted to, expand jurisdiction under certain statutes and to limit jurisdiction in others, such as FEHBA.

Third, if Congress had intended for all of the terms of this health benefit plan to supersede and preempt state laws and regulations, it could have also expressly done so.

What Congress did do was to limit the preemption clause in FEHBA to the terms of the contract relating only to "the nature, provision or extent of coverage or benefits".

Fourth, there is no compelling reason why this Court, without specific Congressional authorization, should expand upon the express jurisdiction provided for in the statute, or preempt state law with the terms of the Petitioner's contract; no reason to displace state law and substitute a judicially fashioned federal common law relative to all FEHBA claims.

Indeed, there are compelling reasons why jurisdiction should not be extended to include claims that do not involve issues of coverage or benefits, such as this reimbursement claim.

As stated, this case does not involve a question of coverage or benefits, nor is it shown that the decision in this case will, in any manner or to any extent, affect the coverage or benefits provided to federal employees. Additionally, the intent of Congress, to ensure that the application of state laws do not limit or affect the health coverage and benefits provided to federal employees, has already been addressed by the preemption provisions of the statute.

Under the test enunciated by this Court in *Boyle v. United Techs. Corp., 487 U.S. 500 (1988)*, this Court has already provided a means to litigate coverage and benefit disputes under FEHBA in the federal district courts. If it is shown that there is a "significant conflict between an identifiable federal policy or interest and the operation of state law" or that the application of state law would "frustrate specific objectives" of FEHBA (so as to limit or deny health coverage or benefits provided to a federal employee), federal law would pre-empt state law to resolve any such conflict in favor of the federal employee.

Fifth, and perhaps most importantly (when viewing this case from a policy standpoint), expanding federal court jurisdiction over simple reimbursement claims such as this, will serve to hurt, most dramatically and in a practical way, the very group of people that the Congress meant to protect by the passage of the FEHBA statute, namely their own federal employees. At the same time, there is no evidence to show that expanding the original jurisdiction of the United States district courts to include reimbursement claims will result in any practical benefit to the Petitioner or to the U.S. government.

ARGUMENT

Whether this case is decided based upon (1) a strict construction of the express language contained in the FEHBA statute, and/or (2) an evaluation of Congressional intent, and/or (3) general policy considerations, the result is the same: the decision of the court of appeals should be affirmed.

I. A STRICT CONSTRUCTION OF THE STATUTORY LANGUAGE IN FEHBA SHOWS THAT THE FEDERAL DISTRICT COURTS DO NOT HAVE JURISDICTION OVER THIS ACTION AND FURTHER THAT STATE LAW SHOULD NOT BE PREEMPTED.

Without question, it is Congress, in the first instance, that has the constitutional authority to define the jurisdiction of the lower Federal courts, *Keene Corporation v. United States, 508 U.S. 200, 207*, and to preempt state laws that conflict with federal statutes, *New York v. U.S., 505 U.S. 144*.

When dealing with questions of federal jurisdiction and preemption, this Court has always begun the inquiry with an examination of the statutory language itself.

The starting point for interpreting a statute is the language of the statute itself, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108,* and the analysis of jurisdiction and preemption in this case must begin with the language of the statute, *Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577; Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176*.

A. JURISDICTIONAL STATEMENT

Jurisdictional provisions are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes, *Palmore v. United States, 411 U.S. 389*. "Due regard for the rightful independence of state governments requires that the federal courts scrupulously confine their own jurisdiction to the precise limits which the statute has defined", *Finley, v. United States, 490 U.S. 545, 553*. Once the lines are drawn, limits on federal jurisdiction must be neither disregarded nor evaded, *Keene Corporation, 508 U.S. at 207, citing to Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374*.

The jurisdictional statement in the FEHBA statute, *5 U.S.C. § 8912*, clearly and unambiguously states that the federal district courts have original jurisdiction over claims "*against the United States*" *(emphasis supplied).*

This language is clear and unambiguous. It does not say that "the district courts shall have jurisdiction (exclusive or otherwise) over civil actions under this chapter", or that "the district courts shall have jurisdiction over civil actions to enforce the terms of a health benefit plan or contract authorized by this chapter". Nor does the statute say that "the district courts shall have jurisdiction over civil actions by or against enrollees in the health plan", or "civil actions that inure to the benefit of the United States", or "civil actions to enforce subrogation and/or reimbursement rights".

Nor does the statute define jurisdiction in a manner to reach any defendant other than "the United States". This statute clearly and succinctly says "*against the United States*" and this Court, in an interpretation of an identical phrase contained in the Federal Tort Claim Act, *28 U.S.C. § 1346(a)*, has previously said

that the phrase means "*against the United States and no one else*". *See, Finley, 490 U.S. at 552 (emphasis supplied); see also Point II (B)(3) herein.*

Strictly construed and applying this Court's interpretation of the phrase "against the United States", there is no jurisdiction in the federal district courts for this claim.

B. PREEMPTION STATEMENT

If a statute contains an express preemption clause, the Court must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent, *Sprietsma v. Mercury Marine, 537 U.S. 51; CSX Transp., Inc. v. Easterwood, 507 U.S. 658.*

FEHBA contains an express preemption clause which provides in pertinent part that the "terms of any contract under this chapter *which relate to the nature, provision, or extent of coverage or benefits* ... shall supersede and preempt any State or local law ...", *5 U.S. C. 8902(m)(1), (emphasis supplied).*

As with the jurisdictional language, this preemption language is clear and unambiguous. It does not say that all the "terms of any contract under this chapter shall supersede and preempt any State or local law ...". Instead, Congress specifically inserted the limiting words " which relate to the nature, provision, or extent of coverage or benefits".

These words, "coverage" and "benefits", have been defined by the Congress in various statutes, see e.g., 42 U.S.C. 300gg-91(b)(1), 5 U.S.C. 8904(a), and those definitions do not include, or even mention, subrogation or reimbursement claims.

Under normal rules of statutory interpretation, "identical words used in different parts of the same statute are generally presumed to have the same meaning", *IBP, Inc. v. Alvarez, 546 U.S. ___ (2006) (slip op., at 11)*. As such, when the preemption clause uses the specific words "coverage or benefits", it must be presumed that it means "benefits consisting of medical care" such as "Hospital benefits, Surgical benefits (etc.)".

Strictly construed, the statute only provides for preemption when the issue involves "coverage or benefits", not for reimbursement claims or other terms of the Petitioner's Statement of Benefits not involving "coverage or benefits".

Furthermore, it is of paramount importance that this Court, when it evaluates and decides jurisdictional issues or preemption issues, examine the language of the statute itself and set forth clear rules of interpretation, so that Congress may know the effect of the language it adopts. *See, Finley, 490 U.S. at 556.*

By using the words "against the United States", the Congress needs to know that it is limiting federal court jurisdiction to cases "against the United States and no one else". Likewise, by using the phrase "which relate to the nature, provision, or extent of coverage or benefits", the Congress needs to know that preemption will not occur unless the application of state laws or regulations affect "coverage or benefits".

While the courts may refer to a statute's legislative history and evaluate Congressional intent to resolve a statutory ambiguity, where the statutory language is clear, there is no need for such inquiry, *Toibb v. Radloff, 501 U.S. 157 at 162*. If the statute's language is plain, the sole function of the court is to enforce it according to its terms, *U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 at 241.*

Where the terms of a statute are clear and unambiguous, judicial inquiry is complete, *Hughes Aircraft Company v. Jacobson, 525 U.S. 432, 438*; *Rubin v. United States, 449 U.S. 424, 430*, and the Court's task is an easy one, *English v. General Elec. Co., 496 U.S. 72.*

II. CONGRESS INTENDED FOR FEDERAL JURISDICTION AND PREEMPTION TO BE LIMITED

It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that the federal courts are not to infer a grant of jurisdiction absent a clear legislative mandate, *Rice v. Railroad Co., 66 U.S. 358, Dalehite v. United States, 346 U.S. 15, 30-31*.

Likewise, it will not be presumed that a federal statute was intended to preempt state law unless there is a clear manifestation of Congressional intent to do so, since the exercise of federal supremacy is not lightly to be presumed, *Schwartz v. State of Tex., 344 U.S. 199.* Congressional intent to supersede state laws must be clear and manifest, *English, 496 U.S. 72.*

Consideration of whether preemption will violate the Supremacy Clause, *U.S.C. Const. Art. VI, cl. 2*, starts with the basic assumption that Congress did not intend to displace state law, *Building and Const. Trades Council of Metropolitan Dist. V. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218; Maryland v. Louisiana, 451 U.S. 725* and a Court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption, unless there is a clear and manifest purpose of Congress to do so, *CSX Transp., Inc., 507 U.S. 658*; *Healy v. Ratta, 292 U.S. 263*.

Indeed, "in order to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution ... the national government should be deferential to the States when taking action that affects the policymaking discretion of the states and should act only with the greatest caution ...", *Ex. Ord. No. 13132, Aug. 4, 1999, 64 F.R. 43255.*

> "(Federal) agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking *only when the exercise of State authority directly conflicts with the exercise of Federal authority* under the Federal statute *or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.* Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated." *Id at Sec. 4 (emphasis supplied).*

A. LEGISLATIVE HISTORY

Congress enacted FEHBA in 1959 to provide "a wide range of hospital, surgical, medical and related benefits designed to afford federal employees full or substantially full protection against expenses of both common and catastrophic illness or injury", *H.R. Rep. 86-957, 3.* Initially it contained a jurisdictional statement that granted original jurisdiction to the federal district courts for "any civil action or claim against the United States founded upon this legislation", *H.R. Rep. 86-957, 15.* However, it did not contain any preemption provisions.

In 1978, Congress amended FEHBA to add a preemption provision, *5 U.S.C. § 8902(m)(1)*. In doing so, Congress stated that:

> "H.R. 2931, as amended, guarantees that the provisions of health benefits contracts made under Chapter 89, of Title 5, U.S.C. *concerning benefits or coverage*, would preempt any state and/or local insurance laws and regulations which are inconsistent with such contracts. *Such a preemption, however, is purposely limited and will not provide insurance carriers under the programs with exemptions from state laws and regulations governing other aspects of the insurance business ...", S. Rep. 95-903, 1978 U.S.C.C.A.N. 1413; H.R. Rep. No. 95-282, 1977 at 3 (emphasis supplied).*

In furtherance of that stated goal, the first preemption provision contained the limiting words "which relate to the nature, provision, or extent of coverage or benefits".

It is also significant that, in this amendment, no change was made to the jurisdictional language that expressly limited federal court jurisdiction to actions "against the United States".

In 1998, Congress again amended FEHBA, primarily to address "the debarment of health care providers engaging in fraudulent practices" and to provide for continued health insurance for certain individuals, *see H.R. Rep. No. 105-374 (J.A. 6-26)*. The preemption provision was also amended, only to the extent of deleting the phrase "to the extent that such law or regulation is inconsistent with the provisions of the Federal employee' health benefits contract", *5 U.S.C. § 8902(m)(1)*.

It is again significant that when FEHBA was amended in 1998, Congress again did not change the limiting jurisdictional language in the statute. Nor did that amendment delete the limiting language "which relate to the nature, provision, or extent of coverage or benefits" from the amended preemption provision.

This legislative history presents strong evidence that Congress considered preemption and jurisdictional issues when drafting and amending this legislation and that Congress made the conscious decision to, not only limit the jurisdiction of the district courts, but also to limit the preemptive effect of the FEHBA statute to issues involving "coverage or benefits".

Indeed, the stated goal of the preemption provision was not to preempt every issue addressed in a FEHBA plan, but to "purposely" limit preemption to issues of "coverage or benefits".

B. COMPARISON WITH OTHER STATUTES

In evaluating the intent of Congress, it is also appropriate to examine and compare the jurisdictional statements and preemption provisions in FEHBA with the provisions contained in similar statutes, along with the policy objectives behind those statutes.

In the first instance, it is significant that Congress made no provision of any kind in FEHBA for subrogation or reimbursement, as it has in other statutes. See, e.g., *42 U.S.C. § 2651-2653* (authorizing the Veterans Administration under the Medical Care Recovery Act to recover benefits from beneficiaries who have obtained tort recoveries); *42 U.S.C. 1395y* (providing for reimbursement to the Social Security Administration). The first and only reference to subrogation or

reimbursement claims is made in the Statement of Benefits written, not by Congress, but by the Petitioner, as part of its contract.

Such an omission by Congress, in stark contrast to the elaborate subrogation and reimbursement provisions contained in other statutes, shows that Congress did not intend to authorize remedies that it simply forgot to incorporate expressly. *See, Mertens v. Hewitt Assoc., 508 U.S. 248 at 254.*

1. ERISA

Unlike FEHBA, the Employee Retirement Income Security Act ("ERISA"), provides in pertinent part that the Federal district courts "shall have *exclusive* jurisdiction of civil actions under this subchapter", *29 U.S.C. § 1132(e)(1) (emphasis supplied)*.

This statute is recognized as a comprehensive statute with a clear grant of extended, and "exclusive", subject matter jurisdiction in the Federal courts. Not only does its jurisdictional statement contain the word "exclusive", the entire legislative scheme behind ERISA establishes an intention by Congress to "provide a uniform regulatory regime", including "expansive pre-emption provisions" and an "integrated enforcement mechanism", "which are intended to ensure that employee benefit plan regulation is 'exclusively a Federal concern' ", *Aetna Health Inc., v. Davila, 542 U.S. 200*.

To further those goals, Congress expressly provided in the ERISA statute for extensive regulatory requirements and for appropriate remedies and access to the federal courts. Congress expressly used the word "exclusive" when defining jurisdiction and included in ERISA an expansive preemption provision, *see*

ERISA § 514, 29 U.S.C. § 1144.

In stark contrast to ERISA, the FEHBA statute does not, in its jurisdictional statement, contain the word "exclusive". Nor is the FEHBA preemption clause nearly as expansive as the clause in ERISA, containing the above noted limiting language.

2. CIVIL RIGHTS ACT

Unlike FEHBA, the Civil Rights Act ("CRA"), provides in pertinent part that "each United States district court ... *shall have jurisdiction of actions brought under this subchapter*", *42 U.S.C. § 2000e-5(f)(3) (emphasis supplied).*

In a manner similar to the analysis here, this Court made a comparison of the jurisdictional language in the CRA to the jurisdictional language in ERISA.

In an opinion delivered by Justice Stevens, this Court stated that "Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, (the Civil Rights Act) contains no (such) language ... The omission of any such provision is strong, and arguably sufficient evidence that Congress had no such intent.", *Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820.*

Presumptively, if Congress had intended for FEHBA jurisdiction to be "exclusive", as it did in ERISA, it could have specifically said so. Likewise, if Congress had intended for FEHBA jurisdiction to include all "actions brought under this subchapter", as it did in the CRA, it also could have specifically said so, rather than indicate that jurisdiction would only be in "a civil action or claim against the United States".

The same can be said for preemption. If Congress had intended for FEHBA, and the terms of contracts authorized by FEHBA, to totally preempt state laws and regulations, it could have said so. If it had intended to specifically authorize the government and it's contract providers to assert subrogation and/or reimbursement claims to recover FEHBA benefits from a third-party tortfeasor or from a federal employee's personal injury recovery, as it did with Veterans benefits and Social Security benefits, it certainly could have included such a comprehensive regulatory provision in FEHBA. It did not.

Paraphrasing a partly concurring and partly dissenting opinion by Justice Thomas, joined by Justice Souter:

> "Had the (Congress) wished to pre-empt all state laws governing (all of the provisions in the Petitioner's Statement of Benefits), (it) could have more explicitly defined the regulatory 'subject matter' to be covered ... To read (otherwise), however, negates Congress' desire that state law be accorded 'considerable solicitude' ", *see CSX Transportation, Inc., 507 U.S. 658 at 679.*

These omissions are strong, and arguably sufficient evidence that Congress had no intent to expand subject matter jurisdiction under FEHBA or to totally preempt state law with the terms of the Petitioner's plan.

3. FEDERAL TORT CLAIMS ACT

Most instructive is this Court's analysis and interpretation of the jurisdictional statement contained in the Federal Tort Claims Act ("FTCA"), *28 U.S.C. § 1346(a)*.

In virtually identical language to FEHBA, the FTCA provides for original jurisdiction in the district courts for a "civil action or claim *against the United States*" *(emphasis supplied)*.

In 1989, in an opinion delivered by Justice Scalia, this Court found that the statutory text of the FTCA "defines jurisdiction in a manner that does not reach defendants other than the United States", concluding that when a statute says *"against the United States"*, it means "*against the United States and no one else*", *Finley, 490 U.S. at 552 (emphasis supplied)*.

This judicial interpretation of the phrase "against the United States" and its application to this case are particularly compelling.

In the first instance, "Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades", *IBP, Inc., 546 U.S. ___ (2005) (slip op. at 10)*.

Furthermore, when Congress amended FEHBA in 1998, it could hardly been unaware of this Court's judicial interpretation of the phrase "against the United States" as adopted in *Finley* in 1989. "And when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the (Congressional) intent to incorporate its ... judicial interpretations as well." *See, Merrill Lynch v. Dabit, 547 U.S. ___ (2006) (slip op. at 13) (citations and internal quotation marks omitted).*

When Congress expressly inserted the phrase "against the United States" into the FEHBA statute and when it left that

phrase intact while amending other sections of FEHBA, it could hardly been unaware that it meant "against the United States and no one else".

There is nothing in the legislative history or background of FEHBA to indicate that the Congress intended FEHBA to be expansive, analogous to ERISA; or that Congress intended to extend jurisdiction under FEHBA to all claims arising under its provisions, analogous to the CRA; or that Congress intended for FEHBA jurisdiction to reach any defendant except the United States, as this Court so succinctly stated in *Finley* in 1989.

To the contrary, the use or omission by Congress of specific words, such as "exclusive" and "against the United States", is strong evidence that Congress considered jurisdictional issues in enacting these statutes and did not hesitate expressly to confer, or limit, federal jurisdiction where it found it necessary or advisable to do so. Likewise, the use of the specific words "which relate to the nature, provision, or extent of coverage or benefits" is strong evidence that Congress considered preemption issues when drafting this legislation and made the intentional decision to limit the preemptive reach of FEHBA.

Absent a clear manifestation of Congressional intent to do otherwise, a clear legislative mandate, it must be presumed that jurisdiction in the federal courts under FEHBA is limited to cases "against the United States" and that FEHBA preemption is limited to issues which relate to "coverage or benefits". To do otherwise would violate the intent of Congress, not to mention raise serious concerns regarding the implications of the Supremacy Clause, *U.S.C. Const. Art. VI, cl. 2*.

In regard to the Supremacy Clause, it must be noted that there was discussion in this case by the Court of Appeals as to whether the private contract terms in the Petitioner's Statement of Benefits can, constitutionally, be considered to be the "supreme Law of the Land", so as to supersede and displace state laws. *See, Memorandum Opinion, appendix to the Petition for Certiorari, 1a; 396 F.3d 136 at 143*.

The Respondent believes that the preemption of settled state law by the private contract terms contained in the Statement of Benefits promulgated and written by this private contractor, and not by the Congress, may, in fact, implicate the Supremacy Clause and be unconstitutional. Only the laws, as written by Congress, can operate as the "supreme Law of the Land" for the purposes of preemption under the Supremacy Clause. However, in that the constitutional issue did not form the basis for the denial of jurisdiction in either the District Court or the Court of Appeals, it will not be addressed here at any length.

Suffice it to say that there is a danger in allowing the terms of a private contract, not written by Congress, to preempt and displace the laws of any State, even where that contract is entered into pursuant to the general authority of a federal statute. This is particularly true where the terms of that private contract are decided upon, and written, by any number of private entities, such as Empire, or any other entity with whom OPM enters into an agreement.

III. FEDERAL COMMON LAW DOES NOT APPLY TO THIS BREACH OF CONTRACT SUIT

It is well settled that there is no federal general common law, *Erie R. Co. v. Tompkins, 304 U.S. 64, 78*. The courts will only create federal common law where (1) the case implicates a

"uniquely federal interest", and (2) a "significant conflict exists between an identifiable federal policy or interest and the operation of state law", *Boyle, 487 U.S. at 504.*

Such cases are "few and restricted" and are "limited to situations where there is a significant conflict between some federal policy or interest and the use of state law", *O'Melveny & Myers v. Federal Deposit Insurance Corporation, 512 U.S. 79, 87 (citations and internal quotations omitted)*.

A. PETITIONER HAS FAILED TO SHOW A "UNIQUE FEDERAL INTEREST"

As a threshold matter, a case must implicate "uniquely federal interests" for federal common law to apply, *Boyle, 487 U.S. at 504*.

While at first glance the Petitioner's argument, that this case involves an area of uniquely federal interest, seems to have merit, upon closer scrutiny, it becomes apparent that this reimbursement claim is too far removed from the purposes and objectives of FEHBA to call for the wholesale creation of a new body of federal common law.

It is manifest from a reading of FEHBA and its legislative history, that Congress intended for federal employees to be guaranteed certain minimum levels of health coverage and benefits that could not be limited or restricted by individual state laws or regulations. That is the "unique federal interest" underlying the FEHBA statute and is clearly stated. Indeed, the legislative history specifically provides as an example conflicting state laws that do not provide coverage for chiropractic services, *S. Rep. 95-903 at 2*.

This case, however, does not involve any issues related to coverage or benefits, but rather involves other aspects of the insurance business that the statute leaves to the authority of the states. This claim for reimbursement by a benefit plan administrator, the Petitioner, from its own beneficiary, pursuant to the terms of its contract, is not an area of "unique federal interest", but is rather a claim already well provided for under the common law of contracts.

Additionally, the Petitioner's argument that applying state law would undermine the ability of the U.S. government to recover funds disbursed under this health program and would conflict with program objectives is unsupported. There is no showing that the United States has any immediate interest in the specific amount the Petitioner may be entitled to recover in this action and there is no evidence presented to demonstrate that the United States would, in any appreciable way, be affected by state adjudication of this claim. Furthermore, there has been no showing that deference to state laws regarding this reimbursement claim would have any demonstrable effect on the U.S. Treasury or the objectives behind the FEHBA program, other than the appellant's and amicus counsel claiming it's so.

There is no "unique federal interest" in this litigation. Because this litigation is among private parties and no substantial rights or obligations of the United States hinge on its outcome, creation of a new body of federal common law is particularly inappropriate.

B. PETITIONER HAS FAILED TO SHOW AN "IDENTIFIABLE FEDERAL POLICY OR INTEREST" THAT CONFLICTS WITH STATE LAW

Even assuming that "uniquely federal interests" are shown, federal common law only applies where a "significant conflict exists between an identifiable federal policy or interest and the operation of state law", *O'Melveny, 512 U.S. at 87; Boyle, 487 U.S. at 504.*

The only argument presented by the Petitioner and by the United States as amicus curiae to attempt to identify some federal policy or interest at stake in this case are their generalized calls for uniformity. However, neither the Petitioner, nor the United States, make any specific showing that New York law in any way conflicts with any claimed need for uniformity. *See Atherton v. F.D.I.C., 519 U.S. 213.*

In numerous cases, this Court has rejected similar attempts to rely upon vague assertions about the need for uniformity. *See, Atherton, 519 U.S. 213; O'Melveny, 512 U.S. at 88; United States v. Kimbell Foods, Inc., 440 U.S. 715 at 730.* " A mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule", *B.F. Goodrich v. Betkoski, 112 F.3d 88, 90 (2d Cir. 1997), cert. denied sub nom; Zollow Drum Co. v. B.F. Goodrich Co., 524 U.S. 926; see O'Melveny, 512 U.S. at 88.*

While uniformity of law might facilitate the Petitioner's nationwide litigation of these reimbursement claims, eliminating state-by-state research and reducing uncertainty, if the avoidance of those ordinary consequences qualified as an identifiable federal interest, the federal courts would be awash in federal common-law rules, *O'Melveny, 512 U.S. at 88*; *see also, United States v. Yazell, 382 U.S. 341, 347, n. 13.*

The Petitioner and the United States as amicus curiae have failed to show an "identifiable federal interest" and their

generalized and unsupported calls for uniformity are insufficient to justify the creation of a federal common law rule.

C. PETITIONER HAS FAILED TO IDENTIFY ANY CONFLICTING STATE LAW

It was upon this failure of proof that the Court of Appeals based its decision:

> "Empire has failed to demonstrate that the operation of New York state law creates an actual, significant conflict with those interests ... Tellingly, Empire's briefs on appeal fail to mention a single state law or state-imposed duty that runs contrary to the federal interests asserted in this case", *Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136 at141 (citations and internal quotation marks omitted)*.

Even assuming that this dispute implicates a uniquely federal interest and further assuming that the Petitioner's generalized call for national uniformity states a sufficient federal interest, which it does not, federal common law would still not apply because the Petitioner has not shown that any state law would, even potentially or marginally, conflict with any such federal policy or interest.

No such state law is even identified. Not only does the Petitioner fail to make any showing that New York law conflicts with any federal interest, it makes no allegations of any kind as to how any New York law would decide this case and fails to explain why, or how, a federal common law rule would or should differ from New York law.

There is no state law of any kind referred to anywhere in the Brief For Petitioner (indeed, there is no mention of any allegedly conflicting state law anywhere in the record of this case), and while the Petitioner claims that there is "considerable variation in subrogation law across the country", such an unsubstantiated claim is, in any event, irrelevant to this case.

The inadequacy of this argument is highlighted by the fact that this case does not involve a subrogation claim (a claim by an insurer against a third-party tortfeasor), but is rather a "reimbursement" claim by this plan administrator against its own beneficiary.

The Petitioner's failure to identify the existence of any state laws relating to "reimbursement" claims or to show the effect of any such laws is fatal to its argument.

Even assuming, as it claims, that there is "considerable variation in subrogation law across the country", the Petitioner fails to show how any such unnamed laws would be relevant to this case or would, in any manner or to any extent, conflict with any claimed need for uniformity or any federal interest.

Proof of an actual, significant conflict between a federal interest and state law must be "specifically shown" and not generally alleged, *Atherton, 519 U.S. 213, see O'Melveny, 512 U.S. at 87-88,* as a "precondition for recognition of a federal rule of decision", *O'Melveny, 512 U.S. at 87, citing to Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 98; Boyle, 487 U.S. at 508; Kimbell Foods, 440 U.S. at 728.*

As stated by this Court, in a unanimous opinion delivered by Justice Scalia:

> "Such cases are, as we have said in the past, few and restricted, limited to situations where there is a significant conflict between some federal policy or interest and the use of state law. Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision", *O'Melveny, 512 U.S. 79, 87*.

D. PETITIONER HAS FAILED TO SHOW THAT THE APPLICATION OF STATE LAW WOULD HAVE ANY DIRECT AND SUBSTANTIAL EFFECT ON THIS HEALTH PLAN OR UPON THE U.S. TREASURY

Beyond bare assertions, the Petitioner fails to submit any evidence to show that there would be any direct or substantial effect upon the United States, or its Treasury, or this health plan, by the application of any state law, including the laws of New York. Even the United States as Amicus Curiae, with presumably scores of accountants at its beck and call, has produced no evidence or statistics or analysis to show how state law would, in any manner or to any extent, affect the Treasury.

It would seem to be a relatively simply matter, had the Petitioner chosen to do so, to demonstrate to the court below how many reimbursement claims are brought each year; how much money is involved in these claims and how the application of state law to these reimbursement claims would significantly alter the net annual outcome to the U.S. Treasury. No such information was provided and this Court should not be asked to speculate on the possibility that such a substantial effect exists.

This Court has repeatedly held that state laws "should be overridden by the federal courts only where clear and substantial interests of the National Government ... will suffer major damage if state law is applied", *Yazell, 382 U.S. at 352; Boyle, 487 U.S. at 518 (in dissent)*.

Where there is no direct and substantial effect on the United States or its Treasury, no significant threat to any identifiable federal policy or interest, and no showing of any major damage that would result if state law is applied, any federal interest in the outcome of the question "is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern", *Boyle, 487 U.S. at 523*.

Even where the Government may arguably have to pay more, such a fact does not justify the creation of a new body of federal common law, *Boyle, 487 U.S. at 521, 522 (in dissent)*. Indeed, this Court has previously rejected "more money" arguments remarkably similar to the one made here, *see O'Melveny, 512 U.S. at 88; Kimbell Foods, 440 U.S. at 737-738; Yazell, 382 U.S. at 348.*

Without proof that the application of state law will directly and substantially affect the United States or its Treasury, this Court should not embark upon the creation of a new body of federal common law, particularly without a clear legislative mandate to do so.

IV. PRECEDENTS DO NOT REQUIRE THAT EMPIRE'S SUIT BE HEARD BY A FEDERAL COURT APPLYING FEDERAL LAW

In an attempt to persuade this Court that all disputes arising under the terms of its contract should be heard by a federal court applying federal law, the Petitioner relies on a long line of cases, all having as their genesis the landmark case of *Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)*. In construing the Judiciary Act of 1789, *28 U.S.C.A. 1652*, this Court in *Erie* announced the general principal that there is no federal general common law, and stated that "(e)xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state", *Erie, 304 U.S. at 78*.

Many significant decisions followed, including *Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. Standard Oil Co., 332 U.S. 301 (1947); United States v. Yazell, 382 U.S. 341 (1966); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); United States v. Kimbell Foods, 440 U.S. 715 (1979); and O'Melveny & Myers v. F.D.I.C., 512 U.S. 79 (1994).*

What is striking when first looking at all of these cases is that, unlike the instant action, the United States was itself either a plaintiff or a defendant, with its rights and obligations directly at stake. Beyond that significant distinction, and in further contradiction to the Petitioner's position, an analysis of these cases shows that, under the facts in this case, the wholesale judicial creation of a new federal rule of decision is unwarranted.

In *Clearfield Trust*, this Court distinguished *Erie*, stating that "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power", *Clearfield, 318 U.S. at 366*.

What this Court found in *Clearfield Trust* was that, while the application of state law at times was appropriate, it was "singularly inappropriate" under the demonstrated facts of that case, because the application of state law "would subject the rights and duties of the United States to *exceptional uncertainty*." *Id. at 367 (emphasis supplied)*.

The same cannot be said about this case. In this case, the United States is not a plaintiff or a defendant and there is no showing that the application of state law to this reimbursement claim would have any appreciable effect on the U.S. Treasury. Certainly, it is not shown in this case that the application of any state law would subject the rights and duties of the United States to "exceptional uncertainty".

Petitioner's unsubstantiated claim that there is "considerable variation in subrogation law across the country" has no application to the "reimbursement" claim in this case and, in any event, none of those subrogation laws have been cited. Nor is it demonstrated how the application of any state laws, whether they be subrogation laws or laws relating to reimbursement claims, would subject the rights and duties of the United States to any uncertainty, much less "exceptional uncertainty". Indeed, in this particular case, the Petitioner has failed to allege how New York law would even decide this case.

Contrary to the Petitioner's argument, the *Clearfield Trust* decision does not require this Court to judicially fashion, or apply, a new body of federal law to this case, but instead weighs heavily toward the application of existing state law.

The decision in *Standard Oil* is even more detrimental to the Petitioner's argument. In *Standard Oil*, this Court was called upon to decide, as a case of first impression, whether the United

States should be reimbursed by a third-party tortfeasor for medical costs incurred by an injured soldier.

At first glance, the *Standard Oil* decision appears to support the Petitioner's argument, in that this Court followed the rule enunciated in *Clearfield Trust*, rather than that of *Erie*, finding that the relations between soldiers and others were "fundamentally derived from federal sources and governed by federal authority", *Standard Oil, 332 U.S. at 305*. However, unlike the instant action, *Standard Oil* involved a subrogation claim against a third-party tortfeasor and not a reimbursement claim against its own federal employee, and, here again, the United States was itself the plaintiff.

Furthermore, even after finding, in *Standard Oil*, that federal law should generally govern the rights of soldiers, this Court still refrained from supplementing state law with a judicially created new body of federal common law, instead finding that the role of determining and establishing federal fiscal and regulatory policies was for congressional action, not for this Court or any other federal court. *Id at 314*.

> "...(Congress) is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself." *Id at 314-315*.
>
> "When Congress has thought it necessary to take steps to prevent interference with federal funds ... it has taken positive action to that end. We think it would have done so here, if that had been its

> desire. This it still may do, if or when it so wishes." *Id at 315-316*.
>
> "In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action." *Id at 316*.
>
> "The only question is which organ of the Government is to make the determination ... for the reasons we have stated, it is in this instance for the Congress, not for the courts." *Id at 317*.

The decision in *Standard Oil* is diametrically opposed to the position taken by the Petitioner. The role of determining and establishing federal fiscal and regulatory policies, including any regulations providing for the recovery of medical costs incurred by a federal employee as the result of the negligence of a third-party, through subrogation or reimbursement, is with the Congress, not the federal courts.

To do otherwise would be intruding on a field properly within the control of Congress as to a matter concerning which it has seen fit to take no action. If in fact the reimbursement claim in this case is "fundamentally derived from federal sources and governed by federal authority" and directly affects the operation of this health benefit program or the U.S. Treasury (which it arguably does not), it is the Congress, as the "custodian of the national purse", *id at 314*, that should determine and establish the proper federal fiscal and regulatory policies, not this Court or other federal courts.

Almost 20 years after *Standard Oil*, this Court, in *Yazell*, was again faced with the continuing problem of the interaction of federal and state laws. Using *Clearfield Trust* as its base, the federal government in *Yazell* sought to collect money due on a loan.

Even with a specific showing of a state law that conflicted with a federal interest, unlike the present action, the government was still rebuffed by the trial and appellate courts.

In *Yazell*, this Court recognized that there is always a federal interest in collecting money which the government is owed and that its desire to collect was understandable, finding however, that the United States cannot, by judicial fiat, collect its money with total disregard of state laws. "Accordingly, generalities as to the paramountcy of the federal interest do not lead inevitably to the result the Government seeks", *Yazell, 382 U.S. at 348-349.*

In *Yazell*, this Court found that state law "should be overridden by the federal courts *only* where (the) *clear and substantial interests* of the National Government, which cannot be served consistently with respect for such state interests, will suffer *major damage* if the state law is applied." *Id at 352 (emphasis supplied)*.

Here again, this decision does not support the Petitioner's claim. In this case, as in *Yazell*, there is no showing of any "major damage" to any "clear and substantial interests" of the U.S. Government. As such, neither the federal government, nor the Petitioner (or any other contract provider), should be permitted, "by judicial fiat" to collect their money with total disregard for state laws.

In *Little Lake Misere*, this Court again confronted the issue of whether it was appropriate to apply settled state law, or to fashion a new body of federal common law, into an area initially found to be of federal concern.

This Court found that "the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interest and to the effects upon them of applying state law", emphasizing that *settled state rules should be applied unless those rules "effect a discrimination against the government, or patently run counter to the terms of the Act", Little Lake Misere, 412 U.S. at 595-596, citing to RFC v. Beaver County, 328 U.S. 204 at 210 (emphasis supplied).*

Here again, the Petitioner's argument is not supported by the decision in *Little Lake Misere.* Under the specific facts in that case, this Court found that state law would abrogate the explicit terms of the federal statute and deal a serious blow to the congressional scheme, *Little Lake Misere, 412 U.S. at 597*.

There is no such showing in this case. Unlike the facts in *Little Lake Misere*, there is no showing here that the application of any state law would abrogate the explicit terms of the federal statute or deal a serious blow to the congressional scheme. Nor is it shown that any state law would "effect a discrimination against the government, or patently run counter to the terms of the Act".

In *Kimbell Foods*, as in this case, the government argued that the administration of a federal program required uniform federal rules. While this Court, citing to *Clearfield Trust*, acknowledged that general rule, it emphasized that even where a dispute is shown to directly affect the operation of a federal

program (which the Petitioner has not shown in this case), such a significant showing, in and of itself, does not "inevitably require resort to uniform federal rules", *Kimbell, 440 U.S. at 729, citing to Clearfield Trust and Little Lake Misere*.

In *Kimbell*, this Court was unpersuaded by the government's argument that nationwide standards were necessary to ease program administration or to safeguard the Federal Treasury and declined to override state laws of general applicability. As in this case, there was simply not a sufficient showing that state law would produce any significant hardship on the administration of the federal program.

Lastly, in *O'Melveny*, in a unanimous opinion delivered by Justice Scalia, this Court again concluded that without a significant conflict between some federal policy and the application of state law "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision was warranted", *O'Melveny, 512 U.S. at 88-89*. "Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict". *Id at 87-88.*

In a concurring opinion delivered by Justice Stevens, joined by Justice Blackmun, Justice O'Connor and Justice Souter, it was aptly stated that the federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. "Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law." *Id at 90.*

Counter to the Petitioner's claims, the precedents set by this Court do not require that Empire's suit be heard by a federal court applying federal law. To the contrary, without a showing

that state law would inflict major damage to a clear and substantial interest of the federal government, these claims should be heard in state court applying state law, unless and until the Congress, as arbiter of federal fiscal affairs, establishes a federal fiscal policy and regulations to determine such claims.

V. PUBLIC POLICY CONSIDERATIONS

Where Congress has not offered conclusive guidance on an issue, it is entirely proper for this Court to consider, in addition to the factors already discussed, what may be described as policy considerations, *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737*. In this regard, the Respondent urges this Court to consider the relative benefits and detriments involved in expanding federal jurisdiction under FEHBA to include litigation of reimbursement claims in federal court.

The only argued benefit to extending Federal jurisdiction to include reimbursement claims is that (1) it will ensure uniformity in the administration of these claims among the several states, and (2) it will financially benefit the U.S. Treasury.

As previously argued, uniformity, in and of itself, is insufficient to justify displacing state law. Furthermore, there is no evidence presented to show that the adjudication of these reimbursement claims in the state courts will result in any divergent results.

In this case in particular, there is no showing that any New York law or regulation would, in any way, affect this health benefit plan or the Petitioner's claimed right of reimbursement. There is simply no allegation as to how any law, including New York law, would affect this case.

Regarding the Petitioner's argument that adjudication of these reimbursement claims in the federal courts will financially benefit the U. S. Treasury, no evidence of any kind has been presented to demonstrate that the application of any state laws, and particularly New York laws, would result in any appreciable losses to the U.S. Treasury. No financial statistics are provided, indeed, the Petitioner has not even alleged how many of these type of reimbursement claims even exist, or are paid or disputed each year. There is simply nothing to show any financial benefit, or detriment, to the U.S. Treasury by application of either state or federal law or jurisdiction.

Conversely, policy considerations dictate that reimbursement claims of private health insurers are best litigated in state court in the related personal injury action.

The logic employed by the Petitioner and the U.S. government would permit multiple plan administrators to include provisions in their various benefit plan documents, such as the Statement of Benefits in this case, that would authorize the reimbursement of medical expenses paid on the behalf of a federal employee out of that federal employee's personal injury settlement, arguably without regard for what the settlement payments were actually intended to compensate. Indeed, the Petitioner not only asserts a "right of reimbursement", it has claimed a contractual and/or equitable "lien" against the settlement proceeds.

Not only would adoption of such logic allow multiple plan administrators to make these claims and assert "liens" in federal court, these plan administrators would then be able to argue that the terms of their plans were "federal law", in total disregard of any state laws meant to protect their own employees.

Such a result would have devastating consequences to their own injured federal employees, not only by requiring them to reimburse such expenses out of their own recoveries, without regard to any state laws enacted for their benefit, but also by requiring them to litigate these claims in separately commenced federal actions at their own expense.

It would be in the best interests of the persons the statute was meant to benefit, namely federal employees, to allow reimbursement claims to be decided in the various state courts where their personal injury lawsuits are pending, where those reimbursement claims can be resolved quickly and inexpensively, rather than to subject those federal employees to the unnecessary costs, in time and money, of responding to actions independently commenced in the federal courts. To require a federal employee, as a personal injury plaintiff (or, in this case, his Estate) to engage in separate and prolonged litigation in the federal courts would be too burdensome, as well as unnecessary.

Not only would it benefit the federal employee for these reimbursement claims to be decided quickly and inexpensively in state court, it would also benefit the U.S. Treasury and the Petitioner as well, who would not have to incur the protracted legal expenses, filing fees and other incidental expenses associated with the commencement and prosecution of a separate federal action.

To expand federal jurisdiction to include litigation of these reimbursement claims in federal court would encourage costly and unnecessary litigation, to the benefit of no one and to the detriment of those federal employees the statute was enacted to protect.

The foremost example of the effects of the logic propounded by the Petitioner is demonstrated by the facts of this case.

In this case, the Petitioner was offered the opportunity, indeed encouraged, to resolve its reimbursement claim over three (3) years ago in open court, by way of a simple motion, made within the context of the Respondent's pending personal injury case. *See Hearing Transcript in Finn v. Town of Southampton, J.A., Vol. 1, 35-36.*

If the Petitioner had elected to resolve this case in that way, as it was encouraged to do, the attorney's fees and expenses incurred by all parties would likely have been a fraction of the fees and expenses incurred in this separately commenced federal action. Indeed, the cost in the New York courts to file the simple motion needed to resolve this claim would have been $45.00 and the claim would likely have been resolved in a few months, not years.

By electing to pursue this case in the federal court, the Petitioner has subjected the Estate of this deceased federal employee (and hence his widow and son) to the imposition of substantial, and unnecessary, legal fees and expenses.

Alternatively, the Petitioner could have elected to present this reimbursement claim to the New York State Surrogate's Court as a simple estate claim. Here again, the savings, in terms of both time and money, to not only the Estate of this deceased federal employee, but to the Petitioner and the federal government, would have been substantial.

It is not plausible that Congress meant for simple reimbursement claims to be resolved in the way propounded by

the Petitioner. Nor is it plausible that Congress intended to channel these simple reimbursement claims into the already overburdened federal courts.

To the contrary, it appears that Congress, by limiting federal jurisdiction to claims "against the United States" and by limiting preemption to claims involving "coverage or benefits", intentionally elected to keep these extraneous reimbursement claims, not related to "coverage or benefits", outside the federal courts and in the state courts where they belong.

Considering the relative benefits of keeping these types of extraneous claims in state court, and the detriments to doing otherwise, there is simply no compelling reason why the jurisdictional and preemptive reach of FEHBA should be extended by this Court.

CONCLUSION

In its narrowest terms, a decision in this case involves, simply, a question of proof; whether the Petitioner met its burden of establishing, in this case, sufficient evidence to show:

(1) a manifest intent on the part of Congress to extend federal court jurisdiction and preemption beyond the express language of the statute, or

(2) a direct and significant conflict between the application of state law and a federal policy or objective, or

(3) that the application of state law will, in any manner or to any appreciable extent, affect this health benefit plan or the U.S. Treasury.

The Respondent believes that the Petitioner has failed to present sufficient evidence to make any of these showings and that, as such, the decision of the Court of Appeals should be affirmed.

In its broadest sense, the issue in this case is whether a private contractor has the right, or the power under the Supremacy Clause, to make the terms of its health insurance contract, entered into pursuant to a federal statute but written by that private contractor, the "supreme Law of the Land", thereby preempting state laws, where those contract terms are tangential at most to the objective of the statute.

Certainly, the Petitioner and other contract providers should not be allowed, in their discretion, to implement any contract terms they desire and then, by judicial fiat, enforce those terms because they are "federal law" with a total disregard for state laws and for the interests of their own beneficiaries.

Under the test enunciated by this Court in *Boyle*, the health coverage and benefits provided to federal employees by FEHBA are protected from any unfavorable intrusion of state laws or regulations. That was the purpose of FEHBA's preemption provision and its purpose is served.

If Congress, as "the primary and most often exclusive arbiter of federal fiscal affairs", wishes to regulate and determine reimbursement rights as an exclusively federal matter and as a matter of federal fiscal policy, it may do so, if and when it so desires.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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