

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 EMPIRE HEALTHCHOICE ASSURANCE, :

4 INC., DBA EMPIRE BLUE CROSS :

5 BLUE SHIELD, :

6 Petitioner :

7 v. : No. 05-200

8 DENISE F. MCVEIGH, AS :

9 ADMINISTRATRIX OF THE ESTATE :

10 OF JOSEPH E. MCVEIGH. :

11 - - - - -X

12 Washington, D.C.

13 Tuesday, April 25, 2006

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:05 a.m.

17 APPEARANCES:

18 ANTHONY F. SHELLEY, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.

20 SRI SRINIVASAN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C. ;
22 on behalf the United States, as amicus curiae,
23 supporting the Petitioner.

24 THOMAS J. STOCK, ESQ., New York, New York; on behalf of
25 the Respondent.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in 05-200, Empire Healthchoice Assurance v.
5 McVeigh.

6 Mr. Shelley.

7 ORAL ARGUMENT OF ANTHONY F. SHELLEY

8 ON BEHALF OF THE PETITIONER

9 MR. SHELLEY: Mr. Chief Justice, and may it
10 please the Court:

11 Empire's complaint in this case raises a
12 Federal claim. As a result, it arises under Federal
13 law. This case involves fringe benefits for Federal
14 employees provided by the Federal Government. The case
15 involves enforcement of a Federal Government contract.
16 The same contract is rooted in a Federal statute, and
17 the money collected here will go to the Federal
18 Treasury. Nonetheless, the court of appeals held that
19 this case belonged in State court to be governed by
20 State law. The court of appeals should be reversed.

21 In particular, this case concerns the
22 reimbursement of health benefits by a Federal employee
23 to his Federal Government health benefit plan, which is
24 known as the service benefit plan. That plan is
25 governed by the Federal Employees Health Benefits Act,

1 FEHBA, and is established through a Federal Government
2 contract.

3 In this case, Empire paid approximately
4 \$157,000 in benefits for certain injuries suffered by
5 Joseph McVeigh, but the plan conditioned the payment of
6 those benefits on reimbursement in the event that a
7 recovery was made from a third party. Those terms are
8 part of the Government contract, the reimbursement
9 terms.

10 Thereafter --

11 JUSTICE GINSBURG: Can you go back and
12 because the -- the parties seem to have different views
13 about it? I think you said it was required by OPM to
14 have this reimbursement term, and the other side said
15 that there was no requirement from the Government
16 agency that you include the reimbursement term.

17 MR. SHELLEY: Under the statute -- Justice
18 Ginsburg, under the statute, the Office of Personnel
19 Management is charged with selecting the benefits and
20 exclusions for this particular program and for this
21 particular plan. The statutory section is 8902(d).
22 And those terms are -- OPM has the final authority over
23 those terms and those terms are placed in a statement
24 of benefits which the -- which this statute also says
25 shall become part of the contract and are attached and

1 incorporated into the contract. So the final authority
2 over the benefits and the exclusions --

3 JUSTICE GINSBURG: But that -- all that says
4 is that OPM looked at these terms and it thought they
5 were okay. It's not -- it doesn't show that OPM
6 required these -- this as a condition for Empire to
7 serve as the insurer.

8 MR. SHELLEY: Well, it's -- our obligations
9 are through the contract, and our only obligations here
10 are the ones in the contract. And that contract --
11 that provision is in the contract. And as a result of
12 that, we were -- we were mandated to enforce that
13 provision. If the Government wanted that provision
14 out, it had the final authority to take it out, and it
15 would only have been included if, as a matter of
16 authorization, OPM wanted it in there.

17 JUSTICE SCALIA: But that's different from
18 putting it in. I mean, you want to change what you --
19 what you allege, that -- that it's mandated by the
20 Government to simply the Government, although it had
21 authority to eliminate it, did not do so? If -- you know,
22 that's a different -- different assertion.

23 MR. SHELLEY: The -- I think it makes no
24 difference. The fact of the reality is that it's in
25 the contract.

1 JUSTICE SCALIA: I'll assume it's the latter
2 then.

3 MR. SHELLEY: The reality is that the --
4 these reimbursement terms are in all the contracts
5 essentially of the FEHBA carriers, and as a result, I
6 think it can be assumed that it's the policy of the
7 Government that they should be in here. And the result
8 of them is that they save the Government money. So it
9 does make good Government policy to have these
10 provisions in -- in the contracts to begin with.

11 CHIEF JUSTICE ROBERTS: But this is a fairly
12 indirect way of establishing a Federal cause of action.

13 I mean, it -- it's a preemption provision. Why isn't
14 it reasonable to assume Congress thought there was no
15 need for a Federal cause of action? Because it's a
16 contract action. State courts handle those every day,
17 and they assumed they'd be handled by State court.

18 MR. SHELLEY: I think the Court's decision in
19 Jackson Transit sets up the framework for that, and
20 that is, that Congress did assume there would be a
21 contract cause of action, but --

22 CHIEF JUSTICE ROBERTS: I noticed you
23 referred in your brief to the Jackson Transit line of
24 authority. Do you know how many times Jackson Transit
25 has been cited in the last 20 years by this Court?

1 MR. SHELLEY: It has not been applied again
2 since then, but we would say it's settled law as a
3 result.

4 CHIEF JUSTICE ROBERTS: It's not been cited.
5 I think it's never been applied and it's not been
6 cited once in 20 years. So what's the line of
7 authority?

8 MR. SHELLEY: Well, it's four or five cases
9 that Jackson Transit was built on, for instance, the
10 Machinists case v. Central Airlines, which came out of
11 the 1960's. In those cases, for instance, they -- the
12 principle is simple and it's a strong one, and that is
13 that Congress assumes that a -- when it calls for the
14 creation of a -- a contract in a statute, that it will
15 be enforceable just as with ordinary contracts.

16 JUSTICE SCALIA: Those cases came from the
17 days when we were also quite willing to imply Federal
18 causes of action in statutes that had nothing to do
19 with the Government, you know, 10b-5 and things of that
20 sort. I thought we had put all of that behind us. You
21 want us to go back to that bygone age.

22 MR. SHELLEY: No, I don't think so, Justice
23 Scalia. The -- the Court in Jackson Transit
24 specifically differentiated between Congress assuming
25 there was a contract cause of action whenever it calls

1 for the creation of a contract and separately implying
2 a cause of action. That's different because that --
3 that has to -- in doing that, the Court has to create a
4 cause of action in the first place, but Congress is
5 assumed to want contracts to be enforceable when it
6 calls for the creation of the contracts in a Federal
7 statute.

8 CHIEF JUSTICE ROBERTS: We're not talking
9 about the contract between you and the Federal
10 Government. We're talking about some other agreement
11 between you and an individual employee.

12 MR. SHELLEY: No. We're talking about the
13 contract between us and the Government because it's
14 that contract that contains the reimbursement terms,
15 and when the enrollee enrolls in the Federal program,
16 he or she takes on the obligation of complying with all
17 the terms of the Government contract.

18 CHIEF JUSTICE ROBERTS: Well, that may give
19 rise to a separate agreement, a related agreement, if
20 you will, between you and the employee. But it's not
21 -- it's not a -- you're not the Government. The
22 employee is not the Government, at least not for these
23 purposes. So why is it a Government contract?

24 MR. SHELLEY: Because the -- the underlying
25 terms are part of the Government contract and --

1 CHIEF JUSTICE ROBERTS: So if the Government
2 says -- Congress says, we think OPM should have a
3 recreation center for its employees and it should have
4 all these things, and then OPM enters into a contract
5 with a company that runs recreation centers -- okay --
6 that's a contract with the Government. And then that
7 entity enters into a contract with somebody else to
8 supply the basketball hoops. Would you say that that
9 last contract is a Government contract?

10 MR. SHELLEY: The subcontract?

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. SHELLEY: I would not say it's a contract
13 with the Government, and that's not our situation.

14 CHIEF JUSTICE ROBERTS: Even if the provision
15 -- even if at some point Congress said, and besides,
16 you know, the basketball hoops should be -- you know,
17 made in America as opposed to somewhere else and, you
18 know, specifies the terms of the subcontract.

19 MR. SHELLEY: It's not a Government contract.
20 The Government contract is the contract between the
21 party with the Government, and that's what we have here
22 and that's what we're seeking to enforce.

23 But I would point out that cases like Jackson
24 Transit and the Central Airlines case -- the case --
25 the party suing wasn't really suing on the contract

1 even. It was -- the case emanated from the contract,
2 and as a result, the Court, nonetheless, held it arose
3 under Federal -- Federal law. In this case, the -- the
4 case is directly on the contract itself. So it's a
5 much closer connection to the Government terms.

6 Under the --

7 JUSTICE GINSBURG: But there's nothing in the
8 statute that speaks about a Federal forum. And if you
9 look at this entire picture, you're seeking
10 reimbursement, and you're seeking reimbursement based
11 on a tort recovery. And why wouldn't the most
12 sensible, the most natural thing for a legislature, if
13 they thought about it, be to say, well, that claim for
14 reimbursement ought to come in on the coattails of the
15 tort claim? You don't need to make a whole separate
16 Federal case out -- out of it. Why would Congress want
17 these claims to be subject to a separate Federal case?

18 MR. SHELLEY: Justice Ginsburg, every other
19 type of claim under this program is in Federal court
20 already, denials of benefits cases, disputes between
21 the carrier and the United States. Only a sliver of
22 lawsuits, these reimbursement suits, are -- are left.
23 And it would be anomalous to -- for Congress to have
24 wanted those to be in State court.

25 But even aside from that, a Federal forum

1 offers the --

2 JUSTICE GINSBURG: Well, it's because there's
3 an anterior lawsuit that everything rides on that State
4 court suit. There wouldn't be any recovery from which
5 you could claim reimbursement were it not for that
6 State court lawsuit.

7 MR. SHELLEY: The reality is that a
8 straightforward Federal lawsuit and a Federal rule that
9 these -- these reimbursement provisions are
10 straightforwardly enforceable through Federal claims
11 means that they will -- the reimbursement will be
12 collected efficiently and correctly.

13 CHIEF JUSTICE ROBERTS: Could you --
14 following up on Justice Ginsburg's question, could you
15 intervene asserting rights of subrogation in the
16 underlying tort suit that your covered beneficiary
17 brought in State court?

18 MR. SHELLEY: Conceivably, but the Federal
19 question statute allows us to raise Federal claims in
20 Federal court, and through it, Congress has determined
21 that if the case turns on Federal law, that the Federal
22 forum is an appropriate forum for that.

23 CHIEF JUSTICE ROBERTS: Well, wouldn't it be
24 more efficient for you to intervene in the pending
25 State suit and get it all resolved at once rather than

1 waiting until your beneficiary gets a recovery and then
2 starting a whole other Federal suit over this somewhat
3 subsidiary subrogation point?

4 MR. SHELLEY: No, because in many States --
5 many States don't allow reimbursement altogether. They
6 have anti-subrogation policies as well, and the reality
7 is, is that what --

8 CHIEF JUSTICE ROBERTS: Well, at that point,
9 you'd be able to assert your argument under the Federal
10 preemption provision that says, in my view somewhat
11 surprisingly, that these contract terms preempt State
12 law.

13 MR. SHELLEY: Yes, and we've fought many
14 battles on those fronts in the State courts. And the
15 reality is that the Federal forum with its familiarity
16 with Federal law, its solicitude towards Federal law is
17 the appropriate forum in these cases, more so than the
18 State court. And what may seem like an efficient --

19 JUSTICE GINSBURG: You don't have any
20 such problem here. There's no conflict between the New
21 York law -- you certainly could have gone into that
22 lawsuit and --

23 MR. SHELLEY: Well, no conflict is required,
24 for instance, under the Jackson Transit analysis. The
25 analysis is, is this a pervasively Federal regime to

1 start with, and if so, it's a Federal claim whether
2 there's a conflict or not. And so a conflict is really
3 unnecessary.

4 But the other point is that with the --

5 JUSTICE GINSBURG: I could see if this were
6 -- what we were talking about everything is -- the
7 insurance of a Federal employee and questions about
8 coverage, questions about benefits, all of that between
9 the employee and the carrier. But this comes up
10 because we have a third party who enters the picture in
11 an estate law claim. So I don't think you can just
12 say, well, everything is -- this whole thing is -- is
13 all a Federal contract.

14 MR. SHELLEY: Your Honor, there is no --
15 there's no requirement in the preemption provision
16 either for a conflict. I mean, Congress went back to
17 the -- to the drafting table in 1998 and said, we want
18 State law to be preempted whether or not there's a
19 conflict in this particular situation. So --

20 CHIEF JUSTICE ROBERTS: That would have been
21 a good time for them to say we want a Federal --
22 Federal court jurisdiction over these causes of actions
23 if that's what they had in mind, but they didn't do
24 that.

25 MR. SHELLEY: Well, first of all, there have

1 -- there was no dispute whatsoever that these types of
2 cases could be brought in Federal court in 1998.

3 CHIEF JUSTICE ROBERTS: Oh, there sure was.
4 For those who like to look at the legislative history,
5 the House report said that -- again, it's very curious
6 language. It said, this change will help strengthen
7 the case in favor of Federal jurisdiction, or something
8 like that.

9 MR. SHELLEY: Yes, Mr. Chief Justice --

10 CHIEF JUSTICE ROBERTS: Well, since when is
11 Congress trying to strengthen -- they either decide
12 it's going to be Federal jurisdiction or not. They
13 don't try to make arguments.

14 MR. SHELLEY: There had been no dispute about
15 whether reimbursement claims could be brought in
16 Federal court. The courts -- the courts were in
17 agreement on that. What there was a dispute about was
18 whether denials of benefits cases could be removed from
19 State court to Federal court. And what Congress did
20 was it followed the ERISA model and changed the
21 preemption provision because the preemption provision
22 was what had been giving the courts problems about the
23 removal issue. And so Congress did, I think, what the
24 courts told it to do, was get rid of some language in
25 the preemption provision that is hampering Federal

1 jurisdiction. Congress did that and created Federal
2 jurisdiction.

3 Nonetheless, now we come up with a new
4 dispute that had never been a problem before --

5 JUSTICE SCALIA: That's sort of queer
6 terminology anyway. When Congress has already decided
7 that there should be Federal jurisdiction. It would seem
8 very strange for Congress to say this strengthens the
9 case for Federal -- what do you mean the case for
10 Federal jurisdiction?

11 MR. SHELLEY: I don't think --

12 JUSTICE SCALIA: We prescribe Federal
13 jurisdiction. I -- you know, I'm not a fan of
14 legislative history, but I -- I don't find that
15 particular piece very much against you. In fact, it
16 may be just -- just the opposite. It may be -- it's
17 lawyers' language, you know. We don't know whether
18 there's Federal jurisdiction or not, but this will make
19 a better case for -- you know, for the other side.

20 MR. SHELLEY: I think Congress enacted the
21 statute in 1995 against the backdrop of -- of settled
22 law that Federal programs are typically litigated in
23 Federal court.

24 What happened, though, was that the States
25 started -- started enacting provisions in the area and

1 Congress went to work in 1978 and enacted a preemption
2 provision to reemphasize what I -- what it believed in
3 the first instance.

4 Then in 1998, after courts continued even to
5 interpret the preemption provision narrowly, they went
6 back to the -- they went back to the -- to the statute
7 and they strengthened it even further to make it
8 absolutely clear. So I think what we have is a --

9 JUSTICE GINSBURG: I thought that the -- the
10 purpose of the preemption provision in this statute was
11 related to benefits and coverage. Some States have
12 mandatory coverage for this or that. The case that was
13 mentioned is the chiropractor. And the -- in the
14 Federal scheme, the Federal administrator didn't want
15 to be saddled with whatever the particular packages
16 that the States had. So the coverage and the benefits
17 -- those were to be determined on the Federal level,
18 and you weren't supposed to be saddled with whatever
19 the State thought would be good to have in the plan.

20 MR. SHELLEY: But the provision doesn't read
21 simply that State laws defining benefits shall be
22 preempted. It reads State laws relating to the extent
23 of coverage or the nature or provision of coverage,
24 benefits, or payments with respect to benefits. And so
25 it covers a broad array of things other than simply

1 mandated benefit statutes.

2 CHIEF JUSTICE ROBERTS: Is --

3 JUSTICE SCALIA: Yes, but -- but -- I'm
4 sorry.

5 CHIEF JUSTICE ROBERTS: Is there any
6 comparable situation where a contract between two
7 private parties has the effect of preempting State law?
8 Suppose all you have to do in your service benefit plan
9 is agree with your beneficiaries that in the case of
10 subrogation, you're entitled to, you know, 10 times
11 actual damages, if they don't pay up right away or
12 something like that. And -- and that would override
13 all sorts of State law. You could specify you're
14 entitled to interest at 20 percent and that would
15 preempt State usury laws?

16 MR. SHELLEY: Well, I believe there are many
17 other statutes in the benefits area involving the
18 Federal Government from long-term care to military
19 benefits which have a similar preemption provision. I
20 think it --

21 JUSTICE SCALIA: It's a sloppy way to put it,
22 don't you think? Maybe what Congress should have said,
23 although Congress doesn't always speak precisely, is
24 that any -- any State law which contradicts a provision
25 of the contract on these particular subjects is

1 preempted.

2 MR. SHELLEY: It said that originally, and
3 the courts interpreted that so narrowly that
4 Congress took that out. Took the contradiction part
5 out. There was an inconsistency requirement in the
6 statute. Congress took it out specifically to knock
7 out even supplementary or --

8 JUSTICE SCALIA: Okay, I'll put it differently.
9 All State laws relating to subjects that are covered
10 in the contract are preempted.

11 MR. SHELLEY: And I would say that that's --
12 that Congress, when it enacted the provision, I think
13 intended something on those lines. The provision is,
14 in fact, the result of several different amendments and
15 it reads the way it does as a result of the amendments.

16 And if I could reserve the remainder of my
17 time for rebuttal, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Srinivasan.

20 ORAL ARGUMENT OF SRI SRINIVASAN

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

23 MR. SRINIVASAN: Thank you, Mr. Chief

24 Justice, and may it please the Court:

25 An action to enforce the terms of a FEHBA

1 contract is a Federal action because the rights and
2 duties in FEHBA contracts are Federal in nature under
3 the Jackson Transit inquiry.

4 The Federal nature of the rights and duties
5 comes both from the context in which FEHBA operates and
6 also from the terms of the express preemption
7 provision. Briefly --

8 CHIEF JUSTICE ROBERTS: Isn't there -- isn't
9 that a big leap? I mean, even if we agree with you
10 that there are Federal rights and duties, is it
11 irrational for Congress to determine, since they arise
12 in a normal breach of contract action, we're going to
13 assume they're going to be brought in State court? The
14 cause of action is for breach of contract that every
15 State recognizes.

16 MR. SRINIVASAN: Well, I guess that seems
17 like an unlikely outcome, given that under the express
18 terms of the preemption provision, it's clear that the
19 contract terms are matters of Federal law in the sense
20 that Federal law dictates that they govern over State
21 law. And if we know that Federal law provides a
22 substantive rule of decision with respect to the
23 construction of the contract, it seems anomalous to
24 impute to Congress the intention that those Federal
25 rights and duties should be litigated solely in a State

1 court action.

2 CHIEF JUSTICE ROBERTS: But wouldn't it have
3 been the easiest thing for Congress to say, as it does
4 countless times when it creates Federal rights, that
5 Federal courts have jurisdiction to enforce these
6 rights? And they didn't do that here.

7 MR. SRINIVASAN: Well, they didn't do that,
8 but I think as Jackson Transit explains, it's -- it's
9 different in the contract context than in your standard
10 implied cause of action context for the following
11 reason. When Congress specifically contemplates the
12 construction of contracts, as it did in FEHBA, it
13 clearly contemplates that those contracts will be
14 enforceable somewhere. So there is a cause of action
15 for breach. The only question is whether that cause of
16 action sounds in State law or instead in Federal law.

17 And on that question, when Congress
18 prescribes, as it did in the preemption provision, that
19 the rights and duties are matters of Federal law, it
20 seems most likely that Congress intended there would be
21 a Federal cause of action that could be brought in
22 Federal court to litigate those terms. And that's what
23 Congress did in the terms of the preemption provision.

24 That --

25 JUSTICE GINSBURG: What -- you -- you might

1 follow along with that perfectly well if you're talking
2 about the beneficiary, the Federal employee, saying I'm
3 entitled to a certain coverage or I'm entitled to
4 certain benefits. You would expect that suit to be in
5 Federal court. But why would you expect what piece of
6 the tort recovery the carrier will get to be in Federal
7 court?

8 MR. SRINIVASAN: Well, this is part and
9 parcel of benefits, Justice Ginsburg, because you're
10 right that when -- and when an employee asks for
11 benefits, you'd expect that issue to be litigated in
12 Federal court. But this is a condition on benefits.
13 That's how the reimbursement obligation is framed in
14 the contract. It's that if you get benefits from the
15 Federal Government and then later on get the same
16 benefits from a third party, a condition on the
17 Government benefits is at that point you have to
18 reimburse the Federal Treasury. So I don't think that
19 one can easily draw a distinction between benefits qua
20 benefits and benefits that are at -- at one point
21 issued to the employee but then are subsequently
22 returned pursuant to the terms of the reimbursement
23 obligation.

24 JUSTICE SCALIA: Suppose there's a dispute in
25 the -- in the lawsuit about whether a particular

1 benefit to which one - the party was entitled under the
2 contract has been waived. Okay? That's the issue. Is
3 that issue to be decided by Federal law or by State
4 law?

5 MR. SRINIVASAN: Well, do you mean in an
6 underlying tort action or --

7 JUSTICE SCALIA: Yes.

8 MR. SRINIVASAN: No. In the underlying tort
9 action, that generally would be governed by State law.
10 Now, on the question of whether a benefit is something
11 that the individual is entitled to or, conversely,
12 whether the benefit is obligated to -- whether the
13 individual is obligated to --

14 JUSTICE SCALIA: No, I'm not talking about
15 the -- I'm talking about the claim, the claim made by
16 an individual against the carrier. And -- and it is
17 asserted that this claim should have been made sooner.

18 It has been waived by not having been brought forward
19 sooner. Okay? That's -- that's the hypothetical. Do
20 -- do you think that that -- that is governed by
21 Federal law?

22 MR. SRINIVASAN: I'm not sure --

23 JUSTICE SCALIA: Whether waiver occurred or
24 not.

25 MR. SRINIVASAN: I -- I think that -- that

1 when it's a claim for benefits, it probably would be
2 governed by Federal law.

3 JUSTICE SCALIA: Why?

4 MR. SRINIVASAN: But even --

5 JUSTICE SCALIA: I mean, the text -- the text
6 only -- only says, shall -- which relate to the nature,
7 provision, or extent of coverage or benefits. Extent
8 of coverage or benefits. I don't know that that
9 relates to any of them. It relates to whether the
10 benefit that was covered has been waived.

11 MR. SRINIVASAN: Well, it depends on whether
12 the contract speaks to the issue. Now, insofar as the
13 contract --

14 JUSTICE SCALIA: Yes.

15 MR. SRINIVASAN: -- insofar --

16 JUSTICE SCALIA: It doesn't speak to it.

17 MR. SRINIVASAN: -- insofar as the contract
18 doesn't speak to an issue, there obviously would be a
19 stronger argument for the operation of State law. But
20 that's not --

21 JUSTICE SCALIA: Okay. So you're not saying
22 that -- that Federal law is -- is pervasive here, that
23 it covers the -- the entire -- the entire suit between
24 the claimant and the insurer.

25 MR. SRINIVASAN: Not necessarily.

1 JUSTICE SCALIA: Okay. In that respect,
2 doesn't it differ from ERISA?

3 MR. SRINIVASAN: Well, it -- it differs from
4 ERISA in the following sense, that in ERISA, ERISA sets
5 forth a cause of action. And so the Court has
6 concluded that that cause of action is exclusive of
7 State court causes of action. And we're not taking
8 that position here. We -- we don't say that the
9 Federal action is the only action -- excuse me --
10 that's available. State court actions for breach of
11 contract might also be available. But --

12 JUSTICE SCALIA: Well, you're gong to make a
13 lot of trouble for us. We're going to have to sort out
14 which of these things are covered by State law and
15 which aren't.

16 MR. SRINIVASAN: Well, I don't know that it's
17 going to be a -- a terribly difficult inquiry because
18 of the precision with which the terms of the preemption
19 provision speaks. And it's certainly not difficult
20 with respect to the reimbursement obligation because it
21 fits --

22 CHIEF JUSTICE ROBERTS: Well, ERISA has a
23 very clear preemption provision too, and that's
24 generated a fair amount of work for us.

25 MR. SRINIVASAN: It has, but in terms of --

1 in terms of the relate-to requirement, that's true, and
2 I think the Court would apply exactly the same
3 standards that it applies in ERISA.

4 JUSTICE STEVENS: Do you think there's any
5 constitutional difficulty with the preemption provision
6 in this statute?

7 MR. SRINIVASAN: I don't. I think --

8 JUSTICE STEVENS: You can make a contract
9 preempt State law. Is there any precedent for that?

10 MR. SRINIVASAN: Well, I think Boyle somewhat
11 stands for the same proposition in this --

12 JUSTICE STEVENS: You don't have Boyle for
13 that.

14 MR. SRINIVASAN: I'm sorry?

15 JUSTICE STEVENS: I didn't think Boyle went
16 that far.

17 MR. SRINIVASAN: Well, Boyle at least
18 establishes that the terms of a contract preempted
19 State law because it was a procurement contract and the
20 idea was that by complying with the terms of the
21 procurement contract, the contractor asserted
22 essentially a federally compelled defense to the State
23 court action.

24 JUSTICE KENNEDY: Well, I thought -- I
25 thought it defined a duty. I -- I agree with Justice

1 Stevens. I -- I've never seen it -- are there other
2 statutes where the contracting parties can decide
3 whether or not they're going to oust Federal law -- or
4 State law?

5 MR. SRINIVASAN: I don't know that there are
6 other statutes, but what this particular -- particular
7 provision indicates is that Congress thought it was
8 very important that FEHBA contracts would control over
9 State law, and I don't think there's any constitutional
10 limitation on Congress' ability to do that. After all
11 --

12 JUSTICE SCALIA: I -- I wrote Boyle and what
13 I thought I was saying was that the common --

14 (Laughter.)

15 JUSTICE SCALIA: -- was that the common law,
16 Federal common law precluded, preempted any State law
17 which contradicted this contract. Now, you can -- you
18 can put that in a sloppy fashion by saying that the
19 contract preempted State law, but it wasn't --

20 MR. SRINIVASAN: But --

21 JUSTICE SCALIA: -- that we thought it was
22 the contract that preempted State law. It was Federal
23 common law which said that the contract -- that any
24 provision in State law which contradicts the contract
25 is preempted by Federal common law.

1 And you can read this statute the same way.
2 It's a sloppy way of putting it, but what it means is
3 Federal law preempts any State provision that is
4 contrary to a provision of the contract --

5 MR. SRINIVASAN: That -- that --

6 JUSTICE SCALIA: -- which -- which is
7 certainly constitutional.

8 MR. SRINIVASAN: Absolutely that's
9 constitutional, and that's -- that's what I mean to be
10 saying because it's Federal law --

11 JUSTICE SCALIA: Congress isn't always
12 precise, is it?

13 MR. SRINIVASAN: No, they're not.

14 JUSTICE BREYER: Is there any significant
15 variation among the different carriers as to the terms
16 of the contracts they use in different places for
17 Federal employees?

18 MR. SRINIVASAN: On which particular --

19 JUSTICE BREYER: Under this program.

20 MR. SRINIVASAN: There's -- there's
21 variation, sure. Now, on -- on --

22 JUSTICE BREYER: Is there a lot or a little?

23 MR. SRINIVASAN: Well, there's -- it depends
24 on what you're talking about.

25 JUSTICE BREYER: What I'm thinking of is a

1 statute. The statute has fairly close detail as to
2 what the contracts must contain. It gives authority to
3 OMB or -- to write regs. And they have written regs
4 that have very detailed provisions as to what the
5 contracts must contain, and then there is the contract
6 with the individual carried -- when the -- when the
7 carrier is implementing these rules, regulations, and
8 statutes.

9 MR. SRINIVASAN: Well --

10 JUSTICE BREYER: And I'm trying to figure out
11 is --

12 MR. SRINIVASAN: The statute doesn't give a
13 great deal of specific --

14 JUSTICE BREYER: It gives some.

15 MR. SRINIVASAN: -- direction on the
16 terminology.

17 JUSTICE BREYER: It gives some.

18 MR. SRINIVASAN: It gives some, but it's only
19 bare bones, Justice Breyer.

20 JUSTICE BREYER: Yes, I know, but I'm trying
21 --

22 MR. SRINIVASAN: But I think that's important
23 because what -- what Congress has done is essentially
24 to leave it to OPM to negotiate the terms of these
25 contracts.

1 JUSTICE BREYER: Insofar as the individual
2 carriers write contracts with their covered employees,
3 i.e., me and you and other people, and there's a lot of
4 variation, I would say there's a lot of private going
5 on. But insofar as those contracts are dictated by
6 what OPM says, then it looks more to me like a regular
7 Federal program.

8 MR. SRINIVASAN: Well, those --

9 JUSTICE BREYER: And I'm trying to get a
10 handle on that.

11 MR. SRINIVASAN: The contracts between the
12 individual and the carrier are dictated by OPM in some
13 sense because OPM negotiates the terms that bind the
14 individual. So, the contract that you and I enter into
15 when we sign on for health insurance is a part of the
16 -- of the program, if you will, that's negotiated by
17 OPM with the carrier.

18 JUSTICE BREYER: So in other words, when I
19 sign a contract, or anyone who's a Federal employee,
20 it's OPM who effectively sets those terms?

21 MR. SRINIVASAN: That's right, in negotiation
22 with the carrier, and the statement of benefits is
23 essentially the program. It tells you what benefits
24 you're entitled to and it tells you what obligations
25 you're encumbered by when you take on those benefits.

1 And one of the obligations that you're encumbered by
2 under the clear terms of this contract is the
3 obligation to reimburse the carrier in the event --

4 JUSTICE BREYER: No, I understand.

5 MR. SRINIVASAN: -- that you receive benefits
6 and then subsequently receive benefits from a third
7 party.

8 And one thing that I don't want to lose sight
9 of is that ultimately this concerns money that will be
10 reimbursed to the Federal Treasury. And so the fact
11 that this case happens to involve litigation between
12 two private parties shouldn't obscure the strength of
13 the Government's interest in the area, given that
14 Federal funds are involved.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Srinivasan.

17 Mr. Stock.

18 ORAL ARGUMENT OF THOMAS J. STOCK

19 ON BEHALF OF THE RESPONDENT

20 MR. STOCK: Mr. Chief Justice, may it please
21 the Court:

22 I must confess that I continue to be
23 perplexed by the claim that Congress intended
24 reimbursement claims of this type to be handled and --
25 and to be dealt with in the Federal courts when that

1 same Congress, in enacting the FEHBA statute, did not
2 provide for that cause of action or that right in the
3 first instance.

4 JUSTICE BREYER: It's quite possible no one
5 in Congress thought about this --

6 MR. STOCK: It -- it --

7 JUSTICE BREYER: -- which is common. So if
8 it is common, why is it that we would not use the same
9 approach that the Court used in Clearfield Trust, in
10 Kimbell Foods, and really look to the nature of the
11 contract? Whereas here, the rights at stake are really
12 those of the United States in that they are going to
13 get the money. We have a statute. We have all those
14 things I just listed. It covers only Federal
15 employees. Should -- there are strong interests in
16 uniformity throughout the Nation, et cetera, et cetera.

17 So what is the difference between this case,
18 other than a technical difference? I concede that one.

19 The title is not United States. It's Blue Cross Blue
20 Shield or whatever.

21 MR. STOCK: No.

22 JUSTICE BREYER: Empire, et cetera. But
23 aside from that, why is it different?

24 MR. STOCK: Because, Your Honor, in the first
25 instance, number one, uniformity really is not a -- a

1 legitimate claim in this -- in this instance by Blue
2 Cross and Blue Shield.

3 JUSTICE BREYER: Why -- why?

4 MR. STOCK: Because --

5 JUSTICE BREYER: The obvious reason for
6 uniformity would be you are a Federal employee, whether
7 you're in Alaska or whether you're in Virginia.

8 MR. STOCK: That's correct, Your Honor.

9 JUSTICE BREYER: And it's unreasonable to
10 think Congress would want the rights of those different
11 Federal employees to differ just because of where they
12 live. And so what's the answer to that?

13 MR. STOCK: It -- the fact of the matter is,
14 is the way Blue Cross has written this reimbursement
15 provision, they will differ. The reimbursement
16 provision, which -- by the way, to start with, the
17 reimbursement provision that is in the Blue Cross Blue
18 -- Blue Cross Blue Shield contract with the employees
19 is different than the reimbursement provisions which
20 are described in the contract between OPM and Blue
21 Cross Blue Shield. It is markedly different in several
22 ways, the first way being that, with respect to
23 procurement costs and the issue of this \$157,000, who
24 pays to obtain that. In the OPM Blue Cross Blue Shield
25 contract, it provides for attorney's fees and

1 disbursements to be paid by the Government and the --
2 and the claim -- the reimbursement claim to be
3 reduced by that.

4 In the Blue Cross Blue Shield version of that
5 between Blue Cross Blue Shield and the -- the litigant
6 here, that provision is changed. And this is why I say
7 they then undercut their own claim for uniformity.
8 They basically say that we'll allow you attorney's fees
9 if we feel like it in a particular case. That's not a
10 uniformity provision.

11 JUSTICE SOUTER: Well, you're saying that
12 there is a uniformity between a master contract between
13 the United States and Blue Cross on the one hand, and
14 Blue Cross and the subscriber on the other hand. But
15 doesn't the United States approve the latter contract?

16 In other words, doesn't it -- well, I forget the
17 initials -- OPM or whatever it is. Doesn't it have a
18 -- a requirement of approval going to the terms of the
19 contract between Empire and -- and the employee before
20 that contract goes into effect?

21 MR. STOCK: I'm not sure what the mechanics
22 are of it, Your Honor.

23 JUSTICE SOUTER: But isn't that -- isn't that
24 crucial, though, in your answer to Justice Breyer?
25 Because if the United States -- if OPM approves the

1 Empire employee contract, maybe you can say, well, gee,
2 there's something strange going on at OPM that they don't
3 require exactly the same terms in the contract with the
4 employee that they -- that they require in their master
5 contract with -- with Empire. But it doesn't say
6 anything one way or the other about the interest of the
7 United States in having uniformity in which the -- in
8 the -- in the interpretation and application of
9 contracts, which they do approve, between Empire, other
10 Blue Cross Blue Shield entities, and their employees.

11 MR. STOCK: Well, I think when we're talking
12 about uniformity, Your Honor, because this is a statute
13 designed to benefit Federal employees, that we're
14 talking about uniformity in the context of all Federal
15 employees are treated the same. The provision that
16 Blue Cross Blue --

17 JUSTICE SOUTER: And the United States is
18 treated the same in relation to all Federal employees.

19 I mean, there's -- there's an interest in uniformity
20 for fairness among employees, and there's an interest
21 in the United States in having the same expectation, in
22 this case a reimbursement expectation, no matter where
23 the employee is.

24 MR. STOCK: That's correct. But in -- in
25 terms of uniformity, the provision that Blue Cross --

1 several provisions that Blue Cross Blue Shield has
2 added to this reimbursement clause undercut the
3 uniformity aspect of it. And when you say in a
4 particular case, we'll decide, well, the fellow from
5 Alaska -- we'll give him his attorney's fees and
6 disbursements, but the fellow from New York, we won't
7 give it to, you undercut any -- any --

8 JUSTICE SCALIA: That's uniform in both
9 Alaska and New York, they are subject to the -- to the
10 Blue Cross waiver of attorney's fees or not. They're
11 being treated uniformly. I don't see that that's
12 disuniform.

13 What is disuniform, it seems to me, is that
14 you have an employee who wins a judgment in Alaska and
15 he gets to keep all his money because Alaska law says
16 the reimbursement provision is -- is invalid, and then
17 you have a Federal employee in Texas who -- who gets a
18 -- wins the same tort lawsuit, and he has to turn over
19 to Blue Cross all the -- the portion of his recovery
20 that would cover the outlay that Blue Cross has made.
21 That's disuniformity.

22 MR. STOCK: The -- the uniformity which we're
23 seeking, relative to these benefits, and the -- and the
24 argument as to uniformity I would submit to you, at
25 least as to how we treat the Federal employees, is

1 illusory in this case because no matter how this Court
2 decides in this particular case, whether there's
3 Federal jurisdiction here or not, the employees are
4 being treated differently State to State based upon the
5 provision that Blue Cross Blue Shield has enacted.

6 CHIEF JUSTICE ROBERTS: And I suppose that
7 the preemption provision would apply equally if this
8 were brought in State court or Federal court. Correct?

9 MR. STOCK: Yes, Your Honor.

10 JUSTICE BREYER: But I'm curious --

11 JUSTICE SOUTER: Your -- your answer to -- to
12 Justice Scalia -- I'm sorry -- just did not register.
13 I don't understand --

14 MR. STOCK: Well, it was incomplete, Your
15 Honor, because I -- I had turned around to answer the
16 Chief Justice.

17 The -- the way they have this set up with the
18 right of reimbursement and the -- and the kickers that
19 Blue Cross Blue Shield puts in the statement of
20 benefits creates a situation. They -- they add that
21 these rights of reimbursement apply no matter how the
22 cause of action for damages is delineated, in other
23 words, whether it's seeking damages for medical
24 benefits or damages for pain and suffering. And what
25 Blue Cross Blue Shield has introduced is that -- that

1 kicker.

2 And -- and what that does, in effect, from
3 State to State is change the outcome for the employee
4 because, for instance, in New York where we have a
5 collateral source rule by statute that says, you may
6 not prove medical damages in a personal injury case for
7 which you've collected insurance. So, for instance, in
8 Denise McVeigh's case, I can't prove her medical bills.

9 Yet, Blue Cross Blue Shield is going to come in and
10 pick Denise Finn's pocket on her claim for pain and
11 suffering for the \$157,000 in medical bills that they
12 say they've paid.

13 Whereas, if I go across the river -- and I
14 don't know the law in New Jersey, but assuming that New
15 Jersey uses the older rule where, if I had the good
16 sense to buy myself medical insurance and I collected
17 medical insurance for the benefits that were -- if I
18 collect the medical payments for the medical bills, I
19 can still go into court and prove those medical bills
20 as against the tortfeasor. In that particular
21 instance, Blue Cross Blue Shield comes in and it takes
22 money at least that I've gotten from the other side as
23 opposed to in New York where they take money that I
24 haven't gotten from the other side.

25 JUSTICE SOUTER: Yes, but do they take money

1 in New York that you haven't gotten from the other
2 side?

3 MR. STOCK: Absolutely. They're looking to
4 assert a claim. I don't have a claim for medical
5 benefits in the underlying court --

6 JUSTICE KENNEDY: But -- but there's
7 uniformity because the Government wins in both cases.

8 MR. STOCK: I'm sorry, Your Honor?

9 JUSTICE KENNEDY: There's uniformity because
10 the Government wins in both cases.

11 (Laughter.)

12 MR. STOCK: I have to concede that that's
13 true, and if that is the uniformity that we seek and
14 the only --

15 JUSTICE KENNEDY: I mean, that's the kind of
16 uniformity the Government loves.

17 MR. STOCK: I'm sure they do.

18 (Laughter.)

19 JUSTICE BREYER: I -- I wasn't thinking of
20 that kind of uniformity.

21 (Laughter.)

22 MR. STOCK: I assure you, Your Honor, that
23 Denise Finn doesn't.

24 JUSTICE BREYER: I was thinking of the
25 contract -- the contracts that the carriers enter into

1 with the individual Federal employees in different
2 places. And I'm trying to get an idea of whether those
3 contracts all read the same or they don't. And so far,
4 you have found one example of where they read
5 differently. Some contracts apparently say when you
6 reimburse us, you can subtract attorney's fees, and
7 others say when you reimburse us maybe you can subtract
8 attorney's fees, depending on how we feel about it.
9 And I grant you that is a difference.

10 And I am curious, as was Justice Souter, as
11 to whether you have to get OPM approval for that
12 difference or whether OPM can tell you, knock it off,
13 we want the same. And also I'd like other examples.

14 What I'm trying to do, to be clear about it,
15 is I'm trying to see how similar this is to the
16 instance of the Federal employee checks, which this
17 Court many, many years ago said, when you pay your
18 Federal employees and you write a check, it's Federal
19 law that's going to govern the interpretation of the
20 endorsement. I want to see how similar it is and how
21 different.

22 I have two differences. One is the name on
23 this case is Empire, not United States, and the second
24 difference is the one you just mentioned about may
25 rather than must. Now, are there others?

1 MR. STOCK: There are differences in my
2 understanding, Your Honor, from State to State between
3 the different Blue Cross entities. I couldn't tell you
4 what exactly those differences are, but my
5 understanding is that these Blue Cross policies vary
6 from State to State.

7 Do they vary -- I -- I think, Your Honor,
8 although it supports my contention, that you may have
9 misunderstood what I said about the -- the difference
10 between the reimbursement clauses, honestly. What I --
11 what I indicated was the -- the reimbursement clause
12 that is in the OPM/Blue Cross contract is different
13 from what Blue Cross then enters into with its members.
14 That differs. I was not asserting that it differs
15 from State to State. What I'm saying is that the
16 effect of that differs from State to State certainly.

17 JUSTICE STEVENS: May -- may I ask this?
18 Because I think your example overlooks the fact that at
19 least your opponent claims that the Blue Cross contract
20 provision would preempt the New York law that denies
21 your client recovery for health benefits.

22 MR. STOCK: It does --

23 JUSTICE STEVENS: I think that would be their
24 answer to your example.

25 MR. STOCK: It -- it would be in error, I

1 believe, Your Honor.

2 JUSTICE STEVENS: Well, if we -- if we think
3 Congress can provide that a contract provision would
4 preempt a State law, it seems to me the example you've
5 given is the precise example that that statute was
6 intended to cover.

7 MR. STOCK: The -- at the -- at the very
8 essence of that, I don't believe that a contract can
9 preempt State law. The constitutional laws of the
10 United States can preempt State law. If somehow you
11 can bootstrap a contract into that by some theory, I
12 suppose you could argue that it -- that it --

13 JUSTICE STEVENS: But if -- if it does, it
14 would eliminate the lack of uniformity on which you
15 rely.

16 MR. STOCK: It -- it would not, Your Honor,
17 in this instance because the -- the operation of that
18 statute does not affect their right to reimbursement
19 under their contract provision. It affects the --

20 JUSTICE STEVENS: No, but it affects the
21 amount that your client can recover. And they would
22 say that they -- because it assumes an absence of -- it
23 assumes a payment by the carrier, and under -- I -- I
24 think they would take the position that they have, in
25 fact, the -- they have not, in fact, paid that

1 insurance cost.

2 MR. STOCK: Your Honor, I don't think we
3 would ever --

4 JUSTICE STEVENS: I'm not stating it very
5 well, but I --

6 MR. STOCK: The -- the situation with the --
7 the term of New York law that I am -- that I had
8 indicated would occur during a trial of the case and in
9 terms of my cause of action. It would not affect Blue
10 Cross' lawsuit against my client.

11 JUSTICE STEVENS: No. But the defendant
12 would say, we don't have to pay those damages because
13 they're covered by insurance. And the response would
14 be, well, they're not -- they -- they are only covered
15 by insurance if they can be reimbursed. I don't want
16 to take up too much of your time on this.

17 MR. STOCK: Yes, they wouldn't be a party to
18 that suit at that time, though, Your Honor, in -- in
19 terms of raising that issue.

20 CHIEF JUSTICE ROBERTS: But -- but the
21 preemption provision, at least with respect to the
22 rights of Empire, would ensure uniformity. In other
23 words, if the contract terms preempt State law, then
24 any impediment to recovery by Empire that varies from
25 State to State would be overridden.

1 MR. STOCK: Right, but that wouldn't affect
2 -- that wouldn't override the net -- the net effect on
3 the -- on the person. The -- the real world effect on
4 Denise Finn and other people like her would still be
5 different.

6 CHIEF JUSTICE ROBERTS: No, I understand
7 that. But to the extent people are concerned about
8 disuniformity from the point of view of the Federal
9 recovery, the preemption provision is going to apply
10 whether this action is in State court or Federal court.

11 MR. STOCK: That's correct.

12 JUSTICE ALITO: What's your --

13 MR. STOCK: And if the only -- if the only
14 interest in uniformity we have, again, is whether the
15 -- whether the Federal Government gets its -- its money
16 back, then -- you know, then the uniformity argument
17 may fly. But if we're also interested in the -- in the
18 uniformity argument in the manner in which Federal
19 employees are treated and in the manner in which ladies
20 who -- such as Denise Finn are treated, then uniformity
21 is -- is out the window under these -- under this --

22 CHIEF JUSTICE ROBERTS: But the only question
23 that we're considering today is whether or not Federal
24 question jurisdiction exists to authorize bringing this
25 suit in Federal court.

1 MR. STOCK: And I would submit to Your Honor
2 it clearly does not because this case, involving Blue
3 Cross suing Denise Finn for these benefits involves not
4 issues of the construction or interpretation of a
5 Federal statute, but issue -- the issues involved in
6 our case are whether they're entitled to collect the
7 money that they paid three times to the same doctor for
8 the same service on the same day. They paid a
9 particular Dr. Brown \$17,500 for the same service on
10 three occasions.

11 In addition, our dispute involves whether or
12 not some of the benefits that they claim they paid and
13 which were medically a result of this accident were in
14 fact or whether they were taking other benefits they
15 paid and trying to be a little cute and collect those
16 under saxony.

17 Those are the issues. Those issues --

18 JUSTICE BREYER: Well, I would have thought
19 the issue is whether Federal law governs this --

20 MR. STOCK: Well, yes, but --

21 JUSTICE BREYER: -- and they come to Federal
22 court.

23 So what is clearly -- maybe I -- maybe you've
24 -- I don't think you've said this. We know this. That if
25 the United States issues checks to all of its employees

1 throughout the country and then it seeks to recover
2 from one of the drawees or one of the people who
3 endorsed the check on the ground it was fraudulent, we
4 know that it is Federal law that must govern those
5 checks. Right? From Clearfield.

6 MR. STOCK: Yes, Your Honor, which --

7 JUSTICE BREYER: All right. Now, what is the
8 difference in this case? In this case, we have a
9 private administrator of this Federal -- of this -- of
10 this Federal program. There are Federal employees
11 throughout the country. They are supposed to receive
12 uniform -- reasonably uniform health insurance, and the
13 private administrator wants to obtain money that it
14 thinks it's entitled to to put into the Federal
15 Treasury. Now, aside from the name, what's the
16 difference?

17 MR. STOCK: The difference is, is in the
18 instance of Clearfield Trust, you had the Government
19 involved in a dispute over their own commercial paper
20 that they issued and a uniquely Federal interest and a
21 uniquely Federal item.

22 Here, these -- Federal employees aren't the
23 only employees in America who get health benefits, and
24 they are -- these disputes that arise under this
25 statute are most frequently not of the -- not seeking

1 to answer the grand questions. They're most frequently
2 involved in dealing with issues such as we have here.
3 Whether the --

4 JUSTICE ALITO: If the Federal Government
5 were running this program itself, would you make the
6 same argument?

7 MR. STOCK: I'm sorry, Your Honor. I missed
8 the first --

9 JUSTICE ALITO: If the Federal Government
10 were running the program itself, rather than having
11 it -- private entities administer the program for it,
12 would you make the same argument?

13 MR. STOCK: I don't know that I would, but I
14 think the caveat to that is if the Federal Government
15 were running it themselves, pursuant to a different
16 statute than we have here, the first thing I think I
17 would look at is what jurisdiction or what the Congress
18 had to say about where they wanted cases arising from
19 that. It may well be --

20 CHIEF JUSTICE ROBERTS: Well, they've already
21 said that. I mean, there would be Federal jurisdiction
22 there because the Federal Government would be a party
23 to the case. Right?

24 MR. STOCK: Yes, Your Honor. But they're not
25 a party to this case.

1 JUSTICE BREYER: That's exactly what I'm
2 trying to find out. That's -- that's what I'm -- I'm
3 trying to figure out in my mind how close this is to
4 the Federal Government running a uniform program. I
5 mean, everybody agrees Federal law governs questions
6 involving the rights of the United States --

7 MR. STOCK: Yes.

8 JUSTICE BREYER: -- arising under nationwide
9 Federal programs. And here, we have not the United
10 States. We have Empire. And so how close is Empire to
11 being simply an instrument of the United States in this
12 respect, and how close is it to being really an
13 independent company that sets up its own insurance
14 contracts? That's what I'm trying --

15 MR. STOCK: Interestingly enough, the
16 Government has told us that. And what they told us --
17 and it's at page 4 of -- and in a footnote number 3
18 from the amicus curiae's briefs from Cruz. And the
19 Government has told us in Cruz's pending certiorari
20 petition that that -- Blue Cross Blue Shield carriers
21 do not perform outsourced Government tasks, are not
22 agents of the Government, and do not act on behalf of
23 OPM. Rather, they function as independent economic
24 entities that offer and run their own health insurance
25 plans, performing a role that is not governmental in

1 nature.

2 JUSTICE BREYER: That's quite good. What are
3 you reading from?

4 MR. STOCK: I'm sorry, Your Honor?

5 JUSTICE BREYER: What are you reading from
6 there?

7 MR. STOCK: We're reading from the footnote
8 number 3 of the amicus curiae's brief at -- at page 4.

9 JUSTICE SCALIA: The Government -- the
10 Government as amicus? The Government as amicus.

11 MR. STOCK: No, no. The -- the amicus from
12 the -- representing Cruz.

13 JUSTICE SOUTER: Isn't -- isn't that --

14 MR. STOCK: And their -- but it is --

15 JUSTICE SOUTER: -- isn't that -- isn't that
16 --

17 MR. STOCK: -- their statement in their -- in
18 the certiorari -- this is the Government's statement. This
19 is the Department of Justice's concession that Blue Cross
20 has sole authority over reimbursement decisions, and that
21 is their language. That's the way they describe --

22 JUSTICE SOUTER: But at the end of the day, the
23 money, every penny collected, minus any service fee, is
24 going to go into the Federal Treasury. Isn't it?

25 MR. STOCK: That's true.

1 JUSTICE SCALIA: Of course, you could say the
2 same about -- about any recovery, that a certain
3 percentage in taxes will go to the Federal Treasury I
4 -- I --

5 MR. STOCK: Well, we can also say -- we can
6 also say that irrespective of whether the Federal
7 courts collect it or the State courts collect it, it's
8 still going to end up in the Federal Treasury, and that
9 these are --

10 JUSTICE SOUTER: But whether it's collected
11 or not may -- indeed, may vary depending on whether
12 State law or Federal law applies. And if Federal law
13 applies, then you have the jurisdictional consequence.

14 MR. STOCK: The problem in this case, in
15 terms of asserting arising-under jurisdiction, is --
16 and -- and in terms of Boyle also, is that the -- the
17 Petitioner has failed to point out any difference in
18 how it would occur. There is absolutely no difference
19 pointed out by the Petitioner as to how the law would
20 differ --

21 JUSTICE SOUTER: Well, presumably it didn't
22 do that because the preemption provision does not rely
23 upon conflict.

24 MR. STOCK: The preemption provision doesn't
25 apply to reimbursement provisions either, Your Honor.

1 It applies to --

2 JUSTICE SOUTER: Well, it doesn't apply to
3 reimbursement provisions, you say, but it does apply to
4 benefits. And -- and the value of a benefit is going
5 to vary from the -- the policy limit to zero depending,
6 in a case like this, on whether a third party payment
7 has to be given to the Government with -- with -- isn't
8 -- isn't that a question of benefit?

9 MR. STOCK: No, it is not, Your Honor.

10 And with all due respect, this Court has
11 consistently held that words used in one place in the
12 statute should mean the same thing as in other places
13 in the statute. Coverage and benefits, as it's defined
14 in this statute, does not include reimbursement claims,
15 and to stretch that preemption clause --

16 JUSTICE SOUTER: Will you quote the language
17 that you're referring to?

18 MR. STOCK: If I can find it, Your Honor,
19 sure. I'm sorry, Your Honor.

20 JUSTICE SOUTER: I -- I don't want to take up
21 too --

22 MR. STOCK: Yes, I'm sorry, Your Honor. I'm
23 flipping around. I have it here.

24 JUSTICE SOUTER: My -- my concern simply is
25 that you've made a conclusory statement that elsewhere

1 there's a definition that doesn't --

2 MR. STOCK: There is.

3 JUSTICE SOUTER: And -- and --

4 MR. STOCK: And it's --

5 JUSTICE SOUTER: After the argument, just
6 give me a cite so I know exactly what you're -- you're
7 getting at.

8 MR. STOCK: No problem, Your Honor. The --
9 the punch line to it is or to paraphrase it, you know,
10 benefits are described as payments for medical --
11 medical payments for this, that kind of thing. But
12 there is a very specific description of what benefits
13 means in the plan. It doesn't include reimbursement.
14 And I -- and I think it really stretches it to include
15 reimbursement as a -- under that benefit setting.

16 JUSTICE GINSBURG: But how do you answer the
17 question that I think Justice Breyer was -- was getting
18 at, that it's -- it's a -- the -- what's in it for the
19 carrier? Nothing. As -- if -- if every penny that the
20 carrier collects is going to go into the U.S. Treasury,
21 then why does the carrier care?

22 MR. STOCK: Being a cynic, I'm not so sure of
23 that, Judge. But -- Your Honor. I'm sorry. I'm not
24 so sure of that because early on in the -- in Blue
25 Cross Blue Shield's summary of the facts, they indicate

1 that Blue Cross' fees in the matter are determined
2 based upon performance. I don't know what performance
3 means, but I suspect it has something to do with how
4 much money ultimately ends up being spent.

5 I don't think it's necessarily relevant to
6 the inquiry that we're involved in. The fact that --
7 that all of the money may ultimately go to the
8 Government, though, I don't think changes the issue as
9 to whether or not this Court should confer subject
10 matter jurisdiction upon the district courts in this
11 case. There -- the -- the issues here can be resolved
12 in the State courts and more efficiently than in the
13 Federal courts. And certainly I think that the Federal
14 courts would not look forward to an influx of cases
15 dealing with issues in -- in essentially personal
16 injury issues involving whether or not particular
17 doctors were paid properly, whether or not particular
18 payments need to be made in connection with and are
19 reimbursable to the Government, or the types of issues
20 that we have here.

21 And to be perfectly honest, most of the cases
22 are not of the magnitude of this one where we're
23 talking about \$150,000. Most of the cases involve
24 \$5,500 and \$6,500 and things like that. The Government
25 --

1 JUSTICE STEVENS: Yes, but this is a claim
2 for \$150,000 out of a settlement of \$3 million or \$4
3 million.

4 MR. STOCK: Yes, Your Honor.

5 JUSTICE STEVENS: What was your defense on
6 the merits?

7 MR. STOCK: To this claim?

8 JUSTICE STEVENS: Yes.

9 MR. STOCK: Our defense on the merits to this
10 claim, were we to get there, is that the Government has
11 paid the same doctor \$17,500 three times for the same
12 service, and that Denise Finn should not be required to
13 reimburse Blue Cross Blue Shield when they have
14 incompetently, in effect, paid out more money than they
15 should have.

16 The second defense involves the fact that
17 some of the benefits which Blue Cross Blue Shield is
18 seeking reimbursement for are not connected to the
19 accident that injured Mr. McVeigh. They're part of his
20 normal health care type of services which wouldn't fall
21 under the reimbursement claim.

22 Those claims are -- are not the type of
23 things that I think that the Federal district courts
24 want to deal with. This case --

25 JUSTICE KENNEDY: But I take it you're not

1 foreclosed from making your defense or your claim in
2 the Federal court.

3 MR. STOCK: No, absolutely not. But --

4 JUSTICE SOUTER: Mr. -- Mr. Stock, we have
5 one loose end. I think we do. Both Justice Breyer and
6 I have -- have asked the question whether OPM has to
7 approve of the terms of the contract between Blue Cross
8 and -- and the -- the insured. Is -- does OPM have to
9 approve?

10 MR. STOCK: I don't believe they do, Your
11 Honor. I think the terms of OPM and Blue Cross'
12 contract provide that Blue Cross will enter into a -- a
13 contract with the -- with the policyholders that is
14 consistent with its contract with OPM. But I don't --
15 I don't believe -- and -- and honestly, I -- I did not
16 look before we -- we talked about this. I don't
17 believe it requires their approval. They don't get a
18 copy of the contract and read it over.

19 JUSTICE SOUTER: Assuming the consistency
20 term, that supports an argument that the Government has
21 an interest in -- in uniformity of -- of
22 interpretation, doesn't it?

23 MR. STOCK: Only if the -- if in uniformity
24 of interpretation of the contract?

25 JUSTICE SOUTER: Yes, yes.

1 MR. STOCK: I think the Government has an
2 interest in uniformity of the manner in which the --
3 the employees are ultimately treated, and I think when
4 we talk about uniformity, that that's what we ought be
5 talking about.

6 JUSTICE SCALIA: Well, I guess you can be --
7 depending upon how detailed the OPM contract is, you
8 can be consistent with that contract and still have an
9 enormous amount of variation from one to another. It
10 depends entirely upon whether the OPM contract is
11 entirely comprehensive. If it covers every jot and
12 tittle, then I guess you can't be consistent with it
13 and different. But if it's -- if it's sort of bare
14 bones, you -- you could be consistent with that and
15 have a lot of variation, couldn't you?

16 MR. STOCK: Yes, absolutely. And -- and my
17 understanding is that -- is for that reason that OPM
18 does not review the contracts and approve the contract
19 language of Blue Cross Blue Shield.

20 JUSTICE SOUTER: But if -- if --

21 MR. STOCK: But I don't know that.

22 JUSTICE SOUTER: -- if, in fact, there were
23 consistently only in this remote sense so that the
24 interests which are meant to be protected in the -- in
25 the OPM Blue Cross contract aren't being protected at

1 the next level, then OPM could bring an action against
2 -- against Blue Cross saying it's not consistent
3 enough, couldn't it?

4 MR. STOCK: It could.

5 JUSTICE SOUTER: Yes.

6 MR. STOCK: It could. But in this particular
7 instance, the contract provisions that Blue Cross are
8 -- and Blue Shield are seeking to enforce, as regards
9 reimbursement, are markedly different. I mean, it's --
10 it's not a small variation. It's a very substantial
11 matter in terms of, first, the procurement costs and,
12 second, in terms of what kind of a cause of action Blue
13 Cross Blue Shield can take the money from. But that's
14 not an -- an incidental. That goes to the heart of --
15 of the matter.

16 If there's no other questions, Your Honors,
17 thank you.

18 CHIEF JUSTICE ROBERTS: Thank you very much,
19 Mr. Stock.

20 Mr. Shelley, you have 4 minutes remaining.

21 REBUTTAL ARGUMENT OF ANTHONY F. SHELLEY

22 ON BEHALF OF THE PETITIONER

23 MR. SHELLEY: Thank you, Mr. Chief Justice.

24 CHIEF JUSTICE ROBERTS: I wonder if you could
25 focus on one question for me. If you have a State law

1 cause of action and the law to be applied to some
2 aspects of that cause of action is Federal law, is that
3 sufficient to establish Federal question jurisdiction
4 or not?

5 MR. SHELLEY: It is, Your Honor, under the
6 Grable case that the Court issued last year. A State
7 law claim that turns on the construction of Federal
8 law, a substantial question of Federal law, is
9 removable to Federal court and arises under Federal law
10 in the first place.

11 I wanted to address Justice Souter's question
12 of whether OPM does approve the contract. There's no
13 individual contract -- excuse me -- between Blue Cross
14 and any individual enrollee. The statement of benefits
15 is part of the Government contract. It is attached at
16 appendix A and the terms of the contract, the master
17 contract, specifically say that in sections 2.2 and
18 2.5, that the benefits shall be -- and -- and
19 reimbursement terms as well -- shall be consistent with
20 and incorporated by the statement of benefits, which is
21 attached. And so it is part of the contract. There's
22 no separate contract here. It's one --

23 JUSTICE BREYER: You mean everybody in the
24 entire United States gets the same piece of paper.

25 MR. SHELLEY: The same brochure.

1 JUSTICE BREYER: So it's identical. There is
2 no difference between every individual's contract,
3 every Federal employee's -- I guess it's a contract
4 with the Federal employee. Isn't it? I mean, he's
5 bound by it you say.

6 MR. SHELLEY: They -- by enrolling, they bind
7 themselves to the contract.

8 JUSTICE BREYER: All right. So I am -- in
9 Alaska, Virginia, everywhere, they get the same piece
10 of paper. They enroll and then they're bound by it.

11 MR. SHELLEY: Absolutely.

12 JUSTICE BREYER: And the question here is
13 whether that should get different interpretations
14 possibly in different places.

15 MR. SHELLEY: Under State law, and it should
16 not.

17 And we are -- it is a uniform system across
18 the country, and the -- the carrier is bound to apply
19 those terms, particularly the reimbursement terms,
20 consistently and equitably across the country.

21 CHIEF JUSTICE ROBERTS: Counsel --

22 MR. SHELLEY: Section 4.1 of the contract
23 says that.

24 CHIEF JUSTICE ROBERTS: -- the -- the Grable
25 case said, though, that the Federal question had to be

1 a necessary element of the State law cause of action.

2 That's not always the case in these cases, is it?

3 MR. SHELLEY: Well --

4 CHIEF JUSTICE ROBERTS: It's only -- the --
5 the Federal question comes up only on issues of
6 preemption. They may or may not be presented in a
7 particular case.

8 MR. SHELLEY: In the first instance, our
9 claim is an enforcement claim for the contract. The
10 contract itself and the common law that surrounds it
11 are -- are Federal law, and as a result, we --

12 CHIEF JUSTICE ROBERTS: Well, that kind of --
13 that begs the -- that's not the question I asked and it
14 sort of begs the question. I mean, you have the State
15 law cause of action to enforce your contract claim, and
16 if there's some State law that's asserted against you
17 that's inconsistent with the contract, then you have
18 the Federal question issue. But that's the only
19 Federal question I see in the case.

20 MR. SHELLEY: Well, but there are, for
21 instance, seven States that wouldn't allow us to bring
22 the cause of action in the first place, and that's why
23 we need to go back to the question of whether the claim
24 itself is Federal in nature. And under the Jackson
25 Transit or Clearfield Trust analogies, the law at the

1 start, the cause of action, the claim itself is Federal
2 in nature, and you don't need to get to the question of
3 whether the vessel of a State law claim --

4 CHIEF JUSTICE ROBERTS: My hypothetical that
5 I started with was assuming you have a State law claim,
6 a State law cause of action. So do you have any
7 authority other than Grable for the proposition that a
8 State law cause of action which -- in which the law to
9 apply may or may not turn on Federal law in particular
10 aspects presents a Federal question?

11 MR. SHELLEY: Well, the contract itself is
12 Federal law. It -- it is a -- it is tantamount to a
13 regulation that the Government has selected the terms
14 of, and as a result, it should be treated as Federal
15 law. And -- and cases, Franchise Tax Board, on which
16 -- on which Grable relies and the earlier cases -- we
17 -- we would say those reach a similar result.

18 One other point I wanted to address was this
19 issue of whether this attorney's fees question is
20 different than the master contract or the statement of
21 benefits. It's not. The master contract addresses the
22 question of whether we can deduct our own attorney's
23 fees from the recovery before we give the money to the
24 Federal Treasury. The statement of benefits governs
25 the question of whether we -- we will deduct for

1 attorney's fees when we collect the claim from the
2 subscriber.

3 CHIEF JUSTICE ROBERTS: Thank you very much,
4 Mr. Shelley.

5 The case is submitted.

6 (Whereupon, at 12:05 p.m., the case in the
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25