26-813-cv

United States Court of Appeals

for the

Second Circuit

JANE DOE, on behalf of BABY DOE, a minor, PATRICIA CAVALLARO-KEARINS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– v. –

ANTHEM HEALTHCHOICE ASSURANCE, INC, DBA Anthem Blue Cross and Blue Shield, DBA Anthem Blue Cross,

Defendant-Appellee,

ANTHEM HP, LLC, DBA Anthem Blue Cross and Blue Shield HP, DBA Anthem Blue Cross HP,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because federal law forms an essential ingredient of Plaintiffs' claims, as discussed further *infra* at 6 & n.2. The district court entered final judgment dismissing Plaintiffs' Complaint on March 5, 2026. J.A. 148. Plaintiffs timely filed notice of appeal on March 31, 2026. J.A. 149. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

INTRODUCTION

The district court dismissed this case based on an interpretation of a preemption statute that is squarely at odds with this Court's interpretation of the same statute. That was error, and this Court should vacate and remand.

Plaintiffs are federal employees who sued their health insurer, Anthem Healthchoice Assurance, Inc. ("Anthem"), for failing to comply with its obligation to provide accurate information about its mental health provider network. In violation of its contractual, statutory, and common-law duties to maintain an accurate directory of available, in-network providers, Anthem has published a directory in which more than 80% of the doctors and therapists listed are not actually in-network, do not exist, are not accepting new patients, and/or cannot be reached using the listed contact information.

By greatly exaggerating the adequacy of its provider network, Anthem attracts enrollees under false pretenses. This deception has caused serious harm to enrollees

like Plaintiffs, who have been unable to find mental health providers, have had to forgo medically necessary care, and have incurred thousands of dollars in unexpected out-of-network costs. Plaintiffs therefore pursue contractual, statutory, and common-law claims on behalf of a putative class.

The district court dismissed Plaintiffs' Complaint because it concluded that each of these claims was preempted by a federal statute, the Federal Employees Health Benefits Act ("FEHBA"), which under certain circumstances preempts state law that "relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The district court reasoned that the statute preempted state laws of general application that did not *specifically* "relate to" health insurance or plans. But this Court has held the opposite and concluded, in a published opinion, that FEHBA does not preempt "laws of general application that make absolutely no reference to health insurance or plans but are used in a given case to 'construe or enforce'" federal employee health insurance plans. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 146 (2d Cir. 2005) (*McVeigh I*). The Supreme Court has implied agreement, twice describing the statute as Congress's "preemption of state *insurance* law"—not preemption of state laws of general applicability. *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 98, 99 n.5 (2017) (emphasis added).

The district court concluded this Court's holding was non-binding dicta, but it was wrong. The district court believed this Court's analysis of the preemption

statute was "not necessary" to this Court's conclusion in *McVeigh I* that subject-matter jurisdiction was lacking. J.A. 138. But that is not how this Court decided *McVeigh I*, which turned on this Court's interpretation of the same preemption clause at issue here. The Court held there was no subject-matter jurisdiction *because* FEHBA did not preempt *any* state laws of general application. This Court came to that conclusion in response to the dissent's argument that FEHBA preempted state laws of general application and thereby authorized federal common law to apply in the realm of FEHBA contracts. This Court's interpretation of FEHBA was thus necessary to its holding that subject-matter jurisdiction was lacking and is therefore binding precedent when interpreting FEHBA. Nor has any subsequent case abrogated this Court's holding that FEHBA does not preempt state laws of general application; to the contrary, the Supreme Court has never construed the prong of FEHBA that this Court addressed in *McVeigh I*. And in addition to its status as binding precedent, this Court's decision in *McVeigh I* remains correct on the merits.

Because this Court has held that federal law does not preempt state-law claims of general application, like those Plaintiffs pursue here, this Court should vacate the district court's judgment of dismissal and remand for further proceedings.

ISSUE PRESENTED

Whether the district court erred in holding that Plaintiffs' state-law claims are expressly preempted by 5 U.S.C. § 8902(m)(1).

STATEMENT OF THE CASE

Plaintiffs are federal employees (or the beneficiary of a federal employee) who enrolled in Anthem's BlueCross BlueShield health insurance plan. J.A. 29 ¶ 70; J.A. 33 ¶ 85. Plaintiffs allege that Anthem has sought to cover up its inadequate mental health provider network by publishing an inaccurate provider directory that dramatically exaggerates that network, in violation of its contractual obligations. J.A. 17–21 ¶¶ 36–48; J.A. 38–49 ¶¶ 117–68. In the contract governing its federal employee plan, Anthem agreed to comply with the No Surprises Act, which requires insurers to (i) maintain a publicly accessible directory containing accurate information about their in-network providers, (ii) verify the accuracy of the directory data at least every 90 days, and (iii) remove those providers who cannot be reached.[1] *See* Pub. L. 116-260, § 116, 134 Stat. 1182, 2878–89 (2020); J.A. 38–39 ¶¶ 117–21; J.A. 111. Anthem's directory represents to customers and prospective customers, including during open-enrollment season, that listed providers are in-network and available to take new patients. J.A. 40–41 ¶¶ 126–28; J.A. 45–49 ¶¶ 150–64.

Anthem's directory is a sham. An extensive survey of the listed mental health providers revealed that approximately 85% were, contrary to Anthem's representations, (i) not in-network, (ii) not accepting new patients, and/or

[1] The contract was between Anthem and the federal Office of Personnel Management. Plaintiffs have standing to enforce that contract as third-party beneficiaries.

(iii) unreachable. J.A. 44–45 ¶¶ 140–47; J.A. 49 ¶ 168. Anthem thus maintains a so-called "ghost network"—a directory of providers that contains so many false listings that it is functionally impossible to use it to find in-network care. J.A. 8–9 ¶¶ 1–2; J.A. 21–29 ¶¶ 51–69. The prevalence of ghost networks was a key impetus for passage of the No Surprises Act. J.A. 17–18 ¶¶ 36–39.

Plaintiffs' experiences with Anthem's ghost network are representative. Plaintiff Patricia Cavallaro-Kearins has been diagnosed with ADHD and anxiety and sought treatment for those conditions. J.A. 30 ¶¶ 72–73. She attempted to use Anthem's directory to find an in-network psychiatrist and spent many hours calling providers listed in the directory, but could not find a single in-network provider. J.A. 31 ¶ 74, J.A. 32 ¶¶ 79–81, 83. She also attempted to call Anthem directly, which was unable to help her find an in-network provider. J.A. 31 ¶ 75. Anthem's failure to maintain an accurate directory left Ms. Cavallaro-Kearins with no option other than to obtain care from an out-of-network provider, which was considerably more expensive than an in-network provider and which she could not afford for long. J.A. 31 ¶ 76; J.A. 32 ¶¶ 80, 82–83.

Baby Doe's experience was, if anything, worse. Baby Doe, the child of federal employee Jane Doe, has been diagnosed with autism spectrum disorder. J.A. 33 ¶¶ 85, 88. Baby Doe requires regular occupational and speech therapy, along with mental health treatment. J.A. 33 ¶ 88. Her mother attempted to use Anthem's

directory to find in-network providers but was unable to do so. J.A. 33–34 ¶¶ 90–91, 94. Jane Doe spent countless hours calling providers in the directory, but found that the directory contained inaccurate information about the listed providers. J.A. 33–34 ¶¶ 91, 94. Ultimately, Jane Doe could not find an in-network provider for Baby Doe and could not afford out-of-network care. J.A. 34 ¶ 93. Baby Doe has had to forgo care altogether. J.A. 34 ¶¶ 93, 96.

Plaintiffs sought relief for Anthem's false and deceptive representations regarding its provider network. Plaintiffs alleged that Anthem breached its contractual obligation to comply with the federal No Surprises Act and related federal statutes, which require health insurers to verify and update their provider directory.[2] Plaintiffs also alleged that Anthem lied to federal employees by exaggerating the adequacy and size of its provider network. Plaintiffs filed suit in the Southern District of New York to pursue state-law claims for breach of contract, deceptive business practices, false advertising, violation of New York Insurance Law § 4226, fraudulent misrepresentation, and unjust enrichment, and seek damages and equitable relief on behalf of a putative class. J.A. 62–77 ¶¶ 216–84.

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[2] The district court therefore had federal question jurisdiction to determine whether Anthem violated the federal statutes referenced in its contract with the federal government. *See Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194–96 (2d Cir. 2005) (holding that federal question jurisdiction was proper over state-law claims that were premised on defendant's failure to comply with federal law incorporated in the contract).

The district court (John P. Cronan, *J.*) granted Anthem's motion to dismiss, concluding that Plaintiffs' claims were preempted by FEHBA. *See* J.A. 129–47. The district court acknowledged this Court's conclusion in *McVeigh I* that FEHBA does not preempt state laws of general application that do not "explicitly refer[] to or discuss[] health insurance or plans." J.A. 138 (internal quotation marks omitted). But the district court concluded that this Court's reasoning was non-binding dicta that it could disregard. J.A. 138–42. The district court reasoned that this Court's statutory interpretation was "not necessary to the Second Circuit concluding that federal question jurisdiction was lacking" in *McVeigh I*. J.A. 138. And the district court buttressed that conclusion based on the Supreme Court's affirmance in *McVeigh* on alternative grounds and on the district court's view that a subsequent Supreme Court decision "undercut the Second Circuit's *McVeigh I* language" in certain respects. J.A. 138, 141.

The district court therefore considered itself unburdened to hold, "contra" this Court's opinion in *McVeigh I*, J.A. 143, that state laws of general application can be preempted by FEHBA. The district court concluded that each of Plaintiffs' claims was preempted because, in its view, those claims "relate[] to health insurance or plans." J.A. 144.[3]

[3] The district court therefore did not reach any of Anthem's alternative arguments for dismissal. *See* J.A. 135.

Plaintiffs timely appealed. J.A. 149–50.

SUMMARY OF ARGUMENT

The district court erred in concluding that FEHBA preempts Plaintiffs' state-law claims. In a well-reasoned and published decision authored by then-Judge Sotomayor, this Court held that FEHBA does not preempt state laws "of general application that make absolutely no reference to health insurance or plans but are used in a given case to 'construe or enforce' FEHBA plans." *McVeigh I*, 396 F.3d at 146. That interpretation of FEHBA was necessary to this Court's decision and has not been abrogated by any subsequent case. In addition to its status as binding precedent, that decision also remains correct on the merits: as this Court rightly recognized, the interpretation adopted by the district court in this case renders the relevant language in FEHBA "meaningless." *Id.* And the Supreme Court has implied agreement with this Court's holding, describing the statute as involving "preemption of state insurance law" but not preemption of other state laws. *Nevils*, 581 U.S. at 98, 99 n.5.

The district court disagreed with this Court's interpretation of FEHBA, relying on the dissent in *McVeigh I*. *See* J.A. 143. The district court concluded that this Court was wrong to believe that applying FEHBA's preemption clause to state laws of general application would render superfluous language in FEHBA. *See id.* (concluding, "*contra*" the majority opinion, that its interpretation of FEHBA gave

full effect to each clause of the preemption statute). It based that conclusion in part on the Supreme Court's decision in *Nevils*, even as the district court acknowledged that *Nevils* addressed a *different* prong of FEHBA's preemption statute than the one that this Court construed in *McVeigh I*. J.A. 141.

The district court was free to express its disagreement with this Court's reasoning, but it was required to apply it all the same. A district court "must follow controlling precedent—even precedent the District Court believes may eventually be overturned—rather than preemptively declaring that [this Court's] caselaw has been abrogated." *Packer v. Raging Cap. Mgmt., LLC*, 105 F.4th 46, 50 (2d Cir. 2024); *see United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 322 (2d Cir. 1969) ("In this case, as in all others, the district court is required to follow a binding precedent of a superior court."). Because FEHBA does not preempt state laws of general application, and Plaintiffs' claims so qualify, this Court should vindicate principles of *stare decisis* and vacate and remand.[4]

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's grant of a motion to dismiss on a preemption question." *DCC Propane, LLC v. KMT Enters., Inc.*, 147 F.4th 171, 174 (2d Cir. 2025).

[4] As noted *infra* at 33 n.8, Plaintiffs do not appeal the dismissal of their claim under New York Insurance Law § 4226.

ARGUMENT

I. FEHBA Does Not Preempt State Laws of General Application

This appeal turns on one federal statute and three appellate decisions construing that statute. *See* 5 U.S.C. § 8902(m)(1); *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005) (*McVeigh I*), *reh'g denied*, 402 F.3d 107 (2d Cir. 2006), *aff'd on other grounds*, 547 U.S. 677 (2006) (*McVeigh II*); *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87 (2017). Properly understood, that statute and those precedents make clear that Plaintiffs' claims are not preempted.

A. FEHBA's Preemption Clause Is Limited in Scope

FEHBA "establishes a comprehensive program of health insurance for federal employees." *McVeigh II*, 547 U.S. at 682. The statute authorizes the federal Office of Personnel Management ("OPM") to contract with private carriers to administer those health insurance benefits. *Id.*; *see* 5 U.S.C. § 8902(a). FEHBA authorizes federal employees to bring suit against OPM for denials of health benefits claims, but it does not otherwise speak to the remedies a federal employee has against the insurance carrier for other injuries, like the ones at issue here. *See* 5 U.S.C. § 8912; 5 C.F.R. § 890.107(c).

FEHBA contains a "limited preemption clause." *McVeigh I*, 396 F.3d at 145. That clause provides: "The terms of any contracts under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with

respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). The Supreme Court has instructed that, when interpreting preemption clauses, courts should "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted). To the extent the Court finds the statute "ambiguous or open to more than one plausible reading, courts have a duty to accept the reading that disfavors pre-emption." *Council for Responsible Nutrition v. James*, 159 F.4th 155, 171 (2d Cir. 2025) (internal quotation marks omitted).

As the Supreme Court and this Court have both recognized, FEHBA's preemption clause "places two preconditions on federal preemption." *Nevils*, 581 U.S. at 94–95. "First, preemption only occurs when the FEHBA contract terms at issue 'relate to the nature, provision, or extent of coverage or benefits.' Second, federal law may only preempt state or local laws if those laws 'relate[] to health insurance or plans.'" *McVeigh I*, 396 F.3d at 145 (citations omitted and alteration in original); *accord Nevils*, 581 U.S. at 94–95. These are "independent conditions" that must both be satisfied for preemption to occur. *McVeigh I*, 396 F.3d at 145.

Plaintiffs' claims are not preempted because they do not satisfy the second preemption condition: they do not involve state laws "relat[ing] to health insurance

or plans." This Court made that conclusion clear in *McVeigh I*. The Court there considered whether there was federal jurisdiction in a contract dispute between a federal employee, as the insured, and Empire, as the insurance carrier. Empire claimed federal jurisdiction was proper because, among other reasons, FEHBA preempted state contract law and thereby authorized application of federal common law. 396 F.3d at 145. This Court, in an opinion by then-Judge Sotomayor, held that FEHBA did not preempt state contract law because contract law did not "relate to health insurance or plans." *Id.* As the Court explained, Empire's argument "completely ignores the existence of this second [preemption] condition, arguing erroneously that because the contract provisions at issue relate to benefits, they necessarily supersede 'all state law.' Without any showing that the dispute implicates a specific state law or state common-law principle 'relat[ing] to health insurance,' § 8902(m)(1) does not authorize federal preemption of state law in this case." *Id.* (second brackets in original).

This Court then rejected the dissent's argument that "the case satisfies the second condition for § 8902(m)(1) preemption on the ground that the phrase 'state or local law . . . which relates to health insurance or plans' encompasses laws of general application that make absolutely no reference to health insurance or plans but are used in a given case to 'construe or enforce' FEHBA plans." *Id.* at 146 (ellipsis in original); *contra id.* at 156 (Raggi, *J.*, dissenting) (disagreeing with the

majority "that preemption is limited to laws specifically addressing 'health insurance or plans'"). As the Court explained, that interpretation of FEHBA's preemption clause "renders the second limiting condition meaningless" because, under that interpretation, "*every* state or local law applied to a dispute satisfying the first condition (that is, every state law applied to a dispute involving a contract term relating to coverage or benefits) will ipso facto affect the construction or enforcement of that term. Thus, under the dissent's reasoning, FEHBA contract terms will preempt every state or local law so long as the first requirement is satisfied. This strips the second limiting condition of any force whatsoever." *Id.* at 146 (majority opinion).

The Court therefore construed FEHBA's preemption clause to avoid surplusage, concerned that the dissent's reading of the second preemption condition would render that second condition functionally meaningless. *See United States v. Dai*, 99 F.4th 136, 139 (2d Cir. 2024) (courts should avoid reading statutory language in such a way that the language "adds nothing"). The Court observed that if Congress had intended to preempt state laws of general application, there were far more straightforward ways of doing so. *See McVeigh I*, 396 F.3d at 146 n.10 ("If Congress had not wished to limit the types of state laws subject to preemption, it could have quite easily provided that 'federal law shall govern the interpretation and enforcement of contract terms under this chapter which relate to the nature,

provision, or extent of benefits.'"); *cf. Biden v. Texas*, 597 U.S. 785, 798 (2022) ("If Congress had wanted the provision to have that effect, it could have said so in words far simpler than those that it wrote.").

This Court accordingly held that the only way to give the second preemption requirement "independent meaning" was to interpret it to apply only to state or local laws that "implicate[] a specific state law or state common-law principle 'relat[ing] to health insurance.'" *McVeigh I*, 396 F.3d at 145–46 (internal citation omitted and second brackets in original). Thus, the Court held that FEHBA's preemption clause does not "encompass[] laws of general application" that do not *specifically* relate to health insurance or plans. *Id.* at 146; *see id.* at 150 ("Section 8902(m)(1) plainly establishes that only state laws 'relat[ing] to health insurance or plans' are subject to preemption. We decline Empire's suggestion that we read this phrase out of the provision.").

This Court's interpretation of FEHBA's preemption clause thus compels the conclusion that Plaintiffs' claims—which arise under laws of general application, as discussed further below—are not preempted.

B. The Supreme Court's Affirmance on Alternative Grounds in *McVeigh II* Did Not Displace This Court's Holding in *McVeigh I*

This Court's holding in *McVeigh I* controls even though the Supreme Court affirmed this Court's judgment in *McVeigh I* on other grounds. On appeal, the Supreme Court observed that it was unclear whether the insurer's claim for

reimbursement satisfied the *first* FEHBA preemption requirement—*i.e.*, whether the insurer's contractual obligation to pursue reimbursement was a contract term "'relat[ing] to . . . coverage or benefits' and 'payments with respect to benefits,' thus falling within § 8902(m)(1)'s compass." *McVeigh II*, 547 U.S. at 697.

The Supreme Court declined to address that issue, reasoning that subject-matter jurisdiction would be lacking either way. The Court explained that "[i]f contract-based reimbursement claims are not covered by FEHBA's preemption provision, then federal jurisdiction clearly does not exist." *Id.* at 698. "But even if FEHBA's preemption provision reaches contract-based reimbursement claims, that provision is not sufficiently broad to confer federal jurisdiction. If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Id.* The Court thus emphasized that FEHBA did not completely preempt state law so as to categorically authorize federal jurisdiction; as the Court explained, "Section 8902(m)(1)'s text does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans." *Id.* Thus, the Supreme Court declined to take any position on the proper interpretation of FEHBA's preemption clause because, under either interpretation, the insurer had "fail[ed] to establish that § 8902(m)(1) leaves no room for any state law potentially bearing on federal employee-benefit plans." *Id.* at 699.

The Supreme Court's decision in *McVeigh II* in no way displaced this Court's interpretation of FEHBA's preemption clause. This Court has held that when, as in *McVeigh*, the Supreme Court affirms a decision on alternative grounds, this Court's earlier ruling "remains the law of this Circuit, notwithstanding the Supreme Court's decision . . . affirming this Court's judgment on other grounds." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015), *reh'g en banc denied*, 822 F.3d 34 (2d Cir. 2016), *aff'd*, 584 U.S. 241 (2018). Even when the Supreme Court's decision "seems to suggest that the Court was less than satisfied with our approach to jurisdiction," the Supreme Court "neither said as much nor purported to overrule [the Second Circuit's reasoning]. The two decisions adopted different bases for dismissal for lack of subject-matter jurisdiction. Whatever the tension between them, the decisions are not logically inconsistent." *Id.* at 153. Likewise here, this Court's interpretation of FEHBA's preemption clause was in no way displaced by the Supreme Court's decision *not* to adopt a particular interpretation of FEHBA in *McVeigh II*. As in *Arab Bank*, this Court and the Supreme Court agreed that subject-matter jurisdiction was lacking, but for different—yet compatible—reasons. And *Arab Bank* teaches that this Court's reasons for concluding that subject-matter jurisdiction was lacking retain their status as binding precedent.

Indeed, this Court has described it as an "obvious error" for a district court to conclude that the Supreme Court's affirmance on alternative grounds "overturned our Court's holding" in that same case. *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 166 n.28 (2d Cir. 2015). As this Court explained: "There is no authority for the proposition that when the Supreme Court affirms a judgment on a different ground than an appellate court it thereby overturns the holding that the Supreme Court has chosen not to address. To hold otherwise would undermine basic principles of *stare decisis* and institutional regularity." *Id.* But that is the very error that the district court committed here by concluding that this Court's holding in *McVeigh I* was non-binding in part because "the Supreme Court had not endorsed in *McVeigh II* the Second Circuit's discussion of generally applicable state laws in *McVeigh I*." J.A. 139 (alteration adopted).

C. This Court's Analysis in *McVeigh I* Was Not Dicta

Similarly, the district court erred in concluding that this Court's interpretation of FEHBA's preemption clause was non-binding dicta. *See* J.A. 138–40. In the district court's view, this Court's interpretation of FEHBA's preemption clause was dicta because this Court noted in its conclusion that "even if federal law is likely to preempt McVeigh's defenses . . . this is insufficient to create federal jurisdiction." *McVeigh I*, 396 F.3d at 150; *see* J.A. 138. But that misunderstands this Court's holding and the nature of its disagreement with the dissent. This Court devoted the

bulk of its analysis—over five pages of the Federal Reporter—to concluding that FEHBA does not preempt state laws of general application. 396 F.3d at 145–50. That analysis was necessary to this Court's holding because Empire argued, and Judge Raggi in dissent agreed, that FEHBA's preemption clause (1) applied to state laws of general application, like the contract claim in *McVeigh*, and (2) thereby provided a basis to apply federal common law in that dispute, such that the case could be heard in federal court. *See id.* at 143 ("Empire also argues—and our dissenting colleague agrees—that federal jurisdiction exists pursuant to FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1). . . . [W]e disagree. . ."); *contra id*. at 155–60 (Raggi, *J.*, dissenting).

The majority's rejection of that argument was thus essential to its conclusion that federal subject-matter jurisdiction did not lie—the opposite of dicta. *See CompassCare v. Hochul*, 125 F.4th 49, 59 n.6 (2d Cir. 2025) ("binding precedent includes not only the result but also those portions of the opinion necessary to that result" (internal quotation marks omitted)); *CREW v. FEC*, 993 F.3d 880, 886 (D.C. Cir. 2021) ("Yet what CREW deems dicta was essential to the holding of *Commission on Hope* because the court rejected the dissent's attempt to carve out the Commission's statutory interpretation from its exercise of enforcement discretion."). This Court's interpretation of FEHBA's preemption clause could not "have been deleted without seriously impairing the analytical foundations of the

holding." *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 508 (2d Cir. 1996) (internal quotation marks omitted). The issue was "before the court; was argued before the court; and was passed upon by the court. It was not dictum." *Id.* (internal quotation marks omitted); *see* Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. REV. 1249, 1256 (2006) (defining dictum as "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner").

At most, this Court's observation that preemption would not suffice to create jurisdiction was an alternative explanation for its holding—and was expressed in a small fraction of the space that this Court took to hold that FEHBA preemption did not apply to state laws of general application. *See Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 251 n.4 (2d Cir. 2021) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum" (internal quotation marks omitted)); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006) ("where two independent rationales support a decision . . . neither can be considered dictum, and each represents a valid holding of the Court").

Nor is it unusual for courts to proceed—as this Court did in *McVeigh I*—by finding that a preemption statute does not apply *at all* and thus, *a fortiori*, conclude that the statute does not confer subject-matter jurisdiction. *See, e.g.*, *Stevenson v. Bank of N.Y. Co., Inc.*, 609 F.3d 56, 59–62 (2d Cir. 2010) (holding ERISA did not

preempt state law and thus that subject-matter jurisdiction was lacking); *Chapman v. Lab One*, 390 F.3d 620, 629 (8th Cir. 2004) (holding federal preemption did not apply at all, such that it "follows naturally" that the preemption statute did not create federal jurisdiction). Indeed, the Supreme Court in *McVeigh II* acknowledged that this Court's method of addressing the issue was a legitimate one when it stated that "[i]f contract-based reimbursement claims are not covered by FEHBA's preemption provision, then federal jurisdiction clearly does not exist." 547 U.S. at 698. In other words, it is perfectly appropriate for a court to find no jurisdiction based on a preemption statute by concluding that the preemption statute did not apply at all.

For similar reasons, this Court's construction of FEHBA's preemption clause applies to this dispute even though *McVeigh I* assessed the existence of subject-matter jurisdiction, while this dispute implicates the merits of Anthem's preemption defense. This Court's holding depended on its interpretation of FEHBA's preemption clause, and it is "a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases." *United States v. Montague*, 67 F.4th 520, 531 n.2 (2d Cir. 2023), *vacated and remanded on other grounds*, 144 S. Ct. 2654 (2024) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 104 (2020)); *see Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) ("just as binding as [a] holding is the reasoning underlying it"). Thus, *McVeigh I*'s holding that FEHBA does not preempt state laws of general application applies squarely in this dispute.

D. The Supreme Court's Decision in *Nevils* Did Not Abrogate This Court's Holding in *McVeigh I*, Which Remains Correct on the Merits

In addition to deeming this Court's precedent dicta, the district court also concluded that the Supreme Court's decision in *Nevils* undermined this Court's holding. J.A. 140–42. But the Supreme Court did not opine on the issue this Court addressed and, if anything, its decision supports this Court's conclusion that FEHBA does not preempt state laws of general applicability. It provides no basis for disregarding this Court's considered analysis in *McVeigh I*.

In *Nevils*, the Supreme Court held that subrogation and reimbursement requirements in OPM's contract with insurance carriers satisfied the first preemption requirement, *i.e.*, they "relate to the nature, provision, or extent of coverage or benefits." 581 U.S. at 95. But the Court did *not* analyze whether state laws prohibiting subrogation and reimbursement "relate[] to health insurance or plans" because "[t]he parties agree[d]" that they did. *Id.* at 94. The Court therefore proceeded on that assumption and did not analyze the second preemption requirement, even as the Court described it as a distinct "precondition[]" to federal preemption. *Id.* The Supreme Court also implied agreement with this Court's interpretation of the second preemption prong—*i.e.*, that preemption only extends to state laws specifically relating to insurance, not state laws of general applicability. The Supreme Court twice described FEHBA as providing for "preemption of state

insurance law"—not all state laws that might be invoked in disputes over FEHBA benefits. *See id.* at 98 ("Without § 8902(m)(1), there would be no preemption of state insurance law."); *id.* at 99 n.5 ("This case involves only Congress' preemption of state insurance laws . . .").

In any event, because the Supreme Court did not address the meaning of FEHBA's second preemption requirement in light of the parties' agreement it was satisfied, *Nevils* did not abrogate this Court's interpretation of that requirement. *See Art & Antique Dealers League of Am., Inc. v. Seggos*, 121 F.4th 423, 437 (2d Cir. 2024) ("a party's concession on a disputed issue may control the outcome of the particular dispute between the parties, but it does not necessarily establish a legal precedent, which, under the rule of *stare decisis*, will control the decision of other unrelated cases"), *cert. denied*, 145 S. Ct. 2732 (2025). As this Court has explained, "[w]hen the Supreme Court expressly disclaims any view on an issue covered by one of our precedents, it cannot be said that its opinion has broken the link on which we premised our prior decision, or undermined an assumption of that decision, such that we are now free from the precedential force of our prior panel decision." *Garcia Pinach v. Bondi*, 147 F.4th 117, 126 n.5 (2d Cir. 2025) (internal quotation marks omitted). This Court "cannot disregard our binding precedents simply by intuiting a new principle that *might* be consistent with later Supreme Court cases, but not necessarily dictated by them, particularly where the Supreme Court has explicitly

told us that it is *not* speaking to the issue at hand." *Id.* Because the Supreme Court did not address the second preemption requirement, this Court's analysis of that requirement remains binding. *See also Chery v. Garland*, 16 F.4th 980, 987 (2d Cir. 2021) (holding that earlier Second Circuit precedent "remains good law" after Supreme Court decision because Supreme Court "did not question" the issue addressed in Second Circuit case); *DiLeo v. Comm'r*, 959 F.2d 16, 19 (2d Cir. 1992) (holding that even when the Supreme Court abrogates one part of Second Circuit precedent, that precedent "remains the law in this circuit" on an issue that "the Supreme Court did not address").

The district court nevertheless concluded that *Nevils* "undercut" this Court's analysis in *McVeigh I* in three respects, such that the district court could adopt a contrary interpretation of FEHBA. J.A. 141. But none of those reasons, alone or in combination, authorized the district court to depart from this Court's precedent construing FEHBA's second preemption condition.

First, the district court reasoned that *McVeigh I* had applied a "presumption against preemption" when construing FEHBA that the Supreme Court declined to apply in *Nevils*. J.A. 141. But the Supreme Court in *Nevils* neither endorsed nor categorically rejected such a presumption. *See* 581 U.S. at 97. Rather, *Nevils* merely rejected the plaintiff's argument that the Supreme Court itself had identified (in *McVeigh II*) two equally "plausible" interpretations of FEHBA's first preemption

condition; thus, the Court found no reason to apply a presumption against preemption. *Id.* And although the Supreme Court has in recent years clarified that an express preemption clause must be construed according to its plain language without regard to any presumption, *see Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016), this Court's analysis in *McVeigh I* did not turn on the "presumption against preemption." Rather, this Court relied on enduring principles of statutory interpretation, principally the canon against surplusage. *See McVeigh I*, 396 F.3d at 146–47; *Pulsifer v. United States*, 601 U.S. 124, 142–43 (2024) (rejecting reading of a statute that, as in *McVeigh I*, would render a provision "meaningless" such that it would perform "no independent work").

And even if this Court's opinion in *McVeigh I* had relied more significantly on a presumption against preemption—which it did not—the Supreme Court has instructed that a court's interpretation of a statute is "still subject to statutory *stare decisis* despite our change in interpretive methodology." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (citing *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008)). So the Supreme Court's recent disfavor of a presumption against preemption, in cases like *Puerto Rico*, was no basis for the district court to depart from the precedent set in *McVeigh I*.[5]

[5] Moreover, whether or not there is a "presumption against preemption," this Court continues to recognize that "where the text of a preemption clause is ambiguous or open to more than one plausible reading, courts have a duty to accept

Second, the district court erred by concluding that *Nevils* "undercut" this Court's analysis because "the state-law prohibition against subrogation and reimbursement at issue in *Nevils* had nothing in particular to do with health insurance or plans." J.A. 141 (internal quotation marks omitted). In the district court's view, that was "another clue" that state laws of general application can be preempted by FEHBA. *Id.* (internal quotation marks omitted). That argument fails for two reasons.

First, as the district court acknowledged, the Supreme Court in *Nevils* did not "assess the second preemption requirement in light of the parties' agreement that it was satisfied." J.A. 141 (internal quotation marks omitted); *see Nevils*, 581 U.S. at 94–95. But precisely because the issue was not disputed, the Supreme Court did not opine on the proper interpretation of the second preemption requirement; it addressed only the proper construction of the *first* preemption requirement. *Nevils*, 581 U.S. at 94–96. Thus, the Supreme Court's holding that subrogation and reimbursement requirements in FEHBA contracts satisfy the first preemption requirement did nothing to address—at the second preemption step—what *kind* of laws are preempted by FEHBA. *See supra* at 22–23 (collecting cases holding that,

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the reading that disfavors pre-emption." *Council for Responsible Nutrition*, 159 F.4th at 171; *see Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). The fact that this Court adopted Plaintiffs' interpretation of the statute in *McVeigh I* is reason enough to conclude that the statute is, at minimum, "open to" Plaintiffs' reading of the statute.

when the Supreme Court does not address issue resolved in prior Second Circuit precedent, the Supreme Court's decision cannot be said to abrogate Second Circuit precedent).[6]

But in any event, the district court erred in concluding that the state laws at issue in *Nevils*—prohibiting subrogation and reimbursement in the insurance context—"had nothing in particular to do with health insurance or plans." J.A. 141 (internal quotation marks omitted). To the contrary, the anti-subrogation and anti-reimbursement laws in *Nevils* directly regulated insurance, and the Supreme Court described them as "state insurance laws." 581 U.S. at 99 n.5; *see also, e.g.*, *World Trade Ctr. Props. LLC v. QBE Int'l Ins. Ltd.*, 627 F. App'x 10, 13 (2d Cir. 2015) ("Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of the insured so that it may recover from the third party legally responsible for the loss." (internal quotation marks omitted)). The district court was therefore wrong to believe that the Supreme Court indicated in *Nevils* that state laws *unrelated* to insurance were preempted by FEHBA.

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[6] The district court's interpretation of *Nevils* would also imply that Justice Sotomayor—the author of this Court's opinion in *McVeigh I*—joined *Nevils* even though (in the district court's view) *Nevils* adopted a contrary interpretation of FEHBA's second preemption prong than the one this Court adopted in *McVeigh I*. The better interpretation, of course, is that *Nevils* did not contradict this Court's construction of the second preemption prong in *McVeigh I*.

Third and finally, the district court erred in concluding that *Nevils* abrogated *McVeigh I* by adopting a "broad[er] reading" of the phrase "relate to" than this Court did in *McVeigh I*. J.A. 141. True enough, the Supreme Court in *Nevils*, while construing FEHBA's first preemption requirement, described the phrase "relate to" as an "expansive phrase" that "expresses a broad pre-emptive purpose." 581 U.S. at 95–96 (internal quotation marks omitted). But however broad the phrase "relate to" might be, this Court must still ensure that the first and second prongs of FEHBA's preemption clause are given "independent meaning" so as to avoid making either prong superfluous. *Rivera-Perez v. Stover*, 171 F.4th 196, 208 n.14 (2d Cir. 2026). Nothing in *Nevils* undermines this Court's conclusion that construing the second prong to apply to laws of general applicability would deprive the second FEHBA prong of "any independent meaning." *McVeigh I*, 396 F.3d at 146.

Put another way, FEHBA's instruction that it only preempts state law "which relates to health insurance or plans" would have no purpose if Congress intended to preempt state laws of general applicability. Congress could simply have omitted that language, secure in the knowledge that FEHBA's first preemption requirement already ensured that preemption would apply only to contract terms "relat[ing] to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)[.]" 5 U.S.C. § 8902(m)(1). No matter how broadly the Supreme Court has defined the phrase "relate to," the district court's interpretation of FEHBA

runs headlong into the canon against surplusage. *See City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." (internal quotation marks omitted)). On the other hand, no one disputes that this Court's interpretation of the second preemption prong in *McVeigh I* avoids surplusage—to the contrary, that interpretation gives full effect to the words Congress drafted by specifying what type of state law is preempted (those that "relate[] to health insurance or plans"). *See McVeigh I*, 396 F.3d at 146. The district court's reading, on the other hand, fails to give full meaning to every word Congress wrote; it renders irrelevant the second preemption prong in any situation where the first prong is satisfied. *Id.* at 146 & n.11.

The district court thus erred in concluding that *Nevils* sufficiently "neutralizes *McVeigh I*" such that the district court could disregard it. J.A. 142. At the very least, *Nevils* did not clearly abrogate this Court's holding in *McVeigh I*, which therefore retains its status as binding precedent. As this Court has explained many times, "a District Court must follow controlling precedent—even precedent the District Court believes may eventually be overturned—rather than preemptively declaring that our caselaw has been abrogated." *Packer*, 105 F.4th at 50. This Court has similarly rejected the proposition that it can "disregard our binding precedents simply by intuiting a new principle that *might* be consistent with later Supreme Court cases,

but not necessarily dictated by them, particularly where the Supreme Court has explicitly told us that it is *not* speaking to the issue at hand." *Garcia Pinach*, 147 F.4th at 126 n.5. But in any event, ordinary principles of statutory construction confirm that *McVeigh I*'s interpretation of FEHBA's preemption clause remains correct—because only that reading gives each prong of the preemption clause independent meaning.[7]

The district court believed that it could construe both FEHBA preemption prongs to have independent meaning because there might be situations in which a dispute "(1) centers on contract terms specifically relating to health coverage but (2) does not involve the enforcement or construction of those contract terms." J.A. 143 (quoting *McVeigh I*, 396 F.3d at 146). As the district court acknowledged, *McVeigh I* rejected this argument, finding it "difficult . . . to imagine such a case." *Id.* (quoting *McVeigh I*, 396 F.3d at 146). The district court disagreed with this Court, giving as an example a state-law medical malpractice claim, which might

[7] The district court also expressed concern that allowing state-law claims to proceed would undermine the interests in uniform application of FEHBA policies. J.A. 144. But Plaintiffs' claims are fully consistent with Anthem's obligations under federal law to provide truthful information to enrollees. *See DCC Propane*, 147 F.4th at 181 ("It is difficult to see how state-law remedies for violation of the federal regulations would detract from the uniformity of the program or interfere with its effective administration." (internal quotation marks omitted and alteration adopted)). If another plaintiff were ever to pursue claims in conflict with federal policy, that would be properly addressed under principles of conflict preemption—not when construing the plain language of FEHBA's express preemption clause. *See McVeigh I*, 396 F.3d at 141–42.

reference the existence of a benefit plan but not *relate to* the health insurance plan. *Id.* (citing *Roach v. Mail Handlers Benefit Plan*, 298 F.3d 847, 849–51 (9th Cir. 2002)). This Court was well aware of *Roach*, having cited it in *McVeigh I*, so it does not constitute new authority that would give the district court license to disregard this Court's precedent in *McVeigh I*. *See* 396 F.3d at 147.

But in any event, the district court's medical malpractice example fails on its own terms because it does not illustrate a situation where one FEHBA preemption prong would be satisfied but the other prong would not be. *See* J.A. 143–44. To the contrary, such malpractice claims do not satisfy *either* preemption prong. The mere fact that a medical malpractice plaintiff may "reference the existence of a benefit plan"—for instance, to show that the physician was an authorized provider under the plan, *see Roach*, 298 F.3d at 851—is not enough to trigger the first FEHBA preemption prong. FEHBA has no preemptive force until the dispute involves a FEHBA contract term that "relate[s] to the nature, provision, or extent of coverage or benefits." 5 U.S.C. § 8902(m)(1). But such contractual terms are generally irrelevant to malpractice claims, which instead focus on the quality of care provided. *See Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 155 (10th Cir. 1995) (medical malpractice claim "does not involve the administration of benefits . . . promised by the plan" but merely "alleges negligent care by the doctor"). So a medical malpractice claim will trigger neither FEHBA preemption precondition—it neither

involves a FEHBA contract term relating to the nature, provision, or extent of coverage or benefits nor involves a state law which relates to health insurance or plans.

The district court's example therefore does not demonstrate that its interpretation of FEHBA would give effect to one preemption precondition in a situation where the *other* precondition would not apply. Accordingly, it does nothing to solve the superfluity problem this Court identified in *McVeigh I*. *See* 396 F.3d at 146 (rejecting same construction of FEHBA because "in such circumstances [] the second limiting condition would likely have no meaning that is independent and distinct from the *first* limiting condition, which requires that the contract terms at issue specifically relate to health coverage in order for preemption to occur"). And as this Court recently recognized in an analogous context, Congress does not use two distinct terms in a statute to cover the same conduct, because "there would have been no reason for Congress to use both." *Barbosa da Cunha v. Freden*, 175 F.4th 61, 77 (2d Cir. 2026) (citing *Biden*, 597 U.S. at 798). Even when a party argues that its interpretation gives one of the terms "*some* meaning," however limited, this Court will reject that interpretation when "Congress could have achieved the same outcome by using" one of those terms alone and "omitting" the other "entirely." *Id.* The same principle applies here: this Court can give full effect to both of FEHBA's

preemption requirements only by adhering to the interpretation this Court adopted in *McVeigh I*.

The district court's reliance on two out-of-circuit decisions was likewise misplaced. *See* J.A. 142. The district court correctly noted that the Fifth Circuit has held that laws of general application can be preempted by FEHBA because, in that court's view, laws of general applicability can "relate to" health insurance or plans. *Gonzalez v. Blue Cross Blue Shield Ass'n*, 62 F.4th 891, 904 (5th Cir. 2023). But the Fifth Circuit reached that conclusion without addressing this Court's opinion in *McVeigh I* and the surplusage problem this Court strove to avoid. So too with the Sixth Circuit's opinion in *Ohio ex rel. Yost v. Ascent Health Servs., LLC*, 165 F.4th 999, 1012 (6th Cir. 2026), which held that defendants could remove a case to federal court based on a "colorable" defense that state-law claims of general applicability were preempted by FEHBA. The Sixth Circuit did not reach a final decision on the merits and likewise did not address the surplusage problem this Court addressed in *McVeigh I*. In any event, out-of-circuit precedent cannot abrogate a holding of this Court. *See Jabar v. U.S. Dep't of Just.*, 62 F.4th 44, 51–52 (2d Cir. 2023) (per curiam).

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In short, both as a matter of *stare decisis* and ordinary statutory interpretation principles, this Court should adhere to the interpretation of FEHBA's preemption

clause that it reached in *McVeigh I*: FEHBA does not preempt state laws of general application.

II. Plaintiffs Assert Claims of General Application That Are Not Preempted By FEHBA

Plaintiffs' claims are therefore not preempted because they arise under state law of general applicability—in other words, they do not arise under state law that specifically governs insurance.[8] Plaintiffs pursue claims for breach of contract, fraudulent misrepresentation, unjust enrichment, and deceptive business practices and advertising under N.Y. Gen. Bus. L. §§ 349 and 350—all of which apply to far more than health insurance. This Court recognized as much in *McVeigh I* with respect to claims for breach of contract, holding that FEHBA did not preempt the state-law contract action at issue there. *See* 396 F.3d at 145–47. The same is true of Plaintiffs' other causes of action. *See, e.g.*, *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 118 n.6 (2d Cir. 2001) (noting that claims of fraud and unjust enrichment "are all of a generic nature and are capable of application to a wide range of contexts"); *New York v. Arm or Ally, LLC*, 718 F. Supp. 3d 310, 330 n.10 (S.D.N.Y. 2024) (stating that General Business Law §§ 349 and 350 "are general consumer-protection laws that prohibit deceptive acts and false advertising" and are therefore "statutes of general applicability" (internal quotation marks omitted)).

[8] Plaintiffs do not appeal, however, the district court's dismissal of their claim under New York Insurance Law § 4226 (Count Four of Plaintiffs' Complaint).

Anthem has never disputed that if state laws of general applicability are *not* preempted by FEHBA, the foregoing claims should not be dismissed on express preemption grounds.

In short, because Plaintiffs pursue claims arising under state laws of general applicability, their claims are not preempted by FEHBA.

CONCLUSION

The Court should vacate the district court's judgment and remand for further proceedings.

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