No. 21-676

IN THE

Supreme Court of the United States

SUSAN K. MUSTA,

Petitioner,

v.

MENDOTA HEIGHTS DENTAL CENTER,
and HARTFORD INSURANCE GROUP,

Respondents.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

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**BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Does the federal Controlled Substances Act—which criminalizes the manufacture, distribution, or possession of marijuana and does not include an exception for medical marijuana—preempt an order under the Minnesota Workers' Compensation Act requiring an employer to reimburse an injured employee for the cost of obtaining medical marijuana?

CORPORATE DISCLOSURE STATEMENT

Though misidentified in the caption and in the proceedings below as "Hartford Insurance Group," the actual insurer involved in this action is Hartford Casualty Insurance Company. (A relevant legal entity called "Hartford Insurance Group" does not, to the best of our knowledge, exist.) Hartford Casualty Insurance Company is wholly owned by Hartford Accident and Indemnity Company, a Connecticut corporation, which is wholly owned by Hartford Fire Insurance Company. Hartford Fire Insurance Company, a Connecticut corporation, is a wholly owned subsidiary of The Hartford Financial Services Group, Inc., a Delaware corporation. The Hartford Financial Services Group, Inc. is a publicly traded corporation that has no parent corporation. To the best of our knowledge, no publicly held corporation currently owns 10% or more of its common stock.

Mendota Heights Dental Center, P.A. was a Minnesota corporation that was formally dissolved in 2020. To the best of our knowledge, it had no parent corporation and no publicly held corporation owned 10% or more of its stock.

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INTRODUCTION

Petitioner Susan K. Musta purchased marijuana in the state of Minnesota. At all relevant times, her possession of marijuana was a federal crime pursuant to the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*. Her possession of marijuana did not, however, also separately subject her to criminal liability under Minnesota state law. That is because Minnesota law authorizes individuals with certain qualifying conditions—in Musta's case, "chronic pain" stemming from a work-related injury—to use marijuana for medical purposes. *See* Minn. Stat. §§ 152.21-.37. Following her initial marijuana purchase, Musta sought reimbursement from Respondents Mendota Heights Medical Center and Hartford Insurance Group pursuant to the Minnesota Workers' Compensation Act, which requires employers to "furnish" injured employees with medical treatments. Minn. Stat. § 176.135, subd. 1.[1] The Minnesota Supreme Court held that the CSA preempted Respondents' reimbursement obligation, reasoning that state law could not compel Respondents to participate in conduct that federal law forbids.

The Minnesota Supreme Court's decision involved a straightforward application of this Court's well-established federal preemption rules. Under long-standing precedent, a federal statute preempts a state statute where the two "conflict" and "compliance with both federal and state regulations is a physical

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[1] As noted above, the actual insurer is the Hartford Casualty Insurance Company, an indirect subsidiary of the Hartford Financial Services Group. For simplicity, we use the inaccurate term "Hartford Insurance Group" for consistency with the Petition and the decision below.

impossibility." *Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985) (internal quotation marks omitted); *see Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479–80 (2013); *Arizona v. United States*, 567 U.S. 387, 399 (2012). The Minnesota Supreme Court faithfully applied this precedent, recognizing that an employer could not possibly comply with both a state-law obligation to aid an employee in possessing medical marijuana and a federal-law obligation not to aid anyone in possessing medical marijuana.

In seeking review of the Minnesota Supreme Court's decision, Musta acknowledges that the tension between new state laws permitting medical marijuana use and the federal law that prohibits such use has created a range of legal issues that reach far beyond the workers' compensation context. For several reasons, the U.S. Supreme Court should not use this particular case to wade into that quagmire.

First, this case is a bad vehicle for review because Musta's employer no longer exists. As discussed below, the corporation that employed Musta was formally dissolved in 2020, prior to the issuance of the Minnesota Supreme Court's decision. The legal effect of Musta's employer's current nonexistence may complicate or impede the Court's analysis of the underlying merits issues. *See infra* Section I.

The Court should also deny the Petition for review because any further opinion issued in this case could swiftly become moot. The Minnesota Supreme Court's decision, as well as other state supreme court decisions on which the Petition relies, all rest substantially on a state of legal affairs that is in a period of rapid change: States are crafting new marijuana laws every year. The federal government's response to

these new laws has been unpredictable to say the least, consisting of Department of Justice ("DOJ") internal rules that have been rescinded with changing presidential administrations, as well as appropriations bill riders that limit funding for marijuana prosecutions for just one year at a time while offering no assurances for any subsequent year. And public pressure continues to grow in support of federal decriminalization of marijuana use—a change that could occur imminently by action of the current attorney general. At any moment, key circumstances could shift and nullify the reasoning behind any U.S. Supreme Court opinion issued in this matter. *See infra* Section II.

Moreover, of the numerous preemption questions triggered by state medical marijuana laws, the workers' compensation question is among the newest sources of debate in state supreme courts. Although *forty-seven* states now have some type of medical marijuana laws, only *four* state supreme courts have yet had an opportunity to consider whether federal law preempts their state marijuana laws that require employers to reimburse employees for medical marijuana purchases. A narrow split has emerged only within the last year, with three of the four relevant decisions issued in 2021 alone. Supreme Court review at this stage would be premature, as the Court would benefit from allowing the state courts more time to develop and address the issues. *See infra* Section III.

Further review is also unnecessary because the Minnesota Supreme Court's decision is plainly correct and rests squarely on federal preemption principles that require no further clarification. In seeking review of that decision, Musta mischaracterizes federal law

and confuses the illegality of conduct with the likelihood of getting away with illegal conduct. *See infra* Section IV.

This Court should deny the Petition.

STATEMENT OF THE CASE

A. Statutory Background

In 1970, Congress enacted the CSA with the "main objectives" of "conquer[ing] drug abuse and . . . control[ling] the legitimate and illegitimate traffic in controlled substances," including marijuana. *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). The CSA categorizes controlled substances into five schedules "based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." *Id*. at 13. The CSA currently lists marijuana in "Schedule I," the category for controlled substances deemed to pose the highest risk. 21 U.S.C. § 812(c)(Sched.I)(c)(10)). By definition, a Schedule I controlled substance "has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B). This scheduling renders the manufacture, distribution, or possession of marijuana a federal crime. 21 U.S.C. § 844(a); *see Raich*, 545 U.S. at 14.

The CSA does not provide an exception for medical marijuana use. Nor does it provide even a more limited exception for medical marijuana use in states that have decriminalized such use under state law. *See United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 491 (2001) ("[A] medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act."). In the more than half a century since the enactment of the CSA,

marijuana has never been removed from Schedule I and the use of marijuana has, without relevant limitation,[2] always remained a federal crime.

The federal aiding-and-abetting statute, 18 U.S.C. § 2(a), provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." This statute "does not create a separate crime, but rather abolishes the common law distinction between the principals and accessories." *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177-78 (6th Cir. 1992); *accord United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984). Section 2(a) "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond v. United States*, 572 U.S. 65, 70 (2014). This Court has clarified that "a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense," and that the defendant need only "(1) take[] an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id*. at 71, 73 (internal quotation marks and alteration omitted). Under § 2(a), an individual who aids and abets a CSA-proscribed crime—such as possession of marijuana—is liable as a principal and can be convicted of that crime. *See, e.g.*, *United States v. Smith*, 573 F.3d 639, 646 (8th Cir. 2009).

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[2] The CSA provides only one exception, which is not at issue in this case: It permits marijuana use as part of a research study preapproved by the Food and Drug Administration. *See* 21 U.S.C. § 823(f).

In 2014, the state of Minnesota amended its THC Therapeutic Research Act ("THC Act") to create a program under which a person "diagnosed with a qualifying medical condition" may obtain and use medical marijuana without criminal liability under Minnesota law. *See* Minn. Stat. §§ 152.21-.37. Originally, the THC Act as amended listed categories of qualifying medical conditions that included certain types of "cancer" and "terminal illness." Minn. Stat. § 152.22, subd. 14. But the THC Act also permitted Minnesota's Commissioner of Health to approve new qualifying conditions. *Id*. The Commissioner of Health has since approved a range of additional qualifying conditions, including "[i]ntractable pain," "[c]hronic pain," "PTSD," and "Autism Spectrum Disorder." 45 Minn. Reg. 1299 (June 14, 2021).

Enrollment in Minnesota's medical marijuana program is entirely voluntary and requires a formal application, including a doctor's certification and payment of application fees. Minn. Stat. § 152.27, subd. 6(a). An enrollee must re-submit a doctor's certification annually. Minn. Stat. § 152.27, subd. 3(b). An enrollee must also only obtain medical marijuana from one of two registered manufacturers in the state. Minn. Stat. § 152.25, subd. 1(a). The THC Act permits and decriminalizes marijuana use under state law where such procedural requirements are satisfied. As noted above, however, the federal CSA still prohibits and criminalizes marijuana use under the same circumstances. *See, e.g.*, *United States v. Schostag*, 895 F.3d 1025, 1028 (8th Cir. 2018) ("Although some medical marijuana is legal in Minnesota as a matter of state law, the state's law conflicts with federal law.").

Finally, the Minnesota Workers' Compensation Act obligates "[e]very employer . . . to pay compensation in every case of personal injury . . . of an employee arising out of and in the course of employment without regard to the question of negligence." Minn. Stat. § 176.021, subd. 1. To satisfy this obligation, the employer must "furnish any medical . . . treatment, including . . . medicines" necessary to treat an employee's work-related injury. Minn. Stat. § 176.135, subd. 1.

B. Proceedings Below

In 2019, Musta received approval under the THC Act to use medical marijuana to treat "chronic pain" that she had been experiencing since a work-related injury sixteen years earlier. Pet. App. 3a; *see* Pet. 8-10. Musta then obtained medical marijuana from a state-authorized distributor. Pet. App. 48a. She paid for her initial marijuana purchase out-of-pocket but requested reimbursement from Respondents under the Minnesota Workers' Compensation Act. *Id*. at 48a-49a. Respondents denied the request for reimbursement on the ground that federal law preempts any state-law obligation to reimburse employees for buying marijuana. *Id*. at 49a.

On August 8, 2019, the parties appeared before a compensation judge. *Id.* At issue was only federal preemption, because Respondents, for the purposes of the proceeding, did not challenge whether Musta's use of marijuana and reimbursement request complied with requirements set by Minnesota state law. *Id*. The compensation judge recommended that an Administrative Law Judge ("ALJ") certify the federal preemption question to the Minnesota Supreme Court. *Id*. at 6a. The ALJ did so, but the Minnesota

Supreme Court declined to accept the certified question and sent the matter back to the compensation judge for resolution. *Id*.

On November 13, 2019, the compensation judge concluded that there was no federal preemption and ordered Respondents to reimburse Musta for the cost of her marijuana. *Id*. at 59a. Respondents appealed to the Worker's Compensation Court of Appeals, which held that it lacked authority to address federal preemption; avoiding the sole disputed issue in the case, it affirmed the compensation judge's order insofar as it required reimbursement. *Id*. at 47a-52a.

On October 13, 2021, the Minnesota Supreme Court issued a decision reversing the decision of the Worker's Compensation Court. *Id*. at 1a-30a. It first agreed with the Worker's Compensation Court that that court lacked jurisdiction under Minnesota law to decide the preemption issue. *Id*. at 11a. The Minnesota Supreme Court then held that the CSA's prohibition on marijuana use preempts Minnesota law insofar as it requires an employer to "'furnish'" an injured employee with medical marijuana by reimbursing the purchase of that marijuana. *Id*. at 3a-4a, 29a-30a (quoting Minn. Stat. § 176.135, subd. 1 (2020)). The court reasoned that state law could not compel Respondents to facilitate marijuana possession in violation of federal law. *Id*. at 21a. The court also noted that compliance with an order requiring reimbursement for medical marijuana "would expose the employer to criminal liability under federal law for aiding and abetting [the employee's] unlawful possession of cannabis." *Id*. at 4a. The court concluded: "As it is impossible to comply with both state and federal law, the compensation court's order is preempted by the CSA." *Id*. at 29a (footnote omitted).

Musta then filed her Petition to this Court, challenging the Minnesota Supreme Court's analysis of the federal preemption question.

REASONS FOR DENYING THE PETITION

I. The petition presents case-specific questions.

As a preliminary matter, this case is a poor vehicle for review because the dissolution of Musta's employer could muddle or hinder further review of the underlying substantive federal preemption question.

As clearly reflected in the records of the Secretary of State of Minnesota,[3] Musta's employer, Mendota Heights Dental Center, P.A. (misidentified as only "Mendota Heights Dental Center" in the captions below), was formally dissolved in 2020—before the Minnesota Supreme Court issued its decision in this case. *See* Business Record Details for "Mendota Heights Dental Center, P.A.," Minnesota Sec'y of State, https://mblsportal.sos.state.mn.us/Business/

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[3] This Court may take judicial notice of the records of the Minnesota Secretary of State. *See* Fed. R. Evid. 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *see also, e.g.*, *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015) (taking judicial notice of "public records contained on the Mississippi Secretary of State's and the Virginia State Corporation Commission's websites" because such records "cannot reasonably be questioned"); *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008) (affirming district court's decision "to take judicial notice of [a] financing statement . . . filed with the Minnesota Secretary of State"); *cf. Knight v. United Land Ass'n*, 142 U.S. 161, 169 (1891) (taking judicial notice of "the records of the interior department").

SearchDetails?filingGuid=d1b69eab-abd4-e011-a886-001ec94ffe7f (last visited Jan. 11, 2022).[4] The Minnesota Supreme Court's decision did not address the legal effect of the dissolution.

Musta's employer's dissolution could complicate or impede this Court's analysis of the underlying federal preemption question. The dissolution raises idiosyncratic case-specific questions, including to what extent an employer *that does not exist* has state-law obligations to furnish medical marijuana and can be liable under federal law for aiding and abetting drug crimes proscribed by the CSA, and what effect (if any) the employing corporation's dissolution has on the potential federal law liability of a workers' compensation insurer satisfying an obligation of a now-defunct entity. To the extent that the Court wishes to address the relationship between the CSA and state medical marijuana law, cases will arise that pose fewer complex case-specific questions and are likely to yield a more broadly-applicable holding. In short, this is a poor vehicle for review of the question presented.

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[4] The website of the Minnesota Secretary of State reflects that another Minnesota dentist currently uses the name "Mendota Heights Dental Center" for his practice, but it is not the same corporation as "Mendota Heights Dental Center, P.A." and the new corporation named "Mendota Heights Dental Center" did not exist at the time of Musta's employment and injury. *See* Business Record Details for "Mendota Heights Dental Center," Minnesota Sec'y of State, https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=dbfaf68a-cd87-e911-9175-00155d01b32c (last visited Jan. 11, 2022); *see also* Pet. App. 48a (identifying Musta's injury date as February 11, 2003).

II. An opinion issued in this case could swiftly become moot.

This is also not the right time for the U.S. Supreme Court to address the federal preemption issue that this case presents. The legal framework regarding marijuana use is currently evolving at a rapid pace, which could at any moment alter or eliminate key building blocks for any decision in this matter and potentially render the decision itself moot.

Nationwide, state law on marijuana use is in a period of seismic change. A growing number of states have recently enacted legislation to limit or eliminate state-law criminal liability for marijuana use. New laws are enacted every year, with the scope of permitted marijuana use varying widely by state, and with each state offering a unique set of procedural requirements for use. *See, e.g.*, *State Medical Cannabis Laws*, National Conference of State Legislatures, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx; *Map of Marijuana Legality by State*, DISA Global Solutions, https://disa.com/map-of-marijuana-legality-by-state.

The federal government's response to the ongoing shifts in state law appears to be a work in progress. *See Wright's Case*, 156 N.E.3d 161, 165 (Mass. 2020) ("[T]he current legal landscape of medical marijuana law may, at best, be described as a hazy thicket."); Pet. App. 22a (describing "the federal government's position on criminal prosecution of cannabis offenses" as "in a state of flux"). During the administration of President Barack Obama, guidance from senior DOJ personnel deprioritized—but did not prohibit—federal prosecution for marijuana offenses. However, during the administration of President Donald Trump, the Attorney General rescinded "previous

nationwide guidance specific to marijuana enforcement." *Memorandum for All United States Attorneys* 1 (Jan. 4, 2018); *see Wright's Case*, 156 N.E.3d at 165, 169 ("[T]he Department of Justice has issued, revised, and revoked memoranda explaining its marijuana enforcement practices and priorities, leaving in place no clear guidance. . . . [T]he Department of Justice has reversed its own stance toward the prosecution of medical marijuana cases multiple times."). The Biden administration has sent mixed messages on marijuana use, expressing some public support for legalization while simultaneously making headlines for suspending marijuana users within the administration's own staff. *See* Andrew Wasserman, *Cannabis and federal legalization: What to expect in 2021*, 2021 WL 1658526 (2021) (describing how the Biden administration "has sown confusion about future legalization efforts"). Future changes in presidential administrations "could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses." *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

In another fleeting and constantly-disappearing attempt to grapple with the influx of state marijuana laws, Congress has passed certain annual riders in appropriations bills that prohibit the use of congressionally-allocated funds to prevent the implementation of "[s]tate laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014). These riders have appeared in annual appropriations bills since 2014. *See, e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020); *United States v. Pisarski*, 965 F.3d

738, 741 (9th Cir. 2020); *United States v. Trevino*, 7 F.4th 414, 419-20 (6th Cir. 2021). The current rider, contained in the Consolidated Appropriations Act of 2021, will remain in effect only until February 18, 2022, under the Further Extending Government Funding Act, 2021, Pub. L. No. 117-70, 135 Stat. 1499 (2021).

Many of Musta's arguments focus specifically on the effect of these riders, suggesting they somehow ameliorate the conflict between state and federal law. *See, e.g.*, Pet. at 2-4, 6, 19, 29-30. As discussed in further detail in Section IV below, these arguments are wrong on the merits, as the riders do not decriminalize marijuana at the federal level and only address the likelihood of prosecution for individuals who have violated federal law. But, perhaps more importantly for purposes of the instant Petition, these arguments also rest substantially on speculation that the riders will appear in future appropriations bills.

In fact, this Congressional stop-gap measure is ephemeral by design. The appropriations act changes every year and, as the Minnesota Supreme Court recognized, there is *no guarantee* that the restriction will appear in any future act. *See* Pet. App. 22a ("The riders are merely temporary measures that can be rescinded at any time . . . ."). As the Ninth Circuit has recognized, should the rider not appear in a future year's appropriations bill, a violator of the CSA could be criminally prosecuted *even if the violation occurred in a year when the rider was in effect*:

> The federal government can prosecute [marijuana] offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain

> individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding.

McIntosh, 833 F.3d at 1179 n.5. Thus, should this Court issue a decision resting on the existence of an appropriations rider, that decision could become baseless in a matter of months. (And, again, no decision in this case should actually turn on the riders; even with these transient measures, marijuana remains listed in Schedule I and the conflict between state and federal law persists. *See infra* Section IV.)

The conflict between the CSA and Minnesota's THC Act could also entirely resolve at any time. One possible resolution of the conflict would be the rescheduling of marijuana. Rescheduling is an administrative prerogative of the federal executive branch. "The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules." *Raich*, 545 U.S. at 14–15. The Attorney General may initiate the rescheduling of marijuana "(1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party." 21 U.S.C. § 811(a). As state law treatment of marijuana continues to evolve nationwide, "considerable efforts" have been made to seek rescheduling under federal law. *Raich*, 545 U.S. at 15. While these efforts have not yet succeeded, *see, e.g.*, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 FR 53767-01 (Aug. 12, 2016), national support for marijuana legalization at

the federal level is substantial and growing, *see, e.g.*, Danielle Grant-Keane, *The Unattainable High of the Marijuana Industry*, 90 Wis. L. 14, 20 (2017) ("The legalization of medical and recreational marijuana will only continue to grow. Only 12 percent of individuals supported legalizing cannabis in 1969. Today, more than 60 percent of the public supports marijuana legalization. And support for medicinal marijuana under the supervision of a doctor is now close to 90 percent." (footnotes omitted)). A decision by the federal executive branch to reschedule marijuana could be prompted by public opinion, political considerations, or the evolving study by scientists of the effects of marijuana.

Given that this area of law is evolving at such a rapid pace—both because states are increasingly changing their marijuana laws, and because the federal government (at both the legislative and executive levels) continues to make and weigh changes to federal law—this is not an opportune moment for this Court to take up the issue of the CSA's preemption of state workers' compensation statutes requiring reimbursement for medical marijuana purchases. The foundation under any decision by this Court in this case could crumble suddenly, rendering the decision a nullity.

III. The modest state supreme court split signals that state courts would benefit from further time to develop these issues.

In asking this Court to grant her Petition, Musta argues that further review is necessary to resolve a small 2-2 split in state supreme court authority. *See* Pet. at 16. She acknowledges that the Minnesota Supreme Court's decision in this case aligned with

the Maine Supreme Court decision in *Bourgoin v. Twin Rivers Paper Co., LLC*, which held that the CSA preempts the Maine Medical Use of Marijuana Act ("MMUMA") insofar as the MMUMA serves as the basis for an order requiring an employer to subsidize an employee's acquisition of medical marijuana. 187 A.3d 10 (Me. 2018). She also points to two decisions—*Appeal of Panaggio*, 260 A.3d 825 (N.H. 2021), and *Hager v. M&K Constr.*, 246 N.J. 1 (2021)—that point in the opposite direction. But Musta's split argument only highlights the fact that, in the veritable deluge of new marijuana laws passed in *the vast majority of states*, *see* Pet. at 3 (stating that *forty-seven* states "permit the use of marijuana or related substances for medical purposes"), only *four* state supreme courts have as of yet had time to even begin to address federal preemption in the context of workers' compensation laws. Forty-three state supreme courts have not yet addressed the issue.

This is a fledgling, emerging issue: three of those four state supreme court decisions were issued just last year. *See* Pet. at 21 (acknowledging that three of the four state supreme court decisions were "in 2021 alone"). With even just a small amount of additional time, we can expect more state supreme courts to address the relationships between their various new marijuana laws, workers' compensation laws, and the CSA. This Court would benefit from allowing the state courts more time to fully identify, develop, and resolve the key arguments on either side of the issue.

Moreover, as Musta acknowledges, the new state laws on marijuana have triggered numerous preemption issues reaching far beyond the workers' compensation context. *See* Pet. at 5 ("[C]ourts have been

bedeviled with difficult questions regarding how to apply state marijuana laws in the shadow of the federal prohibition on marijuana."). If the Court seeks to issue a decision addressing the conflict between the CSA and state marijuana laws, the Court would be better served in choosing one of the many contexts in which lower courts have had more time to issue decisions considering the relevant conflict. Some of these contexts even involve the effect of the medical marijuana laws on the employer-employee relationship.

For example, numerous state and federal courts have, for more than a decade, been considering whether state law can force an employer to accommodate an employee's medical marijuana use in violation of the CSA. Most but not all of these cases have held that a state law *cannot* force an employer to ignore a federal law. *See, e.g.*, *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 520, 529 (Or. 2010) ("[E]mployer was not required to accommodate employee's use of medical marijuana. . . . To the extent that [state law] affirmatively authorizes the use of medical marijuana, *federal law preempts that subsection*, leaving it without effect." (internal quotation marks omitted) (emphasis added)).[5] Some of the state supreme court

[5] *See also Washburn v. Columbia Forest Prod., Inc.*, 134 P.3d 161, 166-68 (Or. 2006) (Kistler, J., concurring) ("Federal law preempts state employment discrimination law to the extent that it requires employers to accommodate medical marijuana use. . . . The fact that the state may choose to exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits."); *Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278, at *7 (D.N.J. Aug. 10, 2018) ("[M]ost courts have concluded that the decriminalization of medical marijuana does not shield employees from

decisions in this context expressly rest not on preemption by the CSA but on a conclusion that the state medical marijuana law at issue did not intend to regulate an employer's conduct. *See Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 203 (Cal. 2008) ("Nothing in the text or history of [California's medical marijuana law] suggests the voters *intended the measure to address the respective rights and duties of employers and employees*. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions." (emphasis added)); *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 257 P.3d 586, 591–92 (Wash. 2011) (state marijuana law "*does not regulate the conduct of a private employer* or protect an employee from being discharged because of authorized medical marijuana use" (emphasis added)). But, as Musta's petition acknowledges, federal preemption concerns likely animate those decisions. *See* Pet. at 24 (arguing that state courts are crafting interpretations of state medical marijuana laws "in order to avoid federal preemption concerns").

The accommodation cases are but one example from the sea of questions raised by state medical marijuana legislation. Other representative examples

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adverse employment actions."); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016) (rejecting employee's claims of wrongful termination for medical marijuana use because "[t]o affirmatively require [an employer] to accommodate" an employee's "illegal [marijuana] use would mandate [the employer] to permit the very conduct the CSA proscribes"); *Lambdin v. Marriott Resorts Hosp. Corp.*, 2017 WL 4079718, at *10 (D. Haw. Sept. 14, 2017) ("A state law decriminalizing marijuana use does not create an affirmative requirement for employers to accommodate medical marijuana use.").

include the question of whether marijuana odor provides probable cause for a search in a state that has authorized medical marijuana use, *see, e.g., State v. Senna*, 79 A.3d 45, 50–51 (Vt. 2013); the question of whether local authorities may withhold concealed handgun licenses from registered medical marijuana users who otherwise qualify for such licenses, *see, e.g., Willis v. Winters*, 253 P.3d 1058, 1060 (Or. 2011); and the question of whether abstention from medical marijuana use is a proper condition of probation, *see, e.g., Baker v. State*, 488 P.3d 579 (Nev. 2021). To the extent the Court seeks to address the tension between the CSA and state laws regarding medical marijuana, there are *many* other available issues far readier for review than the emerging issue raised in this case.

IV. The decision below correctly applied well-settled law on preemption.

Further review is also unnecessary because the decision below is correct and rests soundly on longstanding precedent. This Court has already clarified the relevant federal preemption principles: The Supremacy Clause of the United States Constitution "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29; *see* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."); *Arizona*, 567 U.S. at 399 ("Congress has the power to preempt state law.").

This Court has "identified three different types of preemption—'conflict,' 'express,' and 'field'—but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes

restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) (citation omitted). Conflict preemption occurs where state law "impose[s] a duty that [i]s inconsistent—*i.e.*, in conflict—with federal law." *Id.*; *see Mut. Pharm. Co.*, 570 U.S. at 479–80 ("[I]t has long been settled that state laws that conflict with federal law are without effect." (internal quotation marks omitted)). Express preemption occurs where Congress enacts a statute that expressly states an intent to preempt state law. *Arizona*, 567 U.S. at 399. Field preemption occurs where "federal law occupies a field of regulation so comprehensively that it has left no room for supplementary state legislation." *Murphy*, 138 S. Ct. at 1480 (internal quotation marks omitted).

Though this Court has cautioned that "these categories are not rigidly distinct," *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (internal quotation marks omitted), the category at issue here is conflict preemption, which arises "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (internal quotation marks omitted). Impossibility occurs when state law requires what federal law forbids. *See Mut. Pharm. Co.*, 570 U.S. at 480 (state law is "impliedly preempted where it is impossible for a private party to comply with both state and federal requirements" (internal quotation marks omitted)).

In the CSA, Congress clarified the scope of preemption by including the following provision:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*

21 U.S.C. § 903 (emphasis added). This provision "is an express invocation of conflict preemption." *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1236 (9th Cir. 2017); *see also Bourgoin*, 187 A.3d at 14 ("Congress has . . . preserved the supremacy of the CSA where its provisions conflict with state law in a way that makes compliance with the requirements of both impossible. In this way, Congress has specified that the principles of conflict preemption are to be invoked to determine if state laws must yield to the CSA." (citations omitted)). Accordingly, in the decision below, the Minnesota Supreme Court properly considered whether there is "a positive conflict between" the CSA and Minnesota state law "so that the two cannot consistently stand together." 21 U.S.C.S. § 903.[6]

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[6] After concluding that the CSA preempts the order for reimbursement under the impossibility theory of conflict preemption, the Minnesota Supreme Court declined to address the obstacle theory of conflict preemption. Pet App. 20a.

Plainly, such a conflict exists. The CSA prohibits marijuana use, including medical marijuana use. Federal law criminalizes not only those who use marijuana in violation of the CSA but also those who aid and abet such use. *See* 18 U.S.C. § 2(a). In contrast, Minnesota state law authorizes medical marijuana use under the THC Act and *requires* employers to facilitate employees' medical marijuana use under the Minnesota Workers' Compensation Act. An employer subject to an order to "furnish" an employee with medical marijuana, Minn. Stat. § 176.135, subd. 1, simply cannot simultaneously comply with both state and federal law, *see Schostag*, 895 F.3d at 1028 ("Although some medical marijuana is legal in Minnesota as a matter of state law, the state's law conflicts with federal law."). It is impossible for Respondents to comply with both their state-law duty to aid Musta in obtaining marijuana and their federal-law duty not to aid anyone in obtaining marijuana. *Cf., e.g.*, *Mut. Pharm. Co.*, 570 U.S. at 480 (because "it was impossible for [the plaintiff] to comply with both its state-law duty to strengthen the warnings on [a drug] label and its federal-law duty not to alter [the drug] label, . . . the state law is pre-empted").

The Minnesota Supreme Court properly recognized that an employer who "furnishes" an employee with medical marijuana could incur criminal liability for aiding and abetting a drug crime under the CSA and 18 U.S.C. § 2(a). As noted above, liability under § 2(a) requires only (1) "an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond*, 572 U.S. at 71. An employer who reimburses an employee's purchase of medical marijuana has performed an affirmative act in furtherance of the employee's marijuana

possession, with the intent of facilitating the marijuana possession.

In her petition and below, Musta has argued that the employer would not have the *intent* required for criminal liability under § 2(a) because the employer would have no independent personal interest in facilitating the employee's federally unlawful marijuana possession and would only do so reluctantly to meet an obligation under state law. Pet. at 27-28. But this argument ignores binding Supreme Court precedent focusing the § 2(a) intent inquiry on *knowledge*, rather than *volition* or *personal desire*. This Court has held that, as to the intent required, "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme *knowing its extent and character* intends that scheme's commission," *Rosemond*, 572 U.S. at 77 (emphasis added), and "[t]he law does not, nor should it, care whether [a defendant] participates with a happy heart or a sense of foreboding," *id*. at 79-80; *see also Dixon v. United States*, 548 U.S. 1, 6 (2006) (rejecting argument that defendant never "formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question" and her "will was overborne"; critically, the defendant "still *knew*" what she was doing (emphasis in original)); *Wright v. Pioneer Valley*, 2019 WL 3323160, at *5 (Mass. Dept. Ind. Acc. Feb. 14, 2019) ("[A]ny insurer payments would be made *knowing* that the insurer was participating in activity in contravention to federal laws and policies, even if under an order from an administrative judge." (emphasis added)), *aff'd on other grounds*, *Wright's Case*, 156 N.E.3d 161 (2020). Under this Court's longstanding precedent, an employer could thus have the requisite intent to facilitate the employee's marijuana possession's

commission simply by virtue of having full knowledge that the employer is subsidizing the employee's marijuana possession.

Musta further argues that § 2(a) liability would not attach to her employer because, at the time of reimbursement, "the crime was complete" and thus "the employer would not be facilitating any element of the offense." Pet. at 27. This argument mischaracterizes the nature of the offense and of the obligation Musta has always sought to impose on her employer, since the first time she asked for reimbursement for marijuana purchased as treatment for "*chronic* pain." Pet. App. 3a (emphasis added). Where an employer begins reimbursing an employee for medical marijuana treatment for "chronic pain," the reasonable expectation of both parties is that this is not a facilitation of one-time marijuana use but rather the facilitation of an ongoing marijuana treatment plan, involving ongoing marijuana possession through multiple purchases. Musta does not argue that her reimbursement relationship with Respondents was to be limited to a single purchase of medical marijuana and that her use of marijuana would be "complete" following that one-time use. Rather, in seeking reimbursement for a "chronic pain" treatment, Musta *made clear to Respondents* her intent to enter into a relationship in which Respondents would facilitate her ongoing marijuana use over multiple purchases, with each individual reimbursement enabling her to make the next purchase.[7] Musta does not dispute that that is, as a practical matter, what would happen in the future if Respondents began reimbursing her. Nor can she reasonably dispute

[7] A case involving a prescription for medical marijuana for one-time *acute* pain might present different issues.

that Respondents would act with full knowledge and expectation that that is, as a practical matter, what would happen in the future. In any event, "aiding and abetting a drug offense may encompass activities[] intended to ensure the success of the underlying crime[] that take place after . . . the principal no longer possesses the [illegal substance]." *United States v. Ledezma*, 26 F.3d 636, 643 (6th Cir. 1994). Thus, the Minnesota Supreme Court properly rejected Musta's "completion" argument.

Like the Minnesota Supreme Court, the Maine Supreme Court has recognized that, "were [an employer] to comply with [a reimbursement] order by subsidizing [an employee's] use of medical marijuana, [the employer] would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a)." *Bourgoin*, 187 A.3d at 17; *see id.* at 19 (the employer "would be aiding and abetting [the employee]—in his purchase, possession, and use of marijuana—by acting with knowledge that it was subsidizing [the employee's] purchase of marijuana."). Because the reimbursement order compels the insurer to do what the CSA forbids, the order must yield to the CSA. Ultimately, "a person's right to use medical marijuana cannot be converted into a sword that would require another party, such as [an employer], to engage in conduct that would violate the CSA." *Id.* at 20.

The Colorado Supreme Court has reasoned similarly in the related matter of *People v. Crouse*, 388 P.3d 39 (Co. 2017). There, the constitution of the state of Colorado required police officers to return seized medical marijuana if the owner was acquitted of the underlying state drug charge. *Id*. at 41. The Colorado Supreme Court held that the CSA preempted that

state constitutional mandate "because compliance with one law necessarily requires noncompliance with the other." *Id*. at 42. The court explained that "[a]n officer returning marijuana to an acquitted medical marijuana patient will be delivering and transferring a controlled substance" and will "distribute marijuana in violation of the CSA." *Id*. Thus, "there is a positive conflict between the [state law] and the CSA such that the two cannot consistently stand together." *Id*. An actor cannot at the same time distribute marijuana and not distribute marijuana, and the latter obligation—the federal rule prohibiting distribution—must prevail under the Supremacy Clause.

The Massachusetts Supreme Judicial Court has also recognized that federal preemption would apply to an employer's state-court obligation to reimburse an employee for medical marijuana purchases under a state workers' compensation policy. *Wright's Case* held that the state's medical marijuana law *did not* impose a reimbursement requirement on an employer. The court reasoned that the state legislature had carefully structured the state statute with the intent to avoid federal preemption:

> [T]o determine whether medical marijuana expenses may be compensable at all, we . . . must . . . seek to avoid conflict with Federal law and possible preemption under the supremacy clause. The [state medical marijuana] act itself, we conclude, is drafted with these concerns in mind. It expressly recognizes the Federal legal pitfalls and seeks to steer well clear of them by carving a narrow path through the marijuana regulatory thicket.

Wright's Case, 156 N.E.3d at 171–72 (internal citations omitted). The Massachusetts Supreme Court explained that state law certainly cannot *compel* an actor to violate federal law and expose itself to criminal liability and other penalties:

> [U]nlike . . . patients and doctors . . . , insurance companies would not be participating in the patient's use of a federally proscribed substance voluntarily. It is one thing to voluntarily assume a risk of Federal prosecution; it is another to involuntarily have such a risk imposed upon you. . . . [P]ossession and distribution of marijuana remain federally illegal, as does aiding or abetting such possession or distribution. *See* 18 U.S.C. § 2(a); 21 U.S.C. § 844(a). It is not unreasonable, given the current hazy regulatory environment and shifting winds of Federal enforcement, for insurance companies to fear that paying for a claimant's marijuana could expose them to potential criminal prosecution. Further, insurance companies are typically involved in interstate commerce, thereby raising Federal regulators' concerns. . . . It is one thing for a State statute to authorize those who want to use medical marijuana, or provide a patient with a written certification for medical marijuana, to do so and assume the potential risk of Federal prosecution; it is quite another for it to require unwilling third parties to pay for such use and risk such prosecution.

Id. at 109-110, 166. *Wright's Case* underscores why the Minnesota Supreme Court declined to impose an

obligation on Respondents to pay for marijuana in this case: if the state statute required reimbursement, it would be not just permitting but *forcing* Respondents to violate federal law.[8]

Lastly, the Minnesota Supreme Court also correctly rejected arguments that the DOJ's ever-shifting guidance regarding the prosecution of marijuana offenses, as well as the congressional appropriation riders that temporarily forestall marijuana-related prosecutions, could "suspend the illegality of cannabis under the CSA or take precedence over that law." Pet. App. 22a; *cf*. Pet. at 29-30. These arguments confuse the *likelihood* of prosecution for CSA violations with the relevant preemption question: whether the state law at issue requires what federal law forbids. The impermanent-by-design measures of DOJ directives and appropriations riders have to do with the practical

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[8] *Wright's Case* also supports a potential alternate ground for affirmance of the Minnesota Supreme Court's decision. Minnesota's THC Act could be construed as *Wright's Case* construed Massachusetts' state medical marijuana statute: not to contain the preemption-triggering reimbursement requirement. No provision of the THC Act authorizes the involuntary participation of a third-party in medical marijuana use. The THC Act is premised on *consent* to participate, not compulsion. It does not, for example, compel physicians to prescribe medical marijuana. *See State v. Thiel*, 846 N.W.2d 605, 613 n.2 (Minn. Ct. App. 2014). Employers, schools, and landlords expressly cannot be ordered to violate federal law to accommodate an employee's, student's, or tenant's medical marijuana use. *See* Minn. Stat. § 152.32, subd. 3(a), (c). Medical assistance programs for Minnesotans with low incomes who lack access to affordable health care coverage are expressly not required to reimburse an enrollee or a provider for costs associated with medical marijuana use. *See* Minn. Stat. § 152.23(b). The THC Act contains no provision suggesting that the Minnesota legislature intended, or attempted, to order any unwilling person to violate federal law.

consequences of engaging in conduct that is illegal under federal law, not with the illegality itself. *See Bourgoin*, 187 A.3d at 21 (DOJ memo "made clear that it was directed only to the question of *enforcement* of laws but did nothing to challenge their *existence*" and has in any event already been revoked, emphasizing its "transitory" nature (emphasis in original)); *accord Wright's Case*, 156 N.E.3d at 172 n.11 ("[T]he recent rescission of the Obama administration's medical marijuana guidance demonstrates that enforcement is transitory and subject to change. Further, . . . such guidance was directed only to the question of enforcement of laws but did nothing to challenge their existence[.]" (internal quotation marks omitted) (emphasis in original)).

Critically, the appropriations bill riders and shifting DOJ directives have not changed the fact that the CSA continues to proscribe marijuana possession, distribution, and manufacture under federal law. The federal government has never, even temporarily, removed marijuana from Schedule I. *See, e.g.*, *United States v. Kleinman*, 880 F.3d 1020, 1028 (9th Cir. 2017) (appropriations rider "did not change any substantive law; it merely placed a temporary hold on the expenditure of money for a certain purpose"). Neither the availability of prosecutorial funding nor an existing or historical threat of prosecution are elements of federal conflict preemption. *See Bourgoin*, 187 A.3d at 21 (explaining that "the magnitude of the *risk* of criminal prosecution is immaterial in this case" because, "[p]rosecuted or not, the fact remains that [an employer] would be forced to commit a federal crime if it complied with the directive" to reimburse an employee for a medical marijuana purchase.). As the Minnesota Supreme Court correctly acknowledged, the federal preemption analysis does not turn

on whether parties are likely to get away with violating federal law; the analysis simply turns on whether conduct mandated under state law actually violates federal law. *See, e.g., Mut. Pharm. Co.*, 570 U.S. at 480; *see also* Pet. App. 23a ("Impossibility preemption does not turn on speculation about future prosecutorial decisions, but on whether compliance with both state and federal law is impossible.").

To be sure, the appropriations bills and various DOJ directives may reflect shifting cultural attitudes towards marijuana use. And, indeed, there may be strong arguments that the medical community has increasingly begun to find acceptable uses for marijuana, that the prosecution of marijuana offenses has exacerbated societal inequities, and that marijuana should be rescheduled—or the CSA changed—to accurately reflect our nation's evolving values. But federal preemption does not involve policy positions or value judgments. This Court has already clarified that debates over Congress's policy judgments involving marijuana, and the contrary arguments raised by medical marijuana proponents, are not appropriately resolved by the courts. *See, e.g.*, *Raich*, 545 U.S. at 9 (acknowledging strong arguments against Congress's scheduling judgment but responding that "[t]he question before us . . . is not whether it is *wise* to enforce the [CSA] in these circumstances" (emphasis added)). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when enforcement is sought." *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 497 (internal quotation marks and alteration omitted)). A court's "choice is not whether enforcement is preferable to no enforcement at all," and it "may not consider the advantages and disadvantages of nonenforcement of the statute." *Id.*

at 498. The Minnesota Supreme Court's decision properly adhered to this Court's directive that a "court cannot . . . override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *Id*. at 497.

In sum, the Minnesota Supreme Court relied on well-established principles of federal preemption law in correctly recognizing the positive conflict between the CSA—which criminalizes marijuana use even as a medical treatment—and Minnesota state law—which decriminalizes marijuana use as a medical treatment and requires an employer to "furnish" medical treatments to employees. Because the Minnesota Supreme Court properly held that the CSA preempts Minnesota state law to the extent it requires an employer to reimburse an employee for the purchase of medical marijuana, there is no need for further review.

CONCLUSION

This is the wrong time, and the wrong case, for a U.S. Supreme Court decision. The nonexistence of Musta's employer renders this case a poor vehicle for review. Further, any decision issued in this matter could swiftly become moot as circumstances continue to evolve, at both the state and federal level, in both legislatures and the federal executive branch. This Court would also benefit from allowing state courts more time to address the issue presented. Finally, the Minnesota Supreme Court's decision faithfully applied this Court's well-settled authority on federal preemption. For these reasons, Respondents request that the Court deny the Petition.

Respectfully submitted,

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