No. 21-998

IN THE
Supreme Court of the United States

DANIEL BIERBACH,

Petitioner,

v.

DIGGER'S POLARIS AND
STATE AUTO/UNITED FIRE & CASUALTY GROUP,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. § 801 et seq., preempts an order under the Minnesota Workers' Compensation Act requiring an employer to reimburse an injured employee for the cost of buying medical marijuana.

RULE 29.6 STATEMENT

Respondent Digger's Polaris had no parent corporations, and no publicly held company owned 10% or more of its common stock.

Respondent State Auto/United Fire & Casualty Group is a subsidiary of United Fire Group Inc. Black Rock, Inc. is a publicly held company that owns 10% or more of the common stock of United Fire Group Inc.

SUPPLEMENTAL STATEMENT OF RELATED PROCEEDINGS

The Minnesota Supreme Court decided the same question presented here in *Musta v. Mendota Heights Dental Center*, 965 N.W.2d 312 (Minn. Oct. 13, 2021). The instant case is a companion case to *Musta*. Both were decided the same day and the Minnesota Supreme Court stated that it was deciding this case for the reasons given in *Musta*. Pet. App. 2a.

The *Musta* plaintiff petitioned for certiorari on November 4, 2021, and the defendant filed a brief in opposition on January 14, 2022. *See* No. 21-676.

This Court has not yet ruled on the *Musta* petition.

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BRIEF IN OPPOSITION

Respondents Digger's Polaris and State Auto/ United Fire & Casualty Group respectfully submit that the petition for a writ of certiorari be denied.

INTRODUCTION

This case—*Bierbach*—is a companion case to *Musta v. Mendota Heights Dental Center*, No. 21-676 (pet. docketed Nov. 5, 2021). *Bierbach* and *Musta* present the identical question: whether the Controlled Substances Act, 21 U.S.C. § 801 et seq. ("CSA"), preempts an order under the Minnesota Workers' Compensation Act requiring an employer to reimburse an injured employee for the cost of buying medical marijuana.

The Minnesota Supreme Court heard oral argument in *Bierbach* and *Musta* on the same day, and decided the cases simultaneously. The court held that the CSA preempts a workers' compensation court order mandating reimbursement for the employee's medical marijuana. Pet. App. 2a (*Bierbach*); Pet. App. 30a (*Musta*). Although the court consolidated its legal analysis in its *Musta* opinion, it resolved *Bierbach* on the same basis, and addressed caselaw and arguments that had been raised only in the *Bierbach* briefing in the *Musta* opinion.

This Court should deny both petitions. There is not a mature split in the lower courts, and the decision below is correct. Moreover, the changing legislative landscape counsels strongly in favor of allowing Congress to address this question, as it appears poised to do.

Nonetheless, if this Court is inclined to review the question presented, *Bierbach* presents the better vehicle, for two reasons.

First, one potential complication in *Musta* is that the *Musta* respondents have asserted that *Musta* "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." Resp. Br. in Opp. at 9, No. 21-676 (Jan. 14, 2022). That complication is not present here. Although the employer in this case is no longer an active corporation, the insurer here has *not* taken the position that this affects the underlying preemption question. Accordingly, there would be no impediment to resolving the federal question presented.

Second, unlike *Musta*, which proceeded on stipulated facts, *Bierbach* benefits from a fully developed trial record. That fully developed record would assist and inform the Court in deciding the legal question presented. Among other things, the Court would be better able to evaluate the respective federal and state interests at stake by considering them against the backdrop of a robust factual record developed at trial, rather than on the basis of an antiseptic stipulation. To take one example, the trial record in this case shows that petitioner Bierbach has a longstanding chemical dependency issue and has used marijuana illegally for much of his life. Yet, no doctor stood between Bierbach and his marijuana pharmacy—no doctor was able to ensure that Bierbach's use of marijuana was healthy and medically appropriate for someone with his history—

because under federal law marijuana remains a controlled substance with no medical use. Granting *Bierbach* would allow this Court to decide the preemption question on the basis of a real-world evidentiary record that was fully developed through an adversarial trial rather than by stipulation.

In sum, the Court should deny both the *Musta* petition and this one. But if the Court is inclined to review the question presented, *Bierbach* and its fully developed record present the better vehicle.

STATEMENT

A. Statutory background

Marijuana is a federal Schedule I controlled substance under the CSA, 21 U.S.C. §§ 801-904. That classification makes "the manufacture, distribution, or possession of marijuana . . . a criminal offense," except when part of "a Food and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a) (possession); *United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 490 (2001)). Aiding, abetting, and conspiring to further possession of marijuana apart from an FDA-approved study is also a federal crime. *See* 21 U.S.C. § 846; 18 U.S.C. § 2(a); *United States v. Posters N Things Ltd.*, 969 F.2d 652, 661-62 (8th Cir. 1992) (applying aiding-and-abetting statute to CSA), *aff'd*, 511 U.S. 513 (1994).

No medical-necessity exception exists for marijuana. *See Oakland Cannabis*, 532 U.S. at 491, 493, 494 n.7 ("[A] medical necessity exception for marijuana is at odds with the terms of the [CSA]."). Marijuana has "no currently accepted medical use in treatment in the United States." 21 U.S.C.

§ 812(b)(1)(B). It has "a high potential for abuse" and cannot be safely used "under medical supervision." *Id*. § 812(b)(1)(A), (C).

Federal law and Minnesota law prohibit prescribing marijuana. *See Oakland Cannabis*, 532 U.S. at 491 (citing 21 U.S.C. § 829); Minn. Stat. §§ 152.11-.12; *State v. Thiel*, 846 N.W.2d 605, 613 n.2 (Minn. App. 2014) ("Even under the legislation recently approved by the state legislature, medical cannabis is not prescribed by health care practitioners.").

In 1980, the Minnesota Legislature enacted the THC Therapeutic Research Act. *See* Minn. Stat. § 152.21, subd. 7; 1980 Minn. Laws, ch. 614, § 93. In 2014, the Legislature amended the statute, adding a patient registry program, through which qualifying patients may buy medical marijuana. *See* Minn. Stat. § 152.27. To participate, the patient must get a "certification" from his health-care provider and apply to the Commissioner of the Minnesota Department of Health, providing the "certification" that he was "diagnosed with a qualifying medical condition." *Id*. § 152.27, subd. 3(4). The provider's sole role is to provide that certification. The provider does not and cannot prescribe marijuana. If approved, the patient may buy medical marijuana from a Minnesota dispensary (i.e., a "registered manufacturer"). *Id*. §§ 152.25, subd. 1(a), 152.30(c).

The 2014 amendment grants immunity to registry participants from Minnesota civil or criminal liability for "use or possession of medical cannabis or medical cannabis products by a patient enrolled in the registry program." Minn. Stat. § 152.32, subd. 2(a)(1). It also immunizes from liability under state law "health care

practitioner[s]" and State of Minnesota personnel for their roles in the program. *Id*. § 152.32, subd. 2(c)-(d).

The 2014 amendment also provides that nothing in the statute would "require the medical assistance and MinnesotaCare programs to reimburse an enrollee or a provider for costs associated with the medical use of cannabis." Minn. Stat. § 152.23(b). But it gives no such protection to employers or private insurers, and does not mention workers' compensation.

B. Proceedings below

Petitioner Daniel Bierbach suffered a pilon fracture to his left ankle's distal tibia on April 7, 2004, while employed by respondent Digger's Polaris as an All-Terrain Vehicle salesman. Bierbach initially was given opioids to treat his pain but soon stopped using them. He then began illicitly using marijuana for pain management. In 2018, petitioner's doctor certified that petitioner has "intractable pain," and attested that petitioner "is a great candidate for medical cannabis." The Minnesota Department of Health approved petitioner to buy medical marijuana.

Petitioner filed a workers' compensation claim, seeking reimbursement for his marijuana under the state Workers' Compensation Act, Minn. Stat. §§ 176.001-176.862. Pet. App. 1a. At trial, petitioner "admitted that he has misused drugs and alcohol in the past." *Id*. at 8a (Chutich, J., concurring and dissenting). He admitted to using marijuana "[t]hroughout [his] life." *Id.* (alterations in original). He "admitted receiving two DWI's, including one in 2017 that was followed by chemical dependency treatment." *Id*. He admitted that "he never informed [his treating doctor] or the cannabis manufacturer of

his DWI convictions because he was never asked." *Id*. And he admitted that his doctor had "no control over the frequency or amount of medical cannabis that he receives under the program and that no one monitors his use." *Id*. at 8a-9a. Indeed, petitioner's doctor "did not prescribe [his] medical cannabis." *Id*. at 23a. No one could, under existing law. *See id*. at 21a-23a; *Oakland Cannabis*, 532 U.S. at 491 (citing 21 U.S.C. § 829).

During the ten months covered by purchase records, petitioner's use of marijuana more than doubled. Pet. App. 6a (Chutich, J., concurring and dissenting). His medical marijuana dispensary left his dosing decisions up to him. *See id*. at 8a-9a. "[H]e would use medical cannabis 'a lot more' if he could afford it." *Id*. at 8a.

The workers' compensation judge ordered respondents—Digger's Polaris (petitioner's employer) and United Fire and Casualty (the employer's insurer) to reimburse petitioner for payments and costs associated with his medical cannabis prescription. Pet. App. 1a. The Workers' Compensation Court of Appeals affirmed. *Id*.

The Minnesota Supreme Court reversed, "[f]or the reasons stated" in *Musta*—the companion case decided the same day. Pet. App. 2a ("We addressed the same questions of jurisdiction and preemption in a companion case, *Musta*."). The court "conclude[d] that the CSA preempts an order made under Minn. Stat. § 176.135, subd. 1, that obligates an employer to reimburse an employee for the cost of medical cannabis because compliance with that order would

expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful possession of cannabis." Pet. App. 30a.

ARGUMENT

This Court should deny the petitions in both this case and *Musta*. In the event the Court is inclined to review the question presented, it should grant *Bierbach* and hold *Musta*. Granting *Bierbach* would avoid the vehicle problems identified by the *Musta* respondents and allow this Court to rule on the basis of a fully developed record.

I. The Petition Should Be Denied.

The Court should deny the petition for three reasons. First, the split in the lower courts is not mature and this Court should allow additional courts to weigh in before it resolves the question. Second, the legislative and regulatory landscape is in a state of flux, and the Court should not tackle this question at a time when the law is changing by the day. Third, the Minnesota Supreme Court got it right in holding that the CSA preempts the state-law order directing reimbursement for medical marijuana.

A. The Split Is Not Mature.

Petitioner argues that state supreme courts are divided 2-2 on the question presented. Pet. 8-9. The Maine Supreme Court has joined the Minnesota Supreme Court in holding that the CSA preempts orders under state workers' compensation laws directing reimbursement for medical marijuana. *See Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 12 (Me. 2018); *Musta v. Mendota Heights Dental Cntr.*, 965 N.W.2d 312, 327 (Minn. 2021). On the other hand, two courts have reached a contrary result. *See*

Appeal of Panaggio, 260 A.3d 825, 835-37 (N.H. 2021); *Hager v. M&K Constr.*, 247 A.3d 864, 887-89 (N.J. 2021).

The split is not mature and would benefit from further percolation in the lower courts. With the exception of the Maine decision, every decision was issued in 2021—hardly a longstanding and well-entrenched split in authority. In fact, petitioner himself admits that "the question likely will recur in other jurisdictions with state workers' compensation programs that cover medical marijuana." Pet. 9. And petitioner's blithe assertion that "the split will not go away absent this Court's intervention," *id.*, is doubtful for the reasons discussed below.

B. The Legislative Landscape Is Changing.

In the words of the Massachusettes Supreme Judicial Court, "the current legal landscape of medical marijuana law may, at best, be described as a hazy thicket." *Wright's Case*, 156 N.E.3d 161, 165 (Mass. 2020).

Congress has passed riders in annual appropriations bills that forbid the use of federal funds to implement "[s]tate laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217. But there is no assurance that Congress will continue making an annual decision to include these ephemeral riders. *See* Pet. App. 47a ("The riders are merely temporary measures that can be rescinded at any time.").

The Department of Justice, for its part, has been shifting positions with each administration. Under President Obama, DOJ guidance deprioritized

marijuana offenses. Under President Trump, DOJ rescinded its previous guidance, but did not replace it with any clear directive. And under President Biden, DOJ has yet to provide *any* guidance.

This Court should not shoot at such a quickly moving target. There is a good chance that the legal landscape will look very different by 2023, or whenever the Court would be in a position to issue a merits ruling in this case. The better course is to allow the law to settle before attempting to resolve a case based on statutes and regulations that may be change or vanish before this Court can rule.

C. The Decision Below Is Correct.

Review is not warranted for the additional reason that the Minnesota Supreme Court's decision is correct. The CSA preempts the order under the Minnesota Workers' Compensation Act requiring respondents to reimburse petitioner for the cost of buying medical marijuana.

In its *Musta* opinion, the Minnesota Supreme Court correctly began with first principles: "Preemption of a state law by federal law is based on the Supremacy Clause of the United States Constitution," and "when 'there is any conflict between federal and state law, federal law shall prevail.'" Pet. App. 41a (quoting *Gonzales v. Raich*, 545 U.S. 1, 29 (2005)). The court agreed with respondents that it was "not possible [for them] to comply with both state and federal law," because if they "complie[d] with the order made under the Minnesota workers' compensation law to reimburse Musta for the medical cannabis expense, then [respondents] cannot comply with the federal prohibition against aiding and abetting the possession of cannabis." *Id*. at 42a. The court "ultimately

agree[d]" that "the CSA preempts mandated reimbursement of an employee's medical cannabis purchases under an impossibility theory of conflict preemption." *Id*. at 46a.

The Minnesota Supreme Court's determination is plainly correct. There is a direct conflict between Minnesota law and federal law. Complying with the state workers compensation order would violate the federal prohibition against aiding and abetting marijuana possession. Accordingly, the court got it right in holding the state order preempted.

II. If The Court Is Inclined To Review The Question Presented, It Should Grant *Bierbach* And Hold *Musta*.

In the event the Court determines that the question presented merits review, *Bierbach* presents the better vehicle. The Minnesota Supreme Court stated that it was deciding *Bierbach* for the reasons stated in *Musta*. Pet. App. 2a. Granting *Bierbach* would avoid the vehicle problems that respondents have identified in *Musta*, and would also allow the Court to decide the federal question on the basis of a fully developed record.

A. *Bierbach* Does Not Present The Vehicle Problems Raised By The *Musta* Respondents.

In its brief in opposition, the *Musta* respondents argue that *Musta* "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." *Musta* Resp. Br. in Opp. at 9. The *Musta* respondents contend that "[t]he 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." *Id*. at 10.

Bierbach does not present similar complications. Although respondent Digger's Polaris—like Mendota Heights Dental Center in *Musta*—is no longer an active corporation, respondents in this case have *not* asserted that this fact has any bearing on the question presented, or would pose an obstacle to this Court's resolving the federal question presented on the merits. Accordingly, in the event the Court intends to resolve the question presented, it would avoid this vehicle problem by granting *Bierbach* and holding *Musta*.

B. *Bierbach* Allows This Court To Decide The Question Presented Based On A Fully Developed Trial Record.

Bierbach has another advantage over *Musta*. *Bierbach* comes to this Court after a trial, whereas *Musta* was decided on the basis of a short factual stipulation. The fully developed factual record in *Bierbach* will assist and inform the Court's consideration of the question presented.

The trial record developed in *Bierbach* presents a dark and vivid picture of what would happen if petitioner's view of the law were to prevail. Petitioner Bierbach admitted to a longstanding substance-abuse issue, as demonstrated by his alcohol abuse and his illegal use of marijuana throughout his life. Yet,

under the workers' compensation order, he was given access to an essentially unlimited supply of marijuana, with no doctor serving as gatekeeper. Petitioner was able to buy as much marijuana as he deemed necessary and could afford—and he more than doubled his consumption in less than a year. The *Bierbach* record underscores the dangers in compelling reimbursement from employers and insurers, including the certainty of unregulated, skyrocketing costs, as well as the health risk to employees from unlimited access to marijuana without treatment parameters or a doctor's prescription pad.

This Court would benefit from deciding the question presented on the basis of litigated rather than stipulated facts. The robust, fully developed record in *Bierbach*—unlike the cursory stipulation in *Musta*—will enable the Court to better evaluate the relative federal and state issues at stake, and to appreciate the real-world consequences of its ultimate decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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January 25, 2022