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

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner Daniel Bierbach writes in response to the Brief for the United States as Amicus Curiae ("SG Br."), in which the Solicitor General expressed the view that the Supreme Court should deny Bierbach's petition for writ of certiorari. Petitioner respectfully disagrees and requests that this Court grant his petition.

ARGUMENT

I. The Minnesota Supreme Court Decision Below Is Incorrect

The Minnesota Supreme Court erred in holding that the CSA preempts a state workers' compensation order requiring reimbursement for medical marijuana. The United States acknowledges a split of authority that only this Court can resolve and does not attempt to defend the Minnesota Supreme Court's actual holding. Instead, the government incorrectly argues that obstacle preemption can sustain the holding below.

1. The Minnesota Supreme Court held that the CSA preempts workers' compensation law because compliance with the reimbursement order would constitute aiding and abetting the possession of marijuana under 18 U.S.C. § 2. *See Musta*, App. 53a. In other words, the Minnesota Supreme Court relied on the impossibility theory of conflict preemption, reasoning that it would be impossible for an insurer to comply with both state and federal law. As explained in Bierbach's petition (at 9-12), that was error.

The CSA makes it "unlawful to manufacture, distribute, dispense, or possess any controlled substance," including marijuana. *Gonzales v. Raich*, 545 U.S. 1, 13 (2005) (citing 21 U.S.C. §§ 841(a)(1), 844(a)); *see also* 21 U.S.C. § 812(c), Schedule I (c)(10). Meanwhile, Minnesota authorizes the use of marijuana for medical purposes, and Minnesota workers' compensation law provides that "[t]he employer shall furnish

any medical . . . treatment, including . . . medicines." Minn. Stat. § 176.135, subd. 1 (App. 117a-118a). These laws are distinct and not irreconcilable. The reimbursement order does not require the employer (or its insurer) to possess, manufacture, or distribute marijuana in contravention of the CSA. And that Act does not prohibit an employer or insurer from reimbursing an employee for his purchase of medical marijuana.

The United States acknowledges (at 9, 17) that there is a split among several state supreme courts on this question. The question therefore warrants this Court's review.

2. The United States does not attempt to defend the Minnesota Supreme Court's holding that the CSA preempts Minnesota state law under the doctrine of impossibility preemption. Instead, the government offers an entirely different preemption rationale that two other state supreme courts already have rejected: that the CSA preempts Minnesota's law requiring reimbursement for the purchase of medical marijuana under the doctrine of obstacle preemption. The United States further asserts that certiorari is unwarranted because the lower courts did not adequately address obstacle preemption. The United States is incorrect on both counts. As two state supreme courts have held (and as the dissent below explained), obstacle preemption does not apply here.

Under the doctrine of obstacle preemption, which is a type of implied preemption, federal law preempts state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In weighing whether federal law preempts state law, courts assess congressional intent

and presume that Congress generally intends to leave state law intact. *See Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009). "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)) (brackets in *Bonito Boats*).

a. Complying with a state workers' compensation order to reimburse the cost of medical marijuana does not stand as an obstacle to congressional "purposes and objectives." *Hines*, 312 U.S. at 67. To start, the States' historic police powers to regulate medicines and workplace injury are "'not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And the CSA "explicitly contemplates a role for the States in regulating controlled substances," absent a "'positive conflict'" with its provisions. *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (quoting 21 U.S.C. § 903); *see Hager v. M&K Constr.*, 247 A.3d 864, 886 (N.J. 2021). There is no positive conflict here, which an obstacle-preemption analysis confirms. As the New Hampshire Supreme Court explained, while the CSA proscribes the possession and distribution of marijuana, "the CSA does not make it illegal for an insurer to reimburse an employee for his or her purchase of medical marijuana." *Appeal of Panaggio*, 260 A.3d 825, 837 (N.H. 2021). "Nor does it purport to regulate insurance practices in any manner." *Id.* And an "order to reimburse [claimant] does not interfere with the federal government's ability to enforce the

CSA." *Id.* "Under these circumstances," the court concluded, "the 'high threshold' for obstacle preemption 'is not met here.'" *Id.* (quoting *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion)). For that reason, Justice Thomas's admonition in *Wyeth* that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution," 555 U.S. at 583 (Thomas, J., concurring in the judgment), should cause this Court to reject obstacle preemption in this context.

Moreover, "[i]f Congress thought [state workers' compensation laws or medical marijuana laws] posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [CSA's 50-year] history." *Id.* at 574 (majority).[1] But it did not. Indeed, Congress long has known about States' medical marijuana laws and workers' compensation statutes, *see Beirbach* Pet. 3-5; SG Br. 3-7, yet has "'decided to . . . tolerate whatever tension there [is] between them'" and the CSA. *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats*, 489 U.S. at 167) (brackets in *Bonito Boats*).

Instead of enacting an express-preemption provision, Congress has evinced the opposite intent. It has passed appropriations riders prohibiting the federal government from using appropriated funds to prevent States "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Commerce, Justice, Science, and

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[1] The United States relies on *Wyeth v. Levine* to argue (at 13-14) that, even in the face of a provision similar to 21 U.S.C. § 903, the Court still conducted both impossibility- and obstacle-preemption analyses. That is true. Notably, however, the Court there found no obstacle preemption, partially because of an analogous provision at issue in the statute in that case.

Related Agencies Appropriations Act, 2022, Pub. L. No. 117-103, div. B, § 531 ("2022 Appropriations Act").[2] As the New Jersey Supreme Court explained, "Congress is empowered to amend the CSA via an appropriations action provided 'it does so clearly,'" *Hager*, 247 A.3d at 887 (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992)), and these riders clearly express Congress's decision to tolerate state medical marijuana programs. Similarly, in 2010, Congress permitted the District of Columbia to legalize marijuana,[3] further indicating its intent at least to "tolerate" – if not approve – a State's ability to regulate in this space. *Wyeth*, 555 U.S. at 575.

The United States argues (at 14) that "the appropriations riders do not support an inference that Congress has accepted state laws compelling third-party reimbursement for federal claims" because "[a] limitation on funding for the enforcement of federal law is not a repeal of the CSA's substantive criminal prohibitions." But Congress's decision to neuter enforcement functionally suspends those provisions and certainly is relevant to an analysis of "broad federal policy objectives, legislative history, or generalized notions of congressional purposes," the touchstones of obstacle preemption. *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment).

The United States also asserts (at 14) that "the appropriations riders do not speak to the enforcement

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[2] The 2022 Appropriations Act has not yet been published in the Statutes at Large, but the text of the enrolled bill is available at https://www.congress.gov/bill/117th-congress/house-bill/2471/text. Section 531 appears at pages 102-03 of that bill.

[3] *See* Tim Craig, *Medical Marijuana Now Legal*, Wash. Post (July 27, 2010), http://voices.washingtonpost.com/dc/2010/07/medical_marijuana_now_legal.html.

of workers' compensation orders like those at issue here." There is a good reason for that: *neither does the CSA*. The appropriations riders' silence on workers' compensation orders like the one at issue here only further demonstrates that the subject of those riders – the CSA – does not regulate and therefore does not preempt such laws. The United States cannot have it both ways: it cannot dismiss the appropriations riders because they do not reference workers' compensation orders while simultaneously ignoring the fact that the CSA itself has nothing to do with state workers' compensation laws.[4]

The United States also is incorrect that a reversal would mean that "no legal principle would preclude a State from requiring private employers to reimburse the use of other federally prohibited products or substances, such as LSD and other psychedelic drugs, based on perceived benefits." SG Br. 10-11. An obstacle-preemption analysis of congressional objectives regarding LSD would be far different than an analysis of congressional objectives regarding marijuana. Congress never has allowed Washington, D.C. to legalize LSD (or other Schedule I drugs) and never has passed appropriations riders prohibiting the use of federal funds to prevent States from legalizing medical LSD.

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[4] The United States also argues (at 15) that Congress is not bound by the appropriations riders in the future and that "future prosecutions could encompass present-day conduct," citing the five-year federal statute of limitations for non-capital offenses. But as the United States acknowledges, Congress has enacted these appropriations riders year-after-year since 2014 and has not indicated that it plans to change course. Instead, it has indicated that it does not plan to interfere with state medical marijuana laws.

More generally, the United States has an array of legal and regulatory tools at its disposal to proscribe state laws that it considers inconsistent with federal drug policy. If a State passed a law that the federal government deemed important to preempt, it has ample regulatory tools by which to do so.

b. The United States next contends (at 12) that "[n]either petitioners nor the two state courts of last resort that have upheld marijuana-reimbursement orders have meaningfully engaged with the points above." That is not the case: both the New Jersey and New Hampshire supreme courts, along with the dissent in the decision below, all rejected obstacle preemption and addressed the exact points the United States raises here.

In *Hager v. M&K Construction*, the New Jersey Supreme Court found that the state law at issue there "does not currently create an obstacle to the accomplishment of congressional objectives." 247 A.3d at 886. The court relied on the appropriations riders, reasoning that "'legislative intent through appropriation actions . . . sometimes speak[s] louder than words.'" *Id.* at 887 (quoting *State v. Cannon*, 608 A.2d 341, 352 (N.J. 1992)) (alterations in *Hager*).

And in *Appeal of Panaggio*, the New Hampshire Supreme Court determined "that the 'high threshold' for obstacle preemption 'is not met here'" because "a Board order to reimburse [claimant] does not interfere with the federal government's ability to enforce the CSA." 260 A.3d at 837 (quoting *Whiting*, 563 U.S. at 607 (plurality opinion)). Indeed, the court continued, "[r]egardless of whether the insurer is ordered to reimburse [claimant] for his medical marijuana purchase, the federal government is free to prosecute

him for simple possession of marijuana under the CSA." *Id.* (citing 21 U.S.C. § 844(a)).

The dissent in *Musta* (and *Bierbach*, by incorporation) likewise evaluated – and rejected – the possibility of obstacle preemption. *See Musta*, App. 66a-69a (Chutich, J., concurring in part, dissenting in part). Justice Chutich reasoned that (1) the CSA "does not make it illegal for an insurer to reimburse an employee for a purchase of medical cannabis or purport to regulate insurance practices in any manner"; (2) "the compensation judge's order in no way prevents the federal government from using its own resources to enforce the Act"; and (3) Congress's appropriations riders "at the very least show that Congress has chosen to 'tolerate' the tension between state medical cannabis laws and the [CSA]." *Musta*, App. 68a (citation omitted).

In contrast to those well-reasoned decisions, the United States' reliance on obstacle-preemption doctrine is questionable in the circumstances of this case, where the federal government has tolerated state medical marijuana programs for years. *See Pharmaceutical Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 678 (2003) (Thomas, J., concurring in the judgment) (noting "the concomitant danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others").

II. The Preemption Issue Is Ripe For This Court's Review

The United States admits (at 9, 17) that the petition "present[s] a novel question" and that "a narrow conflict" exists among state supreme courts. Nonetheless, it argues (at 16-19) that this Court's review is not warranted because (1) the Minnesota Supreme Court's reliance on an impossibility theory of conflict

preemption "would needlessly complicate any review"; (2) the state supreme court split is "limited and recent," and none of these courts "has issued a decision that provides an appropriate backdrop for this Court's review of the obstacle-preemption issues that are inherent here"; and (3) this is "a rapidly evolving area of the law" and thus "[r]efraining from taking up the questions presented here . . . represents the sounder course at this time." Petitioner respectfully disagrees with each contention.

1. The Minnesota Supreme Court's decision to rely on the impossibility theory of conflict preemption would not overly complicate this Court's review.

The Minnesota Supreme Court held that the CSA preempts workers' compensation law because compliance with the reimbursement order would constitute aiding and abetting possession of marijuana – a federal crime under 18 U.S.C. § 2. To come to this conclusion, Minnesota's highest court determined that an insurer would satisfy both prongs of the aiding-and-abetting offense: "an affirmative act in furtherance of that offense," with "the intent of facilitating the offense's commission." *Rosemond v. United States*, 572 U.S. 65, 71 (2014); *see Musta*, App. 42a-53a. That straightforward holding, which conflicts with the holdings of two other state supreme courts, is ripe for this Court's review.

The United States argues (at 16) that the analysis of the intent prong is "complicated" given the "unsettled" nature of the "state-law obligation to reimburse past or future marijuana purchases." But whether the intent element is satisfied does not necessarily hinge on any state-law obligation to reimburse past marijuana purchases. Instead, the proper inquiry is whether the individual "'wishes to bring about'" a violation of

federal law. *Rosemond*, 572 U.S. at 76 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). Thus, when evaluating this element, courts should consider independent evidence demonstrating that the accused specifically "'seek[s] by his action to make [the crime] succeed.'" *Id.* (quoting *Nye & Nissen*, 336 U.S. at 619).[5] Simply complying with an order from a state workers' compensation judge may not necessarily create the requisite intent for aiding-and-abetting liability, as the United States suggests.

In addition, the United States' argument (at 17) that resolving this case would require this Court "to analyze the potential scope of federal criminal law in th[e] workers' compensation context" should not inhibit this Court's review. In every preemption case, the Court analyzes the federal law that assertedly preempts the state law.

2. The United States also is incorrect to argue (at 17) that the judicial split is not sufficiently developed. The four state supreme court decisions on this issue manifest a mature split of authority that warrants review now. *Compare Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 12 (Me. 2018); *Musta*, App. 54a (Minn.); *and Bierbach*, App. 2a (Minn.), *with Hager*, 247 A.3d at 887, 889 (N.J.), *and Appeal of Panaggio*, 260 A.3d at 835, 837 (N.H.). Although the question likely will recur in other jurisdictions with state workers' compensation programs that cover medical marijuana, *see Musta* Pet. 21-22, No. 21-676, additional percolation is unnecessary. With two state supreme courts on each side of the question presented,

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[5] In *Bierbach*, the respondent insurer vigorously opposed reimbursing the petitioner for the use of medical marijuana. Such conduct does not meet the intent requirement for aiding-and-abetting liability.

the split will not resolve absent this Court's intervention.

Contrary to the United States' argument, the recency of these four state supreme court decisions favors granting Bierbach's petition. The chronology shows that this issue is pressing now and suggests that it will continue to arise within state judicial systems, inevitably leading to even more contradictory opinions regarding federal preemption law. This Court can avoid that mess by addressing the careful opinions of the four courts that already have confronted the issue.

3. For similar reasons, contrary to the United States' argument, the "'hazy thicket'" of the "'legal landscape of medical marijuana law'" is a reason to grant certiorari. SG Br. 18 (quoting *Wright's Case*, 156 N.E.3d 161, 165 (Mass. 2020)). As some commentators have noted, "[t]he struggle over marijuana regulation is one of the most important federalism conflicts in a generation." Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 74 (2015); *see also Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236-37 (2021) (Thomas, J., respecting the denial of certiorari) ("Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."). State and federal courts alike need clarification as to the contours of federal preemption doctrine in this context. Only this Court can provide such clarification and guidance.

CONCLUSION

The Court should grant either this petition or the *Musta* petition, and hold the other case pending its disposition of the case granted.

Respectfully submitted,

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