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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Respondents Digger's Polaris and State Auto/ United Fire & Casualty Group respectfully submit this response to the Brief for the United States as Amicus Curiae. Respondents agree with the United States that the Court should deny the petition. However, in the event this Court disagrees and determines that the question presented warrants review, it should grant *Bierbach* (No. 21-998) and hold *Musta* (No. 21-676).

ARGUMENT

1. The United States is right to conclude that the questions presented by these cases do not warrant this Court's review. Respondents agree that "[t]he judgments below are correct for the straightforward reason that when a federal law such as the CSA prohibits possession of a particular item, it preempts a state law requiring a private party to subsidize the purchase of that item." U.S. Br. 9. Respondents also agree that the circuit split involves only "four state courts of last resort," and may evaporate in short order given the "rapidly evolving" statutory and regulatory landscape. *Id*.

2. In the event this Court deems the question presented worthy of review, the United States' brief makes even clearer that *Bierbach* is a better vehicle than *Musta*.

In the view of the United States, the Minnesota Supreme Court should have decided this case based on obstacle preemption, not impossibility preemption. *See* U.S. Br. 10. The United States is correct that obstacle preemption is an additional basis on which to find that federal law preempts state workers'

compensation laws requiring reimbursement for medical marijuana.

Only *Bierbach* gives the Court the opportunity to address *both* impossibility and obstacle preemption. That is because only in *Bierbach* did the insurer properly raise obstacle preemption. The insurer argued obstacle preemption in both its opening and reply briefs. *See* Br. and Add. of Relators Digger's Polaris and United Fire at 19-20, No. A20-1525 (Minn. Jan. 15, 2021); Reply of Relators Digger's Polaris and United Fire at 7, No. A20-1525 (Minn. Mar. 1, 2021). The Minnesota Supreme Court later ordered the *Bierbach* parties to file supplemental briefs on the specific question of whether the CSA "prohibits applying the doctrine of obstacle-conflict preemption." Order at 2, No. A20-1525 (Minn. Mar. 24, 2021). The *Bierbach* insurer's supplemental brief also argued that the Minnesota statute was preempted on the basis of obstacle preemption (as well as impossibility preemption), and explained why the CSA does not prohibit applying obstacle preemption. *See* Informal Mem. of Relators Digger's Polaris and United Fire & Casualty Group, No. A20-1525 (Minn. Apr. 6, 2021).

The *Musta* insurer, in contrast, did *not* present and preserve an obstacle preemption challenge. In fact, its opening brief indicated that it was arguing *only* impossibility preemption. *See* Br. and Add. of Relators Mendota Heights Dental Center and Hartford Insurance Group at 23-24, No. A20-1551 (Minn. Feb. 4, 2021) ("Of the three ways in which federal law can preempt state law, relators invoke the third type, called conflict preemption, which arises when state law conflicts with federal law in a way that

makes compliance with both federal and state [law] a physical impossibility.") (quotation marks omitted).[1]

Thus, if this Court were to grant *Musta*, it would be hard pressed to consider obstacle preemption because the argument was not properly presented in that case. "With 'very rare exceptions,' . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (citations omitted). Indeed, the Court "has almost unfailingly refused to consider" a federal claim that was neither addressed by nor properly presented to the state court below. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam).

Because an obstacle-preemption argument was presented in *Bierbach* and not *Musta*, only *Bierbach* would ensure that this Court could provide a full answer to the question presented: whether Minnesota's law is federally preempted. Only *Bierbach* would allow this Court to address *both* impossibility preemption *and* obstacle preemption. Indeed, since the United States believes that obstacle

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[1] Notably, although the Minnesota Supreme Court ordered supplemental briefing on obstacle preemption in *Bierbach*, it did not issue such an order in *Musta*. Aside from a fleeting mention in a reply brief, which was insufficient to preserve the argument under Minnesota law, *see Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (issues raised for first time in reply are forfeited), the parties in *Musta* did not engage the issue of obstacle preemption and the Minnesota Supreme Court "decline[d] to … analyze the obstacle theory of conflict preemption," Pet. App. 45a n.7.

preemption is the correct basis on which to decide this question, it would be anomalous for the Court to grant review in a case where obstacle preemption was *not* presented—while bypassing the case where obstacle preemption *was* presented.

If this Court were to grant *Musta* and not *Bierbach*, it would risk leaving the law in an unsettled state. Giving only a half-answer to the preemption question would leave lower courts in a haze of confusion and uncertainty over whether workers' compensation laws requiring reimbursement for medical marijuana are preempted. Even if this Court rejected the impossibility-preemption argument, litigation would continue over whether such laws are preempted through obstacle preemption. The Court's decision would end up providing no definitive guidance to states, insurers, or employees on the very question of federal preemption the Court set out to resolve.

3. Nothing in the United States' brief undermines the many other reasons why *Bierbach* is the better vehicle.

First, the *Bierbach* insurer has *not* taken the position taken by the *Musta* insurer—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* Br. in Opp. at 9. Although the *Musta* petitioner strives mightily to downplay the strength of this argument, there is no reason for this Court to grant review in a case that raises even a slight likelihood of mootness when there is an alternative case presenting the identical question that raises *no* likelihood of mootness. The lead argument in the *Musta* respondents' merits brief

would be that the case is moot and should be dismissed; *Bierbach* presents no such danger, as the parties agree the dispute remains live. Even the *Musta* petitioner concedes that the federal question is identical and squarely presented in both cases. The two cases traveled together in lockstep through the Minnesota courts; the Minnesota Supreme Court heard oral arguments in both cases on the same day and issued simultaneous opinions that decided the cases for the exact same reasons. *See* Pet. App. 2a (*Bierbach* court orders reversal "[f]or the reasons stated in [*Musta*]").

Second, *Bierbach*, unlike *Musta*, was decided based on a fully developed, adversarial trial record. The *Musta* petitioner gets it exactly backward in arguing (*Musta* Supp. Br. at 12-13) that this makes *Musta* a better vehicle because the *Bierbach* insurer contested liability under state law. The Minnesota Supreme Court's decision *was not based on these state law issues*—indeed, the court did not even need to reach these arguments—so there is no impediment whatsoever to this Court deciding the federal question. And for the reasons respondents have explained, *see* Br. in Opp. at 11-12, the fully developed factual record in *Bierbach* will assist and inform this Court's consideration of the question presented by enabling it to better appreciate the various federal and state interests at stake. As the *Musta* petitioners themselves are forced to admit, "[t]he Court should grant review in a case" where "the legal arguments are properly aired on both sides." *Musta* Reply Br. at 13. That case is *Bierbach*, not *Musta*.

Third, in the wake of the United States' brief arguing that the question should be resolved based on obstacle preemption, the *Bierbach* petitioner has

changed his position and is now requesting an outright grant rather than a hold for *Musta*. *Compare* Pet. at 13, *with* Supp. Br. at 1, 12. The *Bierbach* petitioner acknowledges what the United States' brief makes abundantly clear: *Bierbach*, which would allow this Court to fully answer the preemption question, presents no risk of mootness, and comes to this Court on a fully developed adversarial record, is the far better vehicle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

June 2, 2022

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