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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case is an ideal vehicle to resolve an entrenched conflict of authority on a recurring question of law: whether the Controlled Substances Act preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana. Respondents' efforts to avoid review do not withstand scrutiny.

Respondents open with a "vehicle problem" that is both waived and frivolous. Respondents claim that this case is a bad vehicle because Petitioner's employer was dissolved in 2020. Respondents did not disclose this information to the Minnesota Supreme Court, and now rely on facts outside the record and unsworn attorney representations. In addition to being untimely and unsupported, Respondents' late-breaking argument is also irrelevant, because the employer's alleged dissolution has zero effect on these proceedings under Minnesota law.

Respondents then say that the Court should deny certiorari because the law might change. But Respondents identify no pending legislative proposals or rulemakings that could affect the legal analysis. They simply conjecture that in light of changing poll results, the law might change at some unspecified time in some unspecified way. That is no basis for denying review.

Respondents weakly suggest that more percolation is necessary, but by this point 26 state supreme court justices have considered this question, with 11 finding preemption and 16 finding no preemption. With two state supreme courts on each side of the split, there is

no possibility the split will disappear until this Court intervenes. Delaying review will simply increase uncertainty and confusion. The time for certiorari is now.

ARGUMENT

I. Respondents' purported "vehicle problem" is waived and frivolous.

Respondents open by asserting that Petitioner's employer was dissolved in 2020, creating an alleged vehicle problem. BIO 9-10. The Court should reject this late-breaking effort to avoid review.

First, this argument is waived. Respondents claim that Mendota Heights dissolved in 2020. But Respondents never disclosed this information to the Minnesota Supreme Court, even though Respondents filed both their opening brief and their reply brief in 2021, after the alleged dissolution occurred. Both briefs conclude by stating that "Relators Mendota Heights Dental Center and Hartford Casualty Insurance Company" request reversal,[1] without a word suggesting that Mendota Heights Dental Center is now dissolved.

Not only are Respondents making a new *argument*, but they are relying on new *facts*. There is no information in the record about Mendota Heights'

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[1] Brief and Addendum of Relators at 41, *Musta v. Mendota Heights Dental Center*, Case No. A20-1551 (Minn. Feb. 4, 2021); Reply Brief of Relators at 28, *Musta v. Mendota Heights Dental Center*, Case No. A20-1551 (Minn. Mar. 22, 2021).

dissolution. Respondents insist that the Court can take judicial notice of information that appears on the Minnesota Secretary of State's website, but that website raises more questions than it answers. According to the links that appear in Respondents' brief, BIO 9-10 & n.4, "Mendota Heights Dental Center, P.A." was dissolved in 2020, but "Mendota Heights Dental Center" was formed in 2019. Not only do these entities have virtually identical names, but they are apparently in adjacent offices in the same building: according to the website, both entities are at 880 Sibley Memorial Highway Suite, Mendota Heights, Minnesota, with one at "Suite 109" and one at "#111." This raises doubts as to whether these are really different entities.

Respondents acknowledge the existence of the new entity, but proclaim that it is run by "another Minnesota dentist" and is "not the same corporation." BIO 10 n.4. But these are facts outside the record that cannot be judicially noticed. They are simply the unsworn assertions of Respondents' counsel. Petitioner has no way of verifying whether they are correct. The Court should not allow Respondents to sandbag Petitioner with questionable facts outside the record.

Even if the Court considers Respondents' arguments, they are frivolous. Even assuming that Mendota Heights dissolved, that event is completely irrelevant to any legal issue.

Under Minnesota law, a corporation's dissolution has *zero* effect on pending litigation involving that corporation. Dissolution is not a magic wand a corporation can wave to make pending litigation go away. *See* Minn. Stat. § 302A.783 (after dissolution,

corporate officials continue to defend litigation in the corporation's name). While dissolution may bar certain claims filed *after* the corporation's dissolution, *see* Minn. Stat. § 302A.781, this case was pending when the dissolution occurred, and *Mendota Heights itself* initiated the appeal to the Minnesota Supreme Court. Accordingly, the dissolution had no effect, which is presumably why Mendota Heights continued prosecuting its appeal while never disclosing the dissolution to the court.

Moreover, Mendota Heights' current status is irrelevant for an additional reason: Petitioner's entitlement to payment derives from Mendota Heights' insurance policy, which remains in force. Minnesota, like virtually every other state,[2] mandates that employers obtain workers' compensation insurance. Minn. Stat. § 176.181, subd. 2. The insurance policy protects injured workers for those workers' entire lives, regardless of the present status of the employer. Hence, Petitioner is entitled to receive workers' compensation from the insurer, Respondent Hartford Insurance Group,[3] via the workers' compensation

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[2] To Petitioner's knowledge, Texas is the only state in which worker's compensation insurance is not mandatory. *See* Texas Department of Insurance, *History of Worker's Compensation in Texas*, https://www.tdi.texas.gov/wc/dwc/history.html (last updated Mar. 11, 2020).

[3] Respondents state that the insurance company's actual legal title is "Hartford Casualty Insurance Company." BIO ii. As Respondents acknowledge, however, in the proceedings below, that entity was referred to as "Hartford Insurance Group." *Id.*

insurance policy that covered Mendota Heights in 2003. Mendota Heights' status in 2022 is irrelevant.

Respondents state that the "workers' compensation insurer" is "satisfying an obligation of a now-defunct entity." BIO 10. To be clear, the insurer has *always* been responsible for satisfying the obligation. Indeed, it is the insurer, not the employer, that is the real party in interest in workers' compensation cases. That is why, throughout this entire case—both before and after Mendota Heights' alleged dissolution—the insurer has been a party in this case. The insurer continues to be a respondent in this Court.

Respondents do not offer any actual arguments on how Mendota Heights' alleged dissolution in 2020 affects the legal analysis. They do not even reveal whether they think this development makes their argument weaker or stronger than before. They just vaguely assert that perhaps the analysis might change, creating a vehicle problem. BIO 10. Petitioner can think of no conceivable reason the analysis would change, even if this argument were not waived, which it was.

Indeed, not only does the lower-court caption use that term, but the front cover of Respondents' brief to the Minnesota Supreme Court reads: "BRIEF AND ADDENDUM OF RELATORS MENDOTA HEIGHTS DENTAL CENTER AND HARTFORD INSURANCE GROUP." Respondents' Brief in Opposition follows the convention from the lower courts of using the term "Hartford Insurance Group," BIO 1 n.1, and Petitioner is following the same convention as well.

II. Respondents' speculation that the law might change is no basis to deny review.

Respondents assert that an opinion in this case "could swiftly become moot" if federal law changes. BIO 11. However, Respondents identify no pending legislation in Congress that could affect the legal analysis. Nor do Respondents identify any pending regulatory action—as Respondents acknowledge, the government has refused to entertain requests to reschedule marijuana and has given no indication it would change course. BIO 13-14. Respondents' vague speculation that Congress might someday respond to new poll results is not a basis for denying certiorari.

Respondents assert that the regulatory situation is confusing, in view of the Justice Department's shifting policies and Congress's decision to enact its nonregulatory policy via annual appropriations riders every year since 2014. BIO 11-15. Petitioner will not dispute that the current situation is confusing for all stakeholders. But that enhances the case for review. As Justice Thomas has pointed out, "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." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236-37 (2021) (Thomas, J., respecting denial of certiorari). The Minnesota Supreme Court's decision—which held that compliance with state workers' compensation law is a federal crime—exemplifies Justice Thomas's concerns. Employees, employers, insurers, regulators, and other

stakeholders need guidance *now* on how to balance their conflicting obligations. The Court should reject Respondents' proposal to await federal action that might never come.

III. Additional percolation is unnecessary.

Respondents acknowledge that there is a 2-2 split on the question presented, but suggest that more percolation might be helpful, either on the question presented or on other issues related to medical marijuana. BIO 15-19.

They are wrong. There is no reason to wait. As the petition explained (Pet. 22-23), the arguments on both sides have now been fully considered in published opinions. The Maine Supreme Judicial Court produced an opinion and a dissent. The New Hampshire Supreme Court and New Jersey Supreme Court lined up with the Maine Supreme Judicial Court's dissent. Now the Minnesota Supreme Court has taken the side of the Maine Supreme Judicial Court majority, over a dissent that would have instead followed the New Hampshire Supreme Court and New Jersey Supreme Court. This conflict will not go away. Instead, the confusion will continue, as litigants and lower courts in other jurisdictions try to guess which side of the split their own state supreme court will take.

Respondents do not give any concrete reason why additional state supreme court opinions would be helpful. They simply seek delay for delay's sake. The Court should reject this request and resolve the question presented. Employers, insurers, and employees are trying to follow the law in good faith. It

is intolerable that, in jurisdictions across the country, it is a coin flip as to whether complying with state workers' compensation law would be a federal crime.

IV. The Minnesota Supreme Court's decision is wrong.

The Minnesota Supreme Court's decision is wrong. Compliance with the workers' compensation order would not be a federal crime.

"[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 572 U.S. 65, 71 (2014). Neither requirement is satisfied.

First, reimbursing Petitioner would not be an "affirmative act in furtherance of" an offense, given that at the time of the reimbursement request, the crime had already been completed. *Id.* Respondents emphasize that Petitioner was suffering from chronic pain, such that reimbursement created the expectation of future reimbursements. BIO 24-25. But as the dissent pointed out, Respondents never promised to provide future reimbursements, and whether they are legally obliged to do so going forward depends on future facts and circumstances. Pet. App. 34a. Notably, after reimbursing Petitioner for pain medication for several years, Respondents sought and won an order eliminating that reimbursement obligation on the ground that the pain medication no longer worked. Pet. App. 82a. Respondents are likely to continue fighting Petitioner's reimbursement

obligations tooth and nail going forward, and the fact that Respondents might be legally obliged to fulfill future reimbursement requests does not amount to aiding and abetting.

Second, any reimbursement order would not be "with the intent of facilitating the offense's commission." *Rosemond*, 572 U.S. at 71. Respondents insist that they are *aware* that the payments are reimbursements for medical marijuana. BIO 22-24. But mere *knowledge* does not establish *intent* to facilitate the offense. Respondents cite language from *Rosemond* stating that aiding-and-abetting liability covers any "person who actively participates in a criminal scheme," regardless of whether the person "participates with a happy heart or a sense of foreboding." BIO 23 (quoting *Rosemond*, 572 U.S. at 77, 79-80). But Petitioner is not pointing to Respondents' lack of a "happy heart." Instead, Petitioner contends that Respondents did not intend for a federal crime to occur merely because they treated Petitioner's workers' compensation request like any other workers' compensation request under state law.

Finally, obstacle preemption also does not bar enforcement of the workers' compensation order. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks omitted).

It is difficult to see how Congress's "purpose" could be to interfere with the operation of Minnesota's workers' compensation law, given that it has enacted appropriations riders for the past eight years banning

the Justice Department from interfering with the operation of Minnesota's workers' compensation law. Respondents protest that Congress did not legalize medical marijuana but is merely preventing marijuana laws from being enforced. BIO 28-30. That is true, but these appropriations riders are still Acts of Congress that cannot be ignored in assessing Congress's purpose, and they establish that the Court should err on the side of federalism.

Even without the appropriations riders, there would be no preemption. The Controlled Substances Act carefully delimits the scope of federal and state authority: the federal government regulates the possession of drugs, but the regulation of insurance is left to the States. The Court should not expand the scope of federal law via the vague rubric of obstacle preemption.

V. The Court should grant this case rather than *Bierbach*.

On January 11, 2022, a different litigant sought review of a different Minnesota Supreme Court case that relied on the decision below. *See* Petition for a Writ of Certiorari, *Bierbach v. Digger's Polaris*, No. 21-998. The *Bierbach* petition asks this Court to "hold this petition pending its decision in *Musta* and dispose of this case in a manner consistent with its ruling in that case." *Id.* at 8; *see id.* at 12. Petitioner agrees with that proposed disposition.

Two weeks after the *Bierbach* petition was filed, the respondents in that case rushed to file a brief in opposition, urging the Court to grant certiorari in

Bierbach instead of this case (if certiorari was not denied in both). The Court should decline that request, grant certiorari in this case, and hold *Bierbach*.

The reasons for granting certiorari in this case, and holding *Bierbach*, are straightforward. First, the *Bierbach* petitioner affirmatively requests that disposition. *Bierbach* Pet. 1, 8, 12.

Second, the *Bierbach* petition substantially incorporates this petition by reference. *Id.* at 11 ("As explained in greater detail in *Musta* …").

Third, the *Bierbach* decision simply relied on the decision in this case. *Id.* at 13 (explaining that it is "particularly appropriate" to hold *Bierbach* pending *Musta* "because the Minnesota Supreme Court expressly relied on *Musta* in reaching the decision in the companion case below").

Fourth, this case is a superior vehicle because there are no disputed issues of state law. In *Musta*, all parties agreed that medical marijuana was reasonable and necessary to treat the employee's pain and hence reimbursable under state law. *See Musta* Pet. 23. By contrast, in *Bierbach*, this issue was heavily disputed and litigated in the Minnesota Supreme Court, although the majority did not reach the issue. *See* Bierbach Pet. App. 3a (noting the "remaining issues, which were not present in *Musta*"). Hence, the question presented is outcome-determinative in this case, and might not be outcome-determinative in *Bierbach*.

The *Bierbach* respondents' arguments in favor of review do not withstand scrutiny. First, the *Bierbach*

respondents point to the alleged vehicle problem in this case, *i.e.*, that Mendota Heights no longer exists. *Bierbach* BIO 10-11. But, as the *Bierbach* respondents concede, the employer in that case (Digger's Polaris) also no longer exists. *Id.* Indeed, according to the Minnesota Secretary of State's website, the Digger's Polaris name expired on February 25, 2015, and the "nameholder" of that name, Digger's Sales & Service Inc., dissolved on August 1, 2012.[4] Hence, unlike this case, Digger's Polaris has apparently not existed at any time during the *Bierbach* litigation—which would seem to make that case a worse vehicle than this one.

To avoid this problem, the *Bierbach* respondents waive any argument based on the status of Digger's Polaris, and assert that their own refusal to make an argument makes their case a better vehicle for certiorari. *Id.* Although Petitioner certainly agrees that the argument based on corporate dissolution is meritless, the *Bierbach* respondents' decision to intentionally waive an argument, in order to improve the odds that the Court will review and potentially reverse a decision in their favor, raises questions about

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[4] Business Records Details for Digger's Polaris & Marine Inc., Minnesota Sec'y of State, https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=9c3bd80e-8bd4-e011-a886-001ec94ffe7f (last visited Jan. 27, 2022) (identifying expiration date and nameholder); Business Records Details for Digger's Sales & Service Inc., Minnesota Sec'y of State, https://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=96b26e7a-a3d4-e011-a886-001ec94ffe7f (last visited Jan. 27, 2022) (identifying dissolution date).

their commitment to the adversarial process. The Court should grant review in a case where the parties are genuinely adverse, so as to ensure that the legal arguments are properly aired on both sides.

Second, the *Bierbach* respondents point to the "fully developed trial record," in which the *Bierbach* respondents argued that Bierbach was not entitled to reimbursement under state law. *Bierbach* BIO 11-12 (capitalization omitted). But the record in this case is extensively developed because it includes the harrowing factual findings regarding Petitioner's dependency on physician-prescribed opiates that culminated in her need for medical marijuana as a last resort. Pet. App. 64a-100a (denying reimbursement for physician-prescribed opiates because Petitioner had become dependent on them and they no longer worked); Pet. App. 54a (finding Petitioner's use of medical cannabis to be reasonable and necessary under state law based on finding that she had weaned off of opiates following prior order). Therefore, the record in this case underscores how the Minnesota Supreme Court's ruling hinders patients from receiving medical treatments they need, and appropriately tees up this case for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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