Nos. 21-676 and 21-998

In the Supreme Court of the United States

SUSAN K. MUSTA, PETITIONER

v.

MENDOTA HEIGHTS DENTAL CENTER, ET AL.

DANIEL BIERBACH, PETITIONER

v.

DIGGER'S POLARIS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, preempts a state workers' compensation order that compels an employer to reimburse an employee for the cost of marijuana used in response to pain arising from a work-related injury.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the view of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

A. Federal Law Background

1. In 1970, Congress enacted the Controlled Substances Act (CSA or Act), Pub. L. No. 91-513, Tit. II, 84 Stat. 1242, "with the main objectives of combating drug abuse and controlling the legitimate and illegitimate

traffic in controlled substances." *Gonzales* v. *Oregon*, 546 U.S. 243, 250 (2006); see *Gonzales* v. *Raich*, 545 U.S. 1, 10-15 (2005). The CSA makes it "unlawful for any person knowingly or intentionally" to "possess a controlled substance," or to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by the Act. 21 U.S.C. 841(a)(1), 844(a).

Each substance controlled by the CSA is placed into one of five schedules. 21 U.S.C. 812. Substances are "grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." *Raich*, 545 U.S. at 13. The CSA permits "the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules." *Id.* at 14-15; see 21 U.S.C. 811. A substance is listed in schedule I, the most restrictive classification, if it presents "a high potential for abuse," has no "currently accepted medical use in treatment in the United States," and lacks "accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1)(A)-(C). The CSA prohibits the manufacture, distribution, dispensation, or possession of a Schedule I drug, "with the sole exception being use of the drug as part of a [federally] preapproved research study." *Raich*, 545 U.S. at 14; see 21 U.S.C. 823(f).

When it enacted the CSA in 1970, "Congress classified marijuana as a Schedule I drug." *Raich*, 545 U.S. at 14; see CSA § 202(c), 84 Stat. 1249 (placing "marihuana" in schedule I(c)(10)). The CSA thus "reflects a determination that," for purposes of federal law, "marijuana has 'no currently accepted medical use.'" *United*

States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (quoting 21 U.S.C. 812(b)(1)(B)).

2. The CSA also "contemplates a role for the States in regulating controlled substances." *Gonzales*, 546 U.S. at 251. In particular, the Act specifies that none of its provisions "shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, * * * 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" the federal provision and the "State law so that the two cannot consistently stand together." 21 U.S.C. 903.

In 1996, California created "an exception to [its own] laws prohibiting the possession and cultivation of marijuana" for patients with certain medical conditions. *Oakland Cannabis*, 532 U.S. at 486. Other States followed suit, and 37 States now allow marijuana use for such purposes, in at least some regulated form, as a matter of state law. National Conf. of State Legislatures, *State Medical Cannabis Laws* (Apr. 19, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Some additional States also permit use of products derived from cannabis plants that have lower levels of psychoactive chemical. *Ibid.* This Court has made clear, however, that "medical necessity is not a defense to manufacturing or distributing marijuana." *Oakland Cannabis*, 532 U.S. at 494.

Both Congress and the Executive Branch initially "oppose[d]" state laws like California's, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (1999 Act), Pub. L. No. 105-277, Div. F(11), 112 Stat. 2681-761, which they regarded as "a threat to the [n]ational * * * goal of reducing drug abuse," 62

Fed. Reg. 6164, 6164 (Feb. 11, 1997); see 1999 Act Div. F(1)-(11), 112 Stat. 2681-760 to 2681-761. Between 2009 and 2014, however, the Department of Justice issued several memoranda instructing that, while state marijuana laws do not "alter in any way the Department's authority to enforce federal law" or "provide a legal defense to a violation of federal law," federal law-enforcement officials "[a]s a general matter * * * should not focus federal resources * * * on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Memorandum from David W. Ogden, Deputy Att'y Gen., for Selected U.S. Attorneys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* 1-2 (Oct. 19, 2009), https://go.usa.gov/xu5My; see, *e.g.*, Memorandum from James M. Cole, Deputy Att'y Gen., for All U.S. Attorneys, *Guidance Regarding Marijuana Enforcement* 4 (Aug. 29, 2013) (similar), https://go.usa.gov/xu5Mh. In 2018, the Department rescinded those memoranda. Memorandum from Jefferson B. Sessions, III, Att'y Gen., for All U.S. Attorneys, *Marijuana Enforcement* (Jan. 4, 2018), https://go.usa.gov/xu5ej.

Since 2014, Congress has inserted provisions (riders) in annual appropriations statutes stating that "[n]one of the funds made available under [the statute] to the Department of Justice may be used * * * to prevent" specified States "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Commerce, Justice, Science, and Related Agencies Appropriations Act, 2022, Pub. L. No. 117-103, Div. B, § 531 (2022) (2022 Act); see *United States* v. *Trevino*, 7 F.4th 414, 419-420 (6th Cir. 2021)

(discussing similar riders in earlier annual appropriations statutes), cert. denied, 142 S. Ct. 1161 (2022). In addition, in 2018, Congress amended the CSA's definition of marijuana to exclude certain products that contain only a limited amount of psychoactive chemical (*e.g.*, cannabidiol, or CBD). Agriculture Improvement Act of 2018, Pub. L. No. 115-334, §§ 10113, 12619, 132 Stat. 4908, 5018; see 21 U.S.C. 802(16); 7 U.S.C. 1639*o*(1).

Congress has not, however, enacted various proposed bills that would have listed marijuana on a different schedule or removed it altogether from the list of substances regulated by the CSA. See, *e.g.*, Marijuana 1-to-3 Act of 2021, H.R. 365, 117th Cong., 1st Sess. (2021); Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong., 2d Sess. (2020); Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong., 1st Sess. (2019); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong., 1st Sess. (2017). And the Executive Branch has denied various requests to reschedule or decontrol marijuana. See, *e.g.*, *Sisley* v. *U.S. DEA*, 11 F.4th 1029, 1033 (9th Cir. 2021) (discussing recent denial); 81 Fed. Reg. 53,688 (Aug. 12, 2016) (earlier denial); 76 Fed. Reg. 40,552 (July 8, 2011) (same); *Raich*, 545 U.S. at 15 n.23 (collecting earlier denials). As a result, "federal law still flatly forbids the * * * possession, cultivation, or distribution of marijuana," subject only to the narrow research exception. *Standing Akimbo, LLC* v. *United States*, 141 S. Ct. 2236, 2237 (2021) (statement of Thomas, J., respecting the denial of certiorari).[*]

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[*] Exercising its authority under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, the United States Food and Drug Administration (FDA) has approved a drug containing cannabis-

B. State Law Background

Minnesota has a five-tier schedule of controlled substances that resembles the CSA's. Minn. Stat. § 152.01 *et seq.* (2021). Marijuana is listed on schedule I, the most serious tier, and cannot be prescribed for any purpose. *Id.* § 152.02, Subd. 2(h); see *id.* §§ 152.021, 152.12.

In 2014, Minnesota enacted the Medical Cannabis Therapeutic Research Act (Cannabis Act), Minn. Stat. §§ 152.22-152.37 (2021). Under that law, a patient with a qualifying medical condition, *id.* § 152.22, Subd. 14, may apply to enroll in a state-administered marijuana program, *id.* § 152.27, Subd. 3(a). If the application is approved, the Minnesota Department of Health will issue a registry verification to the patient, the patient's healthcare practitioner, and a participating manufacturer, which may then (with the approval of a pharmacist) supply marijuana to the patient. *Id.* §§ 152.27, Subd. 6; 152.29, Subd. 3.

Minnesota's Cannabis Act does not "require the medical assistance and MinnesotaCare programs"—state-run health programs for low-income patients—"to reimburse an enrollee or a provider for costs associated with the medical use of cannabis." Minn. Stat. § 152.23(b) (2021). But the law contains no similar provision addressing reimbursement for marijuana under state workers' compensation law, which generally provides that an "employer shall furnish any medical * * * treatment * * * as may reasonably be required * * * to cure and relieve from the effects of" a workplace injury. *Id.* § 176.135, Subd. 1. The relevant state administrative agency has determined that marijuana, when

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derived CBD and several drugs containing the same psychoactive chemical as marijuana. The FDA has not, however, approved any drug products that fall within the CSA definition of marijuana.

used by an enrollee in the state program established by the Cannabis Act, is not an "[i]llegal substance" for purposes of Minnesota's workers' compensation scheme. Minn. R., Pt. 5221.6040, Subpt. 7a (2015).

C. Proceedings Below

***1. Musta* v. *Mendota Heights Dental Center*, No. 21-676**

In 2003, petitioner Susan Musta injured her neck while working as a dental hygienist for respondent Mendota Heights Dental Center. *Musta* Pet. App. 4a, 66a. After multiple surgeries and other medical interventions failed to relieve the pain caused by the injury, see *id.* at 66a-77a, a doctor certified that Musta was suffering "intractable pain"—a qualifying medical condition under Minnesota's Cannabis Act, *id.* at 48a. Musta subsequently enrolled in the state program established by the Cannabis Act, purchased marijuana from a state-authorized dispensary, and requested reimbursement from Mendota Heights. *Id.* at 48a-49a, 82a. Mendota Heights did not dispute that Musta's use of marijuana complied with the Cannabis Act and was reasonable, medically necessary, and causally related to her work injury. *Id.* at 54a. But it declined to reimburse Musta for her marijuana purchase, on the ground that doing so would conflict with the CSA. *Id.* at 49a.

A state workers' compensation judge ordered Mendota Heights to provide reimbursement. *Musta* Pet. App. 57a-58a. The Worker's Compensation Court of Appeals affirmed, relying on the parties' stipulation that Musta's marijuana use complied with state law and finding no jurisdiction to address a federal-preemption defense. *Id.* at 51a-52a. But the Minnesota Supreme Court reversed the order on preemption grounds, fo-

cusing on the "impossibility theory of conflict preemption" and reasoning that compliance with the order "would expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful possession." *Id.* at 4a, 21a; see *id.* at 15a-30a. Justice Chutich dissented in relevant part, taking the view that reimbursement of Musta's purchase of marijuana would not satisfy the requirements of aiding-and-abetting liability under federal law and did not create an obstacle to the operation of the CSA. *Id.* at 31a-45a.

***2. Bierbach* v. *Digger's Polaris*, No. 21-998**

In 2004, petitioner Daniel Bierbach injured his ankle while driving an all-terrain vehicle in connection with his employment by respondent Digger's Polaris. *Bierbach* Pet. App. 71a. After undergoing surgery and physical therapy, along with other treatments, he was certified as suffering intractable pain. *Id.* at 71a-72a. He then purchased marijuana in accordance with the Cannabis Act and sought reimbursement from Digger's Polaris. *Id.* at 72a-74a. The company refused on both state-law and federal-preemption grounds. *Id.* at 75a.

Following an evidentiary hearing, a state workers' compensation judge ordered reimbursement, concluding that Bierbach's marijuana use complied with state law and finding no jurisdiction to address a federal-preemption defense. *Bierbach* Pet. App. 82a-92a. The Worker's Compensation Court of Appeals affirmed on similar grounds. *Id.* at 70a-81a. But the Minnesota Supreme Court reversed, with the majority relying on the court's contemporaneous decision in Musta's case, and with Justice Chutich reiterating her dissent in that case and deeming the employer's various state-law arguments to be meritless. *Id.* at 1a-28a.

DISCUSSION

The petitions in these cases, which present a novel question in a rapidly evolving area of law, do not warrant this Court's review. The 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. The decisions below, however, rest on a more complex rationale that unnecessarily explores the scope of federal aiding-and-abetting liability outside the context of any federal prosecution. And while petitioners identify a narrow conflict on the question presented, it involves only four state courts of last resort, none of which has meaningfully considered all of the possible grounds for preemption. No further review is warranted at this time.

A. The Judgments Below Are Correct

Petitioners intentionally possessed marijuana, which is a crime under federal law even if permitted under state law. See 21 U.S.C. 844(a); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 & n.7 (2001). A state law that requires a third party to subsidize such conduct is preempted by federal law. Under black-letter principles of conflict preemption, "federal law must prevail" either "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) (citation and internal quotation marks omitted); see *Kansas* v. *Garcia*, 140 S. Ct. 791, 808 (2020) (Thomas, J., concurring) (explaining that conflict preemption occurs when "federal and state law 'directly

conflict,'" such that "'the two are in logical contradiction'") (citations omitted). Although the Minnesota Supreme Court relied exclusively on the "impossibility theory of conflict preemption" in the decisions below, *Musta* Pet. App. 20a n.7, that theory is not necessary to resolve these cases.

1. To the extent that state law requires reimbursement for the purchase of marijuana, in circumstances where its distribution or possession is illegal under federal law, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok*, 575 U.S. at 377 (citation omitted), or otherwise "directly conflict[s]" with federal law, *Garcia*, 140 S. Ct. at 808 (Thomas, J., concurring) (citation omitted). As this Court has recognized, Congress's classification of marijuana as a Schedule I controlled substance "reflects a determination * * * that marijuana has 'no currently accepted medical use.'" *Oakland Cannabis*, 532 U.S. at 491 (citation omitted). A state-law order that compels third parties to directly subsidize petitioners' possession of marijuana on a medical-use rationale would therefore "override a legislative determination manifest in" the CSA. *Id.* at 493. Under principles of conflict preemption, such a contradiction cannot stand. See, *e.g.*, *Arizona* v. *United States*, 567 U.S. 387, 399, 405 (2012) (explaining that state law "must * * * give way" when it conflicts with "a considered judgment" embodied in federal law).

If States could enforce laws compelling third parties to subsidize federal crimes, they could directly undermine congressional determinations. For example, 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. See 21 U.S.C. 812(c) (including LSD in schedule I(c)(9)); cf., *e.g.*, Dana G. Smith, *More People Are Microdosing for Mental Health. But Does It Work?*, N.Y. Times, Feb. 28, 2022, https://www.nytimes.com/2022/02/28/well/mind/microdosing-psychedelics.html. A State could likewise compel private parties to provide reimbursements for services that are banned by federal law. See, *e.g.*, 18 U.S.C. 431-443 (prohibiting certain types of contracts). But it "is simply implausible that Congress would have" criminalized particular conduct "if it had been willing to" let States "compromise [the] effectiveness" of those laws by compelling private parties to subsidize that very criminal conduct. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000).

"Acknowledging the inconsistency between state and federal law, a number of states have adopted statutory provisions making it clear that an insurer or self-insurer may not be compelled to reimburse a patient for costs associated with the use of medical marijuana." 8 Lex K. Larson, *Larson's Workers' Compensation Law* § 94.06 (rev. ed. Dec. 7, 2021). Minnesota's Cannabis Act itself exempts state-run health programs for low-income patients from any requirement "to reimburse an enrollee or a provider for costs associated with the medical use of cannabis." Minn. Stat. § 152.23(b) (2021). That exclusion—which by definition affects patients with the greatest financial needs—avoids placing state officials who implement those programs into conflict with federal law. The conflict with the CSA remains, however, when Minnesota law compels private employers to subsidize the same federal crimes.

A state-law requirement to provide such a subsidy differs in kind from various other state laws addressing

the use of marijuana in response to a medical condition. A State that merely decriminalizes such marijuana use under state law, for example, would likely not trigger obstacle preemption. See *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1474 (2018). The state orders at issue here, however, are fundamentally different because they compel even unwilling third parties to subsidize federal possession crimes. Cf., *e.g.*, *Michigan Canners & Freezers Ass'n* v. *Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (finding conflict preemption where state law, contrary to federal law, authorized private entities to make contracts that would bind third parties).

2. Neither petitioners nor the two state courts of last resort that have upheld marijuana-reimbursement orders have meaningfully engaged with the points above. And nothing that petitioners or state courts have identified would refute such conflict preemption.

a. Some state courts have viewed 21 U.S.C. 903 to foreclose CSA preemption of state law unless it is impossible to comply with both sources of law. See *Appeal of Panaggio*, 260 A.3d 825, 831-832 (N.H. 2021) (citing cases). That misinterprets Section 903.

Section 903 provides that no CSA provision "shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, * * * to the exclusion of any State law on the same subject matter * * * unless there is a positive conflict between" the federal provision and "State law so that the two cannot consistently stand together." 21 U.S.C. 903. That language is most naturally read to disclaim only "field" preemption, *ibid.*, a type of preemption that would "foreclose *any* state regulation in the area," *Oneok*, 575 U.S. at 377 (citation omitted; emphasis altered). If field preemption applied, it would preclude

States even from adopting drug laws stricter than their federal counterparts, in contravention of the CSA's express purpose to "'strengthen,' rather than to weaken, 'existing law enforcement authority in the field of drug abuse,'" *United States* v. *Moore*, 423 U.S. 122, 132 (1975) (quoting 84 Stat. 1236); see, *e.g.*, *State ex rel. Lance* v. *District Ct.*, 542 P.2d 1211, 1213 (Mont. 1975).

In contrast to its express disclaimer of "field" preemption, Section 903 explicitly preserves preemption when "there is a positive conflict between" the CSA and "State law so that the two cannot consistently stand together." 21 U.S.C. 903. Section 903 thus specifically embraces principles of "conflict" preemption, *ibid.*, which are not limited to impossibility preemption, see *Oneok*, 575 U.S. at 378. This "Court has not previously driven a legal wedge * * * between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law," *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000), and no sound reason exists to interpret Section 903 to preserve only one form of the "conflict" preemption to which it refers, see, *e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 289-290 (2006) (Scalia, J., dissenting) (explaining that Section 903 "merely disclaims field pre-emption, and affirmatively *prescribes* federal preemption whenever state law creates a conflict").

In *Wyeth* v. *Levine*, 555 U.S. 555 (2009), this Court conducted both impossibility- and obstacle-preemption analyses, notwithstanding a statutory provision directing —in language closely resembling Section 903's—that "state law would only be invalidated upon a 'direct and positive conflict' with" federal law. *Id.* at 567 (citation omitted); see *id.* at 575-581; see also *id.* at 612 n.4 (Alito,

J., dissenting) (explaining that the provision "simply recognizes the background principles of conflict pre-emption" and does "not displace [the Court's] conflict pre-emption analysis"). The same analysis applies here.

b. To the extent that petitioners address obstacle preemption, they—like some state courts, see, *e.g.*, *Hager* v. *M&K Constr.*, 247 A.3d 864, 883-888 (N.J. 2021)—rely principally on the annual appropriations riders that Congress has enacted since 2014. See, *e.g.*, *Musta* Pet. 29-30; see also pp. 4-5, *supra*. That reliance is misplaced. The appropriations riders state that "[n]one of the funds made available * * * to the Department of Justice may be used * * * to prevent" States "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." 2022 Act § 531. That is a restriction on certain uses of federal funds, not a disclaimer of otherwise-applicable preemption principles.

By their terms, the appropriations riders do not speak to the enforcement of workers' compensation orders like those at issue here. Not only do the "funds made available * * * to the Department of Justice" have no bearing on the lawfulness of such orders, but such orders are not "laws that authorize the use, distribution, possession, or cultivation of medical marijuana," 2022 Act § 531. Rather than "authoriz[ing]" such activities, the orders compel private employers—whether or not they are willing—to subsidize marijuana possession that is permitted under separate state laws. *Ibid.* And the appropriations riders do not support an inference that Congress has accepted state laws compelling third-party reimbursement for federal crimes. A limitation on funding for the enforcement of federal law is not a repeal of the CSA's substantive criminal prohibitions.

Among other things, Congress is in no way bound to enact similar appropriations riders in future years, and future prosecutions could encompass present-day conduct. See 18 U.S.C. 3282 (general five-year federal statute of limitations for non-capital offenses).

This Court has disfavored interpretations of statutes, especially appropriations statutes, that would result in implied repeals or suspensions of federal law. See, *e.g.*, *Maine Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1323 (2020). That principle applies with full force here. The same congressional majorities that adopted the appropriations riders "could have enacted an exception to the" CSA for marijuana. *United States Dep't of Def.* v. *FLRA*, 510 U.S. 487, 498 (1994). That they "did not do so," *id.* at 499, indicates that Congress intended for marijuana possession to remain criminal under federal law—and for state laws compelling subsidization of that crime to remain preempted.

Petitioners observe (*Musta* Pet. 30) that the CSA does not expressly regulate insurance practices or proscribe reimbursement for marijuana possession. But conflict preemption is a form of *implied* preemption, see, *e.g.*, *Arizona*, 567 U.S. at 399, and a requirement to fund illegal drug possession directly conflicts with federal law by supporting conduct that the CSA prohibits.

B. This Court's Review Is Not Warranted In These Cases

The Minnesota Supreme Court decisions in these cases—which adopted an unnecessarily complex preemption analysis in an idiosyncratic context—do not warrant this Court's consideration.

Although the decisions below do not rely on, or even address, an "obstacle theory of conflict preemption," *Musta* Pet. App. 20a n.7, they nonetheless reach the correct result of finding the state orders preempted.

This Court reviews "judgments," not "opinions," *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015) (emphasis omitted), and review of a correct result is especially unwarranted when it implicates legal reasoning that few other courts have thoroughly addressed, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Indeed, the Minnesota Supreme Court's exclusive reliance on an "impossibility theory of conflict preemption," *Musta* Pet. App. 20a n.7, would needlessly complicate any review.

The Minnesota Supreme Court reasoned that respondents' compliance with the state workers' compensation orders in these cases would necessarily violate the federal criminal prohibition on aiding and abetting a federal crime—namely, the crime of marijuana possession. See *Musta* Pet. App. 17a-30a. Under the federal aiding-and-abetting statute, 18 U.S.C. 2, a person aids and abets a crime when "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). The Minnesota Supreme Court reasoned that compliance with the challenged reimbursement orders "effectively facilitates future possession" in light of an employee's "expectation" of an ongoing reimbursement obligation under state law and an employer's knowledge and intent that its reimbursements will be used for their stated marijuana-related purpose. *Musta* Pet. App. 25a, 28a.

That reasoning is complicated, however, by the unusual context of the parties' apparent "expectation" and "intent" in these cases, in which the employers correctly viewed state law as unsettled and disputed any state-law obligation to reimburse past or future marijuana purchases. The lack of clarity on the application of state

law differentiates these cases from those where an employer engages in a course of reimbursement with more well-established state-law parameters. And it would be inadvisable to analyze the potential scope of federal criminal law in this workers' compensation context. The federal government has neither prosecuted respondents nor expressed any desire to do so. It has not indicated the allegations, evidence, and inferences on which such a prosecution might rely. Nor will it ever have occasion to do so in Minnesota, in which such orders will no longer be issued.

Although petitioners identify a narrow conflict on the question presented—with the highest courts of Minnesota and Maine invalidating workers' compensation orders requiring reimbursement for marijuana and the highest courts of New Hampshire and New Jersey upholding them, see *Musta* Pet. App. 18a-21a—that disagreement does not warrant this Court's review. The disagreement is limited and recent, with three of the four decisions coming in 2021. And it is unclear how many additional States interpret their state workers' compensation schemes, standing alone, to require such reimbursements, or what the limits of such a state-law reimbursement obligation might be. See, *e.g.*, *Wright's Case*, 156 N.E.3d 161, 171-175 (Mass. 2020) (interpreting state law not to require such reimbursement in part to avoid preemption concerns); cf. *Bierbach* Pet. App. 2a (declining to resolve various state-law questions).

Furthermore, no state court of last resort has issued a decision that provides an appropriate backdrop for this Court's review of the obstacle-preemption issues that are inherent here. The Minnesota and Maine courts relied only on impossibility preemption. *Musta* Pet. App. 29a & n.16; *Bourgoin* v. *Twin Rivers Paper*

Co., LLC, 187 A.3d 10, 22 (Me. 2018). The New Hampshire court addressed obstacle preemption briefly, noting that the insurer in that case had made its argument "in a single sentence." *Panaggio*, 260 A.3d at 837. And the New Jersey court's preemption analysis turned entirely on its flawed reading of the appropriations riders. *Hager*, 247 A.3d at 886-888. Given the novelty of the issues, this Court would benefit from further development of the relevant preemption questions in the lower courts before potentially addressing them itself.

The relatively narrow workers' compensation issue in these cases, moreover, is only one of many in a rapidly evolving area of the law. "[T]he current legal landscape of medical marijuana law may, at best, be described as a hazy thicket." *Wright's Case*, 156 N.E.3d at 165. The Legislative and Executive Branches of the federal government are best situated to consider any potential tailored measures to address specific instances of interaction between federal and state marijuana laws. To that end, Congress has recently amended the federal prohibition on marijuana, see p. 5, *supra* (noting 2018 change to CSA definition of marijuana), and continues to consider more expansive approaches; indeed, shortly after the Court issued its invitations in these cases, the House of Representatives passed legislation that would remove marijuana from the CSA's list of controlled substances altogether. Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong., 2d Sess. (Apr. 4, 2022). Refraining from taking up the questions presented here thus represents the sounder course at this time. Cf. *Nebraska* v. *Colorado*, 577 U.S. 1211 (2016) (No. 144, Orig.) (denying leave to file a bill of complaint in this Court alleging preemption of state marijuana laws).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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