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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The government acknowledges that there is a 2-2 split on a question of national importance. Yet it nonetheless recommends denying certiorari—based on unusually weak arguments that one would never ordinarily see in a government brief. Why?

Because the government is not a neutral stakeholder here. For several reasons, the government has powerful institutional incentives to persuade this Court to deny certiorari.

First, with respect to the Minnesota Supreme Court's holding that complying with the workers' compensation order would be a federal crime, the government is in a no-win situation. The government would never *disagree* with this reasoning—it would never advocate for the scope of federal criminal law to be narrowed. But *agreeing* with this reasoning would raise uncomfortable questions about why the government is refusing to enforce federal criminal law. The government therefore refuses to take a position on the Minnesota Supreme Court's reasoning. But if the Court granted certiorari, the government could not evade this issue. The best way for the government to avoid this quandary is to keep this case out of the Supreme Court.

Second, this case threatens to expose the incoherence of the Executive Branch's policy towards marijuana. The government argues that the workers' compensation order is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gov't Br. 10 (quotation marks omitted). This contention is disconnected from reality. It is the federal

government's policy of non-enforcement, not the state-law workers' compensation orders, that poses an obstacle to the accomplishment of Congress's objectives. Minnesota and most other states allow and regulate medical marijuana. Numerous states allow and regulate recreational marijuana. As a result, cultivation, transportation, and retail sales of both medical and recreational marijuana occur, out in the open, at a mass scale, nationwide. The federal government lets this happen. The notion that these workers' compensation orders somehow make a dent in the federal government's effort to combat marijuana cannot be taken seriously. The government knows this, which is why it so badly wants certiorari to be denied. The government does not want to face questions about why it may invoke the Controlled Substances Act as a basis to impede state law while it fails to enforce the Controlled Substances Act.

Third, this case raises the risk that the Court may clip the wings of the government's Commerce Clause authority. Justice Thomas's concurrence in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021) (Thomas, J., respecting denial of certiorari), looms large. For the reasons explained by Justice Thomas, it is far from clear that the federal government has the constitutional authority to intrude on state workers' compensation systems when the government is refusing to enforce medical marijuana law. *Id.* at 2238. It is easy to imagine the Court applying constitutional avoidance principles to reject the government's implied preemption theory—with reasoning that might hinder the government's positions in favor of limitless federal

authority.

It is for these reasons that the government asserts objections to certiorari that are remarkably weak, such as that the 2-2 split is somehow not entrenched enough or that the Senate might overcome a filibuster and legalize marijuana over the Executive Branch's opposition. The Court should not be fooled. This case is certworthy.

The government identifies only one alleged vehicle problem—the existence of a dispute over state law. But that vehicle problem affects only *Bierbach*, not *Musta*. The Court should therefore grant *Musta* and hold *Bierbach*.

ARGUMENT

I. The government's implied preemption theory is meritless.

The Minnesota Supreme Court concluded that the workers' compensation order was preempted because it would force Respondents to commit the federal crime of aiding and abetting marijuana possession. This reasoning puts the government into a difficult situation.

The government cannot bring itself to *disagree* with this reasoning, given its interest in ensuring that the scope of aiding-and-abetting liability is as broad as possible. But the government is well aware that this Court is unlikely to accept the Minnesota Supreme Court's remarkably broad assertion of federal criminal law. And if the government *agrees* with this reasoning, it will face an awkward question: why is the Executive Branch systematically refusing to prosecute these

alleged federal crimes in the states where they openly occur?

So the government simply refuses to take a position on this issue—and to justify this refusal, it resorts to a very strange argument. The government faults the Minnesota Supreme Court for having analyzed whether compliance with the workers' compensation order would violate federal law, because the government has not disclosed its subjective intent to prosecute Respondents or "indicated" what "allegations, evidence, and inferences" it might rely upon. Gov't Br. 17.

Preemption does not work this way. It is hornbook law that courts analyze preemption by assessing whether it is "impossible for a private party to comply with both state and federal requirements." *Merck Sharpe & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019) (quotation marks omitted); *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) (same); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (same). Of course, some of this Court's cases have analyzed implied obstacle preemption—but even in those cases, the Court makes clear that courts should consider whether "compliance with both state and federal law is impossible." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quotation marks omitted); *see Arizona v. United States*, 567 U.S. 387, 399 (2012). This Court has never suggested that it is necessary, or even helpful, to await a federal enforcement action before analyzing impossibility preemption.

It therefore makes perfect sense that the Minnesota Supreme Court analyzed whether compliance with

state law would violate federal law. It was doing exactly what this Court has repeatedly told it to do. The government's critique of the Minnesota Supreme Court's decision to reach this issue is a transparently pretextual effort to change the subject.

At any rate, the government's preferred theory—obstacle preemption—is even weaker than the Minnesota Supreme Court's impossibility preemption theory. Thus far, 37 judges--26 state supreme court justices (Pet. 23), and 11 intermediate appellate court judges (Pet. 22), have considered the question presented. Zero have endorsed the government's obstacle preemption argument. For good reason: it is meritless.

Under the Controlled Substances Act, state law is not preempted unless there is "a positive conflict" between federal and state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. The government claims that this provision operates as a one-way ratchet that preserves *stricter* state drug laws. But the government claims that any time a state law might, even indirectly, make it easier to obtain controlled substances, courts can ignore the text of § 903 and apply standard obstacle preemption principles. Gov't Br. 12-13. Aside from the unhelpful adverb "naturally," the government offers no textual justification for this gerrymandered approach to preemption.

Applied according to its terms, 21 U.S.C. § 903 does not bar the workers' compensation order. There is no "positive conflict," *id.*, between federal law and the state workers' compensation order. Federal law simply

does not regulate employee reimbursement of the cost of medical marijuana, and states can make their own policy decisions. If states want to criminalize such reimbursement, they can. If states want to permit such reimbursement, but leave it optional, they can. And if states want to mandate such reimbursement as part of their workers' compensation systems, they can. Each of these policies can "consistently stand together," *id.*, with the government's policy of nonregulation.

The government complains that Minnesota's scheme will "undermine congressional determinations" by indirectly facilitating marijuana consumption. Gov't Br. 10. To be clear, Minnesota's workers' compensation system does not facilitate *access* to marijuana—injured employees can obtain it with or without workers' compensation coverage. Instead, Minnesota's scheme reimburses employees for the out-of-pocket cost of medical marijuana, thus giving them a little extra money to spend on other goods and services. This outcome, according to the government, would conflict with the Controlled Substances Act's general purpose of stamping out marijuana.

This theory conflicts with fundamental principles of statutory interpretation and separation of powers. The Supremacy Clause cannot be "deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2017) (opinion announcing judgment of Court by Gorsuch, J., joined by Thomas

and Kavanaugh, JJ.). "[P]iling inference upon inference about hidden legislative wishes … risk[s] displacing the legislative compromises actually reflected in the statutory text—compromises that sometimes may seem irrational to an outsider coming to the statute cold, but whose genius lies in having won the broad support our Constitution demands of any new law." *Id.* at 1908. "In disregarding these legislative compromises, we may only wind up displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme." *Id.* The Court should be especially reluctant to reach beyond the statutory text when such a reading would "restrict the States' sovereign capacity to regulate in areas of traditional state concern." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (internal quotation marks omitted). The Court should not expand the scope of the Controlled Substances Act to regulate insurance coverage and employee reimbursement—topics on which it is silent.

The government (Gov't Br. 12) cites *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984). In that case, the Court held that the state statute "empowers producers' associations to do precisely what the federal Act forbids them to do." *Id.* at 477-78. This case is the exact opposite: the state statute acts in an area where federal law is silent.

Moreover, the workers' compensation scheme poses no threat to federal law enforcement interests.

Petitioner consumes marijuana that is prescribed by a physician, in compliance with state law. Permitting reimbursement would not undermine the "main objectives of the CSA": "to conquer drug abuse" and "prevent the diversion of drugs from legitimate to illicit channels." *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005).

It is notable that all of Minnesota's activities—and all of Petitioner's activities—occur out in the open. Minnesota openly authorizes in-state facilities to grow the marijuana. It openly approved Petitioner's application to receive the marijuana. Petitioner's doctor openly prescribed the marijuana. Petitioner is making no secret of her marijuana consumption. The Justice Department has never attempted to enforce federal law with respect to any of these activities. Why should it be taken seriously when it now asserts that reimbursing Petitioner would undermine federal law?

And it is not just Minnesota's activities. Medical marijuana is prevalent nationwide. And in many states, so is recreational marijuana. In states from California to Massachusetts, any adult who wants marijuana can go into a store and buy it. In this environment, saying that workers' compensation reimbursement is an "obstacle" to the federal purpose of ensuring a marijuana-free world is like saying a pothole is an "obstacle" to driving a car across the Atlantic Ocean.

Moreover, in the context of medical marijuana, there is more to federal law than the Controlled Substances Act. As Justice Thomas has observed, Congress has enacted a "half-in, half-out regime that simultaneously tolerates and forbids local use of

marijuana." *Standing Akimbo*, 141 S. Ct. at 2236-37 (Thomas, J., respecting denial of certiorari). While marijuana remains illegal under the Controlled Substances Act, Congress has also banned the Executive Branch from preventing states from implementing their own laws that authorize medical marijuana use. Pet. 3-4.

The government insists that the appropriations rider does not literally speak to the federal preemption question here. Gov't Br. 14-15. This is an ironic argument coming from the government, which unapologetically relies on *implied* preemption. Gov't Br. 15. The point is that federal marijuana law contains a series of compromises in which medical marijuana technically remains illegal, but states are left alone. The Court should not overturn that compromise by using implied preemption to add implied prohibitions to the Controlled Substances Act that do not appear in its text.

Constitutional avoidance also weighs against a finding of implied preemption. As Justice Thomas has observed, "the Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*." *Standing Akimbo*, 141 S. Ct. at 2238 (Thomas, J., respecting denial of certiorari). Even though the Executive Branch refuses to enforce federal marijuana law, the Executive Branch still insists that Minnesota should be banned from implementing its workers' compensation program. It is doubtful at best whether Congress's power stretches that far. Rather

than setting up a constitutional clash, the Court should reject the government's boundless view of implied preemption and hold that the Controlled Substances Act does not interfere with state workers' compensation law.

II. This case warrants Supreme Court review.

The government is well aware that this case poses a risk to its extravagant claims of federal authority. So it launches a series of objections to certiorari, one weaker than the next.

1. The government asserts that the split is "narrow" and "recent." Gov't Br. 17. A 2-2 split among state supreme courts, with 26 judges weighing in, is not "narrow." Moreover, the relative recency of the split demonstrates the contemporary importance of the issue—which weighs in favor of review, not against it.

It is notable that, literally 24 hours after it filed its invitation brief in this case, the government filed a brief acquiescing to certiorari in *Bittner v. United States*, No. 21-1195. *Bittner* involves a 1-1 split on a narrow criminal issue in which both conflicting decisions were released in 2021. If *Bittner* is certworthy, then this case—presenting a broader and longer-lasting split on a more important issue—is also certworthy.

2. The government complains that insufficient judicial attention has been paid to its obstacle preemption argument. Gov't Br. 15-16, 17-18. To be clear, this argument was made below and the dissent addressed it in detail, Pet. App. 44a-45a, so there is no barrier to the Court addressing it in this case.

It is true that no judge has ever found the government's obstacle preemption argument persuasive—every judge to consider the question presented has either rejected preemption, or found preemption on other grounds. That is because the government's argument is unpersuasive. This Court is fully capable of adjudicating this argument on the current record. It need not wait, perhaps indefinitely, for some lower court, somewhere, to agree with the government's bad argument.

3. The government says it is "unclear how many additional States" would require reimbursement of medical marijuana. Gov't Br. 17. Despite medical marijuana being legal in almost every state, the government cites *one* decision—*Wright's Case*, 156 N.E.3d 161 (Mass. 2020)—finding that state law does not require such reimbursement. Gov't Br. 17. But as the petition explained, the reasoning in *Wright's Case* hinged on federal preemption concerns. Pet. 23-24. The risk that state courts will distort state law based on mistaken preemption concerns is a reason to grant review, not to deny it. *Id.* Moreover, appellate courts or workers' compensation tribunals in New Mexico, New York, and Connecticut have recently rejected federal preemption and ordered reimbursement, indicating that this issue will continue to recur in other states. Pet. 22.

4. The government notes that there are many difficult issues in the area of marijuana law. Gov't Br. 18. Indeed there are. It is this Court's function to resolve difficult issues.

5. The government suggests that perhaps Congress

will change the law. Gov't Br. 18. It is true that the House has voted to legalize marijuana, but there is no realistic possibility that the Senate will overcome a filibuster anytime soon. Moreover, the Executive Branch regularly declines to reschedule or decontrol marijuana, as the government's brief admits. Gov't Br. 5. The government does not suggest there is any regulatory change on the horizon. So the government's position boils down to this: the Court should deny certiorari because maybe, someday, the Senate will overcome a filibuster to override the Executive Branch's own refusal to reschedule marijuana. This is not a persuasive argument against certiorari.

III. *Musta* is the better vehicle.

Petitioner's reply brief explained why *Musta* is a better vehicle than *Bierbach*. Pet. Reply 11. The government's brief confirms that *Musta* is the better vehicle.

The government does not endorse any the *Musta* respondents' meritless vehicle objections. It identifies only one vehicle issue, which affects *Bierbach*, not *Musta*.

According to the government, the Court should deny review because of the "unusual context," in which the "employers … disputed any state-law obligation to reimburse past or future marijuana purchases." Gov't Br. 16.

It is true that in *Bierbach*, the employer vigorously disputed its state-law obligation to reimburse marijuana purchases. The Minnesota Supreme Court declined to resolve that state-law dispute. *See*

Bierbach Pet. App. 3a.

In *Musta*, however, as the government correctly acknowledges, "Mendota Heights did not dispute that Musta's use of marijuana complied with [Minnesota's] Cannabis Act and was reasonable, medically necessary, and causally related to her work injury." Gov't Br. 7; *see Musta* Pet. App. 5a, 49a. Indeed, "the sole issue" raised by Respondents was federal preemption. Pet. App. 5a.

As the *Musta* reply brief explained, this feature of the case, among others, makes it a stronger vehicle than *Bierbach*. Pet. Reply 11. The Court should therefore grant certiorari in *Musta* and hold *Bierbach*.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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