

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**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court is considering the question presented in two pending cases. *Musta v. Mendota Heights Dental Center*, No. 21-676 (pet. docketed Nov. 5, 2021), presents the identical question presented in this petition: whether the Controlled Substances Act (“CSA”) preempts an order under a state workers’ compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury. The Court should grant either this petition or the *Musta* petition, and hold the non-granted case for resolution of the granted case.

ARGUMENT

I. The Preemption Question Warrants Resolution Because State Supreme Courts Are Divided And The Minnesota Supreme Court Erred

1. This Court’s review is needed now to resolve a mature split among state supreme courts. Respondents acknowledge an entrenched division of authority as to whether the CSA preempts state workers’ compensation laws, but insist that the split “would benefit from further percolation in the lower courts.” Opp. 7-8. To the contrary, delaying the resolution of this increasingly pervasive issue will only result in further contradictions between States and further confusion as to the law. There is no reason to wait for the split to balloon from 2-2 to 10-10 or more; this issue has crystalized and is ready for resolution by this Court.

Respondents also argue that review is unwarranted because “[t]here is a good chance that the legal landscape will look very different by 2023, or whenever the Court would be in a position to issue a merits

ruling in this case.” Opp. 9. But respondents offer no support for that prophecy. Respondents are mistaken, therefore, to liken resolution of this issue to “shoot[ing] at such a quickly moving target.” *Id.* The CSA has classified marijuana as a Schedule I substance since 1970, and Minnesota has authorized the use of marijuana for medical purposes since 2014. *See* Pet. 3-4. There are no signs that either law will change or that the conflicting judicial decisions among States with similar laws will be resolved on their own.

2. Respondents argue that “[t]he Minnesota Supreme Court’s determination is plainly correct” without further explanation. Opp. 10. For the reasons explained in petitioner’s petition as well as in the *Musta* petition, *see* Pet. 9-10; *Musta* Pet. 26-30, No. 21-676, the Minnesota Supreme Court erred in holding that the CSA preempts a state workers’ compensation order requiring reimbursement for medical marijuana.

II. The Court Should Grant *Musta* Or *Bierbach*

The Court should grant either the *Musta* petition or the *Bierbach* petition, and hold the other. Respondents argue that, if the Court decides to consider the question presented, it should grant *Bierbach* and hold *Musta*. Opp. 10-12. Petitioner respectfully submits that either case would provide an appropriate vehicle for consideration of this question.

First, respondents argue that *Bierbach* is a better vehicle than *Musta* because the *Musta* respondents have argued that “the dissolution of *Musta*’s employer could muddle or hinder further review of the underlying substantive federal preemption question.” Opp. 10-11 (quoting *Musta* Opp. 9, No. 21-676). That issue, however, should not preclude this Court’s review.

Under Minnesota law, a dissolved corporation's officers, directors, and shareholders still can defend claims against the corporation. *See* Minn. Stat. § 302A.783.

Second, respondents argue that *Bierbach* is the preferable vehicle because it has a fully developed trial record, whereas *Musta* was decided on the basis of factual stipulations. Opp. 11-12. Given the legal question at issue, the Court could grant either case and still resolve the division in judicial authority on this issue.

Respondents claim that the record in *Bierbach* “underscores the dangers in compelling reimbursement from employers and insurers, including the certainty of unregulated, skyrocketing costs, as well as the health risk to employees from unlimited access to marijuana without treatment parameters or a doctor’s prescription pad.” Opp. 12. Respondents, however, do not explain how those facts and policy considerations are relevant to resolving the limited question presented here. Instead, those considerations relate to two other questions respondents raised before the Minnesota Supreme Court that are not at issue here: whether the expert opinion relied on by the workers’ compensation judge was well-founded and whether medical cannabis is reasonable and necessary to treat petitioner’s intractable pain. The Minnesota Supreme Court did not reach those questions, *see* App. 2a, and they are not before the Court here.

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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