FILED
March 8, 2021
OFFICE OF APPELLATE COURTS

No. A20-1551

STATE OF MINNESOTA

IN SUPREME COURT

Susan K. Musta,

Respondent,

vs.

Mendota Heights Dental Center and Hartford Insurance Group,

Relators,

and

Keith Ellison, Attorney General for the State of Minnesota,

Intervenor.

INTERVENOR'S BRIEF

Thomas D. Mottaz (#129975)
Cheri M. Sisk (#032999X)
Law Office of Thomas Mottaz
3340 Northdale Blvd. NW, Suite 140
Coon Rapids, MN 55448
Telephone: (763) 421-8226

ATTORNEYS FOR RESPONDENT

William M. Hart (#150526)
Julia J. Nierengarten (#391851)
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661
-and-
Kassi Erickson Grove (#299819) Law Offices of Seven G. Piland
7400 College Boulevard
Suite 550
Overland Park, KS 66210
Telephone: (913) 401-2805

ATTORNEYS FOR RELATORS

KEITH ELLISON
Attorney General
State of Minnesota

LIZ KRAMER (#0325089)
JEFFREY K. BOMAN (#0396253)
RACHEL BELL-MUNGER (#0395962)

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1010 (Voice)
(651) 282-5832 (Fax)

ATTORNEYS FOR INTERVENOR

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Cases (Cont.)

Federal Cases (Cont.)

State Cases

Federal Statutes and Legislation

Constitution

State Statutes

State Rules

Other Authorities

LEGAL ISSUES

1. Does federal law preempt the state laws under which the compensation court ordered Relators to reimburse Respondent Susan Musta for her out-of-pocket medical cannabis expenses?

No. The Controlled Substances Act (CSA) does not preempt Minnesota laws requiring an insurer and employer to reimburse an employee's medical cannabis expenses.

Apposite Authorities

- *Hager v. M & K Constr.*, 462 N.J. Super. 146 (App. Div. 2020), *cert. granted* 241 N.J. 484 (May 12, 2020)
- *Appeal of Panaggio*, No. 2019-0685, ___ A.3d ___, 2021 WL 787021 (N.H. Mar. 2, 2021)
- *Rosemond v. United States*, 572 U.S. 65 (2014)
- *United States v. Murry*, 588 F.2d 641 (8th Cir.1978)
- Minn. Stat. §§ 152.22-152.37

STATEMENT OF THE CASE

This case raises an important constitutional question regarding federal preemption of Minnesota law. Under a theory of conflict preemption, Relators seek to invalidate portions of Minnesota's medical cannabis laws, to the extent these laws require a workers' compensation insurer to reimburse an employee for medical cannabis expenses. Keith Ellison, Attorney General for the State of Minnesota ("Attorney General") has intervened in this case for the limited purpose of defending these state statutes. Because the reimbursement of medical cannabis expenses authorized under Minnesota law is not a violation of federal law and does not expose an insurer to criminal liability, state laws requiring reimbursement are not preempted. This Court should hold that federal law does not preempt state statutes that require an insurer to reimburse an employee for medical cannabis expenses.

STATEMENT OF FACTS

I. OVERVIEW OF MINNESOTA'S MEDICAL CANNABIS PROGRAM

In 2014, the Minnesota Legislature enacted Minnesota's medical cannabis laws, Minn. Stat. §§ 152.22-152.37. These laws establish a patient registry program and allow certain patients with qualifying medical conditions to use and possess cannabis for medical purposes. Minn. Stat. § 152.27. Qualifying medical conditions include cancer, glaucoma, HIV/AIDS, terminal illness, and any other medical condition or its treatment approved by

the Commissioner of the Minnesota Department of Health ("MDH").[1] *Id*. §§ 152.22, subd. 14, 152.27, subd. 2(b); *see also* Minn. R. 4770.4003, subps. 1-5. Qualifying medical conditions approved by the Commissioner include intractable pain and chronic pain. *See* Minn. Dep't of Health, *Medical Cannabis Qualifying Conditions*, available at https://www.health.state.mn.us/people/cannabis/patients/conditions.html (last visited Mar. 8, 2021).

A patient can apply to enroll in the patient registry program by providing, among other information, a certification from a health care practitioner certifying that the patient has been diagnosed with a qualifying medical condition. Minn. Stat. § 152.27, subd. 3(a); *see also id*. § 152.28, subd. 1. If the Commissioner approves of an application, the Commissioner provides the patient with a registry verification. *Id*. § 152.27, subd. 6(a), (e). Upon enrollment, the patient can use the registry verification to obtain medical cannabis from a registered medical cannabis manufacturer. *See id*. § 152.29, subd. 3.

Minnesota's medical cannabis program is strictly regulated. Indeed, the MDH Commissioner can register only two in-state medical cannabis manufacturers. Minn. Stat. § 152.25, subd. 1(a). The medical cannabis manufacturers in Minnesota are responsible for cultivating, manufacturing, preparing, and dispensing medical cannabis in Minnesota. *See id*. §§ 152.22, subd. 7, 152.29. Complying with Minnesota's medical cannabis laws, however, provides protections to those involved with the medical cannabis program. *See*

[1] MDH is responsible for establishing and administering Minnesota's medical cannabis program. Minn. Stat. §§ 152.22, subd. 2, 152.25, 152.27, subd. 2.

id. § 152.32 (providing criminal and civil protections). MDH reports that there are currently over 31,000 patients actively enrolled in the patient registry. Minn. Dep't of Health, *Medical Cannabis Weekly Updates of Registration Counts*, available at *https://www.health.state.mn.us/people/cannabis/about/medicalcannabisstats.html* (last visited Mar. 8, 2021).

II. MUSTA'S WORKERS' COMPENSATION CLAIM AND PROCEEDINGS BELOW

Respondent Susan Musta suffered a work injury in 2003. Relator's Addendum (Rel. Add.) at 002. She has undergone numerous treatments, including taking a long-term opioid. Her employer, Mendota Heights Dental Center, and its compensation carrier, Hartford Insurance (collectively, Relators) have provided covered benefits. Rel. Br. at 7. In 2018, a compensation judge found that opioids were no longer effective at treating Ms. Musta's pain, and thus were no longer a reasonable and necessary treatment. Rel. Add. at 002.

A medical doctor subsequently certified Musta as suffering from intractable pain, qualifying her to obtain medical cannabis under Minnesota's medical cannabis program. *Id.* Following her qualification, Musta obtained medical cannabis from a state authorized dispensary in accordance with Minnesota's medical cannabis laws and paid for the cannabis out of her own pocket. *Id.* She then requested reimbursement from Relators. *Id.* Relators denied her reimbursement request, asserting that reimbursement would require them to violate federal law. *Id.*

The matter then came on for hearing before a workers' compensation judge. *Id.* The parties stipulated that Musta's use of medical cannabis is reasonable, necessary, and causally related to her work injury.[2] *Id.* The parties also stipulated that Musta had properly followed the requirements for obtaining medical cannabis under Minnesota's medical cannabis laws. *Id.* The sole issue presented to the compensation judge was whether an order requiring the employer and insurer to reimburse an employee for out-of-pocket medical cannabis expenses would be in violation of federal law. *Id.* However, before the compensation judge issued her decision, the Office of Administrative Hearings (OAH) certified the federal preemption question to this Court. This Court declined to accept the certified question and remanded the case back to the compensation judge for resolution. The compensation judge subsequently issued her decision, holding that Minnesota's medical cannabis laws were not preempted. The compensation judge found Relators liable for Musta's out-of-pocket medical cannabis expenses. Rel. Add. at 017.

Relators appealed the compensation judge's order to the Workers' Compensation Court of Appeals (WCCA). The WCCA affirmed the compensation judge's order, holding that Musta's out-of-pocket medical cannabis expenses were compensable under state law. Rel. Add. at 4. The WCCA declined to address the question of federal preemption,

[2] The Attorney General intervened in this case after the certiorari appeal was filed. As such, the Attorney General did not participate in litigation or development of the record below.

however, finding that such question was beyond the WCCA's limited jurisdiction. Rel. Add. at 4. This certiorari appeal followed.

III. INTEREST OF THE ATTORNEY GENERAL

On February 3, 2021, the Attorney General intervened in this case for the limited purpose of defending the constitutionality of the state statutes challenged in this appeal, namely Minnesota's medical cannabis laws, Minn. Stat. §§ 152.22-.37.[3] The Attorney General has an inherent interest in defending the constitutionality of state statutes. In addition to the Attorney General's inherent interest in defending the constitutionality of state statutes, a Court order invalidating Minnesota's medical cannabis laws, in whole or in part, would impact the work of numerous State agencies under these statutory schemes, including the Department of Health, the Department of Labor, and the Department of Administration Risk Management. *See* Attorney General's Notice of Intervention (Feb. 4, 2011), A20-1551. In addition, as noted above, over 31,000 Minnesotans are actively enrolled in Minnesota's medical cannabis patient registry. A Court order invalidating the medical cannabis laws, in whole or in part, would be disruptive to many Minnesotans with underlying medical conditions. Accordingly, the Attorney General submits this brief and respectfully requests that the Court find that federal law does not preempt Minnesota law

[3] In their initial brief, Relators argue that the compensation judge's *order* is preempted. Rel. Br. at 23. However, the compensation judge's *order* merely interprets and applies Minnesota law. Thus, ultimately, Relators seek to invalidate the portion(s) of Minnesota laws relied upon by the compensation judge in ordering Relators to reimburse Musta's out-of-pocket medical cannabis expenses.

or, alternatively, issue a limited order that is not disruptive to Minnesota's medical cannabis program on the whole.

STANDARD OF REVIEW

Federal preemption arises under the Supremacy Clause of Article VI of the United States Constitution. Whether federal law preempts state law is primarily an issue of statutory interpretation, which this Court reviews de novo. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008). Similarly, this Court reviews the application of law to stipulated facts de novo. *Id.*

ARGUMENT

I. MINNESOTA'S MEDICAL CANNABIS LAWS ARE NOT PREEMPTED BY THE FEDERAL CONTROLLED SUBSTANCES ACT.

"The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law." *La. Public Serv. Comm'n v. FCC* ("*LPUC*"), 476 U.S. 355, 368 (1986). In all preemption cases, the Court begins with the assumption that federal law does not preempt state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The party asserting federal preemption bears the burden to establish that state laws are preempted. *See Williams v. Nat'l Football League*, 582 F.3d 863, 880 (8th Cir. 2009).

A state law is preempted when: (1) Congress enacts a statute that expressly preempts state law; (2) Congress legislates comprehensively to occupy an entire field of regulation, leaving no room for the states; or (3) there is an outright, actual conflict between state and federal law. *LPUC*, 476 U.S. at 368. Conflict preemption is at issue in this appeal. Generally, conflict preemption arises when "compliance with both federal and state

regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quotations omitted).

Preemption of state law under the federal Controlled Substances Act (CSA) is expressly limited to circumstances where "there is a positive conflict between" the CSA and state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. The phrase positive conflict has been interpreted narrowly—applying only to situations where compliance with both federal and state law is a physical impossibility. *See S. Blasting Servs., Inc. v. Wilkes Cty., NC*, 288 F.3d 584, 591 (4th Cir. 2002) (interpreting the phrase "positive conflict" to simply "restate[] the principle that state law is superseded in cases of an actual conflict with federal law such that compliance with both federal and state regulations is a physical impossibility" (quotation omitted)).

In this appeal, Relators and the amicus assert that state laws requiring an employer and insurer to reimburse medical cannabis expenses conflict with the federal CSA, 21 U.S.C. § 841, which makes it a federal crime to manufacture, possess, or distribute marijuana. Rel. Br. at 23; Ami. Br. at 10. Relators argue that reimbursing an employee for his or her out-of-pocket medical cannabis expenses would require Relators to aid and abet the employee's purchase and possession of cannabis—making compliance with both the CSA and state law impossible. Rel. Br. at 25.

Relators' argument should be rejected. The CSA does not preempt Minnesota laws requiring an insurer and employer to reimburse an employee's medical cannabis expenses

for at least three reasons. First, the after-the-fact reimbursement of medical cannabis expenses does not constitute aiding and abetting. Second, Relators lack the requisite intent to be federally prosecuted for aiding and abetting. Third, Relators do not face a material risk of federal prosecution. These arguments are addressed, in turn, below.

A. Relators' After-the-Fact Reimbursement Of Out-Of-Pocket Medical Cannabis Expenses Does Not Aid And Abet The Purchase And Possession of Cannabis.

As noted above, the CSA prohibits the manufacture, possession, or distribution of cannabis. 21 U.S.C. §§ 812(c), 841(a)(1), 844(a). Relators do not assert that the compensation judge's order requires Relators to directly possess, manufacture, or distribute cannabis. Instead, Relators argue that reimbursing an employee for out-of-pocket medical cannabis expenses would require Relators to aid and abet the employee's purchase and possession of cannabis in violation of the CSA. Rel. Br. at 29. This Court should reject this argument. The after-the-fact reimbursement of an employee's out-of-pocket medical cannabis expenses does not aid or abet the employee's purchase or possession of cannabis.

Under 18 U.S.C. § 2, one who "aids, abets, counsels, commands, induces, or procures" the commission of a federal offense "is punishable as a principal." Thus, "those who provide knowing aid to persons committing federal crimes, with intent to facilitate the crime, are themselves committing a crime." *Rosemond v. United States*, 572 U.S. 65, 71 (2014) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994)). A person is liable for aiding and abetting a crime only if the person:

(1) takes an affirmative act in furtherance of that offense; and (2) with the intent of facilitating the offense's commission. *Id.*

A person cannot, however, aid or abet a crime that has already been completed. *See United States v. Murry*, 588 F.2d 641, 646 (8th Cir.1978) (holding that where evidence established completed crime upon theft of letter from the mail by a codefendant acting alone, the defendant, who received check from codefendant five days afterward, could not be found guilty of aiding or abetting crime which had already been completed); *see also United States v. Delpit*, 94 F.3d 1134, 1151 (8th Cir. 1996) ("We regularly instruct juries that a person may be found guilty of aiding and abetting if, *before or at the time the crime was committed*, he knew the offense was being committed or was going to be committed; he knowingly acted to encourage, aid, or cause the offense; and he intended that the offense be committed."); *United States v. Ledezma*, 26 F.3d 636, 642 (6th Cir. 1994); *Roberts v. United States*, 416 F.2d 1216, 1221 (5th Cir. 1969); *United States v. Shulman*, 624 F.2d 384, 387 (2d Cir. 1980); *United States v. Keach*, 480 F.2d 1274, 1287 (10th Cir. 1973).

Based on this legal premise that one cannot aid and abet a completed crime, a New Jersey appellate court, in a case involving facts indistinguishable from the current case, held that an employer's reimbursement of an employee's medical cannabis expenses did not aid or abet the purchase or possession of cannabis in violation of the CSA. *See Hager v. M & K Constr.*, 462 N.J. Super. 146, 166 (App. Div. 2020), *cert. granted* 241 N.J. 484 (May 12, 2020). The court first noted that nothing in the New Jersey's medical cannabis laws required an employer to possess, manufacture, or distribute cannabis—the actions

proscribed by the CSA. *Id*. The court further reasoned that the employee obtained the cannabis (and thus completed any federal crime) prior to the employer reimbursing him—thus precluding a charge of aiding and abetting. *Id.*

The court's reasoning in *Hager* is persuasive. Here, as in *Hager*, Relators are merely reimbursing Respondent for her out-of-pocket expenses after she has already purchased and obtained the cannabis. Thus, at the time of reimbursement, any alleged federal crimes have already occurred (voluntarily by the employee), and Relators cannot, as a matter of law, aid and abet such. This case thus stands in contrast to *People v. Crouse*, 388 P.3d 39 (Colo. 2017), relied upon by Relators. *Crouse* concerned a state amendment requiring law enforcement to return marijuana seized upon arrest to an individual upon the individual's acquittal. *Id*. at 41-42. The *Crouse* court determined the CSA preempted the state law because the state law, which required an officer to deliver and transfer a controlled substance, required noncompliance with the CSA, which prohibits distributing a controlled substance. While *Crouse* involved a state law affirmatively requiring an officer to distribute a controlled substance, this case concerns only an after-the-fact reimbursement pursuant to a compensation judge's order.

There are some circumstances in which an individual can be prosecuted for aiding and abetting the *retention* of possession of an illegal substance. *See United States v. Poston*, 902 F.2d 90, 94 (D.C. Cir. 1990). However, these cases generally involve possession *with intent to distribute* and, as described below, are factually distinct from the instant case. *See*, *e.g.*, *United States v. Pinillos–Prieto*, 419 F.3d 61, 63–66 (1st Cir. 2005);

see also United States v. Dingle, 114 F.3d 307, 312 (D.C. Cir. 1997).[4] For example, in a typical scenario where an individual is prosecuted for aiding or abetting another's possession of an illegal substance, the individual being prosecuted has acted as a lookout or bodyguard in furtherance of the crime. *See, e.g., United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir. 1990); *United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989).

Here, unlike the situations involving aiding and abetting possession *with an intent to distribute,* an employer's after-the-fact reimbursement of medical cannabis expenses is wholly unrelated to an employee's retention of possession of the cannabis. The employee has already obtained the cannabis at the time of reimbursement and either already has, or soon will, use the cannabis in compliance with state law. Unlike acting as a bodyguard or lookout, reimbursement does nothing *in furtherance* of the employee's possession. Thus, because the alleged crime is completed at the time of reimbursement, and because reimbursement does nothing to further an employee's retention of possession, Relators cannot, as a matter of law, be liable for aiding and abetting a federal crime.[5]

---

[4] In *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10, 19 (Maine 2018), the case cited extensively by Relators as persuasive authority for the proposition that the CSA preempts state laws requiring insurers to reimburse medical marijuana expenses, the Supreme Judicial Court of Maine relied on these cases involving drug possession *with an intent to distribute*. The *Bourgoin* court's failure to distinguish between aiding and abetting common possession and aiding and abetting *possession with an intent to distribute,* as well as its failure to consider the after-the-fact timing of the reimbursement, render its decision unpersuasive.

[5] It is worth noting that Relators would also not be subject to prosecution for being an "accessory after the fact." The crux of being an accessory after the fact lies essentially in (Footnote Continued on Next Page.)

B. Relators Lack the Requisite Intent To Aid And Abet A Federal Crime.

Not only can Relators not aid and abet a completed crime, Relators also lack the requisite intent required to aid and abet an offense under federal law. Specifically, aiding and abetting requires willful conduct that is not present where, as here, an insurer is reimbursing medical cannabis expenses pursuant to a compensation court's order. The insurer has no choice but to comply with the compensation court's order, and thus is not voluntarily facilitating the crime's commission.

A person aids and abets a crime when he or she intends to facilitate that offense's commission. *Rosemond*, 572 U.S. at 76. In *Rosemond,* the Court stated that "[w]hat matters for purposes of gauging intent . . . is that the defendant has *chosen*, with full knowledge, to participate in the illegal scheme . . . ." or "has knowingly *elected* to aid in the commission of a[n] . . . offense." *Id.* at 79. (emphasis added). Choose means "to select freely and after consideration." *Merriam-Webster's Collegiate Dictionary* 218 (11th ed. 2014). Elect means "to choose (as a course of action) esp[ecially] by preference." *Id*. at 400. Thus, by using the words "chosen" and "elected," the Court in *Rosemond* indicated,

---

obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he [or she] has committed the crime . . ." *United States v. Brown*, 33 F.3d 1002, 1004 (8th Cir. 1994). Reimbursing expenses pursuant to a compensation judge's order does not involve assisting an offender in order to hinder or prevent his apprehension, trial, or punishment.

at least implicitly, that aiding and abetting requires voluntary or willful conduct, in addition to full knowledge of the circumstances constituting the charged offense.[6]

Moreover, the Court in *Rosemond* acknowledged long-standing precedent that an alleged aider and abettor must "participate in [the offense] as something that *he wishes to bring about"* and "*seek by his action to make succeed.*" 572 U.S. at 76 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)); *see also United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) ("To be proved guilty of aiding and abetting, . . . the defendant [must have] desired the illegal activity to succeed."); *United States v. Newman*, 490 F.2d 139, 143 (3d Cir. 1974) ("[T]he government must prove beyond a reasonable doubt that the defendant participated in a substantive crime with the desire that the crime be accomplished."). The use of the words "wishes" and "desires" shows that aiding and abetting is a specific intent crime.[7]

There is no willful conduct present here. When Relators reimburse an employee for out-of-pocket medical cannabis expenses pursuant to a compensation judge's order in accordance with Minnesota's medical cannabis laws, they are not doing so voluntarily or

---

[6] For a further discussion of the intent element of an aiding and abetting crime in the context of reimbursement of medical cannabis expenses, as well as a history of cannabis regulation in the United States, *see* Jacob P. LaFreniere, *A Bet Against Abetting: Why Medical Marijuana Reimbursement Under Workers' Compensation Is Not A Federal Crime*, 125:1 Penn. St. L. Rev. 224 (2020).

[7] Specific intent is usually defined as 'the intent to accomplish the precise criminal act that one is later charged with,' as opposed to general intent, which is 'the intent to perform an act even though the actor does not desire the consequences that result.'" *United States v. Gustus*, 926 F.3d 1037, 1041 (8th Cir. 2019) (quoting *United States v. Robertson*, 606 F.3d 943, 954 (8th Cir. 2010)), *cert. denied*, 141 S. Ct. 130 (2020).

of their own volition. They do not *wish* or *desire* that the employee will be successful in possessing medical cannabis. Instead, they are merely complying with the compensation judge's lawful directive, pursuant to the Minnesota laws requiring reimbursement of medical cannabis expenses. Relators have no choice but to comply with the compensation judge's order—as a failure to do so could result in civil penalties. *See* Minn. Stat. § 176.221, subds. 3, 8. Thus, Relators' compliance with the compensation judge's order is insufficient to give rise to the specific intent element of aiding and abetting.

Similar reasoning has been adopted by courts in at least three jurisdictions as a basis of finding that federal law does not preempt state medical cannabis laws. *See Hager*, 225 A.3d 137 (holding that insurer lacks the requisite intent and active participation necessary for an aiding and abetting charge); *Edward C. Caye, Claimant-Appellee*, No. 6296 CRB-1-18-11, 2019 WL 6168483, at *9 (Conn. Work. Comp. Com. Oct. 29, 2019) (penalties imposed on an insurer for failing to follow a tribunal order negate the *mens rea* of willfulness necessary to sustain a criminal prosecution for aiding or abetting); *Appeal of Panaggio*, No. 2019-0685, ___ A.3d ___, 2021 WL 787021, at *1 (N.H. Mar. 2, 2021) (holding that an insurer's compliance with a court order to reimburse an employee for medical cannabis expenses does not constitute voluntary participation such as to establish the *mens rea* for aiding and abetting); *see also Bourgoin*, 187 A.3d at 26 (Jabar, J., dissenting) (arguing that aiding and abetting is a specific intent crime under which an insurer lacks the requisite *mens rea*). This Court should adopt the persuasive reasoning in

these decisions and similarly hold there is no positive conflict between the CSA and state law providing for reimbursement of medical cannabis expenses.

C. Relators Do Not Face A Risk of Federal Prosecution.

As established above, because of the after-the fact timing of reimbursement and Relators' lack of intent, Relators do not aid and abet an employee's possession when they reimburse out-of-pocket medical cannabis expenses. As such, compliance with federal and state law is not a physical impossibility—and thus there is no preemption under the facts of this case. However, even if reimbursement could be construed as a potential violation of the CSA, Relators do not face a material risk of federal prosecution. This weighs against a finding of preemption and highlights the speculative nature of Relators' claims.

On December 16, 2014, Congress enacted the Consolidated and Further Appropriations Act of 2015 to fund the operations of the federal government. Section 538 of the Act provides that "[n]one of the funds made available in this Act to the Department of Justice may be used with respect to the State[] of . . . Minnesota . . . to prevent such State[] from implementing [its] own State laws that authorize the use, distribution, possession or cultivation of medical marijuana." Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014). This section has been interpreted as prohibiting the Department of Justice (DOJ) from spending funds for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016). This provision, known as the Rohrabacher–Farr Amendment (or Rohrabacher–Blumenauer Amendment) has been

renewed each fiscal year since 2014. The current amendment is effective through September 30, 2021. H.R.133, Consolidated Appropriations Act, 2021 §§ 5, 531.

Thus, under the current budgetary decisions of Congress, the DOJ would be prohibited from prosecuting Relators even if reimbursement of medical cannabis could be construed as aiding and abetting under the CSA. Moreover, Relators cannot cite any examples of federal prosecution for possession of medical marijuana in accordance with state laws, let alone a federal prosecution of an insurer for aiding and abetting such—including in states that have required workers compensation insurers to reimburse an employee's purchase of medical cannabis.[8] Although the lack of congressional funding and the lack of actual prosecutions might not be a sufficient ground, alone, to find that state laws are not preempted, it highlights the speculative and hypothetical nature of Relators' claims.

To be prosecuted for aiding and abetting, a federal prosecutor would have to ignore black letter law that one cannot aid and abet a completed crime, ignore that Relators do not have the required specific intent to facilitate the crime, and would also have to violate congressional funding directives. Taken together, Relators' fears that they will be federally prosecuted for reimbursing medical cannabis expenses are not supported by law or existing circumstances. The speculative arguments of Relators are simply not sufficient to meet

[8] States that have required insurers to reimburse medical cannabis expenses include: New Mexico, *see Lewis v. Am. Gen. Media*, 355 P.3d 850 (N.M, App. 2015); New Jersey, *see Hager*, 225 A.3d 137; Connecticut, *see Caye,* 2019 WL 6168483; and recently New Hampshire, *see Panaggio*, 2021 WL 787021.

their burden to show there is a positive conflict with state law such as to warrant preemption. *See*, *e.g.*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978) (holding that the existence of hypothetical or potential conflicts is too speculative to warrant preemption).

Moreover, "[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there is between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (alteration omitted) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). Here, Congress's appropriation decisions, prohibiting funds to be used to prosecute conduct permitted by state medical cannabis laws, evidences a tolerance (if not outright acquiescence) from the federal government of state-legislated medical cannabis. Impossibility pre-emption is a demanding defense, *see Wyeth v. Levine*, 555 U.S. 555, 573 (2009), and Relators have not carried their burden to establish its applicability in this case. This Court should hold, therefore, that Minnesota's medical cannabis laws are not preempted.

II. ALTERNATIVELY, THE SCOPE OF ANY PREEMPTION DECISION SHOULD BE LIMITED.

Finally, if this Court determines that any portions of Minnesota's medical cannabis laws are preempted by federal law, this Court should limit its holding to the narrow circumstances of this case. In declining to reach the issue of federal preemption, the WCCA stated that "the ramifications of this court adopting the preemption argument by

[Relators] would be to invalidate the [Minnesota's Medical Cannabis Therapeutic Research Act] in its entirety . . . ." Rel. Add. at 5, n.1. The WCCA's statement regarding the scope of potential federal preemption is too broad.

A state law is preempted when federal law *forbids* an action that the state law *requires*. *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013). As such, Relators' arguments regarding preemption apply only to the narrow circumstances of this case where an employer and insurer are *required* to reimburse medical cannabis expenses under state workers' compensation law. This appeal does not implicate whether individuals can *voluntarily* avail themselves of Minnesota's medical cannabis program. In fact, despite the broad statement of the WCCA, Relators agree that any preemption would be limited to the narrow circumstances of this case. Rel. Br. at 24.

Thus, although the Attorney General maintains that state law is not preempted at all, if this Court disagrees, this Court should limit its holding to the narrow circumstances of this case and not seek to invalidate any other portion of Minnesota's medical cannabis laws. As noted above, over 31,000 Minnesotans are actively enrolled in Minnesota's medical cannabis patient registry, and a Court order invalidating the medical cannabis laws, in whole or in part, would be disruptive to many Minnesotans with underlying medical conditions.

CONCLUSION

For the above reasons, the Attorney General respectfully requests that this Court determine that the Minnesota laws at issue in this appeal are not preempted.

Dated: March 8, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Jeffrey K. Boman
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

JEFFREY K. BOMAN
Assistant Attorney General
Atty. Reg. No. 0396253

RACHEL BELL-MUNGER
Assistant Attorney General
Atty. Reg. No. 0395962

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1013 (Voice)
(651) 282-5832 (Fax)
liz.kramer@ag.state.mn.us
jeffrey.boman@ag.state.mn.us
rachel.bell-munger@ag.state.mn.us

ATTORNEYS FOR INTERVENOR KEITH ELLISON, ATTORNEY GENERAL FOR THE STATE OF MINNESOTA

CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional 13 point font, and the length of this document is 4,877 words. This Brief was prepared using Microsoft Word 365.

Dated: March 8, 2021

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Jeffrey K. Boman
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

JEFFREY K. BOMAN
Assistant Attorney General
Atty. Reg. No. 0396253

RACHEL BELL-MUNGER
Assistant Attorney General
Atty. Reg. No. 0395962

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1013 (Voice)
(651) 282-5832 (Fax)
liz.kramer@ag.state.mn.us
jeffrey.boman@ag.state.mn.us
rachel.bell-munger@ag.state.mn.us

ATTORNEYS FOR INTERVENOR KEITH ELLISON, ATTORNEY GENERAL FOR THE STATE OF MINNESOTA

|#4907949-v1