STATE OF MINNESOTA

IN SUPREME COURT

A20-1551

Workers' Compensation Court of Appeals

Susan K. Musta,

Respondent,

vs.

Mendota Heights Dental Center
& Hartford Insurance Group,

Relators.

Anderson, J.
Concurring in part, dissenting in part,
Chutich, J.

Filed: October 13, 2021
Office of Appellate Courts

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S Y L L A B U S

1. Because resolving a claim asserting that a conflict exists between federal law that prohibits cannabis possession and state law that requires an employer to pay for an injured employee's reasonable and necessary medical treatment would require the Workers Compensation Court of Appeals to interpret and apply federal law, that court lacks subject matter jurisdiction to decide the preemption issue presented by that claim.

2. The prohibition in the Controlled Substances Act, 21 U.S.C. §§ 801–971, on the possession of cannabis preempts an order made under Minnesota's workers' compensation law, Minn. Stat. § 176.135, subd. 1 (2020), that requires an employer to reimburse an injured employee for the cost of medical cannabis used to treat a work-related injury.

Reversed.

O P I N I O N

ANDERSON, Justice.

The question presented here is whether the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971, which makes the possession of cannabis a federal crime, preempts provisions of the Minnesota Workers' Compensation Act that make an employer liable for an injured employee's cost of treating a work-related injury. More specifically, does the statutory requirement for an employer to "furnish any medical . . . treatment," reasonably necessary to treat a work-related injury, Minn. Stat. § 176.135, subd. 1 (2020), conflict with federal law that prohibits the possession of cannabis when the employer would be required to pay for the expense of treatment using medical cannabis? If federal

law preempts state law in this specific instance, then an employer cannot be ordered to reimburse an injured employee for the cost of medical cannabis used to treat the effects of a work-related injury.

Respondent Susan Musta was injured while working for her employer, relator Mendota Heights Dental Center (Mendota Heights). After multiple rounds of medical intervention were unsuccessful, Musta's doctor certified her for participation in Minnesota's medical cannabis program. Musta then sought reimbursement for the cost of the medical cannabis from Mendota Heights, which agrees that medical cannabis is a reasonable and necessary treatment for Musta's chronic pain. Mendota Heights asserted, however, that the federal prohibition in the CSA on the possession of cannabis preempts the requirement under Minnesota's workers' compensation laws for an employer to pay for an injured employee's medical treatment when that treatment is medical cannabis. The Workers Compensation Court of Appeals (WCCA) declined to address the preemption argument, concluding that it did not have the subject matter jurisdiction to do so, and then upheld the compensation judge's order requiring Mendota Heights to reimburse Musta for medical cannabis.

We conclude that the WCCA lacks subject matter jurisdiction to determine the preemption issue presented in this case because it requires the interpretation and application of federal law. We further conclude that the CSA preempts an order made under Minn. Stat. § 176.135, subd. 1, that obligates an employer to reimburse an employee for the cost of medical cannabis because compliance with that order would expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful

possession of cannabis. We therefore reverse the decision of the Workers' Compensation Court of Appeals.

FACTS

Musta was employed by Mendota Heights[1] as a dental hygienist when she suffered a work-related neck injury in February 2003. Musta received conservative care, including chiropractic treatment, medication management, physical therapy, and injection therapy. She then underwent surgery in November 2003 and August 2006, which provided some temporary relief. She was ultimately prescribed medication to manage the continuing pain, including Vicodin and fentanyl. In late 2009, Musta discontinued using narcotics to treat her pain because of the side effects. At this point, Musta was permanently and totally disabled.

In April 2019, after she was certified as eligible to participate in the state's medical cannabis program, Musta began using medical cannabis, in compliance with the THC Therapeutic Research Act (THC Act), Minn. Stat. §§ 152.21–.37 (2020), to treat her work-related injury. She then requested reimbursement for the cost of that treatment from Mendota Heights under Minn. Stat. § 176.135, subd. 1 (2020). In the proceedings before the compensation judge, the parties stipulated that Musta's use of medical cannabis complies with the THC Act and is reasonable, medically necessary, and causally related to her work injury. Mendota Heights opposed Musta's request for reimbursement, however, asserting before the compensation judge that paying for someone to possess cannabis is

[1] The insurer for Mendota Heights is relator Hartford Insurance Group, and we refer to relators collectively as "Mendota Heights."

prohibited by federal law, specifically the CSA. Thus, the sole issue before the workers' compensation judge was whether the CSA preempts the employer reimbursement requirement in Minnesota's workers' compensation laws when that reimbursement is for medical cannabis.

Cannabis is a Schedule I controlled substance—the most restrictive level—and therefore cannot be lawfully prescribed. 21 U.S.C. § 812(c)(c)(10). Federal law provides that a Schedule I controlled substance has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use of the substance under medical supervision. 21 U.S.C. § 812(b)(1). The CSA makes it a federal crime to possess a controlled substance knowingly or intentionally without a valid prescription. 21 U.S.C. § 844(a).[2] Anyone guilty of such an offense may be sentenced up to one year in prison and fined at least $1,000. *Id*. And anyone who aids and abets a federal crime is liable to the same extent as the principal. 18 U.S.C. § 2(a).

The compensation judge declined to resolve the issue of preemption, recommending instead to the Chief Administrative Law Judge that the question be certified to us. The Chief ALJ did so, but we declined to accept the certified question, stating that "the legal issue presented by this workers' compensation matter is best addressed through the

[2] Under Minnesota's THC Act, a physician does not prescribe medical cannabis for a patient's medical condition; rather, the physician determines whether the patient "suffers from a qualifying medical condition," Minn. Stat. § 152.28, subd. 1(a)(1), which if found allows the patient to apply for enrollment in the medical cannabis program, *see* Minn. Stat. §§ 152.27, subd. 3(a)(4), .30(a).

decision process established by the Legislature." *Musta v. Mendota Heights Dental Ctr.*, No. A19-1365, Order at 2 (Minn. filed Oct. 16, 2019).

On remand, the compensation judge then analyzed the preemption issue. The judge observed that use of medical cannabis is legal under Minnesota law, and nothing in the workers' compensation laws prohibits reimbursement for medical cannabis when used to treat a work-related injury. Further, the judge noted that ongoing congressional appropriations riders prohibit the United States Department of Justice from criminally prosecuting an act that is compliant with a state's medical cannabis laws. The compensation judge stated that a federal prosecution would "prevent Minnesota from implementing its own laws" regarding medical cannabis use. Thus, the compensation judge concluded, there was no risk that Mendota Heights would be criminally prosecuted under federal law, and therefore no preemptive conflict between federal law and Minnesota law existed. Mendota Heights was accordingly required to reimburse Musta for her medical cannabis expenses.

The Workers' Compensation Court of Appeals affirmed. *Musta v. Mendota Heights Dental Ctr.*, No. WC19-6330, 2020 WL 6799288 (Minn. WCCA Nov. 10, 2020). The WCCA concluded that it lacked subject matter jurisdiction over the preemption issue because it "would need to interpret and apply laws beyond the Workers' Compensation Act and beyond [its] limited jurisdiction." *Id.* at *3. Instead, the WCCA believed that the preemption issue was "best addressed by a court of broader jurisdiction." *Id.* Thus, the court rejected the compensation judge's analysis on that issue and struck certain findings made regarding federal law. But, concluding that the legal question—the employer's

reimbursement liability—could be resolved based on the stipulated facts and the remaining findings, the WCCA affirmed the award of reimbursement. Mendota Heights appealed to us by writ of certiorari.

ANALYSIS

This case presents two issues. First, we must determine whether the WCCA correctly concluded that it lacks subject matter jurisdiction to decide whether federal law—the CSA—preempts Minnesota law that requires an employer to reimburse an employee for treatment of a work-related injury. Second, we must determine whether the CSA preempts the requirement in Minnesota law for an employer to reimburse an injured employee for the cost of medical treatment when the treatment for which payment is sought is medical cannabis.

I.

We begin with jurisdiction. "The subject matter jurisdiction of the workers' compensation courts is a question of law," which we review de novo. *Giersdorf v. A & M Constr., Inc.*, 820 N.W.2d 16, 20 (Minn. 2012). "Subject matter jurisdiction is the court's authority to hear the type of dispute at issue and to grant the type of relief sought." *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). The WCCA "is a tribunal of limited jurisdiction, restricted by statute to the construction and application of the Workers' Compensation Act."[3] *Hagen v. Venem*, 366 N.W.2d 280, 283 (Minn. 1985); *see also* Minn.

[3] A compensation judge decides questions of fact and law to make "an award or disallowance of compensation" based on the pleadings. Minn. Stat. § 176.371 (2020); *see also* Minn. Stat. § 176.291(a) (2020) (allowing a party to initiate a proceeding by filing a

Stat. § 175A.01, subd. 5 (stating that the WCCA has jurisdiction over "questions of law and fact arising under the workers' compensation laws of the state"). The WCCA's "powers are plenary" in cases arising under the Workers' Compensation Act, allowing that court to hear and determine the legal and factual questions presented by a case appealed to that court. *Hagen*, 366 N.W.2d at 283.

The WCCA may decide certain questions ancillary to the employee's compensation claim, such as determining insurance coverage, *Giersdorf*, 820 N.W.2d at 20–21; awarding certain fees and costs, *Botler v. Wagner Greenhouses*, 754 N.W.2d 665, 668–70 (Minn. 2008); and determining the liability of a guaranty association, *Seehus*, 783 N.W.2d at 151–52. The WCCA may also look to the laws of other states and federal law "for instruction" in narrow circumstances. *See Sundby v. City of St. Peter*, 693 N.W.2d 206, 215–16 (Minn. 2005) (holding that the WCCA could look to the Social Security Act for instruction because the workers' compensation provision at issue was a means for coordinating workers' compensation benefits with the social security system, and the WCCA "neither construed nor applied federal law").

The WCCA is not authorized, however, "to consider questions of law arising under the workers' compensation statutes of other states." *Martin v. Morrison Trucking, Inc.*, 803 N.W.2d 365, 369 (Minn. 2011). The WCCA similarly may not "construe Minnesota statutes other than the Minnesota Act." *Id.* And its jurisdiction "does not extend to interpreting or applying legislation designed specially for the handling of claims outside

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petition when "there is a dispute as to a question of law or fact in connection with a claim for compensation").

the workers' compensation system." *Sundby*, 693 N.W.2d at 215; *see also Martin*, 803 N.W.2d at 369–70 (distinguishing between the WCCA's statutory authority to order reimbursement to a no-fault insurance carrier and the WCCA's lack of jurisdiction to construe statutes other than those governing workers' compensation claims).

Mendota Heights asserts that this is a case "arising under" Minnesota's workers' compensation laws, and because the WCCA may hear and determine "all questions of law and fact" in such cases, the court possessed subject matter jurisdiction to decide the preemption issue. Mendota Heights emphasizes that requiring the preemption issue to be decided by a district court, while the merits of the workers' compensation action are decided by the compensation courts, would result in case-splitting and squander judicial resources with parallel proceedings. It cites to our decision in *In re McCannel*, 301 N.W.2d 910, 920 (Minn. 1980), in which we held that the tax court may decide constitutional claims in some instances. Mendota Heights asserts that the tax court's jurisdictional statute and that of the WCCA use "substantively identical language," while noting that *McCannel* was decided one year before the statute establishing the WCCA's jurisdiction was enacted.[4]

Musta responds that deciding the preemption issue would require the WCCA to interpret federal civil and criminal law as well as the statutes that govern Minnesota's THC Act, all of which are outside the scope of Minnesota's workers' compensation laws. Thus,

[4] Mendota Heights also suggests that the WCCA's refusal to decide the jurisdictional question was a denial of due process. We need not decide this issue because we have resolved the preemption issue in favor of Mendota Heights. *See, e.g.*, *State v. N. Star Rsch. & Dev. Inst.*, 200 N.W.2d 410, 425 (Minn. 1972) (stating that we do not "decide important constitutional questions unless it is necessary to do so").

she maintains, the WCCA did not have the necessary jurisdiction to decide the preemption issue in this case given our consistent conclusion that the WCCA does not have the authority to interpret the laws of other jurisdictions or other Minnesota statutes.

We agree with Musta. Although Musta's claim certainly arises under Minnesota's workers' compensation law—she seeks only reimbursement for the medical treatment she now uses, *see* Minn. Stat. § 176.135, subd. 1(a) (requiring the employer to "furnish any medical . . . treatment, including . . . medicines")—the precise legal *question* before the WCCA falls squarely outside of workers' compensation laws: does federal law, properly interpreted, preempt the broad requirement in section 176.135 for employers to reimburse injured employees for "any" medical treatment, including when the treatment at issue is medical cannabis. The Legislature has described the WCCA's jurisdiction over legal questions as specific to those "*arising under the workers' compensation laws*" of Minnesota. Minn. Stat. § 175A.01, subd. 5 (emphasis added). By requiring an interpretation and analysis of federal law, the preemption issue presented in this case does not arise under Minnesota's workers' compensation laws; it arises under federal law and legal principles that govern statutory interpretation when resolving claims of alleged conflicts between state and federal laws. *See, e.g.*, *In re Est. of Barg*, 752 N.W.2d 52, 63 (Minn. 2008) (explaining the importance of congressional intent and purpose in a preemption inquiry based on federal law).

Indeed, we have consistently held that when resolution of an issue would require the WCCA to interpret and apply, not merely look to, the laws of another sovereign, the WCCA is without jurisdiction to do so. *See Martin*, 803 N.W.2d at 371; *Hale v. Viking*

Trucking Co., 654 N.W.2d 119, 124 (Minn. 2002). For example, in *Sundby*, the WCCA held that children's benefits under Social Security Disability Insurance (SSDI) should be included in reducing an employer's payment of workers' compensation benefits. 693 N.W.2d at 213. We affirmed that decision, observing that the Workers' Compensation Act expressly permits "any government disability benefits" in the offset. *Id.* at 211 (citing Minn. Stat. § 176.101, subd. 4 (2004)). Although we noted that "[t]he WCCA's jurisdiction does not extend to interpreting or applying legislation designed specially for the handling of claims outside the workers' compensation system," we concluded that the WCCA had merely looked to federal law to ultimately "ascertain[] the appropriate inclusion of SSDI benefits in the workers' compensation benefits offset calculation" under Minnesota's workers' compensation laws. *Id*. at 215. Here, the WCCA correctly recognized that, consistent with our statement in *Sundby*, deciding the preemption issue would impermissibly require it "to interpret and apply laws beyond the Workers' Compensation Act." *Musta*, 2020 WL 6799288, at *3.

Mendota Heights contends that our order denying certification, which cited the decision process provided for in Minn. Stat. § 176.322 (2020) (authorizing a decision based on stipulated facts), reflected our expectation that the compensation judge or the WCCA would decide the preemption issue on the merits. We disagree. In denying certification, we relied primarily on the principle that certification is not a substitute for the normal appellate process, even for important and doubtful questions. *See Musta v. Mendota Heights Dental Ctr.*, No. A19-1365, Order at 1–2 (Minn. filed Oct. 16, 2019) (stating that " 'not every vexing question is important and doubtful' and questions of first impression

are not alone sufficient 'to justify certification as doubtful.' " (quoting *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179–80 (Minn. 1988))).

Finally, our decision in *McCannel* does not support the conclusion that the WCCA has subject matter jurisdiction over the preemption issue presented here. In *McCannel*, we noted that "[a]s a general rule, administrative agencies lack the power to declare legislation unconstitutional" and that "[i]nstead, these issues must be raised in a court of the judiciary." 301 N.W.2d at 919. Nevertheless, we recognized the importance of allowing the tax court to operate "effectively and expeditiously" by deciding all issues presented by the case. *Id.* at 920. Thus, when a constitutional issue is presented in a tax dispute, we noted, the tax court could "acquire jurisdiction in the first instance through *transfers of cases* from the district court, which does have the jurisdiction to determine the constitutionality of legislative acts." *Id.* at 919 (emphasis added); *see Guilliams v. Comm'r of Revenue*, 299 N.W.2d 138, 139 n.1 (Minn. 1980) (noting that the tax court has jurisdiction over a constitutional claim when the claim is raised "in the first instance . . . in the district court before the case is transferred to the tax court"); *see also Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261, 264 (Minn. 1984) (explaining that because the tax court does not have "original jurisdiction to decide constitutional issues," it must "refer the constitutional question to the district court," which can choose to "refer the matter back to the tax court which will then have subject matter jurisdiction" over that issue). No one contends that a district court conferred its original jurisdiction over the preemption issue presented here on the compensation judge or the WCCA. Thus, the general rule stated in *McCannel*—constitutional issues must be decided by "a court of the judiciary" rather than

an executive branch agency—controls here, rather than the process used in tax cases to secure a district court's jurisdiction over a constitutional claim. *See Irwin v. Surdyks Liquor*, 599 N.W.2d 132, 139–40 (Minn. 1999) (acknowledging that the WCCA does not have subject matter jurisdiction over constitutional claims).

We have reiterated that the statutory jurisdiction of the compensation courts does not extend to interpretation of laws outside of legal questions and facts arising under the workers' compensation law.[5] *See Martin*, 803 N.W.2d at 371 (holding that WCCA lacked jurisdiction to declare insurance contract invalid under Wisconsin law); *see also Freeman v. Armour Food Co.*, 380 N.W.2d 816, 820 (Minn. 1986); *Taft v. Advanced United Expressways*, 464 N.W.2d 725, 727 (Minn. 1991). Consequently, we hold that the WCCA lacks jurisdiction to decide whether federal law preempts Minnesota law that requires an employer to "furnish" medical treatment when the treatment for which reimbursement is sought is medical cannabis.

II.

Having concluded that the WCCA correctly determined that it lacks jurisdiction over the preemption issue in this case, we now turn to that issue. *See Gist v. Atlas Staffing, Inc.*, 910 N.W.2d 24, 31–33 (Minn. 2018) (deciding a preemption issue under federal Medicaid and Medicare law that was not addressed by the WCCA, which concluded that

[5] When a case requires "judicial construction" of a statute outside of workers' compensation laws, the remedy is to bring "a declaratory judgment action in district court." *Taft v. Advanced United Expressways*, 464 N.W.2d 725, 727 (Minn. 1991). Although Mendota Heights is correct that requiring a district court to determine a preemption issue may be an inefficient use of judicial resources, efficiency does not permit the WCCA to exceed the carefully defined limits of its specialized jurisdiction.

it lacked jurisdiction over that issue); *see also In re Lauritsen*, 109 N.W. 404, 407–08 (Minn. 1906) (recognizing that "a court of final resort" can provide "peremptory and prompt relief").

Preemption of a state law by federal law is based on the Supremacy Clause of the United States Constitution. *See Gist*, 910 N.W.2d at 33; *see also Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (stating that when "there is any conflict between federal and state law, federal law shall prevail"). "Preemption is primarily an issue of statutory interpretation, which is subject to de novo review." *DSCC v. Simon*, 950 N.W.2d 280, 287 (Minn. 2020) (citation omitted) (internal quotation marks omitted). "In all preemption cases, and particularly those in which Congress has legislated in a field that the states have traditionally occupied"—like workers' compensation—we begin "with the assumption that the historic police powers of the states were not superseded by the federal act unless that was the clear and manifest purpose of Congress." *Gretsch v. Vantium Cap., Inc.*, 846 N.W.2d 424, 433 (Minn. 2014). Accordingly, "preemption is generally disfavored." *Id.* At issue here is conflict preemption, which may occur when it is impossible to comply with both state law and federal law (impossibility preemption) or when the state law stands as an impermissible obstacle to accomplishing the objectives of the federal law (obstacle preemption). *DSCC*, 950 N.W.2d at 288.

"Congressional purpose is the ultimate touchstone" of our inquiry into preemption by federal law. *Barg*, 752 N.W.2d at 63 (citation omitted) (internal quotation marks omitted). "The main objectives of the CSA were to conquer drug abuse and control the legitimate and illegitimate traffic in controlled substances." *Raich*, 545 U.S. at 12. And

"Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id* at 12–13. The CSA explicitly defines the scope of its preemptive reach. A state law is preempted by the CSA only when "there is a positive conflict between" a provision of the CSA and that state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. This provision "is an express invocation of conflict preemption." *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1236 (9th Cir. 2017).

Mendota Heights contends that it is not possible to comply with both state and federal law because if it complies with the order made under the Minnesota workers' compensation law to reimburse Musta for the medical cannabis expense, then Mendota Heights cannot comply with the federal prohibition against aiding and abetting the possession of cannabis. *See Rosemond v. United States*, 572 U.S. 65, 76 (2014) ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."). Stated another way, Mendota Heights asserts that compelling it, by judicial order, to reimburse Musta for medical cannabis "require[d it] to commit a federal crime." Mendota Heights relies on the decision of the Maine Supreme Judicial Court case *Bourgoin v. Twin Rivers Paper Co., LLC*, which held that the CSA preempts an order to reimburse an employee for medical cannabis under the Maine workers' compensation laws because that order required the employer to "engage in conduct that would violate the CSA." 187 A.3d 10, 20 (Me. 2018). Mendota Heights also argues that the likelihood of prosecution for violating the CSA—minimal or otherwise—is a legally irrelevant factor in the preemption analysis.

In response, Musta contends that Congress has demonstrated an intent to *not* obstruct state medical cannabis programs by annually prohibiting the United States Department of Justice from spending funds to prosecute persons who use medical cannabis consistent with their state's laws. She relies on decisions from state courts that have found no conflict between the federal law and state law requirements to reimburse for medical cannabis, including the dissenting opinion in *Bourgoin*, 187 A.3d at 23 (Jabar, J., dissenting). Finally, Musta asserts that Mendota Heights cannot be deemed to aid and abet her possession of cannabis because the crime of possession has already occurred, a completed crime cannot be aided and abetted, and Mendota Heights does not possess the specific intent required for aiding and abetting.

We acknowledge that this issue represents a unique and challenging intersection between the law of preemption, federal aiding and abetting jurisprudence, the ongoing tension between the states and the federal government regarding cannabis regulation, and the objectives of the Minnesota workers' compensation system. But we are not the first state court of last resort to decide this specific issue. Thus, we begin with the decisions that have already addressed the preemptive effect of the CSA on orders for reimbursement of medical cannabis made under state workers' compensation laws.

In *Bourgoin*, the Maine Supreme Judicial Court was the first state supreme court to decide a preemption challenge in the context of employer reimbursement for workers' compensation benefits. *Id.* at 19–20. As here, an employee sought reimbursement from the employer for medical cannabis, which was used to treat a work-related injury. *Id*. at 13. The employer opposed the reimbursement request, asserting that, even if the

employee's medical cannabis use is permitted by state law, requiring the employer to pay for it is barred by federal law. *Id*. The *Bourgoin* court concluded that a right provided by state law to use medical cannabis "cannot be converted into a sword that would require" an employer "to engage in conduct that would violate the CSA." *Id*. at 20. The court recognized that an employer would be liable under federal law on an aiding and abetting theory because the employer—required to reimburse the employee for his use of medical cannabis—would be "acting with knowledge that it was subsidizing Bourgoin's purchase of marijuana." *Id*. at 19. On the other hand, the employer would violate state law if it refused to reimburse the employee. *Id*. The *Bourgoin* court therefore concluded that "[c]ompliance with [state and federal law] is an impossibility." *Id.*; *see also Wright's Case*, 156 N.E.3d 161, 166 (Mass. 2020) (stating that a state may "authorize those who want to use medical marijuana . . . to do so and assume the potential risk of Federal prosecution," but it is "quite another" thing for the state "to require unwilling third parties to pay for such use and risk such prosecution").[6]

Two state supreme courts have reached a different conclusion. In *Appeal of Panaggio*, ___ A.3d ___, 2021 WL 787021 (N.H. Mar. 2, 2021), the New Hampshire Supreme Court rejected the conclusion reached by the Maine Supreme Judicial Court in *Bourgoin*—that the employer would be criminally liable under federal law, 187 A.3d at 19—stating that federal law "does not criminalize the act of insurance reimbursement for

[6] The Massachusetts Supreme Judicial Court concluded in this case that an employer is not required to reimburse an employee for medical cannabis used to treat a work-related injury, based on language in that state's medical cannabis law that relieves "any health insurance provider" from a reimbursement obligation. 156 N.E.3d at 172, 175.

an employee's purchase of medical marijuana." 2021 WL 787021, at *4. The *Panaggio* court concluded instead that the employer lacked the requisite mens rea for an aiding and abetting offense under federal law because the employer's reimbursement is compelled by state law, rather than voluntary participation in an offense. *Id*. at *6. Thus, the court concluded, it was not impossible to comply with both state and federal law. *Id*.[7]

The New Jersey Supreme Court reached the same conclusion, though on different reasoning, in *Hager v. M & K Construction*, 247 A.3d 864 (N.J. 2021). Looking to "appropriations acts as expressions of legislative intent," *id*. at 885, the *Hager* court observed that "Congress has, for seven consecutive fiscal years, prohibited the [Department of Justice] from using funds to interfere with state medical marijuana laws through appropriations riders." *Id.* at 886. The court concluded that this "clear, volitional act in the form of appropriations law takes precedence over" the CSA. *Id*. at 887. Thus, there was no conflict between federal and state law, and state law did not stand as "an obstacle" to congressional objectives. *Id.*

Apart from the workers' compensation context, courts have found preemption by the CSA in some situations, and no conflict or preemption in others. *Compare Garcia v. Tractor Supply Co*., 154 F. Supp.3d 1225, 1229–30 (D.N.M. 2016) (concluding that an

[7] The *Panaggio* court also analyzed, then rejected, obstacle preemption, stating that "the CSA does not make it illegal for an insurer to reimburse an employee" for medical cannabis, "does [not] purport to regulate insurance practices in any manner," and the reimbursement order "does not interfere with the federal government's ability to enforce the CSA" by prosecuting the employee for possession. *Id.* at *8. Because we conclude that the CSA preempts the order for reimbursement under the impossibility theory of conflict preemption, we need not—and decline to—analyze the obstacle theory of conflict preemption.

employer is not required to accommodate an employee's use of medical cannabis as a matter of state law), *and Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (concluding that portion of Oregon law governing use of medical cannabis is preempted by CSA), *with White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 416, 432–33 (Ariz. Ct. App. 2016) (concluding that requiring county to process application for medical cannabis provider as directed by state zoning law is not preempted by CSA), *and Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 537–41 (Mich. 2014) (holding that immunity provision in Michigan medical cannabis law is not preempted by CSA). We ultimately agree with the reasoning set forth by the Maine Supreme Judicial Court in *Bourgoin*: the CSA preempts mandated reimbursement of an employee's medical cannabis purchases under an impossibility theory of conflict preemption. Specifically, we agree that a right provided to an individual under Minnesota's workers' compensation law to secure reimbursement for the use of medical cannabis to treat a diagnosed medical condition cannot be "converted into a sword that" requires an employer to pay for those purchases and thus "engage in conduct that would violate the CSA." 187 A.3d at 20.

We recognize that the federal government's position on criminal prosecution of cannabis offenses has been in a state of flux for over a decade. At one point, the United States Department of Justice announced that it would not prosecute cannabis offenses under the CSA when a cannabis user complies with state law; but the Department later rescinded those directions. *See Hager*, 247 A.3d at 882–83. Further, Congress has prohibited the Department of Justice from using allocated funds to prevent states from

implementing medical cannabis laws. *Id*. at 883–84. We disagree with the *Hager* court that these actions—and the congressional appropriation riders in particular—suspend the illegality of cannabis under the CSA or take precedence over that law. *See id*. at 887. Repeal by implication is heavily disfavored, especially when "the subsequent legislation is an *appropriations* measure." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (citation omitted) (internal quotation marks omitted). As the Ninth Circuit observed in *United States v. McIntosh*, the appropriation riders "do[] not provide immunity from prosecution for federal marijuana offenses." 833 F.3d 1163, 1179 n.5 (9th Cir. 2016). The riders are merely temporary measures that can be rescinded at any time, thus allowing the government to "prosecute individuals who committed offenses *while the government lacked funding*." *Id.* (emphasis added); *see also Bourgoin*, 187 A.3d at 20–21 & n.10 (rejecting reliance on the Department's nonenforcement memorandum because it was a "transitory" policy, as evidenced by its later revocation by Attorney General Sessions).

Nor can we agree that, as a practical matter, Mendota Heights is unlikely to be prosecuted. Impossibility preemption does not turn on speculation about future prosecutorial decisions, but on whether compliance with both state and federal law is impossible. *See DSCC*, 950 N.W.2d at 288. The conflict here is real, not speculative. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 131 (1978) (stating that a "hypothetical conflict" does not warrant preemption). Despite action in multiple states relating to medical cannabis and other cannabis-related issues, Congress has never chosen to de-schedule or re-schedule cannabis; it has instead used funding mechanisms to institute temporary, short-term stays of enforcement. Possession of cannabis remains prohibited by

the CSA, and we cannot read these riders as implicit suspensions of a legislative determination of illegality.

Even setting aside the prosecution risk, the heart of Musta's argument—an order made under state law that compels reimbursement negates mens rea and the specific intent necessary to satisfy federal aiding and abetting—is misplaced. The Supreme Court of the United States has consistently held that compelling a person to act does not necessarily negate the actor's mens rea. *See Dixon v. United States*, 548 U.S. 1, 6–7 (2006). Instead, necessity (like duress and self-defense) is an affirmative defense that goes to motive, not intent. *Rosemond*, 572 U.S. at 89 (Alito, J., concurring in part, dissenting in part) ("[O]ur cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent."). As the *Rosemond* Court put it, "The law does not, nor should it, care whether [the aider and abettor] participates with a happy heart or a sense of foreboding. Either way, he has the same culpability . . . ." *Id.* at 79–80.[8]

The intent requirement of federal aiding and abetting is satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances

[8] The dissent brushes aside the distinction between intent and motive, claiming that the *Rosemond* Court rejected a similar criticism when it held that a defendant must have "advance knowledge" of the presence of a firearm for the defendant to be guilty of aiding and abetting a crime involving the use of a firearm. 572 U.S. at 78. The *Rosemond* Court reasoned that the "distinctive intent standard for aiding and abetting" cannot be satisfied when a defendant learns of the presence of the firearm "only after he can realistically walk away." *Id.* at 81 n.10. But this reasoning lends no support to the dissent's position because Mendota Heights unquestionably has advance knowledge of the underlying conduct that it would be aiding.

constituting the charged offense."[9] *Id.* at 77. Here, Mendota Heights is fully knowledgeable about the circumstances advanced by its compelled reimbursement: Musta's possession of cannabis that is unlawful under the CSA. This reimbursement, which Mendota Heights must comply with as it is embedded in a judicial order, finances Musta's possession and effectively facilitates future possession. Thus, the order compels Mendota Heights' active participation in the possession that is criminalized by the CSA.[10]

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[9] The *Rosemond* Court differentiated the knowledge and active participation that it found satisfied specific intent by describing the hypothetical case of a gun store owner "who sells a firearm to a criminal, knowing but not caring how the gun will be used." 572 U.S. at 77 n.8. Several courts, including the *Panaggio* court, 2021 WL 787021, at *5 n.1, have read this footnote as describing a situation in which specific intent is lacking. But the very next sentence in the footnote explains: "We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting." *Rosemond*, 572 U.S. at 77 n.8. Rather than explaining that this situation was not aiding and abetting, the Court merely described one situation in which it *has not yet decided* whether aiding and abetting was satisfied.

[10] The dissent offers several hypotheticals to challenge our application of the *Rosemond* framework. The first is an employee who informs her employer that her paycheck will be used to purchase cannabis. But this hypothetical fails to appreciate the close connection between the aid provided and the crime committed. In the case at issue here, the reimbursement ordered is explicitly and exclusively for cannabis. In the dissent's hypothetical, the paycheck can be, and indeed ordinarily is, used for any number of purchases wholly outside the control of the employer.

The same is true with the bus driver hypothetical. The route driven is not solely for the benefit of a passenger to obtain cannabis, and the nexus between the transportation provided and results obtained is far weaker than the case here.

The taxi driver hypothetical is a closer call. For a taxi driver to knowingly transport a passenger to a location to commit a crime may implicate aiding and abetting. Consider the counter-hypothetical where a passenger informs the taxi driver, "I am going to rob a bank, wait for me outside so we can drive away afterwards." Setting aside affirmative defenses like duress, the taxi driver may be acting with full knowledge of the crime of robbery to be committed, and the taxi driver knowingly transporting a person to a dispensary for the sole purpose of purchasing cannabis in violation of federal law may in fact be doing the same.

Our conclusion finds support in federal case law. In *Garcia*, an employee was fired after testing positive for cannabis despite informing his employer that he consumed medical cannabis to alleviate symptoms of HIV/AIDS. 154 F. Supp.3d at 1226–27. The employee sued, alleging discrimination based on a medical condition under the New Mexico equivalent of the Minnesota Human Rights Act. *Id.* at 1227. The federal district court held that the employer was not required to accommodate the employee's use of medical cannabis. *Id.* at 1230. It concluded that, "[t]o affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes." *Id.*; *see also Emerald Steel Fabricators*, 230 P.3d at 536 (concluding that the CSA preempted state law such that an employer was not prohibited from firing an employee for using medical cannabis).

Although the district court in *Garcia* did not explicitly find that the employer would be aiding and abetting the employee's possession of medical cannabis, the logic is the same: the state cannot force an employer to facilitate an employee's unlawful possession of cannabis, either through work accommodations or reimbursement for its purchase.[11]

[11] The dissent criticizes our citation to *Garcia* because the implicit basis for that decision was obstacle preemption; and the case on which *Garcia* relies, *Emerald Steel Fabricators*, was decided explicitly under obstacle preemption. *Garcia*, 154 F.Supp.3d at 1230; *Emerald Steel Fabricators*, 230 P.3d at 536. But that fact alone does not undermine the persuasive nature of the analysis in those cases. And the case for preemption is indeed stronger here because an actual conflict exists that makes it impossible for Mendota Heights to comply with both federal and state law, as opposed to *Garcia* and *Emerald Steel Fabricators*, where compliance with state accommodations law was simply an obstacle to congressional purpose in enacting the federal prohibition on cannabis possession under the CSA.

We also reject Musta's argument and the dissent's conclusion that Mendota Heights cannot aid and abet her possession because that possession has already occurred by the time Mendota Heights reimburses her. Generally, "a person cannot be found guilty of aiding and abetting a crime that has already been committed." *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003). But "aiding and abetting a drug offense may encompass activities, intended to ensure the success of the underlying crime, that take place after . . . the principal no longer possesses the [illegal substance]." *United States v. Ledezma*, 26 F.3d 636, 643 (6th Cir. 1994). The same is true with money laundering, which occurs after the distribution of illegal substances, but may nevertheless aid and abet the underlying crime because it is "*integral* to the success of a drug venture."[12] *United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984).

Although the compensation court's order does not require Mendota Heights to reimburse Musta on an ongoing basis, neither does that order limit Mendota Heights's reimbursement obligation to a one-time purchase. Musta obtained and possessed medical cannabis, and will continue to do so in the future,[13] based on the expectation that Mendota

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[12] Although *Orozco-Prada* was technically about conspiracy to aid and abet, in finding probable cause to support the conspiracy charge, the court implicitly recognized that aiding and abetting was also satisfied by the postdistribution act. *See United States v. Perez*, 922 F.2d 782, 786 (11th Cir. 1991) (citing *Orozco-Prada* in upholding a conviction of aiding and abetting illegal narcotics possession and distribution when the conduct at issue occurred after the underlying possession).

[13] Musta's qualifying condition under the THC act is chronic pain, and there is nothing in the record to suggest that she will purchase and possess medical cannabis on only a single occasion. Quite the opposite, Musta had undergone extensive, unsuccessful medical

Heights's reimbursement obligation is established by state law. *See* Minn. Stat. § 176.135, subd. 1(a).[14] Indeed, the entire purpose of reimbursement under our workers' compensation scheme is to fulfill the legislative policy to provide injured employees with "quick and efficient delivery of . . . medical benefits" that are reasonable and necessary to treat the work-related injury. *See* Minn. Stat. § 176.001 (2020). And as long as medical cannabis remains "reasonably . . . required" to treat and cure the effects of Musta's injury, the Workers' Compensation Act requires Mendota Heights to fund Musta's ongoing use and possession that is illegal under federal law.

Thus, we conclude that mandating Mendota Heights to pay for Musta's medical cannabis, by way of a court order, makes Mendota Heights criminally liable for aiding and abetting the possession of cannabis under federal law.[15] Finally, we note the argument by the dissent that preemption here frustrates the intention of the Legislature to make medical

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intervention before she began using medical cannabis, which appears to provide her at least some relief.

[14] It also strikes us as odd to suppose that Musta's first reimbursement of medical cannabis would not be preempted by the CSA, but each subsequent request would be. Or similarly, that Musta's reimbursement would not be preempted because she can afford her medical cannabis while another employee's reimbursement would be preempted if that employee could not afford the medical cannabis without reimbursement. It is far sounder, based on the expectations and obligations designed into our workers' compensation laws, to conclude that all of these reimbursements are preempted.

[15] We note the constitutional danger lurking in Musta's argument that a state court order can negate the mens rea for a federal crime. Were we to adopt her reasoning, then a state could nullify *any* federal specific intent crime by simply passing legislation that mandates a person to perform the criminal act. Under our constitutional order, that cannot be. To do so would undermine the entire purpose of the Supremacy Clause of the United States Constitution.

cannabis available to patients suffering from intractable pain. We agree that if the result here is not beneficial to the employee, the remedy is for Congress to pass, and the President to sign, legislation that addresses the preemption issues created by the conflict between federal and state law.

As it is impossible to comply with both state and federal law, the compensation court's order is preempted by the CSA.[16] Accordingly, we reverse the decision of the Workers' Compensation Court of Appeals.

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[16] Because we conclude that the CSA preempts the order for reimbursement under impossibility preemption, we need not—and decline to—analyze obstacle preemption. We note that there may be other legal theories under which the CSA preempts such an order, but we confine our analysis to the theories raised and argued by the parties. *See State v. Caldwell*, 803 N.W.2d 373, 382 n.3 (Minn. 2011).

Although the dissent finds our interpretation of the intent standard for aiding and abetting liability to be "expansive[]" and "troubling," our decision is based on the authoritative statements by the *Rosemond* Court, which itself reflects the uncertainty and breadth of accomplice liability in the law as it stands. *See* Stephen P. Garvey, *Reading* Rosemond, 12 Ohio St. J. Crim. L. 233, 241 (2014) (stating that the Supreme Court's guidance on the mental state required for aiding and abetting liability "is no model of clarity" and offering three frameworks for interpreting *Rosemond*); Lauren A. Newell, *Hitting the Trip Wire: When Does a Company Become a "Marijuana Business"?*, 101 B.U. L. Rev. 1105, 1131–32 (2021) (explaining that the CSA "casts a wide net of potential liability" and that the "most difficult cases" involve potential liability under conspiracy or aiding and abetting theories).

Consequently, we emphasize that our decision here finding preemption by the CSA is limited to the unique facts and setting of this dispute: a claim for reimbursement of medical expenses, incurred to treat a work-related injury, where the treatment for which the expense is incurred is the purchase and use of medical cannabis, with the reimbursement liability determined in a legal proceeding. We express no opinion on whether the CSA preempts any component of Minnesota's medical cannabis program, nor does our preemption decision here extend to any other form of medical treatment.

CONCLUSION

For the foregoing reasons, we reverse the decision of the workers' compensation court of appeals.

Reversed.

C O N C U R R E N C E & D I S S E N T

CHUTICH, Justice (concurring in part, dissenting in part).

I agree with Part I of the court's decision, which holds that the Workers' Compensation Court of Appeals lacks subject matter jurisdiction to *decide* whether federal law preempts a provision of Minnesota's workers' compensation law that requires an employer to reimburse an employee who purchases medical cannabis. *See* Minn. Stat. § 176.135, subd. 1(a) (2020) (requiring an employer to "furnish any medical . . . treatment . . . as may reasonably be required" to treat a work-related injury). I write separately because I disagree with the court's holding in Part II that the federal Controlled Substances Act, 21 U.S.C. §§ 801–971, *preempts* an employer's obligation under state workers' compensation law, Minn. Stat. § 176.135, subd. 1(a), to reimburse an employee who buys medical cannabis that is reasonably required to treat the employee's work-related injury. Because the court's conclusion that a conflict of law exists rests on an unduly expansive view of aiding and abetting liability, with the result of denying injured employees reasonable and necessary medical treatment,[1] I respectfully dissent.

Federal law establishes that a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." 18 U.S.C. § 2. As explained in *Rosemond v. United States*, 572 U.S. 65, 71 (2014), aiding and abetting has two elements. A person must carry out an "affirmative act in furtherance of" the crime with "the intent of facilitating the offense's commission." *Id*. Reimbursing

[1] The parties stipulated that medical cannabis is reasonable and necessary to treat Musta's work-related injury.

Musta for her prior purchase of cannabis pursuant to the order of the compensation judge satisfies neither element. Nor is Minnesota's workers' compensation law, Minn. Stat. § 176.135, subd. 1(a), an impermissible "obstacle" to the purposes of the Controlled Substances Act.

I.

I begin with the element of an affirmative act in furtherance of the crime. A defendant can be convicted of aiding and abetting without proof of participating in every aspect of the crime, but the defendant must have aided in *some* aspect of the crime. *Rosemond*, 572 U.S. at 74–75 ("It is inconsequential . . . that [a defendant's] acts did not advance each element of the offense; all that matters is that they facilitated one component."). Accordingly, a person cannot aid and abet a crime after it is complete, as is well established. *See United States v. Centeno*, 793 F.3d 378, 390 (3d Cir. 2015); *United States v. Figueroa-Cartagena*, 612 F.3d 69, 74 (1st Cir. 2010); *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003); *United States v. Delpit*, 94 F.3d 1134, 1150–51 (8th Cir. 1996).

Here, the compensation judge ordered relators Mendota Heights Dental Center and Hartford Insurance Group (collectively, Mendota Heights) to reimburse Musta for her prior purchase of medical cannabis. Because that purchase and the related possession are already complete, reimbursing Musta now would not further any element of an offense of possession. *See United States v. Ledezma*, 26 F.3d 636, 642–43 (6th Cir. 1994) (holding that the evidence did not support an aiding and abetting conviction when the defendant

entered the conspiracy *after* the illegal possession was complete). Consequently, Mendota Heights can comply with the reimbursement order without violating federal law.

The court tries to circumvent the completed-crime rule in two ways. First, the court concludes that an exception to the rule applies, citing *Ledezma*. Under that exception, aiding and abetting drug offenses "may encompass activities, intended to ensure the success of the underlying crime, that take place after . . . the principal no longer possesses the [illegal substance]." *Id.* at 643. But *Ledezma* recognized that exception in only two contexts. First, after-the-fact actions may be aiding and abetting when the crime is still *on-going*, such as when the drugs have changed hands but the money has not. *Id. (citing United States v. Coady*, 809 F.2d 119, 124 (1st Cir. 1987)). Second, after-the-fact measures may aid and abet when the defendant's action is a "recurring contribution to a *continuing* crime," such as laundering money proceeds of a drug sale. *Id.* (citing *United States v. Orozco–Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984)). Neither circumstance is present in this case.

Unlike the transaction in *Coady*, Musta's purchase is already complete. So too is the related possession, or at least, if ongoing, it would not be affected by any reimbursement now. And unlike *Orozco-Prada*, reimbursement after the fact is not "*integral* to the success" of unlawful possession in the same way that money-laundering is integral to a drug distribution scheme. *Orozco–Prada*, 732 F.2d at 1080. After all, selling drugs is useless if the proceeds are unusable, but a person may find any number of ways to fund a purchase of medical cannabis. Here, Musta purchased the medical cannabis on her own without knowing whether she would ultimately be reimbursed.

Second, the court relies heavily on Musta's *expectation* of reimbursement and assumes that Musta will continue to buy medical cannabis with the expectation of being reimbursed. But Musta's unilateral expectation does not extend the duration of a crime of possession after it is complete, at least when Mendota Heights does not agree in advance to reimburse her. Mendota Heights has not stated that it will reimburse any future purchase, and whatever statutory obligation it may have to reimburse Musta in the future will depend on the facts and circumstances existing at that time. *See* Minn. Stat. § 176.135, subd. 1(a) (requiring an employer to furnish treatment that is reasonably required "at the time of the injury and *any time thereafter*" (emphasis added)); Minn. Stat. § 176.136, subd. 2(2) (2020) (permitting an employer to refuse to pay for treatment that is excessive).

Musta's personal expectation of future reimbursement is therefore far different from the recurring contribution of a defendant who, by agreeing to launder proceeds of illegal sales on a recurring basis, has offered encouragement and aid for the completed sale—and potentially for future sales too. *See Orozco-Prada*, 732 F.2d at 1080. Accordingly, Mendota Heights can comply with the reimbursement order without violating federal law because reimbursement would not contribute to any element of a crime "before or at the time the crime was committed." *Delpit*, 94 F.3d at 1151.

II.

Even assuming that the affirmative-act requirement would be met, Mendota Heights could not be liable under an aiding and abetting theory because it lacks the required intent. Under the "canonical formulation" of intent for aiding and abetting, "a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in

something that he wishes to bring about' and 'seek by his action to make it succeed.' " *Rosemond*, 572 U.S. at 76 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). In other words, the defendant must act with the *purpose* of furthering the crime.

Undoubtedly, Mendota Heights has no desire to help Musta possess cannabis. This lawsuit and appeal are ample evidence of that fact. *See Hager v. M&K Constr.*, 247 A.3d 864, 889 (N.J. 2021) (observing that, "[b]y the very nature of its appeals," the employer "has made it clear that it does not wish" to aid in an employee's possession of medical cannabis). Accordingly, the court turns to a different formulation of the intent standard in *Rosemond*, namely, that the intent requirement may be satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." 572 U.S. at 77. The court reasons that because reimbursement would finance Musta's possession and effectively facilitate her future possession, Mendota Heights would actively participate in Musta's possession of medical cannabis if it reimburses her. And because Mendota Heights is "fully knowledgeable about the circumstances advanced" by its compelled reimbursement, the knowledge requirement is met.

I agree with the court that active participation with full knowledge of the criminal scheme can satisfy the intent requirement for aiding and abetting, as is clearly stated in *Rosemond*. 572 U.S. at 77. But I disagree that reimbursing an employee to fulfill a statutory duty that is determined by a court order is "active participation" in a crime that the employee chooses to commit.

Rosemond does not suggest that knowingly active participation represents a *lesser* mens rea than acting with the specific purpose of furthering the crime. Instead, active participation operates as a *means of demonstrating* that a person intends to facilitate a crime, as both the majority and dissent in *Rosemond* recognized. *See id.* ("[A] person who *actively participates* in a criminal scheme *knowing* its extent and character *intends* that scheme's commission." (emphasis added)); *id.* at 85 (Alito, J., dissenting) ("[T]he difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight.").

The cases cited by the *Rosemond* Court as examples of knowingly active participation are instructive. *See* 572 U.S. at 77. In *Pereira v. United States*, 347 U.S. 1, 12 (1954), the Court found that the defendant had the requisite intent for aiding and abetting mail fraud when he deceptively obtained a check from the victim knowing that a confederate would do the actual mailing to collect on the check. And in *Bozza v. United States*, 330 U.S. 160, 165 (1947), the Court upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant "helped operate a clandestine distillery" while he was aware of the illegal nature of the business.

In each case, the defendant's purpose of furthering the illegal scheme is inferable from his active participation in, with full knowledge of, the underlying crime. In *Pereira*, the defendant's desire that the check be mailed was clear from his part in deceiving the victim and obtaining the check, knowing that the check would later be mailed. 347 U.S. at 12 ("[I]t is also clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interstate commerce."). And in *Bozza*, assisting with

a secret distillery operation implied an intent to help the owner evade taxes. 330 U.S. at 165 ("[A] person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery."). In short, each defendant's actions showed that he had chosen "to align himself with the illegal scheme in its entirety." *Rosemond*, 572 U.S. at 78.

But the conduct that satisfied active participation in *Pereira* or *Bozza* was far more involved in the underlying scheme than the conduct here. Unlike Bozza, Mendota Heights is not directly involved in carrying out the illegal scheme: Mendota Heights is not participating in the transaction between Musta and the cannabis dispensary nor in Musta's related possession of the cannabis. Any reimbursement would be paid after the purchase and possession are already complete, and any ongoing possession of that cannabis would be unaffected by the reimbursement. Unlike Pereira, Mendota Heights is not seeking to facilitate a criminal act by a confederate. Mendota Heights is not encouraging Musta to buy or possess cannabis; neither is it paying her for future purchases ahead of time. Musta's past decision to purchase cannabis, and any decision to purchase cannabis in the future, is her own. Further, Mendota Heights is doing everything it can to *distance* itself from Musta's purchase and possession of medical cannabis. Consequently, there simply is no sign that Mendota Heights has "align[ed]" itself with Musta's choice to possess cannabis or desires in any way to "make [any plan of Musta's] succeed." *Rosemond*, 572 U.S. at 78. Accordingly, Mendota Heights lacks the required intent to aid and abet.

The court cites to *Garcia v. Tractor Supply Co.*, 154 F. Supp.3d 1225, 1226 (D.N.M. 2016), to support its conclusion that Mendota Heights would have the required intent to

aid and abet. This reliance on *Garcia* is misplaced. *Garcia* held that an employer was not required to accommodate an employee's use of medical cannabis because the New Mexico Human Rights Act was preempted by federal law to the extent that the act required the employer to accommodate the employee's illegal drug use. *Id.* at 1230. But *Garcia* did not rely on impossibility preemption based on a theory of aiding and abetting liability. It relied on *obstacle* preemption, *see id.*, the form of preemption applied in *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 536 (Or. 2010), which is a theory that the court does not reach and that I will address later. Therefore, *Garcia* offers no support for the court's conclusion that federal law preempts section 176.135, subdivision 1(a), based on impossibility preemption.

The court also stakes its analysis on the difference between intent and motive. The court implicitly acknowledges that the compensation judge's order may be relevant to a defense of necessity but insists that the order has no relevance to the question of intent. Notably, a similar criticism was leveled at, and rejected by, the Court in *Rosemond*. The Court held that, to be liable for aiding and abetting, a defendant must have "advance knowledge" of the facts constituting the entire crime such that the defendant can "do something with" that knowledge. *Rosemond*, 572 U.S. at 78. For example, if an accomplice to a drug transaction knows nothing of a gun until it appears on the scene, that accomplice may not be liable for aiding and abetting a gun crime if there was no realistic opportunity for him or her to leave the scene. *Id.* Justice Alito, dissenting in part, accused the Court of confusing intent to commit an act with the motive for committing an act, *id.* at 88 (Alito, J., concurring in part, dissenting in part), but the Court explained that aiding

and abetting has a "distinctive intent standard" that requires a defendant to participate in the venture as something to be brought about and not just "in some sort associate himself with the venture." *Id.* at 81 n.10 (internal quotation marks omitted).

Here, the record clearly shows that Mendota Heights has no desire to help Musta possess cannabis. Neither has Mendota Heights chosen to "align [itself] with the illegal scheme in its entirety." *Id.* at 78. Although Mendota Heights has advance knowledge that Musta seeks reimbursement for medical cannabis, it reimburses her for this medical treatment only under the obligation of state law and at the order of a court. I therefore conclude that the "distinctive intent standard" for aiding and abetting is not met.

The expansiveness of the court's interpretation of the intent standard for aiding and abetting is troubling.[2] Mendota Heights would reimburse Musta only after the fact and only to fulfill a statutory duty as determined by a court. If that counts as active participation in Musta's possession solely because Mendota Heights would be knowingly "financing" or "facilitating" that possession, then other actions thought to be innocent could likewise trigger criminal liability.

For example, if an employee tells her employer, "I'm going to use my next three paychecks to buy medical cannabis," and the employer pays the employee those three paychecks, has the employer then knowingly "financed" that employee's unlawful possession? It would be absurd to suppose that, in such a situation, state fair labor laws

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[2] The court tries to shield responsibility for its expansive interpretation behind the "authoritative statements" by the Supreme Court in *Rosemond*. But as I have explained and other courts of last resort have found, *Rosemond* by no means compels the interpretation or result that the court reaches today.

requiring an employer to pay an employee a minimum hourly wage are partially preempted. Or, if a bus route passes a cannabis dispensary, and the bus driver knows that a passenger is on his way to purchase medical cannabis, has the bus driver knowingly "facilitated" a future possession of cannabis? Is the same true of a taxi driver who knows the purpose of the trip? Surely those facts alone are not enough to convict the bus or taxi driver of aiding and abetting the possession of cannabis. If intent is inferable from those circumstances—which are nothing more than incidental participation in the crime[3]—then the government's burden of proving intent is effectively eliminated.[4]

The law of aiding and abetting does not allow for such expansive liability. *Rosemond* dictates that the government prove "inten[t] to facilitate that offense's

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[3] The Court in *Rosemond* distinguished between incidental and active participants, stating that the owner of a gun store, who sells a gun to a criminal while knowing but not caring how the gun will be used, would be only an *incidental* participant in the subsequent crime. *See* 572 U.S. at 77 n.8. Although the Court declined to decide whether incidental participants are guilty of aiding and abetting an offense, the logical answer is no. The whole point of specific intent is that the defendant is aligned with the venture as something the defendant wishes to bring about. *Id.* at 76. Incidental participants lack this alignment and are more like those who are merely associated " 'in some sort' " with a venture than those who actively participate in bringing the venture about. *Id.* (citation omitted).

Notably, Mendota Heights is even *less* involved than the Court's hypothetical gun store owner who willingly sells the gun. Mendota Heights would be like a gun store owner who staunchly refuses to sell the gun to a customer until ordered to do so by a court.

[4] The court tries to distinguish the employer hypothetical by stating that a paycheck is ordinarily used "for any number of purchases" other than cannabis. That distinction is irrelevant. Under my hypothetical, the paycheck is used to purchase cannabis and, following the court's reasoning, the employer is aiding and abetting the purchase by knowingly financing it.

The court tries to distinguish the bus driver hypothetical by stating that the route is driven "not solely for the benefit of the passenger to obtain cannabis." But that distinction resorts to the motive of the driver, an argument which the court itself rejects.

commission." 572 U.S. at 76. It is not enough that a person is "in some sort associate[d]" with the offense; a person must " 'participate in it as in something that he wishes to bring about.' " *Id.* (quoting *Nye & Nissen*, 336 U.S. at 619). Consistent with the holdings of the New Jersey and New Hampshire Supreme Courts, I conclude that Mendota Heights does not have a specific intent to aid Musta in unlawfully possessing cannabis merely by reimbursing her after the fact based on a court order applying state law. *See Hager*, 247 A.3d at 889; *Appeal of Panaggio*, __ A.3d __, 2021 WL 787021 at *6 (N.H. Mar. 2, 2021).[5]

III.

Because it is not impossible for Mendota Heights to comply with the compensation judge's order and federal law, I next address the question of obstacle preemption. Obstacle preemption exists when "state law is an obstacle to the accomplishment of the purposes of the federal scheme." *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002). Under Minnesota's workers' compensation laws, an employer must "furnish any medical . . . treatment" as "may reasonably be required" to "cure and relieve from the effects of the injury." Minn. Stat. § 176.135, subd. 1(a). The question, then, is whether section 176.135, subdivision 1(a), stands as an obstacle to the purpose of the Controlled

[5] The court claims that, following my reasoning, a state could nullify *any* federal specific intent crime by simply passing legislation that commands a person to perform the criminal act. Not so. A person could still be liable for aiding and abetting an offense if there were facts demonstrating that the person had aligned themselves with the criminal scheme. Further, even if *impossibility* preemption did not apply, there would still be a serious question of *obstacle* preemption, which is triggered when a state law thwarts Congress's intent. As I will explain, obstacle preemption does not exist under the specific facts of this case, but it may apply if a state attempted what the court describes.

Substances Act if section 176.135 requires an employer to reimburse an employee for the purchase of medical cannabis.

"Congressional purpose is the ultimate touchstone of the preemption inquiry." *Gretsch v. Vantium Cap., Inc.*, 846 N.W.2d 424, 432–33 (Minn. 2014). But preemption is usually disfavored. *Martin*, 642 N.W.2d at 11. Because workers' compensation is traditionally a matter of state law, I start with the assumption that section 176.135 is not preempted " 'unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original). The case for preemption is also particularly weak when Congress knew that state law operated in an area of federal interest, but "nonetheless decided to stand by both concepts and to tolerate whatever tension there was between them." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

"The main objectives of the [Controlled Substances Act] were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12–13. "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the [Act]." *Id.* at 13.

Consistent with the decisions of courts of last resort in other states, I conclude that the reimbursement of medical cannabis that is purchased and used within the strictures of the state's medical cannabis research program does not stand as an impermissible obstacle

to the purposes of the Act. As observed by the New Hampshire Supreme Court, the Act does not make it illegal for an insurer to reimburse an employee for a purchase of medical cannabis or purport to regulate insurance practices in any manner. *Appeal of Panaggio*, 2021 WL 787021 at *8. In addition, the compensation judge's order in no way prevents the federal government from using its own resources to enforce the Act. *Id.*; *see* Erwin Chemerinsky et al., *Cooperative Federalism & Marijuana Regulation*, 62 UCLA L. Rev. 74, 111–12 (2015) (arguing that, because the federal government cannot commandeer state legislatures and require them to prohibit cannabis altogether, a state's regulation of medical cannabis does not stand as an obstacle to the objectives of the Controlled Substances Act).

Furthermore, as explained by the New Jersey Supreme Court, since 2015, Congress has prohibited the Department of Justice from using its funds to prevent states from implementing their medical cannabis laws. *Hager*, 247 A.3d at 886. These appropriation riders at the very least show that Congress has chosen to "tolerate" the tension between state medical cannabis laws and the Controlled Substances Act, *see Bonito Boats*, 489 U.S. 141, 166–67 (1989), and may even have eliminated liability under federal law for the possession of medical cannabis that was permitted under state law during those years, *see Hager*, 247 A.3d at 887. For these reasons, I conclude that the high bar for obstacle preemption is not met.

IV.

In sum, because it is not impossible for Mendota Heights to comply with state and federal law, and because reimbursing Musta does not stand as an impermissible obstacle to federal law, I would hold that the section 176.135, subdivision 1(a), is not preempted by

federal law. Consequently, I would affirm the decision of the Workers' Compensation Court of Appeals.

The court has chosen to do otherwise, and the effect of today's decision is to prevent Musta and other injured workers who suffer intractable pain from receiving the relief that medical cannabis can bring. In doing so, the court frustrates the Legislature's goal of providing "quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." Minn. Stat. § 176.001 (2020). Because today's decision misconstrues the scope of the specific intent underlying an aiding and abetting offense—with the effect of denying reimbursement for reasonable and necessary treatment for injured workers—I respectfully dissent.