No. _____

In The

Supreme Court of the United States

ERIC D. SPEIDELL, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, THROUGH ITS AGENCY OF THE INTERNAL REVENUE SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Supremacy Clause, does Colorado's expressly state legal sales of cannabis violate the Controlled Substances Act?

2. Did Congress, under 26 U.S.C. §280E, empower the IRS and its civil auditors to investigate federal drug law crimes and administratively determine whether a taxpayer is criminally culpable under federal drug laws?

3. Given that the IRS summonses were compelling incriminating information of drug crimes, with the IRS reserving all rights to share the information with law enforcement to prosecute the drug crimes, did the IRS need to obtain a warrant?

PARTIES SEEKING REVIEW

1. Eric D. Speidell
2. The Green Solution Retail, Inc.
3. Green Solution, LLC
4. Infuzionz, LLC
5. Green Earth Wellness, Inc.
6. TGS Management, LLC
7. S-Type Armored, LLC
8. IVXX Infuzionz, LLC
9. Medicinal Wellness Center, LLC
10. Medicinal Oasis, LLC
11. Michael Aragon
12. Judy Aragon
13. Steven Hickox

CORPORATE DISCLOSURE STATEMENT

The Petitioner entities do not have a parent corporation or any publicly held company owning 10% or more of the corporations' stock.

RELATED CASES

Boulder Alternative Care, LLC v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 016495-16

Thomas Van Alsburg & Valerie Van Alsburg v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 003959-20

Steven Brooks & Shannon Brooks v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 003958-20

Mike Miller & Michelle Miller v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001613-20

Daniel Meskin & Kari Meskin v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001612-20

Daniel Meskin & Kari Meskin v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001581-20

Mike Miller and Annette Miller, Deceased v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001580-20

RELATED CASES – Continued

Mike Miller & Michelle Miller v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001579-20

Jo Ann Sharp & Randall W. Sharp v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007196-19

Jo Ann Sharp v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007077-19

Ryan Foster v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007073-19

Boulder Alternative Care, LLC, GLG Holdings, LLC, Tax Matters Partner v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 016495-16

Standing Akimbo, Inc. et al. v. USA, United States District Court, District of Colorado, Case No. 1:18-mc-00178-PAB-KLM (*Standing Akimbo II*)

CSW Consulting, Inc. et al. v. USA, United States District Court, District of Colorado, Case No. 1:18-mc-00030-PAB

Standing Akimbo, Ltd. Liab. Co. v. United States, 955 F.3d 1146 (10th Cir. 2020)

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The Petitioners, above named, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is a published decision, *Speidell v. United States*, 978 F.3d 731 (10th Cir. 2020). App. 1. The district court orders are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2020. App. 1. This Petition has been timely filed on or before March 19, 2021 in accordance with the Supreme Court Order dated March 19, 2020. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

A. General Background

IRS continues its aggressive enforcement of the tax code against state legal cannabis production and sale. The IRS has administratively determined that the Petitioners in this case, both individuals and businesses are "unlawful drug traffickers" and that all deductions and credits should be denied due to the unlawful drug trafficking under 26 U.S.C. §280E.

The IRS first makes the administrative determination that the taxpayers are federal criminals. In an earlier case regarding Petitioner Green Solution:

> "The IRS made initial findings that Green Solution trafficked in a controlled substance and is criminally culpable under the CSA. The IRS then requested that Green Solution turn over documents and answer questions related to whether Green Solution is disqualified from taking credits and deductions under §280E."

Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1113 (10th Cir. 2017).

Information regarding the production and sale of state legal cannabis, is considered incriminating evidence due to the unlawfulness under the Controlled Substances Act. See *Feinberg v. C.I.R.*, 808 F.3d 813, 816 (10th Cir. 2015) ("So it is the government simultaneously urged the court to take seriously its claim that the petitioners are violating federal criminal law and to discount the possibility that it would enforce federal criminal law.").

Thus, the Petitioners, in response to the IRS, demands documents regarding production and sale of cannabis, requested immunity from prosecution. See Op., at pg. 8 which was denied.

Without immunity, the IRS has the full right to share the spoils of the audit investigation with law enforcement for criminal prosecution under the C.S.A. See 26 U.S.C. §6103(i)(3)(A); *United States v. One Coin-Operated Gaming Device*, 648 F.2d 1297 (10th Cir. 1981).

A civil enforcement action becomes quasi-criminal when there is a criminal analog present, i.e., the same evidence being extracted civilly can be used to bring criminal charges. *PDX N., Inc. v. Comm'r N.J. DOL & Workforce Dev*., 978 F.3d 871 (3d Cir. 2020). Criminal charges do not have to be brought. Only the potential threat of criminal charges is necessary. *Id.* at 884.

The fact that the IRS auditor was investigating the same conduct that would constitute drug crimes under the CSA, and the information obtained could be used for that purpose, rendered the audit a quasi-criminal proceeding.

Fifth Amendment privilege was asserted. In response, the IRS summonsed the Petitioners' information from the State of Colorado, Department of Revenue, Marijuana Enforcement Tracking Enforcement and Compliance database system ("METRC"). The IRS auditor summonsed numerous "reports" regarding possession, transfer and sale of cannabis.

IRC §280E

Section 280E was enacted in 1982 following a Tax Court case which allowed a convicted cocaine dealer to claim deductions from ordinary business expenses under federal tax law. Under this statute, a person may not take any business deductions or credits if the person unlawfully "traffics" Schedule I or II controlled substances. The result is a "tax" of about $1.20 for every dollar of net income, even after allowance for "costs of goods sold."

Section 280E only applies to unlawful drug traffickers. In order for §280E to apply to state legal cannabis sales, there must be a predicate finding that the taxpayer has committed a federally unlawful act – drug trafficking. To this end, the IRS has taken it upon itself to investigate and administratively determine whether taxpayers, such as the Petitioners, are unlawful drug traffickers, i.e., whether the taxpayer is violating federal criminal drug laws. It "is because of their federally unlawful activities" that they are being audited. See Opinion, App., p. 16. The IRS is doing this for "civil tax purposes," but has the power, and reserves all rights to share the spoils of the "civil" unlawful-drug-trafficking investigation with law enforcement for criminal prosecution purposes. This is all being done under the relaxed Fourth and Fifth Amendment standards for civil tax audits.

Once the IRS suspects the taxpayer is engaging in Schedule I or II drug trafficking, it investigates the taxpayer for the unlawful conduct, without probable

cause, through summons proceedings. The IRS hides behind *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248 (1964) in issuing these summonses.

Despite the subject matter being criminal in nature, the IRS has reserved all rights to share the information with federal law enforcement under 26 U.S.C. §6103(i)(3)(A). The IRS, along with the Department of Justice, refuses to grant immunity for drug law crimes[1] and fully reserves the right to prosecute the taxpayers for drug crimes based upon the information the IRS receives from the tax summons.[2] If during the IRS audit, the taxpayer invokes Fifth Amendment Privilege in response to allegations of unlawful drug trafficking, the IRS taxes the taxpayer on gross receipts. Thus, the Taxpayer must choose between their Fifth Amendment privilege or Sixteenth Amendment right to costs of goods sold. See, e.g., *Sharpe v. Commissioner*, 7196-19 (U.S. Tax Court).

The Petitioners and other taxpayers have attempted to obtain immunity from prosecution under 18 U.S.C. §§6002-6004, in order to share their cannabis business information. However, the IRS and DOJ refuse, and remind the taxpayers that the information provided can be used in federal drug-crime prosecution.

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[1] The IRS/DOJ could easily have granted immunity under 18 U.S.C. §6002-6004 but chose not to.

[2] The IRS and DOJ use plausible deniability regarding this issue. They do not deny they are sharing. They simply state that the Petitioners cannot prove they are sharing.

To defend, the taxpayer must either prove their innocence of the drug violations or acknowledge and describe the criminal conduct in detail in order to recover a small amount of the expenses known as costs of goods sold.

This IRS determination is despite the fact that Congress has defunded the Department of Justice from prosecuting CSA crimes that involve otherwise lawful sales from medical marijuana states from 2014 until today.[3]

The Tenth Circuit ruled that the IRS has the authority to make administrative determinations of violations of the CSA as §280E "requires the IRS to ascertain whether the taxpayer is engaged in conduct that could subject him or her to criminal liability under the CSA." Op. at 16. To this end, the Tenth Circuit affirmed that §841 of the CSA supplies the basis for determining that state legal cannabis is "unlawful trafficking" under §280E. *Id.* at 1192-93. The IRS can voluntarily transmit the spoils of the investigation to federal law enforcement authorities. Thus, the IRS can effectively perform the equivalent of a criminal investigation for law enforcement without the "impediments" of Fourth and Fifth Amendments.

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[3] See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §537, 131 Stat. 135, 228 (2017); and Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §538, H. R. 1625–97-98 (2018).

In the Related Cases Section, the Petitioners have listed the cases pending in the Tenth Circuit and Tax Court where these matters are at issue awaiting a final determination.

B. Background of the Case

This Petition arises out of the Petitions to Quash Summonses filed by the Petitioners in three different district court cases (consolidated in the Tenth Circuit). All summonses seek information concerning the Petitioners' "trafficking" of cannabis.

The summonses request access to information from the MED's database known as the Marijuana Enforcement Tracking Reporting Compliance system ("METRC") – a plant tracking system. Specifically, the summonses requested the following METRC information:

1) Copy of METRC Annual Gross Sales Report.

2) Copy of the Annual Inventory Report showing annual totals of product purchased, grown, processed, sold and waste destroyed from the METRC Database.

3) Copy of Year-end totals for all in-house inventory tagged with plant tags (plant inventory) and product tags (product inventory).

The IRS has provided no explanation what these "reports" are or what they contain. There was no

evidence presented by the IRS that such reports were produced by the State of Colorado at all. As discussed below, the Petitioners understood that these were not documents normally produced by the State of Colorado. Since METRC is a cannabis plant tracking system, the goal of the IRS is clear – find out about the unlawful plants and their transfer.

C. The Audit

The Revenue Agent began his investigations by issuing notices to Petitioners that their 2013 through 2015 tax year returns were under examination/audit by the IRS. Their audit was selected as part of a larger Compliance Initiative Project ("CIP") which the IRS had launched targeting cannabis business nationally. See generally *Rifle Remedies v. United States*, Civil Action No. 18-949 (D. Colo.) (FOIA Action). Subsequently, the Revenue Agent issued Information Document Requests ("IDR") for documents specifically related to cannabis transactions of the Petitioners. The Revenue Agent demanded that the Petitioners create reports of their cannabis transactions through their METRC account and supply the completed reports to the Revenue Agent. The Petitioners declined and thereafter asserted Fifth Amendment Privilege.

In response, the Revenue Agent bypassed the Petitioners and issued the above summonses directly to the State of Colorado to obtain the Petitioners' data.

D. The Underlying Action

The Revenue Agent issued the summonses at issue in this Petition. The Petitioners timely filed and served their Petitions to Quash.

The Petitions included declarations made by the business owners or accounting directors for the respective business. The declarations stated, in relevant part, that the reports summonsed are not documents prepared by the businesses or by MED. Nor were the reports in existence on the dates of the summonses.

Respondent filed Motions to Dismiss the Petitions and Enforce the Summonses pursuant to Fed.R.Civ.P. 12. The accompanying declarations did not dispute that the "reports" were not in existence. Rather, they made conclusory statements that if MED provided "information," it would be helpful to the auditor to determine income and costs of goods sold.

The lower court construed the affidavits, granted the motions to dismiss, and ordered the summonses enforced against the State of Colorado.

E. The Opinion

As discussed further, below, the Court of Appeals affirmed the lower court orders and ordered the summonses enforced against the State of Colorado. The Petitioners appeal on the grounds of Supremacy, that IRS exceeded its Powers, and that under the Fourth

Amendment the IRS needed a warrant to obtain these reports.

SUMMARY OF THE ARGUMENT

I. Preemption

The Tenth Circuit erred by determining that under the Supremacy Clause, the CSA "reigns supreme" over Colorado state cannabis laws. It improperly entertained a "presumption of preemption" rather than a presumption *against* preemption as this Court has mandated. The Tenth Circuit analysis of the Supremacy is deficient and should be reversed.

II. The IRS lacks authority to decide whether the Petitioners' conduct is prohibited by the Controlled Substances Act ("CSA")

In order for Section 280E to apply, there must first be a determination that the taxpayer violated state or federal drug laws. Administratively determining whether drug crimes have been committed is outside the jurisdiction of any agency, including the IRS. The determination of criminal culpability is solely for the courts to decide under Article III of the Constitution.

Section 280E of the Tax Code did not empower the IRS to investigate and administratively rule that a person has violated criminal drug laws. If Congress wants to assign the executive branch discretion to administratively determine criminal conduct, it must

speak "distinctly." *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892). This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). There is nothing within §280E that "distinctly" empowers the IRS to engage in federal criminal drug law investigations and determinations. To conclude otherwise would be a dangerous expansion of IRS power and would be unconstitutional.

III. In the Case of a Quasi-Criminal investigation, the IRS Needs to Obtain a Warrant

There is a necessary criminal analog to the IRS's investigation – in order to assert §280E, there needs to be an underlying determination of criminal conduct. This makes the investigation quasi-criminal. In those cases, the IRS needs to obtain a warrant to compel the incriminating papers.

ARGUMENT

Introduction

This Court has stated that an IRS summons may be challenged by the taxpayer "on any appropriate ground." *Reisman v. Caplin*, 375 U.S. 440, 449 (1964). Certainly, the IRS acting in an unconstitutional manner, enforcing an unconstitutional law, or acting beyond its jurisdiction would be appropriate grounds.

The constitutional challenges, herein, are all challenges on "appropriate grounds."

I. THE TENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT COLORADO STATE LAW FALLS UNDER THE SUPREMACY CLAUSE TO FEDERAL LAW

Section 280E applies if there is "trafficking" in a Schedule I or II controlled substance prohibited by either state or federal law. If the taxpayers are not unlawful drug traffickers, the basis for the audit evaporates.

All concede that the Petitioners are in compliance state law. Thus, the sole question here is whether Colorado legal and regulated sales of cannabis violates federal drug laws. This is only true if the state law falls to the federal law under the Supremacy Clause. The Tenth Circuit so held. In so doing, the Tenth Circuit erred.

The Tenth Circuit incorrectly held that federal law supersedes Colorado law when it comes to state legal cannabis sales. The Panel stated: "[T]he CSA reigns supreme. See *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) . . . '[S]tate legalization of marijuana cannot overcome federal law.'" *Feinberg v. Comm'r*, 916 F.3d 1330, 1338 n.3 (10th Cir. 2019) [additional citations omitted]. So, despite legally operating under Colorado law, "the Taxpayers are subject to greater federal tax liability" because of their federally unlawful activities. Op. at 16.

The Panel's analysis is in error.

A. Supremacy is Analyzed under the Preemption Doctrine.

Preemption is the doctrine arising from the Supremacy Clause which determines whether a particular federal law supersedes a particular state law – whether it "reigns supreme." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress's ability to preempt state law emanates from the Supremacy Clause of the United States Constitution. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

However, the Supremacy Clause "is not an independent grant of legislative power to Congress." Instead, it simply provides "a rule of decision," i.e., which law controls. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). It specifies that federal law is supreme "in case of a conflict with state law." *Id.* at 1479. However, "[i]f it does not [conflict], state law governs." *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

The doctrine is more fully supported by the Tenth Amendment to the Constitution whereby, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

All forms of preemption operate in the same manner. "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers

rights or imposes restrictions that conflict with the federal law; and therefore, the federal law takes precedence, and the state law is preempted." *Murphy*, 138 S. Ct. at 1480.

The party that asserts preemption, in this case the IRS, bears a heavy burden to show that preemption was the "clear and manifest purpose of Congress." See *Wyeth v. Levine*, 555 U.S. 555, 565-69 (2009). There is no presumption *of* preemption.

There is, however, a presumption *against* preemption. Courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485. Again, this concept is consistent with the Tenth Amendment.

Federal law supersedes state law only if Congress intended such an outcome. *Medtronic*, 518 U.S. at 485-86 (congressional purpose is "the ultimate touchstone"). Courts must determine Congress's intent "from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id*. at 486 (citation omitted).

Courts are cautioned to "not be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotation marks and citations omitted).

Importantly, "[w]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Under principles of federalism and the Tenth Amendment, a federal criminal statute will not prohibit an expressly state legal act unless "explicitly" directed by Congress. *Bond v. United States*, 572 U.S. 844, 858 (2014).

Local criminal activity has "traditionally been the responsibility of the States." *Bond v. United States*, 572 U.S. 844, 865 (2014). It is assumed that "Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Bond v. United States*, 572 U.S. at 862. Thus, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

This leads to the well-established principle that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 845.

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to

> bring into issue, the critical matters involved in the judicial decision."

Bass, 404 U.S. at 349.

The Respondent may claim that the Court in *Gonzales v. Raich*, 545 U.S. 1 (2005) preempted all state laws regarding cannabis. This is not correct. The holding was simply that Congress *has* the power under the Commerce Clause to regulate intrastate sales of unregulated marijuana – not that it exercised the power and preempted state law. Preemption was not even discussed. Nor was federal regulation of express legalization by a state which imposes a strong regulatory and oversight system discussed or contemplated. The question presented here will be one of first impression for this Court.

B. Congress Did Not Intend to Prohibit Colorado State Legal Marijuana.

Section 841 of the CSA purportedly makes the expressly state legal acts of the Petitioners unlawful. Hence, the Tenth Circuit determined the Petitioners were engaged in "unlawful trafficking."

However, the preemption statute of the CSA indicates to the contrary: The CSA preemption statute is as follows:

> "Application of State Law
>
> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that

> provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

21 U.S.C. §903

Section 903 must be construed in accordance with the presumption against preemption. Clearly, reading the statute as a whole, Congress did not intend to occupy the entire field to the exclusion of the States. There is nothing in the statute that explicitly prohibits conduct which has been made expressly legal under state law. See *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) (Court follows "presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations . . . ").

Absent the explicit direction by Congress prohibiting that which is expressly legal under Colorado law, Congress did not override Colorado state legal cannabis distribution laws in favor of the CSA. As a result, Colorado law controls. *Aronson, supra*. Colorado expressly state legal and regulated cannabis sales are not "prohibited" under federal law.

Gonzales v. Raich, does not change this result. The Court stated that "failure to regulate the intrastate manufacture and possession of marijuana would leave

a gaping hole in the Controlled Substances Act." 545 U.S. at 22. The Court was referencing unregulated personal-consumption marijuana as it existed at the time in California. Colorado both legalized and extensively regulates sales of state legal cannabis. See generally, C.R.S. §44-10-101, *et seq.*; see also John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, 65 Case W. Res. L. Rev. 649 (2015). Thirty-seven states and the District of Columbia have followed suit. As Tenth Circuit Judge Carlos Lucero stated this has created a "huge federalism dispute." *Feinberg v. Commissioner*, 18-9005, oral argument beginning at 13:30, https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3

Given the above, Colorado's expressly legal and regulated sales are not prohibited by federal law. Thus, the summons investigating unlawful drug trafficking should not be enforced.

C. Under Our System of Government, Conduct Cannot Be Simultaneously Lawful and Unlawful.

The Tenth Circuit made the untenable assertion that §280E allows cannabis sales to be simultaneously lawful and unlawful.

> [Under §280E] Congress's use of "or" extends the statute to situations in which federal law prohibits the conduct even if state law allows it.

Opinion, App. at p. 16.

The principles of preemption forbid this result. Either the federal law prohibits the state legal conduct – thus preempting the state law, or it does not, keeping the state law in place. *Murphy*, 138 S. Ct. at 1480. An act cannot be simultaneously lawful and unlawful.

Furthermore, it would violate the core essentials of due process to allow conduct to be simultaneously lawful and unlawful.

An essential element of due process is notice of the proscribed conduct. Since the court assumes that one "is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Thus, due process will not allow an act to be simultaneously lawful and unlawful. Under those circumstances, constitutionally sufficient notice would be impossible. Also, it would be fundamentally unfair to allow government to make conduct simultaneously lawful and unlawful. It would create arbitrary government. A final decision needs to be made to provide due process – does the law of the state or federal government control here?

This core element of due process permeates the entire supremacy analysis. As discussed above, there is one law that controls given activity, and all other laws must flow without conflict with the controlling law. The supremacy/preemption analysis determines the controlling law. For the reasons stated above,

Colorado law should control. Congress did not override state law.

II. THE TENTH CIRCUIT ERRED IN HOLDING THAT THE IRS HAS ADMINISTRATIVE AUTHORITY TO DETERMINE WHETHER A TAXPAYER HAS CRIMINALLY VIOLATED DRUG LAWS.

A. The IRS Does Not Have Authority to Define Criminal Law.

The IRS is acting in excess of its powers. It does not have power to administratively define crimes and determine whether a non-tax crime has been committed. The only way that §280E can be applied is if there is unlawful drug trafficking. Since it is only the court that can determine whether a person has violated criminal law, there must be a conviction prior to invocation of §280E.

Such a claim of power by the IRS is unprecedented. The CSA is not part of the Tax Code, and no court besides the Tenth Circuit has determined that the IRS has power to administratively determine criminal culpability under federal criminal drug laws. This is a case of first impression for this Court.

It is noteworthy that the Tenth Circuit was unable to cite anything outside of its own precedent that the IRS can investigate, much less administratively find, nontax criminal activity. This is because there is no precedential authority to this effect. This is undoubtedly so because it is well established that a civil tax

auditor's investigatory power is constitutionally limited when it comes to criminal activity. See *infra.*

Section 280E is very concise:

> "No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted."

26 U.S.C. §280E

The elements of Section 280E are (1) person; (2) in the person's trade or business; (3) "traffics"; (4) in a Schedule I or II controlled substance; (5) prohibited by federal or state law. 26 U.S.C. §280E.

Thus, in order for Section 280E to apply, the taxpayer must have engaged in unlawful conduct outside the Tax Code. Since the sale of marijuana is lawful in Colorado, the unlawfulness would have to be found in federal law, e.g., the Controlled Substances Act, 21 U.S.C. §801, *et seq.*

Historically, the application of Section 280E by the IRS came after a conviction of drug law violations. See, e.g., *Bender v. Comm.*, T.C. Memo 1985-375; *Sundel v. Comm.*, T.C. Memo 1998-78. However, in 1996 the IRS became an important law enforcement vehicle to destroy state legal marijuana when the Clinton

Administration created a multi-agency task force to destroy state legal marijuana. See https://www.scribd.com/document/361937054/NLWJC-Kagan-DPC-Box015-Folder011-Drugs-Legalization-Efforts, p. 3 (the "Memo").

> "To the extent that state laws result in efforts to conduct sales of controlled substances prohibited by Federal law, the IRS will disallow expenditures in connection with such sales to the fullest extent permissible under existing Federal tax law."

Id. at 3.

So, it is no wonder why

> "prosecutors will almost always over-look federal marijuana distribution crimes in Colorado but the tax man never will."

Feinberg, 808 F.3d at 814.

In this federalism dispute, the tax man is here to destroy.

This inter-agency strategy has previously run into problems. The DOJ agreement in the Memo to revoke physician controlled substance license was found to violate First Amendment Protections, thus beyond the DOJ power. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (Policy to revoke DEA physician licenses to prescribe controlled substances if physician recommends use of marijuana violative of First Amendment).

Likewise, the IRS agreement in the Memo exceeds its powers. The IRS does not have the authority to define criminal law. So, it cannot administratively determine that a taxpayer is an unlawful drug trafficker.

If Congress wants to assign the executive branch discretion to administratively define criminal conduct, it must speak "distinctly." *United States v. Grimaud*, 200 U.S. at 519; *United States v. Eaton*, 144 U.S. at 688. This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski*, 134 S. Ct. at 2274.

This clear-statement rule reinforces horizontal separation of powers in the same way that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), reinforces vertical separation of powers. It compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority.

Given the above, the IRS does not have authority to investigate and administratively determine that a person has violated federal criminal drug laws.

B. The Tenth Circuit Decision Effectively Reverses Long Standing Precedent that Civil Auditors May Not Conduct Criminal Investigations.

It is well established that the Constitution limits a civil auditor's investigatory authority of tax law crimes (which, unlike nontax crimes, are clearly within the IRS's jurisdiction). For the civil audit to meet

Fourth and Fifth Amendment protections, a civil auditor must cease all civil audit activities once the civil auditor determines that there are "firm indications of fraud." "[O]nce an IRS agent has developed 'firm indications of fraud' in a civil investigation, the case must be turned over to the CID [Criminal Investigations Division]." *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993). This is because:

> "Significantly different rights, responsibilities, and expectations apply to civil audits and criminal tax investigations. It would be a flagrant disregard of individuals' rights to deliberately deceive, or even lull, taxpayers into incriminating themselves during an audit when activities of an obviously criminal nature are under investigation."

United States v. Grunewald, 987 F.2d at 534.

> "Therefore, if a revenue agent continues to conduct a civil audit after developing 'firm indications of fraud,' a court may justifiably conclude that the agent was in fact conducting a criminal investigation under the auspices of a civil audit."

United States v. Peters, 153 F.3d 445, 452 (7th Cir. 1998).

It is constructively deceitful for constitutional purposes to have the civil auditor continue the audit under those circumstances. *Id.* Thus, for tax crimes, the civil auditor cannot proceed and certainly cannot make administrative determinations of tax fraud under those

circumstances. It must be turned over to the criminal investigators. *Id.*

However, for nontax crimes, the Tenth Circuit has freed the civil auditor to fully conduct investigations into the nontax criminal activity and make administrative determinations thereof. Of course, the IRS may supply the fruits of the investigation to law enforcement for criminal prosecution purposes. 26 U.S.C. §6103(i)(A)(3). So now, the investigatory power of a civil tax auditor is constitutionally limited for tax crimes, but is unlimited for nontax crimes. The Tenth Circuit should be reversed.

C. Under the Tenth Circuit Holding, Taxpayers Are Now Required to Keep Books and Records of Drug Law Crimes and Must Turn the Incriminating Information Over to the IRS Upon Demand.

As explained above, the Tenth Circuit has ruled that investigation and finding criminal drug law culpability is part of the IRS's administrative tax authority.

The Tenth Circuit determined that the IRS's power to investigate nontax crimes is derived from the IRS's general investigatory power under 26 U.S.C. §6201. *Standing Akimbo, Ltd. Liab. Co. v. United States*, 955 F.3d 1146, 1154 (10th Cir. 2020). If drug law crimes are now an area for which the IRS may lawfully compel incriminating evidence, the taxpayer must keep records of the drug law crimes and produce the evidence to the IRS upon demand. 26 U.S.C. §6001.

Failure to keep and turnover this information is a criminal offense. 26 U.S.C. §7203. A defense to a §7203 charge is Fifth Amendment privilege. However, the Tenth Circuit ruled that the IRS's new-found authority to compel information of federal drug crimes does not implicate Fifth Amendment concerns because "unlawfulness of an activity does not prevent its taxation."[4] Thus, now it is a criminal offense to refuse to provide the drug crime evidence to the IRS agents under a claim of Fifth Amendment privilege – at least in the Tenth Circuit. 26 U.S.C. §§6001 and 7203; see also *United States v. Willis*, 599 F.2d 684 (5th Cir. 1979) (Absent a valid Fifth Amendment claim, a taxpayer is criminally culpable for failure to supply information to the IRS under §7203).

This is yet another reason why certiorari must be granted and the Tenth Circuit decision reversed.

III. THE IRS NEEDS A WARRANT WHEN INVESTIGATING DRUG CRIME ACTIVITY

The Tenth Circuit stated that Petitioners had no expectation of privacy interest the METRC data compelled by the State of Colorado. Op. at 21. The Tenth Circuit claimed that while Colorado law required the Petitioners to provide this information to legally operate, the submission under a privacy statute was a voluntary act with no privacy attached. Op. at 21.

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[4] We respectfully disagree that the tax power completely overrides the Fifth Amendment.

Effectively this is a corollary of the "silver platter" doctrine. See *Gamble v. United States*, 139 S. Ct. 1960 (2019). The federal government could not get this information directly without a warrant. However, if given to the state under compulsion of law, it can be handed to the federal government on a "silver platter." The Supreme Court has rejected this concept in Fourth Amendment cases. *Id.* It should likewise be rejected here. This information was obtained under a statutory promise of confidentiality. This incriminating evidence could not have otherwise been lawfully obtained from the State.

Information given by taxpayers to the Colorado Department of Revenue is cloaked in privacy. *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009). "Taxpayers are entitled to expect that this information will not be open to scrutiny by state or federal agencies responsible for the investigation or prosecution of non-tax crimes absent particularized suspicion of wrongdoing meeting the demands of the Fourth Amendment." *Id.* at 936.

The federal government should not be allowed to bypass these protections by use of a summons. A warrant should be required.

Furthermore, this proceeding was quasi-criminal. A civil enforcement action becomes quasi-criminal when there is a criminal analog present, i.e., the same evidence being extracted civilly can be used to bring criminal charges. *PDX N., Inc. v. Comm'r N.J. DOL & Workforce Dev.*, 978 F.3d 871 (3d Cir. 2020). Criminal

charges do not have to be brought. Only the potential threat of criminal charges is necessary. *Id.* at 884.

There is simply no way that the IRS can apply Section 280E without first making the predicate finding that the Petitioners have committed a federal crime. As discussed, above, the Tenth Circuit ruled that the IRS can indeed make the predicate finding of criminal conduct. *Green Solution, supra.*

The IRS cannot have it both ways. It cannot be allowed the power to administratively investigate drug crimes but also enjoy the relaxations of the *Powell* standard. They must have probable cause and this summons must be treated as a warrant. "There is . . . only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury." *Donaldson v. United States*, 400 U.S. 517, 540, 91 S. Ct. 534, 547 (1971). A summons under relaxed *Powell* standards will not suffice.

"The question of whether an Internal Revenue Service investigation has solely criminal purposes, so as to preclude use of a summons under 26 U.S.C. §7602, must be answered only by an examination of the institutional posture of the Internal Revenue Service." *United States v. La Salle Nat'l Bank*, 437 U.S. 298, 316, 98 S. Ct. 2357, 2367 (1978).

REASONS FOR GRANTING THE PETITION

This case is of national importance. Thirty-seven states and the District of Colombia have legalized cannabis and the federal government is refusing to stand down. There is not enough support in Congress to address the conflicting laws. While the Rohrbacher-Farr Amendment has slowed the criminal prosecution of state legal cannabis sales, see, e.g., *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (the Amendment "prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws"), the federal government is still expending funds enforcing what the Government believes is unlawful trafficking of state legal cannabis. See, e.g., *United States v. Bureau of Cannabis Control*, Case No.: 20-CV-01375-BEN-LL (So. Dist. Cal.).

Through this and other Tenth Circuit decisions, the IRS is being empowered to be a preferred arm of law enforcement. The powers that are being conferred are much like the disapproved powers of the Revenue Agents in *Paxton's Case Gray*, Mass. Repts., 51 469 (1761) – IRS now can administratively determine what is unlawful trafficking under the CSA. The Revenue Agent can search for evidence of unlawful drug trafficking and the taxpayer has little protection under the Fourth Amendment. See *Powell, supra.* The spoils of the investigation can be turned over to law enforcement in the full, arbitrary discretion of the IRS. See 26 U.S.C. §6103(i)(3)(A); *United States v. One Coin-Operated Gaming Device*, 648 F.2d 1297 (10th Cir. 1981). The Court has

disapproved of this close link between the IRS and law enforcement. See *Marchetti v. United States*, 390 U.S. 39 (1968).

Judge Carlos F. Lucero of the Tenth Circuit eloquently outlined the gravity of this dispute:

> "[T]hese cases are frustrating, because under the Constitution, under the Tenth Amendment, of course the powers of the federal government are limited to the powers granted under the Constitution, and the States reserve certain powers. What we have here, basically, is a huge federalism dispute.
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> * * *
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> "So, it's your interest here to raise taxes. But you're saying is "ok we're not only going to raise taxes, we are going to punish this business, to the point of destruction," and you get into this huge mix of tax raising and criminal law.
>
> * * *
>
> But what you are trying to do, it seems to me with all due respect, is not just raise ordinary and necessary taxes, but what you're trying to do is take this company or any company – forget this company – just look at the entire industry, and say "we're going to tax 100% of gross sales, no exemptions, whatsoever, for the costs of goods, or for the deductions that would ordinarily and normally granted any business that are legally operating within their state. And that seems to be more the power to destroy."

Oral Argument, *Feinberg v. Commissioner*, beginning at 13:30, https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3.

Unfortunately, the Tenth Circuit is simply aggravating federal/state relations. It is empowering more and more the IRS to determine the federal/state relationship regarding cannabis. However, this Court is the umpire of federal/state relations – not the IRS.

Congress and the states are not resolving these issues. Federal agencies are overstepping their constitutional bounds in the wake of the lack of legislative resolution. The time is ripe for this Court to step in and begin acting as the umpire. It needs to determine the issues of supremacy and misuse of the Fourth and Sixteenth Amendments.

CONSOLIDATION

Should the Court grant the Petition for Certiorari in *Standing Akimbo, LLC, et al. v. United States*, 20-645 (conference currently rescheduled), the Petitioners respectfully request that this matter be consolidated with *Standing Akimbo*. Both matters involve IRS summonses of METRC information from the State of Colorado and involve the application of §280E. The undersigned is counsel for the Petitioners in both cases. In the interests of justice and judicial economy, the Petitioners believe that consolidation would be appropriate.

CONCLUSION

The Court should grant certiorari and determine that, as a matter of law, Colorado state legal cannabis is not superseded by the federal Controlled Substances Act, that the IRS does not have administrative authority to determine whether taxpayer has committed a drug crime, and that if the IRS wants cannabis information compelled by the State of Colorado, it must do so by warrant.

Respectfully submitted,

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