No. 20-1332

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**

## REPLY BRIEF

JAMES D. THORBURN
*Counsel of Record*
THORBURN LAW GROUP, LLC
5460 S. Quebec St., #310
Greenwood Village, CO 80111
(303) 646-3482
jthorburn@thorburnlawgroup.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## 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

*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

**RELATED CASES** – Continued

*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

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The Petitioners, above named, respectfully submit their Reply to their Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## REPLY[1]

## ARGUMENT

### I. Those Complying with State Law are not Unlawful Drug Traffickers.

The Government continues to claim that the CSA "reigns supreme", and that Colorado's regulation of cannabis is invalid – as Colorado "may not authorize individuals or businesses to violate federal law." However, the legislative history of the CSA, as well as several state supreme court opinions, irrefutably disagree with the Government.

In discussing the preemption provision[2] of the CSA, Rep. William Springer (22nd Cong. Dist. Ill.) made the following statement:

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[1] The Government acknowledges that issues presented here "substantially overlap" with the issues and briefs of the parties in *Standing Akimbo v. United States*, 20-645 which, as of this writing, is still pending before the Court. In the interests of brevity, the Petitioners will not substantially rehash those arguments herein. Rather, the Petitioners incorporate by reference the Petition and Reply filed by the Petitioners in *Standing Akimbo*.

[2] At the time, Section 708, now Section 903.

> **"[W]e did not seek to preempt State laws and I think very wisely so."** (Emphasis Added)
>
> "It is not possible for the Federal Government to have an agent in every community. The law enforcement agencies at the local level ought to have laws either by virtue of county ordinances, city ordinances or State law with reference to this. It is my recollection that every single one of the 50 States has a law with reference to marihuana. Enforcement for the most part at the local level will take place through the local law-enforcement agencies, the county sheriff, the State police and the city and local police in the local communities."

*Cong. Rec. – House*, p. 33605, September 24, 1970.

In the Senate, Senator Bob Dole made the following statement:

> "Although this legislation [CSA] will be of assistance, it must be made clear that the ultimate responsibility for education and enforcement remains with the State and local government. . . . ***[I]n no way do we seek to preempt existing State laws***. . . ." (Emphasis Added)

*Cong. Rec. – Senate*, p. 35507, October 7, 1970.

Thus, Congress did not intend to supersede state cannabis laws. The Congressional intent was to leave the primary regulation to the States. It was for both financial reasons and the practical acknowledgement that the States were better able to handle drug abuse

on the local level rather than a one-size-fits-all federal approach.

The Oklahoma Supreme Court has also spoken. Relying on 21 U.S.C. §903, the Oklahoma court concluded that the CSA does not preempt state cannabis laws.

> "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them. . . . Like the people of Michigan and Arizona[3], the voters of Oklahoma, should they adopt SQ 807, would be parting ways with Congress only regarding the scope of acceptable use of marijuana."

*Tay v. Kiesel*, 468 P.3d 383 (Ok. 2020).

> "Further, the federal government lacks the power to compel Oklahoma, or any other state, to enforce the provisions of the CSA or to criminalize possession and use of marijuana under state law."

*Id.* at 391.

> "In enacting the CSA, Congress specifically chose to leave room for state regulation

[3] Both Michigan and Arizona have construed §903 similarly. See *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014), and *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶23, 347 P.3d 136 (2015).

> of controlled substances, likely in part because its ability to compel the states is limited[4] . . . but also because it relied on the states to voluntarily shoulder the burden of policing and regulating controlled substances. See, 21 U.S.C. §903."

*Id.* at 392.

The Oklahoma Justices must have been reading the legislative history of the CSA.

The States, including Colorado, are using their police powers under the Tenth Amendment to regulate cannabis in the manner they deem fit. The results are in. The sky has not fallen on these "laboratories of democracy." Those complying with State law are not "unlawful drug traffickers."

## II. Congress did not Empower Civil Auditors to Investigate and Administratively Determine Drug Trafficking Crimes.

These cases are not about cannabis any more than the American Revolution was about Dutch Tea. Rather, these contrabands are the catalysts which demonstrate the abuse of governmental power.

The IRS's administrative power to investigate the correctness of tax returns arises from the "power of inquisition." *United States v. Powell*, 379 U.S. 48, 57 (1964). Thus, the IRS investigates "merely on suspicion

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[4] Citing to *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-79, 200 L. Ed. 2d 854 (2018).

that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 57.

This may be appropriate when the investigation is purely for the purpose of determining the correct tax. However, this power needs to be scrutinized when a necessary element of the tax liability hinges upon whether the taxpayer has committed a nontax crime. Here, the tax is different (and much higher) solely due to the taxpayer allegedly committing a nontax crime – unlawful drug trafficking. Thus, the IRS asserts that it is duty bound to invoke its inquisition powers to determine whether a taxpayer has committed unlawful drug trafficking – for "civil tax purposes", of course. The IRS does not dispute that it has the power to share the spoils of this inquisition with law enforcement. 26 U.S.C. §6103(i)(3)(A).

These facts bring the matter squarely into *Paxton's* case. The summonses involved here are substantively no different that the writs of assistance at issue in *Paxton's* case. The revenue agents investigate the trafficking of the contraband (whether it be Dutch Tea or Cannabis), tax the trafficking at a confiscatory rate, and share the spoils of the inquisition with law enforcement. Like the writs of assistance, these summonses are the "worst instrument of arbitrary power" because they place "the liberty of every [person] in the hands of every petty officer."

The Government claims that the IRS can investigate nontax crime under 26 U.S.C. §280E because Congress linked criminal activity to tax liability.

Unlawful drug trafficking is now an essential element used to determine the *amount* of tax liability. The Government claims that the power to tax illegal income includes the power to discriminate, by *amount* of taxation, between lawful and unlawful conduct. Unlawful conduct thus results in higher taxation – effectively a crime tax.

If Congress can invoke a crime tax combined with the IRS's power of inquisition (with power to share with law enforcement), where will it end?

For example, under this power Congress could pass a tax law to deny taxpayers the "standard" or "itemized" deductions if the taxpayer should engage in any act prohibited under Title 18 of the U.S. Code. At that point, as the Government's argument goes, the IRS would have full power of inquisition to investigate most federal crimes. At any point, the IRS could share the spoils of the inquisition with law enforcement. Placing investigatory power of nontax crime into the hands of the IRS would destroy the Fourth Amendment. Probable cause? Gone. The power of inquisition will now be resurrected for general federal crimes. Such power should not be given to the IRS by implication. Thus, it should not be given here for drug crimes.

## III. The IRS Needs a Warrant when Investigating Nontax Crime.

As discussed above, Congress has linked the *amount* of taxation to whether the taxpayer has

committed a nontax crime. So now, a taxpayer who has not committed any of the Congressionally enumerated crimes gets taxed at *X*. However, the same taxpayer, with the same income, will be taxed at *Y* (a higher amount) if the IRS administratively determines that the taxpayer has violated one of the enumerated nontax criminal laws – "for civil tax purposes." The IRS may share its inquisition findings with law enforcement. 26 U.S.C. §6103(i)(3)(A).

The IRS claims that, under those circumstances, it does not have to demonstrate probable cause to search and seize records of these enumerated crimes. *Powell* protects the IRS and allows a lesser standard for the inquisition. However, Congress has not previously linked criminal activity to the *amount* of taxation. *Powell* predates this linkage.

Prior to §280E, both legal and illegal income were treated alike. The Supreme Court has stated:

> "[T]he federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources."

*Comm'r v. Tellier*, 383 U.S. 687, 691 (1966).

Now, however, with §280E, the amount of taxation is based upon whether the activity is unlawful. As Judge Lucero stated, this has "created a huge mix of tax raising and criminal law." Oral Argument, *Feinberg v. Comm'r*, 916 F.3d 1330, n.3 (10th Cir. 2019), beginning at 13:30, https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3.

If Congress' decision to mix tax raising with criminal law is otherwise constitutional, the procedures must change. Our Bill of Rights ensures that when an investigation of possible criminal conduct occurs – regardless of the forum – Fourth and Fifth Amendment protections apply. *Powell* should not be applicable, or at least be substantially revised, when the IRS investigation includes a "huge mix of tax raising and criminal law." Where, as here, the predicate element of the "tax" is unlawful drug trafficking, a warrant needs to issue to comply with Fourth Amendment protections.[5]

## IV. Eric Speidell Should Have Been Allowed to Defend Against the Government's "Motion to Enforce Summons."

Petitioner Speidell filed a Petition to Quash Summons regarding his license records in the Marijuana Enforcement Division. In response, the Government filed a Motion to Enforce Summons under

[5] Regarding third party doctrine, and whether the METRC records are Petitioners' property, please see the Petitioner's Reply in *Standing Akimbo*, *supra*.

26 U.S.C. §7604 in the same action, as well as a motion to dismiss based upon the timeliness of the petition to quash. The Court denied Speidell's Petition to Quash as being untimely but approved the Government's Motion to Enforce the Summons against the State of Colorado and ordered the summons enforced.

The Court of Appeals determined that due to his untimely filing, not only was his petition to quash barred, but also his defense to the Motion to Enforce. There was no question that the defenses raised were timely. The Court of Appeals stated that the lower court may have been mistaken in ordering the enforcement given the untimely filing of the petition, but nevertheless affirmed the lower court's orders to enforce the summons. This was error.

The Government sought the jurisdiction of the court by filing the Motion for Enforcement. The Government *received* the relief it sought. Speidell clearly had the right to *defend*. See 26 U.S.C. §§7604 and 7609. The Petition to Quash and Motion to Enforce overlapped considerably. Having voluntarily invoked the jurisdiction of the district court, the Government cannot complain about being subject to jurisdiction for all purposes that justice requires. *Adam v. Saenger*, 303 U.S. 59, 67-68, 58 S. Ct. 454, 458, 82 L. Ed. 649 (1938). It cannot have both the benefit of the order to enforce the summons and immunity.

Furthermore, when the Government sued for enforcement of the summons, it abandoned "its immunity from suit and subjects itself to the procedure

and rules of decision governing the forum which it has sought." *Guar. Tr. Co. v. United States*, 304 U.S. 126, 134, 58 S. Ct. 785, 789 (1938). A defense is never barred by the statute of limitations. *Bull v. United States*, 295 U.S. 247, 262, 55 S. Ct. 695, 700-01 (1935).

## 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 Congress did not empower the IRS to investigate drug crimes for "civil tax purposes" and that if the IRS wants cannabis information compelled by the State of Colorado, it must do so by warrant, and provide such other and further relief as the Court deems proper.

Respectfully submitted,

JAMES D. THORBURN
JUNE 1, 2021