No_____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL DARIO TREVINO,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

SHOULD THIS COURT RECONSIDER ITS DECISION IN *GONZALES* AND DETERMINE THAT CONGRESS CANNOT REGULATE SOLELY INTRASTATE MARIJUANA DISTRIBUTION DUE TO THE MASSIVELY CHANGED LANDSCAPE REGARDING MARIJUANA LEGALITY AS OPINED IN JUSTICE THOMAS' CONCURRENCE IN *STANDING AKIMBO*?

WHERE THE DEFENDANT IS SELLING MARIJUANA ONLY TO MEDICAL MARIJUANA PATIENTS IN A STATE WHERE MEDICAL MARIJUANA IS LEGAL; HAS THE LEGAL LANDSCAPE SO CHANGED THAT A NAKED RELIANCE ON THE GUIDELINES IS OBJECTIVELY UNREASONABLE?

SHOULD THE GOVERNMENT BEEN BARRED FROM SUMMARIZING THE DATA FROM THE BUD TENDER SHEETS IN SUCH A MANNER THAT THE JURY WAS GIVEN DETAILS AS TO AMOUNTS AND DOLLARS BY SOMEONE WHO HAD NO FIRSTHAND KNOWLEDGE REGARDING THE FORMS THAT SHE WAS REVIEWING?

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The decision of the Sixth Circuit denying en banc rehearing was dated September 21, 2021. This petition is filed within ninety days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have power to … regulate commerce with foreign nations, and among the several states, and with the Indian tribes

Fed. R. Evid. 1006 provides:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

STATEMENT OF THE CASE

This is matter arises from a marijuana related prosecution in the U.S. District Court for the Western District of Michigan before Hon. Paul Maloney. The Court sentenced the Defendant to a controlling sentence of 188 months incarceration together with supervised release and fines.

Daniel Trevino was the owner and operator of a chain of marijuana dispensaries located in Michigan; these were called "Hydroworld," (R. 271, Vol IV Trial, PGID 3675). He carried on his business openly including signage, Facebook posts and other promotions. After medical marijuana was legalized in Michigan in 2008, Hydroworld transitioned from a hydroponics supply to these dispensaries (R. 271, Vol IV Trial, PGID 3676).

Beginning in 2011 there were a series of police raids on his premises. Mr. Trevino was largely successful in his challenge to these raids and attempted forfeitures, (R. 169 – Jackson County forfeiture and criminal prosecution dismissed).

Mr. Trevino was charged federally in July of 2018 together with some of his employees, (R. 1, PGID 1). The charges were one count of Conspiracy to manufacture, Distribute or possess with intent to distribute over 100 kilograms of marijuana contrary to 21 U.S.C. § 846, §841(a)(1),

§841(b)(1)(B)(vii); 3 counts of Manufacture of Marijuana contrary to 21 U.S.C. § 841(a)(1) and §841(b)(1)(D); one count of possession with intent to distribute marijuana contrary to 21 U.S.C. § 841(a)(1) and §841(b)(1)(D); and five counts of maintaining a drug-involved premises contrary to 21 U.S.C. § 856(a)(1) and §856(b).

Mr. Trevino fully admitted being the owner and operator of Hydroworld, only stating that a small subset of the marijuana found was not his. Mr. Trevino was found guilty on all counts with a finding over 100 kilograms of marijuana was involved, (R. 271, Vol IV, PGID 3702). All told 426 kilograms had been admitted at trial and there was approximately another 54 kilograms of relevant conduct that could be attributed to Mr. Trevino. The Government's Sentencing Memorandum outlines where all the marijuana in this case was seized from. All locations were in the State of Michigan, (R. 265, Sentencing Brief, PGID 2579-285). At sentencing the Offense Level was determined to be 34, Criminal History Category III, and the advisory guideline of 188 to 135 months, (R. 279, Sentencing, PGID 3902). The Court imposed 188 months together with supervised release and fines.

Mr. Trevino's appeal was affirmed on July 30, 2021 by the Court of Appeals in a published opinion. *United States v Trevino*, No. 20-1104, 2021 WL 3235751, at *1 (CA 6, July 30, 2021) (Appendix A).

Mr. Trevino challenged a number of issues in his direct appeal, two of which are relevant here. Mr. Trevino challenged the use of Government prepared summaries of the marijuana sales at various locations. The trial court had previously ruled that these ledgers could be offered into evidence. (ECF 27; PAGE ID 3652). Defendant concedes that the evidence was voluminous, but challenged the foundational evidence for the admission of the evidence. The Sixth Circuit ruled that because co-defendants testified to the record keeping structure generally, the Government prepared summary was admissible.[1]

In this appeal, Mr. Trevino challenged the substantive unreasonableness of his sentence. The panel rejected his argument noting: "the district court's decision to reject Trevino's policy concerns and adhere to the advisory Guidelines was well within its discretion. The court "fully recognize[d] that the landscape has changed in many states," but noted

[1] *United States v. Trevino*, 7 F.4th 414, 431 (6th Cir. 2021).

that "the federal landscape has never changed," and that the court itself it had "no policy disagreement" with the Guidelines on marijuana offenses." *Trevino*, 7 F.4th 414.

Petitioner applied for en banc rehearing in the Court of Appeals, this was denied on September 21, 2021. In that Petition, the Petitioner argued that Justice Thomas' separate opinion respecting the denial of certiorari in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237, 210 L. Ed. 2d 974 (2021), *reh'g denied,* 210 L. Ed. 2d 1009 (Aug. 23, 2021) raised the question of whether the Court's ruling in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) upholding the federal bar on marijuana should be reconsidered in lieu of changed circumstances. The panel ordered the Government to answer, but then declined the Petition without comment.

Petitioner requests this Court grant certiorari.

ARGUMENT

I. THIS COURT SHOULD RECONSIDER THEIR DECISION IN *GONZALES* AND DETERMINE THAT CONGRESS CANNOT REGULATE SOLELY INTRASTATE MARIJUANA DISTRIBUTION DUE TO THE MASSIVELY CHANGED LANDSCAPE REGARDING MARIJUANA LEGALITY AS OPINED IN JUSTICE THOMAS' CONCURRENCE IN *STANDING AKIMBO*.

This case involves the growth, sale, and distribution of marijuana within the State of Michigan. All the Defendant's businesses were within the State of Michigan. The marijuana was grown there and sold there. All purchasers were individuals authorized by the State of Michigan to acquire marijuana for medical purposes. There was no evidence that the Defendant or his enterprises in any way targeted out of state patients. Michigan has allowed medical marijuana since 2008. While this issue was not raised before Defendant's Petition for en banc rehearing, Justice Thomas' June 2021 opinion in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 210 L. Ed. 2d 974 (2021), *reh'g denied,* 210 L. Ed. 2d 1009 (Aug. 23, 2021), calls into question the continuing validity of *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

Congress is authorized by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States." This power normally does not permit Congress to regulate matters which are purely intrastate.[2] In determining whether an activity is wholly intrastate, Congress can view the matter en masse. Congress has the ability to regulate a "class of activities" which when viewed collectively would have a substantial effect on interstate commerce.[3] Thus, if Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class.[4]

"Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement

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[2] *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

[3] *See, e.g., Perez v. United States*, 402 U.S. 146, 151, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971).

[4] *See, e.g., Perez*, 402 U.S. 146; *Wickard v. Filburn*, 317 U.S. 111, 127–128, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, 50 Stat. 551 (repealed 1970)."[5] That Act did not expressly bar marijuana, but created a comprehensive scheme that effectively limited its availability by a cumbersome regulatory system and a prohibitively high tax. In *Leary v. United States*,[6] the Court held certain provisions of the Marihuana Tax Act and other narcotics legislation unconstitutional.

In 1970, as part of the "war on drugs," Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236 which created a comprehensive statutory scheme designed to regulate the legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.

Under this Act, Congress classified marijuana as a Schedule I drug.[7] This was a preliminary classification "until the completion of certain studies now underway." Schedule I drugs are categorized as such because

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[5] *Gonzales*, 545 U.S. 1

[6] *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), *aff'd*, 544 F.2d 1266 (5th Cir. 1977).

[7] 21 U.S.C. § 812(c).

of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. Id at § 812(b)(1). This made all possession/usage of marijuana a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.[8]

This scheme became disrupted with the Medical Marijuana movement. The 1996 California voter initiated referendum known as Proposition 215, which is codified as the Compassionate Use Act of 1996 ("Compassionate Use Act"), Cal. Health & Safety Code § 11362.5 (West) legalized medical marijuana. *Raich*, addressed the question of whether Congress could regulate the intrastrate growth of medical marijuana in California. The Ninth Circuit ruled that this was beyond Congress's commerce clause authority.[9] The Supreme Court reversed.

Even though several states had recognized the right to use medical marijuana at the time, the Court found that the problems between

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[8] 21 U.S.C. § 823(f); see also *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

[9] *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *vacated and remanded sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005).

distinguishing locally produced marijuana from illegally imported marijuana allowed Congress to simply ban the intrastate distribution of marijuana."[10] Prohibiting any intrastate use was thus, according to the Court, " 'necessary and proper' " to avoid a "gaping hole" in Congress' "closed regulatory system."[11]

Justices Thomas, O'Connor, and Rehnquist dissented and would have found that Congress had exceeded its commerce clause powers.[12] The dissenters believed that States had the power to legalize marijuana. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[13]

This power was part of a States' "core police powers" to "define criminal law and to protect the health, safety, and welfare of their

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[10] *Raich*, 545 U.S. 1.

[11] 545 U.S. at 13, 22.

[12] *Gonzales*, 545 U.S. at 42.

[13] *Id. (quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting).

citizens."[14] The majority rule to the contrary was "That rule and the result it produces in this case are irreconcilable with" the Court's prior jurisprudence.[15] In a separate dissent, Justice Thomas noted that (like this case) all marijuana was locally grown and cultivated, never crossed state lines, and had no demonstrated impact on the national marijuana market. "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers. At the end of the day, this scheme was upheld by a six to three majority.[16] Justice Breyer is the only member of the majority still on the Court.

In the intervening sixteen years, Congress delivered mixed signals on marijuana. They simultaneously tolerate and forbid local use of marijuana. "This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."[17]

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[14] *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Whalen v. Roe*, 429 U.S. 589, 603, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Gonzales*, 545 U.S. at 42 (O'Connor, J. dissenting).

[15] *Gonzales*, 545 U.S. 1.

[16] *Gonzales*, 545 U.S. at 57–58.

[17] *Standing Akimbo, LLC*, 141 S. Ct. at 2237

In 2009, Congress allowed the sale of medical marijuana in the District of Columbia.[18] Every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws."[19] 36 States now allow medicinal marijuana use and 18 of those States also allow recreational use.[20]

The time is right to revisit the issue:[21]

> The Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" " 'and try novel social and economic experiments,' " then it might no longer have authority to intrude on "[t]he States' core police powers ... to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no

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[18] *See* Congress Lifts Ban on Medical Marijuana for Nation's Capitol, Americans for Safe Access, Dec. 13, 2009; *Standing Akimbo, LLC*, 141 S. Ct. at 2237.

[19] *United States v. McIntosh*, 833 F.3d 1163, 1168, 1175–1177 (9th Cir. 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).

[20] *Standing Akimbo, LLC*, 141 S. Ct. at 2237.

[21] *Standing Akimbo, LLC*, 141 S. Ct. at 2238.

> longer be necessary *or* proper to support the Federal Government's piecemeal approach.

This "half-in, half-out" approach to federal cannabis regulation is reminiscent of Abraham Lincoln's statement: "It must become all one thing, or the other" ... "A house divided cannot stand." Federal laws and policies designed to nullify the supremacy of federal law in order to assist promotion of state cannabis programs cannot further stand.[22]

This is a jurisdictional question which this Court should address. Justice Thomas' separate opinion was sudden and unexpected. In many ways, his opinion goes beyond the issue raised by the Petitioner in *Standing Akimbo*. This Court should use this case as an opportunity to address this concern. Counsel fully appreciates and apologizes for raising this issue at this late date, but it was only triggered by Justice Thomas' separate opinion which was released on June 28, 2021. Prior to that time, federal courts treated their hands as tied on this issue.[23] An issue of this nature could be

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[22] "A House Divided" speech by Abraham Lincoln, given in Springfield, Illinois, June 16, 1858, https://www.nps.gov/liho/learn/historyculture/housedivided.htm

[23] See, e.g. *Montana Caregivers Ass'n, LLC v. United States*, 841 F. Supp. 2d 1147, 1150 (D. Mont. 2012), *aff'd,* 526 F. App'x 756 (9th Cir. 2013) ("Since Congress acted under one of its enumerated powers when it enacted the

raised by a motion to recall the mandate.[24] In *United States v. Barela*, 571 F.2d 1108, 1110 (9th Cir. 1978), the Ninth Circuit permitted the Government to raise a game changing new argument for the first time on reconsideration. This Court should similarly allow it here.

Petitioner appreciates that there has not been a merit ruling on this issue. While the issue was presented to the Sixth Circuit, their refusal to entertain it at the en banc level means that there is no adjudication on the issue below. While this would ordinarily create an issue, here it does not.

The Sixth Circuit could not have overruled *Gonzales*. This Court has made it clear that lower courts cannot find their rulings implicitly

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Controlled Substances Act, the federal government's enforcement of the Act does not violate the Tenth Amendment"); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1106 (E.D. Cal. 2012), *aff'd*, 552 F. App'x 680 (9th Cir. 2014) ("Plaintiffs' Commerce Clause claim is foreclosed by [Raich] and is dismissed".

[24] See *United States v. Murray*, 2 F. App'x 398, 399 (6th Cir. 2001) (recalling mandate to allow defendant to raise an issue based on an intervening US Supreme Court case); *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir. 1988) ("Here, Petitioner sought a recall of the mandate. The Ninth Circuit has the power to recall a mandate in exceptional circumstances and has exercised its discretion to recall a mandate 'when a decision of the Supreme Court 'departs in some pivotal aspects' " from a prior Ninth Circuit opinion').

overruled.[25] "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[26] While the Petitioner appreciates that having the Sixth Circuit's input would be helpful,[27] in this case the value would be minimal. Existing precedent constrains the results, the issue presented deserves prompt consideration by the Court, and the facts are not seriously in dispute.

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[25] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

[26] *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982). See also, C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39, 83 (1990) ("A lower court clearly violates its duty of allegiance to the Supreme Court when, simply because the lower court feels the earlier Supreme Court decision was analytically wrong, it rejects a precedent that the Supreme Court has not questioned."); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 5 (1994) ("[T]he overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to define the law merely by interpreting existing precedents, without considering what their higher courts would likely do on appeal.")

[27] Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle L Rev 151, 152 n. 4 (2009).

This case is the appropriate case to hear this important question. This Court should either grant certiorari or remand this matter to the Sixth Circuit for plenary consideration of the issue.

II. WHERE THE DEFENDANT IS SELLING MARIJUANA ONLY TO MEDICAL MARIJUANA PATIENTS IN A STATE WHERE MEDICAL MARIJUANA IS LEGAL; THE LEGAL LANDSCAPE HAS SO CHANGED THAT A NAKED RELIANCE ON THE GUIDELINES IS OBJECTIVELY UNREASONABLE.

At sentencing, Judge Maloney noted that even though a number of states have liberalized their treatment of marijuana, Congress has chosen not to modify the guidelines. This issue argues that given the changes to our nation's approach to marijuana, it is substantively unreasonable to nakedly rely on the marijuana sentencing guidelines to the exclusion of all other factors. This is particularly true where the Guideline Commission has not had a voting quorum. The Sixth Circuit held that this policy question is committed to the trial court and subject only to review for unreasonableness.

As the prior issue has demonstrated, Congress has not spoken with a single voice about marijuana. Also, the United States has supported the modification of the 1961 Single Convention on Narcotic Drugs — where marijuana was identified as having little therapeutic effect.

It is important to note that while Congress could certainly modify these guidelines, the Guidelines Commission could not.[28] As noted in the previous issues, many states (including Michigan) have both legalized and regulated medical and recreational marijuana usage and sales. Here, there has been no evidence of diversion of this marijuana or sales to minors. There also has been no suggestions of contaminates in the marijuana he was responsible for selling. Mr. Trevino's real crime is conducting a regulated business without the appropriate license. In many contexts this is a misdemeanor and rarely commands a serious sentence.[29] The same is true for the sales of alcohol without a license.[30] The problem in the

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[28] *See United States v. Jones*, 80 F.3d 1098 (6th Cir. 2020) (noting absence of voting quorum on Commission).

[29] *See, e.g. People v. Bennett*, 201 A.D.2d 440, 608 N.Y.S.2d 166 (1994) (probation for practicing medicine without a license); *People v. Abrams*, 177 A.D.2d 633, 576 N.Y.S.2d 338 (1991) ("it is a misdemeanor for an unlicensed person to "use the title 'psychologist' or to describe his services by the use of the words 'psychologist', 'psychology' or 'psychological' in connection with his practice [without a license]"); *People, for Use of State Bd. of Health v. Moser*, 176 Ill. App. 625, 627 (Ill. App. Ct. 1913) ($100 fine for practicing medicine without a license); *People, for Use of State Bd. of Health v. Fairfax*, 181 Ill. App. 436, 437 (Ill. App. Ct. 1913) (noting fines for defendant's prior practicing medicine without a license);

[30] *See, e.g. People v. Newton*, 257 Mich. App. 61, 62, 665 N.W.2d 504, 506 (2003) (probation for sex offense sales of alcohol without a license); *People v. Al-Saiegh*, 244 Mich. App. 391, 392, 625 N.W.2d 419, 420 (2001) (probation

approach countenanced by the panel is that a minor regulatory violation committed by dispensary resulted in a punishment which is not tied to the degree of the violation, but to a dated viewpoint that marijuana is illegal under all circumstances.

As noted, earlier 36 states now allow the use of medical marijuana and 18 allow the use of recreational marijuana. Medical marijuana is also allowed in the District of Columbia, Guam, Puerto Rico, and the US Virgin laws.[31] Michigan allows both. Courts should be expected to consider the surrounding circumstances in imposing sentence. As Justice Thomas has recently recognized, our current statutory scheme "an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana."[32] Mr. Trevino's fatal sin was selling marijuana without the appropriate license, not selling marijuana.

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for transportation of alcohol without a license); *People v. Rides*, 273 N.Y. 214, 215, 7 N.E.2d 105, 106 (1937)(noting sales of alcohol without a license is a misdemeanor); *State v. Le Blanc*, 125 La. 967, 968, 52 So. 114 (1910) (fine for sales of alcohol without a license).

[31] NCLS, *State Medical Marijuana Laws*, (March 10, 2020) https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx

[32] *Standing Akimbo, LLC*, 141 S. Ct. at 2237.

While illegal, the one offense is a serious public health offense, the other is a regulatory one. Without minimizing the importance of a license and the corresponding good moral character checks, Mr. Trevino received a sentence vastly in excess of penalties for sales of alcohol or tobacco without a license. In fact, his sentence probably exceeded most sentences for practicing medicine without a license.

Mr. Trevino also behaved like a businessman, not a criminal in how the dispensaries were run. He had defined places of business, advertised, paid taxes, and until the bank closed his account (at the request of the government) he paid his employees using a standard payroll service for small businesses. He even won some state court litigation that lent some credence to a lay-person's belief that he was in compliance with the law. A defendant's good faith belief that he was compliant with state medical marijuana law is grounds for a departure.[33] Obviously, this is a much tougher standard than a variance.

In *United States v. Guess*, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016) the Court remarked that there is an "unequal application of law that results

[33] *United States v. Rosenthal*, 266 F. Supp. 2d 1091 (N.D. Cal. 2003).

from the current state of marijuana laws, which leaves criminal defendants facing imprisonment under federal law for activities that their counterparts in states that have legalized marijuana possession will not face prosecution for." Furthermore, the current state of the law creates an untenable grey area in which such certainty and notice have effectively, if not formally, been eradicated."[34]

Lastly, while marijuana is still considered a Schedule I drug with no medically redeeming purpose, products containing the two key ingredients of marijuana CBD and THC are now legal. CBD derived products from hemp products are now legal under the 2018 Farm Bill. U.S. Pub. L. 115-334. The US FDA has approved dronabinol and nabilone which contain THC. They treat nausea caused by chemotherapy and increase appetite in patients with extreme weight loss caused by AIDS. The United Kingdom, Canada, and several European countries have approved nabiximols

[34] *See also United States v. Dayi*, 980 F. Supp. 2d 682, 685–87 (D. Md. 2013).

(Sativex®), a mouth spray containing THC and CBD. It treats muscle control problems caused by multiple sclerosis.[35]

While Congress could have modified this variable at any time, we have been without a voting quorum on the Sentencing Guideline Commission for some time. Nakedly adhering to the guidelines in the face of all of this is objectively unreasonable.

[35] "Marijuana as Medicine, https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine

III. THE GOVERNMENT SHOULD NOT HAVE BEEN ALLOWED TO SUMMARIZE THE DATA FROM THE BUD TENDER SHEETS IN SUCH A MANNER THAT THE JURY WAS GIVEN DETAILS AS TO AMOUNTS AND DOLLARS BY SOMEONE WHO HAD NO FIRSTHAND KNOWLEDGE REGARDING THE FORMS THAT SHE WAS REVIEWING.

This issue presents an important question concerning the admission of summary records under Fed. R. Evid. 1006. This is an issue of increasing frequency in modern federal prosecutions. The evidence is made by individuals who do not have direct knowledge of the records and such evidence often has a distorting and prejudicial impact on the opposing party.

Here, over defense objection the Government called Karla Francisco-Waichum who offered summaries she prepared concerning the marijuana transactions carried out by Hyrdoworld. This accounted for approximately 315 kilos of the 426 kilos referred to at trial.

The underlying bud sheets (records of sales) were found all over the place and according to the Government's witness included many duplicates. They were authenticated by officers as to where and when they were found but not as to account or even the exact documents found at

each location. Ms. Francisco-Waichum was a Government employee with no personal knowledge of the operations of Hydroworld. She did not work there as an employee and she did not prepare her summaries in conjunction with individuals who did.

Properly understood Rule 1006 does no more no more than create an exception to Federal Rule of Evidence 1002, which requires an original to prove contents of writings, recordings, and photographs.[36] This rule provides an exception to the "Best Evidence Rule" which ordinarily requires the proponent, when attempting to prove the content of a document or writing, to produce the original." Other than this exception, evidence admitted under Rule 1006 must meet the parameters of the Rules

[36]Wright & Miller, Federal Practice and Procedure, § 8043 Scope, 31 Fed. Prac. & Proc. Evid. § 8043 (2d ed.)

of Evidence.[37] The burden of demonstrating admissibility rests with the proponent of the evidence.[38]

Ms. Francisco-Waichum supervised the production of the summaries, but she did not participate in the creation of the underlying records and

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[37] *United States v. Oros*, 578 F.3d 703, 708 (7th Cir. 2009) ("Federal Rule of Evidence 1006 allows a party to present, and enter into evidence, a summary of voluminous writings, recordings, or photographs. This provision, however, is not an end around to introducing evidence that would otherwise be inadmissible; therefore, in applying this rule, we require the proponent of the summary to demonstrate that the underlying records are accurate and would be admissible as evidence."); *United States v. Milkiewicz*, 470 F.3d 390, 396 (1st Cir. 2006) (evidence admitted under Rule 1006 must be otherwise admissible and remains subject to the usual objections under the rules of evidence and the Constitution; proponent must show that the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials.)

[38] *United States v. Irvin*, 682 F.3d 1254, 1262 (10th Cir. 2012) (trial court erred in admitting prosecution's summary testimony of bank records on ground that defendants failed to prove that those records were not admissible under hearsay exception for business records; "just as the proponent of hearsay evidence bears the burden of establishing the applicability of a hearsay exception * * * so too must the proponent of a Rule 1006 summary based on hearsay evidence establish that the materials summarized are admissible"). See also *Peat, Inc. v. Vanguard Rsch., Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004) (trial court abused its discretion in admitting exhibit summarizing trade secrets allegedly misappropriated by defendant, where exhibit was prepared by plaintiff's employees, at request of counsel, in response to defendant's discovery request and contained inadmissible hearsay concerning defendant's conduct and intent).

had not worked with individuals who originally prepared these records. She could not have laid the foundation to admit the underlying business records. The fact that the data derived from these bud tender sheets was filtered through a summary does not avoid this problem. "Commentators and other courts have agreed that Fed. R. Evid. 1006 requires that the proponent of the summary establish that the *underlying documents* are admissible in evidence."[39] Improperly used, "they provide particular benefits to prosecutors, who use them to present government agents as summary witnesses."[40]

"Thus, if the original materials contain hearsay and fail to qualify as admissible evidence under one of the exceptions to the hearsay rule" the summary based on that material is inadmissible. As one court has noted, this burden is placed on the proponent in order "to protect the integrity of

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[39] *Martin v. Funtime, Inc.*, 963 F.2d 110, 116 (6th Cir. 1992). *See also United States v. Cecil*, 615 F.3d 678, 690 (6th Cir. 2010).

[40] Lauren Weiser, *Requirements for Admitting Summary Testimony of Government Agents in Federal White Collar Cases*, 36 Am. J. Crim. L. 179, 180 (2009)

the Federal Rules."[41] If Congress, wished to make Rule 1006 a hearsay exception, it would have placed the rule in the 800 series of rules.[42]

In this case, the only hearsay exception which provides any theory of admissibility for the Government is the business records exception. Fed. R. Evid. 803(6). To admit a business record, the following four requirements must be satisfied:[43]

> (1) they must have been made in the course of regularly conducted business activities; (2) they must have been kept in the regular course of business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge.

The bud tender sheets could not be admitted under prong four of this test. While the Government established that Hydroworld completed bud tender

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[41] U.S. v. Johnson, 594 F.2d 1253, 1255 (9th Cir. 1979)

[42] Id.

[43] *United States v. Johnson*, 594 F.2d 1253, 1256 (9th Cir. 1979). *Accord United States v. Scales*, 594 F.2d 558, 562 (6th Cir. 1979) ("If the [underlying] records themselves could have been admitted to show [their contents], there appears to be no reason why Rule 1006 would not apply to a summary of their contents"); *Martin*, 963 F.2d at 116; *Cobbins v. Tennessee Dep't of Transp.*, 566 F.3d 582, 588 (6th Cir. 2009); *Cecil*, 615 F.3d at 690.

sheets generally and they admitted some sheets, they did not lay a foundation for the admissibility of these underlying sheets as business records rather than simply additional evidence of marijuana sales.[44] "In determining admissibility courts are to consider "the character of the records and their earmarks of reliability ... from their source and origin and the nature of their compilation."[45]

The fact that the summary documents may accurately compile the information contained on the seized bud tender sheets does not satisfy the

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[44] *See United States v. Yates*, 553 F.2d 518, 521 (6th Cir. 1977) ("The mere fact that the recordation of the third party statements is routine, taken apart from the source of the information recorded, imports no guaranty of the truth of the statements themselves."). *See also United States v. Bortnovsky*, 879 F.2d 30, 34 (2d Cir. 1989) ("[A] statement does not satisfy the rule's requirements [if] there was no showing that [the speaker] had a duty to report the information he was quoted as having given."); *United States v. McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993), *as amended on denial of reh'g* (Aug. 18, 1993) ("The essential component of the business records exception is that each actor in the chain of information is under a business duty or compulsion to provide accurate information."). "[A]ll of the records from which it is drawn are otherwise admissible." *Harris Mkt. Research v. Marshall Mktg. & Commc'ns, Inc.*, 948 F.2d 1518, 1525 (10th Cir. 1991).

[45] *Palmer v. Hoffman,* 318 U.S. 109, 114, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

accuracy requirements needed for their admission. As an Eastern District of Michigan Court noted:[46]

> [U]nder Rule 1006, a summary must be "accurate, authentic and properly introduced before it may be admitted into evidence." Neither the charts nor the underlying documents have been properly introduced, since L&H has proffered no foundation for either. Even if the company produced the underlying payroll accounting documents in discovery and Plaintiff did not question their admissibility at that time, as Plaintiff points out, documents obtained through discovery do not automatically become part of the summary judgment record. Moreover, the Court is unable to assess the reliability or authenticity of the summarizing charts, even if the underlying documents would be admissible at trial. The preparer of the charts is not named and the exhibits do not reference any range of pages in the underlying accounting documents. Unlike the summarized personnel records in Martin, which were compiled by compliance officers who testified to their accuracy and authenticity, there is absolutely no foundation from which the Court could evaluate the charts' admissibility. Accordingly, the Court will not consider them as part of the summary judgment record.

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[46] *Diebel v. L&H Res., LLC*, No. 08-13823, 2010 WL 11519578, at *7 (E.D. Mich. Feb. 17, 2010), *aff'd sub nom. Diebel v. L & H Res., LLC*, 492 F. App'x 523 (6th Cir. 2012) (citations omitted).

The underlying bud tender sheets did not even remotely produce an indicia of reliability concerning quantity. There were duplicate records and there was no way to determine from these sheets whether the same marijuana moved from one store to another was double scored. A record does not qualify as a business record where "method or circumstances of preparation" of the document "indicate a lack of trustworthiness."[47] As the Sixth Circuit noted in an early case:

> "[A] summary document 'must be accurate and nonprejudicial.' * * * This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner. Nothing should be lost in the translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise".[48]

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[47] 30B Wright Miller, Federal Practice and Procedure, § 6867 ("Trustworthiness").

[48] *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998).

The Committee emphasizes that the opponent is "not necessarily required to introduce affirmative evidence of untrustworthiness," instead the opponent can simply highlight the "circumstances" that suggest untrustworthiness. [49] A summary must be neutral and not contain theory or opinion.[50]

While counsel appreciates that gaps in business records normally go to weight (not admissibility) where quantity was critical to this case, the summaries prepared in this case had a distorting effect and lacked basic reliability.

Preparation of evidence summaries by individuals without sufficient evidence can be particularly dangerous.[51] As one federal district court noted: "Admission of summary exhibits under Rule 1006 of the Federal

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[49] Committee Comments to 2014 Amendment to Fed. R. Evid. 803(6)

[50] See, e.g., *State Off. Sys., Inc. v. Olivetti Corp. of Am.*, 762 F.2d 843, 845 (10th Cir. 1985) (projections of future lost profits, as contained in damages summary, were not legitimately admissible as summaries under Rule 1006, since they were interpretations of past data and projections of future events and not a simple compilation of voluminous records; however, such matter was admissible as opinion testimony under either Fed. R. Evid. 701 or 702).

[51] Cf *In re S.N.A. Nut Co.*, 210 B.R. 140 (Bankr. N.D. Ill. 1997) (denying admission of summary where the witness did not have personal knowledge of the records and the underlying records kept in a haphazard manner).

Rules of Evidence is serious business and is, to some degree (in many instances, to a very great degree, as every trial judge knows), an act of faith. Government witnesses, as a practical matter, often get the benefit of the doubt when sponsoring summary exhibits. The court's experience in this case is, to put it mildly, unsettling."[52] Here, the danger is that shuttled inventory could have been counted multiple times and the summary was prepared by an individual who had to make a series of assumptions beyond her competence.

The appropriate interpretation of this rule is an important question of public policy given the increasing nature of criminal cases involving voluminous amounts of information. Evidence summaries play a valuable role in streamlining trials, yet improperly used that they can a highly distorting effect on the evidence.

This Court should grant certiorari to hear this important issue.

[52] *United States v. King*, 231 F. Supp. 3d 872, 970 n.111 (W.D. Okla. 2017).

CONCLUSION

For these reasons, the Petitioner urges this Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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CERTIFICATE OF SERVICE

A copy of this brief was served on the Office of the Attorney General for the Western District of Michigan and the Office of the Solicitor General.

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