No. _____

In The

Supreme Court of the United States

STANDING AKIMBO, INC., a Colorado corporation; SPENCER KIRSON; SAMANTHA MURPHY; JOHN MURPHY,

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

Two years ago, the Petitioners petitioned this Court to review the IRS actions enforcing the Controlled Substances Act against the Petitioners through the Tax Code and summons proceedings. While this Court denied the petition, Justice Clarence Thomas concurrently issued a Statement calling into question the Government's "half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana." He additionally stated that "[t]his contradictory and unstable state of affairs strains basic principles of federalism. . . ." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021). Further, Justice Thomas stated that "This case (*Standing Akimbo I*) is a prime example." *Id.*

Two years after Justice Thomas' Statement, the federal Government has paid little heed. The IRS is still enforcing the CSA against state-legal cannabis using the Tax Code and its powers as a drug enforcement agency.

Thus, the questions presented are:

1. Should *Gonzales v. Raich* be overruled, i.e., whether the CSA as supplemented by the half-in, half-out regime is in excess of Congress' powers under the Commerce Clause?

2. Whether the Federal Government's implementation of the "half-in, half-out regime" prohibiting intrastate production and sale of marijuana is not necessary or proper under the Necessary and Proper Clause.

QUESTIONS PRESENTED – Continued

3. Did the lower court err by converting the Government's motion to dismiss to summary judgment without notice and without allowing the non-moving party to bring evidence forward?

4. Does 26 U.S.C. §280E violate the Sixteenth Amendment to the Constitution by taxing more than constitutional income?

CORPORATE DISCLOSURE STATEMENT

The Petitioner entity does not have a parent corporation or any publicly held company owning 10% or more of the corporation's stock.

RELATED CASES

Standing Akimbo, LLC v. United States, 141 S. Ct. 2236 (2021)

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

RELATED CASES – Continued

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

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

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

Speidell v. United States, 978 F.3d 731 (10th Cir. 2020)

Estate of Ronald E. Van Steyn, Deceased, Holly A. Cook, Personal Representative, United States Tax Court Docket No. 30991-21

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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 unpublished, *Standing Akimbo, Ltd. Liab. Co. v. United States of America*, 2023 U.S. App. LEXIS 2250. App. 1. The district court order granting the Government's Motion to Dismiss is unreported. 2021 U.S. Dist. LEXIS 166746. App. 19.

JURISDICTION

The Order and Judgment of the court of appeals was entered on January 27, 2023. App. 1. This Petition has been timely filed on or before April 27, 2023 in accordance with the Supreme Court Rule 13-1. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 3

[Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article I, Section 8, Clause 18

[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment X

The 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.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

STATEMENT

a. General Background.

This matter is a continuation of *Standing Akimbo I*, except that this proceeding deals with tax year 2016. As discussed further, below, the Petitioners herein have been subjected to a Compliance Initiative Project by the IRS. The enforcement of the CIP herein seeks to enforce the Controlled Substances Act through 26

U.S.C. §280E. In so doing, taxpayers are determined to be unlawful drug traffickers in violation of the CSA. All "expenditures" are disallowed and the IRS taxes on gross receipts. The enforcement results in an "income tax" greater than the income itself.

Specifically, this action arises from summons proceedings initiated by the IRS to obtain state "METRC" documentation of the Petitioners' cannabis business. Purportedly this information will help the IRS determine gross receipts and costs of goods sold. However, as can be seen from *Standing Akimbo I*, the METRC-summoned information is disregarded by the Revenue Agent. The IRS taxes the Petitioners on gross receipts. *See* https://www.supremecourt.gov/DocketPDF/20/20-645/187517/20210813183214336_Supplemental%20Brief%20Final%20ocr.pdf.

b. The Federal Strategy.

The genesis of these proceedings goes back to the legalization of cannabis[1] in California and Arizona in 1996. Both states brought forth initiative propositions for legalization/decriminalization of cannabis. These initiatives were approved by the people in November, 1996. Then Director of the Office of National Drug

[1] Today, the term "marijuana" is generally considered pejorative relating back to its first use in the *Marihuana Tax Act* of 1937. *See*, *e.g.*, https://www.kiro7.com/news/local/lawmakers-strike-word-marijuana-all-state-laws-calling-term-racist/MJOQZ7OCK5CUDLBA2H53CYOJXE/. Except for references of the term in a statute or regulation, the undersigned will use the term "cannabis."

Control Policy ("ONDCP"), Ret. Gen. Barry R. McCaffrey, convened meetings with numerous federal agencies to create an official "federal response" to the state-legalization of cannabis. https://clinton.presidentiallibraries.us/items/show/26039. The IRS, as a drug control agency, was one of the agencies included. *Id.* After at least four meetings in November – December, 1996, these agencies agreed upon a formal strategic plan to eradicate state-legal cannabis. *Id.* The formal response was approved by President Clinton and was placed in the Federal Register at 62 Fed. Reg. 6164.

The strategy is sweeping with responsibilities assigned to agencies ranging from the Department of Justice to the Nuclear Regulatory Commission. The pertinent strategies in reference to the IRS are as follows:

> "The President has approved this strategy, and Federal drug control agencies will undertake the following coordinated courses of action:
>
> "A. Objective 1 – Maintain Effective Enforcement Efforts Within the Framework Created by the Federal Controlled Substances Act and the Food, Drug, and Cosmetic Act
>
> * * *
>
> "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.

62 Fed. Reg. 6164 (the "Federal Strategy")

Thus, the IRS, as a drug control agency under 21 U.S.C. §1702, *et seq.*, was commanded to use its tax administration power under Title 26 to disallow all "expenditures" to those who sell state-legal cannabis. This commandment was for the purpose of eradicating state-legal cannabis. 62 Fed. Reg. 6164.

c. The Federal Strategy Applied to Taxation.

Prior to the Federal Strategy, the invocation of §280E was rarely used. From the adoption of §280E in 1982, to the issuance of the Federal Strategy, the IRS only invoked §280E in the case of a taxpayer being convicted of drug crimes. *See Bender v. Comm.*, T.C. Memo 1985-375; *Sundel v. Comm.*, T.C. Memo 1998-78, the IRS waited until the taxpayer had been convicted of a drug trafficking crime to invoke §280E.

After the Federal Strategy was adopted, the IRS took the position that it could administratively determine that a taxpayer was an unlawful drug trafficker and could deny all expenditures of the unlawful drug trafficking. The IRS did so without any rules or regulations being adopted by it. The first case the undersigned can find where the IRS invoked the post-Federal Strategy approach was *Californians Helping*

to Alleviate Med. Problems, Inc. v. Commissioner (*CHAMP*), 128 T.C. 173, 181 (2007).

The methodology was described by the Tenth Circuit:

> "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."[2]

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

d. The Half-In, Half-Out Regime.

Despite the federal efforts to keep cannabis illegal, the states were opposing the federal efforts. Colorado was the first to legalize cannabis in 2012. By 2016, twenty-four states have adopted some form of legalization or decriminalization. *See* https://ballotpedia.org/Marijuana_Policy_Project. Today the number is now

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[2] The Tenth Circuit ultimately ruled that the IRS may administratively determine that a taxpayer has violated federal criminal drug laws "as a matter of civil tax law." *Alpenglow Botanicals, Ltd. Liab. Co. v. United States*, 894 F.3d 1187, 1197 (10th Cir. 2018). Thus, burden is on the taxpayer in Tax Court to prove by a preponderance of evidence that the taxpayer did not violate federal criminal drug laws. *See Sharp v. Commissioner*, Docket No. 7077-19 (U.S. Tax Court).

forty-one. https://cannigma.com/us-states-where-cannabis-is-legal/.

In response to the widespread state legalization, and as Justice Thomas recognized in *Standing Akimbo I*, the federal government employs a "half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021). Justice Thomas articulates the nonsensical federal actions taken with regard to cannabis. The regime can be summarized as follows: While avoiding direct criminal prosecution, the federal government instead uses the administrative state to enforce the Controlled Substances Act and keep the criminal threat alive.

e. The Petitioners Subjected to the IRS Compliance Initiative Project.

Beginning in 2016, the Western Region of the IRS initiated a "Compliance Initiative Project (CIP)" for the cannabis "industry" in Colorado. Fifty Colorado cannabis businesses were swept up into this CIP. *See* The U.S. Treasury Inspector General for Tax Administration ("TIGTA"), *The Growth of the Marijuana Industry Warrants Increased Tax Compliance Efforts and Additional* Guidance. https://www.tigta.gov/reports/audit/growth-marijuana-industry-warrants-increased-tax-compliance-efforts-and-additional, p. 8.

The Petitioners are some of the many swept up into this CIP. The summonses at issue in this petition are a result of the CIP.

f. The Underlying Proceeding.

This matter is a second filing by the same Petitioners to quash summonses issued by the IRS. The IRS had issued two sets of summonses. The first set was the subject matter of *Standing Akimbo I*. The second set of summonses were ruled upon by the lower court after Justice Thomas issued his Statement.

Prior to the filing of this petition, on October 25, 2017, the Petitioners in this case filed a similar Petition to Quash against a different set of summonses the IRS issued to the Colorado Department of Revenue, Marijuana Enforcement Division ("MED") seeking Petitioners' data. The IRS was demanding that MED issue reports of Petitioners' information submitted to MED through MED's Marijuana Enforcement Tracking Reporting Compliance ("METRC") system, case number 1:17mc00169-WJM-KLM ("*Standing Akimbo I*"). The facts and arguments in *Standing Akimbo I* are substantively similar to those in this case ("*Standing Akimbo II*"). App. 1.

In this matter, the Respondent demanded that the State prepare the analytical reports of the Taxpayers' raw data through its database known as Marijuana Enforcement Tracking Reporting Compliance system, commonly known as METRC. Regarding the 2016 records of Standing Akimbo Inc. ("*Standing Akimbo II*"), the Government has Summonsed:

- A complete listing of all licenses held for the period of January 1, 2016 – December 31, 2016 for Standing Akimbo LLC and Standing Akimbo Inc.;

- Copy of METRC Annual Gross Sales Report of Standing Akimbo LLC and Standing Akimbo Inc. the taxable year ended December 31, 2016;
- Copy of METRIC (sic) transfer reports for the period of 1/1/2016 – 12/31/2016 for Standing Akimbo LLC and Standing Akimbo Inc.;
- Copy of METRIC (sic) annual harvest reports for the period of 1/1/2016 –12/31/2016 for Standing Akimbo LLC and Standing Akimbo Inc.;
- Copy of METRIC (sic) monthly plants inventory reports for the period of 1/1/2016 – 12/31/2016, for Standing Akimbo LLC and Standing Akimbo Inc.

Regarding Petitioner Spencer Kirson:

- Complete listing of all licenses held for the period of January 1, 2016 – December 31, 2016 for Spencer Kirson.

Regarding Petitioners John Murphy and Samantha Murphy:

- Complete listing of all licenses held for the period of January 1, 2016 – December 31, 2016 for John Murphy and Samantha Murphy.

The auditor made clear that the purpose of the audit is to determine whether the Petitioners have violated the CSA in order to apply Section 280E. The IRS claims that the Appellants are unlawful drug traffickers and should be stripped of the ability to be taxed on net income pursuant to 26 U.S.C. §280E. Rather, they must be taxed on "gross income" – something that has been reserved for the most serious violations of public policy. The IRS claims that marijuana legally sold

under Colorado law is a crime under federal law. Thus, the sale of Colorado state legal marijuana is "unlawful drug trafficking" subjecting the Appellants to Section 280E.

The Appellants sought to quash the summonses and claimed that the summonses are not being issued for a legitimate purpose as required under *United States v. Powell*, 379 U.S. 48 (1964).

A motion to dismiss, along with a response and reply, had been filed and was awaiting a ruling.

While the Motion to Dismiss was pending, the Petitioners in *Standing Akimbo I* were awaiting a ruling on their petition for writ of certiorari.

Certiorari was denied on June 28, 2021. However, concurrent with denial, Justice Clarence Thomas of the United States Supreme Court issued a Statement calling into question the federal government's authority to regulate intrastate sales of marijuana in any manner.

The Petitioners brought the Statement as additional authority in the lower court less than thirty days after Justice Thomas issued the Statement. The motion to dismiss had not yet been decided. The IRS objected to the additional authority being brought. The lower struck the additional authority as being "untimely." The lower court then converted the motion to dismiss to a motion for summary judgment without any notice and ruled against the Petitioners.

SUMMARY OF THE ARGUMENT

I. *Gonzales v. Raich* should be Overruled.

Gonzales v. Raich is the basis for which the IRS is seeking to enforce §280E against the Petitioners. Under this approach, the IRS makes an administrative decision, purportedly supported by *Gonzales v. Raich*, that the taxpayer is an unlawful drug trafficker under the CSA. Then the IRS disallows all "expenditures" pursuant to the Federal Strategy resulting in an "income tax" greater than the income itself. Thus, the validity of both the CSA and *Gonzales v. Raich* is central to the IRS's administrative action.

Gonzales v. Raich allows the federal government to directly criminalize conduct and allow the use of the administrative state to administratively enforce the criminalization. *Gonzalez v. Raich* should be overruled. Direct criminalization is a police power and beyond the reach of Congress.

This Court had previously held that Congress does not have the power under the Commerce Clause to directly criminalize the sale and possession of drugs. "[A] mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, [ ] is beyond the power of Congress and must be regarded as invalid." *Nigro v. United States*, 276 U.S. 332, 341 (1928).

"Congress cannot punish felonies generally." *Bond v. United States*, 572 U.S. 844, 854 (2014), quoting, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428, 5 L. Ed. 257 (1821). To do so would create a "police

power" within Congress abrogating a core power reserved to the states under the Tenth Amendment. *Id.*

The interpretation of *Gonzales v. Raich* has gone well beyond its original limited ruling. The Court noted- "respondents' challenge is actually quite limited." *Gonzales v. Raich*, 545 U.S. 1, 15, 125 S. Ct. 2195, 2204 (2005). The Court presumed, without ruling, that the CSA was a constitutional exercise of the commerce power, and examined whether persons could be "excised" from the reach of an otherwise presumably valid statute. *Id.* The Court concluded that under such circumstances, a person could not be excluded from the statute's reach.

Here the challenge is to the statute itself. Direct criminalization of drug possession and sale is not a commerce power. It is a police power and beyond the reach of Congress.

At the very minimum, the conflict between *Raich* and *Nigro* must be resolved.

2. The Half-In, Half-Out Regime is not Necessary *or* Proper.

Justice Thomas stated: "A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach." *Standing Akimbo I*, p. 5. (Emphasis in Original).

The Necessary and Proper Clause states: [The Congress shall have Power . . .] To make all Laws

which shall be necessary and proper for carrying into Execution the foregoing Powers. Constitution, Article I, Section 8, Clause 18.

Thus, the exercise of the Commerce power is limited by the Necessary and Proper Clause. While the "comprehensive" regulation examined in 2005 passed muster in *Raich* through a "closely divided Court," times have changed. Assuming that this Court decides that it is within Congress' power to criminalize state-legal cannabis, this Court must review the newer "half-in, half-out regime" to determine whether that regime of the last sixteen years meets the necessary and proper test.

"Congress is not empowered by [the Constitution] to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

Regarding federalism, this Court has identified propriety under the Necessary and Proper Clause as a substantive limitation on federal power. *See Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J.) (concluding that a law carrying the Commerce Clause into execution is not proper, for Necessary and Proper Clause purposes, if it "violates the principles of state sovereignty" that various other constitutional provisions reflect); *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 519, 559 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (declaring "laws that undermine our

structure of government established by the constitution" are not a proper means for carrying Congress' enumerated powers into execution); *id.* 567 U.S. at 653 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) ("[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.").

Laws that undermine constitutional structures do not "consist with the . . . spirit of the constitution," so Congress' Necessary and Proper Clause power does not permit it to adopt such laws. *McCulloch v. Maryland*, 17 U.S. (9 Wheat.) at 421.

3. This Court Should Resolve the Split in the Circuits whether Notice and an Opportunity to Bring Evidence and Respond is Mandatory when Converting a Motion to Dismiss to Summary Judgment.

Under Rule 12(d), Fed. R. Civ. P., a Motion to Dismiss may be converted to a Rule 56 motion for summary judgment. However, the lower court must provide opportunity for the non-moving party to respond and present their evidence. There is a split in the circuits of how conversion and notice should be accomplished. Circuits, such as the Eleventh Circuit, make the requirement of notice of the conversion "strict." *See Finn v. Gunter*, 722 F.2d 711 (11th Cir. 1984). The lower

court must give notice to the parties and must provide time to brief and give evidence under the summary judgment standard. The Tenth Circuit, like several other circuits, allows a discretionary standard, leaving it to the discretion of the lower court whether prior notice of conversion and opportunity to respond should be allowed.

This Court should resolve this split in the circuits and determine whether prior notice of the conversion and an opportunity to bring forward the evidence is mandatory under Rule 12(d).

4. Sixteenth Amendment.

Since Section 280E taxes more than income it violates the Sixteenth Amendment. There is a split of authority of whether Section 280E is an unconstitutional under the Sixteenth Amendment. Congress may only tax "income" without apportionment under the Sixteenth Amendment. This means that Congress may only tax as income the "fruit of the tree" – the gain, not the tree itself – the capital. *Eisner v. Macomber*, 252 U.S. 189 (1919). By not allowing exclusion of the recovery of ordinary and necessary expenses in determining income, Section 280E violates the Sixteenth Amendment and taxes the tree.

ARGUMENT

Introduction

This Court has stated that an IRS summons may be challenged by the taxpayer on "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. *GONZALES V. RAICH* SHOULD BE OVERRULED.

This Court in *Gonzales v. Raich*, 545 U.S. 1, 24, 27 (2005) stated that the Controlled Substances Act, 21 U.S.C. 801, *et seq.,* "designates marijuana as contraband for any purpose" and "prohibit[s] entirely [its] possession." *Id.* As a result, under the CSA and *Raich,* "[a]nyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes . . . is committing a federal crime." *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

However, this Court also ruled that Congress does not have such a power. "[A] mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, [] is beyond the power of Congress and must be regarded as invalid." *Nigro v. United States*, 276 U.S. 332, 341 (1928). Also, "Congress cannot punish felonies generally." *Bond v. United States*, 572

U.S. 844, 854 (2014), quoting, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428, 5 L. Ed. 257 (1821). To do so would create a "police power" within Congress abrogating a core power reserved to the states under the Tenth Amendment. *Id.*

Thus, *Raich, Nigro* and *Bond* are in irreconcilable conflict.

It should be noted *Nigro* was construing the Harrison Narcotics Act Ch. 1, 38 Stat. 785 ("HNA"). While the Court disallowed the use of the commerce power, it did allow the use of the tax power for drug regulation. Thus, after *Nigro* was decided, Congress understood that it could not use its commerce power to criminalize drugs. As a result, Congress used its tax power to adopt the *Marihuana Tax Act* of 1937 Pub. L. No. 75–238, 50 Stat. 551 ("MTA"), regulating the possession and sale of cannabis through taxation. However, this experiment did not go well. This Court determined that the MTA was unconstitutional as one had to self-incriminate in violation of the Fifth Amendment to pay the tax. *Leary v. United States*, 395 U.S. 6 (1969).

As a result of *Leary*, Congress repealed the HNA and MTA and adopted the Controlled Substances Act ("CSA"). Congress declared that the CSA was adopted solely through Congress' power to regulate interstate commerce. *See* 21 U.S.C. §801.

Regarding the commerce power and the CSA, the Tenth Circuit stated in *Standing Akimbo II*:

> "*Gonzales v. Raich* is the law . . . [W]e want to be very clear: We will continue to faithfully apply *Gonzales v. Raich* unless the Supreme Court instructs us otherwise."

Standing Akimbo II, App. 16.

On the other hand, the Tax Court has been more introspective:

> "In their motion for judgment on the pleadings, the [Taxpayers] assert that the "federal government's current regulation of intrastate production and sales of cannabis is no longer necessary and proper under the Commerce Clause." Although the [Taxpayers] recognize that the Supreme Court ruled to the contrary in *Gonzalez v. Raich*, 545 U.S. 1 (2005), they contend that the reasoning in *Raich* has been hollowed out by factual and legal developments, including the proliferation of state-sanctioned marijuana businesses (introducing new federalism questions), subsequent Commerce Clause jurisprudence, and the statement of Justice Thomas in *Standing Akimbo v. United States*¸ 141 S. Ct. 2236 (2021), where the Supreme Court declined to review the Tenth Circuit's decision cited above.
>
> The Supreme Court has advised lower courts, however, that "[i]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls,

> leaving to [the Supreme Court] the prerogative of overruling its own decisions." [citations omitted] *Raich* directly controls the question here, and we accordingly will follow it unless and until the Supreme Court sees fit to overrule its previous decision.

Miller v. Commissioner, No. 1613-20, 2022 U.S. Tax Ct. LEXIS 191 (T.C. Sep. 1, 2022) (Urda, J.); *accord, Sharp v. Commissioner*, Docket No. 7196-19 (U.S. Tax Court 9/16/22) (Copeland, J.).

Thus, the lower courts are recognizing the untenable position of *Raich*.

Another example. After *Raich*, this Court decided *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"). *NFIB*'s commerce clause analysis severely limited the reach of *Raich*. One lower court stated: "The Chief Justice's opinion raises a number of vexing legal questions. Foremost among them is determining what remains of *Raich* after *NFIB*." *United States v. Lott*, 912 F.Supp.2d 146 (D. Vt. 2012).

Further,

> "[I]t seems possible that much of Title 18, among other parts of the U. S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty."

Gamble v. United States, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring).

Raich should be overruled. Congress does not have the power under the Constitution to generally criminalize conduct. That power is reserved to the States.

It is argued that the commerce power applies anytime when there is economic activity. However, virtually all human activity has an economic component. Thus, allowing Congress to criminalize any and all economic activity under the commerce power would allow the effective equivalent of a police power. Our country was founded on the principle that federal government was one of limited powers. Congress should not be given the police power.

II. THE HALF-IN, HALF-OUT REGIME IS NEITHER NECESSARY NOR PROPER.

a. The Federal Actions Against State Legal Cannabis Should not be Upheld.

As discussed above, the application of the CSA here is to apply the Federal Strategy against those to produce and sell state-legal cannabis. The administrative state agreed to have the IRS deny all "expenditures" for the purpose of eradicating state-legal cannabis. Is it necessary and proper for the government to employ the half-in, half-out regime to control state-legal cannabis – to call it "unlawful trafficking"? Based upon Justice Thomas' analysis, it is not.

"A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to

support the Federal Government's piecemeal approach." Statement, p. 5. (Emphasis in Original)

Justice Thomas' analysis is a two-step approach. The two-step analysis is (1) identifying the exercise of the Commerce power; and (2) whether the exercise of the Power was necessary and proper.

Commerce Clause is discussed above. The second step requires the Court to determine that the particular exercise of the Commerce power meets the limitations of the Necessary and Proper Clause.

The Necessary and Proper Clause states:

> [The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.

Constitution, Article I, Section 8, Clause 18.

"Congress is not empowered by [the Constitution] to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819).

The terms "necessary" and "proper" have distinct meanings. "Necessary" encompasses "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134, 130 S. Ct. 1949, 1956 (2010).

On the other hand, this Court has identified "proper" as a substantive limitation on federal power, in order to preserve federalism. *See Printz v. United States*, 521 U.S. 898 (1997) (Scalia, J.) (concluding that a law carrying the Commerce Clause into execution is not proper, for Necessary and Proper Clause purposes, if it "violates the principles of state sovereignty" that various other constitutional provisions reflect); *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 519, 559 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (declaring "laws that undermine our structure of government established by the constitution" are not a proper means for carrying Congress' enumerated powers into execution); *id.* 567 U.S. at 653 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) ("[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.").

While governmental action may be "necessary" (a rational purpose), the regime is not "proper" if it undermines the principles of federalism. Laws that undermine constitutional structures do not "consist with the . . . spirit of the constitution," so Congress' Necessary and Proper Clause power does not permit it to adopt such laws. *McCulloch v. Maryland*, 17 U.S. (9 Wheat.) at 421.

The half-in, half-out regime, described by Justice Thomas, is neither necessary nor proper. Justice Thomas described the regime as "more episodic than

coherent" – the definition of arbitrary power. It cannot be considered "necessary."

Nor, can the regime be considered "proper." Actions taken by the regime post *Standing Akimbo I* include the government depriving Second Amendment rights to keep and bear arms to those whose only "crime" is to obtain a state medical marijuana card. *See Fried v. Garland*, 2022 U.S. Dist. LEXIS 203136, ___ F.Supp.3d ___ (N.D. Fla. 2022).

Likewise, Section 8 Housing is being deprived to the poor whose "crime" is to obtain a medical marijuana card. *See* Steel, A., *Don't Let the Reefer Blow the Roof Off: Challenges and Guidance Surrounding Medical Marijuana Patients in Federally Assisted Housing*, 31 J. Affordable Housing & Community Dev. L. 143, 227 (2022).

Further, bankruptcy is being denied to mere employees of state-legal dispensaries. For example, a "budtender" (the functional equivalent of a salesclerk at MacDonalds or Wal-Mart) was recently deprived bankruptcy protection because of his mere employment at a cannabis dispensary. According to the Bankruptcy court, his employment constitutes "aiding and abetting and conspiracy to commit violations of federal criminal laws. . . ." *In re Blumsack*, 647 B.R. 584 (D. Mass. 2023).

b. The *Powell* Standard Should not Protect the Federal Strategy for the IRS.

The Tenth Circuit applied *United States v. Powell*, 379 U.S. 48, 57, 85 S. Ct. 248, 255 (1964) in reviewing the summons. In *Powell*, the court held that the IRS should not be held to a probable cause standard when it issues a summons. The court held that an agency could investigate drug crimes for tax purposes merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. *Id.*

The Tenth Circuit cited *LaSalle* to support its contention that the IRS does not need probable cause to issue the summonses. "In *LaSalle*, the Supreme Court reiterated its previous conclusion "that Congress had authorized the use of summonses in investigating ***potentially criminal conduct***."

Aside from the Fourth Amendment concerns, above, the difference between the instant case and *Powell* and/or *LaSalle* is that these cases do not address what happens when the IRS uses its tax administration power in concert with its power as a drug control agency (enforcing criminal drug laws). The IRS is part of the Federal Strategy and made the determination that the Petitioners are drug trafficking in violation of federal law. *See*, *e.g.*, *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1113 (10th Cir. 2017) ("The IRS made initial findings that Green Solution trafficked in a controlled substance and is criminally culpable under the CSA."). The Petitioners believe that allowing IRS to combine its tax administration

authority with nontax criminal authority is the precise danger which the *LaSalle* court sought to avoid.

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.* Such a ruling is dangerous and should not be countenanced.

The IRS cannot have it both ways. It cannot be allowed the power to investigate and enforce federal criminal drug laws but also enjoy the relaxations of the *Powell* standard. They must have probable cause and this summons must be treated as a warrant. A summons under relaxed *Powell* should not be allowed under these circumstances.

III. THE COURT SHOULD REVIEW THE CIRCUIT SPLIT ON CONVERSION OF A MOTION TO DISMISS TO SUMMARY JUDGMENT AND REQUIRE STRICT NOTICE.

The circuits are divided on whether notice and whether the non-moving party should be allowed to respond to meet the evidence after notice. The Eleventh and D.C. Circuits believe in strict notice. *See*, *e.g.*, *Kim v. United States*, 632 F.3d 713 (D.C. Cir. 2011); *Finn v. Gunter*, 722 F.2d 711 (11th Cir. 1984).

The *Finn* court stated:

> It is clear why we strictly follow the notice requirement of Rule 56. A motion to dismiss may result in a rejection of the complaint but it does not finally resolve the case. When this type of motion is before the court counsel are generally addressing questions of law. A summary judgment, on the other hand, carries far greater impact since it results in a final adjudication of the merits. "The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available." [citation omitted] Appellee argues that [the non-moving party] has already provided everything that he could. Appellant says there is additional material that can and will be filed. What is important is that [non-moving party] must be given an opportunity to present every factual and legal argument available.

Finn v. Gunter, 722 F.2d at 713.

Conversely, the Tenth Circuit leaves it to the discretion of the lower court. In this case, the Tenth Circuit believed notice and an opportunity to bring the evidence was not necessary because the Petitioners alerted the lower court in their 2017 briefing that an affidavit was provided by the government and that the motion to dismiss should be converted to summary judgment. The Tenth Circuit used a "foretell the future" standard for the Petitioners. Purportedly, since the Tenth Circuit ruled in 2020 that *Standing Akimbo I*

should have been determined under a summary judgment standard, the Petitioners should have known that the motion to dismiss would in the future be treated as a summary judgment motion. Thus, the lower court did not abuse its discretion to convert the motion to dismiss to summary judgment without notice. *Standing Akimbo II*, App. 9-10.

The problem with a discretionary standard, the careful practitioner would be obliged to treat every motion to dismiss under Rule 12 that could potentially be converted to a motion for summary judgment as a motion for summary judgment. This is so because, as here, briefing under the Rule 12 standard could prove fatal if the court decides that opposing affidavits are necessary. *See Standing Akimbo II*, App. 11-12. "Here, the Taxpayers filed no affidavits containing the information necessary to meet their burden. That failure ends the conversation." *Id.*

The Court should adopt the Eleventh Circuit strict notice standard and reject the Tenth Circuit discretionary standard.

II. THE IRS' USE OF THE SUMMONS POWER TO ENFORCE §280E IS NOT LEGITIMATE, AS §280E IS UNCONSTITUTIONAL UNDER THE SIXTEENTH AMENDMENT.

The Tenth Circuit again denied relief to Standing Akimbo under the Sixteenth Amendment. While Justice Thomas believed that more development was necessary, the Petitioners are concerned that the lower

court will not cooperate and provide the development. Hence, Petitioners again request review.

Congress' power to tax under the Sixteenth Amendment is limited to taxing "income." Section 280E creates an "income" tax on amounts more than constitutional income, making the statute unconstitutional.

It is not a legitimate purpose of the IRS to enforce an unconstitutional tax, as an unconstitutional law is unenforceable. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78, 2 L. Ed. 60 (U.S. 1803).

Congress's power to impose a national income tax is derived from the Sixteenth Amendment to the U.S. Constitution, which was ratified in 1913. The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on ***incomes***, from whatever source derived, without apportionment among the several States." U.S. Const. Amend. XVI (emphasis added).

For Sixteenth Amendment purposes, "income" is defined as "the *gain* derived from capital, from labor, or from both combined[.]" *Eisner v. Macomber*, 252 U.S. 189, 206-07 (1920) (emphasis added) (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918) (quoting *Stratton's Indep., Ltd. v. Howbert*, 231 U.S. 399, 415 (1913)).

Famous tax jurist, Judge Learned Hand, described income for constitutional purposes in *Davis v. United*

States, 87 F.2d 323, 324-25 (2d Cir. 1937). He stated that all receipts:

> "are gathered together and from the total are taken certain necessary items like cost of property sold; ordinary and necessary expenses incurred in getting the so-called gross income; depreciation, depletion, and the like in order to reduce the amount computed as gross income to what is in fact income under the rule of *Eisner v. Macomber*. . . ."

Davis v. United States, 87 F.2d at 324-25.

The Tenth Circuit in *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018), declined to follow Judge Hand's rule and decided that only "costs of goods sold" was necessary to exclude under the Sixteenth Amendment. Since §280E did not disallow costs of goods sold, it was constitutional. The Tenth Circuit again declined to follow Judge Hand here and ruled that §280E was not in violation of the Sixteenth Amendment. *See Standing Akimbo II*, App. 17-18.

The Tax Court, *en banc*, also recently addressed the issue of constitutional income and its effect on §280E in *Northern California Small Business Assistants Inc. v. Commissioner of Internal Revenue*, 153 T.C. No. 4 (October 23, 2019) ("*NCSBA*"). A majority of the Tax Court followed *Alpenglow* and declined to follow Judge Hand. However, a substantial minority of the Tax Court Judges disagreed and determined §280E unconstitutional.

The dissent stated, following both *Davis* and *Macomber*, *supra*, that §280E allowing "no deduction," disallows "all deductions." In so doing, §280E bypasses altogether any inquiry as to gain as required in *Macomber*. *NCSBA*, 153 T.C. at 28.

Section 280E fabricates gain where there was none and imposes a tax based on artificial income (adding the expenses paid on top of the constitutional income). "[T]his wholesale disallowance of all deductions transforms the ostensible income tax into something that is not an income tax at all, but rather a tax on an amount greater than a taxpayer's 'income' within the meaning of the Sixteenth Amendment." *Id.* at 28-29.

To this end the dissent concluded "that the Sixteenth Amendment does not permit Congress to impose such a tax and that section 280E is therefore unconstitutional." *NCSBA*, at 33.

The Petitioners believe that the dissenting judges in *NCSBA* are correct and §280E is unconstitutional. It is not a legitimate purpose for the IRS to use its summons power to enforce §280E, an unconstitutional tax.

Justice Thomas questioned whether §280E is a direct or indirect tax. The Petitioners believe it is neither. Section 280E is not a "tax." Rather, it is a procedure to calculate the "taxable income" subject to the income tax. It is not a tax, just like a "sentencing procedure" is not a "punishment" for Eighth Amendment purposes. However, like a sentencing procedure can cause an assessed punishment to be excessive under the Eighth Amendment, §280E causes the assessed income to be

in excess of what is allowed to be taxed without apportionment under the Sixteenth Amendment.

Unlike 26 U.S.C. §5000A (individual mandate), §280E does not stand alone. Section 5000A is a standalone provision under the excise tax laws prescribing a particular "tax" (penalty) in the event one chooses not to carry health insurance. What tax power Congress was using to enact §5000A was certainly in question in *National Federation of Independent Business v. Sebelius*, 567 U. S. 519 (2012). Conversely, no such question is present regarding §280E.

Section 280E is part of the Income Tax Code found under Subtitle A "Income Taxes." The Income Tax Code defines the term "taxable income" as "gross income minus the deductions allowed by this chapter." 26 U.S.C. §63(a). Section 280E prohibits all deductions to those in the business of Schedule I and II unlawful drug trafficking. Thus, the question becomes whether §280E, by disallowing all deductions, creates a statutory definition of income in excess of what Congress can tax without apportionment under the Sixteenth Amendment.

Absent the Sixteenth Amendment, Congress does not have the power to assess income taxes, however defined, without apportionment. "A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution." *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 625 (1895). Thus, Congress may tax without apportionment "income" only to the extent

defined under the Sixteenth Amendment. Anything else, however designated, cannot be reached by Congress. Such purported income "cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income." *Eisner v. Macomber*, 252 U.S. 189, 202 (1920). Thus, if §280E causes taxation of something greater than "income" as defined under the Sixteenth Amendment, Congress' attempt is void. *Id.*, and *Pollock, supra.*

Unless this Court wishes to reopen *Pollock* and the necessity of the Sixteenth Amendment, the question of direct versus indirect tax is not present here.

REASONS FOR GRANTING THE PETITION

This case is of national importance. Forty-one 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. The federal government is not only enforcing the Federal Strategy – it is expanding. As shown above, the government is depriving citizens their Second Amendment rights, benefits to federal housing and bankruptcy. It is not getting better since *Standing Akimbo I*. It is getting worse. The regime has devolved to the point of preying on the poor to retain its power.

As discussed above, three Court precedents are in conflict – *Raich, Nigro* and *Bond*. Given the national

importance of this federalism dispute, this conflict needs to be resolved.

Also, the Tenth Circuit's desire to avoid addressing the half-in, half-out regime, forced it into a circuit split allowing the lower court to grant summary judgment on a filed motion to dismiss without notice of conversion or opportunity to bring evidence forward. This Court needs to resolve the circuit split on how to handle a conversion of a motion to dismiss to a motion for summary judgment.

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* – the Federal Strategy empowered the IRS to 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. *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.
>
> * * *
>
> "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.

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. Justice Thomas' Statement was considered a "shot over the bow"[3] to Congress to fix the federalism dispute. The shot was ignored. The time is ripe for this Court to step in.

The Court needs to rein in the abuse of Congressional power in this federalism dispute. The summons process needs to be reviewed.

These are important issues, and this Court as the final arbiter of circuit splits should resolve these procedural issues.

CONCLUSION

The Court should grant certiorari and determine that *Gonzales v. Raich* was improvidently decided; that Congress does not have the police power and that the regulation of commerce is not an identical substitute; that the half-in, half-out regime is neither necessary nor proper, that 26 U.S.C. §280E exceeds Congress' authority under the Sixteenth Amendment; that the lower Court must give notice and an opportunity to the non-moving party to bring evidence when a motion to dismiss is converted to a motion for summary

[3] https://www.forbes.com/sites/insider/2021/07/28/will-justice-thomas-bring-consistency-to-cannabis-regulation/?sh=61d2db303aa1.

judgment, and provide such other and further relief as the Court deems proper.

Respectfully submitted,

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