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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STANDING AKIMBO, INC., a Colorado corporation; SPENCER KIRSON; SAMANTHA MURPHY; JOHN MURPHY, Petitioners-Appellants, v. UNITED STATES OF AMERICA, through its agency the Internal Revenue Service, Respondent-Appellee.	No. 21-1379 (D.C. No. 1:18-MC-00178-PAB-KLM) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Jan. 27, 2023)

Before **EID**, **BALDOCK**, and **CARSON**, Circuit Judges.

Here, we consider the latest battle in the war between Colorado licensed marijuana dispensaries and

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the Internal Revenue Service (IRS) over the latter's access to third-party held information related to its audits of the dispensaries and their owners. We are no strangers to this subject, having addressed it in one form or another no less than six times already. *See*, *e.g.*, *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111 (10th Cir. 2017); *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018); *Feinberg v. Commissioner*, 916 F.3d 1330 (10th Cir. 2019); *High Desert Relief, Inc. v. United States*, 917 F.3d 1170 (10th Cir. 2019); *Standing Akimbo, LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020) ("*Standing Akimbo I*"); *Speidell v. United States*, 978 F.3d 731 (10th Cir. 2020). In keeping with those previous treatments, we exercise jurisdiction pursuant to 28 U.S.C. § 1291 and **AFFIRM** the district court's judgment.

I.

The facts of this case are well known to both us and the parties. Accordingly, we only summarize those facts essential to our disposition. Standing Akimbo, Inc.[1] is a Colorado-licensed marijuana dispensary owned by Spencer Kirson, Samantha Murphy, and John Murphy (we refer to Standing Akimbo and its owners as the "Taxpayers"). The Internal Revenue Code prohibits such enterprises from taking deductions for business

[1] Standing Akimbo, Inc. was previously known as Standing Akimbo, LLC. It changed to Standing Akimbo, Inc. in the 2016 tax year. *See* Appellee's Br. at 2 n.1. We refer to both as "Standing Akimbo."

expenses. *See* 26 U.S.C. § 280E.[2] As part of its efforts to enforce the tax code, the IRS began investigating the Taxpayers' tax filings to determine if they had taken deductions in violation of § 280E. This investigation led the IRS to audit the Taxpayers for the 2014, 2015, and 2016 tax years. The IRS requested documents from the Taxpayers to substantiate their filings. When the IRS found the Taxpayers' responses insufficient, it issued summonses to the Colorado Marijuana Enforcement Division (MED) seeking reports from its Marijuana Enforcement Tracking Reporting and Compliance system (METRC). The Taxpayers petitioned the district court to quash these summonses in two separate actions—the first addressing the summonses for the 2014 and 2015 tax years and the second addressing the summons for the 2016 tax year. In the first action, the district court denied the Taxpayers' petition to quash and we resolved the Taxpayers' appeal arising out that case in favor of the IRS. *See Standing Akimbo I*, 955 F.3d 1146. The present action pertains only to the summonses the IRS sent MED for reports relating to the Taxpayers' 2016 filings.

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[2] Section 280E provides:

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

The IRS issued the summonses in question in September 2018. The first summons directed MED to provide a complete list of Standing Akimbo's licenses for 2016 as well as METRC's 2016 annual gross sales report, 2016 transfer reports, 2016 annual harvest reports, and 2016 monthly plants inventory reports for Standing Akimbo. The second and third summonses instructed MED to provide a complete list of all licenses held by Spencer Kirson, John Murphy, and Samantha Murphy in their individual capacities.

The Taxpayers responded before MED complied by filing a petition to quash the summons in the district court in accordance with 26 U.S.C. § 7609(b). Such proceedings follow "a familiar framework." *Standing Akimbo I*, 955 F.3d at 1154 (citation omitted). First, the IRS must make a threshold showing that it has not referred the matter to the Department of Justice for prosecution. *Id.* (citation omitted). Second, the IRS must meet the "slight" burden of demonstrating its "good faith in issuing the summons" by satisfying the four-factor test established in *United States v. Powell*, 379 U.S. 48 (1964). *Standing Akimbo I*, 955 F.3d at 1155; *United States v. Stuart*, 489 U.S. 353, 359 (1989). Those factors require the IRS to show (1) "that the investigation will be conducted pursuant to a legitimate purpose;" (2) "that the inquiry may be relevant to the purpose;" (3) "that the information sought is not already within the [IRS's] possession;" and (4) "that the administrative steps required by the Code have been followed." *Powell*, 379 U.S. at 57–58. If the IRS can make this showing, usually through an affidavit from

the agent issuing the summons, it establishes the prima facie validity of the summons. *Standing Akimbo I*, 955 F.3d at 1155. Thereafter, the burden shifts to the taxpayer who must meet the "heavy burden" of "factually refut[ing] the *Powell* showing or factually support[ing] an affirmative defense." *Id.* (citation omitted).

The Taxpayers offered three primary lines of attack on the summonses. First, they asserted the IRS could not satisfy the four-factor test laid out in *Powell* for establishing the requisite showing for enforcing the summonses. Second, the Taxpayers claimed the summonses lacked good faith and abused process. Third, they asserted various constitutional violations relating to the summonses.

The IRS moved to dismiss the Taxpayers' petition and asked the district court to enforce the summons pursuant to 26 U.S.C. §§ 7604(a) and 7609(b)(2)(A).[3] To support that motion, the IRS provided an affidavit from the agent assigned to audit the Taxpayers explaining the purpose of the IRS's investigation and the relevance of the METRC reports to it. The IRS argued this affidavit satisfied the requirement that it establish the prima facie validity of the summonses. *See Anaya v. United States*, 815 F.2d 1373, 1377 (10th Cir. 1987). The IRS further asserted that the Taxpayers' arguments failed to carry their "heavy burden" to show that the IRS lacked good faith or that enforcing the

[3] MED did not intervene in this action. Instead, MED informed the district court that it had not responded to the IRS's summonses but would comply with any order issued by the district court.

summonses would be an abuse of process. *See id.* at 1377–78. The motion to dismiss was fully briefed in February 2019 but remained pending until September 2021.

During the lengthy time the IRS's motion was pending, we decided *Standing Akimbo I*. *See* 955 F.3d 1146. Thereafter, the Taxpayers petitioned the Supreme Court for certiorari in that case. Although the Supreme Court denied the Taxpayers' petition, Justice Thomas authored a brief statement expressing his doubts on the integrity of *Gonzales v. Raich*, 545 U.S. 1 (2005) and Congress's authority to regulate the intrastate growth of marijuana. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236 (2021) (Statement of Thomas, J. on denial of certiorari) ("*Standing Akimbo I Statement*"). The Taxpayers seized upon Justice Thomas's statement and attempted to add it to the arguments presented to the district court on the IRS's motion to dismiss, even though the motion was already fully briefed. The IRS in turn moved to strike the Taxpayers' submission of Justice Thomas's statement as supplemental authority.

The district court resolved each of these issues in its order granting the IRS's motion to dismiss. *See Standing Akimbo, Inc. v. United States*, No. 18-mc-00178-PAB, 2021 WL 3931224, (D. Colo. Sept. 2, 2021) ("*Standing Akimbo II*"). Recognizing the need to consider submissions beyond the pleadings, the district court converted the IRS's motion to dismiss into a motion for summary judgment as allowed by Fed. R. Civ. P. 12(d). *See id.* at *2. The district court found the IRS

had "met its burden under *Powell* to show a prima facie case." *Id.* at *5. The district court went on to reject the Taxpayers' arguments about lack of good faith and process, noting the Taxpayers had "not presented factual support for their claims" and "failed to show a material issue of disputed fact" to carry their burden in the face of the IRS's prima facie showing. *Id.* at *9. As for Justice Thomas's statement, the district court concluded it "ha[d] no bearing on the Court's analysis" because the statement was non-precedential and Tenth Circuit precedent controlled the case. *Id.* The district court therefore "decline[d] to consider a new argument raised for the first time in supplemental authority based on no change in precedent." *Id.* (citing *Hooks v. Ward*, 184 F.3d 1206, 1233 n.25 (10th Cir. 1999)).

Accordingly, the district court granted the IRS's motion to dismiss and ordered the summonses be enforced. This appeal followed.

II.

Now before us, the Taxpayers present three overarching arguments. First, the Taxpayers allege the district court committed reversible error when it converted the IRS's motion to dismiss into a motion for summary judgment without providing them with sufficient notice and when it elected not to hold an evidentiary hearing. Appellants' Br. 14–16. Second, the Taxpayers argue the district court erred when it declined to consider Justice Thomas's statement as supplemental authority. *Id.* at 18–19. Finally, the

Taxpayers claim the summonses should have been dismissed because the IRS lacked a "legitimate purpose" in issuing them and therefore failed to meet its burden under *Powell*. *Id.* at 23–27, 29–35. We address each argument in turn.

A.

We begin by considering the Taxpayers' arguments pertaining to the first set of alleged procedural errors. District courts are obligated to treat a motion to dismiss as a motion for summary judgment whenever "matters outside the pleadings are presented to and not excluded by the court." Fed. R. Civ. P. 12(d). "All parties must be given a reasonable opportunity to present all material that is pertinent to the motion." *Id.* We review the "district court's decision to consider evidence beyond the pleadings and convert a motion to dismiss to a motion for summary judgment" for abuse of discretion. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (citing *Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998)). The Taxpayers present a barebones argument on this front. Citing Rule 12(d) and one of our precedents reinforcing the notice requirement, the Taxpayers summarily contend "the lower court failed to provide notice and allow the Appellant's [sic] sufficient time to meet the factual allegations." Appellants' Br. 16 (citing Fed. R. Civ. P. 12(d); *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir. 1986)). But the Taxpayers' argument fails for two independent reasons.

First, while "[w]e have held that failure to provide adequate notice that a motion to dismiss is to be treated as a motion for summary judgment is reversible error," *Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1496 (10th Cir. 1993) (citing *Franklin v. City Abstract & Title Co.*, 584 F.2d 964, 967 (10th Cir. 1978)), we have also recognized that the notice requirement can be waived "[u]nder [the] proper circumstances." *Prospero Assocs. v. Burroughs Corp.*, 714 F.2d 1022, 1024 (10th Cir. 1983) (quoting *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 480 F.2d 607, 608 (10th Cir. 1973)). One such circumstance is when the aggrieved party was the first "to point out to the district court that defendants' 12(b)(6) motion was in fact a motion for summary judgment." *Rockwell*, 7 F.3d at 1496. Here, the Taxpayers responded to the IRS's motion to dismiss by asking the district court "convert the Motion to Dismiss to a Motion for Summary Judgment" and arguing that "[a]t the very minimum, the standard of review should be one of summary judgment." We believe these statements are sufficient to waive the notice requirement. *See Rockwell*, 7 F.3d at 1496.

Second, our decision in *Standing Akimbo I* required the district court to convert the IRS's motion to dismiss into a motion for summary judgment. *See* 955 F.3d at 1155–56. In *Standing Akimbo I*, we recognized that when the IRS moves to dismiss a petition to quash a summons and has to establish a prima facie case under *Powell*, the district court is obligated to consider materials outside the pleadings, such as the affidavits

of IRS agents. *Id.* at 1155. Accordingly, we held that "the IRS's motion to dismiss 'must be treated as one for summary judgment under Rule 56.'" *Id.* (quoting Fed. R. Civ. P. 12(d)). We further noted that the district court erred, albeit not reversibly, by failing to convert the motion to dismiss into a motion for summary judgment in *Standing Akimbo I. Id.* at 1155–56. We cannot conclude that the district court abused its discretion by converting the motion to dismiss into a motion for summary judgment here when our precedents effectively deprive the district court of its discretion in instances like this. Further, the Taxpayers' extensive involvement and intimate familiarity with *Standing Akimbo I* undercuts any claim that they were unaware of the need to treat the IRS's motion to dismiss as a motion for summary judgment and respond accordingly.[4] Therefore, the district court did not err by converting the motion to dismiss or failing to provide the Taxpayers with sufficient notice.

Similarly, the Taxpayers suggest in the portion of their brief addressing the standard of review that the district court erred when it elected not to hold an evidentiary hearing before ruling on the IRS's motion to dismiss. *See* Appellants' Br. 14–15. The decision of "[w]hether to allow an evidentiary hearing in a summons proceeding is left to the discretion of the district court." *Villareal v. United States*, 524 F. App'x 419, 424 (10th Cir. 2013) (unpublished) (citing *Tiffany Fine Arts,*

[4] In fact, the Taxpayers argued in *Standing Akimbo I* that the district court erred because it had not converted the motion to dismiss into one for summary judgment. *See* 955 F.3d at 1156 n.5.

Inc. v. United States, 469 U.S. 310, 324 n.7 (1985)). The Taxpayers point us to *United States v. Security Bank & Trust Co.*, 661 F.2d 847, 850 (10th Cir. 1981) to support their argument that the district court should have granted them an evidentiary hearing. There, we acknowledged that the Supreme Court's recognition of certain affirmative defenses to the enforcement of summonses—namely those pertaining to the IRS's intention to refer a case for criminal prosecution or otherwise facilitate it—meant the Supreme Court "must have envisioned at least limited discovery" in summons proceedings because they depended "on information peculiarly within the knowledge or files of the [IRS]." *Id.* at 850.

But there is a difference between contemplating the potential availability of discovery and establishing an entitlement to it. Our more recent precedents make clear that there is no such entitlement and that taxpayers must clear significant hurdles to obtain an evidentiary hearing at all. We have specifically stated that a taxpayer must meet the "heavy burden" of "factually refut[ing] the *Powell* showing or factually support[ing] an affirmative defense" and that "a hearing *may* be granted only if the burden is met." *Standing Akimbo I*, 955 F.3d at 1155 (citation omitted) (emphasis added). That burden is satisfied "by affidavit." *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) (quoting *United States v. Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979)). Here, the Taxpayers filed no affidavits containing the information necessary to meet their burden.

That failure ends the conversation. The district court did not abuse its discretion by denying the Taxpayers an evidentiary hearing.

B.

We next consider the district court's decision to disregard Justice Thomas's statement on the denial of certiorari in *Standing Akimbo I*. In the district court proceedings, the Taxpayers attempted to supplement their response to the IRS's motion to dismiss with additional authorities—including Justice Thomas's statement—after that motion had been fully briefed, but before it was decided. The IRS moved to strike those filings and the Taxpayers moved for leave to file the supplemental authority. The district court disregarded "[t]his flurry of filings" because Justice Thomas's statement was not precedential and Tenth Circuit precedent controlled the case. *Standing Akimbo II*, 2021 WL 3931224, at *9.

The Taxpayers contend the district court erred when it denied their motion for leave to file supplemental authority and elected to disregard Justice Thomas's statement because they were permitted to file supplemental authority under the district court's Local Rule 7.1(f). Appellants' Br. 18–19. We review decisions relating to the district court's supervision of litigation and management of its docket—such as the denial of a motion for leave to submit supplemental authority—for abuse of discretion. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998); *Johnny*

Blastoff, Inc. v. L.A. Rams Football Co., 188 F.3d 427, 439 (7th Cir. 1999).

The Taxpayers' reliance on the district court's Local Rule 7.1(f) is unavailing. Local Rule 7.1(f) states "*[i]f the matter is set for hearing*, any supplemental authority shall be filed no later than seven days before the hearing." D.C.COLO.LCivR. 7.1(f) (emphasis added). The Taxpayers believe they satisfied Local Rule 7.1(f) because they filed their supplemental authority "at least seven days before hearing." Appellants' Br. 19. But the Taxpayers concede that "a hearing was not set" in the matter at the time they submitted their supplemental authority. *Id.* As a result, the plain language of Local Rule 7.1(f) clearly forecloses the Taxpayers' argument.

We further conclude the district court did not abuse its discretion to deny the Taxpayers' motion and disregard Justice Thomas's statement for two additional reasons. First, Justice Thomas's arguments were available to the Taxpayers before he authored his statement. In his statement on the denial of certiorari, Justice Thomas questioned whether changes in the federal government's policy towards marijuana undermined the reasoning of *Gonzales v. Raich*. *Standing Akimbo I Statement*, 141 S. Ct. at 2238. This idea was fully available to the Taxpayers when they responded to the IRS's motion to dismiss—if they had raised it timeously. But they did not. And district courts do not err when they decline to consider "eleventh-hour" filings on matters that could have been raised timeously.

E.g., *Monfore v. Phillips*, 778 F.3d 849, 853 (10th Cir. 2015) (Gorsuch, J.). This principle holds true here.

Second, the district court correctly concluded Justice Thomas's statement was not precedential. We have noted that "no precedential conclusion can be drawn from the denial of certiorari or the statements made by dissenting justices." *United States v. Mitchell*, 783 F.2d 971, 977 n.5 (10th Cir. 1986). And while we consider the Supreme Court's dicta persuasive authority, Justice Thomas's statement is not even dicta because it forms no part of a decision of the Court. *See United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007); *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995). Accordingly, the district court did not abuse its discretion by declining to consider this authority.

C.

Finally, we consider whether the IRS carried its "slight" burden of demonstrating a "legitimate purpose" behind the summonses. *See Standing Akimbo I*, 955 F.3d at 1155. The Taxpayers offer two constitutional arguments to support their position that the IRS lacked a legitimate purpose in issuing the summonses. The first relies almost exclusively on Justice Thomas's statement and the second arises under the Sixteenth Amendment. Appellants' Br. at 20–27, 29–35.

As a threshold matter, the IRS contends we need not address these arguments at all because they cannot "shoehorn their constitutional challenges into the *Powell* framework." Appellee's Br. at 26. The IRS offers

several procedural avenues for reaching that conclusion.[5] But this is one of those rare situations where resolving the merits is more straightforward than wading into a procedural morass at the Government's invitation. So, we proceed to the merits of the Taxpayers' arguments.

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[5] The IRS argues the Anti-Injunction Act, 26 U.S.C. § 7421(a) bars the Taxpayers from raising their constitutional arguments. Appellee's Br. at 27–28. Because the Anti-Injunction Act is jurisdictional, we are obligated to consider it. *See Green Solution Retail*, 855 F.3d at 1114; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The IRS supports its contention that the Anti-Injunction Act bars these claims by quoting *Green Solution Retail*, 855 F.3d 1111. There, we concluded that a "lawsuit seek[ing] to enjoin the IRS from obtaining information related to its initial findings that [a dispensary] is . . . ineligible for deductions under § 280E" was barred by the Anti-Injunction Act. *Green Sol. Retail*, 855 F.3d at 1114, 1121. The IRS believes "[t]here is no reason that a materially similar pre-enforcement challenge to Section 280E should fare differently because it is made in the context of a summons enforcement proceeding." Appellee's Br. at 28. The IRS is mistaken. In our view, the difference in procedural context between this case and *Green Solution Retail* make them materially different. In *Green Solution Retail*, the taxpayers were actually trying to *enjoin* the IRS from obtaining records while in this case the Taxpayers are contending that the IRS cannot meet its burden under *Powell*. *Compare Green Sol. Retail*, 855 F.3d at 1114, 1121, *with Standing Akimbo II*, 2021 WL 3931224. We will not extend the Anti-Injunction Act to summons proceedings—not least of which because such an extension would directly conflict with (and possibly moot) the statutory scheme entitling taxpayers to challenge summonses in the district court. The IRS should be intimately familiar with that statutory scheme because it is reproduced on all the notices it issues to taxpayers.

1.

The Taxpayers first argue the IRS lacked a legitimate purpose under *Powell* because, per Justice Thomas's statement, the Controlled Substance Act's regulation of marijuana is unconstitutional. Appellants' Br. at 23–27. Although the Taxpayers contended the IRS lacked a legitimate purpose before the district court, they did so based on a different legal theory. As such, the IRS believes we should review this argument for plain error. Appellee's Br. at 31. But because the Taxpayers' argument clearly fails even under a de novo standard, we need not determine whether the plain error standard applies.

The Taxpayers' argument that the IRS lacked a legitimate purpose because Congress lacks the authority to regulate their marijuana dispensary is misplaced. The Supreme Court resolved this question more than fifteen years ago when it decided *Gonzales v. Raich*. The non-precedential statement of a single justice on the denial of certiorari—however esteemed he may be—does not call the integrity of that decision into question. *Gonzales v. Raich* is the law. If the Taxpayers believe, as they have represented to us, that "*Standing Akimbo I* was very close to being accepted for review," Appellants' Br. at 6, then they are welcome to petition the Supreme Court for certiorari again. But we want to be very clear: We will continue to faithfully apply *Gonzales v. Raich* unless the Supreme Court instructs us otherwise. The Taxpayers cannot show the IRS

lacked a legitimate purpose based on Justice Thomas's statement.[6]

2.

Lastly, the Taxpayers argue the IRS did not have a legitimate purpose when it issued the summonses because § 280E is unconstitutional under the Sixteenth Amendment. The Taxpayers base this argument on a footnote in Justice Thomas's statement. *See* Appellants' Br. at 29; *Standing Akimbo I Statement*, 141 S. Ct. at 2238 n.6. We have already made clear that Justice Thomas's statement is non-precedential. What is precedential, however, are the opinions from our Court holding that § 280E does not violate the Sixteenth Amendment. *See Alpenglow Botanicals, LLC*, 894 F.3d at 1202 ("Congress's choice to limit or deny deductions for these expenses under § 280E does not violate the Sixteenth Amendment"); *Standing Akimbo*

[6] The Taxpayers argue the summonses are invalid because they violate procedural due process. Appellants' Br. at 27–28. The Taxpayers' argument on this issue is cursory. They claim, without meaningful substantiation, that "[t]he taking of property is involved, as the Government seeks to take money, take the petitioners [sic] documents and other information, and potentially the business itself." *Id.* at 28. The Taxpayers also erroneously cite Justice Thomas's statement as stating that "this summons process is more `episodic than coherent' " when Justice Thomas actually described the Federal Government's enforcement of the laws prohibiting the sale and distribution of marijuana as "more episodic than coherent." *Id.*; *Standing Akimbo I Statement*, 141 S. Ct. at 2238. In any event, we will not conclude that statutorily mandated summons proceedings applying standards set forth by the Supreme Court are a violation of procedural due process.

I, 955 F.3d at 1157 n.7 ("We agree . . . that § 280E falls within Congress's authority under the Sixteenth Amendment to establish deductions." (citation omitted)). Given this authority, we have little difficulty rejecting the Taxpayers claim that the IRS cannot establish a legitimate purpose because § 280E is unconstitutional.

III.

For the foregoing reasons, we reject the Taxpayers' arguments and AFFIRM the district court's judgment.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Miscellaneous Case No. 18-mc-00178-PAB

STANDING AKIMBO, INC., a Colorado Corporation,
SPENCER KIRSON,
SAMANTHA MURPHY, and
JOHN MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA, through its agency the INTERNAL REVENUE SERVICE,

Respondent.

ORDER

(Filed Sep. 2, 2021)

This matter is before the Court on petitioners' Amended Petition to Quash Summonses [Docket No. 6] and the United States' Motion to Dismiss Amended Petition and Enforce Summonses [Docket No. 12].

I. BACKGROUND

The Internal Revenue Service ("IRS") is conducting a civil audit of petitioner Standing Akimbo Inc.[1]

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[1] Standing Akimbo LLC changed its Employer Identification Number ("EIN") and became Standing Akimbo Inc. for the 2016 tax year. *See* Docket No. 12-1 at 2 n.1. When referring to both entities, the Court will use "Standing Akimbo."

and its owners, petitioners Spencer Kirson, Samantha Murphy, and John Murphy (the "owners"), for the 2016 tax year. Docket No. 12-1 at 2, ¶ 4. Through petitioner Standing Akimbo Inc., the owners operate a marijuana dispensary. *Id.* at 2, ¶ 5. In connection with the audit, Tyler Pringle, an IRS revenue agent, requested documents from both Standing Akimbo and the owners. *Id.* at 3, ¶¶ 8-9. In response to Revenue Agent Pringle's requests, petitioners provided only partial responses. *Id.*, ¶ 9. The IRS maintains that without further information it cannot verify Standing Akimbo's accounting records, reconstruct Standing Akimbo's income, or otherwise confirm the accuracy of the tax returns at issue. Docket No. 12 at 4. Standing Akimbo also refused to produce information it provided to Colorado's Marijuana Enforcement Division ("MED") through the Marijuana Enforcement Tracking Reporting and Compliance ("METRC") system. Docket No. 12-1 at 4, ¶ 11. Colorado law requires marijuana businesses to report business, accounting, and financial information to MED, and part of this requires marijuana businesses to account for their inventory using METRC. Docket No. 12 at 4.

The IRS states that this information from METRC is useful in an audit because it "can establish whether a marijuana business properly reported its gross receipts and allowed deductions for costs of goods sold." *Id.* Revenue Agent Pringle issued a summons to the MED seeking "METRC annual gross sales reports, transfer reports, annual harvest reports, and monthly plants inventory reports." Docket No. 12-1 at 4, ¶ 14.

Revenue Agent Pringle also issued summonses to the owners for "all licenses held from January 1, 2016, to December 31, 2016." *Id.* at 5, ¶ 22. Revenue Agent Pringle stated that he "sought this information to verify that these individuals own Standing Akimbo and to determine whether they own any other similar entity that could affect their tax liabilities." *Id.* at 6, ¶ 22. Petitioners now seek to quash the summonses on MED, Docket No. 6 at 2, and the government seeks to enforce them. Docket No. 12. MED has not produced information in response to the summonses. Docket No. 12-1 at 5-6, ¶¶ 17, 25.

II. DISCUSSION

In order to enforce a summons, the IRS must show that the

> investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed – in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

United States v. Powell, 379 U.S. 48, 57-58 (1964).[2] "The requisite showing is generally made by affidavit of the agent who issued the summons and who is seeking enforcement." *Id.* (internal quotation marks omitted). The IRS's burden "is a slight one because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985) (citation omitted).

If the IRS makes the prima facie showing required under *Powell*, the burden shifts to the party resisting enforcement, whose "burden is a heavy one."[3] *Id.* at 1444 (citing *United States v. Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979)). The party resisting enforcement must establish a defense, show a lack of good faith on the part of the IRS, or "prove that

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[2] The IRS is barred from issuing or enforcing summonses under the Internal Revenue Code "with respect to any person if a Justice Department referral is in effect with respect to such person." 26 U.S.C. § 7602(d)(1) (I.R.C. § 7602(d)(1)). Petitioners do not dispute Revenue Agent Pringle's statement that there is no Justice Department referral in effect in relation to them. *See* Docket No. 12-1 at 5-6, ¶¶ 21, 29; *see generally* Docket No. 17.

[3] In *Speidell v. United States*, 978 F.3d 731 (10th Cir. 2020), the Tenth Circuit confronted whether the "slight" and "heavy" burdens of *Balanced Fin. Mgmt.* comport with the summary judgment standard. 978 F.3d at 738. The court concluded that it need not resolve this issue because the taxpayers failed to raise a genuine dispute of material fact under the traditional summary judgment standards. *Id.* Therefore, the Court analyzes this case under the *Powell* framework, but applies the traditional summary judgment standards.

enforcement would constitute an abuse of the court's process." *Id.* (internal quotation marks omitted).

Because review of the IRS's motion to dismiss requires the Court to consider a declaration outside of the pleadings, the Court must treat the motion as one for summary judgment under Fed. R. Civ. P. 56. *Standing Akimbo, LLC v. United States*, 955 F.3d 1146, 1155 (10th Cir. 2020) ("Because we are considering Agent Pringle's declaration, the IRS's motion to dismiss must be treated as one for summary judgment under Rule 56." (internal quotations omitted)). Under this standard, the Court will "view the record in the light most favorable to [the petitioners] and ask whether the IRS has shown that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law." *Id.* at 1156 (citations omitted). Substantive law determines whether facts are material in a case, so the criteria of *Powell* are "of central importance" in determining whether there are genuine disputes of material fact. *Id.* (citing *High Desert Relief, Inc. v. United States*, 917 F.3d 1170, 1181 (10th Cir. 2019)). The "traditional summary-judgment standard of review precludes the [petitioners] from resting on conclusory statements because such statements do not suffice to create a genuine issue of material fact." *Id.* (internal quotations omitted).

A. *Standing Akimbo LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020)

The vast majority of petitioners' arguments are foreclosed by the Tenth Circuit's ruling in *Standing Akimbo LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020) [hereinafter *Standing Akimbo II*]. In *Standing Akimbo II*, 955 F.3d at 1151, the Tenth Circuit considered an appeal of the district court's denial of the petition to quash summonses filed by Standing Akimbo LLC and its owners for records relating to tax years 2014-2015.

Revenue Agent Pringle issued summonses to MED in relation to 2014-15 tax liabilities for Standing Akimbo LLC and its owners. Docket No. 12-1 at 2-3, ¶ 7. Standing Akimbo LLC and its owners filed a petition to quash the summonses. *Standing Akimbo, LLC v. United States*, No. 17-mc-00169-WJM-KLM, 2018 WL 6791104, at *1 (D. Colo. Aug. 6, 2018) [hereinafter *Standing Akimbo I*]. The magistrate judge recommended denying the petition to quash, *id.*, the district court adopted the recommendation, 2018 WL 6791071, at *1 (D. Colo. Dec. 10, 2018), and the Tenth Circuit affirmed. *Standing Akimbo II*, 955 F.3d 1146.

For the 2016 tax year, Standing Akimbo LLC changed its EIN and became Standing Akimbo Inc., one of the petitioners in this case. *See* Docket No. 12-1 at 2 n.1. While *Standing Akimbo I* was pending, it became apparent that similar issues to Standing Akimbo LLC's 2014-15 tax liability existed with respect to Standing Akimbo Inc.'s 2016 tax liability. Docket No. 12-1 at 3, ¶ 8. Accordingly, the IRS expanded its

examination of Standing Akimbo to 2016 and its owners at that time. *Id.* As part of this examination, Revenue Agent Pringle issued summonses to MED for information related to Standing Akimbo Inc. and its owners. *Id.* at 4-5, ¶¶ 14, 22. Revenue Agent Pringle stated that the information in these summonses "may be relevant to determine the correctness of" the federal tax returns and liabilities of Standing Akimbo and its owners. *Id.* at 5-6, ¶¶ 19, 27.

The summonses Revenue Agent Pringle issued in this case for information on Standing Akimbo Inc. and its owners are identical to the summonses he issued for information regarding Standing Akimbo LLC and its owners in *Standing Akimbo I*, except for the year and name of the entity and owners. *Compare Standing Akimbo I*, No. 17-mc-00169-WJM-KLM, Docket No. 12-2 at 20, 24-26, *with* No. 18-mc-00178-PAB, Docket No. 12-2 at 6, 10-11. Because the summonses are the same, the Tenth Circuit's ruling is largely dispositive of the arguments petitioners raise in this case, and the Court will not provide detailed analysis of issues that are plainly foreclosed by *Standing Akimbo II*.[4]

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[4] In *Standing Akimbo I*, the magistrate judge focused only on the summons issued to MED regarding Standing Akimbo LLC's records, and not on the summonses issued to MED regarding the owners' licenses. *See* 2018 WL 6791104, at *2. However, in *Standing Akimbo II*, the court noted this error and nevertheless affirmed the denial of the petition to quash. *Standing Akimbo II*, 955 F.3d at 1166 n.18 ("The magistrate judge appears to have misunderstood the Taxpayers' argument and addressed only the Standing Akimbo summons. We need not remand, however, because we may affirm on any basis adequately supported by the record.").

B. *Powell* Factors

1. Legitimate Purpose

The IRS provides a declaration from Revenue Agent Pringle stating that he served the summonses in relation to an "examination of the federal tax liabilities" of Standing Akimbo Inc. for the 2016 tax year. Docket No. 12-1 at 2, ¶ 4. Because Standing Akimbo elected to be treated as a pass-through entity for tax purposes, the audit could affect Standing Akimbo's owners' income taxes, and thus the IRS assigned Revenue Agent Pringle also to examine the personal tax returns of the owners. *Id.* Revenue Agent Pringle stated that Standing Akimbo purports to sell marijuana and is located in Denver, Colorado. *Id.*, ¶ 5. The IRS argues that its investigation of whether petitioners' income derives from sale of marijuana is a legitimate purpose in light of the bar on deductions and credits for businesses trafficking in controlled substances under Internal Revenue Code § 280E. Docket No. 12 at 9-10.

Petitioners argue that the summonses do not have a legitimate purpose because Congress did not empower the IRS to investigate violations of federal criminal drug laws. Docket No. 6 at 18. Petitioners state that

> the purpose of these summonses is not to determine income or expenses, but to determine whether Petitioners have violated the CSA in order to apply Section 280E. However, Section 280E contains no language authorizing the

> IRS to investigate or administratively determine that a taxpayer is unlawfully trafficking in a controlled substance.

Id. at 19. Petitioners further argue that the government has read the case law incorrectly to give the IRS authority to administratively investigate and determine violations of federal criminal drug laws. *Id.* at 20.

Petitioners, however, have not shown that a criminal investigation is pending or that the summonses are connected to a criminal investigation.[5] *See Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1121 (10th Cir. 2017) ("But § 280E has no requirement that the Department of Justice conduct a criminal investigation or obtain a conviction before § 280E applies." (citing *Alpenglow Botanicals, LLC v. United States*, No. 16-cv-00258-RM-CBS, 2016 WL 7856477, at *4 (D. Colo. Dec. 1, 2016))). Moreover, in *Standing Akimbo II*, 955 F.3d at 1157, the Tenth Circuit rejected this same argument and stated that "even if the IRS had in fact issued the summonses to investigate federal drug crimes . . . the IRS could still do so as part of determining § 280E's applicability." While the IRS may lack authority to criminally prosecute petitioners for trafficking in controlled substances, the IRS has authority to make determinations about whether

[5] Petitioners provide the statements of the United States Attorney for the District of Colorado wherein he indicated that the United States Attorney's Office would soon (as of September 2018) be filing criminal charges against Colorado marijuana dispensaries. Docket No. 6 at 5-6. However, petitioners provide no information that these investigations are directed at them or that the summonses are connected to the investigations. *See id.*

deductions are allowable under the Internal Revenue Code, including § 280E. Revenue Agent Pringle's affidavit establishes that the summonses are related to an investigation of petitioners' tax liabilities, something within the IRS's authority. *See* Docket No. 12-1 at 5-6, ¶¶ 19, 27.

2. Relevance to Investigation

Petitioners argue that the summonses are not relevant to a legitimate purpose because the IRS does not have the authority to investigate whether a taxpayer violated the Controlled Substances Act, and to give the IRS this power would create a "constitutional difficulty." Docket No. 6 at 21. The Court rejects both of these arguments in other portions of this Order. *See supra* Section II.B.1; *infra* Section II.C.4.a.

The IRS argues that the information it seeks is relevant to its investigation because it will "shed light on [petitioners'] correct income by substantiating, or contradicting, sales and inventory figures." Docket No. 12 at 8. Revenue Agent Pringle's declaration indicates that the information the MED summons seeks "can establish whether a marijuana business properly reported its gross receipts and allowed deductions for cost of goods sold." Docket No. 12-1 at 4, ¶ 12. "The IRS has authority to summon information 'of even *potential* relevance to an ongoing investigation.'" *Standing Akimbo II*, 955 F.3d at 1160 (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984)). The METRC data may also be relevant to the IRS's

investigation in other ways, such as providing inventory figures and helping Revenue Agent Pringle verify the accuracy of internal books and records. *See id.* The Court finds that petitioners have failed to create a genuine dispute of material fact here, and the IRS has satisfied the second *Powell* factor.

3. The IRS Does Not Already Have the Information Sought

Revenue Agent Pringle states that the IRS did not possess the information sought when he requested the summons and that MED has not produced the requested information. Docket No. 12-1 at 5-6, ¶¶ 17-18, 25-26. As petitioners do not challenge the government's prima facie showing on this factor, the Court finds that the government has shown that the IRS does not already have the information sought. "The taxpayers bear the burden of providing facts to contest the IRS's prima facie showing under *Powell*." *Standing Akimbo II*, 955 F.3d at 1160. Here, petitioners have failed to demonstrate a genuine dispute of material fact regarding this issue.

4. Required Administrative Steps

Petitioners do not challenge the IRS's completion of administrative steps. Therefore, the Court finds that this element is satisfied and, accordingly, that the IRS has met its burden under *Powell* to show a prima facie case.

C. Lack of Good Faith or Abuse of Process

"Once the IRS [makes a prima facie case], a 'heavy' burden falls on the taxpayer 'to factually refute the *Powell* showing or factually support an affirmative defense.'" *Speidell*, 978 F.3d at 738 (quoting *Balanced Fin. Mgmt.*, 769 F.2d at 1443). The Tenth Circuit has acknowledged that this framework may not comport with the Supreme Court's holding in *United States v. Clarke*, 573 U.S. 248 (2014), and summary judgment standards, but found that "any tension created by *Clarke* is indirect." *Speidell*, 978 F.3d at 739 ("*Clarke* does not obviously contradict or invalidate *Balanced Financial Management.*"). The Court will therefore consider petitioners' affirmative defenses in the context of the summary judgment standard and without requiring petitioners to satisfy a "heavy" burden.

Petitioners argue that, notwithstanding the IRS's prima facie case, the summonses should not be enforced because (1) the IRS has not acted in good faith in issuing the summonses; (2) the summonses are unreasonable and unenforceable because they are overbroad; (3) the summonses force MED to prepare documents that do not exist; and (4) the summonses would violate petitioners' Fourth and Fifth Amendment rights. Docket No. 6 at 8-16, 21, 23-30. None of these arguments has merit.

1. Good Faith

Petitioners argue that "[t]he IRS is not acting in good faith by alleging and investigating by means of

summons inherently criminal activity . . . that may be shared with law enforcement" despite the fact that the IRS "fail[s] to officially refer the matters to the Department of Justice." *Id.* at 22. As noted earlier, the IRS can enforce § 280E absent a criminal investigation or prosecution. *See Green Sol. Retail, Inc.*, 855 F.3d at 1121; *Alpenglow Botanicals*, 894 F.3d at 1197. Thus, there is no basis to conclude that the IRS is not acting in good faith. *See Villarreal v. United States*, 524 F. App'x 419, 423 (10th Cir. 2013) (unpublished) (rejecting as conclusory a taxpayer's claim that the IRS's subpoena of bank records was a "harassment campaign").

2. Overbreadth

Petitioners make two overbreadth arguments, both of which fail. The first is that the MED reports sought are reports of plant tracking, not financial transactions, and the IRS does not explain why it needs non-taxable transaction information. Docket No. 6 at 18. Revenue Agent Pringle states that accounting for marijuana plants and products "can establish whether a marijuana business properly reported its gross receipts and allowed deductions for cost of goods sold." Docket No. 12-1 at 4, ¶ 12. In *Standing Akimbo II*, 955 F.3d at 1159, the court found that this was sufficient to show that the summons information would be relevant to the investigation of tax liability. The court later rejected the petitioners' overbreadth argument because "*Powell* does not require that the IRS explain why it seeks information beyond showing its

potential relevance to a legitimate purpose." *Id.* at 1166. Accordingly, petitioners' argument fails here.

Petitioners next claim that the MED summonses are overbroad because they constitutes a "fishing expedition" of the records of third parties and "transfer reports." Docket No. 6 at 17, 28-30 (quoting *United States v. Coopers & Lybrand*, 550 F.2d 615, 619-20 (10th Cir. 1977)). Petitioners allege that the MED summons is actually a "John Doe" summons pursuant to 26 U.S.C. § 7609(f) and that the IRS has not shown that the summons is warranted under the statutory factors. *Id.* The Court finds these arguments misplaced. "A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the ends sought." *Coopers & Lybrand*, 550 F.2d at 621. However, § 7609(f) "only applies when the summons does not identify the person with respect to whose liability the summons is issued." *See Rifle Remedies, LLC v. United States*, No. 17-mc-00062-RM, 2017 WL 6021421 at *3 (D. Colo. Oct. 26, 2017). The Court finds that the MED summons does not constitute a fishing expedition, as the IRS has shown that the information sought is proportionate to the ends. *See Coopers & Lybrand*, 550 F.2d at 621. Therefore, petitioners' overbreadth argument fails.

3. Creation of Documents

Next, petitioners contend that the MED summonses would force the MED to "create documents," which is beyond the summoning power of the IRS.

Docket No. 6 at 14-16. As noted above, the summonses are identical to the ones in *Standing Akimbo II* except for the years and entity/owners at issue. The petitioners raised this argument in *Standing Akimbo II* and the court rejected it because the petitioners had not provided any evidence that the summonses forced MED to create documents. 955 F.3d at 1163. The same analysis applies here. Petitioners have argued that there is no evidence the documents requested existed on the date of the issuance of the summons, Docket No. 6 at 15, but this is insufficient. *Standing Akimbo II*, 955 F.3d at 1163. ("To proceed with this affirmative defense, the Taxpayers must provide evidence that the summons forces the [MED] to create documents."). "If the [MED] does not have the requested reports, then by the IRS's guidelines the [MED] need not create or produce them. Nothing requires the [MED] to create the records, and the summons does not purport to say otherwise." *Id.* at 1164. Therefore, the Court finds that there is no genuine dispute of material fact as to this issue.[6]

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[6] Petitioners argue that requiring MED to produce the entire raw database as an alternative to creating the requested documents would be overbroad. Docket No. 6 at 16. This appears to be in reference to *Standing Akimbo I*, 2018 WL 6791104, at *6, where the magistrate judge stated that, "it is true that the IRS cannot force MED to create documents, but this does not mean that enforcing the Summons would constitute an abuse of the Court's process or that the IRS lacked institutional good faith, especially given that MED must still produce all documents and raw data that it does possess." In *Standing Akimbo II*, 955 F.3d at 1164, the court stated, "[i]f the Taxpayers are arguing that the district court extended the summons to reach the entire METRC database, this

4. Constitutional Issues

a. Constitutionality of § 280E

Petitioners argue that, because § 280E gives the IRS the power to investigate non-tax crimes for tax administration purposes, this unchecked power renders § 280E unconstitutional and any investigation pursuant to § 280E is for an improper purpose. Docket No. 6 at 8. Citing the *Marchetti v. United States*, 390 U.S. 39 (1968), line of cases, petitioners argue that it violates the Fourth and Fifth Amendment to compel and then share incriminating information for tax administration purposes. *Id.* at 8-13.

Standing Akimbo II rejected a similar argument:

> the tax code, and not a criminal statute, prescribes the IRS's enforcement of § 280E. Here, the IRS sought the information to determine the Taxpayers' tax liabilities.
>
> The Taxpayers also proffer no evidence that the IRS's investigation "is part of a larger criminal investigation," apart from alleging that the IRS has refused to grant them immunity from any criminal prosecution. Appellants' Opening Br. at 25. But this does not refute Agent Pringle's statement that the IRS has not referred the case to the DOJ. The Taxpayers have offered no evidence that the government is criminally investigating them, let alone that the IRS is involved. *See [United*

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argument misconstrues the district court's language and also fails." Accordingly, the Court rejects this argument.

States v.] LaSalle, 437 U.S. [298,] 311-12 [(1978)] ("The preceding discussion suggests why the primary limitation on the use of a summons occurs upon the recommendation of criminal prosecution to the [DOJ]. Only at that point do the criminal and civil aspects of a tax fraud case begin to diverge." (citations omitted)). In *LaSalle*, the Supreme Court reiterated its previous conclusion "that Congress had authorized the use of summonses in investigating potentially criminal conduct." *Id.* at 307 (citation omitted). So long as the IRS has not referred the case to the DOJ and has issued the summonses in good faith as defined by the *Powell* factors as here, the summonses are enforceable notwithstanding the possibility of later referral to the DOJ. *See id.* at 307, 313-14.

Marchetti does not change this result or remove the IRS's authority to issue summonses under § 7602 when investigating potential § 280E violations. The Taxpayers rely on *Marchetti* to assert that if the IRS is using the information summoned to investigate federal drug crimes, the summonses would be "outside of [the] normal regulatory environment." Appellants' Opening Br. at 25. But *Marchetti* does not stand for that proposition, and the IRS's investigating drug activity within § 280E is a proper purpose. *See Alpenglow*, 894 F.3d at 1197; *Green Sol. Retail*, 855 F.3d at 1121. Further, in *Alpenglow* we distinguished *Marchetti* and its related cases from the IRS's investigations under § 280E. *See Alpenglow*, 894 F.3d at 1197. That analysis

> holds true here. The *Marchetti* line of cases is inapposite: those cases involve the invocation of a Fifth Amendment privilege to overcome IRS regulations requiring a taxpayer to disclose information carrying a real risk of self-incrimination. *See id.; see also Feinberg* [*v. Comm'r*], 916 F.3d [1330,] 1336 [(10th Cir. 2019)] ("The petitioners in those cases, however, were prosecuted for failing to comply with a statute compelling them to provide self-incriminating information, and the Court determined the Fifth Amendment privilege provided a complete defense to that failure." (citations omitted)).

Standing Akimbo II, 955 F.3d at 1162-63 (footnotes omitted).[7] Petitioners argue that, because § 280E allows the IRS to investigate violations of federal criminal drug law and does not prohibit the sharing of the incriminating information with law enforcement, § 280E is unconstitutional. Docket No. 6 at 13. Just as in *Standing Akimbo II*, petitioners have not put forward any evidence that the government is criminally investigating them or that the IRS is involved. Accordingly, under *Standing Akimbo II*, petitioners' arguments regarding the unconstitutionality of § 280E fail.

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[7] While *Standing Akimbo II*, 955 F.3d at 1163, stated that the petitioners had not raised a Fifth Amendment challenge, and the petitioners in this case do invoke the Fifth Amendment, Docket No. 6 at 22-23, that does not change the result. The Court rejects petitioners' Fifth Amendment argument in Section II.C.4.b.

b. Fifth Amendment

Petitioners argue that the IRS cannot investigate non-tax crimes without granting them immunity. Docket No. 6 at 22-23. In response, the government contends that: (1) Standing Akimbo, as a corporate entity, has no Fifth Amendment privileges; (2) § 280E, as it governs voluntary deductions, does not compel taxpayers to disclose any information; (3) taxpayers do not have Fifth Amendment rights in records voluntarily provided to a third party; and (4) petitioners do not identify a "genuine hazard" of self-incrimination. Docket No. 12 at 11-16.

"The Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information." *Fisher v. United States*, 425 U.S. 391, 401 (1976) (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)) (internal quotation marks omitted). In *Standing Akimbo II*, 955 F.3d at 1167, the Tenth Circuit rejected the petitioners' attempt to claim a Fifth Amendment privilege. The dispensary sought to quash a summons from the IRS to MED by claiming that the individual at MED who disclosed the records to the IRS would violate a Colorado law making METRC data confidential. *Id.* The Court rejected this argument, noting that "because the Enforcement Division – a third party – holds the information, [] the Taxpayers have no Fifth Amendment interests in it." *Id.* at 1168. The Tenth Circuit reaffirmed this principle in *Speidell*, 978 F.3d at 744-45, citing *Standing Akimbo* for the proposition that, because a third party holds the information

sought, any Fifth Amendment interest of the taxpayer was removed.

The summonses request information held by MED. *See* Docket No. 12-1 at 4-6, ¶¶ 14, 22. Therefore, petitioners do not have a Fifth Amendment privilege because the information is in the hands of a third party. *See Speidell*, 978 F.3d at 744-45. The Court concludes that there is no requirement that the IRS provide a grant of absolute immunity before issuing a summons to third parties because taxpayers do not have a Fifth Amendment privilege with respect to that information.[8]

c. Fourth Amendment

Petitioners argue that they have a reasonable expectation of privacy in the information they provide to

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[8] Although petitioners' lack of a Fifth Amendment privilege with regard to records held by third parties is dispositive of this issue, the Court notes that petitioners' argument that § 280E compels disclosure of information is not persuasive. As the Tenth Circuit recently noted, the tax scheme does not require persons to claim deductions on their tax returns. *See Green Solution Retail, Inc.*, 855 F.3d at 1121 ("Deductions . . . are not a matter of right. Neither do they turn upon equitable considerations. They are a matter of legislative grace.") (quoting *United States v. Akin*, 248 F.2d 742, 743 (10th Cir. 1957)). It was petitioners' choice to take deductions under § 280E on their tax returns; any investigative action taken by the IRS in response flows from petitioners' voluntary decision. *See also Alpenglow Botanicals*, 2016 WL 7856477 at *6 (concluding that, because the IRS obtained information to make a tax-based determination rather than criminal wrongdoing, petitioners failed to allege a plausible Fifth Amendment claim).

MED, and therefore compelling its disclosure would violate the Fourth Amendment unless a warrant is issued. Docket No. 6 at 23-27. Petitioners rely on *Carpenter v. United States*, 138 S. Ct. 2206 (2018), for the proposition that they have a reasonable expectation of privacy in the information provided to MED. *Id.* at 25-26. Petitioners also argue that they do not provide the data voluntarily and, because Colorado criminalizes the disclosure of METRC records, they have a reasonable expectation of privacy in them. *Id.* at *26.*

In *Standing Akimbo II*, 955 F.3d at 1164, the court rejected these arguments and held that "the Taxpayers have no reasonable expectation of privacy in the METRC data collected on their business." The court found that *Carpenter* did not apply to the petitioners because the data collected by MED "differ[ed] markedly" from the data at issue in *Carpenter. Id.* at 1165. The court also found that the Colorado statute at issue did not preclude sharing METRC data with the IRS, but even if it did, the Supremacy Clause would preempt it. *Id.* Additionally, the Court rejected the argument that the information provided to MED was involuntary, Docket No. 6 at 26, stating that taxpayers voluntarily chose to operate a marijuana business under Colorado law and thus "agreed to provide certain information to the [MED]." *Standing Akimbo II*, 955 F.3d at 1165. Accordingly, the IRS does not – as petitioners contend – need a warrant and a finding of probable cause to issue a summons for the METRC data. *See* Docket No. 6 at 23-28.

If a taxpayer cannot "cannot factually support a proper affirmative defense, the district court should dispose of the proceeding on the papers before it and without an evidentiary hearing" because holding such a hearing "would be a waste of judicial time and resources." *Balanced Fin. Mgmt.*, 769 F.2d at 1444. Because petitioners have not presented factual support for their claims that the IRS is not acting in good faith or is abusing the process, the Court finds that petitioners have not raised a proper affirmative defense. Given that the IRS has demonstrated it is entitled to enforce the summonses and petitioners have failed to show a material issue of disputed fact, petitioners' petition to quash the summons will be dismissed.

D. Supplemental Authority

On July 20, 2021, petitioners filed a submission of additional authority. Docket No. 27. The supplemental authority is a statement of Justice Thomas accompanying the denial of the petition for a writ of certiorari of the Tenth Circuit's opinion in *Standing Akimbo II*. Docket No. 27-1. This statement discussed *Gonzales v. Raich*, 545 U.S. 1 (2005), and concludes that "[a] prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach." Docket No. 27-1 at 1, 5. Petitioners argue that this statement shows that the summonses are not being issued for a legitimate purpose as required by *Powell*. Docket No. 27 at 3-4. On July 28, 2021, petitioners filed a second submission of additional authority, which included a

petition for rehearing filed with the Supreme Court and a statement made by Judge Lucero during the January 22, 2019 oral argument for *Feinberg*, 916 F.3d 1330. Docket Nos. 28-1, 28-2.

On August 6, 2021, the government moved to strike these two filing because (1) the petitioners' submissions violate the Local Rules and this Court's Practice Standards; and (2) the submissions do not identify any new authority with any effect on this case. Docket No. 29 at 1. On August 27, 2021, petitioners filed a response to the motion to strike, arguing that the government's motion should be denied because (1) the government failed to confer before filing it; (2) the supplemental authority are new points of law, not fact, and thus do not need to amend the pleadings; (3) any failure to file a motion for leave is mooted by the contemporaneous filing of such a motion; and (4) "[n]either the Tenth Circuit decision in *Standing Akimbo I[I]*, nor the Supreme Court decision or *Gonzales v. Raich*, control over Justice Thomas' statement that the current federal regime regulating intrastate cannabis is no longer necessary or proper." Docket No. 30 at 1-2. On the same day, petitioners filed a motion for leave to submit the additional authority in Docket Nos. 27 and 28. Docket No. 31.

This flurry of filings has no bearing on the Court's analysis. Petitioners seek to advance a new argument, based on a non-precedential statement accompanying a denial of a writ of certiorari. *See* Docket No. 27. The outcome of this case is controlled by recent Tenth Circuit precedent. The Court declines to consider a new

argument raised for the first time in supplemental authority based on no change in precedent. *See Hooks v. Ward*, 184 F.3d 1206, 1233 n.25 (10th Cir. 1999) ("[W]e do not accept a new argument by way of notice of supplemental authority notices, and arguments not raised in duly filed briefs are deemed waived."). Accordingly, the Court will deny petitioners' motion for leave to submit additional authority [Docket No. 31] and deny as moot the government's motion to strike Docket Nos. 27 and 28 [Docket No. 29].

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that the United States' Motion to Dismiss Amended Petition and Enforce Summonses [Docket No. 12] is **GRANTED**. The summonses issued to the Colorado Marijuana Enforcement Division, are **ENFORCED** pursuant to 26 U.S.C. § 7604. It is further

ORDERED that petitioners' Amended Petition to Quash Summonses [Docket No. 6] is **DISMISSED**. It is further

ORDERED that Petitioners' Motion for Leave to File Its Additional Authority Pursuant to the Court's Practice Standards [Docket No. 31] is **DENIED**. It is further

ORDERED that the United States' Motion to Strike Petitioners' Submission of Additional Authority [Docket No. 29] is **DENIED as moot**. It is further

ORDERED that this case is closed.

DATED September 2, 2021.

BY THE COURT:

/s/ Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge