No. 20-1332

In The
Supreme Court of the United States

ERIC D. SPEIDELL, ET AL.,

Petitioners,

v.

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

Respondent.

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

PETITION FOR REHEARING FROM ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

INTRODUCTION

Pursuant to Supreme Court Rule 44.2, the Petitioners petition for the rehearing of the order of June 28, 2021 denying Petitioners' Petition for a Writ of Certiorari.

This Court denied Petitioners' Petition for Writ of Certiorari on June 21, 2021. However, the following week, this Court denied a similar petition which included in the denial a statement by Justice Thomas. He noted that the current "contradictory and unstable state of affairs [regarding cannabis] strains basic principles of federalism and conceals traps for the unwary." *Standing Akimbo, LLC, et al. v. United States*, 594 U.S. ___ (2021) (Statement of Thomas, J.).

If there was any question of the national importance of the federalism dispute regarding cannabis, it was answered when Justice Thomas' Statement became front page headlines in the national press and network news. While Justice Thomas' Statement indicated that the Court may desire further percolation of the issues in the lower courts, the Petitioners respectfully assert that, as discussed further below, the issues are at a critical stage for our nation. It is essential for our nation's dual-sovereignty that the matters be heard now, rather than later. Thus, the Petitioners request that the Court reconsider Petitioners' Petition for Writ of Certiorari.

GROUNDS FOR REHEARING

A. Additional Question Presented

Justice Thomas' Statement accurately outlines the "half-in, half-out regime" which brings into question whether Congress still has the authority under the Commerce Clause to intrude on '"[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens.'" Justice Thomas' Statement echoes what this Court long ago stated – "a power, growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circumstances which change; in a state of things which may exist at one period, and not at another." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819). Thus, what may have been necessary and proper sixteen years ago may not be necessary and proper today.

The Tenth Circuit specifically relied upon *Gonzales v. Raich*, 545 U.S. 1 (2005) for the proposition that expressly state legal use, cultivation, production, and sale of intrastate cannabis violates the Controlled Substances Act. See *Standing Akimbo v. United States*, 955 F.3d 1146, 1158 (10th Cir. 2020). Thus, the Petitioners are unlawful drug traffickers for purposes of 26 U.S.C. §280E.

Given the above and given the Statement by Justice Thomas, Petitioners request to add the following question to Petitioners' Petition for Writ of Certiorari:

Is the current federal prohibition (relied upon by the Tenth Circuit) in

> ***Gonzales v. Raich*, 545 U.S. 1 (2005) of intrastate use, cultivation, production, and sale of marijuana under the Controlled Substances Act, 21 U.S.C. §801, *et seq.*, ("CSA") a necessary and proper exercise of Congress' commerce clause power?**

Supreme Court Rule 14.1(a) states in part that "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." However, there is no rule prohibiting the Petitioners from adding a petition question in a petition for rehearing under Rule 44.2. If the Court grants this Petition for Rehearing, the additional question would be "fairly included therein." The requested addition of this question to the Petition will allow consideration and resolution of the issues discussed by Justice Thomas in his Statement. *Raich* and the prohibition of intrastate cannabis was directly addressed by the Tenth Circuit in this matter. Thus, the issues raised by Justice Thomas are ripe for review by this Court. This additional question will allow those issues to proceed.

B. Legislative History Of The CSA

The Petitioners wish to add for consideration that the CSA was not designed as a "blanket" prohibition as the *Raich* majority suggested.

In discussing the preemption provision of the CSA[1], Rep. William Springer (22nd Cong. Dist. Ill.), made the following statement:

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

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

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

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

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

---

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

Thus, Congress did not intend to create a blanket prohibition superseding state cannabis laws. The Congressional intent was to leave the primary regulation to the States. It was for both financial reasons and the practical acknowledgement that the States were better able to handle drug abuse on the local level rather than a one-size-fits-all federal approach.

C. The Critical Need For Review

If certiorari is not granted in this case, it may be years before the Court has an opportunity to address these issues again. To the undersigned's knowledge, there are no cases currently pending in the appellate courts which are postured to address the federalism and Sixteenth Amendment questions necessary to resolve the federalism dispute. There are cases in the district and tax courts which could potentially be postured to address these issues. However, this Court is looking at least one to two years before certiorari petitions can be filed.

Nevertheless, these are not issues which can wait years for resolution. Regarding §280E enforcement, this Court acknowledged long ago that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316 (1819). Section 280E serves that purpose. Last year, the Treasury Inspector General for Tax Administration found that §280E is extracting $475.1 million dollars – in only three states. This amount is over and above, what businesses normally pay in taxes. Section 280E is a swirling tornado of

destruction on both an economic and personal level, collapsing any business or individual it encounters.

> "This forecast represents only a portion of the tax noncompliance related to I.R.C. §280E in that it includes only three out of 33 States and the District of Columbia that allow for either medical and/or recreational use of marijuana and does not consider the growth in the industry since Tax Year 2016."

Treasury Inspector General for Tax Administration ("TIGTA"), *The Growth of the Marijuana Industry Warrants Increased Tax Compliance Efforts and Additional Guidance*, March 30, 2020, Reference Number: 2020-30-017, p. 17. ("TIGTA Report")

Given the state-legal cannabis industry is only about $20 Billion, see https://mjbizdaily.com/exclusive-us-retail-marijuana-sales-on-pace-to-rise-40-in-2020-near-37-billion-by-2023/, it is not unreasonable to conclude, as Judge Carlos F. Lucero did, that the confiscatory nature of §280E is more the "power to destroy." *Oral Argument, Feinberg v. Commissioner, beginning at 13:30.* https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3.

In 2015, a Colorado startup business reported $10,517.00 in taxable income. A subsequent §280E audit adjusted its taxable income to $981,204.00 (93 times the reported income). The assessment then flowed through to the individual owners of the business. One owner reported $0.00 in income. This number was adjusted to $720,563.00 in taxable income,

with a $241,712.00 tax and $53, 287.43 in penalties. See *Foster v. Commissioner*, 7073-19 (U.S. Tax Court).

A few hours, away, the same year, another Colorado business, owned by two married couples, reported $740,814.00 in taxable income. A §280E audit adjusted the business' taxable income to $2,917,243.00. One of the married couples had reported $445,123.00 in joint taxable income. This was adjusted to $1,566,946.00 in taxable income with $566,427.00 in tax, $89,012.40 in penalties and $43, 104.18 in interest. The other married couple reported $446,496.00 in joint income. This was adjusted to $1,590,175.00 in taxable income with $575,625 in tax, $91,030.20 in penalties, and $44,081.28 in interest. See *Meskin v. Commissioner*, 1581-20, 1612-20 (U.S. Tax Court) and *Miller v. Commissioner*, 1579-20, 1580-20 (U.S. Tax Court).

These are only two of many examples of the lives and businesses that have been destroyed in §280E's wake.

Importantly, this power has only thus far been enforced in the West. See TIGTA Report, p. 17. TIGTA has recommended an expansion of the Compliance Initiative Project ("CIP") (which ensnared the Petitioners) to a national level. See *TIGTA Report*, p. 13. As stated by the Inspector General –

> "The Commissioner, SB/SE Division, should:
>
> ***Recommendation 1:*** Develop a comprehensive compliance approach, i.e., national CIP,

> for this industry and leverage State marijuana business lists to identify noncompliant taxpayers. . . .
>
> Therefore, as the IRS evaluates its resource allocation, it should take a comprehensive approach and prioritize high-impact compliance areas such as the marijuana industry."

TIGTA Report, p. 13 (Emphasis in Original)

Further, it is exceedingly difficult to present cases addressing the present issues due to the prohibitions within the Anti-Injunction Act, 26 U.S.C. §7421. See, e.g., *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111 (10th Cir. 2017). Also, criminal cases addressing these issues will be few due to the Congressional prohibition of the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States v. McIntosh*, 833 F.3d 1163, 1168 (9th Cir. 2016). Thus, the avenues for seeking review are greatly limited compared to civil rights or other cases of a constitutional stature.

Also, assuming that Congress amends the laws bringing cannabis outside of Schedule I or II of the Controlled Substances Act, there will probably be no retroactive effect. Section 280E will continue to be applied to all previous tax years. Thus, many of these questions will survive possible congressional legalization.

If this Court waits years to review the Government's primary weapon in this federalism dispute (§280E), huge damage will incur in the meantime. This is not something that can wait.

REQUEST FOR RELIEF

The Petitioners request that this Court grant this Petition for Rehearing and consider this Petition for Rehearing with the Petition for Rehearing filed in *Standing Akimbo, LLC, et al. v. United States of America*, No. 20-645, as the issues and questions are substantially identical. The Petitioners believe that the two matters should be heard together.

Given the above, the Petitioners request that the Court grant this Petition for Rehearing and provide such other and further relief as the Court deems proper.

Respectfully submitted, this 12th day of July, 2021

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

CERTIFICATION

The undersigned counsel certifies pursuant to Supreme Court Rule 44.2, that the grounds for this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Further, this petition is presented in good faith and not for delay.

James D. Thorburn