No. 20-645

In The
Supreme Court of the United States

STANDING AKIMBO, LLC, A COLORADO LIMITED LIABILITY COMPANY; PETER HERMES, AN INDIVIDUAL; KEVIN DESILET, AN INDIVIDUAL; SAMANTHA MURPHY, AN INDIVIDUAL; AND JOHN MURPHY, AN INDIVIDUAL,

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

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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 28, 2021. However, this was not the typical denial. The denial included 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 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. 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 federalism that the matters be heard now, rather than later. Thus, the Petitioners request that the Court reconsider the denial of 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 the "'[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) ("*Raich*") for the proposition that expressly state legal use, cultivation, production, and sale of intrastate cannabis violates the Controlled Substances Act. See *Standing Akimbo, Ltd. Liab. Co. 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. *Id.* Justice Thomas has now brought this proposition into question under the Commerce Clause.

Notably, Justice Thomas identified *Standing Akimbo* as a "prime example." So, clearly this case is certworthy.

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 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 through a petition for rehearing under Rule 44.2. This Court has, in fact, allowed new questions presented as late as a supplemental brief on second request for review. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). Thus, 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.

The Government may complain that the precise question was not raised below by the Petitioners. However, the Tenth Circuit did rely upon *Raich*. Thus, the Tenth Circuit "passed upon" the issue. It is not waived. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2175 (2020). Even if the Court decides that the Tenth Circuit did not pass upon the issue, the Court still has discretion to review this important constitutional question.

This Court has held that "even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue." *Freytag v. Commissioner*, 501 U. S. 868, 878-880, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991); *accord June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2175 (2020). This is especially so, when "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" is present. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-536 (1962). Thus, the Court has the power to exercise its discretion to consider non-jurisdictional claims that had not been raised below. *Freytag v. Commissioner*, 501 U.S. 868, 878-879 (1991).

The question of Congress' necessary and proper powers under the Commerce Clause is a "constitutional challenge that is neither frivolous nor disingenuous." See *id.* It should be heard by this Court.

B. The Critical Need for Review

1. Justice Delayed

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 Justice Thomas' statement. 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. The delay may be devastating.

First, Congress is deadlocked on the issues of cannabis. While legislation is being proposed, there is no realistic expectation that this federalism dispute will be resolved in Congress.

Second, 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.

> "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.

Section 280E is a swirling tornado of destruction on both an economic and personal level, collapsing any business or individual it encounters. For example, 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 IRS did not suggest that the gross receipts were substantially understated (they were not). 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. The IRS under §280E 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[1] 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 $575,625.00 in tax, $91,030.20 in penalties, and $44,081.28 in interest. Again, the IRS did not assert that the gross receipts were substantially understated. This is simply the §280E "adjustment." 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

[1] These cases are among the many examples of how the §280E-driven taxation exceeds net income ($445,123 net income, $566,427 in tax). It is not tax – it is confiscation.

> comprehensive approach and prioritize high-impact compliance areas such as the marijuana industry."

TIGTA Report, p. 13 (Emphasis in Original)

2. Justice Denied

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.

The Petitioners can provide Justice Thomas' Statement and argue the issue to the Colorado District Court in the related proceeding of *Standing Akimbo v. United States*, 1:18-mc-00178-PAB-KLM (Colo. Dist. Ct.) ("*Standing Akimbo II*")[2]. However, are these duplicative proceedings necessary? The Petitioners believe that the Court granting certiorari now, rather than later, is appropriate and is "dictated by considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below." *Grosso v. United States*, 390 U.S. 62, 71-72 (1968).

C. Sixteenth Amendment

Regarding the Sixteenth Amendment, the Petitioners agree that the definition of income is a difficult question, but assert that further percolation is unnecessary. The question has been analyzed by three lower courts already, in *Alpenglow Botanicals, Ltd. Liab. Co. v. United States*, 894 F.3d 1187 (10th Cir. 2018); *N. Cal. Small Bus. Assistants, Inc. v. Commissioner*, 153 T.C. 65 (2019); and *Davis v. United States*, 87 F.2d 323 (2d Cir. 1937). These cases give this Court the framework in which to decide whether income is

[2] When this matter ("*Standing Akimbo I*"), was ruled upon in the District Court, Judge Brimmer held back *Standing Akimbo II*, presumably for ruling after *Standing Akimbo I* had run its course. The District Court has not yet ruled on *Standing Akimbo II* and remains outstanding.

"gain" or "gross income" for purposes of the Sixteenth Amendment.

The Petitioners respectfully disagree that the Court must address whether §280E is a direct or indirect tax. 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.

D. 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 concluded. The CSA may have

been operating as a blanket prohibition sixteen years ago, but it was not the drafters' intent.

In discussing the preemption provision of the CSA[3], 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***

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

> ***preempt existing State laws . . .*** " (Emphasis Added)

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

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. The blanket prohibition turning "half-in, half-out" is more a product of arbitrary governmental overreach. It just took sixteen years to demonstrate the "episodic" arbitrary power.

REQUEST FOR RELIEF

The Petitioners request that this Court grant the Petition for Rehearing and consider this Petition for Rehearing with the Petition for Rehearing filed in *Eric D. Speidell, et al. v. United States of America*, No. 20-1332, as the issues and questions are substantially identical. The Petitioners believe that the two matters should be considered together.

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

Respectfully submitted,

JAMES D. THORBURN

July 21, 2021

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