No. 20-_____

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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners allegedly operate a Colorado state-legal cannabis dispensary and sold cannabis in accordance with state law. The IRS claims that although the Petitioners are operating legally under state law, they are unlawful drug traffickers under federal law. The IRS seeks to apply 26 U.S.C. §280E against the Petitioners, to deny all deductions and credits in response to their purportedly unlawful drug trafficking – taxing something other than net income as income.

The State of Colorado compels those who sell licensed cannabis pursuant to state law to provide the state plant tracking information in return for a promise of confidentiality. The IRS summonsed the confidential information from the State of Colorado in report form after the Petitioners claimed Fifth Amendment privilege from preparing the reports themselves. The IRS claims it needs the confidential information to determine the proper tax under §280E, but reserves all rights to share the incriminating information with federal law enforcement and has the power to do so. Given the above, the questions presented are:

1. Under the Supremacy Clause, does Colorado's expressly state-legal sales of cannabis violate the Controlled Substances Act?

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

QUESTIONS PRESENTED – Continued

3. Does the Fourth Amendment protect taxpayers from having confidential information summonsed by the IRS for the purpose of determining unlawful drug trafficking with full rights to share the information to federal law enforcement authorities?

4. Did the process used by the Tenth Circuit, weighing evidence, and giving all inferences to the moving party, all purportedly under Rule 56, Fed.R.Civ.P., violate the rule?

CORPORATE DISCLOSURE STATEMENT

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

RELATED CASES

Boulder Alternative Care, LLC v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 016495-16

Thomas Van Alsburg & Valerie Van Alsburg v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 003959-20

Steven Brooks & Shannon Brooks v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 003958-20

Mike Miller & Michelle Miller v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001613-20

Daniel Meskin & Kari Meskin v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001612-20

Daniel Meskin & Kari Meskin v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001581-20

Mike Miller and Annette Miller, Deceased v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001580-20

RELATED CASES – Continued

Mike Miller & Michelle Miller v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 001579-20

Jo Ann Sharp & Randall W. Sharp v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007196-19

Jo Ann Sharp v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007077-19

Ryan Foster v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 007073-19

Boulder Alternative Care, LLC, GLG Holdings, LLC, Tax Matters Partner v. Commissioner of Internal Revenue, United States Tax Court, Docket No. 016495-16

Standing Akimbo, Inc. et al. v. USA, United States District Court, District of Colorado, Case No. 1:18-mc-00178-PAB-KLM (*Standing Akimbo II*)

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

Eric D. Speidell, et al. v. United States of America, Tenth Circuit Court of Appeals, No. 19-1214, ___ F.3d ___ (10th Cir. October 20, 2020) (Published)

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OTHER AUTHORITY

The Petitioners, above named, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is a published decision, *Standing Akimbo, Ltd. Liab. Co. v. United States*, 955 F.3d 1146 (10th Cir. 2020). App. 1. The order denying reconsideration is unreported. App. 62. The district court order granting the Magistrate's recommendation is unreported. App. 42. The Magistrate's recommendation is unreported. App. 45.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. App. 1. A timely petition for a FRAP Rule 35 Request for En Banc Consideration and FRAP Rule 40 Request for Rehearing was denied on June 10, 2020. App. 62. This Petition has been timely filed on or before November 6, 2020 in accordance with the Supreme Court Order dated March 19, 2020. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived,

without apportionment among the several States, and without regard to any census or enumeration.

STATEMENT

a. General Background

This case, couched in tax law, is ground zero of the largest federalism dispute this country has seen since the American Revolution – a dispute that continues to go unanswered, despite multiple requests from the states for a resolution. Judge Carlos F. Lucero, within the Appellate Panel of this case, stated at oral argument: "[The Court's] pleas to Congress to resolve this dispute have gone unanswered."

The IRS is aggressively enforcing a little-known provision of the Tax Code, IRC Section 280E, against the state-legal cannabis industry. Under this provision, "unlawful drug traffickers" are disallowed from excluding their actual expenses of conducting business from sales revenue to determine their taxable income. The result is similar to Congress forcing the cost of running the Supreme Court to be added on top of the salaries to the Justices to determine the taxable "income" upon which the Justices must pay tax. Such a scheme creates huge amounts of artificial income and a tax well in excess of any accepted definition of income. Section 280E is creating such an artificial income scheme.

Section 280E was enacted in 1982 following a Tax Court case which allowed a convicted cocaine dealer to

claim deductions from ordinary business expenses under federal tax law. Under this statute, a person may not take any business deductions or credits if the person unlawfully "traffics" Schedule I or II controlled substances. The result is a "tax" of about $1.20 for every dollar of net income, even after allowance for "costs of goods sold."

Section 280E only applies to unlawful drug traffickers. In order for §280E to apply to state-legal cannabis sales, there must be a predicate finding that the taxpayer has committed a federally unlawful act – drug trafficking. To this end, the IRS has taken it upon itself to investigate and administratively determine whether taxpayers, such as the Petitioners, are unlawful drug traffickers, i.e., whether the taxpayer is violating federal criminal drug laws. It "is because of their federally unlawful activities" that they are being audited. *See* Opinion, App., p. 17. The IRS is doing this for "civil tax purposes," but has the power, and reserves all rights to share the spoils of the "civil" unlawful-drug-trafficking investigation with law enforcement for criminal prosecution purposes. This is all being done under the relaxed Fourth and Fifth Amendment standards for civil tax audits.

Once the IRS suspects the taxpayer is engaging in Schedule I or II drug trafficking, it investigates the taxpayer for the unlawful conduct, without probable cause, through summons proceedings. The IRS hides behind *Powell* in issuing these summonses.

Despite the subject matter being criminal in nature, the IRS has reserved all rights to share the information with federal law enforcement under 26 U.S.C. §6103(i)(3)(A). The IRS, along with the Department of Justice, refuses to grant immunity for drug law crimes[1] and fully reserves the right to prosecute the taxpayers for drug crimes based upon the information the IRS receives from the tax summons.[2] If during the IRS audit, the taxpayer invokes Fifth Amendment Privilege in response to allegations of unlawful drug trafficking, the IRS taxes the taxpayer on gross receipts. Thus, the Taxpayer must choose between their Fifth Amendment privilege or Sixteenth Amendment right to costs of goods sold. *See, e.g.*, *Sharpe v. Commissioner*, 7196-19 (U.S. Tax Court).

The Petitioners and other taxpayers have attempted to obtain immunity from prosecution under 18 U.S.C. §§6002-04, in order to share their cannabis business information. However, the IRS and DOJ refuse, and remind the taxpayers that the information provided can be used in federal drug-crime prosecution.

The Tenth Circuit ruled that the IRS has the authority to make administrative determinations of violations of the CSA "as a matter of civil tax law." *See Alpenglow Botanicals v. United States*, 894 F.3d 1187,

[1] The IRS/DOJ could easily have granted immunity under 18 U.S.C. §6002-6004 but chose not to.

[2] The IRS and DOJ use plausible deniability regarding this issue. They do not deny they are sharing. They simply state that the Petitioners cannot prove they are sharing.

1197 (10th Cir. 2018). To this end, the Tenth Circuit affirmed that §841 of the CSA supplies the basis for determining that state-legal cannabis is "unlawful trafficking" under §280E. *Id.* at 1192-93. The IRS can voluntarily transmit the spoils of the investigation to federal law enforcement authorities. Thus, the IRS can effectively perform the equivalent of a criminal investigation for law enforcement without the "impediments" of the Fourth and Fifth Amendments.

To defend, the taxpayer must either prove their innocence of the drug violations, or acknowledge and describe the criminal conduct in detail in order to recover a small amount of the expenses known as costs of goods sold.

In the Related Cases Section, the Petitioners have listed the cases pending in the Tenth Circuit and Tax Court where these matters are at issue awaiting a final determination.

This matter is similar to the matter giving birth to the American Revolution. Two hundred and sixty years ago, the British declared Dutch tea as contraband under the Navigation Acts. The Colonies refused to follow suit and kept Dutch tea legal and allowed the tea trafficking. Dutch tea, being contraband, was taxed at a different and much higher rate than the Indian tea imported by the British East India Company to the Colonies.

British revenue agents under a "writ of assistance" would enter and search homes and businesses for the unlawfully trafficked tea and associated

transactions in order to tax the tea at the contraband rate. The revenue agents were then allowed to transmit the evidence found to the British law enforcement authorities for prosecution under the Navigation Acts.

Sixty-three merchants challenged the power of the revenue agents to search for evidence of the taxable transactions in what is now known as *Paxton's Case* Gray, Mass. Repts., 51 469 (1761). The merchants were represented by James Otis. As this Court described:

> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' . . . 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'"

Boyd v. United States, 116 U.S. 616, 624-25 (1885).

Two hundred sixty years later, the issue is back. Except here, the contraband is cannabis.

The federal government claims that cannabis is a Schedule I controlled substance, the possession or distribution of which is generally a serious federal crime. *See* the Controlled Substances Act ("CSA"), e.g., 21 U.S.C. §841. It is contraband, like Dutch tea under the Navigation Acts. On the other hand, like the Colonies, thirty-seven states and the District of Columbia have fervently disagreed with the federal government and have legalized cannabis on various levels.

Like the 63 merchants in *Paxton's Case*, many individuals have moved forward either possessing or distributing cannabis in accordance with state law. There are over 50,000 "badges" (those authorized by the State to work in a cannabis dispensary) in Colorado alone. The IRS is using its tax power to obtain incriminating evidence of the trafficking with full rights to share with federal law enforcement. The federal government seeks to hold its power and destroy what the States claim they can do under the Tenth Amendment – with the IRS and Section 280E of the Tax Code being the primary weapon of choice.

b. Background of the Case

This Petition arises out of the Petition to Quash Summonses filed by Petitioners. The Petition to Quash concerned a total of four administrative summonses issued to Colorado's Marijuana Enforcement Division ("MED") seeking information concerning Petitioners'

"trafficking" of cannabis. The summonses request access to information from the MED's database known as Marijuana Enforcement Tracking Reporting Compliance system ("METRC") – a plant tracking system. Specifically, the summonses issued to Standing Akimbo, LLC on October 6, 2017 requested the following METRC information:

> 1) Complete listing of all licenses held for the period of January 1, 2014-December 31, 2015 for Standing Akimbo LLC.
>
> 2) Copy of METRC Annual Gross Sales Report for Standing Akimbo LLC for the taxable year ended 12/31/2014 and 2015.
>
> 3) Copy of METRC transfer reports for 2014 and 2015.
>
> 4) Copy of METRC annual harvest reports for the periods 2014 and 2015.
>
> 5) Copy of METRC monthly plants inventory reports for the periods 2014 and 2015.

The summonses issued to Standing Akimbo's owners on October 6, 2017 request a complete list of marijuana licenses held by the owners (and Samantha Murphy, the business manager) for the period of January 1, 2014 through December 31, 2015. The request was not limited to licenses of Standing Akimbo.

The IRS has provided no explanation what these "reports" are or what they contain. For example, what is a "Transfers Report"? How can anyone tell objectively what it is that the IRS is seeking? There was no

evidence presented by the IRS that such reports were produced by the State of Colorado at all. As discussed below, the Petitioners understood that these were not documents normally produced by the State of Colorado. Since METRC is a cannabis plant tracking system, the goal of the IRS is clear – find out about the unlawful plants and their transfer.

c. The Audit

The Revenue Agent began his investigation by issuing notices to Petitioners that their 2014 and 2015 tax year returns were under examination/audit by the IRS. Their audit was selected as part of a larger Compliance Initiative Project ("CIP"), which the IRS had launched targeting cannabis business nationally. *See* generally, *Rifle Remedies v. United States*, Civil Action No. 18-949 (D. Colo.) (FOIA Action). Subsequently, the Revenue Agent issued Information Document Requests ("IDR") for documents specifically related to cannabis transactions of Standing Akimbo, its owners, and Samantha Murphy, the business manager. The Revenue agent demanded that the Petitioners create reports of their cannabis transactions through their METRC account and supply the completed reports to the Revenue Agent. The Petitioners declined and thereafter asserted Fifth Amendment Privilege.

In response, the Revenue Agent bypassed the Petitioners and issued the above summonses directly to the State of Colorado to obtain the Petitioner's data.

d. The Underlying Action.

The Revenue Agent issued the summonses at issue in this Petition. The Petitioners timely filed and served their Petition to Quash.

The Petition included a Declaration by Samantha Murphy, business manager of Standing Akimbo, stating that the reports summonsed are not documents prepared by Standing Akimbo. Nor, in her knowledge, does MED prepare these "reports" as a matter of common practice. Further, she did not believe, within her personal knowledge, that these "reports" were in existence on the dates of the summonses.

Appellee filed a Motion to Dismiss the Petition and Enforce the Summonses on December 20, 2017 pursuant to Fed.R.Civ.P. 12. However, in support of its Motion to Dismiss, the IRS submitted the Declaration of Revenue Agent Tyler Pringle. The Declaration of the Revenue Agent was accompanied by nine Exhibits.

Notably, Mr. Pringle's Declaration did not dispute that the "reports" were not in existence. Rather, it made conclusory statements that if MED provided "information," it would be helpful to him to determine income and costs of goods sold. Mr. Pringle failed to describe what the "reports" were.

The lower court Magistrate, then District Court judge, construed the affidavits, granted the motion to

dismiss, and ordered the summonses enforced against the State of Colorado.[3]

e. The Opinion

As discussed further, below, the Court of Appeals affirmed the lower court orders and ordered the summonses enforced against the State of Colorado. The Petitioners appeal on the grounds of Supremacy, Sixteenth Amendment, Fourth Amendment and procedural grounds regarding Rule 56 and burden of proof therein.

SUMMARY OF THE ARGUMENT

1. Preemption.

The Tenth Circuit erred by determining that under the Supremacy Clause, the CSA "reigns supreme" over Colorado state cannabis laws. It improperly entertained a "presumption of preemption" rather than a presumption *against* preemption as this Court has mandated. The Tenth Circuit analysis of the Supremacy is deficient and should be reversed.

[3] The Motion for Enforcement was never served on the State of Colorado and was never a party, but the Tenth Circuit ruled that the issue of subject matter jurisdiction had been waived. *See* Opinion, App. 38, n. 23.

2. Sixteenth Amendment.

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

3. Fourth Amendment.

Under Colorado cannabis regulatory law in effect at the time the summonses were issued, cannabis merchants were required to report to the State both inventory and transaction history for cannabis (plant tracking). This information was deemed under state law as confidential and not to be disclosed to any person under penalty of law. As such, this was private information.

The federal summonses violated the Petitioners' rights to privacy as the IRS was seeking to use the summonses to prove there was unlawful drug trafficking – the predicate issue to apply Section 280E. This was done preserving all rights and power to share

the incriminating information with law enforcement, denying all requests for immunity of the alleged drug crimes.

4. Summary Judgment.

The Tenth Circuit erred by employing the summary judgment standard then weighing evidence, providing inferences in favor of the moving party (the Government), ignoring counter affidavits by the Petitioners, and ultimately making findings of fact after weighing the evidence. This included determining the existence of the summonsed "reports" an irrelevant question.

ARGUMENT

Introduction

This Court has stated that an IRS summons may be challenged by the taxpayer "on any appropriate ground." *Reisman v. Caplin*, 375 U.S. 440, 449 (1964). Certainly, the IRS acting in an unconstitutional manner, enforcing an unconstitutional law, or acting beyond its jurisdiction would be appropriate grounds. The constitutional challenges, herein, are all challenges on "appropriate grounds."

I. THE TENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT COLORADO STATE LAW FALLS UNDER THE SUPREMACY CLAUSE TO FEDERAL LAW

Section 280E applies if there is "trafficking" in a Schedule I or II controlled substance prohibited by either state or federal law. If the taxpayers are not unlawful drug traffickers, the basis for the audit evaporates.

All concede that the Petitioners are in compliance with state law. Thus, the sole question here is whether Colorado legal and regulated sales of cannabis violate federal drug laws. This is only true if the state law falls to the federal law under the Supremacy Clause. The Tenth Circuit so held. In so doing, the Tenth Circuit erred.

The Tenth Circuit incorrectly held that federal law supersedes Colorado law when it comes to state-legal cannabis sales. The Panel stated: "[T]he CSA reigns supreme." *See Gonzales v. Raich*, 545 U.S. 1, 29 (2005) . . . "[S]tate legalization of marijuana cannot overcome federal law." *Feinberg v. Comm'r*, 916 F.3d 1330, 1338 n. 3 (10th Cir. 2019) [additional citations omitted]. So, despite legally operating under Colorado law, "the Taxpayers are subject to greater federal tax liability" because of their federally unlawful activities.

The Panel's analysis is in error.

A. Supremacy is Analyzed Under the Preemption Doctrine.

Preemption is the doctrine arising from the Supremacy Clause, which determines whether a particular federal law supersedes a particular state law – whether it "reigns supreme." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress's ability to preempt state law emanates from the Supremacy Clause of the United States Constitution. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

However, the Supremacy Clause "is not an independent grant of legislative power to Congress." Instead, it simply provides "a rule of decision," i.e., which law controls. *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). It specifies that federal law is supreme "in case of a *conflict* with state law." *Id.* at 1479 (emphasis added). However, "[i]f it does not [conflict], state law governs." *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

The doctrine is more fully supported by the Tenth Amendment to the Constitution whereby, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

All forms of preemption operate in the same manner. "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore, the federal law takes

precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480.

The party that asserts preemption, in this case the IRS, bears a heavy burden to show that preemption was the "clear and manifest purpose of Congress." *See Wyeth v. Levine*, 555 U.S. 555, 565-69 (2009). There is no presumption *of* preemption.

There is, however, a presumption *against* preemption. Courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485. Again, this concept is consistent with the Tenth Amendment.

Federal law supersedes state law only if Congress intended such an outcome. *Medtronic*, 518 U.S. at 485-86 (congressional purpose is "the ultimate touchstone"). Courts must determine Congress's intent "from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id*. at 486 (citation omitted).

Courts are cautioned to "not be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotation marks and citations omitted).

Importantly, "[w]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors

preemption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Under principles of federalism and the Tenth Amendment, a federal criminal statute will not prohibit an expressly state-legal act unless "explicitly" directed by Congress. *Bond v. United States*, 572 U.S. 844, 858 (2014).

Local criminal activity has "traditionally been the responsibility of the States." *Bond v. United States*, 572 U.S. 844, 865 (2014). It is assumed that "Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Bond v. United States*, 572 U.S. at 862. Thus, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

This leads to the well-established principle that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 845.

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

Bass, 404 U.S. at 349.

The Respondent may claim that the Court in *Gonzales v. Raich*, 545 U.S. 1 (2005) preempted all state laws regarding cannabis. This is not correct. The holding was simply that Congress *has* the power under the Commerce Clause to regulate intrastate sales of unregulated marijuana – not that it exercised the power and preempted state law. Preemption was not even discussed. Nor was federal regulation of express legalization by a state which imposes a strong regulatory and oversight system discussed or contemplated. The question presented here will be one of first impression for this Court.

B. Congress Did Not Intend to Prohibit Colorado State-Legal Marijuana.

Section 841 of the CSA purportedly makes the expressly state-legal acts of the Petitioners unlawful. Hence, the Tenth Circuit determined the Petitioners were engaged in "unlawful trafficking."

However, the preemption statute of the CSA indicates to the contrary: The CSA preemption statute is as follows:

> "Application of State Law
>
> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless

> there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

21 U.S.C. §903.

Section 903 must be construed in accordance with the presumption against preemption. Clearly, reading the statute as a whole, Congress did not intend to occupy the entire field to the exclusion of the States. There is nothing in the statute that explicitly prohibits conduct which has been made expressly legal under state law. *See Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) (Court follows "presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations . . . ").

Absent the explicit direction by Congress prohibiting that which is expressly legal under Colorado law, Congress did not override Colorado stat-legal cannabis distribution laws in favor of the CSA. As a result, Colorado law controls. *Aronson, supra*. Colorado expressly state-legal and regulated cannabis sales are not "prohibited" under federal law.

Gonzales v. Raich does not change this result. The Court stated that "failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the Controlled Substances Act." 545 U.S. at 22. The Court was referencing unregulated personal-consumption marijuana as it existed at the time in California. Colorado both legalized and extensively

regulates sales of state-legal cannabis. *See* generally, C.R.S. §44-10-101, *et seq.*; *see also*, John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization*, 65 Case W. Res. L. Rev. 649 (2015). Thirty-seven states and the District of Columbia have followed suit. As Tenth Circuit Judge Carlos Lucero stated, this has created a "huge federalism dispute." *Feinberg v. Commissioner, 18-9005, oral argument beginning at 13:30*, https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3.

Given the above, Colorado expressly-legal and regulated sales are not prohibited by federal law. Thus, the summons investigating unlawful drug trafficking should not be enforced.

C. Under Our System of Government, Conduct Cannot Be Simultaneously Lawful and Unlawful.

The Tenth Circuit made the untenable assertion that §280E allows cannabis sales to be simultaneously lawful and unlawful.

> [Under §280E] Congress's use of "or" extends the statute to situations in which federal law prohibits the conduct even if state law allows it.

Opinion, App. at p. 19.

The principles of preemption forbid this result. Either the federal law prohibits the state-legal conduct

– thus preempting the state law – or it does not, keeping the state law in place. *Murphy*, 138 S. Ct. at 1480. An act cannot be simultaneously lawful and unlawful.

Furthermore, it would violate the core essentials of due process to allow conduct to be simultaneously lawful and unlawful.

An essential element of due process is notice of the proscribed conduct. Since the court assumes that one "is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Thus, due process will not allow an act to be simultaneously lawful and unlawful. Under those circumstances, constitutionally sufficient notice would be impossible. Also, it would be fundamentally unfair to allow government to make conduct simultaneously lawful and unlawful. It would create arbitrary government. A final decision needs to be made to provide due process – does the law of the state or federal government control here?

This core element of due process permeates the entire supremacy analysis. As discussed above, there is one law that controls given activity, and all other laws must flow without conflict with the controlling law. The supremacy/preemption analysis determines the controlling law. For the reasons stated above, Colorado law should control. Congress did not override state law.

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

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

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

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

For Sixteenth Amendment purposes, "income" is defined as "the *gain* derived from capital, from labor, or from both combined[.]" *Eisner v. Macomber*, 252 U.S. 189, 206-207 (1920) (emphasis added) (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918)) (quoting *Stratton's Indep., Ltd. v. Howbert*, 231 U.S. 399, 415 (1913)).

Famous tax jurist, Judge Learned Hand, described income for constitutional purposes in *Davis v. United States*, 87 F.2d 323, 324-325 (2d Cir. 1937). He stated that all receipts

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

Davis v. United States, 87 F.2d at 324-325.

The Tenth Circuit in *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018) declined to follow Judge Hand's rule and decided that only "costs of goods sold" was necessary to exclude under the Sixteenth Amendment. Since §280E did not disallow costs of goods sold, it was constitutional. The Tenth Circuit again declined to follow Judge Hand here and ruled that §280E was not in violation of the Sixteenth Amendment. *See* Opinion, App, p. 18, n. 7.

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

the Tax Court Judges disagreed and determined §280E unconstitutional.

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

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

To this end, the dissent concluded, "that the Sixteenth Amendment does not permit Congress to impose such a tax and that section 280E is therefore unconstitutional." *NCSBA*, 153 T.C. at 33.

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

III. THE TAXPAYERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THEIR RECORDS AND ARE SUBJECT TO FOURTH AMENDMENT PROTECTIONS

A. Reasonable Expectation of Privacy

As discussed above, a necessary element of §280E liability is unlawful drug trafficking. The Tenth Circuit ruled that the IRS has the power to investigate nontax activity criminalized by federal law to make this determination. This is so, "even if that determination requires the IRS to ascertain whether the taxpayer is engaged in conduct that could subject him or her to criminal liability under the CSA." Opinion, App. at p. 17. The Petitioners challenge that power. It is beyond the jurisdiction of the IRS to investigate nontax criminal activity. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006) (It is beyond the power of the Attorney General to administratively determine whether physicians have violated the CSA). The IRS has been given no jurisdiction over the CSA by Congress.

The Tenth Circuit acknowledged 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." *See* Opinion, App., p. 17.

The IRS has the power to share this same information found through the audit with the Department of Justice for criminal prosecution purposes. *See* 26

U.S.C. §6103(i)(3)(A); *United States v. One Coin-Operated Gaming Device*, 648 F.2d 1297 (10th Cir. 1981).

However, despite that wide grant of power to the IRS to investigate federal drug crimes, and the ability to share with law enforcement, the Tenth Circuit opines that a taxpayer has no Fourth Amendment rights when faced with that investigation.

"Because the Taxpayers have no Fourth Amendment right at stake, the IRS need not obtain a warrant supported by probable cause to get the [METRC] records."

The Tenth Circuit erred. The Petitioners have a reasonable expectation of privacy in their data based on the expectation of privacy test discussed in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

All persons who produce or sell marijuana pursuant to Colorado law must submit plant tracking data to the Colorado Marijuana Enforcement Division ("MED") through a system known as "METRC." METRC stands for Marijuana Enforcement Tracking Reporting & Compliance. The rules can be found on the State of Colorado website. https://www.metrc.com/colorado. It is a plant tracking system, not a financial system. *Id.*

METRC data is confidential. In fact, it is a criminal offense for Colorado to disclose the information:

> Any person who discloses confidential records or information in violation of the provisions of this article commits a class 1 misdemeanor

> and shall be punished as provided in section 18-1.3-501, C.R.S.

C.R.S. §12-43.3-201(5)[4].

Given the confidentiality of the records, the Appellants have a reasonable expectation of privacy. Thus, the government may only obtain the records through the use of a search warrant showing probable cause. *Carpenter, supra*.

The Tenth Circuit should have concluded that the Petitioners have an expectation of privacy in information that is compelled by the State of Colorado and was given under a promise of confidentiality. The information given to MED is neither bank records nor does it extend to the public in any other way. It is a crime to disclose the information. As *Carpenter* illustrates, this case should not rely solely on the act of sharing. This case is about a detailed chronicle of the Petitioners' transactions compiled every day, over several years.

It is the Petitioners' data that the IRS seeks to have the State of Colorado prepare in report form. These daily submissions form a chronicle that is compelled by law and implicates privacy concerns similar to that in *Carpenter*. Given that METRC is a daily compelled chronicle, and that the State of Colorado deemed

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[4] The Panel asserted that the Petitioners could not rely upon this statutory protection because Colorado revised the law after the fact allowing law enforcement access. However, the Petitioners' rights became fixed when the information was given. *See United States v. Rue*, 819 F.2d 1488, 1493 (8th Cir. 1987) (Rights become fixed on the date the summons is issued).

the information confidential, there should be a Fourth Amendment expectation of privacy attached. If the IRS wants the information, a warrant needs to issue, and probable cause need to be shown.

The Tenth Circuit ruled that the Petitioners gave up their rights to the data when they decided to move forward with cannabis sales and submit to the state regulatory scheme. However, this Court has disapproved of such waivers.

While based upon Fifth Amendment, the Supreme Court stated that one does not give up constitutional rights simply because s/he engages in unlawful conduct.

This Court overruled *Lewis v. United States*, 348 U.S. 419 (1955), which stated that one voluntarily waives Fifth Amendment privilege against the government obtaining documents related to wagering activity. This is because "one does not have a constitutional right to gamble." *Lewis v. United States*, 348 U.S. at 423. Rather, in *Marchetti v. United States*, 390 U.S. 39 (1968), the *Marchetti* Court concluded: "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself." *Marchetti*, 390 U.S. at 51. Likewise, when one decides to engage in activity where the government compels incriminating evidence by regulation (with a promise of confidentiality), one does not voluntarily waive Fourth Amendment rights in favor of another government agency. *See Boyd*, 116 U.S. at 632. The Fourth and Fifth Amendments have

an "intimate relation." *Id.* "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.[5]

It is clear why the Government chose to summon the records from a third party rather than from the Petitioners directly. The Government sought to bypass the Fifth Amendment protections by obtaining the incriminating evidence from the State of Colorado which had compelled it from the Petitioners under penalty of law.

Despite the Government's assertion that it seeks the information solely to assess tax, the audit investigation and Section 280E are directed to an area "permeated with criminal statutes," towards a group "inherently suspect of criminal activities." *Marchetti v. United States*, 390 U.S. 39 (1968). As a result, the standard analysis of the regulatory tax system does not apply. This is because the IRS's investigation of inherently criminal activity poses a "constitutional difficulty" – sacrificing Fourth and Fifth Amendment rights when the information is compelled through the

[5] The Tenth Circuit opined that the Petitioners waived this part of the argument because, while being timely raised to the district court judge, the argument was not raised to the magistrate judge. Petitioners do not believe such a waiver has occurred. *United States v. Raddatz*, 447 U.S. 667, 681-82, 100 S. Ct. 2406, 2415 (1980); *see also*, Fed.R.Civ.P. 54(d). The circuits are split in this issue: First, Fifth, Ninth and Tenth vs. Second and Eleventh Circuits. *See generally*, *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009).

use of the tax power. *Id.* Under the *Marchetti* line of cases (as supplemented by *Boyd*), the criminal investigatory aspect of unlawful drug trafficking cannot be divorced from the civil investigatory power. Under these facts, it is bad faith to investigate criminal drug trafficking without constitutional protections.

Regarding the Panel's summary argument that the confidentiality statute is preempted, the above arguments in Section I would apply. It is difficult to believe that Congress could preempt/destroy a state privacy statute only to allow the IRS power to give the confidential information to law enforcement.

B. The *Powell* Standard Does Not Protect the IRS In This Case

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

The Tenth Circuit cited to *La Salle* to support its contention that the IRS does not need probable cause to issue the summonses. "In *La Salle*, the Supreme Court reiterated its previous conclusion 'that Congress had authorized the use of summonses in investigating ***potentially criminal conduct***.'" Opinion, App., p. 29.

Aside from the Fourth Amendment concerns, above, the difference between the instant case and *Powell* and/or *La Salle* is that these cases do not address what happens when an agency has already made the determination that the law is being violated. The IRS has already made the determination that the Petitioners are drug trafficking in violation of federal law. *See, e.g.*, *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1113 (10th Cir. 2017) ("The IRS made initial findings that Green Solution trafficked in a controlled substance and is criminally culpable under the CSA.").

There is simply no way that the IRS can apply Section 280E without first making the predicate finding that the Petitioners have committed a federal crime. As discussed, above, the Tenth Circuit ruled that the IRS can indeed make the predicate finding of criminal conduct. *Green Solution, supra.*

The IRS cannot have it both ways. It cannot be allowed the power to administratively investigate drug crimes but also enjoy the relaxations of the *Powell* standard. They must have probable cause and this summons must be treated as a warrant. "There is . . . only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury." *Donaldson v. United States*, 400 U.S. 517, 540, 91 S. Ct. 534, 547 (1971). A summons under relaxed *Powell* standards will not suffice.

"The question of whether an Internal Revenue Service investigation has solely criminal purposes, so

as to preclude use of a summons under 26 U.S.C. §7602, must be answered only by an examination of the institutional posture of the Internal Revenue Service." *United States v. La Salle Nat'l Bank*, 437 U.S. 298, 316, 98 S. Ct. 2357, 2367 (1978).

IV. THE TENTH CIRCUIT MISAPPLIED THE MOTION FOR SUMMARY JUDGMENT STANDARD AND CONFUSED IT WITH THE SUBSTANTIVE ELEMENTS OF *POWELL*

In this case, the Government had the burden of proof to enforce the summonses. *Powell, supra.* The Government moved to both dismiss the petitions to quash while at the same time enforce the summonses. Since attachments and affidavits were appended to the Government's motions, the Tenth Circuit treated them as motions for summary judgment. "Thus, we will apply our traditional Rule 56 summary-judgment standard in assessing this case." *See* Opinion, p. 13.

Given the Panel's decision, summary judgment was used offensively.

"The court shall grant summary judgment if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587 (1986). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.*

"On a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in such party's favor; for purposes of deciding such motion, the nonmoving party's version of any disputed issue is presumed correct." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 454, 112 S. Ct. 2072, 2076 (1992).

The standard is rather straightforward. However, the Panel gave only lip service to it. The Panel weighed the conflicting evidence, gave the inferences in favor of the Government (moving party) and made factual rulings – all in violation of Rule 56.

A. Weighing the Evidence

The Tenth Circuit conflated the Summary Judgment Standard with rules announced in *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985). The Court, on summary judgment, placed a "slight" burden on the moving party ("IRS") with all inferences in favor of the government. Opinion, App., p. 12. The Tenth Circuit then placed a "heavy" burden on the non-moving party to "factually refute." It appeared that the burden on the Petitioners was by at least clear and convincing evidence. *See* Opinion, App. at 12. The

Panel, using this conflated standard, made factual findings of disputed facts and granted Summary Judgment. These disputed facts include:

Court Panel Finding:

"In May 2017, the IRS began investigating whether Standing Akimbo had claimed business deductions prohibited by Section 280E." Opinion, p. 3.

This is found nowhere in the record. Importantly, Standing Akimbo had not claimed business deductions on its tax returns.

"The information the Taxpayers did provide was so minimal and incomplete that Agent Pringle could not verify the accuracy of their returns." Opinion, p. 5.

This finding weighed the following statements in the two conflicting affidavits. The first from Petitioner Samantha Murphy and the second from the Revenue Agent, Tyler Pringle:

Samantha Murphy:

Standing Akimbo and its Principals have fully cooperated with Mr. Pringle and the IRS during the audits, including providing of numerous documents in response to Mr. Pringle's IDRs.

vs.

Tyler Pringle:

Standing Akimbo has provided only minimal, incomplete, and redacted financial and other records. It

has refused to provide detailed product or sales information.

Finding of the Panel:

"The Taxpayers only partially responded to the Document Requests and did not provide enough information to substantiate their returns.

For example, the Taxpayers provided none of the requested METRC reports."

Again, this is a weighing of conflicting evidence. First, Samantha Murphy then Tyler Pringle:

Samantha Murphy:

"I am . . . the Business Manager of Standing Akimbo. . . . I have personal knowledge of the facts stated herein. . . . In the summonses at issue, Mr. Pringle requested the following in regard to Standing Akimbo [Listing METRC Reports]. . . . These reports are not reports that are created in the ordinary course of business by Standing Akimbo, or any of its Principals. . . . To the best of my knowledge, these reports are not reports that are ordinarily created by the Marijuana Enforcement Division of the State of Colorado. . . . I have no information to show that these reports were in existence on the date the summons was issued."

vs.

Tyler Pringle:

"Standing Akimbo's production did not include information reported to the Colorado Marijuana

Enforcement Division ("MED"). Specifically, Standing Akimbo refused to produce information from MED's Marijuana Enforcement Tracking Reporting and Compliance ("METRC") system."

At the very least, these two conflicting affidavits create a question of fact whether Standing Akimbo: (1) created these reports; (2) whether these State of Colorado reports were available through Standing Akimbo; and (3) were the reports in existence on the date the summons was issued. Contrary to the Panel, testimony of absence of records is receivable as evidence of its non-occurrence. *See* 5 Wigmore, Evidence, sec. 1531.

Importantly, Mr. Pringle did not testify in any way what the reports were, how the reports were compiled, and whether they were in existence on the dates of the summonses.

The Opinion was a Panel assessment of disputed issues of material facts. In order to arrive at its finding, the Panel had to weigh conflicting affidavits and give inferences in favor of the moving party (Government).

B. Burden shifting

Under 26 U.S.C. §7603, the IRS must describe the documents summonsed with "reasonable certainty." This requirement addresses the evil of "the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general,

exploratory rummaging. . . ." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038 (1971).

To this end, the reasonable certainty requirement includes whether the documents exist.

> "We wish to emphasize that the burdens of production and proof on the questions of the existence, possession, and authenticity of the summoned documents are on the Government, not the taxpayer."

United States v. Rue, 819 F.2d 1488, 1493 n. 4 (8th Cir. 1987).

> "[T]he Government must know, and not merely infer, that the sought documents exist, that they are under the control of defendant, and that they are authentic."

United States v. Greenfield, 831 F.3d 106, 116 (2d Cir. 2016).

Nevertheless, the Tenth Circuit created a split of authority. The Panel acknowledged that the IRS failed to produce any evidence of the pre-existence of the reports. However, the Panel stated:

> "This argument fails. The Taxpayers bear the sole burden of factually supporting their affirmative defenses." Opinion, p. 28.

The Tenth Circuit became a lone dissenting circuit placing the burden to prove the non-existence of the summonsed documents on the taxpayer. The Court should reject this lone dissenting voice.

First, proving the negative, i.e., the documents do not exist, is ordinarily an "unsustainable burden." *United States v. Fordice*, 505 U.S. 717, 753 (1992).

Second, placing the burden on the government to prove existence comports with the particularity requirement that the government must identify with reasonable certainty what it is summonsing. Certainly, summonsing a non-existent document would not be a legitimate purpose of the Government. Further, allowing a summons of a non-existent document could be easily construed by the person summonsed that it must create the document to adequately respond to the summons. This is especially true where, as here, the summonsed document is a "report," i.e., a presentation of facts. *See Black's Law Dictionary* definition of report.

REASONS FOR GRANTING THE PETITION

This case is of national importance. Thirty-seven states and the District of Colombia have legalized cannabis and the federal government is refusing to stand down. There is not enough support in Congress to address the conflicting laws. While the Rohrbacher-Farr amendment has slowed the criminal prosecution of state-legal cannabis sales, *see e.g.*, *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (the Amendment "prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the

State Medical Marijuana Laws and who fully complied with such laws"), the federal government is still expending funds enforcing what the Government believes is unlawful trafficking of state-legal cannabis. *See, e.g.*, *United States v. Bureau of Cannabis Control*, Case No.: 20-CV-01375-BEN-LL (So. Dist. CA).

Through this and other Tenth Circuit decisions, the IRS is being empowered to be a preferred arm of law enforcement. The powers that are being conferred are much like the disapproved powers of the revenue agents in *Paxton's Case* – the IRS now can administratively determine what is unlawful trafficking under the CSA. The revenue agent can search for evidence of unlawful drug trafficking and the taxpayer has little protection under the Fourth Amendment. *See Powell, supra.* The spoils of the investigation can be turned over to law enforcement in the full, arbitrary discretion of the IRS. *See* 26 U.S.C. §6103(i)(3)(A); *United States v. One Coin-Operated Gaming Device*, 648 F.2d 1297 (10th Cir. 1981). The Court has disapproved of this close link between the IRS and law enforcement. *See Marchetti v. United States*, 390 U.S. 39 (1968).

Judge Carlos F. Lucero of the Tenth Circuit eloquently outlined the gravity of this dispute:

> "[T]hese cases are frustrating, because under the Constitution, under the Tenth Amendment, of course the powers of the federal government are limited to the powers granted under the Constitution, and the States reserve certain powers. What we have here, basically, is a huge federalism dispute."

> * * *
>
> "So, it's your interest here to raise taxes. But what you're saying is 'ok we're not only going to raise taxes, we are going to punish this business, to the point of destruction,' and you get into this huge mix of tax raising and criminal law."
>
> * * *
>
> "But what you are trying to do, it seems to me with all due respect, is not just raise ordinary and necessary taxes, but what you're trying to do is take this company or any company – forget this company – just look at the entire industry, and say 'we're going to tax 100% of gross sales, no exemptions, whatsoever, for the costs of goods, or for the deductions that would ordinarily and normally be granted any business that are legally operating within their state. And that seems to be more the power to destroy.' "

Oral Argument, Feinberg v. Commissioner, beginning at 13:30, https://www.ca10.uscourts.gov/oralarguments/18/18-9005.MP3.

Historically, the application of Section 280E by the IRS came after a conviction of drug law violations. *See*, *e.g.*, *Bender v. Comm.*, T.C. Memo 1985-375; *Sundel v. Comm.*, T.C. Memo 1998-78. However, in 1996 the IRS joined an inter-agency agreement to destroy state-legal marijuana. *See* https://clinton.presidentiallibraries.us/items/show/26039, p. 3.

> "To the extent that state laws result in efforts to conduct sales of controlled substances prohibited by Federal law, the IRS will disallow expenditures in connection with such sales to the fullest extent permissible under existing Federal tax law."

Id. at 3.

Therefore, the true purpose here is not to verify whether a business properly reported its gross receipts and allowed deductions for cost of goods sold. The goal is to destroy.

Unfortunately, the Tenth Circuit is simply aggravating federal/state relations. It is empowering more and more the IRS to determine the federal/state relationship regarding cannabis. However, this Court is the umpire of federal/state relations – not the IRS.

Congress and the states are not resolving these issues. Federal agencies are overstepping their constitutional bounds in the wake of the lack of legislative resolution. The time is ripe for this Court to step in and begin acting as the umpire. It needs to determine the issues of supremacy and misuse of the Fourth and Sixteenth Amendments.

It needs to reign in the abuse of the summons power. The modified summary judgment standard announced by the Tenth Circuit simply gives the government an end-run around the Fourth Amendment, allowing the Government to get what it wants without any real protections to our citizens. The summons process needs to be reviewed.

Also, regarding the procedural issues, there are two holdings within the Opinion which have created a split in the circuits. First, whether a litigant waives an argument when it is not brought to the attention to the magistrate judge in the first instance but timely brings it to the attention of the Article III judge before final judgment. The undersigned believes that the holdings of the Second and Eleventh Circuits are persuasive. Precluding an Article III judge from hearing an argument before final judgment would violate basic principles of due process. Prudential concerns of judicial economy as discussed by Tenth Circuit cases simply does not override the right to a full and fair hearing.

Second, as discussed above, the Government should have to prove with reasonable certainty the existence of summonsed documents. The Tenth Circuit is a minority circuit of one and placing the burden on the taxpayer to prove non-existence is simply not tenable.

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

CONCLUSION

The Court should grant certiorari and determine that, as a matter of law, Colorado state-legal cannabis is not superseded by the federal Controlled Substances Act, that Section 280E is unconstitutionally being violative of the Sixteenth Amendment, that if the IRS wants cannabis information compelled by the State of

Colorado, it must do so by warrant, that a summary judgment standard must be applied in accordance with Rule 56 with no special exceptions for summons actions, resolve the circuit splits as to the procedural issues, and provide such other and further relief as the Court deems proper.

Respectfully submitted,

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