No. _____

In The
Supreme Court of the United States

ALPENGLOW BOTANICALS, LLC, A COLORADO LIMITED LIABILITY COMPANY; CHARLES WILLIAMS; JUSTIN WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

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

1) Did Congress, under 26 U.S.C. §280E, empower the IRS and its civil auditors to investigate federal drug law crimes and administratively determine whether a taxpayer is criminally culpable under federal drug laws?

2) Is Section 280E – a provision that strips the taxpayer of the benefit of taking otherwise lawful deductions and credits if it is found that the taxpayer is a criminal drug trafficker – a penalty for crime?

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.

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

OPINIONS BELOW

The opinion of the court of appeals is a published decision, *Alpenglow Botanicals, LLC v. U.S.*, 894 F.3d 1187 (10th Cir. 2018). Appx. A-1. The order denying reconsideration is unreported. Appx. A-66. The opinion of the district court is unreported. Appx. A-36. The order of the district court denying the Rule 59 Motion is also unreported. Appx. A-57.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2018. Appx. A-1. A timely petition for a FRAP Rule 35 Request for En Banc Consideration and FRAP Rule 40 Request for Rehearing was denied on September 25, 2018. Appx. A-66. A timely request for an extension of time to file this Petition for Writ of Certiorari until February 22, 2019 was granted on December 21, 2018. This Petition has been timely filed on or before February 22, 2019. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. Const., Article III, Section 2

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment V, Bill of Rights

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment VIII, Bill of Rights

STATEMENT

a. General Background

This case, while couched in tax law, is ground zero of the largest federalism dispute this country has seen since the Civil War. The federal government claims that marijuana is a Schedule I controlled substance, the possession or distribution of which is generally a serious federal crime. Thirty-three States and the District of Columbia have fervently disagreed with the federal government and have legalized marijuana on various levels. Many individuals have moved forward either possessing or distributing marijuana in accordance with State law. Undaunted, the federal government seeks to hold its power and destroy what the States claim they can do under the Tenth Amendment – the Tax Code being the primary weapon of choice. Section 280E of the Tax Code is the weapon.

The effect of Section 280E is clear. Section 280E divorces the concept of gain from the definition of income that this Court has required since the advent of the Sixteenth Amendment. *See Eisner v. Macomber*, 252 U.S. 189 (1920). The taking away of the ability to subtract incurred ordinary and necessary expenses to

determine income has created a huge penalty instead of a tax on income. For example, in *Feinberg v. Commissioner*, T.C. Memo 2017-211, Section 280E resulted in nearly a $300,000 tax even though the taxpayers received no compensation or gain. In *High Desert Relief v. Comm'r*, 13289-18 (U.S. Tax Court), Section 280E resulted in an income "tax" of 329% of net income.

As part of the use of this weapon, the IRS investigates whether the taxpayers have committed drug trafficking crimes. The IRS claims that the taxpayer must make available all the taxpayer's books and records which would establish the crime. *See* 26 U.S.C. §6001. The IRS has reserved all rights to share the information with federal law enforcement under 26 U.S.C. §6103(i)(A)(3). However, the IRS, along with the Department of Justice, refuses to grant immunity for drug law crimes and fully reserves the right to prosecute the taxpayers based upon the information the IRS receives in the Audit. If the taxpayer claims Fifth Amendment privilege, the IRS taxes the taxpayer on gross receipts (instead of gross income) because the taxpayer will not confess to the crime and describe the nature and extent of the product sold. *See, e.g.*, *Superior Organics v. Comm'r*, 18726-18 (U.S. Tax Court). This results in an excessive tax.

While in the days of *Feinberg I*, the federal government was sending "mixed messages" about the enforcement of federal criminal drug laws against State legal marijuana, those days have passed. The federal government now has affirmatively stated that it intends

to fully enforce the drug laws against State legal marijuana.

> "[T]he Department of Justice has specifically rescinded its former policy of non-prosecution for marijuana dispensaries complying with State law, evidencing governmental intent to enforce the law." *See* Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Justice for all U.S. Att'ys (Jan. 4, 2018)."

Appx. A-1, p. 34.[1]

This matter is one of many where the IRS, under color of Section 280E, investigates the drug law crimes and administratively determines that the crime had been committed. As a result of this administrative determination of criminal drug trafficking, the IRS stripped the Alpenglow Petitioners of their ability to subtract ordinary and necessary expenses to determine their tax for income tax purposes.

The Petitioners challenged the IRS's determination, as more fully discussed below. A panel of the Tenth Circuit affirmed the IRS's administrative determination. Under the decision, the Internal Revenue Service ("IRS") has the power to investigate and administratively determine that a taxpayer:

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[1] The new Attorney General, William Barr, indicated in his confirmation proceedings that he may resurrect the Cole and Ogden Memos. However, it is unknown at this time what his official position will be now that he is in office.

> "***[C]ommitted the crime of trafficking in a controlled substance in violation of the CSA.***"

See Appx. A-1, p. 3 (emphasis added).

This determination is despite the fact that pursuant to the Tenth Amendment, thirty-three States and the District of Columbia have legalized the sale of marijuana for medical purposes. Ten States have legalized marijuana for "adult use" and regulate it in a similar manner as alcohol.

This IRS determination is also despite the fact that Congress has defunded the Department of Justice from prosecuting CSA crimes that involve otherwise lawful sales from medical marijuana States from 2014 until today.[2]

b. Background of the Case

Alpenglow Botanicals, LLC ("Alpenglow"), and Charles Williams and Justin Williams (collectively referred to as "Williams") were under Audit for tax years 2010 through 2012 by the IRS (the "Audit"). As a result of the Audit, the IRS issued a letter Form 921 on December 11, 2014, denying certain deductions which

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[2] *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §537, 131 Stat. 135, 228 (2017); and Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §538, H. R. 1625–97-98 (2018).

correspondingly increased both the income and tax of Alpenglow and Williams. The deductions were denied because the IRS administratively determined that Alpenglow and the Williams committed the crime of trafficking in a controlled substance in violation of the Controlled Substances Act, 21 U.S.C. §801, *et seq*. ("CSA"). The increased tax liability was paid under protest.

Subsequently, the parties timely filed amended returns and timely filed claims for refunds for tax years 2010 and 2012 pursuant to 26 U.S.C. §7422(a). With respect to Alpenglow, the IRS responded and denied the claims on or about May 29, 2015. With respect to the Williams, the IRS did not respond to their claims for refund for over 180 days. As a result, these claims are deemed denied.

The redetermination of the tax liability of Alpenglow and the Williams was a result of the IRS invoking 26 U.S.C. §280E. Section 280E disallows a taxpayer's ability to take otherwise lawful deductions or credits in a person's trade or business if that person is unlawfully "trafficking" in a controlled substance. There has been no conviction of Alpenglow or the Williams of any drug crimes in any court.

In the action, the IRS claimed it was both necessary and within its power to make administrative determinations that a person is criminally culpable under federal drug laws in order to strip the taxpayer of the benefit of taking lawful deductions.

Both the District Court and the Tenth Circuit Court of Appeals affirmed the IRS's administrative determination of criminal drug trafficking. This Petition timely follows.

Moreover, the IRS has routinely denied the taxpayers immunity based on the information provided in the Audits. *See* oral argument *Feinberg v. Comm'r*, https://www.ca10.uscourts.gov/oralarguments/18/18-9005. MP3 at 23:00 through 23:55. Thus, the IRS has preserved the right to share the information given in the Audit with the DOJ for prosecution purposes.

Importantly, the actions of the Internal Revenue Service are ongoing. This action is only one of many and is part of the larger attempt by the IRS to shut down the Colorado marijuana industry using the tax code.[3] *See Feinberg v. Commissioner*, 808 F.3d 813, 814

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[3] *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1113 (10th Cir. 2017). *See also Futurevision, Ltd. v. United States*, 1:17-MC-00041-RBJ (D. Colo.) (IRS summonsing METRC claiming that the Petitioner unlawfully trafficked in a controlled substance); *Nutritional Elements v. United States*, 16-MC-0188-PAB (D. Colo.) (same); *Nutritional Elements v. United States*, 17-MC-00052-RM (D. Colo.) (same); *Colorado's Best, Inc. v. United States*, 1:17-MC-00154-RBJ (D. Colo.) (same); *Green Solution, Inc. v. United States*, 1:16-MC-00137-PAB (D. Colo.) (same); *Eric Speidell*, 1:16-MC-00162-PAB (D. Colo.) (same); *Medicinal Wellness Center, LLC v. United State*s, 1:17-MC-00170-PAB (D. Colo.) (same); *Rifle Remedies, LLC v. United States*, 1:17-MC-00062-RM (D. Colo.) (same); *Standing Akimbo, LLC v. United States*, 1:17-MC-00169-WJM-KLM (D. Colo.) (same); *High Desert Relief, Inc. v. United States*, 1:16-CV-469 MCA/SCY (D. N.M.) (IRS summonsing information from New Mexico Medical Cannabis Program claiming that the Petitioner unlawfully trafficked in a controlled substance); *High Desert Relief, Inc. v. United States*,

(10th Cir. 2015) ("[O]fficials at the IRS refuse to recognize business expense deductions claimed by [marijuana dispensaries] on the ground that their conduct violates federal criminal drug laws. *See* 26 U.S.C. §280E.").

SUMMARY OF THE ARGUMENT

1. The IRS does not have the power to determine criminal culpability of drug law crimes.

The Tenth Circuit interpretation of Section 280E would have Congress overstep its bounds. The IRS does not have the power or authority to administratively determine that a person has criminally violated federal criminal drug laws. The IRS only has authority within the Tax Code, i.e., assess and collect tax. In order for Section 280E to apply, there must first be a determination that the taxpayer violated State or federal drug laws. Administratively determining whether drug crimes have been committed is outside the jurisdiction of any agency, including the IRS. The determination of criminal culpability is solely for the courts to decide under Article III of the Constitution.

Section 280E of the Tax Code did not empower the IRS to investigate and administratively rule that a person has violated criminal drug laws. If Congress wants to assign the Executive Branch discretion to

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1:16-CV-816 MCA/SCY (D. N.M.) (same); and *Feinberg v. C.I.R.*, 808 F.3d 813 (10th Cir. 2015).

administratively determine criminal conduct, it must speak "distinctly." *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892). This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). There is nothing within Section 280E that "distinctly" empowers the IRS to engage in federal criminal drug law investigations and determinations. To conclude otherwise would be a dangerous expansion of IRS power and would be unconstitutional.

2. Section 280E is a penalty for crime as it applies to criminals and no others. It is not a tax.

The Tenth Circuit erred in determining that Section 280E is not a penalty for crime.

Section 280E only applies if the taxpayer has committed the predicate act of illegal trafficking of Schedule I or II drugs. *Feinberg, supra.* When a tax is imposed on criminals and no others, it departs so far from normal revenue laws as to become a form of punishment. *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 783 (1994).

Section 280E applies to criminals and no others. Contrary to the Tenth Circuit, a denial of exemptions or deductions may be deemed a penalty. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (Tax statute denying an exemption if taxpayer criminally subverts the government is not a tax; it is a penalty).

The fact that Section 280E is a penalty for crime is both violative of the Eighth Amendment excessive fines clause and further supports that the IRS does not have the authority to investigate or administratively determine that the crime has been committed.

ARGUMENT

A. THE TENTH CIRCUIT ERRED IN HOLDING THAT THE IRS HAS ADMINISTRATIVE AUTHORITY TO DETERMINE WHETHER A TAXPAYER HAS CRIMINALLY VIOLATED DRUG LAWS.

i) The IRS Does Not Have Authority to Define Criminal Law.

The merits of the Petitioners' claims are clear. The IRS is acting in excess of its powers. It does not have power to administratively define crimes and determine whether the crime has been committed.

Such a claim of power by the IRS is unprecedented. The CSA is not part of the Tax Code, and the courts have not previously determined that the IRS has power to administratively determine criminal culpability under federal criminal drug laws. This is a case of first impression for this Court.

It is noteworthy that the Tenth Circuit was unable to cite a single judicial precedent holding that the IRS is empowered to investigate, much less administratively find, nontax criminal activity. The Court referred

to *Green Solution Retail, Inc. v. United States*, 855 F.3d 1111 (10th Cir. 2017) (cert. denied) where the Court did not see any mandate from Congress that a criminal conviction must occur first. However, the *Green Solution* court did not cite to any judicial precedent holding that civil IRS auditors have inherent authority to investigate *any* nontax crime, much less drug law crimes. This is because there is no precedential authority to this effect. This is undoubtedly so because it is well established that a civil tax auditor's investigatory power is constitutionally limited when it comes to criminal activity. *See*, *infra*.

Section 280E is very concise:

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

26 U.S.C. §280E

The elements of Section 280E are (1) person; (2) in the person's trade or business; (3) "traffics"; (4) in a Schedule I or II controlled substance; and (5) prohibited by federal or State law. 26 U.S.C. §280E.

Thus, in order for Section 280E to apply, the taxpayer must have engaged in unlawful conduct outside

the Tax Code. Since the sale of marijuana is lawful in Colorado, the unlawfulness would have to be found in federal law, e.g., the Controlled Substances Act, 21 U.S.C. §801, *et seq.*

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 became an important law enforcement vehicle to destroy State legal marijuana when the Clinton Administration created a multi-agency task force to destroy State legal marijuana. *See* https://www.scribd.com/document/361937054/NLWJC-Kagan-DPC-Box015-Folder011-Drugs-Legalization-Efforts, p. 3 (the "Memo").

> "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.

So, it is no wonder why

> "prosecutors will almost always over-look federal marijuana distribution crimes in Colorado but the tax man never will."

Feinberg, 808 F.3d at 814.

In this federalism dispute, the tax man is here to destroy.

This inter-agency strategy has previously run into problems. The DOJ agreement in the Memo to revoke physician controlled substance license was found to violate First Amendment protections, thus beyond the DOJ power. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (Policy to revoke DEA physician licenses to prescribe controlled substances if physician recommends use of marijuana violative of the First Amendment).

Likewise, the IRS agreement in the Memo exceeds its powers. The IRS does not have the authority to define criminal law. So, it cannot administratively determine that a taxpayer is an unlawful drug trafficker.

If Congress wants to assign the Executive Branch discretion to administratively define criminal conduct, it must speak "distinctly." *United States v. Grimaud*, 220 U.S. at 519; *United States v. Eaton*, 144 U.S. at 688. This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. at 2274. (2014).

This clear-statement rule reinforces horizontal separation of powers in the same way that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), reinforces vertical separation of powers. It compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority.

Given the above, the IRS does not have authority to investigate and administratively determine that a person has violated federal criminal drug laws.

ii) The One Interpretation Rule Precludes the Tenth Circuit's Determination that Criminal Drug Trafficking for Tax Purposes is Different than for Criminal Purposes.

As discussed above, the Court approved the IRS administratively determining that Appellants "committed the crime of trafficking in a controlled substance in violation of the CSA." The Tenth Circuit sidestepped the issue that the IRS was making determinations of criminal law by claiming criminal trafficking is somehow different under tax law than criminal law.

> "At the core of Alpenglow's argument is the assumption that a determination a person trafficked in controlled substances under tax law is essentially the same as a determination the person trafficked in controlled substances under criminal law. . . . We . . . reject[ ] this argument."

Appx. A-1, p. 9.

The Tenth Circuit's rationalization violates the one-interpretation rule.

A single statute has a single interpretation regardless if the statute has dual applications. Thus, courts must give dual-application statutes just one interpretation, and the criminal application controls. Statutes are not "chameleon[s]" that mean one thing in one setting and something else in another. *Carter v.*

Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013).

The IRS's finding that Petitioners "committed the crime of trafficking in a controlled substance in violation of the CSA," can only have one interpretation, and the criminal interpretation of the CSA controls. *Id.* There can be no separate "tax interpretation" of the CSA.

A single law has a single meaning. Thus, the "lowest common denominator" – including all rules applicable to the interpretation of criminal laws – governs all of its applications. *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Under the one-interpretation rule, *United States v. Thompson/Center Arms Co.* applied the rule of lenity to a civil tax case that turned on language that had civil and criminal applications. 504 U.S. 505, 517-18 & n.10 (1992) (plurality opinion); *id*. at 519 (Scalia, J., concurring in the judgment).

This Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute prevails over the civil-law construction of it. When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation. *See, e.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 16 (2011); *Clark*, 543 U.S. at 380; *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 408-09 (2003).

Nevertheless, the Tenth Circuit rejected the one-interpretation rule in favor of differing criminal and civil tax interpretations of the CSA. The Court's rejection of the rule and acceptance of the IRS's civil interpretation turns "the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990).

iii) The Tenth Circuit Decision Effectively Reverses Long Standing Precedent that Civil Auditors May Not Conduct Criminal Investigations.

It is well established that the Constitution limits a civil auditor's investigatory authority of tax law crimes (which, unlike nontax crimes, are clearly within the IRS's jurisdiction). For the civil audit to meet Fourth and Fifth Amendment protections, a civil auditor must cease all civil audit activities once the civil auditor determines that there are "firm indications of fraud." "[O]nce an IRS agent has developed 'firm indications of fraud' in a civil investigation, the case must be turned over to the CID [Criminal Investigations Division]." *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993). This is because:

> "Significantly different rights, responsibilities, and expectations apply to civil Audits and criminal tax investigations. It would be a flagrant disregard of individuals' rights to deliberately deceive, or even lull, taxpayers into incriminating themselves during an audit

> when activities of an obviously criminal nature are under investigation."

United States v. Grunewald, 987 F.2d at 534.

> "Therefore, if a revenue agent continues to conduct a civil audit after developing 'firm indications of fraud,' a court may justifiably conclude that the agent was in fact conducting a criminal investigation under the auspices of a civil audit."

United States v. Peters, 153 F.3d 445, 452 (7th Cir. 1998).

It is constructively deceitful for constitutional purposes to have the civil auditor continue the audit under those circumstances. *Id.* Thus, for tax crimes, the civil auditor cannot proceed and certainly cannot make administrative determinations of tax fraud under those circumstances. It must be turned over to the criminal investigators. *Id.*

However, for nontax crimes, the Tenth Circuit has freed the civil auditor to fully conduct investigations into the nontax criminal activity and make administrative determinations thereof. Of course, the IRS may supply the fruits of the investigation to law enforcement for criminal prosecution purposes. 26 U.S.C. §6103(i)(A)(3). So now, the investigatory power of a civil tax auditor is constitutionally limited for tax crimes, but is unlimited for nontax crimes. The Tenth Circuit decision should be reversed.

iv) Under the Tenth Circuit Holding, Taxpayers Are Now Required to Keep Books and Records of Drug Law Crimes and Must Turn the Incriminating Information Over to the IRS Upon Demand.

As explained above, the Tenth Circuit has ruled that investigation and finding criminal drug law culpability is part of the IRS's administrative tax authority.

The Tenth Circuit determined that the IRS's power to investigate nontax crimes is derived from the IRS's general investigatory power under 26 U.S.C. §6201. Appx. A-1. Since drug law crimes are now an area for which the IRS may lawfully compel incriminating evidence, the taxpayer must keep records of the drug law crimes and produce the evidence to the IRS upon demand. 26 U.S.C. §6001.

Failure to keep and turnover this information is a criminal offense. 26 U.S.C. §7203. A defense to a §7203 charge is Fifth Amendment privilege. However, the Tenth Circuit ruled that the IRS's new-found authority to compel information of federal drug crimes does not implicate Fifth Amendment concerns because "unlawfulness of an activity does not prevent its taxation."[4] Appx. A-1, p. 13. Thus, now it is a criminal offense to refuse to provide the drug crime evidence to the IRS agents under a claim of Fifth Amendment privilege – at least in the Tenth Circuit. 26 U.S.C. §§6001 and

[4] We respectfully disagree that the tax power completely overrides the Fifth Amendment.

7203; *see also United States v. Willis*, 599 F.2d 684 (5th Cir. 1979) (Absent a valid Fifth Amendment claim, a taxpayer is criminally culpable for failure to supply information to the IRS under §7203).

This is yet another reason why certiorari must be granted and the Tenth Circuit decision reversed.

v) The Tenth Circuit Decision Implicates *Chevron* Deference Being Allowed for Criminal Law.

Also, the Tenth Circuit, by giving the IRS authority to interpret criminal law, now subjects the CSA to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837 (1984). However, *Chevron* deference is part of the reason the courts have not allowed agencies to define crimes. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring); *see also Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) (Attorney General does not have jurisdiction to define drug law crimes under the CSA for administrative enforcement purposes).

Under the Tenth Circuit's ruling, the one-interpretation rule is thrown out and the IRS has great power in interpreting what federal drug law crimes are under the CSA. *See Chevron*, *supra*. Effectively, for administrative purposes, the IRS can create new drug law crimes at will.

The administrative orders interpreting these crimes can have far reaching effects. Combining

Chevron deference with determining criminal culpability could destroy our criminal justice system.

Given the IRS's new power, under *Chevron*, who will the IRS determine to be unlawfully "trafficking" in controlled substances? The seller of cannabis? How about the welder who assists in putting together the grow facility? The welder assisted in the trafficking "crime." How about the doctor who recommends cannabis to the patient for medical purposes under Colorado law? S/he is definitely an important accessory to traffic. For that fact, how about the utility company who knowingly supplies electricity for the cannabis grows? Certainly, knowingly supplying the electricity to grow cannabis under agreement could be considered conspiracy to traffic. The answer lies in the deference of the agency. Now, "criminal defendants [are] one agency interpretation away from being incarcerated." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d at 735.

What will these drug-law-crime investigations look like? How will they differ from a traditional criminal investigation? They will clearly be more expansive. The IRS's investigations of unlawful drug trafficking will not be impeded by Fourth and Fifth Amendment concerns, unlike law enforcement. *See, e.g.*, *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (Fourth Amendment probable cause is not implicated in an IRS summons of documents). We are already getting a glimpse of these investigations through the order in *Standing Akimbo, infra*.

With this new-found authority, the IRS may come into Walgreens, without a warrant, and rifle through all of the patient records to see whether any prescriptions of Schedule II controlled substances were illegally issued and sold. *See* 26 U.S.C. §§7602 and 7606. After all, the IRS is now empowered to determine whether any business has unlawfully trafficked in a controlled substance to determine tax liability. The power is now clear. Of course, this power is necessarily extended to investigate all drug manufacturers such as Pfizer and Lily. The IRS must assure that the drug manufacturers (or for that fact, any other person) are not unlawfully trafficking in drugs to determine the proper tax. The days of the general writs of England are back.

vi) The Use of the Administrative Determinations of Criminal Culpability.

Normally, a tax notice of determination ("NOD") is reduced to an assessment and takes the form of a judgment. *Bull v. United States*, 295 U.S. 247 (1935). Since the IRS now has jurisdiction to determine criminal drug law culpability, the determination is now a proper subject of the NOD. It too will be reduced to judgment. When an agency has jurisdiction to make findings of fact and conclusions of law in an area, such findings are binding upon the subsequent criminal prosecution of the same facts and may not be retried de novo. *Yakus v. United States*, 321 U.S. 414 (1944); *Cox v. United States*, 332 U.S. 442 (1947).

> "The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

Cox v. United States, 332 U.S. 442, 453 (1947).

> "Though Yakus arose and was decided in a wartime context . . . the Supreme Court has never repudiated the fundamental principle on which the decision rests. [Cox] buttresses the holding in Yakus that the Sixth Amendment does not require that in a criminal prosecution the facts underlying an administrative order be tried de novo by a jury."

United States v. Gonzalez-Parra, 438 F.2d 694, 699 (5th Cir. 1971).

The rule has met severe criticism. *See United States v. England*, 347 F.2d 425, 431 (7th Cir. 1965); *see also United States v. Phillips*, 427 F.2d 1075, 1078 n.7 (5th Cir. 1970) (" We are not confronted with the Fourth Circuit's holding that the issue could be determined as a matter of law and need not have been submitted to the jury. . . ."). Nevertheless, this is a Pandoras' Box, which the Tenth Circuit opened by giving the IRS authority to administratively determine violations of federal criminal drug laws.

Like the lack of precedential authority providing the administrative power to determine drug law

crimes, there is no precedential authority commanding any limitation on the use of the administrative determination. In fact, the weight of authority is to the contrary.

Furthermore, the NOD could be used to determine criminal culpability in actions such as civil forfeiture and civil injunctions under the CSA. *See* Fed.R.Evid. 803(8).

The Tenth Circuit's decision has now opened the door to criminal convictions of drug law crimes via administrative order, as well as civil forfeitures and injunctions based upon the IRS's administrative determination. For the sake of our Constitution, this is not a door which should be opened.

As stated above, these administrative interpretations may have preclusive effect on subsequent criminal trials. Unless the crimes are arbitrary, the Court may have no power to reel in the IRS's interpretation of these criminal laws. *Id*. Fourth, Fifth and Sixth Amendment protections are now dead in the Tenth Circuit in favor of the IRS.

Even if the investigation and findings do not have preclusive effect, the information obtained may be used in the subsequent criminal drug law prosecution, civil forfeiture or RICO actions. *See Garner v. United States*, 424 U.S. 648 (1975) (Federal tax return information used as primary evidence to convict taxpayer of unlawful gambling). Also, the findings may be used in any civil enforcement proceeding such as civil forfeiture or civil RICO. *See* Fed.R.Evid. 803(8). Since the

incriminating information would be lawfully compelled in the tax audit (with no statutory restriction on sharing with law enforcement), the Court could not limit the use of the information to tax purposes. *Haynes v. United States*, 390 U.S. 85, 100 (1968). All incriminating information of drug law violations compelled by law through the civil tax auditor could be used in the subsequent criminal prosecution.

This Court needs to grant certiorari.

vii) Granting the IRS the Authority to Investigate and Find Violations of Federal Criminal Drug Laws Necessarily Will Make Section 280E Unconstitutional.

Granting the IRS the authority to investigate and find violations of federal criminal drug laws necessarily grants the IRS the authority to use an unconstitutional methodology.

The Tenth Circuit declined to apply the *Leary v. United States*, 390 U.S. 6 (1969); *Marchetti v. United States*, 390 U.S. 39 (1969); *Grosso v. United States*, 390 U.S. 62 (1969); and *Haynes v. United States*, 390 U.S. 85 (1969) line of cases because, in the Court's opinion, these cases looked at unconstitutional *methodology* and the focus here was on the *authority* of the IRS. Respectfully, the panel missed the point. The distinction is without a difference.

In the *Leary* line of cases, the Court struck the Marijuana Tax Act, Wagering Tax Act, and the National

Firearms Act because (1) the tax acts required the taxpayers to turn over incriminating evidence to the IRS; and (2) allowed the IRS to share the incriminating evidence to federal law enforcement without a grant of immunity.

By granting the *authority*, the Tenth Circuit necessarily granted the use of the statutory audit *methodology* which this Court has found unconstitutional under the *Leary* line of cases.

The panel correctly noted that "these cases struck down IRS regulations that required the taxpayers to disclose information such as the names and address of the sellers and buyers, their registration numbers, and the quantity of products sold." Opinion at 11. However, the Court's decision granting the authority here is already being used to legitimize this same unconstitutional methodology. *See* Order, August 7, 2018, *Standing Akimbo, LLC v. United States*, 1:17-MC-00169 (D.C. Colo). The Magistrate Judge opined that:

> "The Tenth Circuit has previously held that investigating the application of §280E is a legitimate purpose for an IRS investigation, including when that investigation necessarily leads the IRS to investigate whether the taxpayer has been trafficking in illegal drugs."

Order, p. 7.

Using the *Alpenglow* decision as an authority, the Magistrate Judge then found that the following audit methodologies are a part of the IRS's power granted by

this Court: (1) The IRS "seeking the identities of third parties" (buyers and sellers). (Order, p. 6); (2) Compelling the taxpayer's marijuana license and registration information because "it might throw light on the taxpayer's return." (Order, p. 9); and (3) "accounting for all marijuana plants and products within Colorado. . . ." (Order, p. 8-9)[5]. As the court in *Standing Akimbo* has demonstrated, the authority and the methodology are intertwined and inseparable.

Given the Tenth Circuit's grant of authority, drug law crimes are now a necessary part of administrative tax investigation. *Standing Akimbo, supra.* Thus, under the statutory methodology, taxpayers are required keep and disclose to the IRS the drug law crime information. 26 U.S.C. §6001. Since this Court has ruled that the Fifth Amendment is not implicated by this authority, taxpayers are now compelled to incriminate themselves.

Of course, this information of nontax criminal activity may be shared by the IRS to law enforcement in the IRS's discretion. 26 U.S.C. §6103(i)(A)(3); *see also United States v. One Coin-Operated Gaming Device*, 648 F.2d 1297 (10th Cir. 1982).

As shown above, the IRS is currently using this power to compel the disclosing of the sellers and buyers of marijuana, their licenses and registration

[5] Our experience with §280E audits has demonstrated that this information is among the first items the IRS demands of the taxpayer at the commencement of the audit.

numbers, and the quantity of product sold.[6] See *Standing Akimbo, supra, see also*, *Medicinal Wellness Center, et al. v. United States*, 1:18-MC-00031-PAB (D.C. Colo) (IRS summonsing METRC information regarding identity of purchasers of marijuana, marijuana licenses and registration numbers of taxpayers, and quantity type of marijuana product sold).

The Tenth Circuit determined that *Leary* and *Marchetti* disapproved of such methodology since "these tax provisions violated the Fifth Amendment due to the 'substantial' and 'real' . . . hazards of incrimination." Appx. A-1, p. 12. However, as demonstrated with *Standing Akimbo*, the Tenth Circuit has approved the authority to use this precise methodology. The

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[6] While the *Standing Akimbo* court was construing the power of the IRS to compel a State mandated daily chronicle of marijuana transactions by a taxpayer (METRC), the power is just as applicable to the taxpayer directly. Both are a search for criminal wrongdoing for tax administration purposes – using a summons instead of a warrant. "[O]ur cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018) (Disapproving a summons procedure as unconstitutional to obtain cell phone tower records. Third-party records doctrine also called into question). The IRS is a law enforcement agency. *Church of Scientology Int'l v. U.S. Internal Revenue Serv.*, 995 F.2d 916, 919 (9th Cir. 1993). A "detailed chronical" of a person's activities over years held by a third party implicates privacy concerns protected by the Fourth Amendment. *Carpenter, supra.* However, with the *Alpenglow* decision, the IRS does not have to worry about *Carpenter.* The power to compel this information about drug law crimes is now inherent and the authority has no limits.

methodology is statutorily concurrent with the authority. Thus, the power and the methodology are inseparable. Since the IRS has been granted the power by the Court, the power to employ the methodology necessarily goes with it.

The IRS's Court-approved authority necessarily grants the IRS the unconstitutional *methodology* which this Court has disapproved. Unlike the gambling statutes which were amended post-*Marchetti*, *see* 26 U.S.C. §4424, Section 280E does not contain any of the required constitutional protections necessary to allow the IRS investigatory authority of drug law crimes. Thus, the IRS's investigatory authority of drug law crimes under §280E should not be implied. "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

Empowering the authority necessarily empowers the unconstitutional methodology. *United States v. One Coin-Operated Gaming Device*, 648 F.2d at 1300 ("The IRS is no longer required to disclose the names of persons paying special taxes, and there is no indication in the record of this case that IRS officials are providing information derived from Form 11-B to State or federal prosecutors; still, protection such as that afforded by section 4424 and absent here is necessary"). It's the *grant* of power – not whether the power is *actually used*. *Id.*

Since §280E does not contain the mandatory constitutional protections required when investigating taxpayers "inherently suspect of criminal activity," the Tenth Circuit erred in finding that Congress empowered the IRS to investigate and administratively find federal criminal drug law violations. The Court's decision necessarily renders Section 280E unconstitutional.

B. THE TENTH CIRCUIT ERRED IN REFUSING TO DETERMINE THAT SECTION 280E IS A PENALTY.

The Tenth Circuit erred by dismissing Petitioners' Eighth Amendment claims. It incorrectly held that Section 280E is not a penalty. This Court should reverse and allow the Petitioners' Eighth Amendment claims to proceed.

Section 280E only applies if the taxpayer has committed the predicate act of illegal trafficking of Schedule I or II drugs. *Feinberg*, *supra*. When a tax is imposed on criminals and no others, it departs so far from normal revenue laws as to become a form of punishment. *Kurth Ranch*, 511 U.S. at 783.

> "A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly

> a penalty it cannot be converted into a tax by the simple expedient of calling it such."

United States v. LaFranca, 282 U.S. 568, 572 (1931).

The fact that Section 280E is a penalty implicates both the power of the IRS to investigate the drug crimes and the Eighth Amendment against excessive fines and penalties. For these reasons, the Court should determine that Section 280E is a penalty.

REASONS FOR GRANTING THE PETITION

The Petitioners respectfully urge the Supreme Court to grant the Petition to determine whether the IRS has administrative authority to define criminal culpability under nontax criminal drug laws.

The Tenth Circuit already determined that this is an important matter, as the opinion by the panel was published. The panel stated: "This appeal is the product of the clash between State and federal policies [regarding the sales of marijuana]." (Opinion, p. 3). Also, this case is being followed by the press and the undersigned also understands that this case is being followed by members of Congress. Regardless of the outcome, the answer to this question has major national policy implications.

Importantly, as the *Alpenglow* court demonstrated, there is no precedent for these powers. This is a case of first impression which will set the course of this country for many years to come.

Thirty-three States and the District of Columbia have legalized the sale of marijuana either medically or for adult use. While the CSA potentially makes such sales illegal on the federal level, this question has not been definitively answered. Questions abound about the effect of the now repealed Cole and Ogden Memos, the Rohrabacher-Blumenauer Amendment, and preemption.

As Justice Gorsuch noted in the *Feinberg* decision:

> "In light of questions and possibilities like these, you might be forgiven for wondering whether, memos or no memos, any admission by the petitioners about their involvement in the marijuana trade still involves an "authentic danger of self-incrimination."

Feinberg, 808 F.3d at 816.

The political war rages and few do not have an opinion on the merits. Ultimately, the legalization of marijuana will be decided by Congress and the Several States.

However, these political questions should not be decided by the IRS. The Executive Branch through the Memo sought to empower the IRS to destroy. Empowering the IRS to administratively determine the core issues of federalism would be contrary to our constitutional order.

Here, without any rules or regulations, the IRS seeks to administratively determine those who are on the wrong side of the marijuana issue.

The determination of this issue will set the template for further abuses of power by Congress. If Section 280E constitutionally empowers the IRS into criminal investigations and administrative determinations for Title 21 drug crimes, why couldn't Congress do the same thing for Title 18 crimes? The IRS would then become the chief criminal investigator of all federal crime, with virtually no Fourth and Fifth Amendment protections. The IRS then turns the investigative findings to federal law enforcement for prosecution. The Tenth Circuit has created a template to make our Constitution just a memory.

CONCLUSION

The Court should grant certiorari and determine that, as a matter of law, Congress did not give the IRS authority to administratively determine that a person has violated federal criminal drug laws; and that Section 280E is a penalty, not a tax.

Respectfully submitted,

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