No. 17-

In The

Supreme Court Of The United States

THE GREEN SOLUTION RETAIL, INC., A COLORADO CORPORATION; KYLE SPEIDELL,
Petitioners,

v.

UNITED STATES OF AMERICA; INTERNAL REVENUE SERVICE; JOHN KOSKINEN, INTERNAL REVENUE SERVICE COMMISSIONER; DAVID HEWELETT, IN HIS OFFICIAL CAPACITY, AUDITOR FOR THE INTERNAL REVENUE SERVICE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1) Does the Internal Revenue Service ("IRS"), as an executive agency of the United States, have authority to investigate and administratively determine that a taxpayer is criminally culpable under federal criminal drug laws?

2) Does the *Anti-Injunction Act*, 26 U.S.C. §7421, preclude the Courts from exercising its constitutional power to take appropriate action preclude the executive branch (IRS) from acting in excess of its power?

3) Does the *Declaratory Judgment Act*, 28 U.S.C. 2201 preclude the Courts from determining whether the executive branch (IRS) is acting in excess of its authority when conducting administrative investigations into violations of federal criminal drug laws?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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, *Green Solution Retail, Inc. v. U.S.*, 855 F.3d (10th Cir. 2017) (App., p. A-4). The order denying reconsideration is unreported. (App., p. A-1). The opinion of the district court is unreported. (App., p. A-32).

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2017 (App., A-4). A timely petition for a FRAP Rule 35 Request for En Banc Consideration and FRAP Rule 40 Request for Rehearing was denied on August 1, 2017 (App., p. A-1). This Petition has been timely filed on or before October 30, 2017. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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.

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.

STATEMENT

"This case owes its genesis to the mixed messages the federal government is sending these days about the distribution of marijuana." *Feinberg v. C.I.R.*, 808 F.3d 813 (10th Cir. 2015)[1]. Justice Gorsuch's statement in *Feinberg* is equally applicable to this case.

[1] The undersigned had the honor of arguing the *Feinberg* matter to Justice Gorsuch on behalf of Mr. and Mrs. Feinberg and Ms. McDonald. Since the *Feinberg* opinion, the matter has been tried in Tax Court to Judge Kathleen Kerrigan in January, 2017. Closing briefs have been filed and the parties are awaiting the ruling.

The Green Solution Retail Inc. ("Green Solution") and Kyle Speidell ("Speidell") are currently under audit for tax years 2013 and 2014 by the IRS ("the "Audit"). The Audit is still in process. Under color of the Audit, the auditor, David Hewelett is conducting an investigation into the criminal culpability of Green Solution and Speidell under the Controlled Substances Act, 21 USC 801, *et seq.* ("CSA"). There has been no assessment or collection activity by the IRS in this matter. The Petitioners believe that Hewlett and the IRS are sharing this information with the Department of Justice ("DOJ") for future prosecution purposes.

> "The IRS made initial findings that Green Solution trafficked in a controlled substance and is criminally culpable under the CSA."

Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1113 (10th Cir. 2017).

> "In connection with its investigation of Green Solution, the IRS issued a summons to Colorado's Marijuana Enforcement Division seeking "information about the type of products sold, the weight of the products sold and the identity of [Green Solution's] purchasers." Green Solution filed a petition to quash the motion, which is currently pending in the United States District Court for the District of Colorado. *See* No. 1:16-mc-00137 (D. Colo., filed June 27, 2016)."

Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1113 n.1 (10th Cir. 2017).

There has been no conviction of Green Solution or Speidell of any drug crimes in any court. The CSA is not part of the Tax Code. The IRS has no authority outside the Tax Code. However, Hewelett and the IRS claim that this criminal investigation and determination is necessary for the IRS to invoke 26 USC §280E against Green Solution and Speidell. Section 280E disallows deductions in a person's trade or business if that person is unlawfully "trafficking" in a controlled substance. Thus, the IRS claims it is necessary and within its power to make administrative determinations that a person is criminally culpable under federal drug laws. Such a claim of power by the IRS is unprecedented.

Justice Gorsuch in *Feinberg,* noted that the IRS has taken "an especially curious turn" in its federal drug law investigation of the marijuana industry. He noted that the IRS in response to the Fifth Amendment Privilege claim by Feinbergs and McDonald, sought to compel the production of incriminating documents.

> "So it is the government simultaneously urged the court to take seriously its claim that the petitioners are violating federal criminal law and to discount the possibility that it would enforce federal criminal law."

Feinberg, 808 F.3d at 815.

The passage of time and new revelations make the "especially curious turn" not so curious.

In 1996, at the beginning of the era where states began legalizing medical marijuana, the Clinton Administration adopted a policy to destroy the developing state-legal marijuana programs. A memorandum to then President Clinton from Barry R. McCaffrey, then Director of the Office of National Drug Control Policy, outlined the strategy to "blunt the negative consequences of the recent "medicinal marijuana" Propositions . . ." (the "Memo"). The Petitioners understand that Justice Kagan participated in the drafting of the Memo during her tenure as Associate White House Counsel. See, https://www.scribd.com/document/361937054/NLWJC-Kagan-DPC-Box015-Folder011-Drugs-Legalization-Efforts. Part of the strategy is to use the IRS and the Tax Code to discourage the state legalization efforts. *Id.,* p. 3.

The Memo discusses a "coordinated Federal response" among various agencies including the Departments of Treasury and Justice to limit or destroy state-legal marijuana programs. A part of the policy stated in this Memo was determined to be unconstitutional in *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 First Amendment). The Executive Branch apparently continues to follow the Memo using its governmental powers "to reduce use and availability of marijuana".
https://www.whitehouse.gov/ondcp/key-issues/marijuana.

However, as Justice Gorsuch noted:

> "[O]fficials at the Department of Justice have now twice instructed field prosecutors that they should generally decline to enforce Congress's statutory command when states like Colorado license [marijuana] operations . . . "

Feinberg, at 814.

So, how can the Executive Branch have a policy of destroying the marijuana industry while declining to prosecute? This is where the "mixed messages" become especially curious.

Twenty-nine states and the District of Columbia have legalized the sale of marijuana for medical purposes. Eight states have legalized marijuana for "adult use" and regulate it in a similar manner as alcohol. Congress has defunded the Department of Justice from prosecuting CSA crimes that involve otherwise lawful sales from medical marijuana states. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217(2014); and Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015). This part of the Appropriations Act is known as the "Rohrbacher-Farr Amendment". See *United States v. McIntosh,* 833 F.3d 1163 (9th Cir. 2016).

However, the Department of Justice ("DOJ") is still trying to enforce the CSA against persons who are selling marijuana in accordance with state law.

Attorney General, Jeff Sessions, has written to Congress asking that the Rohrbacher-Farr Amendment not be extended into the next appropriations act so he can prosecute state-legal marijuana sales under the CSA. See https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections.

While DOJ investigatory and prosecution power into state-legal marijuana has been defunded, the Petitioners believe that the DOJ and IRS have entered into an agreement where the IRS will conduct the investigations into CSA criminal culpability, under the color of a civil audit, then share the information obtained with the DOJ for future prosecution purposes. See *Rifle Remedies v. United States,* 1:17-mc-00062-RM (Colo. Dist. Ct.), specifically Doc. 20, with declarations and documents attached thereto. This is a large-scale operation of these two executive agencies, with Colorado being the site of the initial investigations and ultimately being expanded into the remaining state-legal-marijuana states.

Importantly, these actions 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. See *Feinberg v. Commissioner*, 808 F.3d 813, 814 (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.")

Thus, given the above, the Petitioners believe that they are being subjected to this coordinated federal effort to destroy what twenty-nine states have developed over the last two decades regarding medical and adult use marijuana.

To this end, the Petitioners brought the underlying action to have the court determine whether the IRS has the power to conduct investigations into federal drug crime violations, make administrative findings of a person's criminal culpability under the CSA, and share the information with the DOJ for future prosecution purposes.

The Petitioners are seeking two requests for relief: (1) A determination that the IRS and Hewlett are exceeding their statutory authority by conducting investigations and/or making administrative determinations that they are violating federal criminal drug laws; and (2) the court enjoin the IRS and Hewlett from continuing such investigations outside of their power. The Petitioners are not seeking an injunction on the audit itself.

The District Court, on motion from the DOJ attorneys, determined that the Anti-Injunction Act, 26 U.S.C. §7421, and the Declaratory Judgment Act, 28 U.S.C. §2201, precluded the court from addressing these issues. The District Court relied upon the Tenth Circuit decision *Lowrie v. United States,* 824

F.2d 827 (10th Cir. 1987) for support of its decision. Specifically, *Lowrie* states that the AIA applies "not only to the actual assessment or collection of a tax, but [also] to activities leading up to, and culminating in, such assessment and collection. *Id.* at 830.

On appeal, a panel of the Tenth Circuit reluctantly affirmed. It determined that it was without jurisdiction to determine whether the IRS's investigation into violations of federal criminal drug laws exceeded its authority. The panel acknowledged that the Supreme Court's decision in *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015) ("Direct Marketing") called *Lowrie* into question and potentially overruled *Lowrie*. However, the panel concluded "that while *Direct Marketing* calls our holding in *Lowrie* into question, that question cannot be answered by this panel acting alone." *Green Solution,* at 1118-1119. The panel determined that the question needed to be resolved in an *en banc* rehearing.

The Petitioners petitioned the Tenth Circuit to rehear the matter *en banc*. The court denied the rehearing in a 6-5 decision. See App., p. A-1.

SUMMARY OF THE ARGUMENT

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. Federal criminal drug laws are outside of the Tax Code.

Section 280E of the Tax Code did not empower the IRS to investigate and administratively rule that a person has violated federal criminal drug laws. If Congress wants to assign the executive branch discretion to 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, 12 S. Ct. 764, 36 L. Ed. 591 (1892). This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274, 189 L. Ed. 2d 262 (2014). There is nothing within §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.

It is within the power of the courts to determine whether the IRS has exceeded its authority under the Tax Code. *Anti Injunction Act*, 26 U.S.C. § 7421 ("AIA") and the like provisions in the *Declaratory Judgment Act*, 28 U.S.C. §2201 ("DJA") do not bar the court from making such a determination. This Court in *Direct Marketing* made clear that the AIA only prohibits suits which would restrain the assessment or collection of tax. "Restrain" is not interpreted broadly as the Tenth Circuit did in *Lowrie*. Rather, this Court has determined that "restrain" is something that would *stop*, not merely hinder, the assessment or collection of tax.

Also, the question presented here is a balance of powers issue. Should the AIA be construed as prohibiting the Court from determining whether the

executive branch has exceeded its authority? Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) it has been the province of the judiciary to determine questions of balance of powers. Thus, the AIA should not be construed as divesting the courts of subject matter jurisdiction to determine balance of powers issues.

Furthermore, the underlying action is not barred under the *AIA*, because 26 U.S.C. §280E is a penal statute and not a tax. The penalty in Section 280E (taxing on gross rather than net income) is a punishment for violating federal criminal drug laws. See *Tank Truck Rentals v. Comm'r,* 356 U.S. 30 (1958). The *Anti-Injunction Act* and the like provisions in the *Declaratory Judgment Act* do not bar such actions for the invocation of this penalty.

Finally, since the *AIA* and *DJA* are co-extensive, the Petitioners' claims are likewise not barred.

ARGUMENT

A. THE COURT HAS SUBJECT MATTER JURISDICTION TO DETERMINE THE POWERS OF THE IRS.

This Court has not ruled on the issue, but the general concensus is that the AIA is jurisdictional in nature. *Green Solution,* at n.2, *supra.* but see, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (Gorsuch, J. Concurring) (AIA is a waivable defense). Regardless of whether the AIA is

jurisdictional or a waivable defense, the Court may hear the merits of this action.

The Tenth Circuit erred by determining that the AIA barred a determination of the merits of this case. As discussed below, the broad reading of the AIA by *Lowrie* has been rejected by this Court, and a determination of the merits should be allowed to proceed.

The Anti-Injunction Act, ("AIA") states: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). Thus, the question presented here is whether an action seeking to stop the IRS from acting in excess of its authority is "restraining the assessment or collection" of tax. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015) ("Direct Marketing") makes clear that such an action is not precluded by the AIA.

Direct Marketing involved the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"). However, this Court "assume[d] that words used in both Acts are generally used in the same way," 135 S. Ct. at 1129. This Court determined that "restrain" in the AIA means suits that to some degree stop, rather than merely inhibit, the assessment, or collection of taxes. *Id.*

In this case, the Petitioners are not trying to stop the Audit. Rather, Petitioners are merely asking

that the IRS act within its powers. Having the IRS act within its powers may inhibit an audit much like stopping a police officer from acting ouside of constitutional bounds may inhibit an arrest. However, the AIA should not be construed so broadly as to prohibit the Court from examining whether the IRS is exceeding its powers. See, e.g., *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48 (D. D.C. 2014) (AIA does not preclude action to force the IRS to act within its constitutional powers).

The Tenth Circuit panel generally agreed with this proposition but was concerned about the concurring opinion in *Direct Marketing*. Specifically, the panel was concerned about Justice Ginsberg's statement that the "Court does not reach today the question whether the claims in such a suit, i.e., claims suitable for a refund action, are barred by the [TIA]." *Green Solution,* at 1120. However, this concern is misplaced.

There is nothing in the Petitioners' claims that would be suitable for a refund action. As the Tenth Circuit stated, "Green Solution's lawsuit seeks to enjoin the IRS from obtaining information related to its initial findings that Green Solution is dispensing marijuana in violation of the CSA . . ." *Id.* at 1114.

The question of whether these claims would be suitable for a refund action are speculative at best. The IRS must issue a deficiency for a taxpayer to have access to the courts in a refund action.

A refund action under 26 U.S.C. §7422 requires that there is a disputed assessment, that the taxpayer has paid the disputed assessment, the taxpayer has filed for a refund with the IRS, and the refund has been denied. 26 U.S.C. §7422(a). In this case, the IRS could obtain all the information of the purportedly unlawful drug trafficking, provide the information to DOJ, and close the matter without issuing a deficiency. The Petitioners' access to the courts would be completely denied.

Thus, the IRS alone will determine whether the Petitioners or any party similarly situated could have access to the courts by merely withholding a notice of deficiency. If this action may not be heard due to the AIA, the IRS will have complete, arbitrary, discretionary authority to determine whether this action should be heard by the courts. The IRS should not be given that type of power.

Also, the amount of a deficiency, if any, would be irrelevant to the question of the IRS acting in excess of its authority. Like the police officer example, the IRS's acting outside of its authority may result in increased assessments and collections, but the IRS's power to take such actions transcends the assessment and collection issue.

B. THE TENTH CIRCUIT ERRED IN REFUSING TO DETERMINE THAT SECTION 280E IS PENAL IN CHARACTER, THUS NOT COMING UNDER THE ANTI-INJUNCTION ACT.

Assuming that this Court dermines that the AIA applies to this action, the Tenth Circuit erred in determing that Section 280E is not penal in character. Section 280E only applies if the taxpayer has committed the predicate act of illegal trafficking of Schedule I or II drugs. *Feinberg, supra.*.

The *Anti-Injunction Act* does not apply to penal statutes even if Congress designates the statute as a tax. *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922). 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).

> "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).

When a tax is penal in nature, the *Anti-Injunction Act* has no application and a court of equity could enjoin the assessment and collection of such a penalty. *Robertson v. United States,* 582 F.2d 1126 (7th Cir. 1978) (Finding that the *Anti-*

Injunction Act does not apply to actions enjoining assessment under the Marijuana Tax Act).

Clearly, Section 280E is a penalty. Actions against this penalty are not affected by the *Anti-Injunction Act.*

Given the above, Section 280E is penal in nature and an action enjoining the IRS's investigation of whether the taxpayer has violated federal drug laws is not barred by the *Anti-Injunction Act.*

C. PETITIONERS' CLAIMS ARE NOT BARRED UNDER THE DECLARATORY JUDGMENT ACT.

The Tenth Circuit correctly determined that the "[t]he DJA's tax exception is 'coterminous' with the AIA's prohibition." *Green Solution,* at 1115.

However, for the same reasons as stated above regarding the AIA, the Tenth Circuit erred to determine that the DJA barred the Petitioners' claims.

D. THE IRS IS ACTING IN EXCESS OF ITS POWERS.

The merits of the Petitioners' claims are clear. The IRS is acting in excess of its powers.

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) "trafficks" ; (4) in a Schedule I or II controlled substance; (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, the IRS became more aggressive after states began to make the sale of marijuana legal and the Justice Department declined to enforce federal marijuana laws. See Memorandum by David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice to

Selected U.S. Att'ys (Oct. 19, 2009), revised by Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice (Aug. 29, 2013). By the time of *Feinberg, supra.,* the IRS was in full swing of administratively determining that taxpayers selling state-legal marijuana were criminally culpable under federal law.

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

Feinberg, at 814.

The problem with the IRS's actions, however, is it does not have the authority to define criminal law. The fact that §280E provides no language allowing the IRS to investigate and make findings of criminal culpability supports the Petitioners' position. 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. 506, 519 (1911); *United States v. Eaton*, 144 U.S. 677, 688, 12 S. Ct. 764, 36 L. Ed. 591 (1892). This is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274, 189 L. Ed. 2d 262 (2014).

This clear-statement rule reinforces horizontal separation of powers in the same way that *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), reinforces vertical separation of powers. It compels Congress to legislate deliberately and

explicitly before departing from the Constitution's traditional distribution of authority.

There has been no specific delegation of authority by Congress to the IRS to determine under what circumstances a taxpayer violates the CSA. It is completely absent in the Tax Code – especially Section 280E. In fact, the legislative history of the Tax Code shows that Congress took away any IRS authority to investigate and find violations of federal criminal drug laws.

On or about July 18, 1956, Congress passed the *Narcotics Control Act*. Public Law 728;- 84th Congress Chapter 629 - 2d Session H.R. 11619 All 70 Stat. 567 ("NCA"). A copy of the NCA is attached hereto. The NCA penalized the possession and distribution of marijuana as well as taxed the possession thereof. *Id., Sec. 101.* The NCA was made part of the Internal Revenue Code with the Department of Treasury/IRS being the agency in charge of its enforcement. *Id.*

In 1969, the Supreme Court in *Leary v. United States,* 395 U.S. 6 (1969) declared parts of the NCA unconstitutional. The Court was especially concerned that the NCA required disclosure of a criminal act (sale/possession of marijuana) to the IRS for tax purposes, but allowed for sharing of the same information for criminal prosecution purposes. *Id.* The *Leary* Court discussed the Fifth Amendment "constitutional difficulty" of requiring a taxpayer to disclose facts of a federal crime for tax purposes,

while allowing these same facts to be shared by the government for prosecution purposes. *Id.* at 26.

In response to *Leary*, Congress repealed the NCA and adopted the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CSA"). Public Law 91-513, now codified at 21 U.S.C. §801, et seq. Congress adopted important provisions to comply with *Leary*. First, the jurisdiction of the Department of Treasury/IRS to investigate federal drug crimes was removed and given to the Attorney General and, by delegation, Department of Justice. See 21 U.S.C. §871. Second, the CSA precluded the Attorney General, and any of its delegates thereof, from obtaining financial records from the subjects of its investigation of violations of federal criminal drug laws. See 21 U.S.C. §880(b)(4). Congress further clarified that the Secretary of Treasury's only remaining authority over federal criminal drug laws is with respect to customs and import and export of drugs out of the country. See 21 U.S.C. §966. Thus, Congress created a "Chinese wall" between the IRS and the investigation of violations of federal criminal drug laws. This wall is an important component of the CSA to assure that the amended Tax Code and the CSA did not infringe on the "constitutional difficulty" expressly addressed by repeal of the NCA.

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

When a federal officer does or attempts to act in excess of his authority or under authority not validly

conferred, equity has jurisdiction to restrain him. See, *State of Colorado v. Toll,* 268 U.S. 228, 45 S. Ct. 69 L.Ed 927 (1925); see also, *Zirin v. McGinnes,* 282 F.2d 113, 115 U.S. App Lexis 3917 (1960). The courts have jurisdiction to restrain the IRS from acting in excess of its authority.

REASONS FOR GRANTING THE PETITION

Given the ruling in *Direct Marketing,* the Court should determine whether those same definitions apply to the AIA. The Court needs to provide guidance of how the AIA operates under the new *Direct Marketing* definitions.

As the panel of the Tenth Circuit noted, it is not clear whether the broad definition of the AIA is still applicable. The Petitioners believe that it is not. However, the Tenth Circuit believes that this is an open question. The question should be answered so that justice is administered equally among the circuits.

Resolution of this issue will have national implications. The courts currently do not have guidance. Granting certiorari and answering the question will provide greatly needed guidance of whether the AIA should be construed similarly to the TIA or should be more broad. It is an open question that needs to be decided.

Also, the Court should grant the Petition to determine whether the IRS has administrative authority to define criminal culpability under federal

criminal drug laws. The answer to this question has major national policy implications.

Twenty nine states and the District of Columbia have legalized 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 Cole and Ogden Memos, the Rohrbacher-Farr 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, 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. Answering the question of the extent of the IRS's administrative authority will also answer just how far the IRS can jump into these political questions. To this end, the Court should not allow the IRS to administratively determine whether a person is violating federal criminal drug laws. To conclude otherwise, would allow the IRS to

determine who are the politically favored and give them favorable tax treatment. Here, without any rules or regulations, the IRS seeks to administratively determine those who are on the wrong side of the marijuana issue. Unfavorable tax treatment may follow – or it may simply provide incriminating evidence to the Department of Justice to prosecute the unfavored.

With such administrative power, the IRS could determine that Planned Parenthood, or the gun industry, or other politically unfavored groups, are on the wrong side of federal criminal law and penalize them accordingly. They could be investigated criminally by the IRS simply for the purpose of determining the "correctness of the return." Once the information is gathered, it can be forwarded to the DOJ so the unfavored can be politically or legally destroyed. This is not a power that should be given to the IRS.

The IRS should not be given the power to administratively determine that a person has violated federal criminal drug laws.

CONCLUSION

The Court should grant certiorari and determine that the AIA and DJA do not prohibit the Court from determining the merits of the case.

The Court should also grant certiorari and determine that Section 280E is a penalty – not a tax. Due to its penal nature, §280E is not subject to the AIA.

The Court should further 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.

Respectfully submitted,

JAMES D. THORBURN
RICHARD A. WALKER
OCTOBER 30, 2017

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A
Filed August 1, 2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The GREEN SOLUTION RETAIL, INC., a Colorado corporation; Kyle Speidell,

Plaintiffs–Appellants,
(D.C. No. 1:16-CV-00257-RPM
v.

No. 16-1281

(D.Colo)

UNITED STATES of America; Internal Revenue Service; John Koskinen, Internal Revenue Service Commissioner; David Hewlett, in his official capacity, Auditor for the Internal Revenue Service,

Defendants–Appellees.

ORDER

Counsel:

James D. Thorburn, Thorburn Walker, LLC, Greenwood Village, Colorado (Richard Walker, with him on the briefs), for Plaintiffs–Appellants.

Patrick J. Urda, Attorney, Tax Division (Caroline D. Ciraolo, Principal Deputy Assistant Attorney General; Diana L. Erbsen, Deputy Assistant Attorney General; Gilbert S. Rothenberg, Attorney; Richard Farber, Attorney; and Robert C. Troyer, Acting United States Attorney, with him on the brief), United States Department of Justice, Washington, D.C., for Defendants–Appellees.

Judges: Before TYMKOVICH, Chief Judge, KELLY, BRISCOE, LUCERO, HARTZ, HOLMES, MATHESON, BACHARACH, PHILLIPS, McHUGH, and MORITZ, Circuit Judges.

This matter is before the court on the appellants' *FRAP Rule 35 Request for En Banc Consideration and FRAP Rule 40 Request for Rehearing*. We also have a response from the appellees.

Upon consideration, the request for panel rehearing is denied by the original panel members. The request for rehearing and the response were also circulated to all of the judges of the court who are in regular active service. A poll was called, and a majority voted to deny the en banc petition. *See* Fed. R. App. P. 35(a). Consequently, the request for en banc consideration is also denied.

Chief Judge Tymkovich, as well as Judges Lucero, Holmes, McHugh and Moritz voted to grant rehearing en banc.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

APPENDIX B
Filed May 2, 2017

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

No. 16-1281

The GREEN SOLUTION RETAIL, INC., a Colorado corporation; Kyle Speidell, Plaintiffs–Appellants, v. UNITED STATES of America; Internal Revenue Service; John Koskinen, Internal Revenue Service Commissioner; David Hewlett,* in his official capacity, Auditor for the Internal Revenue Service, Defendants–Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:16–CV–00257–RPM)

Counsel:

James D. Thorburn, Thorburn Walker, LLC, Greenwood Village, Colorado (Richard Walker, with him on the briefs), for Plaintiffs–Appellants.

Patrick J. Urda, Attorney, Tax Division (Caroline D. Ciraolo, Principal Deputy Assistant Attorney General; Diana L. Erbsen, Deputy Assistant Attorney General; Gilbert S. Rothenberg, Attorney; Richard Farber, Attorney; and Robert C. Troyer, Acting United States Attorney, with him on the brief), United States Department of Justice, Washington, D.C., for Defendants–Appellees.

Judges: Before HARTZ, MATHESON, and McHUGH, Circuit Judges.

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*Mr. Hewlett was referred to as such throughout the proceedings, including the district court's judgment and the subsequent notice of appearance filed with this court. However, there is mention (and accompanying exhibits demonstrating) that his name is actually David Hewell. Because it is unclear, and neither party moved to amend the name, we retain the designation of David Hewlett for purposes of this decision.

Opinion by: McHUGH, Circuit Judge.

I. INTRODUCTION

The Green Solution Retail, Inc. and one of its owners, Kyle Speidell (collectively, Green Solution), sued to

enjoin the Internal Revenue Service (IRS) and related parties from investigating Green Solution's business records. The district court dismissed Green Solution's complaint for lack of subject matter jurisdiction, concluding the Anti–Injunction Act and the Declaratory Judgment Act bar this action. The court relied on our decision in *Lowrie v. United States,* where we held that lawsuits challenging "activities leading up to and culminating in" an assessment are barred. 824 F.2d 827, 830 (10th Cir. 1987). On appeal, Green Solution contends the district court had jurisdiction to hear its claims because the Supreme Court has implicitly overruled *Lowrie* in its recent decision *Direct Marketing Association v. Brohl,* 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015). We conclude we are still bound by Lowrie and affirm.

II. BACKGROUND

Green Solution is a Colorado-based marijuana dispensary with several locations across the state. The IRS is currently auditing Green Solution's tax returns for the 2013 and 2014 tax years to determine whether it should apply 26 U.S.C. § 280E (I.R.C. § 280E), which forbids federal tax deductions and credits to companies trafficking in a "controlled substance" as defined by the Controlled Substances Act (CSA). The IRS made initial findings that Green Solution trafficked in a controlled substance and is criminally culpable under the CSA. The IRS then requested that

Green Solution turn over documents and answer questions related to whether Green Solution is disqualified from taking credits and deductions under § 280E[1]. It is undisputed the IRS has not made an assessment or begun collection proceedings.

Green Solution sued the IRS and related parties in the United States District Court for the District of Colorado, seeking to enjoin the IRS from investigating whether it trafficked in a controlled substance in violation of federal law, and seeking a declaratory judgment that the IRS is acting outside its statutory authority when it makes findings that a taxpayer has trafficked in a controlled substance. Green Solution claimed it would suffer irreparable harm if the IRS were allowed to continue its investigation because a denial of deductions would (1) deprive it of income, (2) constitute a penalty that would effect a forfeiture of all of its income and capital, and (3) violate its Fifth Amendment rights.

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[1] In connection with its investigation of Green Solution, the IRS issued a summons to Colorado's Marijuana Enforcement Division seeking "information about the type of products sold, the weight of the products sold and the identity of [Green Solution's] purchasers." Green Solution filed a petition to quash the motion, which is currently pending in the United States District Court for the District of Colorado. *See* No. 1:16-mc-00137 (D. Colo., filed June 27, 2016).

The IRS moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). According to the IRS, Green Solution's claim for injunctive relief is foreclosed by the Anti–Injunction Act (AIA), which bars suits "for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). Similarly, the IRS asserted that the claim for declaratory relief violated the Declaratory Judgment Act (DJA), which prohibits declaratory judgments in certain federal tax matters. 28 U.S.C. § 2201.

The district court agreed with the IRS that the AIA and DJA barred Green Solution's claims, relying on *Lowrie v. United States*, where we held that the AIA applies "not only to the actual assessment or collection of a tax, but [also] to activities leading up to, and culminating in, such assessment and collection." 824 F.2d 827, 830 (10th Cir. 1987). The court further concluded that Green Solution's request for declaratory relief on the ground the IRS was acting outside of its authority was similarly barred by the DJA. Accordingly, the court dismissed the action with prejudice for lack of subject matter jurisdiction. Green Solution timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

The Controlled Substances Act (CSA) makes it unlawful to knowingly or intentionally "manufacture, distribute, or dispense ... a controlled substance." 21 U.S.C. § 841(a)(1). Despite its legalization in twenty-eight states (and Washington, D.C.) for medical use and in eight states (and Washington, D.C.) for recreational use, marijuana is still classified as a federal "controlled substance" under schedule I of the CSA. *Id*. § 812(c)(10); 21 C.F.R. § 1308.11 (Schedule I); *see also* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,688 (Aug. 12, 2016) ("[M]arijuana continues to meet the criteria for Schedule I."). Schedule I drugs have "a high potential for abuse" and are classified as those for which there is "no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(A)–(B).

Although still illegal federally, the Justice Department has declined to enforce § 841 when a person or company buys or sells marijuana in accordance with state law. In 2015 and 2016, Congress reinforced this arrangement by defunding the Justice Department's prosecution of the exchange of medical marijuana where it is legal under state law. 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); *see also United States v. McIntosh*, 833 F.3d 1163, 1169–70 (9th Cir. 2016).

But while "today prosecutors will almost always overlook federal marijuana distribution crimes in Colorado," it does not mean the "tax man" is willing to turn a blind eye. *Feinberg v. C.I.R.,* 808 F.3d 813, 814 (10th Cir. 2015). Section 280E of the Internal Revenue Code provides:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business ... 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....

As discussed, marijuana is still a controlled substance under the CSA, and the IRS has pursued numerous marijuana dispensaries in Colorado and elsewhere to recoup unlawful business deductions. *See, e.g., Feinberg*, 808 F.3d at 814; *Olive v. C.I.R.*, 792 F.3d 1146, 1147 (9th Cir. 2015).

Green Solution's lawsuit seeks to enjoin the IRS from obtaining information related to its initial findings that Green Solution is dispensing marijuana in violation of the CSA and is thus ineligible for deductions under § 280E. But under the AIA, a

litigant may not bring a "suit for the purpose of restraining the assessment or collection of any tax ... in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. § 7421(a). The Supreme Court has long held the AIA is jurisdictional.[2] *See Enochs v.*

[2] We "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). The issue of subject matter jurisdiction may not be forfeited or waived. Id. The Supreme Court has also instructed that "drive-by jurisdictional rulings ... have no precedential effect." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In Hobby Lobby Stores, Inc. v. Sebelius, a three-judge concurring opinion in our en banc panel would have found the AIA not jurisdictional, but a "waivable defense." 723 F.3d 1114, 1157–59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014). But that position did not garner a majority of the en banc court, perhaps because we have held to the contrary that the AIA is jurisdictional. See, e.g., Sterling Consulting Corp. v. United States, 245 F.3d 1161, 1167 (10th Cir. 2001); Kirtley v. Bickerstaff, 488 F.2d 768, 769 (10th Cir. 1973); Williams v. Wiseman, 333 F.2d 810, 811 (10th Cir. 1964). This position is consistent with the conclusion of every circuit to examine this question. See, e.g., Hotze v. Burwell, 784 F.3d 984, 991 (5th Cir. 2015), cert. denied, 136 S.Ct. 1165, 194 L.Ed.2d 240 (2016); Liberty Univ., Inc. v. Lew, 733 F.3d 72, 87 (4th Cir. 2013); RYO Mach., LLC v. U.S. Dep't of Treasury, 696 F.3d 467, 470 (6th Cir. 2012); Hansen v. Dep't of Treasury, 528 F.3d 597, 601 (9th Cir. 2007). This combined weight of authority amounts to more than "drive-by jurisdictional rulings" and, without contrary

Williams Packing & Navigation Co., 370 U.S. 1, 5, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962) (AIA's purpose "is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes"); *see also Jefferson Cty. v. Acker*, 527 U.S. 423, 434–35, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999). Thus, if the AIA applies, we may not reach the merits of Green Solution's claims.

Nor may Green Solution make an end-run around the AIA through its request for declaratory relief. The

DJA allows a federal district court to grant declaratory relief "[i]n a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* ..." 28 U.S.C. § 2201 (emphasis added). The DJA's tax exception is "coterminous" with the AIA's prohibition. *Cohen v. United States*, 650 F.3d 717, 730–31 (D.C. Cir. 2011) (en banc). In other words, "with respect to Federal taxes" means "restraining the assessment or collection of any tax." *Id.* at 727.

On appeal, Green Solution first contends that a suit to enjoin an investigation into whether a business trafficked in a controlled substance is a step removed from a suit to "restrain[ ] the assessment or collection

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en banc or Supreme Court authority, we cannot conclude the AIA is a "waivable defense" and not a jurisdictional bar.

of any tax" and is accordingly not precluded by the AIA.[3] Although Green Solution acknowledges that this Circuit in *Lowrie* held that the AIA bars "activities leading up to, and culminating in assessment," it contends the Supreme Court in *Direct Marketing Ass'n v.* Brohl, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015), implicitly overruled *Lowrie*.[4] Green Solution next argues the AIA does not preclude this suit, even if *Lowrie* controls, because (1) the IRS is acting outside its authority by investigating whether Green Solution violated criminal law, and (2) section 280E is a penalty and not a "tax" subject to the AIA. We reject Green Solution's arguments and affirm the district court's dismissal of the action.

A. Whether Direct Marketing *Implicitly Overruled* Lowrie

Green Solution asks us to depart from our holding in *Lowrie* that the AIA bars "activities leading up to, and culminating in, ... assessment," *Lowrie,* 824 F.2d at 830, in favor of a holding that the AIA has no

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[3] And if the AIA bars this suit, the DJA claims are likewise barred because the two Acts are coterminous. *See Cohen v. United States*, 650 F.3d 717, 730–31 (D.C. Cir. 2011) (en banc).

[4] At oral argument, Green Solution conceded that the IRS's investigation is an "activity leading up to" the assessment, which under *Lowrie* is barred by the AIA." Because it is uncertain whether Green Solution intended also to concede its arguments that § 280E is a penalty, and the IRS is acting outside its authority, we address those arguments on the merits.

application unless the lawsuit restrains—meaning in some degree stops—the assessment or collection of a tax. But "we are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Barnes v. United States,* 776 F.3d 1134, 1147 (10th Cir. 2015) (internal quotation marks omitted). Although the Supreme Court decision need not be "on all fours with our precedent," it must "contradict[ ] or invalidate[ ] our prior analysis" to be considered superseding authority. *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014); *compare Barnes*, 776 F.3d at 1147 (refusing to overrule our prior precedent because the Supreme Court authority was not "so indisputable and pellucid ... that it constitutes intervening (i.e., superseding) law that would permit us to hold (without en banc consideration)" to the contrary), *with Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 843 F.3d 1225, 1242 (10th Cir. 2016) (concluding intervening Supreme Court authority "undermine[d] the rationale of our decision ... and warrant[ed] our retreat from its holding"). Green Solution contends that the Supreme Court has provided just such superseding authority in *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015).

To determine whether *Direct Marketing* has implicitly overruled *Lowrie* such that this panel is not horizontally bound by it, we begin with a discussion of

our AIA precedent. We then examine the Supreme Court's decision in *Direct Marketing* to determine whether it has clearly undermined the rationale of our decision in *Lowrie*. Ultimately, we conclude Green Solution has failed to show that *Direct Marketing 's* reasoning so undermines *Lowrie* that this panel is not bound by that precedent. "Whether the Declaratory Judgment and Anti–Injunction Acts bar [a plaintiff's] claim is a question of law that we review de novo." *Ambort v. United States,* 392 F.3d 1138, 1140 (10th Cir. 2004).

1. AIA and *Lowrie*

Congress designed the AIA to enable "a minimum of preenforcement judicial interference" and "to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974) (internal quotation marks omitted); *Lowrie v. United States,* 824 F.2d 827, 830 (10th Cir. 1987) ("The intent behind the [AIA] is the protection of the government's need to assess and collect taxes as expeditiously as possible without preenforcement judicial interference and to require that disputed sums of taxes due be determined in suits for refund."); *see also Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1074 (D.C. Cir. 2015) ("If taxpayers could challenge the validity of a tax and forego payment during the pendency of the lawsuit, it

would so interrupt the free flow of revenues as to jeopardize the Nation's fiscal stability." (internal quotation marks omitted)).

Accordingly, we held in *Lowrie* that the AIA applies "not only to the actual assessment or collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection." 824 F.2d at 830. Several other circuits agree. *See, e.g., Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (en banc) ("[The AIA] requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection." (emphasis added)); *Dickens v. United States,* 671 F.2d 969, 971 (6th Cir. 1982) ("A suit designed to prohibit the use of information to calculate an assessment is a suit designed for the purpose of restraining an assessment under the [AIA]." (internal quotation marks omitted)); *Kemlon Prods. & Dev. Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981) ("[T]his ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment." (internal quotation marks omitted)); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) ("True, the suit does not directly and expressly aim at the assessment. But it is directed expressly at the means to that end, and in our view is substantially aimed at restraining the assessment."); 14 Mertens Law of

Federal Income Taxation § 49E:45 (2007) ("Administrative determinations and investigations necessary to an assessment are part of that process, for purposes of [the AIA].").

Thus, as Green Solution concedes, the district court's decision dismissing the action for lack of subject matter jurisdiction was correct, *if Lowrie* still controls. We now consider that question.

2. *Direct Marketing* and the Tax Injunction Act

Green Solution contends the Supreme Court implicitly overruled the *Lowrie* line of cases in Direct Marketing Ass'n v. Brohl, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015). In *Direct Marketing*, a group of online retailers sued in federal court to enjoin the Colorado state taxing authority from requiring the retailers to, among other things, disclose certain information about their customers, including names, home addresses, and amounts spent. *Id.* at 1128. The district court concluded this requirement violated the Commerce Clause because it discriminated against and placed undue burdens on interstate commerce. *Id.* at 1128–29.

On appeal, the Tenth Circuit did not reach the merits of the retailers' claim. Instead, we concluded the Tax Injunction Act (TIA) deprived the district court of subject matter jurisdiction. *Direct Mktg. Ass'n v.*

Brohl, 735 F.3d 904, 906 (10th Cir. 2013). The TIA protects against federal interference in state tax matters, but contains similar language to the AIA, providing: "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Using an argument similar to Green Solution's here, the retailers argued that Colorado's reporting requirement merely "related" to the use tax, which was not enough to bring their suit "under the umbrella of the TIA as a suit seeking to enjoin the collection of a state tax." *Direct Mktg.,* 735 F.3d at 912.

We focused on the word "restrain," defining it as "to limit, restrict, or hold back" the assessment, levy, or collection of taxes. *Id*. at 913; see also id. at 912 ("[T]he TIA bars more than suits that would enjoin tax collection. It also prohibits federal lawsuits that would 'restrain the ... collection' of a state tax."). Applying that definition to the facts, we concluded the "lawsuit, if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue" because it would "hamper Colorado's ability to raise revenue." *Id*. at 913–14. Because the lawsuit had the "potential to restrain tax collection," we held that it "trigger[ed] the jurisdictional bar" in the TIA. *Id.* at 913 (emphasis added).

The Supreme Court reversed. *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 191 L.Ed.2d 97 (2015). In doing so, the Court referred to the AIA to guide its interpretation of the TIA, noting that "[a]lthough the TIA does not concern federal taxes, it was modeled on the Anti–Injunction Act (AIA), which does." *Id.* at 1129. The Court explained: "We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code." *Id.*

First, the Court defined the term "assessment" as "an official action taken based on information already reported to the taxing authority." *Id.* at 1130. While the Court explained that assessment "might also be understood more broadly to encompass the process by which [an] amount is calculated," it clarified that assessment is "the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority." *Id.* (emphases added). Accordingly, the Court explained that, historically, "assessment was understood as a step in the taxation process that occurred after, and was distinct from, the step of reporting information pertaining to tax liability." *Id.* After defining "assessment," the court then defined the words "levy" and "collection," and concluded "the three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax

liability." *Id*. at 1129; *see also id.* ("[T]he Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection.").

The Supreme Court then rejected our definition of "restrain"—to include any suit that would "limit, restrict, or hold back"—as too broad. *Id.* at 1132. The Court did this for two reasons. First, because the word "restrain" acts on "assessment," "levy," and "collection," and "not on an all-encompassing term like 'taxation,' " the Court reasoned that:

To give "restrain" the broad meaning selected by the Court of Appeals would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to "hold back" "collection." Such a broad construction would thus render "assessment and levy"—not to mention "enjoin and suspend"—mere surplusage, a result we try to avoid. *Id.*

The Supreme Court also rejected our definition of "restrain" because it would "lead[ ] the TIA to bar every suit" "that would have a negative impact on States' revenues." *Id*. at 1133. Second, the Court rejected our definition because the word "restrain" is paired with the words "enjoin" and "suspend," which are remedies that "restrict or stop official action to

varying degrees, strongly suggesting that 'restrain' does the same." *Id*. at 1132.

In applying these definitions to the facts of the case, and noting that we favor "clear boundaries in the interpretation of jurisdictional statutes," the Supreme Court concluded the retailers' reporting requirements were not an act of "assessment," "levy," or "collection" because, although "[e]nforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers," "the state still needs to take further action to assess the taxpayer's use-tax liability and to collect payment from him." *Id*. at 1131. The Court elaborated that "[t]he question—at least for negative injunctions—is whether relief to some degree stops 'assessment, levy or collection,' not whether it merely *inhibits* them." *Id*. at 1133 (emphases added).

Justice Ginsburg concurred, but emphasized that the retailers were "not challenging [their] own or anyone else's tax liability or tax collection responsibilities." *Id*. at 1136 (Ginsburg, J., concurring). The concurrence explained that "[a] different question would be posed ... by a suit to enjoin reporting obligations imposed on a taxpayer ... in lieu of a direct challenge to an 'assessment.' " *Id*. And Justice Ginsburg noted the "Court does not reach today the question whether the claims in such a suit, i.e., claims

suitable for a refund action, are barred by the [TIA]." *Id.*

3. Application

The question we must answer today is *whether Direct Marketing* contradicts, invalidates, or undermines our reasoning in *Lowrie,* such that this panel is no longer bound by horizontal stare decisis. *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC,* 843 F.3d 1225, 1242 (10th Cir. 2016); *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015); *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014). We conclude that while *Direct Marketing* calls our holding in *Lowrie* into question, that question cannot be answered by this panel acting alone.

The differences between the two opinions are significant. *Direct Marketing* involved the TIA, while *Lowrie* considered the AIA. The TIA and the AIA are different statutes located in different titles of the United States Code. *See* I.R.C. § 7421 (AIA); 28 U.S.C. § 1341 (TIA). Although the TIA was modeled on the AIA, the Acts serve different purposes. The TIA is designed to protect against federal interference in state tax matters, while the AIA serves to protect the IRS's ability to collect taxes without interference,

requiring taxpayers in most cases to challenge the taxes in a refund suit.[5]

And although the Supreme Court in *Direct Marketing* "assume[d] that words used in both Acts are generally used in the same way," 135 S.Ct. at 1129, the Acts contain different language. The AIA provides that, subject to certain exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The Supreme Court concluded the word "restrain" in the TIA refers to suits that to some degree *stop*, not merely *inhibit*, the assessment, levy, or collection of taxes. It came to this conclusion for two reasons, the first of which supports the argument that *Direct Marketing* implicitly overruled *Lowrie*, the second of which does not.

First, the Supreme Court reasoned that the word "restrain" in the TIA "acts on a carefully selected list

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[5] I.R.C. § 6213(a) is an exception to the refund requirement, allowing a taxpayer to petition the Tax Court prepayment for redetermination within ninety days of receiving a notice of deficiency.

of technical terms – 'assessment, levy, collection' – not on an all-encompassing term, like 'taxation.'" 135 S.Ct. at 1132. The Court explained that "*any* court action related to any phase of taxation might be said to 'hold back' 'collection,'" rendering "assessment and levy" a "mere surplusage." *Id*. (emphasis added). Like the TIA, in the AIA the word "restrain" acts on the words "assessment" and "collection."

Lowrie construed the AIA to preclude suits that challenge "activities leading up to" an assessment or collection, which could potentially include suits only tangentially related to assessment or collection, and that thereby merely inhibit assessment, rather than stop it to some degree. *See id.* (rejecting our definition of "restrain" as "to hold back" because "virtually any court action related to any phase of taxation might be said to hold back collection" (internal quotation marks omitted)). Green Solution argues that because the AIA, like the TIA, uses the words "assessment" and "collection" rather than "taxation," we should reject *Lowrie 's* inclusion of "activities leading up to, and culminating in, such assessment and collection" and instead require that the lawsuit would in some degree stop an assessment or collection.

But the Supreme Court also provided a second rationale for interpreting "restrain" in the TIA to mean suits that to some degree *stop*, rather than merely *inhibit*, the assessment, levy, or collection of

taxes. The Court reasoned that " '[r]estrain,' standing alone, can have several meanings," so it looked "to the company 'restrain' keeps" in the TIA. *Id.* The Court explained that "restrain" keeps company with "enjoin" and "suspend," both "terms of art in equity ... that restrict or stop official action to varying degrees, strongly suggesting that 'restrain' does the same." *Id.*

Unlike in the TIA, "restrain" in the AIA stands alone. Recall that the AIA states: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). To the extent it keeps company, it does so with the phrase "for the purpose of restraining the assessment or collection." Thus, unlike in the TIA, the injunctive relief barred by the AIA need not actually restrain an assessment or collection, it need only have restraint of those functions as its purpose. This language comports with our reasoning in *Lowrie,* that the AIA applies "not only to the *actual* assessment and collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection." 824 F.2d at 830 (emphasis added). That is, suits barring "activities leading up to[ ] and culminating in" assessment may be barred if they are filed "for the purpose of restraining" an assessment.

In addition, Justice Ginsburg's concurrence in *Direct Marketing* would limit that case to its unique facts.[6] It noted that the retailers were "not challenging [their] own or anyone else's tax liability or tax collection responsibilities," and explained that "[a] different question would be posed ... by a suit to enjoin reporting obligations imposed on a taxpayer ... in lieu of a direct challenge to an 'assessment.' " *Direct Mktg.*, 135 S.Ct. at 1136 (Ginsburg, J., concurring). Justice Ginsburg explained, the "Court does not reach today the question whether the claims in such a suit, i.e., claims suitable for a refund action, are barred by the [TIA]." *Id.* Unlike Green Solution, the retailers in *Direct Marketing* could not seek relief in a state refund action because the inquiries to the retailers were aimed at increasing the tax liability of their customers, not themselves. Thus, it is uncertain whether a majority of the Supreme Court would hold the TIA bars a federal action seeking to enjoin the state taxing authority from enforcing reporting obligations against the taxpayer. And it is therefore even more unsettled how the Court would assess a similar action to enjoin federal taxing authorities under the distinct language of the AIA. When three concurring Justices say that *Direct Marketing* did not reach the situation now before us, and no Justice

[6] Justice Breyer and Justice Sotomayor joined in the relevant portion of Justice Ginsburg's concurrence. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135–36 (2015) (Ginsburg, J., concurring).

disputed that statement, we can hardly say that *Direct Marketing* so undermined the authority of *Lowrie* in this context that we must retreat from its holding.

B. Additional Arguments

Green Solution asserts that even if *Lowrie* is still good law, the AIA does not preclude this suit. First, Green Solution contends the IRS was acting outside its authority in investigating whether Green Solution trafficked in a controlled substance, which it claims is a criminal investigation properly carried out by the United States Attorney.[7] According to Green Solution, "While § 280E is within the Tax Code, the CSA is not. Thus, a determination of whether a taxpayer violated the CSA is not within the authority of the IRS." Green Solution claims it is not seeking to enjoin the IRS from enforcing § 280E, which it acknowledges would be precluded by the AIA, but that it seeks only to enjoin

[7] After oral argument, Green Solution submitted supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j), raising two new arguments with respect to the IRS's authority: (1) Congress did not provide the IRS with standards to determine whether to deny deductions under § 280E, and (2) the IRS failed to go through a formal rulemaking process before enforcing § 280E. But Green Solution never raised these arguments in the district court or in its appellate briefs, and "it is well established that we will not consider issues raised for the first time in a Rule 28(j) letter." *Flores-Molina v. Sessions*, 850 F.3d 1150, 1172 n.16 (10th Cir. 2017) (internal quotation marks omitted).

the IRS's investigation of alleged federal drug law violations, which Green Solution claims falls outside the protection of the AIA.

But § 280E has no requirement that the Department of Justice conduct a criminal investigation or obtain a conviction before § 280E applies. *See Alpenglow Botanicals, LLC v. United States*, No. 16-cv-00258-RM-CBS, 2016 WL 7856477, at *4 (D. Colo. Dec. 1, 2016) (unpublished) ("If Congress had wanted such an investigation to be carried out or conviction to be obtained, then it could easily have placed such language in § 280E."). Instead, the IRS's obligation to determine whether and when to deny deductions under § 280E, falls squarely within its authority under the Tax Code. *See* I.R.C. § 6201(a) (authorizing and requiring the IRS "to make the inquiries, determinations, and assessments of all taxes ... imposed by this title"); I.R.C. § 7602(a) (authorizing the IRS to "examine any books, papers, records, or other data which may be relevant or material to" "determining the liability of any person for any internal revenue tax"); *see also United States v. Clarke,* 134 S.Ct. 2361, 2364, 189 L.Ed.2d 330 (2014) (holding the IRS "has broad statutory authority to summon a taxpayer to produce documents or give

testimony relevant to determining tax liability"). Thus, the AIA is implicated here.[8]

Second, Green Solution argues that § 280E is a penalty, not a tax subject to the AIA. Again we disagree. A "penalty" is defined as "an exaction imposed by statute as punishment for an unlawful act." *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931). The disallowance of a deduction is not an exaction imposed as punishment. "Deductions ... are not a matter of right. Neither do they turn upon equitable considerations. They are a matter of legislative grace." *See United States v. Akin,* 248 F.2d 742, 743 (10th Cir. 1957). Moreover, Green Solution does not cite a single case that holds the disallowance of a deduction constitutes a "penalty" and falls outside the AIA's reach. *Bob Jones University v. Simon,* 416 U.S. 725, 738, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), and *Alexander v. Americans United, Inc.,* 416 U.S. 752, 760–61, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974), both involved the disallowance of deductions for charitable contributions, and neither was held to be a penalty. Section 280E is not a penalty.

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[8] To the extent Green Solution argues the IRS exceeded its authority under the Internal Revenue Code, we lack subject matter jurisdiction to consider the merits of the argument. We decide here only that the IRS's efforts to assess taxes based on the application of § 280E fall within the scope of the AIA.

IV. CONCLUSION

The Supreme Court's decision in *Direct Marketing Ass'n v. Brohl* did not clearly undermine our reasoning in *Lowrie*. Thus, because the IRS's investigation of Green Solution's business records is an "activity leading up to" an assessment, we conclude Green Solution's lawsuit was filed for the purpose of restraining any such assessment and is therefore barred by the AIA and DJA. We affirm.

APPENDIX C
Filed June 7, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 16-cv-00257-RPM

THE GREEN SOLUTION RETAIL, INC., and KYLE SPEIDELL,

Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, JOHN KOSKINEN, and DAVID HEWLETT,

Defendants.

Counsel:

James D. Thorburn, Richard A. Walker, Thorburn Walker, LLC, Greenwood Village, Colorado, for Plaintiffs

Caroline D. Ciraolo, Acting Assistant Attorney General, Goud P. Maragani, US. Department of

Justice, Tax Division, John F. Walsh, of Counsel, United States Attorney, Washington, D.C., for Defendants

Judge: Richard P. Matsch, United States District Judge

ORDER FOR DISMISSAL

In *Feinberg v. Commissioner of Internal Revenue*, 808 F.3d 813 (10th Cir. 2015), Circuit Judge Gorsuch made the following observation:

> This case owes its genesis to the mixed messages the federal government is sending these days about the distribution of marijuana. The Feinbergs and Ms. McDonald run Total Health Concepts, or THC, a not-so-subtly-named Colorado marijuana dispensary. They run the business with the blessing of state authorities but in defiance of federal criminal law. *See* 21 U.S.C. § 841. Even so, officials at the Department of Justice have now twice instructed field prosecutors that they should generally decline to enforce Congress's statutory command when states like Colorado license operations like THC. At the same time and just across 10th Street in

> Washington, D.C., officials at the IRS refuse to recognize business deductions claimed by companies like THC on the ground that their conduct violates federal criminal drug laws. See 26 U.S.C. § 280E. So it is that today prosecutors will almost always overlook federal marijuana distribution crimes in Colorado but the tax man never will.

So in this civil action the plaintiffs The Green Solution Retail, Inc., (TGSR), a Colorado licensed cannabis dispensary and its owner/operator Kyle Speidell, seek to enjoin David Hewlett, an IRS auditor, from seeking information investigating and determining whether they trafficked in an Schedule I Controlled Substance (marijuana) in violation of 21 U.S.C. § 801 et seq., the Controlled Substances Act (CSA). Their purpose is to prevent the IRS from applying 26 U.S.C. § 280E to their 2013 and 2014 tax returns. That section reads:

> 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.

In essence the plaintiffs contend that the IRS should not enforce that provision against them just as the DOJ does not enforce the CSA by prosecuting them for a federal felony.

The defendants move to dismiss under Fed.R.Civ.P12(b)(1), claiming this Court is deprived of jurisdiction by The Anti-Injunction Act, 26 U.S.C. § 7421(a) as follows:

> (a) Tax. – Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6330€(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The plaintiffs counter that they are not seeking to restrain assessment or collection of income tax but only the gathering of information about their business. That argument is contrary to established law. The Anti-Injunction act applies "not only to the

actual assessment and collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection." Lowrie v. United States, 824 F.2d 827, 830 (10th Cir. 1987) (internal citation omitted).

The plaintiffs also argue that § 280E is not a tax but a penalty for violating federal law. If that argument has validity it is premature. An injunction may only issue only if the plaintiffs show irrevocable injury and the plaintiffs have ample opportunity to challenge the statute if there is an assessment of additional tax liability by a petition to the Tax Court or a refund action in this Court.

The plaintiffs also seek a declaratory judgment that the IRS has no jurisdiction to enforce the CSA. That claim is barred by the exclusion in 28 U.S.C. § 2201(a) as to Federal taxes. Even so, Congress has placed § 280E in the Internal Revenue Code and assigned enforcement of it to that agency.

Upon the foregoing, it is ORDERED that this civil action is dismissed with prejudice for lack of jurisdiction.

DATED: June 7, 2016

BY THE COURT:
/s/ Richard P. Matsch

RICHARD P. MATSCH, SENIOR JUDGE