No. 20-1332

# In the Supreme Court of the United States

ERIC D. SPEIDELL, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Acting Solicitor General*
*Counsel of Record*
DAVID A. HUBBERT
*Acting Assistant Attorney General*
MICHAEL J. HAUNGS
NATHANIEL S. POLLOCK
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

For income tax purposes, the Internal Revenue Code disallows any deduction or credit for business expenses incurred in carrying on a trade or business that "consists of trafficking in controlled substances" in violation of federal or state law. 26 U.S.C. 280E. Marijuana is a controlled substance, and federal law prohibits trafficking it. 21 U.S.C. 812(c), 841(a)(1). Petitioners own and operate marijuana dispensaries in Colorado, which has decriminalized marijuana in some respects under state law. The question presented is as follows:

Whether the court of appeals correctly affirmed the district court's decision to enforce several third-party summonses issued by the Internal Revenue Service as part of investigations into the accuracy of petitioners' federal income tax returns.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 978 F.3d 731. The orders of the district court (Pet. App. 34-61, 72-98) are not published in the Federal Supplement but are available at 2019 WL 1859161, 2019 WL 1859146, 2018 WL 1305449, 2019 WL 1859159, and 2019 WL 1859147.

## JURISDICTION

The judgment of the court of appeals was entered on October 20, 2020. The petition for a writ of certiorari was filed on March 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Internal Revenue Code (Code), 26 U.S.C. 1 *et seq.*, imposes a tax on the "taxable income" of individuals and corporations. 26 U.S.C. 1(a), 11(a). The Code

defines "taxable income" to mean "gross income minus the deductions allowed by" the Code. 26 U.S.C. 63(a). The Code defines "[g]ross income," in turn, to mean "all income from whatever source derived, including * * * [g]ross income derived from business." 26 U.S.C. 61(a)(2). A taxpayer's gross income derived from business generally means the business's "total sales, less the cost of goods sold." 26 C.F.R. 1.61-3(a).

The deductions that a taxpayer may take "[i]n computing taxable income under section 63" are set forth elsewhere in the Code. 26 U.S.C. 161. As a general matter, the Code permits a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during [a] taxable year in carrying on any trade or business." 26 U.S.C. 162(a). But the Code prohibits tax deductions (or tax credits) for expenditures made "in carrying on any trade or business" that "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.

Congress enacted Section 280E in 1982, in response to a Tax Court decision. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. III, Subtit. I, § 351(a), 96 Stat. 640 (26 U.S.C. 280E); see S. Rep. No. 494, 97th Cong., 2d Sess. Vol. 1, at 309 (1982). The Tax Court case had involved a taxpayer "self-employed in the trade or business of selling amphetamines, cocaine, and marijuana," in violation of federal law. *Edmondson* v. *Commissioner*, 42 T.C.M. (CCH) 1533, 1534 (1981). Under the Code's capacious definition of "[g]ross income," 26 U.S.C. 61(a)(2), even income derived from illegal drug-trafficking is taxable. The taxpayer in *Edmondson* successfully sought to deduct from his taxable

income what he claimed were "ordinary and necessary" expenses of drug-trafficking, such as "the purchase of a small scale, packaging expenses, telephone expenses, and automobile expenses." 42 T.C.M. (CCH) at 1535-1536. Congress responded by enacting Section 280E and prohibiting deductions for any expenses of engaging in the business or trade of unlawfully trafficking in controlled substances. 26 U.S.C. 280E.

2. a. Petitioners are two sets of legal entities that are in the business of selling marijuana in Colorado, and some of the putative owners of those entities. Pet. App. 6, 8. Colorado does not criminalize the sale of marijuana by businesses that operate within the state's regulatory regime. See Colo. Const. Art. XVIII, § 16. But, as a matter of federal law, the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, classifies marijuana as a Schedule I controlled substance, 21 U.S.C. 812(c), and prohibits knowingly or intentionally "manufactur[ing], distribut[ing], or dispens[ing]" it, 21 U.S.C. 841(a)(1).

The decisions below concern challenges to third-party summonses issued by the IRS in the context of audits of petitioners. The first set of petitioners are Green Earth Wellness, Inc.; Green Solution, LLC; Infuzionz, LLC; IVXX Infuzionz, LLC; S-Type Armored, LLC; TGS Management, LLC; The Green Solution Retail, Inc.; and Eric Speidell (collectively, Green Solution petitioners). They operate a marijuana dispensary advertised as "Colorado's #1 Marijuana Dispensary." Pet. App. 6 (citation omitted). The IRS sought to obtain information relevant to its audits of the Green Solution petitioners' 2013 and 2014 tax returns from those petitioners themselves, but received only partial responses that did not "substantiate the figures shown on their tax returns." *Ibid.* (citation omitted). The Green Solution

petitioners failed to produce "information reported to Colorado's Marijuana Enforcement Division ('MED'), including information from MED's Marijuana Enforcement Tracking Reporting and Compliance ('METRC') system." *Id.* at 7. Because that information was relevant for confirming the Green Solution petitioners' gross receipts and cost of goods sold, the IRS summoned the information from MED itself. *Ibid.* The IRS also issued summonses to the Green Solution petitioners' financial institutions. *Ibid.*

The second set of petitioners are Medicinal Oasis, LLC; Medicinal Wellness Center, LLC; Judy Aragon; Michael Aragon; and Steven Hickox (the Medicinal Wellness petitioners). Pet. App. 8. They operate a marijuana dispensary that they advertise as containing the "largest selection of cannabis in the world!" *Ibid.* (citation omitted). The Medicinal Wellness petitioners likewise did not produce the information they reported to MED in response to the IRS's summonses. *Id.* at 9. The IRS then issued third-party summonses to MED itself seeking that information. *Ibid.*

Some of petitioners are organized as "pass-through entities for tax purposes," meaning the entities' profits are reportable as income on the individual federal tax returns of their owners. Pet. App. 6, 9. The IRS also audited one putative owner of the Green Solution entities, petitioner Eric Speidell, and three putative owners of the Medicinal Wellness entities, petitioners Judy and Michael Argon and Steven Hickox. See *ibid.*

The IRS's authority to issue a summons to a third party is set out in Section 7602 of the Code. Under that provision, the IRS may "examine any books, papers, records, or other data" as part of an inquiry into "ascertaining the correctness of any return" or "determining

the liability of any person for any internal revenue tax." 26 U.S.C. 7602(a)(1). The IRS may also "summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * * to appear before the [IRS] * * * to produce such books, papers, records, or other data." 26 U.S.C. 7602(a)(2). When the IRS issues a summons to a third party seeking information about a person, it must notify the person, 26 U.S.C. 7609(a)(1), and the person may seek to quash the summons in federal district court, 26 U.S.C. 7609(b)(2).

Collectively, petitioners filed in the district court five separate petitions to quash the third-party summonses. Pet. App. 6-10. Petitioners contended that the summonses lacked a legitimate purpose and were deficient in other respects under this Court's decision in *United States* v. *Powell*, 379 U.S. 48 (1964). The government moved to dismiss the petitions to quash and to enforce the summonses. Pet. App. 40, 51, 72, 82. The government also argued that one of the petitions, Speidell's separate challenge to the third-party summonses to MED concerning his individual tax returns, was untimely. *Id.* at 8.

b. The district court determined that the IRS satisfied the *Powell* framework as to the summonses challenged in four of the five petitions to quash (all except the summonses challenged by Speidell). The court first concluded that the summonses were issued for legitimate purposes, including the purpose of determining whether petitioners' income is from trafficking in a controlled substance (*i.e.*, marijuana). Pet. App. 43-45, 55-56, 75-76, 85-86. The court rejected petitioners' contention that the IRS lacks authority to make that determi-

nation and therefore that the IRS's purpose was illegitimate. *Id.* at 44-45, 56, 76, 87. The court also rejected the Medicinal Wellness petitioners' argument that the IRS was required to offer them immunity from criminal prosecution before issuing the summonses. *Id.* at 87-89.

The district court concluded that the IRS established that summoned information was relevant to a legitimate purpose via the revenue agent's declarations stating, *inter alia*, that the information sought in the summonses would substantiate or contradict petitioners' cash flow, gross receipts, and costs of goods sold. Pet. App. 45-46, 56-57, 77-78, 89-90. The court determined that the revenue agent's uncontradicted declaration established that the IRS did not already have the information the summonses sought, *id.* at 46-47, 57-58, 78, 90-91, and that uncontroverted evidence showed the IRS had followed the required administrative procedures in issuing the summonses, *id.* at 47, 58, 78, 91-92.

The district court concluded that petitioners failed to support their claim that the IRS had not acted in good faith in issuing the summonses. Pet. App. 48-49, 59-60, 80, 97. In the context of its determinations about good faith, the court rejected, *inter alia*, petitioners' contentions that the IRS was really seeking to place petitioners in criminal jeopardy, that the summonses violated their Fourth Amendment rights, that the summonses were overbroad, that the summonses required MED personnel to commit a state-law crime and to create reports that did not already exist, and that some of the summoned materials would impermissibly reveal the identities of third parties. *Id.* at 48-49, 59-60, 79-80, 92-97.

Finally, the district court ruled that Speidell's petition to quash was untimely. Pet. App. 36-38.

c. The court of appeals affirmed. Pet. App. 1-30. The court noted that "multiple Colorado marijuana dispensaries" have filed appeals challenging "the IRS's ability to investigate and impose tax consequences upon them" and that "[t]he dispensaries have lost every time." *Id.* at 5 (citing *Standing Akimbo, LLC* v. *United States*, 955 F.3d 1146 (10th Cir. 2020), petition for cert. pending, No. 20-645 (filed Nov. 6, 2020); *High Desert Relief, Inc.* v. *United States*, 917 F.3d 1170 (10th Cir. 2019); *Feinberg* v. *Commissioner*, 916 F.3d 1330 (10th Cir.), cert. denied, 140 S. Ct. 49 (2019); *Alpenglow Botanicals, LLC* v. *United States*, 894 F.3d 1187 (10th Cir. 2018), cert. denied, 139 S. Ct. 2745 (2019); and *Green Solution Retail, Inc.* v. *United States*, 855 F.3d 1111 (10th Cir. 2017), cert. denied, 138 S. Ct. 1281 (2018)). In particular, the court explained that its previous decision in *Standing Akimbo* "is directly on point for almost every argument" petitioners raised. *Id.* at 6.

The court of appeals reiterated its conclusion in *Standing Akimbo* that "the Rule 56 standards governing motions for summary judgment apply, rather than the Rule 12 standards governing motions to dismiss." Pet. App. 14. The court determined, however, that petitioners "have not shown that any application of Rule 12 by the district court affected the outcome of the case" and that, as in *Standing Akimbo*, petitioners' evidence and their "attacks on the IRS's evidence did not create a genuine dispute of material fact." *Id.* at 14-15.

On the merits, the court of appeals concluded that the government satisfied the *Powell* standard. Initially, the court determined that the IRS agents' declarations established that cases had not been "referred to the DOJ for [criminal] prosecution." Pet. App. 17. The

court concluded that the IRS's investigation had the legitimate purpose of "'verifying the accounting records,' 'reconstructing income,' 'substantiating the tax returns at issue,' and confirming business relationships." *Id.* at 17-18 (citations omitted). The court rejected petitioners' contention that the IRS lacks authority to decide whether they violated the Controlled Substances Act and was therefore acting for an illegitimate purpose. The court explained that the IRS has authority to deny deductions under 26 U.S.C. 280E and thus "to determine, as a matter of civil tax law, whether taxpayers have trafficked in controlled substances." Pet. App. 18 (citation omitted). The court also rejected petitioners' contention that the IRS's purpose was illegitimate because its authority in this context does not preempt Colorado law. *Id.* at 18-19. The court explained that whether the Controlled Substances Act preempts state law is beside the point because Section 280E plainly applies "to situations in which federal law prohibits the conduct *even if* state law allows it" and, in any event, a State's legalization of marijuana does not overcome the Controlled Substances Act's prohibitions. *Id.* at 19 (citation omitted).

The court of appeals determined that IRS agents' declarations asserting that the summoned information may help to determine gross receipts, cost of goods sold, and (more broadly) the correctness of petitioners' tax returns were sufficient to establish relevance. Pet. App. 20-21. It concluded that there was no genuine dispute that the IRS did not already possess the summoned information. *Id.* at 21. And it concluded that the IRS's compliance with required administrative steps in issuing the summonses was not contested. *Id.* at 21-22.

Next, the court of appeals rejected petitioners' contention that "the IRS's refusal to grant immunity constitutes bad faith and makes these proceedings quasi-criminal." Pet. App. 22. Contrary to petitioners' position, the court explained that *Marchetti* v. *United States*, 390 U.S. 39 (1968), and similar cases "involve the invocation of a Fifth Amendment privilege to overcome IRS regulations requiring a taxpayer to disclose information carrying a real risk of self-incrimination" and that petitioners had not raised any Fifth Amendment challenge. Pet. App. 23 (citation omitted). The court likewise rejected petitioners' contention that the summonses were impermissibly broad because they required MED to create new reports, explaining that MED was required to produce only reports that it already has. *Id.* at 23-24.

The court of appeals also rejected petitioners' Fourth Amendment argument, determining that they had no reasonable expectation of privacy concerning information they turned over to third parties and, thus, that the IRS was not required "to obtain search warrants supported by probable cause." Pet. App. 24-25. And the court rejected petitioners' argument that enforcing the summonses compelled a violation of Colorado privacy law because current Colorado law "permits disclosure of confidential data for an authorized purpose, such as" compliance with an IRS summons. *Id.* at 26-27.

Finally, the court of appeals upheld the dismissal of Speidell's petition to quash on timeliness grounds. The court explained that, under 26 U.S.C. 7609(b)(2)(A), a taxpayer must file a petition to quash a third-party summons "no later than the twentieth day after notice of the summons is given," and that the evidence "showed that Speidell missed this deadline." Pet. App. 27-28.

**ARGUMENT**

The court of appeals correctly rejected petitioners' effort to quash the third-party summonses issued by the IRS. The IRS seeks to obtain information about petitioners' marijuana dispensaries as part of its investigations into the accuracy of petitioners' federal income tax returns. The decision below does not conflict with any decision of this Court or another court of appeals, and further review is unwarranted. This Court has denied petitions for writs of certiorari filed by other Colorado marijuana dispensaries challenging the IRS's authority to investigate potential violations of 26 U.S.C. 280E. See *Feinberg* v. *Commissioner*, 140 S. Ct. 49 (2019) (No. 19-129); *Alpenglow Botanicals, LLC* v. *United States*, 139 S. Ct. 2745 (2019) (No. 18-1122); *Green Solution Retail Inc.* v. *United States*, 138 S. Ct. 1281 (2018) (No. 17-663). The same course is warranted here.[1]

1. Petitioners principally contend (Pet. 13-21), as do the petitioners in *Standing Akimbo, LLC* v. *United States*, No. 20-645 (filed Nov. 6, 2020), that "[t]he Tenth Circuit incorrectly held that federal law supersedes Colorado law when it comes to state legal cannabis sales," Pet. 13. This case, however, does not present any question about federal preemption of state law. As the court of appeals explained, the Controlled Substances Act "does not have to preempt Colorado law for § 280E to apply," because Section 280E applies as long as the trafficking at issue violates federal law—whether or not it also violates state law. Pet. App. 18 (quoting

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[1] This Court has not yet acted on the petition for a writ of certiorari filed in *Standing Akimbo, LLC* v. *United States*, No. 20-645 (filed Nov. 6, 2020). As the court of appeals noted, the arguments raised by the challengers in this case overlap significantly with the ones addressed in *Standing Akimbo*. Pet. App. 6.

*Standing Akimbo, LLC* v. *United States*, 955 F.3d 1146, 1158 (10th Cir. 2020)). In particular, the plain text of Section 280E disallows any deduction for expenditures incurred in carrying on a trade or business that "consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act)," if the trafficking is "prohibited by Federal law *or* the law of any State in which such trade or business is conducted." 26 U.S.C. 280E (emphasis added). Trafficking in a controlled substance such as marijuana is "prohibited by Federal law." *Ibid.*; see 21 U.S.C. 812(c), 841(a)(1). Accordingly, whether the Controlled Substances Act preempts Colorado's marijuana laws (see Pet. 14-17) is academic here. The IRS's authority to investigate possible violations of Section 280E by Colorado marijuana dispensaries does not turn on that question.

Petitioners nonetheless assert (Pet. 19) that the decision below untenably interprets the term "or" in Section 280E to mean that "cannabis sales [are] simultaneously lawful and unlawful" in Colorado. But the court of appeals merely explained, correctly, that the federal prohibition on trafficking marijuana is itself a sufficient basis for the IRS to investigate potential violations of Section 280E by petitioners, irrespective of state law. See Pet. App. 19 ("Congress's use of 'or' extends the statute to situations in which federal law prohibits the conduct even if state law allows it.") (quoting *Standing Akimbo*, 955 F.3d at 1158).

The court of appeals was also plainly correct that the Controlled Substances Act would preempt Colorado law in the event of any conflict. Pet. App. 20. Colorado may, of course, choose not to prohibit conduct that federal law prohibits. See *Gamble* v. *United States*, 139 S. Ct.

1960, 1969 (2019) (acknowledging that States "may choose to legalize an activity that federal law prohibits, such as the sale of marijuana"). Under the Supremacy Clause, however, Colorado may not authorize individuals or businesses to violate federal law. See U.S. Const. Art. VI, Cl. 2 (providing that "the Laws of the United States * * * shall be the supreme Law of 10 the Land"); see also, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018) ("[W]hen federal and state law conflict, federal law prevails and state law is preempted.").

Petitioners alternatively contend that the Controlled Substances Act does not actually prohibit trafficking in "state legal marijuana." Pet. 17 (capitalization and emphasis omitted); see Pet. 17-19. The court of appeals also correctly rejected that contention. Pet. App. 19. Marijuana is listed on Schedule I of the Controlled Substances Act, see 21 U.S.C. 812(c), without any exception for "state legal" marijuana. Petitioners' contrary view rests on a misreading of 21 U.S.C. 903. See Pet. 17-18. In that provision, Congress disclaimed any "intent * * * to occupy the field" of regulating controlled substances, thus making clear that States may also regulate the same substances. 21 U.S.C. 903. But the no-intent-to-preempt provision contains an exception, applicable whenever "there is a positive conflict between" federal law and state law "so that the two cannot consistently stand together." *Ibid.* Section 903 thus confirms that States may not countermand Congress's decision to prohibit trafficking in marijuana. Such activity violates federal law even when it does not independently violate state law (and even when it is affirmatively permitted by state law). See, *e.g.*, *United States* v. *Canori*, 737 F.3d 181, 184 (2d Cir. 2013) ("Marijuana remains illegal under federal law, even in those states in which medical

marijuana has been legalized.") (citing 21 U.S.C. 903). Indeed, petitioners acknowledge in passing (Pet. 30) "the conflicting laws" that have resulted from the decision of 37 States and the District of Columbia to "legalize[] cannabis" and the federal government's refusal "to stand down."

2. Petitioners next reprise an argument made in the petition filed in *Alpenglow*, *supra*. Petitioners assert (Pet. 21-24) that the court of appeals' decision empowers the IRS to define the scope of federal drug laws and determine taxpayers' criminal liability under those laws. But the IRS's administration of Section 280E does no such thing. Congress has defined the federal drug offenses in the Controlled Substances Act, see 21 U.S.C. 812(c), and Section 280E does not authorize the IRS to add or remove substances to or from the ambit of the Controlled Substances Act. Section 280E merely provides that a business that traffics in illegal drugs in violation of federal law cannot claim business-related deductions or credits in determining its income for purposes of federal income taxation. And there can be no serious doubt that petitioners bought and sold a drug in violation of federal law: They are marijuana dispensaries and marijuana dispensary owners.

The decisions on which petitioners rely (Pet. 24) do not support their position. Both *United States* v. *Grimaud*, 220 U.S. 506 (1911), and *United States* v. *Eaton*, 144 U.S. 677 (1892), concern Congress's ability to delegate to an agency the authority to define a criminal offense. See *Grimaud*, 220 U.S. at 518-519 (citing *Eaton*, 144 U.S. at 677). But as explained above, Congress has defined federal drug offenses in the Controlled Substances Act. The relevant Internal Revenue Code provisions do not authorize the IRS to initiate or conduct

criminal prosecutions under the Controlled Substances Act, but simply authorize the agency to determine, for civil tax purposes, whether taxpayers may claim credits or deductions for particular expenses. The fact that this inquiry turns in part on whether a business's activities are among those Congress has prohibited does not mean that the IRS is enforcing the criminal laws as such. And, like other IRS tax-assessment decisions, any IRS determination that Section 280E bars particular tax credits or deductions is judicially reviewable in a taxpayer's challenge to a consequent finding of a tax deficiency.

Petitioners rely on *United States* v. *Peters*, 153 F.3d 445 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999), and *United States* v. *Grunewald*, 987 F.2d 531 (8th Cir. 1993), for the proposition that "civil auditors may not conduct criminal investigations." Pet. 24-26. In those cases, however, courts found that the IRS had "engaged in impermissible deception" by conducting criminal tax investigations under the guise of civil tax audits, and that this deceptive conduct was relevant to the disposition of the defendants' motions to suppress in subsequent criminal prosecutions. *Peters*, 153 F.3d at 453; see *Grunewald*, 987 F.2d at 534 (suppression justified where "there is clear and convincing evidence that the IRS affirmatively and intentionally misled the defendant"). Those decisions do not suggest that the IRS must halt a civil tax investigation whenever it learns that a taxpayer has earned money through illegal activities or businesses, or that the agency is barred from basing civil tax determinations on such evidence. Cf. *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 778 (1994) ("[T]he unlawfulness of an activity does not prevent its taxation.").

Finally, petitioners' concern about compelled self-incrimination (Pet. 26-27) has no relevance here. As an initial matter, petitioners did not raise "a Fifth Amendment challenge" in the court of appeals. Pet. App. 23 (citation omitted). Moreover, this case concerns summonses that the IRS issued to third parties, not to the taxpayers themselves. The Fifth Amendment privilege against compulsory self-incrimination is accordingly not implicated. See *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 55 (1974) ("[A] party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights.").

3. Petitioners further contend (Pet. 27-29) that enforcement of the IRS's third-party summonses would violate the Fourth Amendment in the absence of a search warrant based on probable cause. As the court of appeals correctly held, however, petitioners' Fourth Amendment claim fails because petitioners lack any reasonable expectation of privacy in information they turned over to the Colorado's Marijuana Enforcement Division. Pet. App. 25-26. "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *United States* v. *Miller*, 425 U.S. 435, 443 (1976). That is true even if, as petitioners contend (Pet. 28), they had a subjective expectation that information they provided to Colorado would be kept confidential. See *Miller*, 425 U.S. at 443 (third-party doctrine applies "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed"); cf. Pet. App. 26-27 (explaining that the provision of Colorado

law on which petitioners rely for their purported confidentiality interest has been repealed and replaced with a provision making clear that METRC data may be shared in some circumstances). The same rationale also applies to information that the Green Solution petitioners turned over to financial institutions.

Petitioners contend (Pet. 29) that the standard established in *United States* v. *Powell*, 379 U.S. 48 (1964), is inapplicable because the investigation of drug crimes requires probable cause. But in *Powell*, this Court squarely held that the statutory framework for IRS investigations does not impose "any standard of probable cause" before the IRS may "obtain enforcement of [a] summons." *Id.* at 57; see *United States* v. *Stuart*, 489 U.S. 353, 359 (1989) ("In [*Powell*], we rejected the claim that the IRS must show probable cause to obtain enforcement of an administrative summons issued in connection with a domestic tax investigation."). The Court instead held that, to obtain judicial enforcement of a summons, the IRS must show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Powell*, 379 U.S. at 57-58. Petitioners fail to explain how the court of appeals could have erred in rejecting a probable-cause requirement in light of *Powell*.[2]

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[2] Petitioners' reliance on the silver-platter doctrine (Pet. 28) is misplaced. That term was used to describe the pre-incorporation use of state-gathered evidence that would have violated the Fourth Amendment in a federal prosecution. See *Gamble*, 139 S. Ct. at 1979. That situation is not materially analogous to the IRS's summonsing a state agency to get information relevant to an audit to

Petitioners cite (Pet. 29) this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), in support of the notion that the *Powell* standard is inapplicable because the investigations are, according to petitioners, criminal or "quasi-criminal." But *LaSalle* held that the *Powell* standard was appropriate even though the investigating IRS agent appeared to have had future criminal enforcement in mind where "[n]o recommendation to the Justice Department for criminal prosecution ha[d] been made" and the evidence did not establish that the IRS "in an institutional sense had abandoned its pursuit of [the taxpayer's] civil tax liability." *Id.* at 318-319. Here, petitioners did not contest, and the court of appeals determined, that the IRS has not made a criminal referral. Pet. App. 17.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Acting Solicitor General*
DAVID A. HUBBERT
*Acting Assistant Attorney General*
MICHAEL J. HAUNGS
NATHANIEL S. POLLOCK
*Attorneys*

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determine a person's federal tax liability. In any event, this Court in *Powell* has already rejected the notion that IRS summonses must be supported by probable cause.