No. 25-5412

Supreme Court of the United States

RYAN RICHMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 26 U.S.C. § 280E—which denies ordinary and necessary business deductions to enterprises trafficking in Schedule I controlled substances—may constitutionally be applied to a state-authorized marijuana business when, in the two decades since *Gonzales v. Raich*, Congress and the States have abandoned a uniform federal prohibition, and marijuana's Schedule I classification no longer serves the Commerce Clause, the Necessary and Proper Clause, or Congress's Taxing Power?

RELATED PROCEEDINGS

The District Court proceeding was in the United States District Court for the Eastern District of Michigan. The issue presented in this petition was not presented to the District Court. The case is *United States v. Richmond*, 21-cr-20209

The undersigned successor counsel filed a notice of appeal presented the issue to the Sixth Circuit. in *United States v. Richmond*, Sixth Circuit No. 25-1525 (docket Jun. 4, 2024). The opinion was dated January 30, 2025. Rehearing en banc was denied March 19, 2025.

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The opinion of the United States Court of Appeals for the Sixth Circuit is dated is dated January 30, 2025 and appears at App 1a. The Sixth Circuit's order denying rehearing and rehearing en banc is dated May 19, 2025 and appears at App.13a.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The decision of the Sixth Circuit denying en banc rehearing was dated March 19, 2025. A request to extend the filing period was filed within ninety days of that order. On June 11, 2025, this Court extended the time period to file certiorari until August 16, 2025.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have power to … regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. Const. art. I, § 8, cl. 18 provides:

> [The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

> Government of the United States, or in any Department or Officer thereof.

U.S. Const. amend. X provides:

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

U.S. Const. amend. XVI provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

26 U.S.C. § 280E 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 (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.

STATEMENT OF THE CASE

This case involves the validity of the Petitioner's conviction of one count of corrupt endeavor to

obstruct or impede the Administration of Internal Revenue laws, three counts of tax evasion, and one count of willful failure to file a tax return in in the U.S. District Court for the Eastern District of Michigan before Hon. Linda Parker. Petitioner was convicted after a jury trial in which he was convicted of one count of corrupt endeavor to obstruct or impede the Administration of Internal Revenue laws, three counts of tax evasion, and one count of willful failure to file a tax return. He was found not guilty of making a false statement in the jurisdiction of the United States Government and not guilty of tax evasion in the year 2011. The applicable offenses took place between 2012 and 2014.

On June 5, 2024 the District Court sentenced Petitioner to twenty-four months in prison, followed by one year supervised release, together with restitution of $2,777,684.49 and an assessment of $425.00.

Petitioner was involved with a marijuana dispensary, "Relief Choices," during a period where Michigan law was very unclear about what exactly state law allowed and what it did not, (R 116, PGID 941,945; R. 118, PGID 1095). It is not in dispute that Mr. Richmond was one of the owners of the company, but there was a dispute as to whether Jacob Schell was his partner in the operation. Prior to trial, Petitioner went through several attorneys and had several periods where he represented himself.

The Government presented four IRS-affiliated witnesses. Renee McClain, an IRS records custodian, testified that Petitioner and his wife filed joint returns for 2011–2013, she filed separately in 2014,

and Petitioner filed no 2014 return (R. 116, PGID 895). Fouad Nona summarized IRS calculations, explaining that as a marijuana dispensary, § 280E disallowed deductions for salary, rent, and utilities (R. 118, PGID 1074). Supervisory Agent John Copenhagen testified that audits began in 2014 when a 1099-K showed far higher receipts than reported for Richmond Media (R. 116, PGID 763). An initial IRS letter alleged $66,758.43 in underpaid taxes (R. 116, PGID 679). Through accountant James Campbell, Petitioner proposed an amended return including omitted income and new deductions, which the IRS questioned (R. 116, PGID 672). Copenhagen testified that Petitioner claimed minimal involvement in Relief Choices, but records tied him to founding documents and bank accounts (R. 116, PGID 791-797). Agent Tammy Linn confirmed similar admissions, noting Petitioner's limited role and shared representation with co-owner Jacob Schell (R. 116, PGID 820-832).

Former employees Amanda Tweedly and Cassandra Frost testified they viewed Petitioner and Schell as co-owners; Petitioner visited occasionally but did not handle cash or vendors (R. 116, PGID 852-887). Schell, however, claimed Petitioner was present "all the time," received most profits, and used his home as the business address (R. 116, PGID 910-915, 957, 922). Campbell testified Petitioner was sole owner, ignored advice not to file an inaccurate amended return, and failed to comply with § 280E (R. 116, PGID 976, 993-1003). Campbell himself had been sanctioned by the IRS (R. 116, PGID 1014).

Petitioner testified he and Schell were partners under a lost operating agreement, splitting profits

60/40 or 50/50 depending on the venture (R. 118, PGID 1099). He denied operational control, visited briefly every few days, and presented a 2014 buyout offer from Schell (R. 118, PGID 1100-1105). Reported income for 2011–2013 came from figures supplied by Schell, which he attributed to a non-cannabis business, believing the source immaterial if income was declared (R. 118, PGID 1106-1111).

The jury returned a verdict of not guilty of making a false statement in the jurisdiction of the United States Government and not guilty of tax evasion in the year 2011. Petitioner was found guilty of one count of corrupt endeavor to obstruct or impede the Administration of Internal Revenue laws, three counts of tax evasion, and one count of willful failure to file a tax return, (R. 137, PGID 1764-1765).

Petitioner was sentenced on June 5, 2024. Most of the argument centered around restitution. Petitioner, through counsel, argued that Jacob Schell should be responsible for the portion of the restitution. Secondary Counsel, Hugh Woodrow, argued this issue to the Court. The Court agreed that he could discuss his responsibility under the Michigan Limited Liability Act of 1993, (R. 145, PGID. 1863). However, the Court found that the defense failed to establish that Mr. Schell had an ownership interest in Relief Choices, (R. 145, PGID 1865). She then sentenced Mr. Richmond to 24 months incarceration and one year supervised release on each count to be served concurrently. She also ordered costs of $425.00 as well as restitution to the IRS in the amount of $2,777,684.49, (R. 145, PGID. 1861).

On Petitioner's appeal to the Sixth Circuit, he challenged constitutional applicability of § 280E to his conduct. He also challenged the denial of a continuance and the restitution amounts.

The Court of Appeals found there was a procedural forfeiture to Petitioner's constitutional challenge to 26 U.S.C.A. § 280E because it was raised for the first time on appeal. They therefore reviewed this matter for plain error under the standard of *Puckett v. United States*, 556 U.S. 129, 134–35, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); and *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

Under that standard, the panel concluded Petitioner could not show a "clear or obvious" constitutional violation (*Puckett*, 556 U.S. at 135) because existing precedent—specifically *Gonzales v. Raich*, 545 U.S. 1, 15–22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)—upheld Congress's Commerce Clause authority even to prohibit home-grown marijuana for personal use, and thus "suggests that Congress also has the power to regulate a business that sells well over a million dollars' worth of marijuana in a year."

The court acknowledged Petitioner's reliance on changed legal circumstances, including Congress's more fragmented, state-dependent regulatory approach and Justice Thomas's opinion respecting the denial of certiorari in *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236–38, 210 L. Ed. 2d 974 (2021), suggesting *Raich* should be reconsidered. But the panel held that, "at least" under the deferential review given in *Raich*, these

developments did not render that precedent "clearly or obviously" invalid.

The court also rejected Petitioner's Sixth Amendment claim that the trial court erred in denying a continuance, finding no abuse of discretion given his repeated delays, inadequate explanations from new counsel, and scheduling conflicts. Finally, it upheld the restitution order, concluding the record supported the finding that Petitioner was the sole owner of the marijuana business and thus liable for the full amount.

In his Petition for Rehearing En Banc, Petitioner urged the Sixth Circuit to revisit two principal issues decided against him on appeal. First, he contended the panel erred in holding that his facial Commerce Clause challenge to 26 U.S.C.A. § 280E—barring business expense deductions for marijuana enterprises—was procedurally defaulted because it was raised for the first time on appeal, thereby limiting review to plain error. Richmond argued that a facial constitutional challenge to the validity of a statute, unlike an as-applied challenge, may be raised at any stage, including for the first time on appeal, as recognized in numerous state high courts and the Navy-Marine Court of Criminal Appeals (pp. 5–11). He asserted the panel's reliance on *Raich*, was misplaced given the radically changed federal–state regulatory landscape for marijuana, and that the court should have examined whether § 280E is unconstitutional under current conditions, which include widespread state legalization and congressional appropriations limits on federal enforcement (pp. 11–13).

Second, he sought remand for resentencing on the restitution order, asserting the district court erroneously stated there was "no evidence" that Jacob Schell was his partner, despite substantial trial evidence indicating shared ownership and management of Relief Choices (pp. 14–16). He maintains this misstatement shows the court failed to recognize it had discretion to apportion restitution—an error constituting an abuse of discretion under Sixth Circuit precedent (pp. 17–18). The Sixth Circuit denied en banc rehearing on March 19, 2025.

Petitioner requests this Court grant certiorari.

INTRODUCTION

This case asks whether 26 U.S.C. § 280E—enacted to penalize traffickers in federally prohibited drugs—may constitutionally be applied to state-authorized marijuana enterprises when the factual and legal premises of *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), have collapsed. Congress no longer enforces a uniform federal prohibition: forty States, three territories, and the District of Columbia authorize medical use, and nearly half the nation allows regulated recreational adult use. Yet § 280E still imposes crushing tax burdens on lawful state businesses, justified only by marijuana's Schedule I classification—an outdated designation that no longer serves the Commerce Clause, the Necessary and Proper Clause, or Congress's Taxing Power.

The Sixth Circuit, because this issue was first raised on appeal, applied a plain error standard, holding that *Raich* foreclosed relief. That procedural

posture creates a deadlock: petitioners cannot preserve this purely legal question for review without lower courts willing to entertain it, and lower courts will not entertain it absent this Court's direction.

REASON FOR GRANTING WRIT

I. THIS COURT SHOULD DECIDE WHETHER § 280E CAN CONSTITUTIONALLY BE APPLIED TO PETITIONER, BECAUSE MARIJUANA'S SCHEDULE I CLASSIFICATION CANNOT BE SUSTAINED UNDER THE COMMERCE CLAUSE, THE NECESSARY AND PROPER CLAUSE, OR THE TAXING POWER—AND THE QUESTION WARRANTS REVIEW EVEN THOUGH IT WAS NOT RAISED BELOW.

This Court's intervention is essential to break that deadlock. For nearly two decades, *Raich* has been applied as an absolute bar to constitutional challenges against § 280E, even as Congress and the States have abandoned the uniform prohibition on which *Raich* rested. The decision below illustrates the impasse: plain-error review treated *Raich* as controlling, ensuring the merits would never be reached. Meanwhile, § 280E continues to impose extraordinary federal tax burdens on state-compliant businesses—burdens sustained only by a Schedule I classification whose constitutional justification

under the Commerce Clause, the Necessary and Proper Clause, and the Taxing Power has evaporated. This Court should grant review to restore the limits *Raich* itself acknowledged and to ensure that a statute's constitutionality does not escape review merely because the issue arises in a changing legal landscape.

The Government' claimed that Mr. Richmond willfully violated Section 280E of the Tax Code dealing with the taxation of marijuana. This petition will challenge the assumption that marijuana is properly regulated as a Schedule I controlled substance and thus subject to Section 280E. This petition will explore at some length the history of marijuana regulation, the evolution of Section 280E, the parameters of the *Raich* decision and whether it has withstood the test of time.[1] Most relevant to this brief why marijuana cannot be treated in this fashion under the commerce clause, the necessary and proper clause, or the taxing powers of the constitution. While the Petitioner understands that these issues were not presented to the trial court, there is nothing to be gained by deferring consideration to proceedings under 18 U.S.C. § 2255.

A. A Brief History of Marijuana Regulation.

The Anglo-American legal tradition has long recognized hemp—botanically identical to marijuana—as a protected agricultural commodity.

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[1] *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

English common law, reflected in the Magna Carta and later statutes, treated hemp as "emblements,"[2] conferring specific legal rights and protections. Colonial legislatures extended this protection, enacting measures that required hemp cultivation,[3] prohibited its destruction,[4] and even used it as legal tender. This historical foundation underscores that marijuana commerce, far from being a recent innovation, has been legally recognized and encouraged for centuries.

Federal regulation of marijuana is a comparatively recent phenomenon. The Marihuana Tax Act of 1937,[5] though not prohibiting marijuana outright, imposed a burdensome licensing and taxation scheme that functionally curtailed its availability, and was partially invalidated in *Leary v. United States*.[5] In 1970, Congress enacted the Controlled Substances Act ("CSA"), classifying marijuana as a Schedule I substance pending completion of scientific

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[2] 2 W. Blackstone, Commentaries on the Laws of England 122; see also E. Coke, Institutes of the Lawes of England 55.

[3] 1619 Va. Act ("for hemp…we do require and enjoine all householders…to make trial thereof the nexte season") referenced in The Records of the Virginia Company of London, at 166 (1906), available at https://www.loc.gov/item/06035006/.

[4] 1660 Mass. Act (prohibiting "wanton destruction" of hemp) referenced in The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts, at 289 (1660), available at https://archives.lib.state.ma.us/handle/2452/430907.

[5] *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), *aff'd,* 544 F.2d 1266 (5th Cir. 1977).

studies.[6] The Schedule I classification rendered all possession and use a federal crime absent FDA-approved research. "The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[7]

State-level reform began in 1996 with California's Compassionate Use Act,[8] permitting medical marijuana notwithstanding federal prohibition. *In Gonzales v. Raich*, the Court upheld Congress's authority under the Commerce Clause to prohibit even intrastate, noncommercial medical marijuana activity. The dissent maintained that the federal government had overstepped its constitutional authority, emphasizing the federalist "laboratories of democracy" principle.[9]

Congress has since limited enforcement of the CSA against state-compliant medical marijuana through the Rohrabacher-Farr Amendments,[10] and in 2009

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[6] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236; 21 U.S.C. § 812(b)(1). See also *Canna Provisions, Inc. v. Bondi*, 138 F.4th 602, 605 (1st Cir. 2025).

[7] *Canna Provisions, Inc.*, 138 F.4th at 605 (quoting *Gonzales*, 545 U.S. at 10–12).

[8] Cal. Health & Safety Code § 11362.5 (West).

[9] *Id.* at 42 (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting)).

[10] See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

permitted medical marijuana sales in the District of Columbia. These measures demonstrate that Congress no longer seeks eradication of marijuana and instead contemplates regulated state markets.

Justice Thomas' separate opinion in *Standing Akimbo*,[11] calls into question the continuing validity of *Gonzales v. Raich.* The widespread legalization of medical and recreational marijuana has undercut key assumptions of *Raich.*

In the twenty years since *Raich,* our nation has had over a decade of experience with what in *Raich*'s time was merely a hypothetical: what would happen if a substantial number of people participated in state-regulated marijuana programs? As of 2025, 40 states, three territories and the District of Columbia allow the medical use of cannabis products. Also as of 2025, 24 states, three territories and the District of Columbia have enacted measures to regulate cannabis for non-medical (recreational) adult use.[12]

B. Section 280E of the Tax Code.

26 U.S.C.S. § 280E was passed in response to the Tax Court's decision in *Edmondson v. Commissioner of Internal Revenue*,[13] and severely limits the tax deductions a person can take for being in the

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[11] *Standing Akimbo, LLC*, 141 S. Ct. 2236.

[12] https://www.ncsl.org/health/state-medical-cannabis-laws.

[13] *Edmondson v. Comm'r*, 42 T.C.M. (CCH) 1533 (T.C. 1981), *acq. in part and nonacq. in part recommended by In re Jeffrey Edmondson*, AOD-1982-82 (IRS AOD Oct. 15, 1982).

marijuana industry – even state regulated medical marijuana facilities.

As the law currently stands, even where a marijuana dispensary operates under the blessing of state law, the business is highly limited in the deductions it may take.[14] As Justice Thomas has noted that the Tax Code allows all other businesses "to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries."[15] But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary business expenses.[16] Under this rule, a business that is still in the red after it 'pays its workers and keeps the lights on might nonetheless owe substantial federal income tax."[17]

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived."[18] Accordingly, except for the special limitations imposed by Section 280E, cannabis

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[14] *Olive v. Comm'r*, 792 F.3d 1146 (9th Cir. 2015).

[15] *See* 26 U.S.C. § 162(a); 26 C.F.R. § 1.61-3(a) (2020).

[16] See 26 U.S.C.A. § 280E.

[17] *Standing Akimbo, LLC*, 141 S. Ct. at 2237–38 (Thomas, J., concurring).

[18] 1 Marijuana Regulation § 9.02 (Matthew Bender & Company, Inc., 2024).

income generally is subject to the same rules that apply to other income.

The importance of Section 280E was described by one commentator as follows:[19]

> IRC § 280E provides that no deduction or credit shall be allowed for any trade or business consisting of trafficking in controlled substances prohibited by Federal law or the law of any State in which such trade or business is conducted. Because cannabis remains classified as a Schedule I controlled substance under the federal Controlled Substances Act, cannabis businesses are generally not permitted to deduct business expenses on their federal income tax returns. H.R. 2643 was introduced in the House of Representatives on April 7, 2023. H.R. 2643 would exempt a trade or business that conducts marijuana sales in compliance with state law from IRC § 280E. As of this writing, H.R. 2643 remains in the House Committee on Ways and Means. For now, so long as cannabis is found on the controlled substances list, income from cannabis business activities is subject to IRC § 280E.

Tax Court decisions have read Section 280E very broadly, applying the policy of the act to non-textually exclude deductions otherwise allowed under clear provisions of the tax code. If marijuana

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[19] 1 Marijuana Regulation § 9.02.

was not a Schedule 1 controlled substance, then both the loss amounts in this case and even Mr. Richmond's liability would be cast in doubt.

C. Section 280E Cannot be Justified as a Commerce Clause Measure.

Standing Akimbo was a commerce clause challenge to Section 280E by a Colorado marijuana dispensary which operated in accordance with state law and was deprived of various federal tax deductions which it believed it was entitled to.

Congress is authorized by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States."[20] This power normally does not permit Congress to regulate matters which are purely intrastate.[21] In determining whether an activity is wholly intrastate, Congress can view the matter en masse. Congress can regulate a "class of activities" which when viewed collectively would have a substantial effect on interstate commerce.[22] Thus, if Congress decides that the "total incidence" of a practice poses a threat

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[20] U.S. Const. art. I, § 8, cl. 3 provides that Congress shall have the power: "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[21] *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

[22] *See , e.g.*, *Perez v. United States*, 402 U.S. 146, 151, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971).

to a national market, it may regulate the entire class.[23]

The true power being exercised by this legislation is not the regulation of Commerce but rather is part of a States' "core police powers" to "define criminal law and to protect the health, safety, and welfare of their citizens."[24] The majority rule to the contrary was "That rule and the result it produces in this case are irreconcilable with the Court's prior jurisprudence."[25] In a separate dissent, Justice Thomas noted that (like this case) all marijuana was locally grown and cultivated, never crossed state lines, and had no demonstrated impact on the national marijuana market. "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers". At the end of the day, this scheme was upheld by a six to three majority.[26] No member of the majority is still on the Court.

In the intervening twenty years, Congress delivered mixed signals on marijuana. They simultaneously tolerate and forbid local use of

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[23] *See , e.g.*, *Perez*, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686; *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

[24] *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); *Whalen v. Roe*, 429 U.S. 589, 603, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Gonzales*, 545 U.S. at 42 (O'Connor, J., dissenting).

[25] *Gonzales*, 545 U.S. 1.

[26] *Gonzales*, 545 U.S. at 57–58.

marijuana. "This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."[27]

The last twenty years has drastically altered our relation with marijuana at the federal level. *Raich* should not be expansively foreclosed to bar the current challenge:[28]

> The Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" " 'and try novel social and economic experiments,' " then it might no longer have authority to intrude on "[t]he States' core police powers ... to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.

As of 2024, the state legal marijuana industry accounts for approximately 440,445 jobs.[29] In 2023,

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[27] *Standing Akimbo, LLC*, 141 S. Ct. at 2237

[28] *Standing Akimbo, LLC*, 141 S. Ct. at 2238.

[29] See Barcott & Whitney, Jobs Report 2024: Positive Growth Return (Vangst) accessed August12, 2025, available at

the state legal marijuana industry reached $28.8 billion in sales.[30] This is now a major industry.

D. The Classification of Marijuana as a Schedule I Controlled Substance and Thus Subject to 280E Cannot be Justified Under the "Necessary and Proper" Clause (Including the Taking Power).

Section 280E can also not be justified under the Necessary and Proper Clause.[31] To be "necessary" within the meaning of that clause, courts have emphasized that Congress's regulation must be "plainly adapted" to implementing Congress's delegated authority.[32] This "plainly adapted" standard requires that "the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other

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https://5711383.fs1.hubspotusercontent-na1.net/hubfs/5711383/VangstJobsReport2024-WEB-FINALFINAL.pdf

[30] See New Frontier Data, U.S. Legal Cannabis Market Growth, September 8, 2019, available at https://newfrontierdata.com/cannabisinsights/u-s-legal-cannabis-market-growth/.

[31] U.S. Const. art. I, § 8, cl. 1, grants Congress the power to lay and collect taxes, duties, imposts, and excises to pay debts and provide for the common defense and general welfare of the United States, with the requirement that such duties, imposts, and excises be uniform throughout the United States.

[32] *M'Culloch v. State*, 17 U.S. 316, 421, 4 L. Ed. 579 (1819).

powers that the Constitution grants Congress the authority to implement."[33]

This mandatory "connection between" the local regulation and "Congress' authority" cannot be "too attenuated,"[34] and the regulation must be "really calculated to effect" Congress's enumerated authority.[35]

The "proper" half of the Necessary and Proper Clause requires that the local regulation be "not prohibited, but consistent with the letter and spirit of the constitution." [36] The Necessary and Proper Clause, however, requires more than simply "pretext."[37]

More than twenty years ago, in *Raich*, this Court applied these standards to conclude that the CSA was a proper exercise of the Necessary and Proper Clause. At the time, Congress's interstate marijuana goal was "eliminating commercial transactions in the interstate market in their entirety."[38] Congress had also determined that it was necessary to regulate all

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[33] *United States v. Comstock*, 560 U.S. 126, 135, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010) (internal quotations omitted) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring)).

[34] *Artis v. D.C.*, 583 U.S. 71, 90, 138 S. Ct. 594, 199 L. Ed. 2d 473 (2018) (quoting *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 464, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003))

[35] *M'Culloch*, 17 U.S. at 423.

[36] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

[37] *Artis*, 583 U.S. at 90.

[38] *Raich*, 545 U.S. at 19.

local marijuana commerce to achieve that goal, because permitting intrastate marijuana would leave a "gaping hole in the CSA."[39] Congress supported that determination with factual findings about the relationship between local and interstate commerce in controlled substances. Those findings, in turn, were consistent with the record in *Raich*.[40] These circumstances meant that at the time, Congress's prohibition on intrastate commerce fell within its "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce among the several States.'"[41]

In the two decades since *Raich*, those crucial legal and factual premises have disappeared. Congress has abandoned its goal of eradicating marijuana and has, in fact, expressly exempted it from federal enforcement in certain circumstances. Congress has also dropped any assumption that federal control of state-regulated marijuana is necessary to prevent a "gaping hole in the CSA."[42] Yet the federal prohibition on state-regulated marijuana nonetheless continues. Now bereft of the interstate goal and findings that justified it in *Raich*, the CSA's ban as applied to state-regulated marijuana cannot be upheld today.

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[39] *Id.* at at.

[40] See *id.*

[41] *Id.* (internal ellipses omitted) (quoting U.S. Const. art. I, § 8).

[42] *Id.* at 22.

These significant changes in Congress's approach to marijuana were recognized by the First Circuit three years ago, when it held that "the CSA was not Congress's last word on the market in marijuana."[43]

E. Section 280E Cannot be Justified Under the Taxing Power.

Congress' taxing power cannot justify this law. Congress's power to tax is primarily justified by specific clauses in the U.S. Constitution. These clauses grant Congress the authority to lay and collect taxes, duties, imposts, and excises to pay debts and provide for the common defense and general welfare of the United States.[44] Additionally, the Sixteenth Amendment explicitly empowers Congress to tax incomes without apportionment among the states.[45] Thus, while this argument largely overlaps the necessary and power clause argument made in the prior sub-issue, there are slight uniqueness's that warrant addressing it separately.

Section 280E of the Internal Revenue Code, forces state-authorized marijuana businesses to pay exceptionally high taxes, under Congress's power to tax and spend. The justifications for upholding the law fly in the face of the Supreme Court precedent regarding congressional power to tax, particularly *NFIB* which when properly read makes it clear that

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[43] *NE. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 549 (1st Cir. 2022).

[44] U.S. Const. art. I, § 8, cl. 1.

[45] U.S. Const. amend. XVI.

§ 280E lies outside of Congress's Taxing Power because it is an impermissible penalty.[46] Justice Thomas accepted this position in his separate opinion in *Standing Akimbo*.

NFIB makes it is clear that Congress lacks the power to enact this provision under the Tax and Spend Clause because it operates as a penalty. "[T]he federal income tax is a tax on net income, not a sanction against wrong-doing."[47] Even the supporters of the law have recognized the sheer breadth of this this law.[48] The High Court's reaffirmation of the penalty as a limit on congressional Taxing Power, combined with the Court's more restrictive treatment of congressional powers generally, makes the subject ripe for analysis.

While the Supreme Court's interpretation of the Taxing Power has varied over time, with the most recent case, *NFIB*, addressing the penalty limit. NFIB challenged the Affordable Care Act's individual mandate, which required most Americans to buy health insurance or make a "shared responsibility payment." The Court found the

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[46] *NFIB*, 567 U.S. 519, 132 S. Ct. 2566 (2012) ("NFIB")

[47] *National Federation of Independent Business*, 132 S. Ct. at 2594, 2599.

[48] *Wellness v. Comm'r of Internal Revenue*, 156 T.C. 62, 72 n.11 (2021) (By enacting section 280E Congress intended to prohibit affected taxpayers from reducing their taxable income "to the extent of its constitutional authority." *See also Lord v. Commissioner*, No. 19224-18, 2022 Tax Ct. Memo LEXIS 13, at *11 (T.C. Mar. 1, 2022)

Commerce Clause insufficient to justify the individual mandate but re-characterized the penalty as a tax within Congress's Taxing Power.

The *NFIB* Court relied on precedent, particularly *Drexel Furniture*,[49] to determine that the individual mandate did not punish unlawful behavior. Similarly, in In *Hill v. Wallace*, the Court struck down a federal tax on grain futures contracts because the Court found it "impossible to escape the conviction . . . that [the tax] was enacted for the purpose of regulat[ion] . . . ."[50] In *Constantine*, the Court struck down a federal excise tax on alcohol dealers who acted contrary to state laws.[51] The purpose of the tax, the Court said, was to penalize liquor dealers for violating state law, Moving forward, courts will have to either uphold a tax or invalidate it as a penalty based on these factors. § 280E is functionally labeled a tax but acts as a penalty and thus may not be enacted under Congress's Taxing Power.

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[49] *Child Labor Tax Case (Bailey v. Drexel Furniture Co. (U.S. Reps. Title: Child Lab. Tax Case)*, 259 U.S. 20, 42, 42 S. Ct. 449, 66 L. Ed. 817 (1922).

[50] *Hill v. Wallace*, 259 U.S. 44, 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922); Julie Pack, *Powerless to Penalize: Why Congress Lacks the Power to Penalize Marijuana Businesses Through S 280e of the Internal Revenue Code*, 59 Ariz. L. Rev. 1081, 1093–94 (2017)012) ("Power to Penalize").

[51] *United States v. Constantine*, 296 U.S. 287, 288–29, 56 S. Ct. 223, 80 L. Ed. 233 (1935). N.b. the challenged tax was enacted before the Eighteenth Amendment was repealed in 1933; the challenge came after the Eighteenth Amendment was repealed. *Id.* at 287.

Section 280E is a penalty for purpose of the taxing power analysis. A penalty is an sanction imposed by statute as punishment for an unlawful act.[52] Applying the *NFIB/Drexel Furniture* test three factor test, this Court in determining whether it is a impermissible penalty must consider: (1) whether the tax imposed an exceedingly heavy burden; (2) whether it contained a scienter requirement; and (3) whether it was enforced by an agency other than the IRS.[53]

The first factor weighs heavily as the burdens are exceedingly high. As one commentator noted:[54]

> Estimates referenced in the Introduction of this Note--that marijuana businesses face far heavier tax burdens than non-marijuana businesses, one of which owes 1,007% of its net revenue suggest

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[52] *See United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931) (defining a penalty as such). *See also* Jonathan S. Sidhu, *For the General Welfare: Finding A Limit on the Taxing Power After Nfib v. Sebelius*, 103 Cal. L. Rev. 103, 110 (2015)10 ("[T]he Taxing Power only requires that individuals pay money into the Treasury, and if they pay their taxes, Congress does not have the power to punish them."); Charles A. Borek, *The Public Policy Doctrine and Tax Logic: The Need for Consistency in Denying Deductions Arising from Illegal Activities*, 22 U. Balt. L. Rev. 45, 49 (1992) (citing *Constantine*, 296 U.S. at 295) ("[F]ederal income tax law is not intended as a penal statute, but rather as a revenue-producing measure."); *Power to Penalize*, 59 Ariz. L. Rev., at 1083 (2012).

[53] *Power to Penalize* at 1100.

[54] *Power to Penalize* at 1100-1101.

this provision imposes an exceedingly heavy burden.

The second factor in making something an impermissible penalty is the lack of a scienter requirement. Notably, § 280E arguably lacks the explicit scienter requirement set forth in *Drexel Furniture*. Specifically, § 280E applies not only to individuals who knowingly operate a business involved in trafficking controlled substances but also to all such businesses, regardless of whether the business owners possess specific knowledge of the illegality of their conduct. While it may be unlikely to find business owners in the marijuana industry unaware of their violation of federal law, the absence of an explicit scienter requirement strengthens the definition of 280E as an impermissible penalty. [55]

Recognizing that adding a scienter requirement might appear to help the statute, it does not as § 280E has continually functioned as a strict-liability penalty. The Court in *NFIB* denounced strict-liability penalties, particularly those enforced by the IRS, noting that any exaction lacking a scienter requirement and enforced by the IRS does not automatically qualify as a permissible tax. Congress cannot circumvent its authority to impose criminal fines by establishing strict-liability offenses enforced by the IRS rather than the Federal Bureau of Bureau of Investigation.[56]

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[55] *Powerless to Penalize* at 1101

[56] *Powerless to Penalize* at 1101

The third factor also supports the conclusion that § 280E constitutes an impermissible penalty, as enforcement is not solely vested with the IRS. In addition to IRS enforcement, the Financial Crimes Enforcement Network ("FinCEN") requires banks to file Suspicious Activity Reports, which may compel financial institutions to conduct their own investigations into the operations of marijuana businesses, ensuring compliance with all applicable laws, including potential inconsistencies with federal tax obligations. As a result, both FinCEN and the IRS play a role in monitoring marijuana businesses for compliance with federal tax laws. This dual enforcement mechanism mirrors the situation in *Drexel Furniture*, where the Secretary of Labor, in conjunction with the IRS, was authorized to inspect businesses to ensure compliance with the child labor tax.[57]

Moreover, the absence of a scienter factor need not be met for a provision to exceed congressional power because it acts as a penalty.[58] In his dissent, Justice Scalia clarified that the presence of a scienter requirement suggests a penalty, but the absence of one does not necessarily suggest a tax.[59] He cautioned that "[s]ince we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a

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[57] *Powerless to Penalize* at 1102.

[58] *Id.* at 2596.

[59] *Id.* at 2654-55 (Scalia, J., dissenting). *See also Powerless to Penalize* at 1102.

penalty for want of an express scienter requirement." Section 280E imposes an exceedingly heavy burden on state-authorized marijuana businesses, need not contain an explicit scienter requirement, and is enforced by entities other than the IRS. Thus, it constitutes an impermissible penalty and lies outside of Congress's Taxing Power. Congress should either rewrite § 280E as a criminal penalty, do away with it entirely, or impose an excise tax if it wishes to raise revenue.

F. This Court Should Resolve the Merits of Petitioner's Facial Constitutional Challenge to § 280E, Which May Be Raised for the First Time on Appeal in Exceptional Cases and Pure Questions of Law.

This Court should use this case as an opportunity to address this concern. There is no argument that the Petitioner could have presented to the lower court which would have altered this issue. While Justice Thomas's opinion should have alerted predecessor counsel of the issue, it is understandable why counsel missed the issue. Prior to that time, federal courts treated their hands as tied on this issue.[60]

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[60] *See, e.g. Montana Caregivers Ass'n, LLC v. United States*, 841 F. Supp. 2d 1147, 1150 (D. Mont. 2012), *aff'd,* 526 F. App'x 756 (9th Cir. 2013) ("Since Congress acted under one of its enumerated powers when it enacted the Controlled Substances Act, the federal government's enforcement of the Act does not violate the Tenth Amendment"); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1106 (E.D. Cal. 2012), *aff'd,* 552 F. App'x 680 (9th Cir. 2014) ("Plaintiffs'

Petitioner understands that that it is “is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."[61]

The Sixth Circuit Court has identified two main policies to support this general rule. "First, the rule eases appellate review 'by having the district court first consider the issue.'"[62] "'Second, the rule ensures fairness to litigants by preventing surprise issues from appearing on appeal.'"[63]

This rule, however, is not carved into granite. This Court has "on occasion, deviated from the general rule in 'exceptional cases or particular circumstances' or when the rule would produce a 'plain miscarriage of justice.'"[64] As the Sixth Circuit has noted:[65]

Commerce Clause claim is foreclosed by [Raich] and is dismissed”.

[61] *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). *See also Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008).

[62] *Id.* (quoting *Foster v. Barilow*, 6 F.3d 405, 409 (6th Cir. 1993)).

[63] *Id.* (quoting *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002)); *Ware v. Tow Pro Custom Towing & Hauling, Inc.*, 289 F. App'x 852, 857 (6th Cir. 2008).

[64] *Id.* (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)) (quoting *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988)); *Ware*, 289 F. App'x at 85757.

[65] *Ware*, 289 F. App'x at 857 (quoting *In re Morris*, 260 F.3d 654 (6th Cir. 2001)). *See also Commodity Futures Trading Comm'n v. Miklovich*, 687 F. App'x 449, 451 (6th Cir. 2017);

> [W]e may deviate from the general rule [in]an exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if this appeal presents a "particular circumstance" warranting departure. We also may hear an issue for the first time on appeal if doing so would serve an overarching purpose other than simply reaching the correct result in [the] case. Finally, we should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in [the] case.

Poss also notes that the normally, the *Pinney Dock* exception: "we should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case."[66] In *United States v. Barela*,[67] the Ninth Circuit permitted the

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Hayward v. Cleveland Clinic Found., 759 F.3d 601, 615 (6th Cir. 2014)

[66] *Pinney Dock and Transport Co.*, 838 F.2d at 1461 (citing *Alexander v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 565 F.2d 1364, 1370–71 (6th Cir. 1977)). *See also United States v. Butler*, 207 F.3d 839, 849–50 (6th Cir. 2000).

[67] *United States v. Barela*, 571 F.2d 1108, 1110 (9th Cir. 1978).

Government to raise a "game changing new argument" for the first time on reconsideration.

While a lower court's input is often helpful,[68] in this case the value would be minimal. In the courts where this issue has been presented in the District Court, District Courts have typically cited *Raich* and stated that overruling that decision rests with this Court.[69]

The questions presented in this issue are pure questions of law. Here, the Court of Appeals panel found that Mr. Richmond's challenge to Section § 280E should not be considered by the panel because it was first raised on appeal. It did so by saying that the only review mechanism was through the plain error standard and that until *Gonzales* is expressly overruled, there can be no plain error. This rule should not have been applied to a facial challenge.

Textually, any commerce clause challenge has to be a facial challenge. Article I, § 8, of the Constitution grants Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the

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[68] Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle L Rev 151, 152 n. 4 (2009).

[69] See, e.g. *Canna Provisions, Inc. v. Garland*, 738 F. Supp. 3d 111, 115 (D. Mass. 2024), *aff'd sub nom. Canna Provisions, Inc. v. Bondi*, 138 F.4th 602 (1st Cir. 2025) ("While the Complaint has alleged persuasive reasons for a reexamination of the way the Controlled Substances Act regulates marijuana, the relief sought is inconsistent with binding Supreme Court precedent and, therefore, beyond the authority of this court to grant").

several States." Congress's power is to regulate "class[es] of *activities*,"[70] not classes of *individuals*.[71] For purposes of the commerce clause, a lower court would not focus on the activities of Ryan Richmond, but state medical marijuana operations in general. Congress has the ability to regulate a "class of activities" which when viewed collectively would have a substantial effect on interstate commerce.[72] Thus, if Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class.[73] A facial challenge to a statute can be mounted for the first time on appeal where a facial review of the indictment establishes that the Petitioner's conduct cannot be prosecuted.[74]

The purpose of the rule allowing waiver of constitutional claims not raised below was explained by the Navy-Marine Court of Appeals as follows:[75]

> Appellant's assertion here is that constitutional equal protection precludes him from being tried by court-martial for violations of the UCMJ. This challenge

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[70] *Gonzales*, 545 U.S. at 17 (emphasis added),

[71] *NFIB*, 567 U.S. at 556.

[72] See, e.g., *Perez*, 402 U.S. at 151.

[73] See, e.g., *id.*, at *Perez*, 402 U.S. 146; *Wickard*, 317 U.S. at 127–128).

[74] *United States v. Broce*, 488 U.S. 563, 576, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989).

[75] *United States v. Begani*, 79 M.J. 767, 785–86 (N-M. Ct. Crim. App. 2020), *aff'd,* No. 20-0217, 2021 WL 2639319 (C.A.A.F. June 24, 2021)

> cannot be determined on the face of the attacked statute. And Appellant's failure to lodge this claim with the court below leaves us thin means in the record to address such a weighty constitutional claim of first impression. We have some authority to consider additional extrinsic evidence at this level. *See, e.g., United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)) (considering unchallenged medical documentation submitted to appellate court to address jurisdictional challenge brought for first time on appeal). But piecemeal, ad-hoc supplementation of the record at the appellate level was never designed to take the place of litigating these issues before the trial court. To the contrary, the waiver rule exists precisely to avoid this sort of novel constitutional issue from being asserted for the first time on appeal. *United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003), *abrogated by United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003)03) (explaining that the "raise-or-waive" rule is designed "to promote the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined").

Here, the Petitioner has mounted a pure constitutional challenge devoid of case specific facts. None of the facts of this case alter the constitutional question. Petitioner agrees that the Court must

apply its analysis treating the "facts in the light most favorable to the jury's guilty verdict."[76] This Court has stated that jurisdictional challenges can be raised for the first time on appeal.[77] A conviction under a facially unconstitutional law should fall within this category.

Many state courts reviewing the same issue have stated that facial challenges to laws may be raised for the first time on appeal. The Ohio Supreme Court has held that a facial constitutional challenge may be raised for the first time on appeal from an administrative agency, but an as-applied constitutional challenge must be raised at the first available opportunity during the proceedings before the administrative agency.[78]

In Texas, the Court of Criminal Appeals has also recognized that a facial constitutional challenge to a statute may be raised for the first time on appeal, as it affects the jurisdiction of the trial court to have entered a judgment.[79] However, as-applied

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[76] *Richmond*, 2025 U.S. App. LEXIS 2302, at *2.

[77] *United States v. Duval*, 742 F.3d 246, 248 (6th Cir. 2014)

[78] *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, 132 Ohio St. 3d 167, 970 N.E.2d 898

[79] *See, e.g. Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) ("under well-established law, even absent objection, "a court will always adjudicate whether a statute is unconstitutional when its unconstitutionality is obvious and apparent"). *See also People v. Stevens*, 2018 IL App (4th) 150871, 112 N.E.3d 609, 614 (""[A] challenge to the constitutionality of a criminal statute may be raised at any time."); *State v. Yang*, 2019 MT 266, ¶ 10, 397 Mont. 486, 492, 452 P.3d 897, 9009) ("We differentiate between the types of constitutional challenges that we will address for the first time

challenges must be raised in the trial court to be preserved for appeal.[80] This distinction is crucial as it determines the procedural requirements for raising constitutional challenges depending on their nature. The state court position is both more logical and efficient than the position adopted by the panel. This Court should agree to hear this challenge.

The constitutional limits on Congress's power are not academic—they are the guardrails that preserve the federal balance and protect citizens from penalties untethered to any enumerated power. Section 280E, as applied here, exceeds those limits. In addition, to the direct penal sanctions, this law has made the Petitioner responsible for $277 million dollars in "restitution" for profits never received. Only this Court can resolve whether Congress may continue to impose such penalties in the post-*Raich* era. The time has come for this Court to stop *Standing Akimbo* and decide whether § 280E can stand on the diminished foundations that remain.

The petition for a writ of certiorari should be granted.

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on appeal. A claim that a statute authorizing a sentence is unconstitutional on its face may be raised for the first time on appeal, but the exception does not apply to as-applied constitutional challenges") (cleaned up).

[80] *Bader v. State*, 15 S.W.3d 599 (Tex. App. 2000).

CONCLUSION

For these reasons, the Petitioner urges this Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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