No. 17-663

In the Supreme Court of the United States

THE GREEN SOLUTION RETAIL, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act, 26 U.S.C. 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a), bar petitioners' suit.

2. Whether the Internal Revenue Service is authorized to investigate and determine whether a business is engaged in illegal drug-trafficking activity for purposes of applying 26 U.S.C. 280E, which prohibits such businesses from claiming certain deductions and credits on their federal income-tax returns.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A30) is reported at 855 F.3d 1111. The order of the district court (Pet. App. A31-A36) is unreported but is available at 2016 WL 7078635.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2017. A petition for rehearing was denied on August 1, 2017 (Pet. App. A1-A3). The petition for a writ of certiorari was filed on October 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code prohibits tax deductions or 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. The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, classifies marijuana as a Schedule I controlled substance and makes it illegal to knowingly or intentionally "manufacture, distribute, or dispense" it. 21 U.S.C. 812(c) (Sched. I (c)(10)), 841(a)(1). That prohibition applies even in States that have purported to legalize the sale of marijuana in some circumstances. See *Gonzales* v. *Raich*, 545 U.S. 1, 29 (2005).

Although Section 280E bars certain deductions and credits for businesses that engage in drug trafficking, it does not affect those businesses' obligation to pay taxes on their income, including income derived from the sale of illegal drugs. See 26 U.S.C. 61(a) (defining "gross income" as "all income from whatever source derived"); see also 1 S. Rep. No. 494(I), 97th Cong., 2d Sess. Pt. 2, at 309 (1982) (explaining that Section 280E does not affect the obligation of covered businesses to pay taxes on gross income). A business's gross income includes "total sales, less the cost of goods sold." 26 C.F.R. 1.61-3(a). In order to ascertain the tax liability of a business that traffics in controlled substances, such as a marijuana dispensary, the Internal Revenue Service (IRS) must examine the business's proceeds, its cost of goods sold, and whether its business activities trigger the application of Section 280E.

2. This case arises out of an IRS audit of the 2013 and 2014 tax returns filed by petitioners The Green Solution Retail, Inc. (Green Solution), a Colorado marijuana dispensary, and Kyle Speidell, one of its owners. Pet. App. A5-A6. In those returns, petitioners claimed deductions for business expenses. See D. Ct. Doc. 1, at

4 (Feb. 3, 2016) (Compl.). The IRS made an initial finding that petitioners' business activities were among those covered by Section 280E. Pet. App. A6. It asked petitioners to provide documents and other information, including information about the nature and extent of Green Solution's business activities as a marijuana dispensary, related to whether petitioners were "disqualified from taking credits and deductions under [Section] 280E." *Id.* at A7.

Petitioners refused to comply with the IRS's requests for information, and they filed suit seeking declaratory and injunctive relief. Pet. App. A7. Petitioners asserted that the IRS could not require them to disclose information about their business operations because the agency lacks authority to "investigate and make findings that a taxpayer has violated the Controlled Substances Act." Compl. 7. They requested a declaratory judgment to that effect, and they sought an injunction that would bar the agency "from conducting investigations or making administrative findings * * * that taxpayers have trafficked in a Schedule I or II Controlled Substance in violation of the Controlled Substances Act." *Ibid.*

The government moved to dismiss petitioners' suit under the Anti-Injunction Act, 26 U.S.C. 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a). Pet. App. A8. Subject to enumerated exceptions that are not at issue here, the Anti-Injunction Act bars suits brought "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. 7421(a). The Declaratory Judgment Act prohibits suits for declaratory relief "with respect to Federal taxes."

28 U.S.C. 2201(a). The government argued that petitioners' suit was foreclosed by those provisions. Pet. App. A8.

3. The district court dismissed petitioners' complaint, concluding that it lacked subject-matter jurisdiction over their suit. Pet. App. A31-A36. The court determined that the "purpose" of petitioners' suit was "to prevent the IRS from applying [Section] 280E to their 2013 and 2014 tax returns." *Id.* at A33. It noted that 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,'" including "the gathering of information about [petitioners'] business." *Id.* at A34-A35 (quoting *Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987)). The court held that the Anti-Injunction Act therefore barred petitioners' request to enjoin the IRS from enforcing Section 280E. *Id.* at A35.

The district court further held that petitioners' request for declaratory relief was barred by the tax exception to the Declaratory Judgment Act. Pet. App. A35. The court also rejected petitioners' contention "that the IRS has no jurisdiction to enforce" the Controlled Substances Act. *Ibid.* The court explained that "Congress has placed [Section] 280E in the Internal Revenue Code and assigned enforcement of it to that agency." *Ibid.*

The district court did not address petitioners' assertion that Section 280E "is not a tax but a penalty for violating federal law." Pet. App. A35. The court noted that petitioners would have "ample opportunity to challenge the statute" in future proceedings, including in a deficiency redetermination proceeding in the Tax Court or in a refund suit in district court. *Ibid.*

4. The court of appeals affirmed. Pet. App. A4-A30. Petitioners conceded on appeal that the IRS's investigation of its tax liabilities was an "activity leading up to" the assessment of taxes, and that their suit was barred under the Tenth Circuit's interpretation of the Anti-Injunction Act in *Lowrie*. *Id.* at A13 n.4; see *id.* at A13, A17. Petitioners contended, however, that *Lowrie*'s reasoning was inconsistent with this Court's subsequent decision in *Direct Marketing Ass'n* v. *Brohl*, 135 S. Ct. 1124 (2015). Pet. App. A13. They further argued that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act did not apply to their claims because the IRS lacks statutory authority to conduct a criminal drug investigation and Section 280E is a penalty, not a tax. *Ibid.*

The court of appeals rejected petitioners' arguments. The court held that *Brohl* did not undermine the reasoning of *Lowrie*, and that petitioners' request for an injunction was barred by the Anti-Injunction Act. Pet. App. A22-A27. *Brohl* addressed the Tax Injunction Act (TIA), 28 U.S.C. 1341, which provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." This Court held that the TIA did not preclude a federal court from enjoining the enforcement of a state law that imposed reporting requirements on out-of-state businesses in order to facilitate the State's collection of sales and use taxes from the businesses' in-state customers. *Brohl*, 135 S. Ct. at 1131.

The court of appeals observed that, although the TIA was "modeled on" the Anti-Injunction Act, the two statutes "contain different language" and "serve different purposes." Pet. App. A22-A23. In *Brohl*, this Court interpreted the word "restrain" in the TIA in light of the

"company [it] keeps"—"enjoin" and "suspend"—and concluded that all three words were "terms of art * * * that restrict or stop official action." 135 S. Ct. at 1132; see Pet. App. A25. The Court concluded that the TIA is therefore limited to suits that seek to stop the assessment or collection of taxes directly, and that it does not apply to efforts to impede preliminary information-gathering designed to facilitate a later assessment. 135 S. Ct. at 1133. The Anti-Injunction Act, in contrast, uses the word "restrain[]" in isolation and precludes all suits undertaken "*for the purpose* of restraining the assessment or collection of any tax." 26 U.S.C. 7421(a) (emphasis added). The court of appeals stated that, "unlike in the TIA, the injunctive relief barred by the [Anti-Injunction Act] need not actually restrain an assessment or collection, it need only have restraint of those functions as its purpose." Pet. App. A25. The court held that *Brohl*'s interpretation of the TIA did not abrogate *Lowrie*'s interpretation of the Anti-Injunction Act because "suits barring 'activities leading up to[] and culminating in' assessment" may violate the Anti-Injunction Act "if they are filed for the purpose of restraining an assessment." *Ibid.* (quoting *Lowrie*, 824 F.2d at 830) (internal quotation marks omitted).

The court of appeals noted that its conclusion was consistent with Justice Ginsburg's concurring opinion in *Brohl*. Pet. App. A26-A27. That concurrence emphasized that the Court's opinion did not address whether the TIA would permit a *taxpayer* to sue to enjoin a reporting obligation imposed on him in lieu of bringing a direct challenge to an assessment of his own tax liability, a claim ordinarily "suitable for a refund action" but not for injunctive relief. 135 S. Ct. at 1136 (Ginsburg, J., concurring). In this case, the court of appeals observed

that, "[u]nlike Green Solution, the retailers in [*Brohl*] 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." Pet. App. A26. The court concluded that, under *Lowrie*, petitioners' suit was barred by the Anti-Injunction Act. *Id.* at A26-A27.

The court of appeals also rejected petitioners' arguments that Section 280E is not a tax provision and that the IRS lacks authority to enforce it. Pet. App. A27-A29. The court explained that a tax deduction is "a matter of legislative grace," "not a matter of right," and that "disallowance of a deduction is not an exaction imposed as punishment." *Id.* at A29 (citation omitted). The court concluded that "the IRS's obligation to determine whether and when to deny deductions under [Section] 280E, falls squarely within its authority under the Tax Code," including the agency's authority to make inquiries and request information concerning potential tax liability. *Id.* at A28.

ARGUMENT

Petitioners contend (Pet. 11-16) that neither the Anti-Injunction Act, 26 U.S.C. 7421(a), nor the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a), precludes their challenge to the enforcement of 26 U.S.C. 280E. They further argue (Pet. 16-21) that the IRS lacks authority to determine whether deductions claimed on their tax returns are precluded by Section 280E, because such an inquiry necessarily requires the agency to determine whether petitioners violated the criminal provisions of the Controlled Substances Act. The court of appeals correctly rejected those ar-

guments, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Anti-Injunction Act provides that "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." 26 U.S.C. 7421(a). The language of that provision "could scarcely be more explicit": it protects the government's ability "to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference," and it "require[s] that the legal right to [any] disputed sums be determined in a suit for refund." *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974) (citation omitted); see *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 543 (2012) ("Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.").

This Court has consistently held that the Anti-Injunction Act precludes efforts to restrain the assessment or collection of taxes directly, see, *e.g.*, *United States* v. *American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974) (per curiam) (challenge to withholding of payroll taxes), and indirectly, see, *e.g.*, *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 761 (1974) (challenge to revocation of organization's charitable status, "the objective" of which was to "reduce the level of taxes of its donors"); *Bob Jones Univ.*, 416 U.S. at 738-739 (same where revocation of charitable status would likely increase tax liability of organization and donors). Consistent with those decisions, the courts of appeals have uniformly held that the Anti-Injunction Act "is equally

applicable" to challenges directed at "the actual assessment or collection of a tax" and those directed at "activities leading up to, and culminating in, such assessment and collection." *Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987); see, *e.g.*, *Judicial Watch, Inc.* v. *Rossotti*, 317 F.3d 401, 405 (4th Cir.), cert. denied, 540 U.S. 825 (2003); *Dickens* v. *United States*, 671 F.2d 969, 971 (6th Cir. 1982); *Kemlon Prods. & Dev. Co.* v. *United States*, 638 F.2d 1315, 1320 (5th Cir.), cert. denied, 454 U.S. 863 (1981); *Blech* v. *United States*, 595 F.2d 462, 466 (9th Cir. 1979); *Colangelo* v. *United States*, 575 F.2d 994, 996 (1st Cir. 1978); *United States* v. *Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

The Declaratory Judgment Act similarly bars declaratory relief "with respect to Federal taxes." 28 U.S.C. 2201(a). That provision "is at least as broad as the Anti-Injunction Act," *Bob Jones Univ.*, 416 U.S. at 733 n.7, and reflects the same "congressional antipathy for premature interference with the assessment or collection of any federal tax," *id.* at 732 n.7. Petitioners acknowledge (Pet. 16) that, if the Anti-Injunction Act bars their request for injunctive relief, the tax exception to the Declaratory Judgment Act likewise bars their request for declaratory relief.

2. Petitioners contend (Pet. 11-16) that neither the Anti-Injunction Act nor the Declaratory Judgment Act bars their claims because, rather than challenging the assessment or collection of taxes directly, they seek only to prevent the IRS from determining whether they are eligible for certain deductions claimed on their tax returns. That argument lacks merit.

a. The federal system of taxation "is basically one of self-assessment, whereby each taxpayer computes the

tax due and then files the appropriate form of return along with the requisite payment" or request for a refund. *United States* v. *Galletti*, 541 U.S. 114, 122 (2004) (citation and internal quotation marks omitted); see 26 U.S.C. 6011 *et seq.* The Internal Revenue Code vests the IRS with wide authority "to make the inquiries, determinations, and assessments of all taxes" imposed by the Code, 26 U.S.C. 6201(a), including by conducting audits and investigations to ensure that taxpayers' self-reported tax liabilities are correct, 26 U.S.C. 7601(a), 7602; see *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975) (noting the IRS's "broad mandate" under those provisions "to investigate and audit persons who may be liable for taxes") (citation, emphasis, and internal quotation marks omitted). The agency is specifically authorized to issue summonses for "books, papers, records, or other data" relevant to "ascertaining the correctness of any return"; "determining the liability of any person for any internal revenue tax"; and "collecting any such liability." 26 U.S.C. 7602(a); see *United States* v. *Clarke*, 134 S. Ct. 2361, 2365 (2014).

The investigation and calculation of tax liabilities leads to an "assessment," which the Internal Revenue Code defines as the "recording [of] the liability of the taxpayer" by the IRS. 26 U.S.C. 6203. Assessment is "essentially a bookkeeping notation," *Laing* v. *United States*, 423 U.S. 161, 170 n.13 (1976), that is complete when "an [IRS] assessment officer sign[s] the summary record of assessment," 26 C.F.R. 301.6203-1; see *ibid.* (noting that a record of assessment "shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment"). If the taxpayer owes tax, the assessment is followed by collection efforts. See

26 U.S.C. 6301 (authorizing the IRS to "collect the taxes imposed by the internal revenue laws").

b. As the courts of appeals have consistently held, the Anti-Injunction Act (and, by extension, the Declaratory Judgment Act) does not bar only those suits that seek to directly enjoin IRS officials from engaging in the specific act of recording an assessment. Rather, the statute also bars efforts to restrain "activities leading up to" the assessment of tax liability, *Lowrie*, 824 F.2d at 830, including efforts to prevent the IRS from determining whether a taxpayer's self-reported tax liability is correct in order to fulfill the agency's statutory obligation to accurately calculate and assess federal taxes. Petitioners offer no persuasive reason for this Court to review that uniform judgment.

i. Petitioners contend (Pet. 12) that the Tenth Circuit's decisions below and in *Lowrie* conflict with this Court's construction of the TIA in *Direct Marketing Ass'n* v. *Brohl*, 135 S. Ct. 1124 (2015). The court of appeals correctly explained why *Brohl* is inapposite here. Pet. App. A22-A27.

The Court in *Brohl* held that the TIA's prohibition on district-court orders "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection" of state taxes, 28 U.S.C. 1341, did not preclude a challenge to a Colorado statute that required businesses to provide tax authorities with information about customer transactions in order to facilitate the eventual assessment and collection of sales and use taxes from those customers. 135 S. Ct. at 1131. The Court emphasized that its interpretation of the TIA depended on the language of that statute, including the TIA's use of the words "enjoin, suspend or restrain" as "terms of art * * * that restrict or stop official action." *Id.* at 1132. The Court

explained that the reporting requirements at issue in *Brohl* were intended merely to "improve [the] State's ability to assess and collect taxes" from third parties "at some future point," and that enjoining those requirements would not restrict or stop the "specific assessment and collection procedures" that would be "triggered" under Colorado law if those third parties later filed deficient tax returns. *Id.* at 1131.

The Anti-Injunction Act, in contrast, states (with enumerated exceptions that are not at issue here) that "no suit *for the purpose* of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. 7421(a) (emphasis added). That language indicates that the statute's applicability turns on the "purpose" of the "person" (*i.e.*, the plaintiff) who seeks to "maintain[]" a particular suit. *Ibid.*; cf. *Shady Grove Orthopedic Assoc., P. A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (stating, with respect to the proper interpretation of the word "maintained" in Federal Rule of Civil Procedure 23, that "[c]ourts do not maintain actions; litigants do."). An action therefore "need not actually restrain an assessment or collection" of tax to be barred by the Anti-Injunction Act; "it need only have restraint of those functions as its purpose." Pet. App. A25. The district court found that the "purpose" of petitioners' suit was "to prevent the IRS from applying [Section] 280E to their 2013 and 2014 tax returns" in the course of determining their tax liabilities. *Id.* at A33; see Compl. 6 (alleging that, if Section 280E is applied to petitioners' tax returns, it would effectively require them to forfeit their income and capital to the United States in the form of unpaid taxes). That is precisely the sort of "preenforcement judicial interference" with the assessment and collection of taxes that the

Anti-Injunction Act prohibits. *Bob Jones Univ.*, 416 U.S. at 736.

The Court's opinion in *Brohl*, moreover, did not address whether the TIA bars federal courts from entertaining "a suit to enjoin reporting obligations imposed on a *taxpayer* * * * in lieu of a direct challenge to an 'assessment,' 'levy,' or 'collection'" of that taxpayer's own tax liability. 135 S. Ct. at 1136 (Ginsburg, J., concurring) (emphasis added). Unlike the third-party reporting requirements imposed by the Colorado statute in *Brohl*, a taxpayer's challenge to its own reporting obligation would be "suitable for a refund action" once any taxes were paid. *Ibid.* Similarly, as the district court in this case noted, petitioners will have "ample opportunity to challenge" the IRS's ability to enforce Section 280E in future proceedings, including in a deficiency redetermination proceeding in the Tax Court or in a refund suit in district court. Pet. App. A35.

ii. Petitioners contend (Pet. 13-14) that the Anti-Injunction Act does not preclude their suit because they seek to prevent the IRS "'from obtaining information'" about their business activities in a manner that exceeds the agency's "constitutional powers" (citation omitted). Petitioners do not identify what constitutional provision would preclude the IRS from obtaining information about the legitimacy of a taxpayer's self-reported tax deductions. In any event, this Court has construed the Anti-Injunction Act to encompass claims of constitutional violations. See *Bob Jones Univ.*, 416 U.S. at 736 (applying Anti-Injunction Act despite taxpayer's claim that "the [IRS's] threatened action was outside its lawful authority and would violate petitioner's [constitutional] rights"); cf. *Judicial Watch*, 317 F.3d at 405 (holding that Anti-Injunction Act barred suit to enjoin

an IRS audit, despite the plaintiff's allegation that the "audit [was being] conducted for unlawful purposes"). The district court decision on which petitioners rely is inapposite because it did not involve the assessment or collection of taxes. See *Z Street, Inc.* v. *Koskinen*, 44 F. Supp. 3d 48, 59-60 (D.D.C. 2014) (holding that the Anti-Injunction Act did not bar a claim that the IRS had engaged in viewpoint discrimination by subjecting certain applications for tax-exempt status to heightened scrutiny), aff'd, 791 F.3d 24 (D.C. Cir. 2015).

Courts have repeatedly rejected the argument that the Anti-Injunction Act does not apply to challenges to IRS requests for information. See, *e.g.*, *Judicial Watch*, 317 F.3d at 405 (holding that a suit to "enjoin [an] audit" is barred by the Anti-Injunction Act); *Dickens*, 671 F.2d at 971 ("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 statute."); *Kemlon Prods.*, 638 F.2d at 1320 (holding that Anti-Injunction Act barred taxpayer's effort "to prevent disclosure of information"). As in those cases, "[i]t cannot be seriously contended that precluding the assessment is not the end sought" by petitioners' efforts to prevent disclosure of information concerning the legality of deductions they have claimed on their tax returns. *Dickens*, 671 F.2d at 971 (citation omitted).[*]

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[*] In separate proceedings, petitioners and related parties have challenged the validity of IRS summonses issued in connection with its investigation into their tax liabilities. See *The Green Solution Retail Inc., et al.* v. *United States*, No. 16-mc-137 (D. Colo.) (filed June 27, 2016); *Green Solution, LLC, et al.* v. *United States*, No. 16-mc-167 (D. Colo.) (filed Aug. 8, 2016); *Eric Speidell* v. *United States*, No. 16-mc-162 (D. Colo.) (filed July 29, 2016). The Internal Revenue Code vests federal district courts with jurisdiction to "hear and determine" suits to quash IRS summonses, 26 U.S.C. 7609(h)(1),

iii. Petitioners assert (Pet. 14-16) that the Anti-Injunction Act does not apply because Section 280E "is penal in character" and thus does not qualify as a "tax" provision. The court of appeals correctly rejected that argument. Pet. App. A29. "The power to tax income * * * is plain," *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934), and Congress has unquestioned authority to "tax all gains except those specifically exempted," *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co.*, 292 U.S. at 440.

All businesses—including those engaged in illegal drug trafficking—are required to report and pay taxes on their income. See 26 U.S.C. 61(a) (defining "gross income" as "all income from whatever source derived"); see also *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 778 (1994) ("[T]he unlawfulness of an activity does not prevent its taxation."). Congress may limit the ability of certain types of businesses to claim deductions and credits that would reduce their gross income and their corresponding tax liability. The decisions on which petitioner relies (Pet. 15) involved statutes that imposed excise taxes as punishment for certain crimes. See *Kurth Ranch*, 511 U.S. at 781-784 (tax imposed on individuals previously convicted of possessing marijuana); *United States* v. *La Franca*, 282 U.S. 568, 572 (1931) (tax imposed on individuals found to have illegally manufactured or sold alcohol); *Lipke* v. *Lederer*,

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and thus the dismissal of petitioners' requests for declaratory and injunctive relief in this case does not affect those pending actions.

259 U.S. 557, 561-562 (1922) (same). None of those decisions suggests, however, that taxing illegal activity—including by imposing a special excise tax—is impermissible as a general matter. See *Kurth Ranch*, 511 U.S. at 778 ("Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction."). And none of those cases involved limitations on a taxpayer's ability to claim a deduction or credit from otherwise taxable income.

3. Petitioners contend (Pet. 16-21) that the IRS exceeded its authority by seeking information about petitioners' involvement in illegal drug trafficking. They assert (Pet. 19-20) that, because enforcement of the criminal provisions of the Controlled Substances Act is vested in the Department of Justice, see 21 U.S.C. 871, the IRS lacks power "to investigate and administratively determine that a person has violated federal criminal drug laws." That argument is foreclosed by Section 280E. That Internal Revenue Code provision, which is one of several such provisions identifying types of expenses that may not be deducted "[i]n computing taxable income," 26 U.S.C. 261, provides that "[n]o deduction or credit shall be allowed" for expenses incurred in connection with "any trade or business" that "traffic[s] in controlled substances" in violation of federal or state law, 26 U.S.C. 280E.

Section 280E thus regulates the calculation of income and income-tax liability under the Internal Revenue Code. Congress has authorized the IRS to make "inquiries, determinations, and assessments of all

taxes" imposed by the Code, 26 U.S.C. 6201(a); to conduct audits and investigations to ensure that those taxes are accurately assessed, 26 U.S.C. 7601(a), 7602; and to request from taxpayers "books, papers, records, or other data" relevant to "ascertaining the correctness of any return," "determining the liability of any person for any internal revenue tax," and "collecting any such liability," 26 U.S.C. 7602(a). Those grants of authority clearly encompass IRS efforts to investigate and determine whether deductions or credits should be disallowed under Section 280E. See, *e.g.*, *Olive* v. *Commissioner*, 792 F.3d 1146, 1150 (9th Cir. 2015) (upholding tax deficiency for medical-marijuana dispensary based on the application of Section 280E); *Californians Helping to Alleviate Med. Problems, Inc.* v. *Commissioner*, 128 T.C. 173, 182-183 (2007) (same).

The decisions on which petitioners rely 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 688). As explained, 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 precludes particular tax credits or deductions will be judicially reviewable in a taxpayer's challenge to a consequent finding of a tax deficiency.

In *Leary* v. *United States*, 395 U.S. 6 (1969), the Court held that the Fifth Amendment privilege against compelled self-incrimination barred a criminal prosecution for failing to notify the IRS of taxable marijuana transactions that were themselves illegal. *Id.* at 16-18, 27. That decision, however, involved an excise tax imposed under the now-repealed Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551, see *Leary*, 395 U.S. at 14-15, not deductions from gross income that a taxpayer voluntarily chose to claim on its tax return. Because petitioners were not compelled to claim those deductions, and "the burden of clearly showing the right to [a] claimed deduction is on the taxpayer," *Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593 (1943), any objection on grounds of self-incrimination would not save petitioners from a deficiency determination. And petitioners' ability to press their claims in any judicial proceedings that may follow such a determination provides a further reason for this Court not to review those claims now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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