No. _____

In The
Supreme Court of the United States

HELIX TCS, INC.,

Petitioner,

v.

ROBERT KENNEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JORDAN FACTOR
Counsel of Record
JEREMY T. JONSEN
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.
1600 Stout Street
Suite 1900
Denver, CO 80202
(303) 534-4499
jfactor@allen-vellone.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Marijuana is a Schedule 1 controlled substance under the Controlled Substance Act ("CSA"). 21 U.S.C. § 812. Consequently, the federal government, as a matter of course, does not extend federal benefits to those associated with the marijuana industry. However, in the case at bar, the Tenth Circuit held that an individual trafficking marijuana within Colorado's legal marijuana industry may bring a private action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, to recover federally mandated overtime pay for conduct that violates the CSA. In reaching this conclusion, the Tenth Circuit ruled that individuals have a private property interest in the proceeds of federal drug crimes and that a federal court may award them compensation out of those proceeds for their efforts in trafficking Schedule 1 drugs.

The Tenth Circuit's decision deepens the confusion, conflict, and lack of uniformity between state and federal law regarding federal rights and protections accorded to those participating in the marijuana industry. In the absence of congressional action, which is not anticipated any time soon, this Court should rule that an individual perpetrating a federal drug crime is not entitled to federally mandated compensation for their efforts.

The question presented is:

> Whether the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, confers a private right of action to recover minimum wages for conduct that violates the Controlled Substances Act, 21 U.S.C. § 812.

PARTIES TO THE PROCEEDINGS

Petitioner Helix TCS, Inc. was Defendant-Appellant below.

Robert Kenney was Plaintiff-Appellee below.

RELATED CASES

- *Kenney v. Helix TCS, Inc.*, No. 1:17-cv-01755, U.S. District Court for the District of Colorado. Order denying Helix's Motion to Dismiss entered on January 5, 2018.
- *Kenney v. Helix TCS, Inc.*, No. 18-1105, U.S. Court of Appeals for the Tenth Circuit. Judgment entered on September 20, 2019.

RULE 29.6 DISCLOSURE

The following entities own ten percent (10%) or more of Helix TCS, Inc. stock:

Helix Opportunities LLC
RSF4, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Helix TCS, Inc. ("Helix") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The decision of the Tenth Circuit, reported at 939 F.3d 1106, is reprinted in the Appendix ("App.") at 1-13. The Tenth Circuit's denial of Helix's motion for rehearing *en banc* is unreported and reprinted at App. 31-32. The decision of the district court, reported at 284 F. Supp. 3d 1186, is reprinted at App. 22-30. The district court's order granting Helix's motion for certification of appeal is reprinted at App. 16-21.

JURISDICTION

The court of appeals entered its order on September 20, 2019. The court of appeals denied Helix's petition for rehearing *en banc* on January 31, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Pertinent provisions of 29 U.S.C. §§ 203, 207, 213, 21 U.S.C. § 812, 841, 18 U.S.C. § 2, and 13 C.F.R.

§ 120.110 are reproduced in the appendix at App. 33-54.

STATEMENT OF THE CASE

Helix provides armed security and transport services to the legal marijuana industry in Colorado. (App. 2-3). Helix's business complies with Colorado state law legalizing and regulating the cultivation, distribution, possession and consumption of marijuana for both medical and recreational use. (*Id.*). Plaintiff-Appellee Robert Kenney ("Kenney") was employed by Helix for Helix's security division. (App. 2). Pursuant to an employment agreement with Helix, Kenney's duties include providing armed security for cannabis production and distribution locations. (App. 3). In other words, Kenney uses a firearm to aid and abet the distribution of marijuana—a federal crime. *See*, *e.g.*, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2.

On July 20, 2017, Kenney filed an Original Collective Action Complaint (the "Complaint") against Helix alleging that Helix failed to pay him, and other similarly situated drug traffickers, overtime wages. (App. 2). In the Complaint, Kenney sought to recover federally mandated wages for his federal crimes. (*Id.*). On September 13, 2017, Helix filed a Motion to Dismiss Plaintiff's Claims (the "Motion to Dismiss") under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that the district court does not have jurisdiction to provide Kenney relief under the FLSA

because Kenney's claims, arising from his federally illegal conduct, do not involve a federally protected interest and also that Kenney failed to state a claim for which relief can be granted. (App. 2). On January 5, 2018, the district court denied the Motion to Dismiss. (*Id.*). The district court then certified Helix's interlocutory appeal of its order on the Motion to Dismiss. (App. 16-21).

Exercising jurisdiction under 28 U.S.C. § 1292(b), a panel of the Tenth Circuit affirmed the district court's order denying the Motion to Dismiss. (*Id.*). The Tenth Circuit held that "Mr. Kenney and similarly situated individuals are not categorically excluded from FLSA protections." (App. 12). Central to the court's holding was the determination that "the FLSA is focused on regulating the activity of businesses, in part on behalf of the individual workers' wellbeing, rather than regulating the legality of individual workers' activities." (App. 12). The Tenth Circuit denied Helix's Petition for Rehearing *En Banc*. (App. 31).

REASONS FOR GRANTING THE PETITION

Before the Tenth Circuit's opinion, lower courts have held uniformly that those trafficking marijuana are not entitled to federal rights and protections granted to legitimate businesses.[1] Breaking with that

[1] To be clear, one case from the United States District Court for the District of Oregon held that any possible violations of the CSA are irrelevant to whether FLSA protections apply. *See Greenwood v. Green Leaf Lab LLC*, 2017 WL 3391671 (D. Or. July 13, 2017). The court explained that it "presume[d] that the FLSA

precedent, the Tenth Circuit held that individuals have a private property interest in the proceeds of federal drug crimes and that a federal court may award them compensation out of those proceeds for their efforts in trafficking Schedule 1 drugs. Although arising out of Colorado's recreational marijuana industry, the Tenth Circuit's decision confers the same rights on a mule trafficking methamphetamine for a cartel in Oklahoma as it does on a driver ferrying marijuana through the streets of Denver.

In the face of increasing conflict between state and federal law in regard to marijuana, the Tenth Circuit's opinion departs from virtually every other federal court declining to extend federal rights and protections to those in the marijuana industry, imposes an unworkable standard on courts throughout this country, decimates the uniform application of the Controlled Substances Act and FLSA, undermines Congress' consistently expressed policy of inhibiting commercial transactions in Schedule 1 drugs, and contradicts this Court's decisions in, *e.g.*, *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617, 627 (1989); *Luis v. United States*, 136 S. Ct. 1083, 1091-92 (2016), which

---

covers a worker unless specifically exempted." *Id.* at *3. The Tenth Circuit relied heavily on *Greenwood* in rejecting Helix's appeal. (App. 13). But, as discussed herein, Congress cannot have intended to confer FLSA rights and protections on *anyone* not specifically exempted. Other than *Greenwood* and the case at bar, it appears that federal courts unanimously refuse to extend federal rights and protections to those in the marijuana industry.

hold that individuals have no right to enjoy the fruits of their drug-trafficking activity.

Any effort to cabin the Tenth Circuit's opinion to only those trafficking marijuana in Colorado—which limitation cannot be found in the opinion itself—would lead to unequal application and enforcement of federal employment law based solely on the drug policy choices of the several states and contravene decisions of this Court requiring that federally declared standards are not to be defeated by giving the states a final say as to their applicability. *See*, *e.g.*, *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952) (uniform application of Federal Employers' Liability Act); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245-46 (1942) (uniform application of the Jones Act); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (uniform application of the tax laws); *United States v. Lee*, 455 U.S. 252 (1982) (uniform application of Social Security Act); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (uniform Sunday closing laws); *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878) (uniform criminal prohibition on polygamy); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013) (uniform application of labor laws), *aff'd sub nom*. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The only way to ensure uniform application of federal law that comports with clearly expressed congressional intent is for this Court to hold that FLSA does not guarantee minimum compensation for those whose employment conduct constitutes a federal drug crime.

This Court has consistently interpreted federal forfeiture statutes to preclude property rights in proceeds from activities prohibited by the CSA. This Court also requires the uniform application of federal law, which application must not depend on the decisions of state legislatures as they act in contravention of federal statutes. Given the spate of states legalizing marijuana, the conflict, confusion, and lack of uniformity between federal and state law is only getting worse. The issues presented in this case are critical because a decision from this Court will—unless and until Congress lifts the prohibition on marijuana trafficking—define the relationship and increasing conflict between federal law and the growing number of state statutes legalizing and regulating marijuana.

I. The Question Presented is of Nationwide Importance Given the Growing Marijuana Industry and Confusion Surrounding the Applicability of Federal Law

The question presented here is of exceptional nationwide importance, affecting most state governments and hundreds of thousands of people working in a multi-billion-dollar industry. Although this Court has decided that those who are engaged in federally illegal activities are not entitled to federal benefits, this Court has never decided whether those who participate in state-legal marijuana enterprises enjoy a private right of action under FLSA. This question (and the larger issue of the extent to which conduct that violates the CSA is cosseted by the protection of federal

law) is of critical and increasing importance. Specifically, the exceptionally important issues in this matter include the following:

1) whether an individual engaged in trafficking a Schedule 1 drug may avail himself of federal benefits for such trafficking in contravention of forfeiture by federal statute;

2) whether the FLSA, 29 U.S.C. §§ 201-219, and the CSA, 21 U.S.C. § 801 *et seq*., must be uniformly applied regardless of the legal status of marijuana in the state in which they are applied; and

3) whether drug traffickers in any state are "employees" within the meaning of the FLSA.

By addressing the question presented in the context of FLSA, this Court will have the opportunity to confront the increasing conflict between state and federal law in a rapidly expanding industry.

a. The booming marijuana industry.

Congress has designated marijuana as a Schedule 1 drug (21 U.S.C. § 812(b)(1)) with "no currently accepted medical use in treatment." *Id.* at § 812(b)(1)(B)-(c). The states disagree. California became the first state to legalize medical marijuana in 1996. *See* Cal. Health & Safety Code § 11362.5. Since then, legalization momentum has been steady and unstoppable. For instance, when Helix filed the underlying Motion to Dismiss on September 13, 2017, 28 states had enacted legislation permitting in various degrees the

manufacture and possession of marijuana for medical and/or recreational purposes. Less than three years later, five more states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have joined their ranks. *See*, *e.g.*, National Conference of State Legislatures, *State Medical Marijuana Laws*, March 10, 2020, available at https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. An additional thirteen states "allow use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations or as a legal defense." *Id.* As such, fifty states and territories permit to some extent the production, transportation, sale, and consumption of marijuana.

The marijuana industry accounts for approximately 243,000 jobs and is the fastest growing occupation in the United States. *See* Leafly, *Leafly Jobs Report 2020*, accessed April 19, 2020, available at https://d3atagt0rnqk7k.cloudfront.net/wp-content/uploads/2020/02/06145710/Leafly-2020-Jobs-Report.pdf. In 2019, the marijuana industry reached $13.6 billion in sales, a 31.7% increase from 2018. *See* New Frontier Data, *U.S. Legal Cannabis Market Growth*, September 8, 2019, available at https://newfrontierdata.com/cannabis-insights/u-s-legal-cannabis-market-growth/.

b. Federal benefits and protections are not, as a matter of course, extended to the marijuana industry.

Despite the ubiquity of marijuana trafficking, federal courts hold routinely that the CSA preempts state marijuana law

There have been only two cases in this Court exploring the consequences of legalized marijuana: *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) and *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Oakland Cannabis*, the Court answered whether "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Oakland Cannabis*, 532 U.S. at 489. In *Raich*, the issue was "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Raich*, 545 U.S. at 9. The Court there held that Congress' authority under the Commerce Clause includes the power to prohibit intrastate cultivation and use of marijuana, even if it is in compliance with California law. *Id.*

Other federal courts tasked with managing the conflict between state and federal law have declined to provide federal statutory protections to persons engaged in state-sanctioned marijuana activities. For instance, medical marijuana users may not seek protection under the federal Fair Housing Act ("FHA"). *See*, *e.g.*, *Forest City Residential Mgmt., Inc. ex rel. Plymouth Square Ltd. Dividend Hous. Ass'n v. Beasley*,

71 F. Supp. 3d 715, 719 (E.D. Mich. 2017) (landlord not required to permit Multiple Sclerosis patient to use doctor-prescribed marijuana because "a reasonable accommodation to use marijuana would be to require [landlord] to violate federal law"); *Assenberg v. Anacortes Housing Authority*, 268 F. Appx. 643, 644 (9th Cir. 2008) (no duty to allow marijuana use for federally subsidized housing recipient as a "reasonable accommodation" for disability pursuant to FHA).

Nor will courts facilitate or legitimize the marijuana industry in the business context. *See Fourth Corner Credit Union v. Federal Reserve Bank of Kansas*, 861 F.3d 1052, 1054-55 (10th Cir. 2017) (where bankers attempted to form a credit union to serve marijuana-related businesses, the court declined to facilitate illegal activity by giving marijuana businesses access to banking that they lacked).

Marijuana businesses are not entitled to take federal tax deductions afforded to legitimate businesses.[2] *Feinberg*, 916 F.3d at 1338 ("The Taxpayers have not pointed to any evidence showing the IRS erred in determining they were engaged in unlawfully trafficking a controlled substance. Therefore, the Taxpayers failed to meet their burden of proving the IRS's determination that the deductions should be disallowed under § 280E was erroneous, and we affirm the tax court on this alternative ground."); *Alpenglow Botanicals, LLC*

[2] That the federal government is willing to collect taxes from the marijuana industry only indicates a willingness to exercise its right to title in illicit gains, not to provide reciprocal protection and/or relief to criminals.

v. United States, 894 F.3d 1187, 1197 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2745, 204 L. Ed. 2d 1134 (2019) ("It is within the IRS's statutory authority to determine, as a matter of civil tax law, whether taxpayers have trafficked in controlled substances. Thus, the IRS did not exceed its authority in denying Alpenglow's business deductions under § 280E."); *see also Futurevision, Ltd. v. United States*, No. 17-mc-00041-RBJ, 2017 WL 2799931 (D. Colo. 2017); *Green Solution Retail, Inc. v. U.S.*, 855 F.3d 1111 (10th Cir. 2017); *Canna Care, Inc. v. Comm'r of Internal Revenue*, 110 T.C.M. (CCH) 408, 2015 WL 6389130, at *13 (2015); *Olive v. Comm'r of Internal Revenue*, 792 F.3d 1146 (9th Cir. 2015).

Likewise, federal law will not protect any trademark used to promote a marijuana enterprise. *In re JJ206, LLC*, 120 U.S.P.Q.2d 1568, 2016 WL 7010624, at *2, *5 (T.T.A.B. Oct. 27, 2016) ("It logically follows that if the goods on which a mark is intended to be used are unlawful, there can be no bona fide intent to use the mark in lawful commerce."); *In re Morgan Brown*, 119 U.S.P.Q.2d 1350, 2016 WL 4140917, at *4-5 (T.T.A.B. Jul. 14, 2016) (mark may not be registered if it is being used in connection with sales of marijuana).

Employees who violate the CSA by using doctor-prescribed marijuana in compliance with state law, or selling marijuana in compliance with state law, are not protected by the Americans with Disabilities Act ("ADA"). *See EEOC v. Pines of Clarkston*, 2015 WL 1951945, *6 (E.D. Mich. 2015) *citing James v. City of Costa Mesa*, 700 F.3d 394, 397-98 (9th Cir. 2012) (ADA

definition of "individual with disability" does not include "an individual that is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use" even if used to treat a medical condition); *Steele v. Stallion Rockies Ltd.*, 106 F. Supp. 3d 1205, 1218-19 (D. Colo. 2015) (ADA claim dismissed for failure to state a claim where employee claimed discrimination based upon medical marijuana use); *James v. City of Costa Mesa*, 700 F.3d 394, 413 (9th Cir. 2012) ("[a]bsent any statutory provision addressing the intersection of the [CSA and ADA], it would be proper to hold that employers may ban from employment, and public entities may refuse to harbor within their borders, drug dealers who violate the CSA, as Congress in no way indicated otherwise").

Nor does federal law recognize a private property in interest in marijuana. *See River N. Properties, LLC v. City & Cty. of Denver*, 2014 WL 7437048, at *1-3 (D. Colo. Dec. 30, 2014) (dismissing constitutional claims brought by a property owner against the City and County of Denver alleging that Denver "utilized various regulatory processes to improperly prevent [plaintiff] from . . . leasing the Property to a tenant who grows medical marijuana" because "marijuana is contraband *per se* under federal law [and, therefore] plaintiff lacked a cognizable property interest in its cultivation"); *Barrios v. County of Tulare*, 2014 WL 2174746, at *4-5 (E.D. Cal. May 23, 2014) (due process claims dismissed where purported property interest in marijuana plants was not "legitimate" property interest warranting federal protection); *Young v. Larimer*

County Sheriff's Office, 356 P.3d 939, 943 (Colo. App. 2014) ("[N]otwithstanding the MMA, Young cannot seek relief under section 1983 for destruction of marijuana plants because that destruction did not impair a federal right.").

Federal courts deny protection pursuant to the Contracts Clause holding that no contract "inextricably linked to and contingent upon the tenant's cultivation of marijuana" could exist to be impaired. *See River N. Properties, LLC v. City & Cty. of Denver*, 2014 WL 7437048, at *6 (D. Colo. 2014); *see also Staffin v. County of Shasta*, 2013 WL 1896812, at *3-4 (E.D. Cal. 2013) (contracts purporting to facilitate distribution and cultivation of marijuana not "contracts" subject to federal law protection).

Federal bankruptcy relief is similarly unavailable to the marijuana industry. Rather than extending this federal protection, courts have held that involvement in the marijuana industry "betrays a lack of good faith" that prevents one from seeking the shelter of federal law. *See In re Arenas*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) ("the debtors cannot obtain bankruptcy relief because their marijuana business activities are federal crimes"). Indeed, courts find that participants in the state-legal marijuana industry violate federal law in their normal course of business, and "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime." *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012); *In re Way to Grow, Inc.*, 597 B.R. 111, 120

(Bankr. D. Colo. 2018) (holding a party cannot seek bankruptcy relief "while in continuing violation of federal law" or "where the trustee or court will necessarily be required to possess and administer assets which are illegal under the CSA or constitute proceeds of activity criminalized by the CSA"); *Burton v. Maney (In re Burton)*, 610 B.R. 633 (9th Cir. BAP 2020) (upholding the dismissal of a Chapter 13 case based on debtor's ownership of an interest in an entity that was involved in litigation seeking to recover damages for breach of contracts related to growing and selling marijuana).

The Second Amendment's protections have even been denied to lawful marijuana users. *See Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (provision of federal Gun Control Act, accompanying regulation, and administrative policy effectively criminalizing the possession of a firearm by the holder of a state medical marijuana registry card did not violate Second Amendment).

c. Confusion relating to federal law and policy applicable to the marijuana industry.

The Tenth Circuit is not the only one that has been inconsistent and confused. Indeed, attempts to sort out the interplay between state and federal marijuana law have spawned myriad litigation (some of which is referenced above). It has confounded federal judges, those in the marijuana industry, legal scholars, and state regulators. Until there is clarity, at least as to what

federal rights and protections are afforded, needless litigation will only increase as the industry and attendant confusion swells.

Ultimately, Congress is most equipped to provide a permanent resolution. But Congress' years of inaction—despite the onslaught of state legalization—indicates that it is in no hurry to do so and content to let the courts clean its mess. The little action the federal government has taken has only made things worse In January 2018, Jeff Sessions, the current administration's (now former) Attorney General, publicly announced the Department of Justice's rescission of the Obama-era policy that the federal government would not interfere with states' laws and enforcement schemes regarding marijuana use. *See* James M. Cole, Deputy Attorney General, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (Aug. 29, 2013); Jeffrey B. Sessions, Attorney General, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: MARIJUANA ENFORCEMENT (Jan. 4, 2018) (revoking the Cole Memo).

Unsurprisingly, Sessions' memo threw the marijuana industry into a frenzy, with many fearing that their state-legal businesses would be raided at any moment by federal agents. *See* German Lopez, *The Trump Administration's New War on Marijuana, Explained*, January 5, 2018, available at https://www.vox.com/policy-and-politics/2018/1/4/16849866/marijuana-legalization-trump-sessions-cole-memo ("[Sessions'] move could lead to a shift back to the days before the memos, when

marijuana businesses that were deemed legal at the state level were often raided by federal law enforcement. That will cause more uncertainty in an industry that's expected to grow by tens of billions of dollars in the next decade, while signaling to voters and officials that legalization at the state level is no longer enough for drug policy reform.").

States have not hesitated to voice their frustration and confusion over federal policy. For instance, the Speaker of the West Virginia House of Delegate and West Virginia's State Treasurer requested "an Opinion of the [West Virginia] Attorney General concerning legal risks the financial services industry may face as West Virginia implements its medical cannabis law." Office of the Attorney General Opinion Letter, 2019 WL 1144402, at *1 (W.Va. A.G. Jan. 11, 2019). However, rather than provide any certainty, the Attorney General stated in response that "[t]he approaches of these States [that have legalized medical marijuana], and key issues to analyze, are set forth in this opinion letter. Over the long term, however, the concerns that motivated your requests stem from federal law, and a permanent, complete solution will require additional federal action." *Id.* at *10.

Similarly, on December 2, 2016, California's state treasurer, John Chiang, wrote to President-elect Trump, seeking guidance on banking for the California cannabis industry. He wrote:

> Conflict between federal and state rules creates a number of difficulties for states that

> have legalized cannabis use, including collecting taxes, increased risk of serious crime and the inability of a legal industry under state law to engage in banking and commerce. . . . We have a year to develop a system that works in California and which addresses the many issues that exist as a result of the federal-state legal conflict. . . . Uncertainty about the position of your administration creates even more of a challenge.

See CBS/Associated Press, *California Treasurer Asks Trump For Guidance On Pot, Banking*, December 2, 2016, available at https://sanfrancisco.cbslocal.com/2016/12/02/california-treasurer-asks-trump-for-guidance-on-pot-banking/.

Muddled law has created much fodder for scholars. *See*, *e.g.*, Ira P. Robbins, *Guns N' Ganja: How Federalism Criminalizes the Lawful Use of Marijuana*, 51 U.C. Davis L. Rev. 1783, 1807-08 (2018) ("Unsurprisingly, the decriminalization of recreational marijuana by state governments along with the reassurance of its criminality by the federal government has elicited mass confusion."); Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 Am. Crim. L. Rev. 215, 216 (2016) ("The discrepancy between federal and state marijuana law and the resulting uncertainty for marijuana businesses undermines the ability of states such as Colorado and Washington to develop a successful, regulated marijuana industry as intended through legalization."); W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected*

Federal Trademark Registrations for Marijuana Derivatives, 55 Am. Bus. L.J. 117, 117-18 (2018) ("Although marijuana is legal in some states, the United States Patent and Trademark Office (USPTO) refuses to grant trademarks covering marijuana products because federal law prohibits the drug. The USPTO's position is unremarkable except for the fact that trademarks are freely available for an equally illegal marijuana alternative called cannabidiol (CBD), a chemical derived from the marijuana plant."); Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms A Nation*, 50 Gonz. L. Rev. 241, 243 (2015) ("lack of uniformity between the federal and state law results in consumer confusion and inconsistent compliance with the current laws governing marijuana use and distribution within the United States").

Federal judges are not immune to the confusion. *See In re Sandra C. Malul, Debtor*, 11-21140 MER, 2020 WL 1486775, at *1 (Bankr. D. Colo. Mar. 24, 2020) ("Whether, and under what circumstances, a federal bankruptcy case may proceed despite connections to the locally 'legal' marijuana industry remains on the cutting-edge of federal bankruptcy law. Despite the extensive development of case law, significant gray areas remain. Unfortunately, the courts find themselves in a game of whack-a-mole; each time a case is published, another will arise with a novel issue dressed in a new shade of gray.").

Judicial confusion has arisen in criminal proceedings, as well. *See United States v. Guess*, 216 F. Supp.

3d 689, 694 (E.D. Va. 2016) ("interaction between state law and federal policy creates three related issues that collectively trouble this Court: (1) it is apparent that AUSAs in states in which possession of marijuana has been legalized or decriminalized will refrain from prosecuting possession, cultivation, and distribution cases, so long as potential defendants are (a) in compliance with state law and regulations and (b) do not run afoul of the eight federal enforcement priorities; (2) this, in turn, creates uncertainty as to the CSA's application and the federal prosecution of marijuana offenses; and (3) consequently, such uncertainty impacts district courts' consideration of the 18 U.S.C. § 3553(a) factors when sentencing defendants for marijuana possession, cultivation, or distribution").

The uncertainty even extends to parental rights. *See* Alice Kwak, *Medical Marijuana and Child Custody: The Need to Protect Patients and Their Families from Discrimination*, 28 Hastings Women's L.J. 119, 135 (2017) ("The disparity between states with progressive marijuana laws and the decades-old federal prohibition has caused confusion in many areas of the law, including child custody. Since federal law remains supreme and trumps state laws, a judge in a child custody case may use the parent's use of marijuana or the parent's providing it for their child as evidence of the parent's inability to properly care for the child, even if doing so in full compliance with the state's permissive medical marijuana laws.").

d. The marijuana industry is barred from federal relief during the COVID-19 epidemic despite being deemed "essential" by states.

More recently, when small businesses everywhere were being (and continue to be) bludgeoned by nationwide social distancing laws, the federal government launched a $350 billion Small Business Association ("SBA") loan program dubbed the Paycheck Protection Program ("PPP") in March 2020. The PPP was designed to rescue millions of small businesses with forgivable SBA loans.

However, according to SBA policy, "[b]usinesses engaged in any illegal activity" are ineligible for SBA loans. 13 C.F.R. § 120.110. In a 2018 Policy Notice, the SBA affirmed that "[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, businesses that derive revenue from marijuana-related activities or that support the end-use of marijuana may be ineligible for SBA financial assistance." *See* Linda E. McMahon, *SBA Policy Notice*, April 3, 2018, available at https://www.sba.gov/sites/default/files/resource_files/SBA_Policy_Notice_5000-17057_Revised_Guidance_on_Credit_Elsewhere_and_Other_Provisions.pdf).

Nevertheless, marijuana businesses operating lawfully under state law were hopeful that, given the dire circumstances, they would be afforded relief under

the PPP. Expectations were raised when states across the country deemed the marijuana industry "essential," asking them to continue to operate during social distancing shutdowns. *See* John Schroyer, *U.S. Markets That Have Allowed Marijuana Businesses to Remain Open During Coronavirus Pandemic Stay-at-Home Orders*, April 2, 2020, available at https://mjbizdaily.com/states-that-have-allowed-marijuana-businesses-to-remain-open-during-coronavirus-pandemic/.

Yet, when these "essential" businesses were informed they were not eligible for SBA relief—a final nail in the coffin for many struggling to stay afloat amidst the pandemic. On March 23, 2020, the SBA's Northwest branch publicly confirmed the ineligibility declaring, "[w]ith the exception of businesses that produce or sell hemp and hemp-derived products (Agriculture Improvement Act of 2018, Public Law 115-334), marijuana-related businesses are not eligible for SBA-funded services (OMB, 2 C.F.R. § 200.300)." *See* SBA Pacific NW Twitter Feed, accessed April 17, 2020, available at https://twitter.com/SBAPacificNW/status/1242227023302373377?ref_src=twsrc%5Etfw.

The paradox of being deemed "essential" to the health and welfare of United States citizens during a deadly pandemic, but otherwise ineligible for federal disaster relief, is the pinnacle of the confounding—and unequal—interplay between state and federal law. This issue must be resolved.

e. By addressing the question presented, the Court will be able to provide much needed clarity and relief from uncertainty.

The Tenth Circuit's decision is an outlier in federal caselaw. It simply cannot be reconciled with the univocal refusal to extend federal rights and protections to the marijuana industry. Given the decision's breadth, it will create needless litigation as parties attempt to expand the holding to other federal benefits and protections.

The rapid expansion of the marijuana industry means this problem will only get worse. United States citizens have a right to know what federal policy and law is. Until Congress enacts legislation clarifying the relationship between federal and state marijuana law (or legalizes marijuana altogether), this Court can alleviate national confusion by accepting this Petition and holding that industry participants have no right to FLSA damages. Such a decision would be consistent with other federal law holding that federal protections and relief (ADA, bankruptcy, HUD, SBA) are not afforded to the marijuana industry.

II. The Court Should Correct the Unintended Consequences of the Tenth Circuit's Opinion

Not only is it exceptionally important for the Court to provide clarity as to the applicable federal law in the marijuana industry, but this Petition will allow

the Court to correct the unintended consequences of the Tenth Circuit's opinion which purports to vest property rights in the proceeds of illegal conduct and precludes the uniform application of federal law.

a. The Tenth Circuit's opinion vests in criminals a personal property right to the proceeds of their illicit conduct in conflict with decisions of this Court.

Nothing in the Tenth Circuit's opinion limits its application to participants in Colorado's state-legal marijuana industry. To the contrary, the Tenth Circuit emphasized "the 'striking breadth' of the FLSA's definition of employee, which is purposefully expansive to maximize the full reach of the Act[.]" (App. 8). The Tenth Circuit reasoned, unless a plaintiff fits within one of the "categories of employees that are explicitly exempted from FLSA protections," they are covered under the Act. (App. 5). Thus, because the plaintiff here—an individual who transports marijuana and drug proceeds while armed with a firearm—is not "plainly and unmistakably" exempted from FLSA's definition of "employee," he may sue in federal court and recover FLSA relief. (*Id.*).

This reasoning applies with equal force to anyone performing labor for an organization engaged in drug trafficking—or any other federally illegal conduct. The FLSA does not expressly exempt from its definition of "employee" those performing labor for cartels trafficking any Schedule 1 substance, nor for employees of

human traffickers, nor for those trafficking illegal firearms. But Congress cannot have intended a private property right in overtime pay to vest in paid laborers of criminal enterprises. To the contrary, this Court has held that title to those illicit gains vest in the United States upon commission of the crime. *Caplin & Drysdale, Chartered*, 491 U.S. at 627; *Luis*, 136 S. Ct. at 1091-92.

Drug traffickers cannot have a private right of action for overtime pay—cannot state a claim under FLSA for "their" unpaid wages—because the proceeds of their conduct is not theirs; ownership vests in the United States. *Nichols*, 841 F.2d at 1489; *United States v. Gordon*, 710 F.3d 1124, 1135 n.13 (10th Cir. 2013). The Tenth Circuit's opinion contradicts decisions so holding, and thereby promotes drug trafficking and other federally illegal conduct in contravention of Congress's express intent. *Caplin & Drysdale, Chartered*, 491 U.S. at 627; *Luis*, 136 S. Ct. at 1091-92; *Nichols*, 841 F.2d at 1489; *Gordon*, 710 F.3d at 1135 n.13.

b. The Tenth Circuit's order requires different results in different states and precludes the uniform application of federal law to different states in the country.

Any attempt to limit application of the Tenth Circuit's opinion to similarly situated dealers in Colorado would itself be problematic, undermining the uniform application of FLSA between states that have legalized marijuana and those that have not. This cannot be.

Congress enacts law in a particular area because of the need for uniform legislation throughout the United States. *See*, *e.g.*, *Dice*, 342 U.S. at 361; *Garrett*, 317 U.S. at 245-46. Applying the Panel's decision in a reasonable way—by limiting its reach to employees of Colorado's state-legal marijuana industry—requires unequal interpretation and enforcement of the FLSA in this country in contravention of decisions made by this Court.

The Tenth Circuit's opinion is unworkable. Either it creates a federally vindicable property interest in the proceeds of federal drug crimes in direct contravention of congressional intent and Supreme Court precedent or it requires unequal application of federal employment law depending on the marijuana policy of each state. This Court's review is necessary to hold that an individual perpetrating a federal drug crime is not entitled to federally mandated compensation.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

JORDAN FACTOR
Counsel of Record
JEREMY T. JONSEN
ALLEN VELLONE WOLF
HELFRICH & FACTOR P.C.
1600 Stout Street
Suite 1900
Denver, CO 80202
(303) 534-4499
jfactor@allen-vellone.com