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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NEIL FEINBERG; ANDREA E. FEINBERG; KELLIE MCDONALD, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	No. 15-1333

Petition for Writ of Mandamus to the United States Tax Court (T.C. Nos. 10083-13, 10084-13)

James D. Thorburn of The Law Office of James D. Thorburn, LLC, Greenwood Village, CO (Richard A. Walker of The Law Office of Richard A. Walker, P.C., Longmont, CO, with him on the petition) for Petitioners.

Patrick J. Urda, Attorney, Appellate Section, Tax Division (Caroline D. Ciraolo, Acting Assistant Attorney General, Tax Division, and Gilbert S. Rothenberg and Richard Farber, Attorneys, Appellate Section, Tax Division, with him on the response) of the United States Department of Justice, Washington, D.C., for Respondent.

Before **GORSUCH**, **HOLMES**, and **MORITZ**, Circuit Judges.

GORSUCH, Circuit Judge.

This case owes its genesis to the mixed messages the federal government is sending these days about the distribution of marijuana. The Feinbergs and Ms. McDonald run Total Health Concepts, or THC, a not-so-subtly-named Colorado marijuana dispensary. They run the business with the blessing of state authorities but in defiance of federal criminal law. *See* 21 U.S.C. § 841. Even so, officials at the Department of Justice have now twice instructed field prosecutors that they should generally decline to enforce Congress's statutory command when states like Colorado license operations like THC. At the same time and just across 10th Street in Washington, D.C., officials at the IRS refuse to recognize business expense deductions claimed by companies like THC on the ground that their conduct violates federal criminal drug laws. *See* 26 U.S.C. § 280E. So it is that today prosecutors will almost always overlook federal marijuana distribution crimes in Colorado but the tax man never will.

Our petitioners are busy fighting the IRS's policy. After the agency disallowed their business expense deductions and sent them a large bill, the Feinbergs and Ms. McDonald challenged that ruling in tax court. Among other things, they argued that the agency lacked authority to determine whether THC trafficked in an unlawful substance and, as a result, they suggested that their deductions should have been allowed like those of any other business. As the litigation progressed, though, the IRS issued discovery requests asking the petitioners about the nature of their business — no doubt seeking proof that they

are indeed trafficking in marijuana, just as the agency alleged. The Feinbergs and Ms. McDonald resisted these requests, asserting that their Fifth Amendment privilege against self-incrimination relieved them of the duty to respond.

It's here where the parties' fight took an especially curious turn. The IRS responded to the petitioners' invocation of the Fifth Amendment by filing with the tax court a motion to compel production of the discovery it sought. Why the agency bothered isn't exactly clear. In tax court, after all, it's the petitioners who carry the burden of showing the IRS erred in denying their deductions — and by invoking the privilege and refusing to produce the materials that might support their deductions the petitioners no doubt made their task just that much harder. *See* Tax Ct. R. 142(a)(1). And harder still because in civil matters an invocation of the Fifth Amendment may sometimes lawfully result in an inference that what you refuse to produce isn't favorable to your cause. *See, e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Still, the IRS chose to pursue a motion to compel. And in support of its motion the agency advanced this line of reasoning. Yes, of course, the IRS said, it thinks THC's deductions are impermissible precisely because they arise from activity proscribed by federal criminal statutes. Yes, the Fifth Amendment normally shields individuals from having to admit to criminal activity. But, the IRS argued, because DOJ's memoranda generally instruct federal prosecutors not to prosecute cases like this one the petitioners should be forced to divulge the

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

Ultimately, the tax court sided with the IRS and ordered the petitioners to produce the discovery the agency demanded — and it is this ruling the Feinbergs and Ms. McDonald now ask us to overturn. Because the tax court proceedings are still ongoing and no final order exists that might afford this court jurisdiction in the normal course, the petitioners seek a writ of mandamus. But, of course, courts of appeals only rarely intervene in ongoing trial court proceedings, and winning a writ of mandamus poses a special challenge. To secure a writ, the petitioners must show that no other adequate means exist to secure the relief they seek. They must also show a clear and indisputable entitlement to that relief. And even if they can satisfy these two requirements, the petitioners still must convince this court that exercising its discretion to intervene in an ongoing trial court proceeding is "appropriate" in the interests of justice. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004); *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976); *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013).[1]

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[1] At times our cases have suggested that, when a petitioner seeks a writ of mandamus to vindicate a claim of privilege in response to an adverse discovery ruling, this court will apply a two-prong test before considering the merits of the petition — asking first whether "(1) disclosure of the allegedly privileged or

When it comes to establishing a clear and indisputable entitlement to relief, you might wonder if the petitioners are indeed able to bear the burden the law imposes on them. Of course it's true, as the IRS argues, that to invoke the Fifth Amendment you must "face some authentic danger of self-incrimination." *United States v. Rivas-Macias*, 537 F.3d 1271, 1277 (10th Cir. 2008) (internal quotation marks omitted). And it's true, as the IRS stresses, that two consecutive Deputy Attorneys General have issued memoranda encouraging federal prosecutors to decline prosecutions of state-regulated marijuana dispensaries in most circumstances.[2] But in our constitutional order it's Congress that passes the laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a federal crime. And, frankly, it's not clear whether informal agency memoranda guiding the exercise of prosecutorial discretion by field prosecutors may lawfully go quite so far in displacing Congress's policy directives as these memoranda seek to do. There's always the possibility, too,

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confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice." *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654-55 (10th Cir. 1984) (internal quotation marks omitted). The parties before us debate whether this test merely restates the traditional test for mandamus relief we've outlined in the text or whether it imposes a more onerous burden on the petitioner. Who's right, though, proves immaterial in light of our assessment that petitioners in this case fail even under the traditional mandamus standard.

[2] *See* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice to Selected U.S. Att'ys (Oct. 19, 2009), *revised by* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice (Aug. 29, 2013).

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