48702-1-II

No. 91883-0

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN NICKERSON, JR.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE; GOVERNOR JAY INSLEE, Washington State Governor (in his official capacity); WASHINGTON ATTORNEY GENERAL BOB FERGUSON (in his official capacity); CAROL NELSON, Director of Washington State Department of Revenue (in her official capacity); and JOHN AND JANE DOES 1-10,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Rules

Other Authorities

I. INTRODUCTION

Appellant Martin Nickerson wants to have his cake and eat it too. For several years, Mr. Nickerson ran a retail business that openly sold marijuana for medical use (medical marijuana), but he failed to pay the excise taxes that apply to all retail businesses, namely the retail sales tax and retailing business and occupation tax (B&O tax). He now claims that he cannot be taxed because the state law under which he professed to operate his business is supposedly preempted by federal law and because paying such taxes would somehow incriminate him. Both arguments fail under well-established precedent.

Mr. Nickerson's first claim is both improperly presented and incorrect. He lacks standing to argue that the state law under which he purportedly operated is preempted by federal law, because such a holding would have no impact on his case. But even if the Court reaches that argument, it fails. Congress has expressly stated an intention *not* to preempt state laws regarding controlled substances unless they positively conflict with federal law. Federal law on controlled substances never mentions state tax laws, creating no positive conflict. And even if federal law did preempt state law here, that would not excuse Mr. Nickerson from paying the taxes at issue because it is clear that states may tax illegal activities.

The Fifth Amendment to the United States Constitution privilege against self-incrimination is similarly unavailing to Mr. Nickerson. Having held himself out to the world as a source of medical marijuana, he cannot refuse to communicate with the tax collector alone. Long established United States Supreme Court precedent declares that a taxpayer cannot refuse to pay a tax on the basis that the revenue subject to tax arose from illegal activity. Moreover, nothing in the tax laws required him to disclose anything incriminating.

For these reasons, this Court should affirm the decision of the superior court upholding the tax assessments against Mr. Nickerson and his medical marijuana business.

II. COUNTERSTATEMENT OF ISSUES

This appeal presents the following issues:

1. Does Mr. Nickerson have standing to argue that the federal Controlled Substances Act preempts Washington's medical marijuana laws where the answer makes no difference in his case?

2. If Mr. Nickerson does have standing to raise the issue, does the federal Controlled Substances Act preempt Washington law when the Controlled Substances Act does not address taxes at all?

3. Does complying with state excise tax reporting requirements violate Mr. Nickerson's right against self-incrimination when the requirements arise from generally-applicable tax laws?

4. Does requiring Mr. Nickerson to pay state excise taxes on medical marijuana sales before challenging them in court result in an actual and substantial injury when he has an adequate remedy at law under RCW 82.32.180?

III. STATEMENT OF THE CASE

A. Factual Background: Mr. Nickerson Operated a Business Selling Medical Marijuana and Failed to Collect and Pay Generally-Applicable Excise Taxes

Mr. Nickerson brings this case with regard to his medical marijuana business. Since 2011, Mr. Nickerson has operated Northern Cross Collective Gardens, an entity that he describes as a "collective garden" that anticipated selling medical marijuana. Br. Appellant at 13; *see also* CP at 89. Although Mr. Nickerson describes Northern Cross as a collective garden authorized by state law, he faces criminal charges in state court for delivery of marijuana and possession of hydrocodone. CP at 34-37.

Despite operating for several years, Mr. Nickerson and Northern Cross did not report any revenue or pay any excise taxes. CP at 89. When the Department of Revenue (DOR) discovered this, it issued two tax

assessments for unpaid retail sales tax and B&O tax, one against Mr. Nickerson and the other against Northern Cross. CP at 89, 102-03. Mr. Nickerson still did not pay the tax assessments. CP at 89, 102-03. DOR then issued tax warrants against Mr. Nickerson in the amount of $7,152.66 and against Northern Cross in the amount of $55,016.95. CP at 89, 105-08. It then filed the tax warrants in superior court and obtained judgments against Mr. Nickerson and Northern Cross. CP at 8, 110-11. Only then did Mr. Nickerson file an administrative appeal challenging the assessment, which DOR dismissed as untimely. *See* CP at 124-32. DOR also provided notice to Mr. Nickerson and Northern Cross before revoking their business registrations. CP at 113-16. Since filing the tax warrants, DOR has continued to pursue collection of the unpaid taxes, including garnishing $824.23 from a Northern Cross bank account. CP at 90. DOR eventually revoked the business registrations of Mr. Nickerson and Northern Cross pursuant to RCW 82.32.215. CP at 90, 118-19.

B. Procedural Background: Trial Court Granted Summary Judgment in Favor of the State

Mr. Nickerson filed this action seeking declaratory and injunctive relief against DOR, Governor Inslee, Attorney General Ferguson, and former DOR Director Carol Nelson. CP at 4-18. He claimed that the federal Controlled Substances Act (CSA) preempts state taxation of

medical marijuana sales. CP at 13-14. He further asserted that requiring him to report and pay taxes on medical marijuana sales violates his Fifth Amendment right against self-incrimination. CP at 15-16.

Mr. Nickerson initially sought a preliminary injunction, which the trial court denied. CP at 274-76. He then moved for summary judgment, seeking a permanent injunction and declaratory judgment. CP at 161-70. The State moved to dismiss, arguing that Mr. Nickerson could not meet the equitable criteria to warrant such relief. CP at 171-92.

The trial court converted the State's motion to dismiss to a motion for summary judgment because it considered material beyond the initial pleadings. CP at 318; CR 12(b). After a hearing, the trial court granted the State's motion and dismissed Mr. Nickerson's claims. CP at 317-22. In a written decision, the trial court rejected Mr. Nickerson's claim that the CSA preempts the State from applying its generally-applicable excise taxes to Mr. Nickerson's sales of medical marijuana because state tax law does not impose any requirement that the CSA prohibits. CP at 319-20. The trial court also rejected Mr. Nickerson's Fifth Amendment claim, explaining that Mr. Nickerson could not rely on the Fifth Amendment to refuse to comply with generally-applicable tax laws. CP at 321. The trial court also pointed out that Mr. Nickerson had failed to cite any specific

law or evidence in the record that compelled him to violate his right against self-incrimination. CP at 321. Mr. Nickerson appealed.

C. Legal Background: The Law Applicable to This Case and as Later Amended

The tax assessments Mr. Nickerson challenges consist entirely of retail sales taxes and B&O taxes for which Mr. Nickerson and Northern Cross incurred liability from 2011 to 2013. CP at 89, 102-03. This case is accordingly governed by the generally-applicable statutes imposing retail sales taxes and the B&O tax in effect during that time period. In 2015, the legislature substantially overhauled state laws governing medical and recreational marijuana, including both ending legal recognition of collective gardens and altering the tax treatment of medical marijuana sold through licensed retailers. *See* Laws of 2015, ch. 70. Those amendments significantly alter the law going forward, but do not apply to this case.

To provide context, this brief begins with a description of the law governing collective gardens that applies until collective gardens are phased out of operation by July 1, 2016. The relevant background also includes tax law as it existed in 2011 through 2013, the tax periods covered by this case. It is additionally helpful to describe the 2015 amendments that will affect the future taxation of medical marijuana.

1. Collective Gardens are Authorized Only Until July 1, 2016

This case concerns the taxation of Mr. Nickerson's sales of medical marijuana through Northern Cross, which he describes as a "collective garden." Mr. Nickerson acknowledges that he established Northern Cross in anticipation of selling medical marijuana at retail. Br. Appellant at 13 (citing CP at 93-100).

The term "collective garden" refers to a group of qualifying patients under Washington's medical marijuana statutes that share responsibilities for the production and use of medical marijuana. RCW 69.51A.085(2). Along with the option for qualifying patients[1] to grow marijuana themselves for medical use, collective gardens were allowed "to ensure some, albeit limited, access to marijuana for medical use." Laws of 2015, ch. 70, § 2 (intent section of Cannabis Patient Protection Act). The statutory authorization for collective gardens anticipates a group effort by qualifying patients for "'sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use,' such as by providing real estate, equipment, supplies, or labor for the collective garden." *Cannabis*

[1] Statutes often use the phrase "qualifying patient or designated provider" to describe the category of people who can do something relating to medical marijuana. *See, e.g.* Laws of 2015, ch. 70, § 19. For brevity, we simply use the phrase "qualifying patient" without intent to exclude designated providers.

Action Coal. v. City of Kent, 183 Wn.2d 219, 224, 351 P.3d 151 (2015) (quoting RCW 69.51A.085(2)). Mr. Nickerson alleges that Northern Cross is such an operation. *See* CP at 5, 99.

The legislature determined in 2015 that the distribution system for medical marijuana could be improved in light of the enactment of a licensed and regulated marketplace for recreational marijuana under Initiative 502 (I-502). Laws of 2015, ch. 70, § 2. The legislature repealed RCW 69.51A.085, which authorized collective gardens, effective July 1, 2016. Laws of 2015, ch. 70, §§ 49, 50. Going forward, state law will provide for three methods by which qualifying patients can obtain medical marijuana. First, a qualifying patient may purchase medical marijuana from a licensed retailer holding a medical marijuana endorsement. Laws of 2015, ch. 70, § 19(1) (effective July 24, 2015, but not yet codified). Second, state law also will allow a qualifying patient to grow up to six plants in his or her domicile for personal medical use. *Id.* Third, after July 1, 2016, state law will allow qualifying patients to form a cooperative and grow marijuana together for medical use. The statutory authorization for cooperatives differs from that for collective gardens in several ways. *Compare* Laws of 2015, ch. 70, § 26 (amended by Laws of 2015, 2d Spec. Sess., ch. 4, § 1001) *with* RCW 69.51A.085. The statutory authorization for cooperatives clearly precludes the business model of

opening a storefront and selling marijuana, an approach available only to a licensed retailer with a medical endorsement. *See* Laws of 2015, ch. 70, §§ 10, 26.

2. The Retail Sales Tax and Retailing B&O Tax Apply to Collective Gardens

Like other businesses, "collective gardens" must report and pay state excise taxes. *See* RCW 82.08.020(1)(a) (retail sales tax applies to each retail sale of tangible personal property); RCW 82.04.250 (imposing B&O tax on gross proceeds from retail sales); CP at 39 (DOR notice explaining that medical cannabis sales are subject to sales tax). This case concerns retail sales taxes and the retailing B&O tax as applied in 2011 to 2013. The marijuana excise tax established under I-502 is not at issue because it applies only to sales by licensed marijuana retailers. *See* RCW 69.50.535 (as amended by Laws of 2015, 2d Spec. Sess., ch. 4, § 205).

a. Retail Sales Taxes

The retail sales tax applies to "each retail sale" of "tangible personal property, unless the sale is specifically excluded from the RCW 82.04.050 definition of retail sale." RCW 82.08.020(1)(a). RCW 82.04.050 is framed broadly: "'Sale at retail' or 'retail sale' means every sale of tangible personal property . . . to all persons irrespective of

the nature of their business . . . ." RCW 82.04.050 provides several exclusions, but none of them apply to sales of medical marijuana. Nor did any of the retail sales tax exemptions in RCW 82.08 apply to medical marijuana sales during the period at issue.[2] The legal analysis is the same with regard to retail sales taxes imposed by cities and counties, which DOR collects on their behalf. RCW 82.14.050(a).

The retail sales tax does not distinguish between sales transactions involving legal products or activities and sales transactions involving illegal products or activities; the tax applies equally to both. RCW 82.08.050 (defining retail sale without distinction based on the status of the seller). Nor does state law distinguish between a retail seller organized as a for-profit business or, as Mr. Nickerson claims to be, a nonprofit "collective garden." *Id.* The retail sales tax applies to Mr. Nickerson's sales of medical marijuana in the same way as it applies to the retail sale of any other product, and does not depend upon any unique tax statute.

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[2] The parties to another case dispute whether sales of medical marijuana are exempt from retail sales tax under RCW 82.08.0281, which exempts sales of prescription drugs. *Duncan v. Dep't of Revenue*, Court of Appeals No. 33245-4-III. DOR's position is that the prescription drug exemption does not apply, but the point is irrelevant to this case because it is a statutory refund claim that cannot be raised in a case brought under RCW 82.32.150 or under RCW 82.32.180 without the taxpayer first paying the disputed tax. *See* discussion *infra* pp. 14-16.

Beginning July 1, 2016, retail sales taxes will no longer apply to the sale of medical marijuana made by licensed marijuana retailers with medical endorsements. Laws of 2015, 2d Spec. Sess., ch. 4, § 207. This exemption will apply only to sales made to qualifying patients. *Id.*

b. Retailing Business and Occupation Tax

Similarly, those who make retail sales must pay retailing B&O tax on the gross proceeds of the sales made by their businesses. RCW 82.04.250. "Gross proceeds of sales" include "the value proceeding or accruing from the sale of tangible personal property. . . ." RCW 82.04.070. Like the retail sales tax, the B&O tax does not distinguish between transactions involving legal products and those involving illegal products. And, as with the retail sales tax, the B&O tax applies without regard to whether the business is organized on a for-profit or nonprofit basis. *Young Men's Christian Ass'n v. State*, 62 Wn.2d 504, 508, 383 P.2d 497 (1963); *see also* WAC 458-20-169 (explaining that B&O tax applies to nonprofit organizations absent a tax deduction or exemption). Therefore, it too applies to sales of medical marijuana.

Mr. Nickerson claims, with only partial accuracy, that after July 1, 2016, "medical marijuana" will be exempt from the B&O tax. Br. Appellant at 12 (citing Laws of 2015, ch. 70, § 40). But only cooperatives will be exempt from the tax; others who sell marijuana, even

for medical purposes, will continue to be subject to the retailing B&O tax. Laws of 2015, ch. 70, § 40 (exempting only cooperatives). And cooperatives will be prohibited from selling, donating, or otherwise providing medical marijuana to any person who is not a participant in the cooperative. Laws of 2015, ch. 70, § 26(4)(e).

IV. SUMMARY OF ARGUMENT

Because Mr. Nickerson brought this claim without having paid the taxes assessed by DOR, the only relief he can properly request is an injunction against the tax assessments. RCW 82.32.150. Nothing beyond that request is properly at issue. Anything beyond that request, including seeking an advisory opinion of this Court regarding the relationship between federal and state laws on marijuana, is not properly presented and is not necessary to resolve Mr. Nickerson's request for injunctive relief against the tax assessment.

Mr. Nickerson contends that the CSA preempts state law in a manner that he does not articulate. At no point does Mr. Nickerson identify any specific state law that he contends is preempted. And both federal and state courts strongly presume that federal law does not preempt state law unless that is the manifest intention of Congress.

Mr. Nickerson seems to argue that federal law entirely preempts Washington's laws on the medical use of marijuana. But that argument is

irrelevant to determining the validity of the tax assessments Mr. Nickerson challenges because the only consequence of finding federal preemption would be to render Mr. Nickerson's medical marijuana sales illegal under state law. The generally-applicable excise taxes at issue in this case relate to retail sales in general and are not based on any laws relating specifically to medical marijuana. It is well established in any event that states may tax illegal activities. The question of whether federal law preempts state law is therefore irrelevant to this dispute about tax assessments.

Even if the question of federal preemption was relevant, it would be unavailing to Mr. Nickerson because Congress has expressly stated its intent *not to preempt* state laws on controlled substances except in cases of a positive conflict between federal and state law such that the two cannot consistently stand together. Requiring Mr. Nickerson to comply with state tax laws does not conflict with federal law. State law does not compel Mr. Nickerson to violate federal law, and the state law does not impose an obstacle to federal enforcement of federal laws.

Finally, compliance with the generally-applicable state excise taxes does not compel Mr. Nickerson to incriminate himself in violation of the Fifth Amendment. Throughout the tax period, Mr. Nickerson and his business voluntarily held themselves out to the public as a source of medical marijuana, and Mr. Nickerson admits that he anticipated

conducting retail sales through that business. When a state tax does not target any selected group and suspect criminal activity, the Fifth Amendment does not grant a taxpayer immunity against an obligation to pay a tax simply on the basis that the activity involved is illegal. The retail sales tax and B&O tax apply to retail sales generally, and do not specifically target sales of medical marijuana. Assessing those taxes against Mr. Nickerson does not violate his Fifth Amendment right.

V. ARGUMENT

A. Standard of Review

1. Review of Summary Judgment

A court reviewing a grant of summary judgment engages in the same inquiry as the trial court. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). State laws are presumed valid, and the party alleging their invalidity bears the burden of proving otherwise beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 327 (1998). A party alleging that federal law preempts state law must similarly overcome the strong presumption against preemption. *Cipolone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). As issues of law, this Court reviews such questions de novo. *Keck v. Collins*, No. 90357-3, 2015 WL 5612829, at *6 (Wash. Sept. 24, 2015).

2. RCW 82.32.150 Limits the Scope of Review to the Constitutionality of Washington's General Excise Tax Laws as Applied to Mr. Nickerson

This is an action under RCW 82.32.150, which provides:

> All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. *No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.*

(Emphasis added.) Judicial review of a tax assessment is generally unavailable unless the taxpayer first pays all disputed taxes, penalties, and interest. RCW 82.32.150, .180; RCW 82.03.180. The sole narrow exception is for claims alleging that the assessment of a tax is unconstitutional. RCW 82.32.150; *see also Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 89, 241 P.3d 439 (2010).[3]

Until all taxes, penalties, and interest have been paid in full, the sole relief available to the taxpayer is limited to the restraining or enjoining of the collection of assessed taxes. This is because "the disruption of the state's prompt and orderly collection of taxes . . . could have catastrophic effects on [the state's] economy, let alone the solvency

[3] RCW 82.32.150, like RCW 82.32.180, is a conditional, partial waiver of the State's sovereign immunity and, therefore, must be strictly construed. *See Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995) (addressing waiver of sovereign immunity under RCW 82.32.180).

of state government." *Booker Auction Co.*, 158 Wn. App. at 89; *see also Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 796-97, 638 P.2d 1213 (1982) (discussing society's strong interest in the collection of taxes).

Mr. Nickerson has not paid the disputed taxes. CP at 250. Mr. Nickerson is therefore precluded from seeking any relief other than the narrow request for an injunction against the assessments of the generally-applicable excise taxes against him and Northern Cross on the basis they are constitutionally precluded.

3. To Obtain Injunctive Relief Under RCW 82.32.150 a Taxpayer Must Establish the Traditional Equitable Criteria Applying to Such Relief

"An injunction is distinctly an equitable remedy and is frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (some internal quotation marks omitted). Consequently, equitable relief should not be granted if an adequate remedy at law is available. *Kucera*, 140 Wn.2d at 209. This reflects society's strong interest in the efficient collection of taxes, because "[a]ny delay in the proceedings of officers, upon whom the duty is devolved of collecting taxes, may derange the operations of

government, and thereby cause serious detriment to the public." *Tyler Pipe*, 96 Wn.2d at 797 (internal quotation marks omitted).

The party requesting injunctive relief must satisfy the equitable criteria governing the issuance of an injunction. *Id.* at 791. The requesting party thus "'must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.'" *Id.* at 792 (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). Injunctive relief must be denied if the requesting party fails to establish any of these criteria. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007).

Mr. Nickerson fails to meet this burden because, among other reasons, he has a plain, speedy, and adequate remedy at law. He fails to show why he cannot pay the taxes at issue and then bring an action for a refund under RCW 82.32.180. "Mere inconvenience . . . is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of a tax." *Tyler Pipe*, 96 Wn.2d at 795 (quoting *California v. Latimer*, 305 U.S. 255, 262, 59 S. Ct. 166, 83 L. Ed. 2d 159 (1938)). Mr. Nickerson accordingly has not shown that he is entitled to an injunction. *Tyler Pipe*, 96 Wn.2d at 792.

B. Mr. Nickerson Lacks Standing to Argue That Federal Law Preempts State Marijuana Laws

Mr. Nickerson cannot establish standing to argue that federal law preempts the Washington Medical Use of Cannabis Act (MUCA), because he cannot show that any injury he may have suffered by being assessed for the taxes at issue would be redressed by his preemption argument. *See State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139 (2014).[4] Mr. Nickerson alleges that federal law preempts the MUCA, but the taxes at issue are not imposed by the MUCA. The ruling he requests would not satisfy the "redress" prong of the injury-in-fact test because the alleged injury and the preemption argument are disconnected. *See KS Tacoma Holdings, LLC v. Shorelines Hr'gs Bd.*, 166 Wn. App. 117, 129, 272 P.3d 876 (2012) (requiring a nexus between the alleged injury and the relief requested).

Mr. Nickerson's basis for claiming that state law allowed him to sell medical marijuana in the first place was RCW 69.51A.085, a provision of the MUCA. Having relied upon RCW 69.51A.085 as the authority under which he sold medical marijuana, Mr. Nickerson cannot

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[4] The two elements of standing consist of, first, a requirement that a plaintiff show an injury-in-fact caused by the conduct at issue "*and likely to be redressed by the requested relief*," and second, a requirement to show that the claim falls within the zone of interest at issue. *Johnson*, 179 Wn.2d at 552 (emphasis added). As a jurisdictional question, standing may be raised at any time, including sua sponte by the Court. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875, 101 P.3d 67 (2004); *see* CP at 155 (asserting the affirmative defense of standing).

now contest the validity of that very act. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (applying "judicial estoppel" and explaining that equity "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position"). Not only is such a request deeply ironic, but the result of accepting his argument would simply be to deprive Mr. Nickerson's business of any claim of legality under state law, not to excuse him from paying taxes.

This is true because courts repeatedly have upheld the application of tax statutes with respect to illegal activities. For example, the United States Supreme Court has held that, "[a] statute does not cease to be a valid tax measure . . . because the activity [taxed] is otherwise illegal." *Minor v. United States*, 396 U.S. 87, 98 n.13, 90 S. Ct. 284, 24 L. Ed. 2d 283 (1969). And it has explained that "the unlawfulness of an activity does not prevent its taxation." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) (citing inter alia *Marchetti v. United States*, 390 U.S. 39, 44, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968)). The Court observed that a state "no doubt could collect [a] tax on the possession of marijuana" under certain circumstances. *Id.* Similarly, a Michigan court held that the state had the "authority . . . to assess a sales tax on petitioners' illegal sale of marijuana." *Greer v. Dep't*

of Treasury, 145 Mich. App. 248, 251-52, 377 N.W.2d 836 (1985). "Intrinsically it is obvious that the states and the federal government have the constitutional right and power as separate sovereigns to tax that which the sovereignty has declared to be illegal." *State v. Wood*, 187 So. 2d 820, 823 (Miss. 1966).

It therefore follows that Mr. Nickerson lacks standing to assert that federal law preempts state laws on medical marijuana. Even if Mr. Nickerson proved preemption—and as discussed below he cannot—the result would not be to excuse him from paying taxes on what would then be an illegal business under state law. Mr. Nickerson's alleged grievance is therefore not redressable through his federal preemption argument. *Johnson*, 179 Wn.2d at 552.

C. Federal Law Does Not Preempt Washington From Assessing and Collecting Excise Taxes on the Sale of Medical Marijuana

Analysis of Mr. Nickerson's federal preemption claim is complicated unnecessarily by his failure to clearly articulate precisely which state statute he argues is preempted. *See* CP at 251 (trial court's observation that Mr. Nickerson "has not cited to specific state statutes that he asserts are preempted" by federal law); *see generally* CP at 13-14. Mr. Nickerson contends that the CSA preempts the MUCA, and that as a result DOR cannot collect taxes from collective gardens. *See, e.g.*, Br.

Appellant at 1-2 (first assignment of error and first issue). But that proposition is a *non sequitur* because the preemption of the MUCA would have no effect on the state's tax assessments against Mr. Nickerson and Northern Cross when those taxes are not imposed pursuant to the MUCA in the first place. Rather, the gravamen of Mr. Nickerson's argument is much narrower: that DOR cannot collect taxes on medical marijuana sales because the CSA preempts state taxation of such sales. *See* Br. Appellant at 29-31.

DOR assessed the excise taxes at issue in this case based on generally-applicable tax laws that form no part of the state's medical marijuana laws, and so federal preemption of the MUCA can have no effect upon the collection of the taxes. And the CSA expresses a general congressional intent *not to preempt* state laws except where a direct conflict arises, and no direct conflict with federal law precludes the assessment of state taxes.

1. State Taxes are Imposed Pursuant to Generally-Applicable Excise Tax Laws, Not Pursuant to Medical Marijuana Laws

Mr. Nickerson's attempt to broadly assert that the CSA preempts the MUCA ignores the narrowness of this case: a constitutional challenge under RCW 82.32.150 to tax assessments DOR issued against him and his business. CP at 318-19. Indeed, other than the fact that his business

purports to qualify as a "collective garden," this case does not concern the MUCA at all. The retail sales tax is imposed pursuant to RCW 82.08.020. The retailing B&O tax is imposed pursuant to RCW 82.04.220 and .250. These statutes do not address medical marijuana specifically, nor are they part of the MUCA, which is codified in RCW 69.51A.

And, as described above in the context of standing, states may tax illegal activities. *Kurth Ranch*, 511 U.S. at 778. If Mr. Nickerson successfully demonstrated that the CSA preempts the MUCA, the result would merely be to deprive his own business of any claim of legality under state law. But that illegality would not excuse him from the obligation to pay taxes. *Id.* Mr. Nickerson's preemption argument therefore does not advance this Court's analysis of his tax obligations.

The broad question of federal preemption of the MUCA is accordingly not presented in this case. Mr. Nickerson merely seeks injunctive relief under RCW 82.32.150 against the assessment of generally-applicable excise taxes. Determining whether the CSA preempts the MUCA does not help answer that question, both because the taxes at issue are not imposed pursuant to the MUCA and because states may tax illegal activities.

2. Federal Law Does Not Preempt the Collection of the State's Application of Generally-Applicable Excise Tax Laws to Marijuana Businesses

Preemption analysis begins "with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981). This Court has repeatedly emphasized that there is a strong presumption against finding preemption of state law in an ambiguous case. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 78, 896 P.2d 682 (1995). "Even if there is an express preemption clause, this court will give it a fair but narrow reading." *Northwest Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn.2d 176, 184, 357 P.3d 650 (2015) (internal quotation marks omitted; petition for *certiorari* pending).

The presumption disfavoring preemption of state law is particularly strong when a state legislates within its "historic powers." *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 81 L. Ed. 2d 1447 (1947). This includes a state's taxing powers. *See Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29, 21 S. Ct. 787 (1873) (the power to tax is "indispensable" to the continued existence of the states). Washington courts similarly recognize that the presumption against preemption is the strongest when the state acts within its traditional areas of sovereignty. *Hue*, 127 Wn.2d at 78-79; *see also*

Analytical Methods, Inc. v. Dep't of Revenue, 84 Wn. App. 236, 244, 928 P.2d 1123 (1996) (acknowledging strong presumption against preemption). For purposes of those statutes it does not matter whether Mr. Nickerson was selling medical marijuana or something else.

Mr. Nickerson's contention that the CSA specifically preempts DOR's assessments of retail sales taxes and retailing B&O tax on his marijuana sales fails because the CSA expresses a general Congressional intent *not to preempt* state laws. This is so except where a direct conflict arises. No direct conflict with federal law precludes the assessment of state taxes. Congress explicitly set forth in statute its clear intent *not to preempt* state laws except in a narrow category of cases in which irreconcilable conflict arises:

> No provision of [the CSA] shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a *positive conflict* between that provision of [the CSA] and that State law *so that the two cannot consistently stand together*.

21 U.S.C. § 903 (emphasis added).

Federal law does not preempt state tax law unless that is the "clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230; *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009); *Hue*,

127 Wn.2d at 78. Congress has clearly stated its intent *not to preempt* state law except where state and federal laws are irreconcilable. This express statement by Congress that the CSA does not generally preempt state law led one Supreme Court justice to characterize it as a "nonpre-emption clause." *Gonzales v. Oregon*, 546 U.S. 243, 289, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (Scalia, J., dissenting).

The statute expressly preempts only state laws that present a "positive conflict." *See, e.g., County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 819, 81 Cal. Rptr. 3d 461 (2008) ("numerous courts have concluded[] that . . . 21 U.S.C. § 903 [] demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances"). Congress has expressly disavowed field preemption, and express preemption also effectively becomes irrelevant because it overlaps completely with conflict preemption here. 21 U.S.C. § 903.

A direct conflict exists if it is "impossible for a private party to comply with both state and federal requirements," such as where federal law prohibits activity that state law requires, or vice versa. *See PLIVA, Inc. v. Mensing*, 564 U.S. ___, 131 S. Ct. 2567, 2576, 180 L. Ed. 2d 580 (2011) (internal quotation marks omitted); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d

248 (1963) (federal preemption applies only if "compliance with both federal and state regulations is a physical impossibility"). "Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 573. Where state law merely allows what federal law prohibits, it is not impossible to comply with both laws at the same time. *PLIVA, Inc.*, 131 S. Ct. at 2577. Washington law does not compel Mr. Nickerson to operate a "collective garden." Doing so is simply Mr. Nickerson's choice, a choice that subjects him to Washington's generally-applicable excise tax laws.

No positive conflict arises between the CSA and the generally-applicable excise tax laws under which DOR assessed Mr. Nickerson and his business for retail sales taxes and B&O tax. The CSA is entirely silent as to state tax laws. Therefore, no positive conflict between the CSA and state excise tax laws is possible, and this Court should reject Mr. Nickerson's federal conflict preemption claim.

Mr. Nickerson seems to make an argument based on obstacle preemption, and not the positive conflict preemption to which federal statute expressly limits the CSA. Br. Appellant at 29-31. To do so is diametrically at odds with the express intention of Congress. Federal law excludes obstacle preemption from consideration because the statute limits preemption to state laws where "there is a positive conflict between . . . [the CSA] and State law so that the two cannot consistently

stand together." 21 U.S.C. § 903. Obstacle preemption is irrelevant under the CSA, because it is concerned with "a positive conflict." 21 U.S.C. § 903; *see also San Diego NORML*, 165 Cal. App. 4th at 825; *People v. Crouse*, No. 12CA2298, 2013 WL 6673708, at *4 (Colo. Ct. App. 2013), *review granted*, 2015 WL 3745183 (Colo. June 15, 2015); *cf. S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002) (reaching the same conclusion as to the substantively identical preemption clause in 18 U.S.C. § 848). Indeed, other federal statutes specify that both impossibility and obstacle preemption apply, demonstrating that Congress knows how to write such a clause if that is its intent. *See, e.g.*, 21 U.S.C. § 350e(e).

Mr. Nickerson's notion seems to be that for Washington to tax medical marijuana businesses somehow stands at odds with an amorphous spirit of the CSA. *See* Br. Appellant at 24, 29-31. But even if obstacle preemption applied to the CSA, it is not a wispy doctrine that can be summoned whenever a party senses an air of inconsistency between federal and state law. "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 1985, 179 L. Ed 2d

1031 (2011) (internal quotation marks omitted). Instead, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce*, 131 S. Ct. at 1985.

Obstacle preemption arises only if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers*, 373 U.S. at 141 (internal quotation marks omitted). But Congress expressed an intent to preempt only for positive conflict. 21 U.S.C. § 903. And for the state to tax the activities of medical marijuana businesses hardly frustrates the purposes and objectives of the CSA. Again, nowhere does the CSA even mention state taxation. And whether the State applies its generally-applicable excise tax laws to marijuana businesses or not, the federal government remains free to prosecute violators of federal law. *See Gonzales v. Raich*, 545 U.S. 1, 17-19, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). If anything, the state's taxation of marijuana businesses discourages activities that violate federal law by "impos[ing] fiscal burdens on individuals, and deter[ing] certain behaviors." *Kurth Ranch*, 511 U.S. at 778. Thus, taxing medical marijuana sales poses no "obstacle" to the accomplishment of federal purposes and objectives.

Finally, Mr. Nickerson seems to contend that it was an action of DOR, rather than his own activities, that somehow made Mr. Nickerson

and Northern Cross a "business" subject to tax. Br. Appellant at 29-31. His impression seems to be that before DOR issued the assessments for generally-applicable excise taxes against him and his business, they were simply a "collective garden," and not a business. This argument seeks to turn a public education campaign that DOR conducted for medical marijuana businesses into a state effort to "target" such businesses for treatment that the law would not otherwise provide. *See* CP at 39-42.

Neither the retail sales tax laws nor the B&O tax law distinguish between a retail seller organized as a for-profit business or, as Mr. Nickerson claims to be, a nonprofit "collective garden." RCW 82.08.050 (defining retail sale without distinction based on the status of the seller); *Young Men's Christian Ass'n*, 62 Wn.2d at 508 (applying B&O tax to nonprofit organizations); *see also* WAC 458-20-169 (explaining the same). That the legal applicability of generally-applicable excise tax laws to Mr. Nickerson was somehow the product of anybody's actions but his own is untenable.

Mr. Nickerson cannot show any positive conflict between the CSA and the application of the state's generally-applicable excise tax laws to Mr. Nickerson or Northern Cross. Washington's taxation of medical marijuana sales does not impede in any manner the federal government's prosecutorial options. And since Mr. Nickerson did not and does not

establish a clear legal or equitable right with respect to his federal preemption claim, he failed to meet his burden of showing that he is entitled to declaratory and injunctive relief.

D. Requiring Mr. Nickerson to Collect and Pay Taxes Does Not Violate His Right Against Self-Incrimination When He Holds His Business Out to the Public as a Place to Buy Marijuana

Mr. Nickerson holds himself and his business out to the world as a place where people can acquire medical marijuana, through which he anticipated making retail sales. Br. Appellant at 13 (citing CP at 93-100). Having told the world that he anticipated retail sales, and making such sales, he now maintains that the Fifth Amendment protects him from telling this to the tax collector or paying generally-applicable state excise taxes to DOR. CP at 31-47. The United States Supreme Court long ago rejected the argument that the Fifth Amendment authorizes a person who earns income from engaging in an illegal activity to refuse to comply with generally-applicable tax laws. *United States v. Sullivan*, 274 U.S. 259, 263, 47 S. Ct. 607, 71 L. Ed. 2d 1037 (1927). Mr. Nickerson's challenge based on the Fifth Amendment therefore fails.[5]

[5] Mr. Nickerson says that his challenge is also based upon article I, §sections 3 and 9 of the Washington Constitution, but offers no independent argument based on those provisions. "[I]ssues not supported by argument and citation to authority will not be considered on appeal." *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015) (internal quotation marks omitted). And the Washington Constitution provides no greater protection against self-incrimination than does the Fifth Amendment,

Although "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" (U.S. Const. amend. V), this right does not permit a person to refuse to comply with generally-applicable laws that do not target inherently suspect groups or activities. Numerous courts, including the United States Supreme Court, have repeatedly rejected the contention that a person can avoid generally-applicable legal obligations under the Fifth Amendment.

As an initial matter, Washington law did not compel Northern Cross to hold itself out to the public as a business from which qualifying patients may obtain medical marijuana. Nor did state law compel Mr. Nickerson to sell medical marijuana. Mr. Nickerson should not be allowed to proclaim to the world that he and Northern Cross provide medical marijuana, but then invoke the Fifth Amendment right against self-incrimination to avoid having to report and pay taxes with respect to that business activity. *See Sullivan*, 274 U.S. at 263-64.

Sullivan is one of the earliest cases to address this issue. Mr. Sullivan earned income by selling liquor in violation of the National Prohibition Act. He was convicted of willfully refusing to file a federal income tax return. *Sullivan*, 274 U.S. at 262. The Court refused to allow

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so additional argument based on the state constitution would avail Mr. Nickerson of nothing. *State v. Templeton*, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002).

Mr. Sullivan to assert the right against self-incrimination as a defense: "It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."[6] *Sullivan*, 274 U.S at 263-64.

Mr. Nickerson acknowledges *Sullivan* only by noting that the Court indicated that the Fifth Amendment would permit a taxpayer to object to providing specific incriminating information on a tax return. Br. Appellant at 34 (citing *Sullivan*, 274 U.S. at 263-64). But Mr. Nickerson seeks no such relief, having instead refused to file any tax information with DOR or to pay any tax. CP at 15-17. And *Sullivan*'s more important holding for this case is that the Fifth Amendment does not provide immunity against an obligation to pay taxes simply because the activity taxed was illegal. *Sullivan*, 274 U.S. at 263-64.

In a later case, *California v. Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971), the Court held that the Fifth Amendment does not shield a defendant from prosecution for violating a statute that required motorists involved in accidents to stop and provide their name and address

[6] Mr. Nickerson's Fifth Amendment argument seems in this regard to presume that the federal CSA preempts the collection of taxes against his marijuana business. As discussed above, that argument is incorrect. Operating a "collective garden" in full compliance with state law—assuming arguendo that Mr. Nickerson is in full compliance—is not a crime under state law. RCW 69.51A.040, .085(3).

to the driver of the other vehicle. *Byers*, 402 U.S. at 432-34. The Court distinguished cases in which the privilege had been upheld on the basis that in those cases the disclosures were extracted only from a "highly selective group inherently suspect of criminal activities" and the privilege was applied in "an area permeated with criminal statutes." *Id.*, 402 U.S. at 430; *accord Baltimore Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990) (the Fifth Amendment "may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws").

Other courts have relied on these and other Supreme Court cases to hold that generally-applicable regulatory and tax statutes that do not selectively target inherently suspect groups are not subject to the Fifth Amendment privilege. *See, e.g., Sibley v. Obama*, 810 F. Supp. 2d 309, 311 (D.D.C. 2011) (no Fifth Amendment defense to requirement that medical marijuana growers and dispensers execute affidavit acknowledging federal criminal laws); *In re Grand Jury Proceedings*, 707 F.3d 1262, 1268 (11th Cir. 2013) ("[W]hen the government is authorized to regulate an activity, an individual's Fifth Amendment privilege does not prevent the government from imposing recordkeeping, inspection, and reporting requirements as part of a valid regulatory scheme."); *United*

States v. Josephberg, 562 F.3d 478, 492-93 (2d Cir. 2009) (no Fifth Amendment defense in criminal investigation for failing to file tax returns); *see also* Ariz. Op. Att'y Gen. No. 111-004 at 7-9 (2011) (medical marijuana dispensaries do not have a Fifth Amendment defense to a generally-applicable requirement to file tax returns and pay the taxes due).

Ignoring these cases, Mr. Nickerson relies solely on decisions involving taxes that targeted a highly selective group and suspect criminal activity. *Leary v. United States*, 395 U.S. 6, 18 , 89 S. Ct. 1532, 23 L. Ed 2d 57 (1969), involved the former federal Marijuana Tax Act that required Dr. Leary to reveal himself as an unregistered transferee of marijuana. *Marchetti v. United States*, 390 U.S. 39, 42, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62, 63-64, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968), involved federal wagering tax statutes that required those engaged in the business of accepting wagers to pay a 10 percent excise tax on the gross amount. At that time, "[w]agering and its ancillary activities [were] very widely prohibited under both federal and state law." *Marchetti*, 390 U.S. at 44. The federal wagering tax statutes consequently placed petitioners "entirely within an area permeated with criminal activities." *Grosso*, 390 U.S. at 64 (internal quotation marks omitted). Finally, *Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968), involved a firearms registration requirement

directed at those who had obtained possession of a firearm without complying with the National Firearm Act's other requirements. *Haynes*, 390 U.S. at 95. Thus, it too applied to "persons inherently suspect of criminal activities." *Id.* at 96 (internal quotation marks omitted).

Mr. Nickerson similarly cites a series of out-of-state cases in which parties raised Fifth Amendment objections to state laws relating to marijuana. Br. Appellant at 38-42 (discussing *People v. Duleff*, 183 Colo. 213, 515 P.2d 1239 (1973); *Florida Dep't of Revenue v. Herre*, 634 So. 2d 618 (1994); *Wisconsin v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997)). But again, even as he describes them, those cases involved state laws that targeted a highly selective group and suspect criminal activity. Br. Appellant at 38-42.

The excise taxes Mr. Nickerson challenges here do not selectively target an inherently suspect group. The B&O tax applies to virtually all activities of persons engaging in business in the State, regardless of the nature of the business. *Simpson Inv. Co.v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000); *Steven Klein, Inc. v. Dep't of Revenue*, 184 Wn. App. 344, 351, 336 P.3d 663 (2014). And to pay retailing B&O tax, no taxpayer is required to report any information revealing that the taxpayer is selling medical marijuana. Taxpayers are required to self-report only the following information: (1) the gross amount of revenues;

(2) any amounts deducted; (3) the taxable amount; and (4) the tax due. CP at 121-23.

The retail sales tax likewise is a broad-based tax. RCW 82.04.040 defines "sale" as "any transfer of ownership of . . . property for a valuable consideration[.]"[7] In turn, RCW 82.08.010(11) defines "retail sale" as "any sale . . . for any purpose other than a resale . . . ." And, like the B&O tax, to report and remit retail sales taxes, taxpayers must self-report only non-incriminating information: (1) the gross amount of sales; (2) any amounts deducted; (3) the taxable amount; (4) the tax due; (5) the location of each local taxing jurisdiction in which sales were made; (6) the taxable amount for such local taxing jurisdiction; (7) the local rate for each such local taxing jurisdiction; and (8) the tax due to each such local taxing jurisdiction. CP at 121-23. Thus, under Washington's tax laws, taxpayers may comply with their reporting and payment obligations without revealing any incriminating information.

Nor does any information requested on the state's master business license application implicate a Fifth Amendment right, an argument Mr. Nickerson raises for the first time on appeal. He complains that the

[7] The definition of "sale" in RCW 82.04.040 also applies for the B&O tax. *See* RCW 82.08.010(6).

license application asks for information about the nature of his business.[8] CP at 93-100. The tax returns do not request the same information. CP at 121-23. If the information on the master business registration form is the source of Mr. Nickerson's Fifth Amendment objection, he should have objected in that context. *See Sullivan*, 274 U.S. at 263-64 (taxpayer can raise a Fifth Amendment objection on a tax return). Mr. Nickerson did not object until he was asked to pay taxes that he owed under the law. Br. Appellant at 14-15. If that is his argument, he objected to the wrong thing at the wrong time, and his refusal to pay taxes or submit a tax return should not be excused.

Mr. Nickerson contends that DOR did, in fact, target marijuana businesses for assessment of retail sales taxes and the B&O tax. As with a similar argument he offered regarding preemption, his argument erroneously characterizes a public education campaign that DOR conducted for marijuana businesses as a state effort to enact laws specifically to "target" marijuana businesses. *See* CP at 39-42. Mr. Nickerson and his business would be subject to the same tax treatment no matter what product he sold. As noted, retail sales taxes and B&O tax apply broadly to *any* business making retail sales. DOR simply

[8] The master business registration form does not require the information that the business plans to sell marijuana. For example, Mr. Nickerson described the principal products or services that he would be providing as "Skin Products, Hemp Products, Soaps." CP at 95. In contrast, Northern Cross responded "Collective Garden." CP at 99.

communicated educational information to medical marijuana businesses to make them aware of the law's application, an application that would have applied whether DOR provided that communication or not. Moreover, the activity to which the taxes are applied is not prohibited by state law, provided that a collective garden operates within the scope of the MUCA. RCW 69.51A.085(3). This is not selective "targeting" of a suspect group akin to that in *Leary*, *Marchetti*, *Grosso*, or *Haynes*.

Lastly, Mr. Nickerson contends that DOR improperly compelled him to incriminate himself when DOR continued to try to collect taxes from Mr. Nickerson and his business after he objected. These actions included revoking his business license for failure to pay taxes. Br. Appellant at 45-47. But that argument simply begs the question by assuming that his Fifth Amendment right was implicated in the first place. Since it was not, this additional argument amounts to nothing.

The Fifth Amendment right against self-incrimination is not a free pass that permits Mr. Nickerson to voluntarily and openly participate in a "collective garden" but then avoid having to comply with the state's generally-applicable tax laws. This Court should therefore reject Mr. Nickerson's Fifth Amendment claim.[9]

[9] If the Court were to conclude that Mr. Nickerson was entitled to equitable relief with respect to his Fifth Amendment claim, such relief should be limited to the assessment issued against Mr. Nickerson and not include the assessment issued against

VI. CONCLUSION

This Court should affirm the decision of the trial court. Mr. Nickerson and Northern Cross are obligated to pay retail sales taxes and retailing B&O tax for the 2011 through 2013 period, the same as every other Washington business making retail sales in this state. This Court should reject Mr. Nickerson's challenges to the assessment of generally-applicable excise taxes against him based upon federal preemption and the Fifth Amendment privilege against self-incrimination.

RESPECTFULLY SUBMITTED this 11th day of December, 2015

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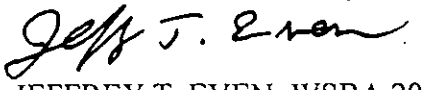

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Northern Cross. As a nonprofit corporation (CP at 98), Northern Cross may not assert the protections of the Fifth Amendment. *State v. Mecca Twin Theatre & Film Exch., Inc.*, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973) ("[A] corporation is not protected by the constitutional privilege against self-incrimination.").

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail a true and correct copy of the Brief of Respondent, upon the following:

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DATED this 11th day of December 2015, at Olympia, Washington.

Stephanie N. Lindey

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Dear Clerk,

Attached for filing in case number 91883-0, please find the Brief of the Respondent.

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