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NO. 48702-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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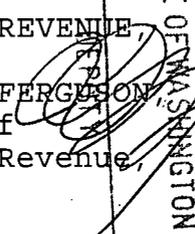
MARTIN NICKERSON, JR.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE  
GOVERNOR JAY INSLEE,  
WASHINGTON ATTORNEY GENERAL BOB FERGUSON  
CAROL NELSON, Director of  
Washington State Department of Revenue  
et al.,

Respondents.

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FILED  
COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR THURSTON COUNTY,

The Honorable Carol Murphy, Judge

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AMENDED REPLY BRIEF OF APPELLANT

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**A. SUMMARY OF REPLY**

Mr. Nickerson fell prey to a "bait and switch." The Legislature laid the bait by passing a law to permit commercial retail distribution of medical marijuana if the distributor registered with the state by a certain date. Mr. Nickerson registered his intent to be a retail distributor. But the Governor then vetoed all sections permitting retail sales. The remaining law permitted only noncommercial collective gardens for medical marijuana patients.

Despite the Governor's veto of all retail sales provisions, DOR then did the "switch." It specifically targeted the "private, unlicensed, noncommercial" collective gardens as "retail businesses" subject to business excise taxes. DOR thus converted these noncommercial endeavors into commercial enterprises, effectively creating a commercial market in medical marijuana.

The CSA preempts a retail market in marijuana. Thus the Supremacy Clause precludes DOR from applying the tax laws to collective gardens. DOR equates a "positive conflict" for preemption purposes with an "impossibility" analysis. But a

conflict preemption analysis also includes "obstacle" preemption. Converting noncommercial provision of medical marijuana via collective gardens into a commercial enterprise is an obstacle to Congress's purpose in the CSA.

The Combined Excise Tax Return requires the taxpayer's "tax registration number," which links it to the Master Business Application, which identifies Mr. Nickerson's business as retail sales of medical marijuana. The tax return would thus provide a significant "link in the chain" of evidence tending to establish his guilt of pending criminal charges that he delivered marijuana, violating his Fifth Amendment right.

**B. STATEMENT OF CASE IN REPLY**

1. THERE IS NO EVIDENCE ON THIS RECORD OF A BUSINESS OPERATING FOR YEARS OR OF ANY COMMERCIAL SALES WHATSOEVER. THE TAX ASSESSMENTS WERE BASED SOLELY ON IMPUTED INCOME.

DOR claims "Mr. Nickerson holds himself and his business out to the world as a place where people can acquire medical marijuana," "operated a business selling medical marijuana," "making such sales" "for several years." Resp. Br. at 3, 23-24, 30-31, 37. But on this record, there is no

evidence of a "business" or of "sales."<sup>1</sup> DOR relies solely on the master business applications filed in 2011, when the Legislature required the registration in anticipation of legalizing retail sales of medical marijuana. DOR then draws assumptions from that registration. Resp. Br. at 3-4, citing CP 88-123. DOR specifically targeted noncommercial collective gardens, permitted by statute, and declared them to be retail businesses for business tax purposes. CP 39-42. It relied on this erroneous legal conclusion and combined it with Mr. Nickerson's anticipatory registration to imagine years of retail sales followed. Then it imputed income for medical marijuana sales it imagined had occurred. CP 251; RP(5/15/15) 30-31.

2. THE 2011 LAWS CREATED NONCOMMERCIAL COLLECTIVE GARDENS.

To the extent DOR claims Mr. Nickerson alleges Northern Cross is a "collective garden" under the Laws of 2015, it is mistaken. Resp. Br. at 7-8. This case involves only the laws effective 2011-

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<sup>1</sup> Defendants' counsel acknowledged the distinction below: "There is a -- state law permits the sale of -- or the operation of collective gardens." RP(2/20/15) at 12.

2013. DOR admits the 2015 amendments do not apply to this case. Resp. Br. at 6.

State law in effect 2011-2013 created collective gardens as a non-commercial<sup>2</sup> entity, permitting patients to

create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use . . . .

RCW 69.51A.085. The Legislature specified its intent not to preclude

a qualifying patient or designated provider from engaging in the private, unlicensed, **noncommercial** production, possession, transportation, delivery or administration of cannabis for medical use . . . .

Former RCW 69.51A.025 (emphasis added).

3. THE CRIMINAL CHARGES REMAIN PENDING AGAINST MR. NICKERSON; THEY ARE NOT EVIDENCE OF SALES.

DOR cites the pending criminal charges as evidence that Mr. Nickerson engaged in "retail

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<sup>2</sup> Noncommercial is distinct from "non-profit." Resp. Br. at 10, 11, 29.

A similar noncommercial entity is a community pea patch. Various people may have specific plots to plant. They may combine efforts: one providing fertilizer, another hoeing weeds when others are unable, helping harvest. They may provide each other fresh produce in exchange for these shared efforts. This activity does not convert the pea patch into a commercial enterprise to which state business excise taxes apply.

sales" of medical marijuana. Resp. Br. at 3;<sup>3</sup> CP 34-37. Those charges have not been resolved, and so support no factual conclusions. Furthermore, they allege activities permitted among qualifying patients sharing responsibility in a collective garden. DOR's description of "collective garden," Resp. Br. at 7, omits "delivering cannabis for medical use," as permitted by RCW 69.51A.085(1). Nothing in the charges alleges "retail sales" or operating a "business."

4. THE ONLY RELIEF REQUESTED IS AN INJUNCTION OF TAX ASSESSMENTS UNDER RCW 82.32.150.

DOR argues the only relief Mr. Nickerson can request is "an injunction against the tax assessments. RCW 82.32.150." Resp. Br. at 12, 15-16. Indeed, that is all Mr. Nickerson seeks. It is, however, based on "the relationship between federal and state laws on marijuana." See App't's Br. at 10-20.

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<sup>3</sup> Although it has no relevance to the issues here, DOR gratuitously noted a charge for possession of hydrocodone -- for which Mr. Nickerson had a prescription.

5. DOR IMPUTED TAXES ON MR. NICKERSON SOLELY FOR COMMERCIAL SALES OF MEDICAL MARIJUANA.

As the trial court noted, "[t]he State asserts that it only assessed taxes with respect to the business activities of the Plaintiff for medical marijuana sales." CP 251; RP(5/15/15) at 30-31.<sup>4</sup> It is disingenuous for DOR now to claim the business could be selling other hemp products. Resp. Br. at 37 n.8.

Both registrations list Mr. Nickerson as the sole owner of Northern Cross, and so tax returns for both would incriminate him. Resp. Br. at 38-39, n.9; CP 93-100. Mr. Nickerson alleges he "has participated in a 'collective garden' (as defined by RCW 69.51A.085)." CP 5. He does not allege that Northern Cross "is such an operation." Resp. Br. at 8.

6. APPELLANT'S ONLY ARGUMENTS ARE CONSTITUTIONAL CHALLENGES.

DOR argues Mr. Nickerson may only challenge its tax assessment based on violations of the

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<sup>4</sup> MR. COMFORT: "... Mr. Nickerson and Northern Cross, though, only sold medical marijuana, so they only have standing, in the State's view, to bring claims with respect to medical marijuana." RP(5/15/15) 30-31.

Constitution of the United States or of Washington. Resp. Br. at 15-16; RCW 82.32.150. Indeed, that is the only kind of challenge he raises. U.S. Constitution, Article VI and Amendment 5.

7. THE LEGALITY OR ILLEGALITY OF COMMERCIAL ACTIVITY DOES NOT DETERMINE DOR'S ABILITY TO TAX IT.

Mr. Nickerson agrees that DOR's ability to tax commercial activity is not determined by whether that activity is legal. Resp. Br. at 18-22. Although *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 348 Ore. 159, 230 P.3d 518 (2010), supports such an argument, Mr. Nickerson's position does not require this Court to hold the CSA pre-empts MUCA.<sup>5</sup> The Controlled Substances Act nonetheless preempts DOR from creating a commercial medical marijuana market by deeming noncommercial collective gardens, permitted by MUCA, to be businesses subject to excise taxes. See Appellant's Brief at 20-31.

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<sup>5</sup> In reply to Resp. Br. at 20-21, Mr. Nickerson attempted to modify and clarify his Assignment of Error No. 1 to remove the assertion that the CSA preempts the Medical Use of Cannabis Act. DOR objected and moved to strike the reply brief with the amended Assignment of Error. The Commissioner ruled for DOR, prohibited the amendment, and required this Amended Reply Brief.

8. THE SUPERIOR COURT RULED AGAINST DOR IN *DUNCAN v. DEP'T OF REVENUE*.

DOR cites *Duncan v. Dep't of Revenue*, Court of Appeals No. 33245-4-III, as another case in which a party disputes the application of retail sales taxes to medical marijuana, albeit under RCW 82.08.0281(1). Resp. Br. at 10, n.2. In that case, however, the Superior Court ruled against DOR and reversed the Board of Tax Appeals, concluding it erroneously interpreted or applied the law. See Appendix A (Order Reversing Board of Tax Appeal's Decision).<sup>6</sup> DOR has appealed.

**C. ARGUMENT IN REPLY**

1. BY INTERPRETING PROVISION OF MEDICAL MARIJUANA VIA COLLECTIVE GARDENS TO BE "SALES" SUBJECT TO STATE TAX, THE DEPARTMENT OF REVENUE CREATES A COMMERCIAL MARKET OUT OF WHAT WAS A NON-COMMERCIAL MEANS OF MAKING MEDICINE AVAILABLE TO PATIENTS.

DOR complains that Appellant has not specified a state statute that is preempted by the Controlled Substances Act (CSA). Resp. Br. at 13-14, 20-21.

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<sup>6</sup> This Court may take judicial notice of adjudicative facts not subject to reasonable dispute based on sources whose accuracy cannot reasonably be questioned; and it shall take judicial notice if requested by a party and supplied with the necessary information. ER 201.

a. *The Supremacy Clause is Not Limited to Preempting State Statutes.*

The Supremacy Clause does not limit federal preemption to state statutes. It applies with equal force to the "laws of any State to the Contrary," in whatever form those laws may take: statute, common law, or regulatory application. U.S. Const., Article VI.<sup>7</sup>

b. *DOR's Application of General Sales Tax Laws to the Noncommercial Function of Collective Gardens is Preempted by the Controlled Substances Act.*

Appellant's claim arises from DOR applying the State's business excise taxes to qualifying patients and their designated providers participating in collective gardens, a noncommercial activity permitted by MUCA. RCW 69.51A.085, 69.51A.025, *supra*.

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<sup>7</sup> See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) (National Traffic and Motor Vehicle Safety Act combined with specific Federal Motor Vehicle Safety Standards preempted common law tort claim under state law where it "actually conflicted" with the safety standard); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (federal minimum standards for blood plasma supply did not preempt local ordinances imposing more restrictions).

When DOR imposes sales and B&O taxes on "producing, processing, transporting and delivering" medical cannabis, it converts these private, noncommercial activities into a commercial market. It requires that the collective garden function as a business, that it quantify each participant's contributions, even if non-monetary, and collect sales taxes from its qualifying patient or designated provider participants.

This application of the law, creating a commercial market, is preempted by the CSA. See authority cited in Brief of Appellant at 20-31.

2. THE LEGAL TEST FOR PREEMPTION UNDER 21 U.S.C. § 903 IS WHETHER DOR'S CONVERSION OF NONCOMMERCIAL COLLECTIVE GARDENS INTO COMMERCIAL MARIJUANA ENTERPRISES IS AN OBSTACLE TO CONGRESS'S PURPOSE IN THE CSA.

In discussing § 903, DOR repeatedly uses the phrases "direct conflict" and "irreconcilable" which it conflates with the CSA term "positive conflict" and with the legal standard of "impossibility." It uses the terms interchangeably without analyzing the statute. Resp. Br. at 21, 24-29. The terms are not the same under the law.

The trial court here applied the "impossibility" standard in its preemption

analysis. It concluded the CSA would preempt state law only if state law **required** Mr. Nickerson to sell marijuana. This is the impossibility test.

But in *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries*, 348 Ore. 159, 230 P.3d 518 (2010), the Court considered precisely the preemption clause of the CSA, 21 U.S.C. § 903. *Id.*, 348 Ore. at 174. It applied the "obstacle" conflict analysis to find it preempted state law: the CSA preempts a state law that **even permits** what it prohibits.

If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. Or, to use a different example, if federal law prohibited all sale and possession of alcohol, a state law licensing the sale of alcohol and authorizing its use would stand as an obstacle to the full accomplishment of Congress's purposes. ... [T]o the extent that ORS 475.306(1) authorizes persons holding medical marijuana licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).

*Emerald Steel* at 182. This holding is completely consistent with the United States Supreme Court's analysis.

This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of the particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" -- whether that "obstacle" goes by the name of "conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference," or the like. \*\*\* The Court has not previously driven a legal wedge -- only a terminological one -- between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that **both forms of conflicting state law are "nullified" by the Supremacy Clause \*\*\* and it has assumed that Congress would not want either kind of conflict.** \*\*\* We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case.

*Geier, supra*, 529 U.S. at 873-74 (emphasis added; Court's period ellipses; asterisk ellipses added).

Under federal law, there is no "strong presumption against preemption" that appellant must overcome, and DOR's citations do not support such a statement. Resp. Br. at 14, 23-25. Rather, "the purpose of Congress is the ultimate touchstone" of

preemption analysis. *Cipollone v. Liggett Group*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (Congressional intent preempts state law if state policy produces a result inconsistent with the federal statute's objective).<sup>8</sup>

Applying obstacle preemption analysis here does not involve an "amorphous spirit of the CSA," nor "freewheeling judicial inquiry" into federal objectives. Resp. Br. at 27. Congress's objectives with the CSA are clearly articulated in *Gonzales v. Raich*, 545 U.S. 1, 10, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005): to preclude any commercial market, legal or illegal, in marijuana. See App't's Br. at 23-26 and authorities there cited.

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<sup>8</sup> Our state's Court pushes at this standard in its "continuing desire to uphold state sovereignty to the maximum extent." *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 77, 896 P.2d 682 (1995) (holding state common law pre-empted by federal statute). Yet in *Hue*, it noted that an express statutory preemption provision, such as 21 U.S.C. § 903, is "the end of the matter."

DOR fails to analyze, or distinguish those authorities.<sup>9</sup> Resp. Br. at 23-28.

Instead, conflating its terms, DOR argues circularly that obstacle preemption is not concerned with "a positive conflict."

DOR cites *People v. Crouse*, 2013 COA 174 (Colo. App. 2013), cert. granted, 2015 Colo. LEXIS 530 (2015). *Crouse* involved a statute that required police to return seized medical marijuana to patients if they were acquitted of any crime. The State argued such a requirement was preempted by the CSA under obstacle preemption: "delivering" marijuana back to the patient would frustrate the CSA's purposes.

The Colorado Court of Appeals split. The majority held § 903 required impossibility preemption. But it mistakenly relied on *Boggs v. Boggs*, 520 U.S. 833, 844, 117 S. Ct. 1754, 138 L.

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<sup>9</sup> Instead it quotes Justice Scalia's description of § 903 in a dissent -- thus obviously not a view upheld by the Court. Resp. Br. at 25. *S. Blasting Servs., Inc. v. Wilkes County*, 288 F.3d 584, 591 (4th Cir. 2002), held a similarly worded statute excluded field pre-emption, but did not distinguish between impossibility and obstacle pre-emption.

Ed. 2d 45 (1997), which applied obstacle, not impossibility, preemption. *Id.*, 520 U.S. at 844.

The powerful dissent in *Crouse* would have held § 903 incorporates both impossibility and obstacle preemption. In its lengthy and articulate opinion listing many reasons for its decision, the dissent noted since *San Diego NORML*,<sup>10</sup> the U.S. Supreme Court explored a statute using the phrase "direct and positive conflict," similar to § 903, and analyzed it under both varieties of preemption, impossibility and obstacle. *Wyeth v. Levine*, 555 U.S. 555, 568-81, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).<sup>11</sup>

Appellant respectfully refers this Court to the dissenting opinion in *Crouse*, for which the Colorado Supreme Court granted certiorari.

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<sup>10</sup> DOR also cites *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 819, 81 Cal. Rptr. 3d 461 (2008), which acknowledges § 903 rejects field preemption. Resp. Br. at 27.

<sup>11</sup> *San Diego NORML* had relied on the state court decision in *Wyeth v. Levine*, *supra*, before the Supreme Court decided it. 165 Cal. App. 4th at 823-24.

3. THE TEST FOR THE FIFTH AMENDMENT'S PRIVILEGE AGAINST INCRIMINATION TURNS ON THE FACTS AS THEY NOW EXIST AND THE SUBSTANTIALITY OF THE RISK OF INCRIMINATION, NOT ON THE GENERAL VS. SPECIFIC NATURE OF THE LAW.

DOR considers the Fifth Amendment cases from the United States Supreme Court,<sup>12</sup> but draws the wrong conclusions on the controlling points.

The critical distinction is not between "generally applicable laws" and those that "target inherently suspect groups or activities." It is between a "real and appreciable" versus "imaginary and speculative" risk of incrimination. Having "chosen" to engage in illegal activity does not disqualify a person from the Fifth Amendment privilege; rather it is practically the sine qua non for invoking and applying it.

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<sup>12</sup> *United States v. Sullivan*, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 1037 (1927); *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 96 (1968); *Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968); *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). Resp. Br. at 30-38; App't's Br. at 31-38.

- a. *Generally Applicable Laws Are Not Immune from Implicating the Fifth Amendment Privilege If They Require Information That Provides a Significant "Link in the Chain" of Evidence With a "Real and Appreciable" Risk Tending to Establish Guilt.*

Unlike *Marchetti, Grosso, Haynes, and Leary*, Mr. Nickerson is not challenging the entire state excise tax system as unconstitutional and inherently violating the Fifth Amendment for any person subject to its requirements. The Fifth Amendment privilege applies to Mr. Nickerson based on the specific facts of his case, arising from the "bait and switch" that occurred between the Legislature, Governor, and DOR.

Mr. Nickerson registered his intent to operate a "retail" "business" providing medical marijuana when the Legislature required this registration to operate what it planned to be legal businesses. See App't's Br. at 5-10, 13. His Master Business Applications expressed his intent for what he believed would be legal retail businesses under state law of providing medical marijuana. Those business applications received identifying registration numbers. CP 93-100. DOR argues:

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.

Resp. Br. at 35-36.<sup>13</sup> However, the Combined Excise Tax Return also requires the taxpayer's "tax registration number." CP 121-23. This number then links to the Master Business Application to identify the business, and so the source of Mr. Nickerson's income as providing medical marijuana at "retail," CP 97-100 -- an illegal activity in 2011-2013, although now becoming legal again.

These two documents combined would provide a significant "link in the chain" of evidence tending to establish Mr. Nickerson's guilt of the pending criminal charges<sup>14</sup> for delivering marijuana. *Marchetti, supra*, 390 U.S. at 48-49; App't's Br. at

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<sup>13</sup> Below, DOR's counsel argued: "[T]he state tax return...does not reveal that you're a medical marijuana business...**You'd have to know that the plaintiff or the taxpayer was in a particular business to presume that some of those sales might be medical marijuana.**" RP(5/15/15) at 35. The Master Business Application provides just that information.

<sup>14</sup> DOR omits completely from its discussion of the Fifth Amendment that Mr. Nickerson currently faces criminal prosecution in state court for delivering marijuana, inter alia. Resp. Br. at 30-38; App't's Br. at 13-14.

34-35. Indeed, DOR has concluded from the Master Business Application alone that Mr. Nickerson has been "selling" marijuana at retail. If the prosecutor and jury also could consider Mr. Nickerson's report of gross income from this "business," it stands to reason it would further "tend[] to establish his guilt." *Id.*

While the cases DOR cites refer to a targeted regulatory regime, the essence of the distinction is where there is a "real and substantial risk" that the information will incriminate the defendant for a crime.

In *Sullivan*, unlike here, there was no initial "business registration" on which Mr. Sullivan had recorded his business as illegally selling liquor. Thus the Court found merely reporting income did not create a real and substantial risk of self-incrimination.

Furthermore, IRS tax returns now are protected from distribution to law enforcement, while state excise tax returns are available to state and

federal law enforcement. RCW 82.32.330; App't's Br. at 33.<sup>15</sup>

DOR relies on *California v. Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971), where a state law required drivers involved in auto accidents to identify themselves. The statute was upheld by a mere plurality of the Court:

[D]isclosures with respect to automobile accidents simply do not entail the kind of **substantial risk of self-incrimination** involved in *Marchetti*, *Grosso*, and *Haynes*.

*Id.* at 431 (emphasis added). Nonetheless, the dissent noted:

The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protection against compelled self-incrimination.

*Id.* at 459 (Black, J., dissenting). Justice Harlan, whose vote was essential to uphold the state statute, emphasized the distinction from reporting income and the limitations of *Sullivan*:

Yet--at least for an individual whose income is largely or entirely derived

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<sup>15</sup> In *United States v. Appoloney*, 761 F.2d 520 (9th Cir. 1985), the court held a statutory requirement to file a federal wagering tax return does not violate the Fifth Amendment because the federal statutes (amended after *Leary* and *Marchetti*) now prohibit IRS from disclosing the information to law enforcement.

from illegal activities--it is, I think, manifestly unsatisfactory to maintain that it should be "'perfectly clear [to him], from a careful consideration of all the circumstances in the case [that his statement of the amount of his income] cannot possibly have [a] tendency' to incriminate." ... Certainly that individual would have a good reason to suspect that if the State is permitted to introduce his income tax return into evidence, the information contained therein--even if wholly confined to a statement of his gross income--will, when combined with other evidence derived from independent sources, incriminate him.

*Byers*, 402 U.S. at 439-40 (Harlan, concurring) (emphases original). Justice Harlan went on to emphasize that the Fifth Amendment privilege is a personal one, with the central standard being the presence of "real" as opposed to "imaginary" risks of self-incrimination. *Id.* at 442. He ultimately concluded a "hit and run" statute was very different from reporting taxes, and did not create a substantial and real risk of incrimination.<sup>16</sup>

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<sup>16</sup> DOR's other authorities are equally unavailing. *Sibley v. Obama*, 810 F. Supp. 2d 309 (D.D.C. 2011), Resp. Br. at 33, is irrelevant. The plaintiff there was seeking to operate a medical marijuana program under the District of Columbia's laws, which required him to sign an affidavit acknowledging marijuana was still illegal under federal law. Acknowledging he knew the law did not tend to incriminate him.

In *In re Grand Jury Proceedings*, 707 F.3d 1262 (11th Cir. 2013), the Grand Jury subpoenaed existing business records; DOR is compelling Mr.

b. *The Question is Not Whether Appellant Has a "Right" to Violate the Law, But Whether, Assuming He Has Done So, He May Be Compelled to Give Evidence Against Himself.*

DOR argues Washington law did not compel Mr. Nickerson and Northern Cross to sell medical marijuana; and having "proclaimed to the world" that he provides medical marijuana, he should be not be able to invoke the Fifth Amendment to avoid having to report and pay taxes for the "business activity." Resp. Br. at 31, 38.

But the Supreme Court soundly rejected this argument:

The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself.

*Marchetti*, 390 U.S. at 51. Mr. Nickerson does not assert a Fifth Amendment privilege against the

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Nickerson to create records and reports which are incriminating.

*United States v. Josephberg*, 562 F.3d 478, 492-94 (2d Cir. 2008), cert. denied, 558 U.S. 965 (2009), simply restates *Sullivan's* holding.

Arizona state law permits retail sales of medical marijuana. Arizona Attorney General Opinion No. 11-004 (2011), Resp. Br. at 34. Nonetheless the AG observes the Fifth Amendment may be invoked where there are "substantial and real, and not merely trifling or imaginary, hazards of self-incrimination."

Master Business Application. However, he provided the information he did in good faith expecting the business to be legal. When the State rendered it illegal, that fact must be considered for purposes of the Fifth Amendment privilege.

4. INJUNCTIVE RELIEF IS APPROPRIATE AND THE ONLY EFFECTIVE REMEDY IN THIS CASE.

The trial court noted that DOR's argument on the equities of injunctive relief was circular; it would turn on its decision on the merits. RP(5/15/15) at 33-35.

The argument remains circular in this Court. If Appellant prevails on the merits of the constitutional arguments he raises, injunctive relief is the appropriate remedy.

DOR is accurate that RCW 82.32.150 does not **require** the court to grant injunctive relief when a taxation statute is unconstitutional. *Tyler Pipe Industries, Inc. v. State*, 96 Wn.2d 785, 638 P.2d 1213 (1982); Resp. Br. at 16-17. But it remains a permissible and appropriate remedy.

The exception for constitutional cases simply means that the legislature has chosen not to limit the court's equitable powers with regard to those cases even though it has provided a legal remedy.

Thus it permits the court to grant an injunction.  
*Id.* at 788-89.

In *Tyler Pipe*,<sup>17</sup> unlike here, the trial court granted a **preliminary** injunction<sup>18</sup> against the State, the State appealed, and the Supreme Court reversed. Of *Tyler Pipe*'s three criteria, the first seems to apply to preliminary injunctions; and the first and third turn on the merits of the ultimate issues.

Clear Equitable or Legal Right: In *Tyler Pipe*, the Court interpreted this as a "likelihood of success on the merits." *Id.* at 793. Whether this right exists turns on this Court's decision on the merits. Appellant concedes, if the Court finds he has no equitable or legal right on these merits, he is not entitled to an injunction.

Well Grounded Fear of Invasion: Mr. Nickerson's fear of invasion of his rights is well-grounded: DOR already seized his bank account and

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<sup>17</sup> In *Tyler Pipe*, at least DOR conducted an audit of an actual business before imposing taxes, 96 Wn.2d at 794; here all income is purely imputed, with no basis in this record to determine how DOR arrived at its calculations of sales or income.

<sup>18</sup> *Kucera v. Dep't of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000), Resp. Br. at 16-17, also reversed a preliminary injunction.

imposed taxes for noncommercial activity, and continues to try to collect the taxes it imputes to him. Resp. Br. at 4. Requiring him to file a tax return reporting income from "sales" of marijuana compels statements against his Fifth Amendment Privilege. Repayment of taxes cannot solve that invasion; only an injunction can.

Actual and Substantial Injury: Mr. Nickerson has suffered actual and substantial injury in the seizure of his bank account. He faces further actual and substantial injury from DOR's continued efforts to collect on the judgment for back taxes, and the compulsion to file a return reporting income from "sales" of marijuana. He faces pending criminal charges, and if required to file the tax returns, will provide significant additional evidence to support that prosecution, an essential link of evidence, tied to the business registration describing the nature of the anticipated business. They would be seen as an admission that he in fact sold marijuana -- potentially leading to convictions of multiple felonies.

Under all criteria, if this Court grants either constitutional challenge, an injunction is the appropriate remedy.

**D. CONCLUSION**

For the reasons stated above and in the Brief of Appellant, this Court should reverse the superior court and grant an injunction against the Department of Revenue from taxing the noncommercial activity of a collective garden, and from compelling Mr. Nickerson to file an excise tax return.

DATED this 3d day of May, 2016.

Respectfully submitted,

  
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WSBA No. 21017

  
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Attorneys for Appellant

# APPENDIX A

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SUPERIOR COURT OF WASHINGTON  
FOR SPOKANE COUNTY

RHONDA L. DUNCAN d/b/a THE  
COMPASSIONATE KITCHEN,  
  
Appellant,  
  
v.  
  
STATE OF WASHINGTON  
DEPARTMENT OF REVENUE,  
  
Respondent.

NO. 14-2-04440-7  
  
ORDER REVERSING BOARD OF  
TAX APPEAL'S DECISION

THIS MATTER came before the above-entitled Court on February 20, 2015, upon Rhonda L. Duncan d/b/a The Compassionate Kitchen's petition for judicial review of the Board of Tax Appeal Final Decision Granting Summary Judgment dated October 13, 2014. The Department was represented by Attorney General Robert W. Ferguson and David M. Hankins, Senior Counsel. Rhonda L. Duncan d/b/a The Compassionate Kitchen was represented by Jeffrey K. Finer. Pursuant to RCW 34.05.574(1), the Court hereby enters the following order.

**I. DOCUMENTS CONSIDERED BY THE COURT**

In reaching its decision the Court has reviewed the entire file, including a certified copy of Board of Tax Appeal's record for this matter (Docket No. 12-286), consisting of 206 pages; and the entire Superior Court file, Cause No. 14-2-04440-7. The Court also heard oral argument of counsel on February 20, 2015.

ORDER REVERSING BOARD OF TAX  
APPEAL'S DECISION

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II. DECISION

The Court, having reviewed the entire file enters its decision reversing the Board of Tax Appeal's Final Decision Granting Summary Judgment to the Department of Revenue. Under the Court's reading of RCW 82.08.0281(1), sales of medical marijuana made pursuant to RCW 69.51A are exempt from retail sales tax. Under RCW 34.05.570(3)(d), the Board of Tax Appeals has erroneously interpreted or applied the law.

III. ORDER AND JUDGMENT

On the basis of the foregoing Decision, it is hereby ORDERED, ADJUDGED AND DECREED that:

The Final Decision of the Board of Tax Appeals dated October 13, 2014, is REVERSED and the matter is stayed for thirty days to allow the Department to consider its decision to appeal.

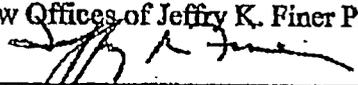
DATED this 2<sup>nd</sup> day of March, 2015.

Honorable Michael P. Price  
Superior Court Judge

JUDGE MICHAEL PRICE

Presented By:

Law Offices of Jeffrey K. Finer PS

  
Jeffrey K. Finer, WSBA No. 14610

Notice of Presentation Waived  
Approved as to form only:

ROBERT W. FERGUSON

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DECLARATION OF SERVICE

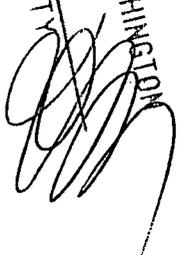
On this date, I caused a copy of the attached document to be served on the following parties by agreed electronic service addressed as follows:

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FILED  
COURT OF APPEALS  
DIVISION II  
2016 MAY -5 AM 11:21  
STATE OF WASHINGTON  
BY DEPUTY 

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

MAY 3, 2016 - SEATTLE, WA  
Date and Place

  
ALEXANDRA FAST