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NO. 94032-1

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN O. NICKERSON, JR.,

Petitioner,

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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Martin Nickerson operated a business known as Northern Cross Collective Gardens that openly sold marijuana for medical use (medical marijuana) for several years. Mr. Nickerson and Northern Cross failed to collect and pay the excise taxes that apply to all businesses making retail sales, the retail sales tax and retailing business and occupation (B&O) tax. Mr. Nickerson claims that he cannot pay these taxes because federal law preempts the Department of Revenue (DOR) from assessing the taxes against him, and because paying such taxes would violate his Fifth Amendment right against self-incrimination. Both the trial court and the Court of Appeals properly rejected Mr. Nickerson's constitutional claims.

This Court should deny Mr. Nickerson's request to review the Court of Appeals unpublished opinion. Mr. Nickerson's appeal does not concern an issue of substantial public interest, but instead, involves narrow issues during a limited time period. The appeal relates to his operation of an alleged "collective garden," which Washington law no longer authorizes. *See* Laws of 2015, ch. 70, § 49 (repealing RCW 69.51A.085, which allowed "collective gardens," effective July 1, 2016). This case also does not involve state marijuana laws. Rather, it relates solely to the application of state excise tax laws to sales of medical marijuana by Mr.

Nickerson and his business. Finally, because Mr. Nickerson and Northern Cross have not paid the taxes at issue, he must establish all of the elements for injunctive relief under RCW 82.32.150, which he failed to do. Given this limited context, the Court of Appeals decision followed well-established federal caselaw to reject Mr. Nickerson's constitutional claims. Nothing in the unpublished decision justifies this Court's review.

II. COUNTERSTATEMENT OF THE CASE

In 2011, Mr. Nickerson began operating Northern Cross Collective Gardens, a medical marijuana business that he alleges was a "collective garden" authorized under state law. CP at 89, 97-100. While Mr. Nickerson claims Northern Cross was a "collective garden," he currently faces criminal charges in state court for delivery of marijuana in relation to his business. CP at 34-37.

Like any other business in Washington, a "collective garden" 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 stating that medical marijuana sales are subject to retail sales tax). Mr. Nickerson and Northern Cross, however, did not report any revenue or pay any excise taxes. DOR discovered this and issued two assessments for unpaid retail sales tax and B&O tax, one against Mr.

Nickerson and the other against Northern Cross.[1] CP at 89, 102-03. When Mr. Nickerson failed to pay the tax assessments, DOR issued tax warrants against Mr. Nickerson for $7,152.66 and against Northern Cross for $55,016.95. CP at 89, 102-08. DOR then filed the tax warrants in superior court and obtained judgments against both Mr. Nickerson and Northern Cross. CP at 89, 110-11. In response, Mr. Nickerson belatedly filed an administrative appeal challenging the tax assessments, which DOR dismissed as untimely. *See* CP at 124-32.

After filing the tax warrants, DOR continued to pursue collection of the unpaid taxes, including garnishing $824.23 from a Northern Cross bank account. CP at 90. Eventually, after providing notice, DOR revoked the business registrations of Mr. Nickerson and Northern Cross pursuant to RCW 82.32.215. CP at 90, 118-19.

Mr. Nickerson filed this action seeking declaratory and injunctive relief against DOR, Governor Jay Inslee, Attorney General Bob 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 claimed that requiring him to report and pay taxes on medical marijuana sales violates his Fifth Amendment right against self-incrimination. CP at 15-16. Ultimately, the

[1] Because Mr. Nickerson and Northern Cross refused to provide records related to their sales, DOR issued estimated assessments pursuant to RCW 82.32.100.

trial court rejected Mr. Nickerson's claims, first denying his request for a preliminary injunction, and then denying his motion for summary judgment and granting Respondents' motion to dismiss. CP at 274-76, 317-22.

Mr. Nickerson sought direct review of the trial court's decision before this Court. This Court denied his petition for direct review and transferred the appeal to the Court of Appeals. Order (Mar. 2, 2016). The Court of Appeals rejected Mr. Nickerson's claims in an unpublished opinion. It first concluded that the CSA does not preempt state tax laws because DOR's application of retail sales tax and B&O tax to sales of medical marijuana does not conflict with the purposes of the CSA. *Nickerson v. Dep't of Revenue*, No. 48702-1-II, 2016 WL 6599651 at *6 (Wash. Ct. App. Nov. 8, 2016) (unpublished). Second, the Court of Appeals concluded that Mr. Nickerson's Fifth Amendment right against self-incrimination is not violated by requiring him to pay retail sales tax and B&O tax. *Id.* at *8. The Court explained that paying generally-applicable taxes on medical marijuana sales cannot create a "real and appreciable" risk of self-incrimination. *Id.* (internal quotations omitted). The Court further pointed out that by the time Mr. Nickerson filed his lawsuit, he did not even need to file a tax return to pay the judgment

against him for unpaid taxes. *Id.* Mr. Nickerson now seeks this Court's review of the Court of Appeals decision.

III. COUNTERSTATEMENT OF ISSUES

A. Does the CSA preempt the application of state excise tax laws to alleged collective gardens when the CSA does not address state taxes at all?

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

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

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

None of the limited circumstances described in RAP 13.4(b) under which this Court may choose to accept review of a decision by the Court of Appeals is present here. Mr. Nickerson's appeal involves narrow issues arising in a context limited in both scope and time. His challenge is limited in scope because, while he asserts that the resolution of this case has broad consequences for state marijuana laws, his appeal involves constitutional claims challenging generally-applicable state tax laws, not state marijuana

laws. Washington's marijuana laws are not at issue in this case, because the taxes at issue do not arise under them. He challenges the constitutionality of DOR's tax assessments against him and his business by seeking injunctive relief under RCW 82.32.150. Mr. Nickerson, however, failed to meet the equitable criteria for such relief. His appeal affects only a limited time period because in 2015 the Legislature repealed the statute authorizing collective gardens and revised the application of tax laws to marijuana businesses. Recognizing this, both the trial court and the Court of Appeals applied long-standing federal caselaw to reject his claims. This Court should deny Mr. Nickerson's petition for review.

A. The Court Of Appeals Decision Is Unworthy Of Review Because It Arises In A Very Narrow Context That Limits Its Importance.

In his petition for review, Mr. Nickerson fails to address the limited context of this matter. His appeal involves a narrow request for injunctive relief stemming from generally-applicable state tax laws and the operation of his business under state laws that the Legislature has now repealed. In an unpublished opinion with no precedential value, the Court of Appeals rejected Mr. Nickerson's request for injunctive relief. Given this context, this case is not one of "substantial public interest" that warrants this Court's review. *See* RAP 13.4(b)(4).

1. Mr. Nickerson's appeal involves state excise tax laws, not state marijuana laws.

Mr. Nickerson asserts that the relationship between the CSA and state marijuana laws presents an issue of substantial public interest this Court should address. Pet. at 10-13. Mr. Nickerson, however, ignores the limited scope of his appeal. His case involves state excise tax laws, not state marijuana laws.

In his petition for review, Mr. Nickerson discusses the changing landscape in state marijuana laws. Pet. at 10-11. He even analogizes this case to lawsuits in other jurisdictions involving preemption claims and state marijuana laws. Pet. at 13. The problem for Mr. Nickerson is that these state marijuana laws have no affect on his appeal. This case is not about recreational marijuana businesses licensed under Initiative 502 (as amended) or the marijuana excise taxes imposed under Initiative 502. Instead, Mr. Nickerson's appeal involves a constitutional challenge under RCW 82.32.150 to tax assessments issued by DOR against him and his business. CP 318-19. Indeed, if his business did not happen to be a "collective garden," this case would have no connection to state marijuana laws at all.

The connection between Mr. Nickerson's case and state marijuana laws is even more limited given recent legislative changes. The

Legislature recently passed a new law that brings the production, processing, and sale of medical marijuana within the licensing and regulatory scheme for recreational marijuana. Laws of 2015, ch. 70. That law also eliminated "collective gardens" and replaced them with "cooperatives." Laws of 2015, ch. 70, §§ 26, 32, 49. In yet another change, the Legislature completely reformed the regulation and taxation of marijuana. Laws of 2015, 2d Spec. Sess., ch. 4. As part of that reform, the Legislature created a sales tax exemption for "collective gardens," effective until such gardens were themselves eliminated on July 1, 2016. Laws of 2015, 2d Spec. Sess., ch. 4, § 207. These changes limit the legal context of this appeal to a narrow period of time. Therefore, this is not a case of substantial public interest that warrants further review.

2. Mr. Nickerson cannot meet the standards necessary for injunctive relief.

The Court of Appeals decision also demonstrates the limited context of Mr. Nickerson's appeal. The Court of Appeals explained that a taxpayer "generally cannot contest the imposition of taxes until all taxes, penalties, and interest have been paid." *Nickerson*, 2016 WL 6599651 at *2 (referencing RCW 82.32.150). Despite that requirement, Mr. Nickerson asserts that DOR improperly imposed taxes on his alleged collective garden, converting "private, noncommercial activities into a commercial

market." Pet. at 9-10. As the Court of Appeals explained, however, Mr. Nickerson's appeal cannot involve "any statutory arguments about the applicability of the tax code to this particular business and sales." *Nickerson*, 2016 WL 6599651 at *2. Without paying the taxes assessed by DOR, Mr. Nickerson cannot ask this Court to determine whether he and his business owed retail sales tax and retailing B&O tax. *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 547, 205 P.3d 159 (2009) (all taxes, penalties and interest must be paid to challenge the imposition of taxes).

Instead, Mr. Nickerson's challenge is limited to the narrow exception in RCW 82.32.150 that allows a taxpayer to seek injunctive relief based on a constitutional challenge, even when the taxpayer has not paid the taxes at issue. He still must meet the requirements for equitable relief. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 788-91, 638 P.2d 1213 (1982). Mr. Nickerson thus must establish that (1) he has a clear legal or equitable right, (2) he has a well-grounded fear of immediate invasion of that right, and (3) the challenged acts are causing or will cause an actual and substantial injury to him. *Id.* at 792.

The Court of Appeals properly limited its review to the scope of RCW 82.32.150, and concluded that he cannot meet the required elements for injunctive relief. Mr. Nickerson failed to establish a clear legal or equitable right based on his preemption or Fifth Amendment claims. *See*

Nickerson, 2016 WL 6599651 at *3-*8 (rejecting Mr. Nickerson's constitutional claims after a well-reasoned analysis based on federal caselaw). Consequently, having to pay the assessed taxes and challenging them in a refund action will not cause him any injury. *See Tyler Pipe Indus., Inc.*, 96 Wn.2d at 795 (inconvenience from raising funds to pay taxes is not an actual and substantial injury). Because Mr. Nickerson did not meet the elements that are required to obtain injunctive relief, he may only challenge the tax assessments against him and Northern Cross if he pays the taxes at issue and files a refund action under RCW 82.32.180.

B. The Court Of Appeals Properly Applied Well-Established United States Supreme Court Precedent To Mr. Nickerson's Constitutional Claims.

Mr. Nickerson also argues that this Court should accept review of his case because it raises significant questions of law under the federal constitution. Pet. at 7, 14 (referencing RAP 13.4(b)(3)). He is incorrect in asserting a conflict between the Court of Appeals decision and United States Supreme Court precedent. Pet. at 7, 14 (referencing RAP 13.4(b)(1)). The Court of Appeals rejected Mr. Nickerson's constitutional claims by following long-standing federal precedent.

1. Federal law does not preempt the State's application of generally-applicable state excise tax laws to marijuana businesses.

Before the trial court, Mr. Nickerson asserted that the CSA preempts the State from taxing marijuana sales, but failed to identify the state law that he claimed the CSA preempted. CP at 320. On appeal, Mr. Nickerson still failed to identify the precise state law at issue in his preemption claim. Instead, he asserted that DOR's *application* of state excise taxes to alleged collective gardens "converted" the noncommercial activities of Northern Cross into a commercial market, which the CSA preempts. *See Nickerson*, 2016 WL 6599651 at *5. Mr. Nickerson continues to assert the same in his petition for review to this Court, without ever explaining how he believes that the application of the *law* can change the *facts* applicable to what a business *does*. The CSA does not preempt state taxation of medical marijuana sales.

Mr. Nickerson's preemption claim rests on a false premise, recognized by the Court of Appeals. "DOR's tax assessments did not *cause* Nickerson to grow, possess, and distribute medical marijuana." *Nickerson*, 2016 WL 6599651 at *5. Rather, "DOR imposed taxes on Nickerson *because* he had distributed medical marijuana in exchange for other items of value." *Id.* Thus, as the Court of Appeals put it, "[t]he taxes came after the fact." *Id.*

Once the Court of Appeals rejected Mr. Nickerson's false premise, it then easily applied a straightforward preemption analysis. *Id.* at *4-*6. The Court of Appeals explained that federal law preempts a state law if the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nickerson*, 2016 WL 6599651 at *4 (internal quotations omitted). Mr. Nickerson agrees that the Court of Appeals enunciated the correct standard for preemption. Pet. at 7. Nonetheless, he argues that the Court of Appeals incorrectly applied the preemption standard by interpreting "the purpose of the CSA too broadly" and ignoring the specific context of this case, marijuana. Pet. at 8. The Court of Appeals did no such thing.

The Court of Appeals relied on United States Supreme Court cases to describe the CSA as a comprehensive regulatory scheme intended to control the "distribution, dispensing, and possession" of both legal and illegal drugs. *Nickerson*, 2016 WL 6599651 at *5 (citing *Gonzales v. Oregon*, 546 U.S. 243, 250, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)). The Court of Appeals then specifically addressed the CSA's connection to marijuana, concluding that "[i]t is hard to see how the DOR's tax assessments would disturb the CSA's ability to regulate the distribution, dispensing, or possession of marijuana." *Id.* The Court of Appeals continued, noting that DOR's tax assessments do not affect federal

prosecutions for CSA violations. *Id.* If anything, imposing taxes on medical marijuana sales supports the CSA's purposes, rather than conflicting with them. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778-81, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) (state taxation of marijuana businesses discourages activities that violate federal law).

The Court of Appeals correctly concluded that the CSA does not preempt state tax laws, and its analysis of Mr. Nickerson's preemption challenge provides no basis for review.

2. Requiring Mr. Nickerson to pay generally-applicable state taxes does not violate his right against self-incrimination.

Mr. Nickerson also argues that his Fifth Amendment self-incrimination claim involves a significant question of federal constitutional law, asserting that the Court of Appeals decision conflicts with United States Supreme Court precedent. Pet. at 14. He is wrong here, too. Relying on established federal caselaw, the Court of Appeals correctly concluded that requiring Mr. Nickerson to pay state excise taxes does not violate his Fifth Amendment right against-self incrimination.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In its decision, the Court of Appeals explained that the

United States Supreme Court has drawn a distinction between invoking one's Fifth Amendment right against self-incrimination in the context of generally-applicable laws and laws that target suspect criminal activities. *Nickerson*, 2016 WL 6599651 at *6-*7 (comparing *United States v. Sullivan*, 274 U.S. 259, 47 S. Ct. 607, 71 L. Ed. 2d 1037 (1927) (Fifth Amendment is no defense for failing to file a federal tax return on income earned from illegally selling liquor) with *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968) (allowing Fifth Amendment defense for failing to comply with federal wagering tax statutes when state and federal law widely prohibited wagering), and *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) (permitting Fifth Amendment defense for failure to pay marijuana transfer tax when compliance could establish guilt under state marijuana laws)).

At issue here are generally-applicable retail sales and B&O tax statutes, unlike the tax laws in *Marchetti* and *Leary* targeting specific criminal activity. *Nickerson*, 2016 WL 6599651 at *7. Accordingly, the "mere fact that Nickerson is subject to retail sales and B&O taxes does not create any suspicion of criminal activity." *Id.* Moreover, even if Mr. Nickerson reported sales to DOR for tax purposes, nothing in the state excise tax return would require Mr. Nickerson to submit incriminating information. *Id.* Indeed, the tax return does not ask him to identify what he

sold. *Id.* Finally, the Court of Appeals also noted that when Mr. Nickerson filed his lawsuit, he no longer needed to submit a tax return because DOR had already obtained warrants and a judgment for the outstanding taxes. *Id.* at *8. Thus, Mr. Nickerson simply can pay the judgment against him, rather than filing a tax return. *Id.*

Mr. Nickerson recognizes that state excise tax returns do not require incriminating information, but argues that his tax return would provide a "link" to other incriminating evidence, namely his business license registration. Pet. at 14. But the Court of Appeals properly rejected this argument as well, calling it "too vague and speculative." *Nickerson*, 2016 WL 6599651 at *7. As the Court of Appeals noted, Mr. Nickerson's business license application does not contain any incriminating information. *Id.* It merely states that he sells skin products, hemp products, and soap. CP at 93-96. The same is true for the Northern Cross business application, in which it identifies itself as a "collective garden" and does not mention selling marijuana.[2] CP 97-100. State law, however, did not prohibit the operation of collective gardens. *See* RCW 69.51A.040,

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[2] The business license application of Northern Cross also is wholly irrelevant to Mr. Nickerson's Fifth Amendment claim because Northern Cross is a limited liability corporation possessing no Fifth Amendment protection. *See 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.").

.085(3). Accordingly, none of the information on these business license applications provides incriminating evidence against Mr. Nickerson.

If the business license application form is the source of Mr. Nickerson's Fifth Amendment claim, he also objected to the wrong thing at the wrong time. This case concerns Mr. Nickerson's payment of retail sales tax and B&O tax, not the filing of his business license application. If Mr. Nickerson had concerns that information on the business license application implicated his Fifth Amendment right, he should have objected when filing the applications. *See Sullivan*, 274 U.S. at 263-64 (taxpayer may raise Fifth Amendment objection on tax return). Mr. Nickerson did not make any such objection and cannot now use the business license application to excuse his refusal to pay taxes or submit a tax return. Thus, as the Court of Appeals concluded, paying state excise taxes on medical marijuana sales would not violate his right against self-incrimination.

V. CONCLUSION

Mr. Nickerson's petition concerns the application of general state excise tax laws to a "collective garden" authorized under state laws that have since been repealed. Within this limited context, the Court of Appeals issued an unpublished decision that properly applied federal caselaw to reject Mr. Nickerson's preemption and Fifth Amendment claims. Discretionary review is not warranted in this case.

RESPECTFULLY SUBMITTED this 1st day of February,

2017.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of February, 2017, at Tumwater, WA.

Susan Barton, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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