Half In, Half Out

Description

On June 28th, Supreme Court Justice Clarence Thomas released a statement pertaining to the federal ban on the cultivation and use of marijuana within states where he noted that it “may no longer be necessary or proper.” This statement was made in connection with the denial of a petition for a writ of certiorari to the Supreme Court of the United States (SCOTUS) in the case of Standing Akimbo, LLC v. United States.

Facts

In 2005, SCOTUS held that Congress’s power to regulate interstate commerce authorized it “to prohibit the local cultivation and use of marijuana” in Gonzales v. Raich, 545 U. S. 1, 5 (2005). There, SCOTUS’s reasoning was that Congress had “enacted comprehensive legislation to regulate the interstate market in a fungible commodity” and that “exemption[s]” for local use could undermine this “comprehensive” regime. SCOTUS stressed that Congress had decided “to prohibit entirely the possession or use of [marijuana]” and had “designate[d] marijuana as contraband for any purpose.” Prohibiting any intrastate use was, therefore, “necessary and proper” to avoid a “gaping hole” in Congress’s “closed regulatory system.”

The petitioners in this case lawfully operate a medium medical-marijuana dispensary in Colorado. The issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold and other ordinary and necessary business expenses, such as rent and employee salaries. But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law are treated differently. Instead, these businesses can only subtract the cost of goods sold, not the other ordinary and necessary business expenses. Under this rule, a business that is still in the “red” after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax. The Internal Revenue Service is currently investigating petitioners’ deducted business expenses and petitioners are trying to prevent disclosure of relevant records held by the State. The petitioners filed a writ of certiorari for SCOTUS to hear the case which was denied with no explanation.

Statement by Justice Thomas

On June 28, 2021, Justice Thomas stated that although federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, the Government, post-Raich, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law. In 2009, Congress enabled Washington D. C.’s government to decriminalize medical marijuana under local ordinance. Additionally, every fiscal year since 2015, Congress has prohibited the Department of Justice from spending funds to prevent states’ implementation of their own medical marijuana laws.

Thomas noted that “[t]he federal government’s current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana . . . This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.” Given the many approaches and new developments surrounding marijuana, Thomas stated that, “[o]ne can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.”

Takeaways

Thomas’s statement points to the obvious contradictory approach to marijuana in the federal government and the clear need to rectify the current “half in, half out regime” that creates confusion. Federal law makers need to ask themselves during these evolving times, where are we going with marijuana in this country?

***Standing Akimbo, LLC v. United States*, 594 U.S. __ (2021)**

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