IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES C. LYNCH, Defendant-Appellant.	C.A. No. 10-50219 D.C. No. CR 07-689-GW (Central Dist. Cal.) **GOVERNMENT'S MOTION FOR LEAVE TO FILE RESPONSE TO DEFENDANT'S SECTION 538 MOTION WITH FOURTH BRIEF ON CROSS-APPEAL**
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CHARLES C. LYNCH, Defendant-Appellee.	C.A. No. 10-50264 D.C. No. CR 07-689-GW (Central Dist. Cal.)

Defendant-Appellant/Cross-Appellee Charles C. Lynch ("defendant") has filed a "Motion to Enforce Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, or in the Alternative for a Limited Remand." Plaintiff-Appellee/Cross-Appellant United States of America, by and through its counsel of record, hereby moves this Court for leave to file its response to

defendant's motion contemporaneously with its fourth brief on cross-appeal, which will be due 14 days after defendant files his third brief on cross-appeal.

The motion is made pursuant to Federal Rule of Appellate Procedure 27 and is based on the files and records in this case and the attached memorandum of points and authorities.

Defendant is not in custody.

No court reporter is in default with regard to any designated transcript.

DATED: March 9, 2015

Respectfully submitted,

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/s/ *Jean-Claude André*

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MEMORANDUM OF POINTS AND AUTHORITIES

The parties' first and second briefs in these consolidated cross-appeals have been on file since April 11, 2014, with defendant-appellant/cross-appellee Charles C. Lynch's ("defendant") third brief on cross-appeal originally due on May 12, 2014. Since then, defendant has obtained two lengthy extensions of that deadline, with his third brief on cross-appeal presently due on March 12, 2015. Instead of filing his third brief on cross-appeal, defendant has filed an over-length "Motion to Enforce Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, or in the Alternative for a Limited Remand," seeking an order from this Court "direct[ing] the Department of Justice to cease spending funds on this case" or, alternatively, for a "limited remand so that the district court may consider this issue in the first instance."[1] The government respectfully requests that this Court refer

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[1] Defendant recently filed a third extension request, seeking to have his brief due June 12, 2015. As defendant's appellate counsel explained in that motion, his counsel did "not contact[]" the government "to ascertain [its] position on [that] motion" because of defendant's view that government "counsel would violate federal statutory [i.e., Section 538] and constitutional law if they were to expend any resources on this case." (Mar. 5, 2015, Decl. of Deputy Federal Public Defender

(footnote cont'd on next page)

defendant's motion to the merits panel assigned to hear these consolidated cross-appeals and make the government's response to defendant's motion due when its fourth brief on cross-appeal is due (which will be 14 days after defendant files his third brief on cross-appeal).[2]

On December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act of 2015, which funds the federal government through September 30, 2015. The legislation includes a rider stating that no funding allocated to the Department of Justice under the Act can be used to prevent certain states from implementing their laws related to medical marijuana. *See*

Alexandra Yates at pg. 7.) Whatever position the government ultimately takes on how to interpret Section 538, the government believes that it is permitted to use appropriated funds to litigate that statute's meaning. The government's litigation efforts in this regard do not prevent implementation of a State law but relate to the meaning of a federal statute. The situation is analogous to the principle that a federal court always has jurisdiction to decide whether it has jurisdiction. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947)); *Armstrong v. Armstrong*, 350 U.S. 568, 574 (1956)).

[2] Defendant's reply in support of his motion could then be due at an appropriate time after the government files its response.

Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, tit. V, div. B, § 538 (2014). Section 538 provides that:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Invoking this rider, defendant has filed an over-length, 26-page motion—in what appears to be the first appellate filing in the country—seeking an order from this Court "direct[ing] the Department of Justice to cease spending funds on this case" or, alternatively, for a "limited remand so that the district court may consider this issue in the first instance." (Mot. 26.) For a variety of reasons, the government respectfully requests that this Court refer defendant's motion to the merits panel assigned to hear these consolidated cross-appeals and make the government's response to defendant's motion due when its fourth brief on cross-appeal is due (which will be 14 days after defendant files his third brief on cross-appeal).

As a threshold matter, the novelty and length of defendant's motion warrants consideration by a merits panel. To the government's knowledge, defendant's motion is the first appellate filing in the country to invoke Section 538 against the government. To the extent that this Court elects to publish its decision resolving defendant's motion, that decision will be binding precedent in each of the 12 federal judicial districts in the eight states mentioned in Section 538. This Court has a long tradition of referring such potentially precedent-setting motions to merits panels.

Referral to the merits panel would be particularly prudent because of a host of sub-issues that defendant's motion potentially implicates. For example, because Section 538 limits how "funds made available . . . to the Department of Justice may be used," does a criminal defendant have standing to invoke Section 538, especially after conviction on appeal, given that the law is silent as to who may invoke it and how it must be invoked? Additionally, because such funds may not be used "to prevent such States from implementing their own State laws," does Section 538's limitation apply to individual criminal prosecutions—which are not mentioned anywhere in Section 538—at

all? Moreover, if Section 538 applies to some individual criminal prosecutions, does it not apply where the defendant's conduct was not authorized by State or local law, such that the defendant's conduct would not be consistent with the State's efforts to "implement[] their own State [medical marijuana] laws"? And if a defendant's compliance or non-compliance with State and local law is relevant, which party bears the burden of proof, and how should such proof be adjudicated?

Some of these issues also implicate and/or overlap with the briefing for the merits of these consolidated appeals, which is another settled basis on which this Court regularly refers motions to the merits panel assigned to hear an appeal. *See, e.g., United States v. Gonzalez*, 981 F.3d 1037, 1038 (9th Cir. 1992) (holding that, where a defendant's allegation that the government breached his plea agreement "call[ed] into question the validity of the [defendant's appeal] waiver," the breach issue "should be resolved by a merits panel, along with any other issues that the merits panel determines are properly before it"); Christopher A. Goelz et al., CALIFORNIA PRACTICE GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶ 6:104 (Feb. 2015 ed.) ("Where the grounds for [a] motion [to strike an appellate filing] are substantive or tied up

with the merits of the appeal (*e.g.,* failure to raise the issue below), the clerk's office typically refers the motion to a merits panel for disposition." (citing *Simo v. Union of Needletrades, Industrial & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 624 (9th Cir. 2003))).

For example, the issue whether defendant complied with State or local law when he operated his medical marijuana store has been heavily briefed by the parties in their first and second briefs on cross-appeal. (*See, e.g.,* Government's Answering Brief Part III(C)(2) & (3).) Similarly, defendant complains in his motion about the district court's instructions to the jury about the irrelevance of state law to this prosecution (Mot. 3) and argues that continuing this prosecution "hinders the fulfillment of California law" because it deprives him of a State law affirmative defense of immunity from prosecution (*id.* at 11-15). The propriety of those instructions, however, has also been heavily briefed by the parties in their first and second briefs on cross-appeal. (*See, e.g.,* Government's Answering Brief Part III(D)(2).) Accordingly, the same panel that considers these merits issues should also consider defendant's motion.

Even defendant's alternative request for a "limited remand so that the district court may consider this issue in the first instance" (Mot. 26) is also "tied up with the merits of the appeal," Goelz et al., *supra*, because the government—with the approval of the United States Solicitor General—has sought reassignment to a different district judge for any further proceedings on remand. (*See* Government's Answering Brief Part III(J).) Accordingly, the government is not confident, as it has argued in its answering brief, that the district judge presently assigned to this case will be able to "put[] out of [his] mind [his] previously expressed views" regarding this case if asked to consider the claim raised in defendant's motion in the first instance. (*See id.*)

Finally, having the motion handled during the course of the briefing on this appeal will be efficient, prudent, and fair. It will allow the government time to coordinate any response to this new law with the Department of Justice's Criminal Division, and to assure that any position taken is informed and consistent with other cases in this Circuit and around the country. It will also give the government the opportunity for full consideration and briefing of what is essentially a new ground for dismissing its conviction, presented for the first time on

appeal by means of a motion. This will allow the government time to examine not only the substantive issues potentially addressed with respect to defendant's claims about this new law, but also the procedural issues outlined above, including whether this new claim is appropriate to bring on appeal or by means of a motion. It may also give the merits panel the benefit of any case law developed in other district and circuit courts. Finally, this briefing plan would be efficient and would not be unfair to defendant, given that he has already taken months from his already-extended time to file his third brief on cross-appeal to bring this motion based on a law that was passed several months ago.

For all these reasons, this Court should refer defendant's motion to the merits panel assigned to hear these consolidated cross-appeals and make the government's response to defendant's motion due at the same time that the government's fourth brief on cross-appeal is due (with defendant's reply in support of his motion due at an appropriate time thereafter).

9th Circuit Case Number(s) 10-50219, 10-50264

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