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 REPLY IN SUPPORT OF 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.)

Plaintiff-Appellee/Cross-Appellant United States of America, by and through its counsel of record, hereby submits this reply in support of its motion for leave to respond to Defendant-Appellant/Cross-Appellee Charles C. Lynch's ("defendant") Section 538 motion when it files its fourth brief on cross-appeal.

This reply is based on the files and records in this case and the attached memorandum of points and authorities.

DATED: April 2, 2015

Respectfully submitted,

STEPHANIE YONEKURA
Acting United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/s/ *David Kowal*

JEAN-CLAUDE ANDRÉ
DAVID KOWAL
Assistant United States Attorneys

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

In response to defendant's oversized motion (in conjunction with his *fifteenth* request to delay his briefing of the issues already on appeal), filed without consulting the government on its position or giving notice of the filing in this Court,[1] and seeking to raise a new unprecedented theory for the first time by way of an appellate motion, the government sensibly requested that it be allowed to respond when it files its fourth brief on cross-appeal. The government's request was based on this Court's procedural precedents, the unprecedented nature of the issues raised, and the indisputable fact that resolution of the motion was intertwined with several issues and large portions of the record to be considered and reviewed by the merits panel assigned to resolve the issues already briefed, as well as related considerations of judicial economy, prudence, and fairness. (Gov't Req. 4-8). Defendant's response is

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[1] Defendant's assertion that he "shared his draft briefing with the United States Attorney's Office" before filing his motion is not entirely accurate. (Def. Resp. 16). Prior to filing his motion in this Court, representatives of counsel for defendant shared with the government a draft civil complaint seeking declaratory and injunctive relief. The government warned that any such complaint would likely run afoul of Federal Rule of Civil Procedure 11, given that, among other things, the district court found at defendant's sentencing that he had violated not just the federal Controlled Substances Act *but also* California's state marijuana law. Defendant subsequently raised his theories for the first time by means of a motion in this Court.

primarily to ignore these concerns and issues, and when seeking to oppose them, to inadvertently, but unmistakably highlight the wisdom of the government's proposed course.

* * *

Perhaps most telling is defendant's response to the government pointing out that resolution of defendant's motion should be handled by the merits panel assigned to hear these consolidated appeals because resolution of the motion is "tied up with the merits of the appeal" and will overlap with the Court's consideration of the extensive record and issues already briefed. (*See* Gov't Req. 4-7). Defendant's response is to ignore the overlapping issues as "red-herrings" or to mistakenly claim that "only one, not 'some,' of these issues is remotely related to the issues the merits panel will resolve in this case." (Def. Resp. 8-11). For example, defendant claims that the "one . . . remotely related" issue is "whether [defendant] complied with state and local laws." (*Id.* at 9). But as the government explained in its request, both defendant's merits appeal and his motion ask this Court to evaluate the district court's jury instructions on the irrelevance of state law: the former asking whether the court's instructions on the irrelevance of state law were correct, and the latter asking whether the court's refusal to instruct the jury on California's medical marijuana affirmative defense—*on the basis that state law is*

irrelevant—means that continuing this prosecution "hinders the fulfillment of California law." (Gov't Req. 6). Thus, defendant is wrong when he asserts that "[t]his Court need not address the correctness of any jury instructions to resolve [his] motion." (Def. Resp. 10). Additionally, despite having now filed over 100 pages of material in support of his motion, defendant does not even acknowledge that he has alternatively sought a limited remand to a district court judge, who the government has asked this Court to remove from the case due to his strongly expressed views at sentencing. (Gov't Mot. 7).

Even with respect to the "one" issue that he characterizes as only "remotely related," defendant's response is wholly unsatisfactory. As the government noted in its request, "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." (Gov't Req. 6). Defendant responds that, because his compliance with the "local law" in the municipality where he ran his marijuana store was "undisputed" in district court, overlap between his motion and his merits appeal will be minimal. (Def's Resp. 8-9). This is a distortion of both the record and the issues on appeal that will be evident to any panel that evaluates defendant's motion and the merits appeals (and the merits appeals' extensive and lengthy, but clear, record of what happened in district court) together.

Section 538 says nothing about "local laws," but rather "State laws." By pointing to evidence of his supposed compliance with "local law" and not mentioning "State laws," defendant is confusing inquiries and not addressing the most-clearly relevant one: whether he was in compliance with "State laws."

While Section 538's focus on "State laws" may not preclude "local law" from being relevant to defendant's motion, his characterization of the state of the record relating to his compliance with local law is simply wrong, as the panel assigned to adjudicate the merits appeals will readily see from the record. Specifically, as explained in the government's second brief on cross-appeal regarding the district court's jury instruction on state law, "Morro Bay officials never determined whether defendant complied with state law, *and the* [*district*] *court held at sentencing that defendant had not*." (GAB 93 (emphasis added) (citing sentencing hearings and the district court's sentencing memorandum); *see also id.* at 70 (argument and citations to record showing that city attorney testifying at sentencing never formed an opinion on defendant's compliance with state law); *id.* at 92-96 (reviewing jury instructions of state law issues).

The panel reviewing the full record already presented and briefed will also know in resolving defendant's unsupported *Brady* claim that evidence of his violations of California marijuana law were evident throughout the

government's investigation, highlighted in the government's search warrants, turned over to defendant in discovery, discussed during sentencing hearings, and argued in connection with the denial of defendant's fourth new-trial motion.[2] (*See* GAB at 116-20). The panel reviewing the full record already presented and briefed on appeal will also know that that the appellate record and briefing on the merits references other occasions and issues where state marijuana law was analyzed or referenced below. (*See id.* at 5-9 (reviewing district court litigation on propriety of introducing state law evidence at trial); *id.* at 71-74 (references to medical marijuana during trial)).

On this record, it is unsurprising that defendant seeks a truncated, hurried decision, and it is clear that a fair and complete resolution of

[2] Moreover, a full review of the district court record at sentencing — rather than the truncated, incomplete one presented in the attachments to defendant's motion—will also reveal that defendant's supporting *amici curiae* (an attorney for a marijuana industry lobbying group) actually testified at sentencing about California state law to the district court. The record will also show that the *amici*'s views were rejected by the district court, just as they were unanimously rejected by the California Supreme Court in *People v. Mentch*, 195 P.3d 1061 (Cal. 2008), the case that definitively rejected under California law the basis that defendant advances to demonstrate the purported legality of his store during its operation. And a full review of the district court record at sentencing, as will likely occur in deciding the government's cross-appeal, will demonstrate that defendant violated his own subjective views of California state law and made admissions confirming his state-law violations.

defendant's motion would be best made by the same panel reviewing the merits appeals.

* * *

Defendant's other main response to the government's request is to express concern that Section 538 will expire six months from now and thus potentially moot his motion if decided by a merits panel. He demands consideration by a motions panel on a truncated schedule or expedited, "urgent" briefing. (C.A. Dkt. No. 95). Leaving aside the substantive issue that Congress could not have meant for a temporary, expiring provision in a funding law with no reference to criminal prosecutions or appeals to repeal the clear provisions of the Controlled Substances Act under which defendant was convicted, defendant's position highlights its unfairness and imprudence—particularly against the backdrop of this case's procedural history and posture.

A review of this Court's docket shows that, once transcripts were completed, defendant obtained *12* extensions of time to file his first brief on cross-appeal for a total of over 21 months. Five of those extension requests were made *after* the Court ordered that further requests would be "disfavored." Defendant's third brief on cross-appeal (his final brief) was initially due on May 11, 2014, with the government's optional fourth brief due 14 days later. Defendant, however, received two additional extensions to file the third brief

and has now sought a third that, if granted, would yield an extension period exceeding 13 months and pushing briefing in this case to the summer.

Moreover, as reflected in the government's second brief on cross-appeal, the government continually sought prompt resolution of sentencing and other post-trial issues in district court, only to be thwarted by the successful attempts of defendant and the district court to repeatedly continue and delay matters such that judgment was not entered for almost two years after defendant's guilty verdicts. (GAB 126-30). Yet now, after receiving almost three years of extensions on appeal and after two years of post-trial delay in district court, defendant suddenly perceives a potential procedural advantage and demands expedited consideration by this Court (while continuing to delay briefing on the merits), arguing that delaying briefing on the motion would be unfair. On this record, defendant's contention cannot be taken seriously. If defendant wants his Section 538 claim addressed quickly, he should withdraw his currently pending extension request and simply file his third-brief on cross-appeal.

Moreover, the prudential, fairness, and related reasons for the government's request for consideration by the merits panel are correct and sound—not a means for delay. In addition to the intertwined nature of the issues on appeal and in defendant's motion, the motion raises new, difficult

issues that warrant full briefing, and sufficient preparation time and consideration by the government and this Court.

Those include the procedural sub-issues that, as noted in government's request, have never been decided by a court of appeals: (a) "does a criminal defendant have standing to invoke Section 538?" and (b) "which party bears the burden of proof" for establishing compliance or non-compliance with State and local law? (Gov't Req. 4-5). Neither of these sub-issues is addressed or referenced in the various government district court pleadings attached to defendant's opposition.

Nor do the various government district court pleadings address various other potential issues implicated by defendant's Section 538 claim: Is Section 538 inapplicable to the Controlled Substances Act in light of Congress's 1998 reaffirmance in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, Div. F. 112, Stat. 2681-760 to 2681-761, of its "oppos[ition to] efforts to . . . legaliz[e] marijuana . . . for medicinal use without valid scientific evidence and the approval of the [FDA]"? What is the meaning of the term "medical marijuana" under federal law and Section 538? May one coordinate branch of government (the legislature or the judiciary) temporarily direct another branch (the executive) to

not faithfully enforce a valid law (the Controlled Substances Act) without running afoul of Separation of Powers principles?

And even with respect to sub-issues that the various government filings have addressed, it is significant that those filings were submitted to district courts. While the government strives to be consistent before all courts at all levels, it is indisputable that the stakes are higher when issues are briefed to a circuit court of appeals and that the amount of time and care that go into presenting the government's position is far greater. This is particularly so where, as is the case with the government's cross-appeal here, the appeal is a government affirmative appeal authorized by the United States Solicitor General.

Moreover, that the government has addressed some of the sub-issues in a variety of district court procedural situations different from the situation here—sentencing, motions to dismiss the indictment, etc.—and in some instances analyze the law of different states should not change the conclusion that defendant's motion should be decided by the merits panel assigned to resolve these consolidated cross-appeals. Notably, and tellingly, defendant provides no information about what the district courts in those cases *decided* or what

their reasoning was—information that would assist this Court when it issues perhaps the first appellate decision in the country on Section 538.[3]

* * *

The government is confident that when this Court reviews the entire briefing and full district court record in this matter that it will reject defendant's Section 538 claim, reject his challenges to his conviction set forth in his first brief on cross-appeal, and further order that the case be reassigned to a new district judge to impose the lawfully required sentence. As set forth above, however, because the truncated, incomplete procedure requested by defendant for resolving the Section 538 issue is inappropriate, imprudent and unfair, defendant's motion should be referred to the merits panel assigned to resolve these consolidated cross-appeals and the government should be permitted to file its response along with its fourth and final brief.

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[3] Defendant asserts that there are three other appeals pending before this Court raising Section 538 issues. (Def. Resp. 11 & n.2). Since defendant filed his response, however, this Court has issued orders to show cause in all three cases questioning whether this Court has interlocutory appellate jurisdiction. *See United States v. Lovan*, C.A. No. 15-10122; *United States v. McIntosh*, C.A. No. 15-10117; *United States v. Silkeutsabay*, C.A. No. 15-30045.

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

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