CA NOS. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/Cross-Appellant, v. CHARLES C. LYNCH, Defendant-Appellant/Cross-Appellee.	DC NO. CR 07-689-GW

SUPPLEMENTAL EXHIBIT TO MOTION TO ENFORCE SECTION 538 AND OPPOSITION TO GOVERNMENT'S MOTION TO DELAY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE GEORGE H. WU
United States District Judge

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Defendant-Appellant/Cross-Appellee Charles C. Lynch, by and through counsel of record Deputy Federal Public Defender Alexandra W. Yates, hereby files the attached Supplemental Exhibit R to his previously-filed Motion To Enforce Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, or in the Alternative for a Limited Remand, filed on February 24, 2015, and Opposition to Government's Motion To Delay Adjudication of Lynch's Motion To Enforce Section 538, filed on March 23, 2015.

In Mr. Lynch's opposition, he explained that "[t]he government has set forth its position on Section 538 and each and every one of the sub-issues [raised by the

government], following discussion with the Department of Justice, in several cases in district court," and attached as exhibits all but one of those cases. (Lynch Opp. 13.) In the remaining case, *United States v. Watson and Walker*, C.D. Cal. CR-12-84-JVS & CR-12-240-JVS, Mr. Lynch represented that "[t]he government filed its position on Section 538 . . . under seal. The district court ordered the government to file a public, redacted version no later than March 26. Mr. Lynch will file that document as an exhibit once it becomes available." (*Id.* at 14 n.3 (citation omitted).) The government filed the redacted version today. Mr. Lynch attaches it as Exhibit R.

Notably, in its *Watson/Walker* position, the government explicitly asks the court to delay proceedings in that case until after September 30, 2015, when the fiscal year expires. (*See* Ex. R at 3, 28, 31-32.)

Respectfully submitted,

HILARY POTASHNER
Acting Federal Public Defender

DATED: April 10, 2015

By */s Alexandra W. Yates*
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, I electronically filed the foregoing **SUPPLEMENTAL EXHIBIT TO MOTION TO ENFORCE SECTION 538 AND OPPOSITION TO GOVERNMENT'S MOTION TO DELAY** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Lorena Macias
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EXHIBIT R

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRUCE ANDREW WATSON, and JOHN ALVIN WALKER, et al., Defendants.	No. SA CR 12-84-JVS No. SA CR 12-240-JVS GOVERNMENT'S CONSOLIDATED OPPOSITION TO DEFENDANTS BUTIER'S AND WATSON'S MOTIONS FOR DECLARATORY JUDGMENT AND THIS COURT'S ORDER TO SHOW CAUSE RE: SECTION 538[1]

The United States of America, by and through its counsel of record, Assistant United States Attorney Kevin M. Lally, hereby files its Consolidated Opposition to Defendant Nicholas Martin Butier's Motion For Declaratory Judgment (CR 629), which was joined by defendants Michael Alan Nixon (CR 636), Alan David Nixon (CR 638), and John Eugene Scandalios (CR 641) in No. SA CR 12-240-JVS, and

[1] The government previously filed its consolidated opposition under seal. This more broadly redacted version has been submitted for public filing.

defendant Bruce Andrew Watson (BW CR 56) in No. SA CR 12-84-JVS, and this Court's Order To Show Cause Re: Section 538 (CR 639). The government's consolidated opposition is based upon all files and records in the case, and upon such further evidence or argument as may be requested by the Court.

Dated: March 13, 2015

Respectfully submitted,

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I.

INTRODUCTION

Defendants Nicholas Martin Butier ("Butier"), Michael Alan Nixon ("M. Nixon"), Alan David Nixon ("A. Nixon"), John Eugene Scandalios ("Scandalios") and Bruce Andrew Watson ("Watson") (collectively "defendants") have moved for declaratory judgment, arguing that Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015 ("CAFCAA") precludes the government from participating in either the sentencings of defendants Butier, Watson, M. Nixon, and Scandalios, or the probation revocation hearing for defendant A. Nixon.[2] This Court, after receiving defendants' motions, issued an Order to Show Cause in which it asked the parties to brief whether "the Court had the power to sentence a defendant who has pled guilty in the absence of the presence of any further input from the government?" and/or "whether the Court had discretion not to sentence a defendant?" in the event that it were to find that Section 538 precluded continued government involvement in these proceedings.

Defendants' motions for declaratory judgment should be denied. First, the plain language of Section 538 establishes that its funding limitation extends solely to State-based action, and does not preclude the government from proceeding with criminal enforcement

[2] Regardless of how defendants' motions are decided, the government respectfully submits that Section 538 does not inhibit its ability to respond to the motions. The government's litigation efforts in opposition to a Section 538 motion 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).

under Title 21 against private individuals or entities who violated Federal law by possessing, cultivating, or distributing marijuana. Therefore, Section 538 does not apply to preclude the government from proceeding with the sentencings of defendants Butier, Watson, M. Nixon, and Scandalios –- all private individuals who have knowingly and voluntarily pled guilty to having violated Title 21 –- or defendant A. Nixon's court ordered probation revocation proceeding.

Second, even if Section 538 does extend to private litigants, it does not extend to the conduct here. Simply stated, defendants were participants in a for-profit marijuana distribution operation that was illegal under both Federal and State law. Thus, proceeding with defendants' sentencings on this criminal conduct cannot reasonably be deemed to impede California's ability to implement its "medical marijuana" laws.

Third, defendants bear the burden of establishing that Section 538 bars the government from participating in the sentencings in this case. None of the defendants have made the requisite showing. Moreover, none of the defendants can make the requisite showing given the extensive evidence establishing that defendants were engaged in a for-profit marijuana distribution scheme that was illegal under both State and Federal law.

Finally, continued prosecution of defendants who have brazenly violated State and Federal law and who have knowingly pled guilty to a Federal violation would not have a chilling effect on California's continued implementation of its longstanding "medical marijuana" statutory framework. On the contrary, these proceedings will reinforce the State and Federal statutory schemes, which have successfully co-existed for almost two decades, by ensuring that

those who violate these laws will be charged, convicted, and sentenced for their crimes.

While Section 538's funding restrictions do not act to bar the government from participating in either defendants' pending sentencings or supervised release proceedings, the government, in response to the Court's Order to Show Cause, respectfully submits that: (1) the Court could proceed with defendants' sentencings without further input from the government; (2) the Court potentially could proceed with the sentencing proceedings in the government's absence; (3) if the Court were to do so, it could not appoint another party to stand in the government's place; (4) the Court should exercise its discretion not to sentence defendants at this time; and (5) instead, the Court should schedule defendants' sentencing for a date after September 30, 2015, at which time the funding restrictions set forth in Section 538 will no longer be in effect.

Similarly, with respect to defendant A. Nixon's probation revocation hearing –- which effectively involves a Probation Office request for non-action and reinstatement of probation under the original terms and conditions -– the Court can proceed without government involvement, as is frequently done in this district when there are no changes to the status quo. However, should the Court continue to believe that a hearing should be held in this matter, it can do so with the government's participation. Even under the broadest reading of Section 538, the pending probation revocation hearing would not impede California's implementation of its laws as there is no applicable affirmative defense in this context and California courts have recognized that restrictions against the use of medical marijuana are permissible conditions of probation.

II.

PROCEDURAL OVERVIEW

A. THE UNDERLYING CONDUCT, CHARGES, AND PLEAS

Working hand-in-hand with defendants, co-defendant John Melvin Walker ("Walker"), who had been twice-convicted for prior acts of felony drug trafficking[3], devised a scheme to use the veneer of legitimacy provided by California's medical marijuana laws to shield a sprawling, massively profitable, marijuana trafficking operation that utilized sham collectives/dispensaries to openly conduct for-profit distribution of marijuana in violation of State and Federal law. To conceal his involvement from the State agencies that regulated medical marijuana dispensaries, Walker paid others, including defendants Butier and A. Nixon, to file legal paperwork with the California Secretary of State in which they identified themselves as the corporate heads of specific dispensaries. (CR 233.) To disguise the fact that the network of nine dispensaries[4] opened and controlled by Walker were fronts for an illegal, profit-based marijuana trafficking operation, Walker, through defendants and others, represented to the California Board of Equalization that the dispensaries were not-for-profit collectives. To hide the significant profits being generated (at least $25,000,000 over a five

[3] Walker was convicted in 1979 of felony possession for sale (cocaine), in violation of California Health and Safety Code Section 11352, and in 1990 of felony possession for sale (marijuana), in violation of California Health and Safety Code Section 11359.

[4] The storefronts, which operated in both Los Angeles and Orange Counties, included: Alternative Herbal Health ("AHH"), Garden Grove Alternative Care ("GGAC"), Belmont Shore Natural Care ("BSNC"), Santa Fe Compassionate Health Care ("SFCHC"), Santa Ana Superior Care ("SASC"), Costa Mesa Patients Association ("CMPA"), the Whittier Collective ("TWC"), APCC, also known as the "San Juan Capistrano Store", and Dana Point Safe Harbor Collective ("SHC"). (CR 233.)

year period), which both illicitly suppressed the amount of taxes paid to the State of California, and more importantly, allowed the dispensaries to fraudulently maintain their not-for-profit status, Walker, again with the aide of defendants and others, systematically destroyed business records documenting proceeds generated from the sale of marijuana at these storefronts. (Id.) To stave off closures caused by operating dispensaries in areas prohibited under State law -- such as in close proximity to schools - Walker, again with the help of defendants, illicitly collected and funneled cash to politicians who potentially could slow or stop the closures. Stated succinctly, Walker, with the assistance of defendants, ran a sophisticated and exceptionally profitable drug trafficking operation that brazenly violated State and Federal law on a daily basis.

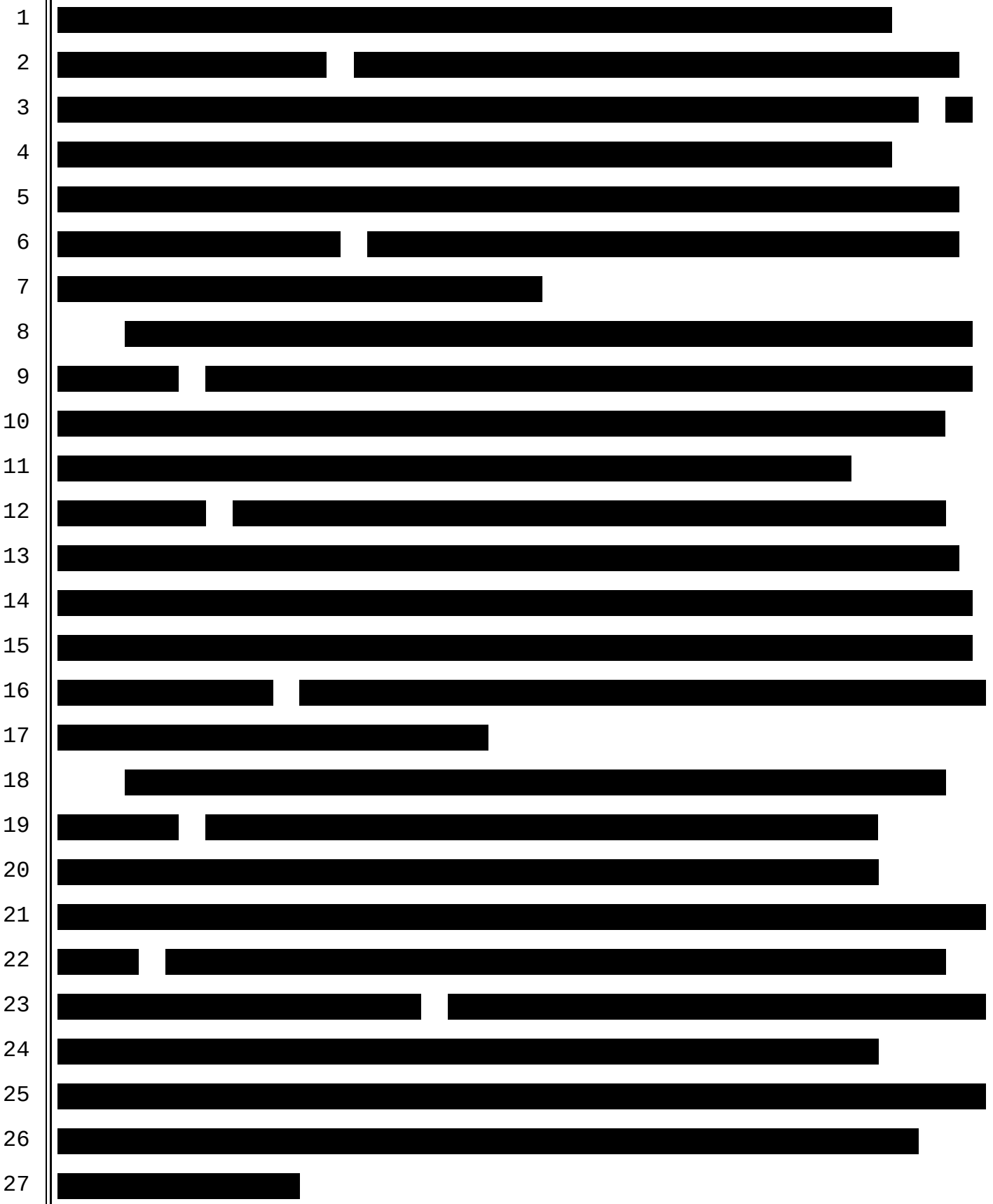
Presented with this flagrant criminal conduct, a duly empaneled Federal grand jury returned a fifteen count indictment that charged Walker, and defendants Butier, M. Nixon, A. Nixon, and Scandalios, with offenses that included conspiracy to distribute at least 1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(viii), and maintaining drug-involved premises, in violation of 21 U.S.C. § 856. (CR 1.) In an earlier, related indictment, defendant Watson separately was charged with conspiring with Walker and others to distribute marijuana and to maintain a drug involved premises, and with multiple counts of possession with intent to distribute and/or distribution of marijuana.[5] (BW CR 1.)

[5] [redacted].

Defendants have all pled guilty. [redacted]

[redacted]

[redacted]



[redacted]

B. THE CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT OF 2015

On December 16, 2014, President Obama signed CAFCAA, which funds the Federal government through September 30, 2015. This appropriations legislation includes a rider, also effective only through September 30, 2015, stating that no funding allocated to the Department of Justice (the "Department") under the Act can be used to prevent certain states from implementing their laws related to medical marijuana. Specifically, 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,

[7] [redacted].

> 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.

See CAFCAA, Pub. L. No. 113-235, tit. V, div. B, § 538 (2014).

III.

ARGUMENT

A. THERE IS NO BASIS ON WHICH TO GRANT DEFENDANTS' MOTIONS FOR DECLARATORY JUDGMENT

Following CAFCAA's enactment, defendant Butier moved for declaratory judgment, claiming that Section 538's funding restrictions bar the United States Attorney's Office ("USAO") -- the Department representative charged with prosecuting his case -- from participating in further proceedings in this matter. (CR 629.) This motion subsequently was joined by defendants M. Nixon (CR 636), A. Nixon (CR 638), Scandalios (CR 641), and Watson.[8] (CR WT 56.)

Defendants' principal argument is purely legal and textually-based. Defendants assert that Section 538 bars the Department from investigating and prosecuting marijuana possession and distribution under the Controlled Substances Act ("CSA") in the State of California during the appropriations period because federal

[8] Defendant Watson filed his motion in his related, separately charged case. (CR 56.) His motion essentially tracks the textual argument advanced by defendant Butier. Therefore, unless otherwise noted, references to the defendants' arguments will focus on the arguments raised in defendant Butier's motion.

enforcement of the CSA purportedly "nullifie[s]" California's medical marijuana statutory scheme by not recognizing the limited affirmative defense set forth in the Compassionate Use Act ("CUA") and the Medical Marijuana Program ("MMP"). Defendants further claim that federal enforcement of the CSA, including against individuals such as themselves who knowingly and voluntarily admitted to violating Federal drug laws, has a chilling effect that impermissibly hinders California's implementation of its medical marijuana laws. Finally, defendant Butier alleges that Section 538 precludes his being sentenced on his knowing and voluntary admission of guilt for having violated the CSA, because prosecuting defendant in a Federal forum that lacks California's affirmative defense deprived defendant of the ability to pursue that defense and thus, purportedly prevented California from being able to "fully execute its laws authorizing medical marijuana." (Mot. p.6.) Defendants' claims are unfounded and should be denied.

1. The Controlled Substances Act Permits Continued Prosecution of the Underlying Conduct

The CSA, 21 U.S.C. § 801 *et seq.*, governs enforcement of the Federal drug laws. "Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." Gonzales v. Oregon, 546 U.S. 243,

250 (2006). The purpose of the CSA is to "consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs." Gonzales v. Raich, 545 U.S. 1, 10 (2005); see also id. at 12-13 (noting that "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels"). "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance (including marijuana, a Schedule I drug) except in a manner authorized by the CSA." Id. at 13.

In Raich, the Supreme Court held that the application of the CSA provisions criminalizing the manufacture, distribution, or possession of marijuana to intrastate growers and users of medical marijuana did not violate the Commerce Clause. The Raich Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." Id. at 22. It further rejected the argument that states could displace Federal regulation of marijuana by approving cultivation and possession of the drug in certain circumstances; to the contrary, it expressly found that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between Federal and State law, Federal law shall prevail." Id. at 29. Moreover, the Raich Court further found that the drug's purported medical properties did not exempt it from

the CSA's scope. Id. at 28 ("[T]he mere fact that marijuana -- like virtually every other controlled substance regulated by the CSA -- is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA."); see also United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 491 (2001) ("In the case of the Controlled Substances Act, the statute reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project).").

It, therefore, is not subject to legitimate dispute that the CSA properly extends to the criminal conduct for which defendants were lawfully charged, to which defendants Butier, M. Nixon, Scandalios, and Watson knowingly and voluntarily pled guilty, and for which they now await sentencing in these proceedings. This applies equally to defendant A. Nixon, whose judgment and conviction on the underlying conduct is final and who presently has been called before this Court on a probation violation.

2. Section 538 Does Not Act To Limit The Department's Ability To Proceed With The Prosecution Of Private Individuals And Entities Under The CSA

Defendants' claim -- that Section 538 bars federal investigations and prosecutions of "medical marijuana"-based violations of the CSA in California -- is dependent on what defendants refer to as the "sweeping" breadth of this one-paragraph, nominally debated rider to the annual appropriations bill. (Mot. 11.) Defendants' extraordinarily expansive interpretation of Section 538, however, simply is not supported by the statutory text.

In construing Section 538, "[w]e begin with the statutory text." DePierre v. United States, 131 S. Ct. 2225, 2231 (2011), which is instructive in several meaningful respects. First, Section 538 does not explicitly repeal any provision of the CSA. See, e.g., Posadas v. National City Bank, 296 U.S. 497, 503 (1936) ("the intention of the legislature to repeal must be clear and manifest.")[9] This is apparent from both the absence of any reference to the CSA in the text of Section 538 and from the fact that the House of Representatives, contemporaneous with its passage of Section 538, considered but declined to pass a bill that would have done just that, by amending the CSA to bar its enforcement against individuals who acted in compliance with State medical marijuana laws. See H.R. 1523, 113th Cong.

Second, Section 538 expressly prohibits expenditure of the Department's 2015 appropriations "to prevent [the listed] States from implementing their own State laws" and thereby plainly addresses actions directed against States, not individuals. As such, it prohibits the Department from impeding the ability of States to carry out their medical marijuana laws, not from taking actions against particular individuals or entities. Third, Section 538 is devoid of any language expressly prohibiting the Department from using its funds to investigate and prosecute non-state actors, such as

[9] Similarly, when Congress seeks to withhold funding for the enforcement of Federal law or regulations it disfavors, it typically uses much more direct language than was used in Section 538. See, e.g., Pub. L. 100-404, Title I, Aug. 19, 1988, 102 Stat. 1021.

defendants, whose conduct violates Federal law. Fourth, Section 538 necessarily does not restrict the use of Department funds to pursue violations of Federal law that also violate State law, because permitting such ongoing criminal conduct would not be consistent with the State's efforts to implement its medical marijuana laws.

The text of Section 538, therefore, is not nearly as "sweeping" as defendants claim it to be. Instead, Section 538 is best read to prohibit the expenditure of the Department's 2015 appropriations during the appropriations period on litigation regarding State laws authorizing the medical use of marijuana where the State or State officials are a party, where the status of a State law is challenged, and/or where the claim is that a State law or regulatory regime is invalidated by the CSA.[10] None of these circumstances exist here. On the contrary, the present proceedings are not directed at State actions or actors, but rather at private individuals: (1) whose conduct violate both State and Federal law; (2) who have voluntarily admitted to knowingly violating the CSA as part of a criminal plea agreement; and (3) who, at least with respect to one defendant, already has a judgment of conviction in place and presently is subject to a Court-ordered probation violation hearing. Thus, Section 538's funding restrictions simply do not apply to these proceedings.

[10] As the issue is not raised, and could not be raised, by these specific defendants, the government has not addressed whether Section 538 would be constitutional when applied to limit Federal government actions against States or State actors.

Despite acknowledging that the statutory text typically controls questions of statutory interpretation (Mot. 3), defendants base their claims of the "sweeping" scope of Section 538 not on the statutory text but rather on their assessment of the rider's legislative history and a Supreme Court decision, Bond v. United States, 134 S.Ct. 2077 (2014), that was never mentioned by the few legislators who spoke on the issue. This approach is misguided and undermines defendants' analysis.

As a preliminary matter, the Supreme Court repeatedly has found that sound textual analysis should not be supplanted by statements made by legislators in the lead-up to a statute's passage. See, Salinas v. United States, 522 U.S. 52, 57 (1997) ("Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language") (internal quotation marks, citations, and brackets omitted); Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 29 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents. '[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'") (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 (1981)). Moreover, the Committee Reports accompanying the bill –- which the Supreme Court has "repeatedly stated" is the "authoritative source for finding the Legislature's intent" when

"surveying legislative history" -- is silent as to Congressional intent. The joint explanatory statement accompanying the conference report[11] simply parrots a portion of the language of the amendment, thereby returning the focus to the statutory text. See Garcia v. United States, 469 U.S. 70, 76 (1984). Similarly, the Senate record is completely devoid of floor statements related to the amendment. All that exists, therefore, are the floor statements of a handful of legislators in a single House of Congress that run the gamut in support and opposition of the rider.[12] Given how undeveloped and inconclusive the legislative history is, there simply is not a valid basis to find that it is sufficiently authoritative to overcome the best reading of the plain and unambiguous language of the text.

Equally unavailing is defendants' reliance on the Bond decision to support their expansive interpretation of Section 538. Bond

[11] The joint explanatory statement asserts that "Section 538 prohibits the Department of Justice from preventing certain States from implementing State laws regarding the use of medical marijuana," U.S. Congress Joint Explanatory Statement (to Accompany H.R. 83), Consolidated and Further Continuing Appropriations Act 2015, http://docs.house.gov/billsthisweek/ 20141208/113-HR83sa-ES-B.pdf; also available at 160 Cong. Rec. H9307, H9351 (daily ed. Dec. 11, 2014), https://www.congress.gov/congressional-record/2014/12/11/house-section/article/H9307-1.

[12] Cf. Co-sponsor Rep. Barbara Lee: ("It is past time for the Justice Department to stop its unwarranted persecution of medical marijuana and put its resources where they are needed.") 160 Cong. Rec. at H4984, http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf, with Rep. Andy Harris: ("There are two problems with medical marijuana. First, it is the camel's nose under the tent; and second, the amendment as written would tie the DEA's hands beyond medical marijuana."), See, e.g., 160 Cong. Rec. H4914, H4983 (daily ed. May 29, 2014) available at http://www.gpo.gov/fdsys/pkg/CREC-2014-05-29/pdf/CREC-2014-05-29.pdf; *id.*.

involved a prosecution under 18 U.S.C. § 229, the chemical weapons statute, in which the defendant was convicted for using low grade toxic chemicals in an unsuccessful attempt to cause contact-based physical discomfort on the hands of the woman with whom her spouse was having an affair. Bond, 134 S.Ct. at 2085-86. The Supreme Court reversed, finding that the scope of the statute did not reach this simple assault because Congress, in passing the statute, had not made clear its intent to have the statute encompass purely local criminal activity. Id. at 2090. Bond is inapposite, as the Supreme Court's decision in Raich –- a decision squarely addressing Tenth Amendment/state's rights claims as applied to California's Compassionate Use Act -- makes abundantly clear.

As noted above, the Raich Court ruled that the CSA's categorical prohibition of the manufacture and possession of marijuana properly extended to the intrastate manufacture and possession of marijuana for medicinal purposes pursuant to California law.[13] Raich, 545 U.S. at 15. It concluded that the application of the CSA provisions criminalizing the manufacture, distribution, and possession of marijuana to intrastate growers and users of medical marijuana fell squarely within Congress' legitimate exercise of power under the Commerce Clause and represented a clear Congressional intent to

[13] Raich involved the Drug Enforcement Administration's seizure of six marijuana plants from two California citizens who were authorized to cultivate and possess medical marijuana under California's Compassionate Use Act and whose actions were completely lawful under California State law. Id. at 6-8

create a "closed regulatory system" that "was particularly concerned with the need to prevent the diversion from legitimate to illegitimate sources." Id. at 12-13. In doing so, the Raich Court considered and rejected Tenth Amendment/state's rights-based arguments against application of the CSA in those states that had existing statutory schemes permitting medical marijuana. As the Court explained, the premise underlying these arguments "would turn the Supremacy Clause on its head, and would resurrect limits on Congressional power that have long since been rejected." Id. at 29 n38 (emphasis added).

Defendants' interpretation of the scope of Section 538 is in direct conflict with Raich and would give rise to serious, completely unnecessary, questions regarding Section 538's constitutionality. Such an interpretation also would cause the very "gaping hole" in drug enforcement that the Raich Court found that Congress sought to preclude through passage of the CSA.[14] Id. at 22. Given that the plain text of Section 538 did not repeal the CSA, in whole or in part, there is no sound basis for adopting defendants' interpretation, which effectively would do just that in the more than 30 states that have some form of statutory framework related to "medical marijuana." Thus, defendants' "sweeping" interpretation of

[14] While defendants' arguments focus on the interplay between Section 538, the CSA, and California state law, this gaping hole would be many magnitudes larger if deemed to extend to preclude enforcement of the marijuana-based provisions of the CSA in each of the States identified within Section 538.

Section 538 should be rejected and this Court should find that the funding restrictions set forth in Section 538 apply to State, not individual, action, as the text of Section 538 directly states.

Even if there was merit to defendants' claim that Section 538 extends to Federal criminal proceedings against private individuals, there still would be no merit to defendants' claim that Section 538 categorically operates to preclude Federal prosecution of "medical marijuana"-based cases because the CSA "nullifie[s]" California's statutory framework relating to marijuana by not allowing for the affirmative defense recognized in the CUA and the MMP. (Mot. p.6) The CSA does nothing of the sort, however, as defendants' own argument implicitly concedes.

Defendants stress that "without the affirmative defense, the entire legal framework falls apart." (Id.) Defendants, however, then immediately note that the California statutory system has successfully co-existed with the CSA for almost two decades despite the CSA's failure to recognize an affirmative defense ("For the last eighteen years, the affirmative defense has been the heart of California law authorizing medical marijuana.") (Id.) Now, as before the passage of Section 538, the limited conditions under which the CUA's and MMP's affirmative defenses can be invoked under California State law remain completely unaffected by the CSA and continue to be applied as enacted by the California State Legislature and as interpreted by the California State Courts. Therefore, the CSA has

not operated to "nullify" the California statutory scheme and defendants' claim to the contrary is simply meritless.[15]

Moreover, defendants' claim is also significantly overbroad. As defendants correctly note (Mot. p. 4), California law generally prohibits the cultivation, possession, transportation, sale, or other transfer of marijuana from one person to another. California Health and Safety Code Sections 11357-11360. While the CUA and the MMP both include an affirmative defense to prosecution, the defense is quite limited under each statute. See City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc., 300 P.3d 494, 497, 500, 506 (Cal. 2013) (neither CUA nor MMP "create[] a broad right of access to medical marijuana without hindrance or inconvenience" (internal quotation marks omitted)); See, e.g., People v. Mentch, 195 P.3d 1061, 1067 (Cal. 2008) ("The [CUA] is a narrow measure with narrow ends"; "While the [MMP] does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession of sale"); People v. Mitchell,

[15] This argument is even less persuasive when the Federal proceeding at issue is a court ordered probation violation hearing. In this context, the defendant is not being prosecuted for breaking a particular State or Federal law, but rather is being punished for breaching the Court's trust. United States v. Reyes-Solosa, 761 F.3d 972, 975 (9th Cir. 2014); United States v. Simtob, 485 F.3d 1058, 1063 (9th Cir. 2007). In this circumstance, no affirmative defense applies as California courts have found that it is permissible to impose conditions of probation that restrict use of medical marijuana.

170 Cal. Rptr. 3d 825, 835 (Ct. App. 2013) (noting that the CUA "was not intended to decriminalize marijuana on a wholesale basis nor eviscerate this State's marijuana laws"). Of particular note, the MMP, which extends the affirmative defense to collectives and cooperatives that operate within the proper scope of the law, plainly states that for profit distribution of marijuana remains illegal and not subject to the affirmative defense.[16] See California Health and Safety Code Section 11462.765; See, e.g., People v. Anderson, -- Cal.Reptr.3d --, 2015 WL 128591, *11 (Ct. App. Jan. 9, 2015) (noting that collectives or cooperatives must operate on a non-profit basis); People v. Baniani, 176 Cal.Rptr. 3d 764, 776 (Ct. App. 2014) ("sales for profit remain illegal")

As the CUA's and MMP's affirmative defenses are limited in scope and applicability, defendants' argument, to the extent that it has any merit at all, must be equally as limited in scope. Therefore, even assuming arguendo that the enforcement of the CSA actually impeded California's implementation of the CUA and the MMP by not allowing for a defendant to assert the affirmative defenses set forth

[16] The MMP provides the only potential avenue through which defendants could argue for application of the affirmative defense under California State law. The affirmative defense under the CUA is narrowly drawn such that it is limited solely to a patient with proper prescriptions and that patient's primary caregiver. The primary caregiver also has been narrowly defined to be "the individual designated by the person excepted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." California Health and Safety Code Section 11362. It logically follows that a storefront dispensary and its operators do not qualify as primary caregivers simply because a qualified medical marijuana patient has designated them. People v. Hochanadel, 98 Cal. Rptr. 3d 347, 362 (Ct. App. 2009.)

under those laws in a Federal marijuana prosecution (i.e., the exact scenario that the Raich Court said would turn the Supremacy Caluse on its head), it would do so in only those limited circumstances in which the affirmative defenses actually applied to exempt a defendant from liability. Such is not the case here, as defendants joined with defendant Walker to open a network of sham, for-profit dispensaries that operated in violation of State and Federal law.

Section 538 simply does not apply to the government's participation in the sentencings of defendants Butier, M. Nixon, Scandalios, and Watson. The continued prosecution in these matters is not ultra vires, and defendants' motions should be denied.

a. Even If The Scope Of Section 538 Extends To Select Criminal Prosecutions, It Does Not Apply Here As Defendants' Conduct Ran Afoul Of Both Federal And State Law

The burden of establishing that Section 538, as applied, bars continued government involvement during the 2015 appropriations period in sentencing defendants who were lawfully indicted under the CSA and who knowingly and voluntarily pled guilty to a Title 21 violation rests with the individual defendants, not the government.[17] This is apparent from: (1) the plain language of the statute, which

[17] The same would hold true for defendant A. Nixon's efforts to preclude government involvement in a probation revocation hearing called by this Court.

does not place the burden on the Department;[18] (2) the fact that Section 538 does not alter the elements of a CSA offense or provide for an affirmative defense negating any particular element under the CSA;[19] and (3) the fact that defendant, as a moving party, is attempting to thwart a lawful CSA prosecution on a ground unrelated to his guilt or innocence.[20] As the party with the burden, each defendant must show that his conduct was authorized by State law, and how continuing on with his Federal sentencing would impede the State of California from implementing the CUA or MMP.

None of the defendants has met (and none can meet) this burden. In fact, defendants Watson[21], Scandalios, and A. Nixon[22] have made no

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[18] Compare Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (Religious Freedom Restoration Act explicitly places burden on government of demonstrating that prohibiting use of controlled substance in religious ceremony represents the least restrictive means of advancing a compelling government interest); 42 U.S.C. § 2000bb-1.

[19] See, e.g., Smith v. United States, 133 S. Ct. 714, 719 (2013) (defendant bears burden of establishing date of his withdrawal from conspiracy, because date goes to statute of limitations and does not negate element of the offense); *id.* at 720 ("A statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill-suited for prosecution.").

[20] United States v. Villareal, 707 F.3d 942, 953 (8th Cir. 2013) (defendant bears burden on motion to dismiss for speedy trial violation); cf. INS v. Abudu, 485 U.S. 94 (1988) (movant bears burden on motion to reopen deportation proceeding, just as movant bears burden on new trial motion).

[21] Defendant Watson's motion simply addressed the purely legal question of whether Section 538 operates, as a matter of law, to

[redacted]

showing at all.[23] Thus, their claims should be denied without further consideration.[24]

Defendant M. Nixon made an extremely nominal showing, claiming

[redacted]

[22] There is nothing, however, that defendant A. Nixon could provide to advance a claim. As noted above, the pending probation revocation hearing is not part of the underlying prosecution, but rather is a Court-directed proceeding in which the defendant is brought before the Court to address a breach of the Court's trust. Defendant A. Nixon's circumstance, therefore, is materially different from that of the non-sentenced defendants, who at least can facially argue that, had their conduct been adjudicated in State court, they may have been able to assert the affirmative defense under the MMP. Defendant A. Nixon lacks that argument because under both Federal and California State law, a court is permitted to impose as a condition of probation that a defendant not possess or use controlled substances, to include "medical marijuana." See, People v. Hughes, 202 Cal.App.4th 1473, 1479-81 (2012)(holding that a trial court did not abuse its discretion by imposing a condition of probation that prohibited the use of medical marijuana as the condition had a relationship to the crimes of conviction and forbade conduct that, even if otherwise lawful under the MMP, was reasonably related to future criminality to warrant imposition of the condition); see also Riverside, 300 P.3d at 497 (neither CUA nor MMP "create[] a broad right of access to medical marijuana without hindrance or inconvenience"). Thus, neither the pending Probation Revocation hearing nor the USAO involvement in that hearing will act to "prevent [California] from implementing [its] State laws" related to medical marijuana. Section 538, therefore, does not apply to this proceeding.

[23] Defendants Scandalios and A. Nixon filed joinders to defendant Butier's motion that, likewise, did not address how the law as applied to their individual circumstance hindered California in the implementation of the CUA and/or the MMP. (CR 638, 641.)

[24] [redacted]

that he had been misled into believing that his conduct was legal. However, this proffer falls woefully short of carrying defendant M. Nixon's burden because, as he expressly recognizes, this claim does not provide a defense under the law. (CR 576.) Moreover, defendant M. Nixon does not, and cannot, dispute that he was part of a for-profit marijuana distribution scheme, and thus, would not be entitled to the affirmative defense under California state law. His, claim, therefore, fails.

Finally, defendant Butier made a brief showing that was as deficient as it is problematic.[25] Defendant Butier claims that the prosecution in this case "hinder[s] the fulfillment of California law authorizing medical marijuana because [he] has a viable affirmative defense." (Mot. p.6.) In support of this claim, defendant significantly minimized his conduct, made factually false claims, and broadly asserted that "there is nothing in the factual basis, or the record for that matter, suggesting that [defendant] Butier would not

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[25] The government acknowledges that defendant Butier correctly has reported that, prior to the filing of his motion, the government advised defendant Butier that it would not consider the filing of a motion challenging the government's ability to proceed with this prosecution based on the passage of Section 538 to be a breach of the plea agreement. The government stands by the representation that the purely legal [redacted] each

have the all-important affirmative defense under California law."[26] (Mot. p.7.) The record, however, shows just the opposite. Specifically, the record overwhelmingly establishes that defendant Butier was involved in an illegal, for-profit marijuana distribution operation and thus, statutorily would not have been entitled to the affirmative defense. The record further shows that this drive for profits was so great that the members of the operation filed false or misleading paperwork with the State of California, destroyed documents that would allow the sale proceeds to be properly tracked, and sought to corrupt individuals in positions of trust, to include attorneys and politicians, to allow the sham collectives to remain open. Thus, it simply is false to claim that there is nothing in the record that would cause defendant Butier to be ineligible for the affirmative defense.

Defendants' alternative claim, that holding a sentencing hearing

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[26] That defendant Butier cites to his involvement in regulatory filings with the State of California does not aide his case as the evidence shows that such filings were done to mislead the State and to provide the veneer of legitimacy behind which defendant Butier and his associates engaged in the for-profit distribution of marijuana. Furthermore, even if is true that presentation of such facts could meet the low threshold necessary to have the affirmative defense presented to a California State court jury, the defense would be easily rebutted by the overwhelming evidence of illegal for-profit distribution at the sham dispensaries run by defendant Butier and his associates(and the equally overwhelming evidence of the additional illegal conduct engaged in to both conceal the for-profit nature of the sham dispensaries and to maintain their operability). Finally, defendant ignores that similarly situated individuals with equally unfounded defenses regularly recognize the weakness of the defense and knowingly and voluntarily waive the defense and plead guilty to receive a sentencing benefit. This is the more accurate reflection of where defendant now stands.

for defendants who have knowingly and intelligently pled guilty to having violated Title 21 would have a chilling effect on California's ability to implement its laws authorizing medical marijuana is equally meritless. As noted above, defendants worked at dispensaries that violated not just Federal law, but State law as well. Moreover, defendants have not cited to any evidence indicating that the State of California has, in any way, altered the manner by which it implements its laws authorizing medical marijuana or enforcing violation of these laws based on the CSA or the manner in which the USAO enforces the CSA. Similarly, the proliferation of dispensaries throughout Los Angeles and Orange Counties belies defendants' claim of a chilling effect. Rather than having a chilling effect, the sentencing of the defendants in this case will reaffirm both the importance of the rule of law and reassure the public that criminals who attempt to shield their illegal conduct behind a veneer of legitimacy will be held accountable when their wrongdoing is brought to light.

B. POSITION RE: ORDER TO SHOW CAUSE

Through its January 23, 2105 Order to Show Cause, this Court instructed the parties to address whether it has the power to sentence defendants without the presence or input of the government should it conclude that Section 538 bars any further participation of the government in the sentencings of defendants Butier, Watson, and M. Nixon, and Scandalios, or the supervised release hearing for

defendant A. Nixon.[27] This Court further ordered the parties to address whether the Court had discretion not to proceed with these matters.

For all the reasons stated above, the government firmly believes that this scenario will not be realized. Nevertheless, under the premise set forth by the Court, the government respectfully submits that the Court technically could, but should not, proceed with defendants' sentencings at this time; instead, the Court should schedule the sentencings for a date after September 30, 2015, when Section 538 will expire.

As a preliminary matter, only Department attorneys may conduct Federal criminal litigation on behalf of the Executive Branch. Article II, Section 3 of the Constitution "imposes on the President the duty to 'take Care that the laws be faithfully executed.'" United States v. Valenzuela-Bernal, 458 U.S. 858, 863 (1982). The Take Care Clause places in the Executive Branch "the exclusive authority and absolute discretion whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974). *See also* Batchelder, 442 U.S. at 124 ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest with the prosecutor's discretion."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (same). Congress, in turn, has directed that,

[27] While Section 538 does not properly extend to these proceedings, had it done so, the continued expenditure of Department funds to advance these proceedings during the appropriations period would violate the Anti-Defeciency Act.

"[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General."[28] 28 U.S.C. § 516. Thus, this Court would not be permitted to substitute another party for the government at the sentencings in these proceedings.

Moreover, while courts have recognized that a defendant can be sentenced with the government remaining silent on all issues related to the sentencing, United States v. Mondragon, 288 F.3d 978, 979-80 (9th Cir. 2000), the Department's direct participation is instrumental to sentencing proceedings. The Department represents the interests of the United States at sentencing, and advocates for a just punishment that takes into account the need to protect the public and to deter future wrongdoing.[29] See Rule 32(4)(A)(iii)

[28] Although Congress has given a few specialized agencies limited authority to litigate civil matters within their sphere, it has not done so with respect to criminal law. See, e.g., 15 U.S.C. § 78u (Securities and Exchange Commission); 15 U.S.C. § 717t-1 (Federal Energy Regulatory Commission); 29 U.S.C. § 1132 (Department of Labor); 52 U.S.C. § 30106(b)(1) (Federal Election Commission). This is true even when non-DOJ attorneys appear as "special attorneys" "to assist in prosecuting Federal offenses." In such instances, the non-DOJ attorneys are there only "to assist United States attorneys"; they do not supplant them. See 28 U.S.C. § 543. See also The Confiscation Cases, 74 U.S. 454, 458-459 (1869) ("public prosecutions" and civil suits "for the benefit of the United States" are "subject to the direction, and within the control of, Attorney-General").

[29] Unlike the select defendants who voluntarily have removed themselves from sentencing proceedings and been sentenced in absentia, the government's absence would not be of its own doing.

(footnote cont'd on next page)

(before imposing sentence, court must "provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney"). The Department also has a right to object to findings and conclusions in the presentence report, has the ability to move to dismiss Section 851 informations, and in the case of cooperating defendants, is the sole entity that can request downward variances under USSG § 5K1.1 and move for the setting aside of mandatory minimum penalties under 18 U.S.C. § 3553(e).[30] See, e.g., Fed. R. Crim. P. 32(i) (court must "give to the defendant and an attorney for the government a written summary of * * * any information excluded from the presentence report * * * and give them a reasonable opportunity to comment on that information"). Moreover, if the government is dissatisfied with the sentence, it is only through its presence at the hearing that it will be able to preserve its claims in a manner that would allow it to seek vindication of its interests on appeal.[31]

Sentencing in the government's absence -- particularly when that absence is compelled by another branch of government -- raises a host of constitutional questions that need not be addressed given that: (1) Section 538 does not extend to these proceedings; and (2) there are alternative, less constitutionally problematic ways for addressing this issue.

[30] [redacted]

[31] The government also has strong participatory interests on

(footnote cont'd on next page)

Should the government be precluded from participating in the pending sentencings of defendants Butier, M. Nixon, Scandalios, and Watson, those proceedings should not proceed at this time. The government has not yet filed its sentencing position as to any of the parties [redacted] Moreover, the government's exclusion from this hearing would deprive it of the opportunity to respond to each defendant's arguments at the hearing, to answer any questions that the Court may have, to argue for what it believes is the most just sentence in this case, and to preserve its rights and arguments for any appeals and/or collateral attacks. As Section 538 expires along with the appropriations bill on September 30, 2015, the Court could stay the proceedings until that time, at which point the government

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direct appeal, or later on a collateral attack. The government has an interest in advocating for a particular legal position, and in identifying the appropriate facts from the record that best support its position. Even where the government elects to concede error and aligns itself with the defendant, it has a right to present that view to the court. The government does not lose its stake in the proceeding by conceding error. If the appeal proceeds without the government, there will be no opportunity to reassess prosecutorial policies, or to ask a court to vacate a conviction and dismiss an indictment where the Department determines in retrospect that a particular prosecution should not have been brought. See Rinaldi v. United States, 434 U.S. 22 (1977) (court of appeals abused its discretion in denying government's motion to vacate conviction and dismiss indictment as violative of DOJ's successive-prosecution policy); Fed. R. Crim. P. 48(a) (government may dismiss an indictment "with leave of court").

could resume its rightful place as a participant in the proceedings.[32]

As to defendant A. Nixon's probation revocation hearing, this Court could proceed prior to September 30, 2015. It is not uncommon in this district for Courts to engage in such proceedings without government involvement and without holding a hearing pursuant to Federal Rule Criminal Procedure 32.1. This is particularly true when the Probation Office issues a no-action letter or otherwise recommends that the defendant be reinstated on the same terms and conditions as previously imposed. See, e.g., USSG §§ 7B1.2-3 (noting that isolated grade C violations need not be reported and that the Court can reinstate probation under the same conditions for Grade C violations). [redacted], this Court could opt to resolve the matter and return to the status quo without a hearing and without government involvement. Should the Court, however, conclude that a hearing is either warranted or required (and assuming the government is barred from participating pursuant to Section 538), the government would again request that the matter be continued to a date after September 30, 2015, so that the government can participate in the proceeding. United States v. Reyes-Solosa, 761 F3.d 972, 977 (9th Cir. 2014) (citing United States v. Santana, 526 F.3d 1257, 1260-61 (9th Cir. 2008) for the proposition that the lower courts "generally have

[32] This, of course, presumes that future appropriations bills will not contain similar riders. Should the 2016 appropriations bill contain a similar rider, the issue of how to proceed could be promptly addressed at that time.

agreed that post accusation delay" will trigger Speedy Trial analysis when it approaches a year.)

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Case Name: USA v. Charles Lynch
Case Number: 10-50219
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Docket Text:
Filed (ECF) Appellant Charles C. Lynch in 10-50219, Appellee Charles C. Lynch in 10-50264 Correspondence: SUPPLMENTAL EXHIBIT TO MOTION TO ENFORCE SECTION 538 AND OPPOSITION TOGOVERNMENT'S MOTION TO DELAY. Date of service: 04/10/2015 [9492109] [10-50219, 10-50264] (AWY)

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