No. 15-30098

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERAD JOHN KYNASTON, SAMUEL MICHAEL DOYLE, BRICE CHRISTIAN DAVIS, JAYDE DILLON EVANS, and TYLER SCOTT McKINLEY

Defendant-Appellants.

On Appeal From The United States District Court
For the Eastern District of Washington

BRIEF OF FEDERAL PUBLIC DEFENDER FOR THE CENTRAL DISTRICT OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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I. STATEMENT OF CONSENT

Robert R. Fischer on behalf of the Appellants and Russell Smoot and Doug Wilson on behalf of the Appellees have consented to the filing of this brief.

II. STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party, party's counsel, or person, other than *Amicus Curaie* or its counsel, contributed money to fund the preparing or submission of this brief.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29-2, the Federal Public Defender for the Central District of California ("FPD") submits this *amicus curiae* brief in support of Appellants' petition for panel rehearing and suggestion for rehearing en banc. The FPD represents indigent defendants in federal court in the Central District of California pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A.

The FPD has amassed significant experience related to the legal issues presented in Appellants' petition for rehearing. Indeed, the FPD was the first to raise these issues in the Ninth Circuit. This Court's interpretation of Section 542 of the Consolidated Appropriations Act will affect a number of C.D. Cal. defendants, including several represented by the FPD. As the institutional defender for the district, and counsel for defendants currently challenging their federal prosecutions

under Section 542, the FPD has a unique interest in, and a well-developed perspective on, the issues presented in this case.

IV. INTRODUCTION

In a rare bipartisan move, Congress directed the Department of Justice ("DOJ") to cease spending funds on medical marijuana prosecutions. *See* Consolidated Appropriations Act, 2016, Pub L. No. 114-113 § 542, 129 Stat. 2242, 2332-33 (2015) ("Section 542" or "appropriations rider"). The Panel's decision in this case recognizes Section 542's application in criminal cases, but limits its reach to defendants who "strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." Slip op. at 32. To evaluate "strict compliance," district courts must hold lengthy evidentiary hearings, at which federal prosecutors will expend unauthorized funds, and federal judges will be asked to interpret "a wide variety of" ambiguous and conflicting state laws that are constantly "in flux." *Id.* at 29. In the end, few, if any, defendants will satisfy the panel's impossibly stringent test.

Because this case raises questions of exceptional, national importance, and because the Panel's resolution of these questions effectively guts Section 542, this Court should grant Appellants' petition for panel rehearing and suggestion for rehearing en banc.

V. ARGUMENT

A. The Panel's Decision To Require "Strict Compliance" with All State Laws Ignores the Plain Language and Legislative History of Section 542

Section 542 prohibits DOJ from expending funds in 43 U.S. states and territories "'to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.'" Slip op. at 11-12 (quoting Section 542).

The Panel's opinion requires "strict compliance" with all state medical marijuana laws before a defendant may invoke Section 542. Slip op. at 32. According to the Panel, when individuals are not strictly compliant with every aspect of state medical marijuana law, States are not prevented from implementing their own laws.

That view ignores the practical reality that state medical marijuana laws, at least in California, are ambiguous, contradictory, and ever-changing—as discussed more fully below. State law enforcement, judges, and juries are tasked with sorting through this thicket, to determine whether individual California citizens are authorized by state law to use, distribute, possess, or cultivate medical marijuana. When a defendant has a colorable claim that his conduct is legal under state law, a federal prosecution interferes with this process and prevents the State's implementation of its own medical marijuana laws.

For example, in the Central District of California, there are several cases where the State of California elected not to bring charges, but the DOJ nonetheless decided to prosecute. *See, e.g.*, *United States v. Charles Lynch*, CR No. 07-689-GW (C.D. Cal.); *United States v. Aaron Sandusky*, CR No. 12-548-PA (C.D. Cal.); *United States v. Nicholas Martin Butier et al.*, CR No. 12-240-JVS (C.D. Cal.). In each case, state officials were not entrusted to decide whether California citizens operated California medical marijuana dispensaries in compliance with California law, preventing California from implementing its own laws. State legislators, including the principal coauthor of California's governing medical marijuana statute, have represented to this Court that their State is prevented from implementing its medical marijuana laws in precisely these kinds of cases. *See* Brief of Senator Mark Leno (SD-11), Senator Mike McGuire (SD-02), and Former Senator Darrell Steinberg as *Amici Curiae* in *United States v. Charles C. Lynch*, CA Nos. 10-50219 and 10-50264, Dkt. No. 107.

The Panel's holding, which delegates to federal judges the job of adjudicating strict compliance with evolving state laws, thus "prevent[s]" States "from implementing their own" medical marijuana laws, in violation of the plain language of Section 542.

Moreover, the legislative history of Section 542, wholly ignored by the Panel despite its acknowledgment that "the rider is not a model of clarity," shows that Congress intended a broad construction of the term "prevent." Slip op. at 24.

In debate, the lead sponsors of the predecessor to Section 542 explained it was designed to prevent DOJ from prosecuting medical marijuana patients, doctors, and business owners entirely. *See* 160 Cong. Rec. H4968, at H4982-85 (daily ed. May 29, 2014). Lead sponsor Representative Farr described the amendment as "say[ing], Federal Government, in those States [that have legalized medical marijuana], in those places, you can't bust people." *Id*. at 4984 (Statement of Rep. Farr). Lead sponsor Representative Rohrabacher urged passage because, "[f]or those of us who routinely talk about the [Tenth] Amendment, which we do in conservative ranks, and respect for State laws, this argument should be a no-brainer." *Id*. at 4983 (Statement of Rep. Rohrabacher). Cosponsors expressed similar sentiments. *See, e.g.*, *id.* at 4984 (Statement of Rep. 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."); *id.* (Statement of Rep. Broun) ("This is a states' rights, Tenth Amendment issue. We need to reserve the states' powers under the Constitution."); *id.* (Statement of Rep. Blumenauer) ("Let this process work going forward where we can have respect for states' rights."); *id.* ("This amendment is important to get the Federal Government out of the way.").

Post-enactment statements by the lead sponsors confirm the Panel's narrow construction misinterprets their legislation.[1] In a letter to then-Attorney General Holder, Representatives Rohrabacher and Farr explained, "the purpose of our amendment was to prevent the Department from wasting its limited law enforcement resources on prosecutions . . . against medical marijuana patients and providers," and "to the extent that there may be questions about whether the facts of . . . any . . . specific case constitute violations of state law, . . . state law enforcement agencies are best-suited to investigate and determine free from federal interference." Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to Eric Holder, Attorney General (Apr. 8, 2015), *available at* http://farr.house.gov/images/pdf/RohrabacherFarrDOJletter.pdf. *See also* Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as *Amici Curiae* in *United States v. Charles C. Lynch*, CA Nos. 10-50219 and 10-50264, Dkt. No. 103.

In sum, it is up to the States, not the federal government, to determine the level of compliance necessary to be "authorized" under State law. The Panel's adoption of an overly narrow interpretation of Section 542 discounts the plain language and legislative history of the rider.

[1] "Although postenactment developments cannot be accorded the weight of contemporary legislative history, [this Court] would be remiss if [it] ignored these authoritative expressions concerning the scope and purpose of [the law]." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (internal quotation marks omitted).

B. The Panel's Decision To Require "Strict Compliance" with All State Laws Is Unworkable and Unduly Burdensome

California medical marijuana law is a Gordian Knot. It is made up, as the Panel properly recognized, of a jumble of legislation, judicial precedents, customs, and other guidelines that are constantly "in flux." Slip op. at 28-29. The California legislature recently passed comprehensive medical marijuana reform slated to be implemented in 2018, and there is a California voter initiative to legalize recreational marijuana on the November 2016 ballot. These reforms are a response to the abysmal state of current medical marijuana law, which has been ambiguous in the twenty years since its inception.

In a 2011 letter from the California Attorney General, Kamala D. Harris, to the state legislature, Ms. Harris highlighted a number of confusing and contradictory state medical marijuana rules that required clarification. *See* Letter from Kamala D. Harris, Att'y Gen. of Cal., to Darrell Steinberg, Senate President Pro-Tempore, and John A. Perez, Speaker of the Assembly (Dec. 21, 2011), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-sends-letters-regarding-medical-marijuana-law. As Ms. Harris explained, some of the key ambiguities concerned the contours of the right to collective and cooperative cultivation, dispensaries, non-profit operation, and edible medical marijuana products. *See id.* at 2-3. "Without a substantive change to existing law, these irreconcilable interpretations of the law, and the resulting uncertainty for law

enforcement and seriously ill patients, will persist." *Id.* at 2. Ms. Harris urged that the "law itself needs to be reformed, simplified, and improved to better explain to law enforcement and patients alike how, when, and where individuals may cultivate and obtain physician-recommended marijuana." *Id.* at 1.

Yet in the five years since Ms. Harris's letter, major uncertainties in California medical marijuana law remain. Take, for example, the amount of marijuana authorized to be possessed under state law. California "plainly allow[s] qualified patients, valid identification cardholders, and their primary caregivers to pool their efforts and resources to cultivate marijuana for the qualified patients and holders of valid identification cards, in amounts necessary to meet the reasonable medical needs of the qualified patients and cardholders . . . ." *People v. London*, 228 Cal. App. 4th 544, 554 (Cal. App. 4th Dist. 2014). But what constitutes an amount necessary to meet reasonable medical needs? There is no hard and fast test. Rather, this is a question for a jury to decide, after hearing expert testimony on the matter. *See People v. Wright*, 40 Cal. 4th 81, 97 (2006).

Or consider the issue of how much remuneration a collective may recoup before running afoul of the State's for-profit ban. Again, there is no clear answer. Jurors must grapple with the facts of the specific case at hand—Did the collective incorporate as a non-profit? What were the overhead costs? What was reasonable compensation for the employees' work?—none of them alone determinative, to

decide whether a collective qualifies as a not-for-profit. *See People v. Jackson*, 210 Cal. App. 4th 525, 538-39 (Cal. App. 4th Dist. 2012); *People v. Solis*, 217 Cal. App. 4th 51, 58-61 (Cal. App. 2d Dist. 2013); *London*, 228 Cal. App. 4th at 554; *People v. Baniani*, 229 Cal. App. 4th 45, 60 (Cal. App. 4th Dist. 2014); *People v. Orlosky*, 233 Cal. App. 4th 257, 271 (Cal. App. 4th Dist. 2015).

In other words, there are major unresolved issues specifically left to California juries to decide in individual cases. Because of these open questions, it is nearly impossible for California citizens to "strictly comply" with State medical marijuana laws. Even the supposedly authoritative 2008 State Attorney General guidelines are mere "persuasive" authority on the legality of an individual's conduct; they are not "bind[ing]." *People v. Hochanadel*, 176 Cal. App. 4th 997, 1011, 1018 (Ct. App. 4th Dist. 2009). The best anyone can do is make a good faith attempt to comply with the State's complex, ever-changing statutes, common law, and guidelines.

The Panel's decision thus means, as a practical matter, that few, if any, federal defendants in California are likely to meet the "strict compliance" standard. Section 542 was not intended to have such limited effect.

C. The Evidentiary Hearings Envisioned by the Panel Will Require Significant DOJ Expenditures in Violation of Section 542 and the Anti-Deficiency Act

The Panel's decision also puts federal judges in the unenviable position of stepping into the shoes of state judges to decide myriad issues of state law in the first instance, and of state jurors to decide thorny factual disputes—requiring precisely the expenditure of federal resources Congress intended to halt.

Due to the ambiguities in state law, *McIntosh* hearings in district court, at least in California, will mirror state court trials where the federal government fulfills the role of state district attorney and the federal judge acts as state court jury. These trial-hearings will require the DOJ to expend extraordinary resources in contravention of Section 542 and the Anti-Deficiency Act.

The Anti-Deficiency Act—nowhere mentioned by the Panel in its decision—states that "[a]n officer or employee of the United States Government . . . may not," among other things, "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A); *see id.* § 1517(a). Any unauthorized expenditure of funds, no matter how insignificant, violates the Anti-Deficiency Act, and violation of the Act is serious: it is a criminal offense with possible penalties of two years in prison and a $5,000 fine. *See id.* §§ 1350, 1519. It must be reported immediately to both the President and Congress. *See id*. § 1517(b).

As the Panel explained, "if DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the [Constitution's] Appropriations Clause." Slip. op. 23. But the Panel failed to recognize its proposed remedy of evidentiary hearings on state-law compliance, with their concomitant factual and legal disputes, encourages—indeed, *requires*—federal prosecutors to expend unauthorized funds and thus commit criminal acts.

Only by enjoining federal prosecutions where a defendant makes out a colorable claim that his conduct is legal under state law, will this Court give proper effect to Section 542 and avoid violations of the Anti-Deficiency Act.

VI. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Federal Public Defender for the Central District of California urges this Court to grant rehearing in this case.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: October 24, 2016

By */s/ Jesse Gessin*
JESSE GESSIN
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 29-2(c)(2), the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,916 words.

DATED: October 24, 2016

By */s/ Jesse Gessin*
JESSE GESSIN
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I electronically filed the foregoing BRIEF OF FEDERAL PUBLIC DEFENDER FOR THE CENTRAL DISTRICT OF CALIFORNIA AS *AMICUS CURAIE* IN SUPPORT OF PETITION FOR REHEARING 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.

/s/ Antonia Alcaraz
ANTONIA ALCARAZ