

1 HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
2 ALEXANDRA W. YATES (Bar No. 250442)
JOHN LITTRELL (Bar No. 221601)
3 (E-Mail: Alexandra_Yates@fd.org)
Deputy Federal Public Defenders
4 321 East 2nd Street
Los Angeles, California 90012-4202
5 Telephone: (213) 894-5059
Facsimile: (213) 894-0081

6 Attorneys for Defendant
7 CHARLES C. LYNCH

8
9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 CHARLES C. LYNCH,

17 Defendant.

Case No. 07-689-GW

**NOTICE OF MOTION AND
MOTION FOR WRITTEN
INDICATION THAT THE COURT
WOULD GRANT OR ENTERTAIN A
MOTION FOR *MCINTOSH* RELIEF;
MEMORANDUM OF POINTS AND
AUTHORITIES**

18
19
20 TO THE HONORABLE GEORGE H. WU, UNITED STATES DISTRICT
21 JUDGE, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:
22

23 PLEASE TAKE NOTICE that on January 9, 2017, at 8:00 a.m., or as soon
24 thereafter as the matter may be heard, Defendant Charles C. Lynch will and hereby
25 does move the Court for a written indication that it would grant or entertain this motion
26 for injunctive relief, dismissal, or a hearing pursuant to *United States v. McIntosh*, 833
27 F.3d 1163 (9th Cir. 2016), and Federal Rule of Appellate Procedure 12.1.
28

TABLE OF CONTENTS

		Page
1	I. INTRODUCTION	1
2	II. BACKGROUND	2
3	A. Mr. Lynch Operated a Medical Marijuana Dispensary in California	2
4	B. The Government Charged and Tried Mr. Lynch for Violations of	
5	Federal Drug Laws	2
6	C. The Parties Cross-Appealed Mr. Lynch’s Conviction and Sentence.....	3
7	D. Congress Enacted Legislation That Prohibits the Department of Justice	
8	from Using Funds To Prevent States from Implementing Their	
9	Medical Marijuana Laws.....	3
10	E. Mr. Lynch Moved in the Ninth Circuit To Enforce the Rider in His	
11	Case, but the Court Tabled Consideration of His Arguments	4
12	F. The Ninth Circuit Subsequently Held That the Rider Prevents the DOJ	
13	from Spending Funds Prosecuting Individuals Who Engaged in	
14	Conduct Authorized by State Medical Marijuana Laws.....	4
15	III. JURISDICTION	5
16	IV. ARGUMENT.....	6
17	A. Based on the Existing Record, this Court Can and Should Find That	
18	Section 542 Applies to Mr. Lynch’s Case	6
19	1. This Court Already Has Found Mr. Lynch Complied with State	
20	Law	6
21	2. The Authors of the Rider and the Principal Coauthor of the	
22	MMPA Support Enforcing the Rider in Mr. Lynch’s Case.....	13
23	B. The Appropriate Remedy Is for the Court To Issue an Injunction and	
24	Order the Case Dismissed	14
25	1. Under <i>McIntosh</i> , this Court Should Enjoin the Department of	
26	Justice from Spending Funds on Mr. Lynch’s Case.....	14
27	2. The Court Also Should Issue an Order Dismissing Mr. Lynch’s	
28	Case.....	15
	C. At a Minimum, the Court Should Order a <i>McIntosh</i> Hearing on Mr.	
	Lynch’s Compliance with State Law	16
	V. CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Crateo, Inc. v. Intermark, Inc.,
536 F.2d 862 (9th Cir. 1976) 5

Hensley v. Municipal Ct.,
411 U.S. 345 (1973)..... 15

United States v. McIntosh,
833 F.3d 1163 (9th Cir. 2016) *passim*

United States v. Morgan,
346 U.S. 502 (1954)..... 16

United States v. Ramirez,
710 F.2d 535 (9th Cir. 1983) 15

Federal Statutes, Rules, and Acts

18 U.S.C. § 2 2

21 U.S.C. § 841 2

21 U.S.C. § 846 2

21 U.S.C. § 856 2

21 U.S.C. § 859 2

28 U.S.C. § 1651 16

28 U.S.C. § 2255 15

31 U.S.C. § 1341 16

31 U.S.C. § 1350 16

31 U.S.C. § 1517 16

31 U.S.C. § 1519 16

Fed. R. App. P. 4 5

Fed. R. App. P. 12.1 5

TABLE OF AUTHORITIES

Page(s)

Federal Statutes, Rules, and Acts

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) 3

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015)..... 4

Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Pub. L. No. 114-223, 130 Stat. 857 (2016) 3

Further and Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-____, ____ Stat. ____ (2016), 2015 CONG US HR 2028 (Westlaw)..... 3

State Cases

People v. Anderson, 232 Cal. App. 4th 1259 (2015) 12

People v. Colvin, 203 Cal. App. 4th 1029 (2012) 12

People v. Hochanadel, 176 Cal. App. 4th 997 (2009) 13

People v. London, 228 Cal. App. 4th 544 (2014) 12

People v. Mentch, 45 Cal. 4th 274 (2008) 12

People v. Urziceanu, 132 Cal. App. 4th 747 (2005) 12, 13

State Statutes

Cal. Health & Safety Code § 11362.5 7, 12

Cal. Health & Safety Code § 11362.775 12

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In 2008, this Court presided over a trial at which the jury convicted Defendant
4 Charles C. Lynch of federal marijuana charges. The parties’ cross-appeals of the
5 conviction and sentence remain pending in the Ninth Circuit.

6 At sentencing, the Court explained that Mr. Lynch, who operated a medical
7 marijuana dispensary under California law, was “caught in the middle” between State
8 decriminalization of medical marijuana and federal enforcement of the Controlled
9 Substances Act. Dkt. 327 (Sentencing Memorandum) at 41.¹ The Court suggested
10 justice might be better served if the federal government took steps to eliminate this
11 tension. *See id.* at 40-41.

12 In December 2014, Congress attempted to do just that by enacting an
13 appropriations rider that prohibits the Department of Justice (“DOJ”) from spending
14 funds that interfere with States’ medical marijuana laws. The rider has been included in
15 each subsequent spending bill, including the most recent act funding the government
16 through April 28, 2017.

17 In August 2016, the Ninth Circuit held that the rider prevents DOJ expenditures
18 on any federal marijuana prosecution where the defendant’s conduct was authorized by
19 State medical marijuana laws. The appeals court directed defendants covered by the
20 rider to move in district court for, at a minimum, orders enjoining the DOJ from
21 spending funds on their cases. The court strongly suggested that district courts could
22 order further relief, including dismissal, where appropriate.

23 Because this Court already has determined that Mr. Lynch’s conduct was
24 authorized by California law, he seeks an injunction and dismissal of his case.

25
26
27

¹ All citations are to the ECF docket heading pagination, not the internal
28 pagination of the documents themselves.

1 **II. BACKGROUND**

2 **A. Mr. Lynch Operated a Medical Marijuana Dispensary in California**

3 From approximately April 2006 through March 2007, Mr. Lynch operated the
4 Central Coast Compassionate Caregivers (“CCCC”) medical marijuana dispensary in
5 Morro Bay, California. As this Court has explained, “the purpose of the CCCC’s
6 distribution of marijuana was not for recipients to ‘get high’ or for recreational
7 enjoyment. Rather, it was pursuant to the CUA’s [Compassionate Use Act] goal of
8 providing marijuana to Californians for medical uses as prescribed by their treating
9 physicians.” *Id.* at 33. Mr. Lynch operated the CCCC “under the guidelines set forth by
10 the State of California,” in order “to provide marijuana to those who, under California
11 law, were qualified to receive it for medical reasons.” *Id.* at 12 (alterations and internal
12 quotation marks omitted).

13 **B. The Government Charged and Tried Mr. Lynch for Violations of**
14 **Federal Drug Laws**

15 In March 2007, the Drug Enforcement Agency raided the CCCC and Mr.
16 Lynch’s home, pursuant to a federal search warrant. On July 13, 2007, the federal
17 government filed an indictment charging Mr. Lynch with conspiracy to manufacture,
18 possess with intent to distribute, and distribute marijuana; distribution of marijuana to a
19 person under the age of twenty-one; possession with intent to distribute marijuana; and
20 maintaining a drug-involved premises, in violation of 21 U.S.C. §§ 841, 846, 856, and
21 859, as well as 18 U.S.C. § 2 (aiding and abetting or causing an act to be done). Federal
22 authorities arrested Mr. Lynch. Two days later, a magistrate judge ordered him released
23 on bond. Mr. Lynch has been under the supervision of U.S. Probation and Pretrial
24 Services ever since.

25 Following a ten-day trial, at which the jury was instructed that California medical
26 marijuana laws were irrelevant to the case, a jury found Mr. Lynch guilty of all five
27 federal drug counts. The Court sentenced Mr. Lynch to one year and one day in prison,
28 followed by four years of supervised release.

1 **C. The Parties Cross-Appealed Mr. Lynch’s Conviction and Sentence**

2 Mr. Lynch appealed his conviction and sentence, and the government cross-
3 appealed the sentence, seeking a five-year prison term. Mr. Lynch filed the First Cross-
4 Appeal Brief in July 2012. Two groups of amici curiae filed briefs in support of Mr.
5 Lynch. The government filed the Second Cross-Appeal Brief in April 2014.²

6 **D. Congress Enacted Legislation That Prohibits the Department of Justice**
7 **from Using Funds To Prevent States from Implementing Their Medical**
8 **Marijuana Laws**

9 In December 2014, Congress enacted and the President signed into law a 2015
10 appropriations bill; it contained a rider prohibiting the DOJ from spending funds to
11 prevent States from implementing their medical marijuana laws. Consolidated and
12 Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat.
13 2130, 2217 (2014). Congress has included the rider in every subsequent appropriations
14 bill and short-term extension. *See United States v. McIntosh*, 833 F.3d 1163, 1169-70
15 (9th Cir. 2016); Continuing Appropriations and Military Construction, Veterans
16 Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and
17 Preparedness Act, Pub. L. No. 114-223, Div. C, § 101(a)(2), 130 Stat. 857, 908 (2016).
18 The rider currently governs the DOJ’s expenditure of funds through April 28, 2017. *See*
19 *Further and Continuing and Security Assistance Appropriations Act, 2017*, Pub. L. No.
20 114-___, Div. A, § 101, ___ Stat. ___, ___ (2016), 2015 CONG US HR 2028
21 (Westlaw).

22 Colloquially known as “Section 542” or the “Rohrabacher-Farr Amendment,”
23 after its coauthors, the rider in its current form states:

24 None of the funds made available in this Act to the
25 Department of Justice may be used, with respect to any of the
26

27 ² Mr. Lynch’s Third Cross-Appeal Brief is due on February 13, 2017. The
28 government’s optional reply brief is due seventeen days later.

1 States of Alabama, Alaska, Arizona, California, Colorado,
2 Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois,
3 Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts,
4 Michigan, Minnesota, Mississippi, Missouri, Montana,
5 Nevada, New Hampshire, New Jersey, New Mexico, New
6 York, North Carolina, Oklahoma, Oregon, Rhode Island,
7 South Carolina, Tennessee, Texas, Utah, Vermont, Virginia,
8 Washington, Wisconsin, and Wyoming, or with respect to the
9 District of Columbia, Guam, or Puerto Rico, to prevent any of
10 them from implementing their own laws that authorize the
11 use, distribution, possession, or cultivation of medical
12 marijuana.

13 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242,
14 2332-33 (2015).

15 **E. Mr. Lynch Moved in the Ninth Circuit To Enforce the Rider in His**
16 **Case, but the Court Tabled Consideration of His Arguments**

17 In February 2015, Mr. Lynch moved in the Ninth Circuit to enjoin the DOJ from
18 spending funds on his case, in violation of the rider. A motions panel denied relief in a
19 brief order, without deciding the merits and without prejudice to Mr. Lynch renewing
20 the request in his Third Cross-Appeal Brief or in Rule 12.1 proceedings in district
21 court. Ex. A (Order). Mr. Lynch sought en banc review of the motions panel's decision,
22 and two new amici curiae, including the authors and lead sponsors of the rider, filed
23 briefs in support. The Ninth Circuit denied review in June 2015.

24 **F. The Ninth Circuit Subsequently Held That the Rider Prevents the DOJ**
25 **from Spending Funds Prosecuting Individuals Who Engaged in**
26 **Conduct Authorized by State Medical Marijuana Laws**

27 In August 2016, the Ninth Circuit issued a published decision, *United States*
28 *v. McIntosh*, holding that “§ 542 prohibits DOJ from spending money on actions

1 that prevent Medical Marijuana States’ giving practical effect to their state laws
2 that authorize the use, distribution, possession, or cultivation of medical
3 marijuana,” including “prosecuting individuals for use, distribution, possession,
4 or cultivation of medical marijuana that is authorized by such laws.” *McIntosh*,
5 833 F.3d at 1176. “[A]t a minimum,” the court wrote, “§ 542 prohibits DOJ from
6 spending funds from relevant appropriations acts for the prosecution of
7 individuals who engaged in conduct permitted by the State Medical Marijuana
8 Laws and who fully complied with such laws.” *Id.* at 1177.

9 *McIntosh* specifically delegated to district courts the authority for
10 determining whether a defendant’s “conduct was completely authorized by state
11 law,” i.e., whether the defendant “strictly complied with all relevant conditions
12 imposed by state law on the use, distribution, possession, and cultivation of
13 medical marijuana.” *Id.* at 1179. The Ninth Circuit left it “to the district courts to
14 determine, in the first instance and in each case, the precise remedy that would be
15 appropriate,” *id.*, but made clear that an injunction prohibiting the DOJ from
16 spending funds on the case was one possibility, *see id.* at 1172-73.

17 **III. JURISDICTION**

18 Notwithstanding the fact that jurisdiction over Mr. Lynch’s case has been
19 transferred to the Ninth Circuit, this Court has the authority to issue an indicative ruling
20 “stat[ing] that it would grant th[is] motion or that the motion raises a substantial issue,”
21 which would allow the Court of Appeals to “remand for further proceedings” on the
22 motion, but retain jurisdiction over the appeal. Fed. R. App. P. 12.1(b); *see also Crateo,*
23 *Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), *partially superseded on other*
24 *grounds by Fed. R. App. P. 4.*

1 **IV. ARGUMENT**

2 **A. Based on the Existing Record, this Court Can and Should Find That**
3 **Section 542 Applies to Mr. Lynch’s Case**

4 The existing factual record is sufficiently well developed to support an injunction
5 or dismissal in Mr. Lynch’s case. Indeed, based on the existing record, the authors of
6 Section 542 and the principal coauthor of California’s governing medical marijuana
7 statute all urge relief in this case.

8 **1. This Court Already Has Found Mr. Lynch Complied with State**
9 **Law**

10 After presiding over Mr. Lynch’s trial and receiving exhaustive briefing from
11 both parties at sentencing, this Court made extensive factual findings regarding Mr.
12 Lynch’s strict compliance with state law. Specifically, this Court found as follows:

13 [T]he defendant opened a marijuana dispensary under the
14 guidelines set forth by the State of California. His purpose for
15 opening the dispensary was to provide marijuana to those
16 who, under California law, were qualified to receive it for
17 medical reasons.

18 Dkt. 327 at 12 (alterations and internal quotation marks omitted).

19 [T]he purpose of the CCCC’s distribution of marijuana was
20 not for recipients to “get high” or for recreational enjoyment.
21 Rather, it was pursuant to the CUA’s goal of providing
22 marijuana to Californians for medical uses as prescribed by
23 their treating physicians.

24 *Id.* at 33.

25 Lynch took steps to have CCCC comply with applicable laws
26 such as by obtaining a business license, following federal and
27 state labor statutes, etc. Further, Lynch attempted to regulate
28 the conduct of CCCC’s employees by not hiring felons and

1 requiring workers to sign an Employee Agreement which
2 included promises to abide by CCCC's conduct standards and
3 the "Conditions for Issuance of Business License" issued by
4 the City of Morro Bay. CCCC's customers had to execute a
5 "Membership Agreement" wherein they consented to obey
6 "the laws of the State of California regarding medical
7 cannabis," CCCC's rules barring the use of marijuana at
8 certain locations and during certain activities, etc.

9 *Id.* at 35.

10 Before being allowed to purchase any marijuana
11 product, a customer had to provide both medical authorization
12 from a physician and valid identification. The status of the
13 doctors listed on the medical authorization forms were also
14 checked with the California Medical Board website. CCCC
15 also had a list of physicians who could re-issue expired
16 medical authorization cards. A customer would have to sign a
17 "Membership Agreement Form" wherein the buyer had to
18 agree to the listed conditions which included, *inter alia*: not
19 opening the marijuana container within 1000 feet of the
20 CCCC, using the marijuana for medical purposes only,
21 abiding by the California laws regarding medical marijuana,
22 etc. In addition, the customer had to execute a CCCC
23 "Designation of Primary Caregiver" form wherein the buyer:
24 1) certified that he or she had one or more of the medical
25 conditions which provide a basis for marijuana use under the
26 CUA, and 2) named the CCCC as his or her "designated
27 primary caregiver" in accordance with Cal. H & S Code §
28 11362.5(d) and (e). Evidence presented at trial showed that

1 the CCCC not only sold the marijuana but also advised
2 customers on which varieties to use for their ailments and on
3 how to cultivate any purchased marijuana plants at their
4 homes.

5 *Id.* at 15-16 (citations and footnote omitted).

6 The Court made additional findings on Mr. Lynch’s overall efforts to operate the
7 CCCC in a law-abiding manner:

8 Prior to opening the CCCC in Morro Bay, Lynch took a
9 variety of steps. They included, inter alia: 1) calling an office
10 of the Drug Enforcement Agency (“DEA”) where, according
11 to Lynch, he inquired regarding the legality of medical
12 marijuana dispensaries; 2) hiring a lawyer (Lou Koory) and
13 seeking advice in regards to his operations; 3) applying to the
14 City for a business license to operate a medical marijuana
15 dispensary, which he obtained; and 4) meeting with the City
16 of Morro Bay’s Mayor (Janice Peters), city council members,
17 the City Attorney (Rob Schultz) and the City Planner (Mike
18 Prater). The aforementioned city officials did not raise any
19 objections to Lynch’s plans. However, the City’s Police Chief
20 issued a February 28, 2006 memorandum as to Lynch’s
21 business license application indicating that, while the medical
22 marijuana dispensary might be legal under California law,
23 federal law would still prohibit such an operation and
24 “California law will not protect a person from prosecution
25 under federal law.”

26 The CCCC was not operated as a clandestine business.
27 It was located on the second floor of an office building with
28 signage in the downtown commercial area. An opening

1 ceremony and tour of the facilities were conducted where the
2 attendees included the city's Mayor and members of the city
3 council. Both the Mayor and Lynch separately passed out
4 their business cards to proprietors of commercial
5 establishments within the immediate vicinity of the CCCC
6 who were told that, should they have any concerns or
7 complaints about the CCCC's activities, they should notify
8 either the Mayor or Lynch. No one ever contacted either the
9 Mayor or Lynch to make a complaint.

10 *Id.* at 13-15 (citations and footnotes omitted).

11 Lynch employed approximately ten people to help him
12 run CCCC as security guards, marijuana growers, and sales
13 staff. He worked at the store most days. He ran background
14 checks on prospective employees and did not hire anyone
15 with a felony record or who was an "illegal alien." Employees
16 signed in and out via an electronic clock and Lynch ran
17 payroll through "Intuit Quickbooks." Employees had to
18 execute a "CCCC Employee Agreement" which contained
19 various disclosures and restrictions.

20 Lynch installed a security system which included video
21 recording of sales transactions within the facility. The CCCC
22 kept detailed business records of its purchases and sources of
23 the marijuana. It likewise had extensive records as to its sales,
24 including copies of the customers' medical marijuana
25 authorizations and driver's licenses. No one under 18 was
26 permitted to enter unless accompanied by a parent or legal
27 guardian. Entrance to the CCCC was limited to law
28

1 enforcement/government officials, patients, caregivers and
2 parents/legal guardians.

3 *Id.* at 15 (citations and footnotes omitted).

4 Lynch on his own took steps to reduce/eliminate the criminal
5 aspects and/or potential harmful consequences of CCCC's
6 operation (aside from the essential function of distributing
7 marijuana to authorized recipients for medical reasons). . . .
8 *[B]efore* opening the CCCC, he notified governmental
9 authorities including the City of Morro Bay's mayor and city
10 council plus various local law enforcement entities such as
11 the county sheriffs and (according to Lynch) the DEA.

12 *Id.* at 34-35.

13 [H]is conduct greatly reduced the lawlessness and danger to
14 the public that normally would be associated with violations
15 of 21 U.S.C. § 841(a) and (b)(1)(B)(vii).

16 *Id.* at 37.

17 Lynch displayed his respect for the law herein by notifying
18 governmental authorities and law enforcement entities of his
19 planned activities prior to engaging in them. Were all
20 purported criminals so accommodating, this country would be
21 a much safer and law-abiding place.

22 *Id.* at 38-39.

23 The Court's findings are consistent with those of the U.S. Probation Office,
24 which wrote that Mr. Lynch was "in compliance with California law." Dkt. 314
25 (Recommendation Letter) at 4; *see also id.* ("And so, believing he was operating a legal
26 marijuana dispensary, the defendant carried on with his business."). They also are
27 consistent with the analysis set forth by an amicus curiae to Mr. Lynch's Ninth Circuit
28 case, detailing how and why Mr. Lynch was in strict compliance with State medical

1 marijuana laws. *See* Ex. B (Amicus Curiae Br. of Americans for Safe Access) at 8-17 &
2 nn.1-4. The government did not argue in its Second Cross-Appeal Brief that the amicus
3 curiae’s analysis is incorrect, thereby waiving any such argument.

4 Indeed, the Court’s findings are consistent with the government’s own
5 description on appeal of “the overwhelming, undisputed evidence of defendant’s
6 compliance with the rules of his city and county.” Ex. C (Second Cross-Appeal Br.) at
7 88; *see also id.* at 81 (“Defendant offered ample evidence on the undisputed issue of his
8 compliance with local law.”); *id.* at 84 (referring to “this undisputed and overwhelming
9 evidence on the topic”). As the government recognizes, those rules required Mr. Lynch
10 to “comply with all provisions of the Health and Safety Code”—i.e., State medical
11 marijuana law. Dkt. 244-4 (Conditions for Issuance of Business License) at 4; *see* Ex.
12 C at 82 (conceding “undisputed” evidence, including that Mr. Lynch “[c]omplied with
13 all eight provisions for obtaining Morro Bay’s business license, including . . .
14 complying with the California Health and Safety Code”).

15 And they are consistent with California law enforcement’s refusal to arrest Mr.
16 Lynch for or charge him with any violations of State law, despite a year-long stakeout
17 and undercover infiltration of the CCCC by the San Luis Obispo County Sheriff’s
18 Department. *See* Dkt. 244-6 (Affidavit for Search Warrant) at 47-50, 53, 56-58, 60-67;
19 Dkt. 354 (Transcript of July 30, 2008) at 45-52, 140; *see also* Dkt. 327 at 35 (“The
20 CCCC did business in a prominent location with appropriate signage such that its
21 operations were not clandestine but were, in fact, subject to apparent scrutiny by law
22 enforcement.”).

23 Although some of Mr. Lynch’s employees may have engaged in illicit marijuana
24 sales outside of the CCCC, and Codefendant Tollette wrote sham marijuana
25 prescriptions, this Court made clear factual findings about Mr. Lynch’s lack of
26 knowledge of and culpability for those acts. *See* Dkt. 327 at 34 (“While the
27 Government has cited to certain instances where some of the CCCC’s marijuana may
28 have been obtained by persons through fraudulent medical authorizations or may have

1 been diverted by a few employees to unlawful recipients, there is no evidence . . . that
2 Lynch himself was aware of and/or participated in that misfeasance.”); *see also id.* at
3 16 n.13, 17-19 & nn.15-16, 39 (making similar findings).

4 And although the government presented evidence that the “CCCC had sales of
5 \$2.1 million,” *id.* at 17, there was no evidence the CCCC violated State rules
6 prohibiting for-profit marijuana dispensaries, once “reimbursement for marijuana and
7 the services provided in conjunction with the provision of that marijuana,” *People v.*
8 *Urziceanu*, 132 Cal. App. 4th 747, 785 (2005), including reasonable expenses and
9 salaries, are accounted for. *See generally* Dkt. 327 at 17 & n.14. To the contrary, the
10 CCCC “ran a discount program for patients who did not have a lot of money,” Dkt.
11 246-2 (Decls. in Support of Charles Lynch’s Pos’n Re: Applicability of the Mandatory
12 Minimum Sentence) at 8, and Mr. Lynch never recouped his initial investment in the
13 dispensary, *see id.* at 6-7.

14 Mr. Lynch recognizes that this Court stated, in a footnote to its Sentencing
15 Memorandum, that “the CCCC was not operated in conformity with California state
16 law because, as held by the California Supreme Court in [*People v. Mentch*, 45 Cal. 4th
17 274, 283-87 (2008)], medical marijuana distribution operations (such as the CCCC)
18 cannot show that they fall within the CUA’s or MMPA’s [Medical Marijuana Program
19 Act] definition of a ‘primary caregiver.’” Dkt. 327 at 33-34 n.25. However, as an
20 amicus curiae explained in the Ninth Circuit, the Court “conflate[d] the ‘primary
21 caregiver’ provision of the CUA, Cal. Health & Safety Code § 11362.5(e), which is not
22 at issue here, with the collective/cooperative provision of the MMPA, Cal. Health &
23 Safety Code § 11362.775, which is.” Ex. B at 10 n.1. Retail medical marijuana
24 dispensaries such as the CCCC are legal under the MMPA, and were at the time Mr.
25 Lynch operated the CCCC. *See id.* at 8-17; *see also People v. Anderson*, 232 Cal. App.
26 4th 1259 (2015); *People v. London*, 228 Cal. App. 4th 544 (2014); *People v. Colvin*,

1 203 Cal. App. 4th 1029 (2012); *People v. Hochanadel*, 176 Cal. App. 4th 997 (2009);
 2 *People v. Urziceanu*, 132 Cal. App. 4th 747 (2005).³

3 In sum, this Court already has found that Mr. Lynch’s “conduct was completely
 4 authorized by state law,” i.e., “that [he] strictly complied with all relevant conditions
 5 imposed by state law on the use, distribution, possession, and cultivation of medical
 6 marijuana.” *McIntosh*, 833 F.3d at 1179. This finding entitles him to relief under
 7 Section 542. *See id.* at 1177.

8 **2. The Authors of the Rider and the Principal Coauthor of the**
 9 **MMPA Support Enforcing the Rider in Mr. Lynch’s Case**

10 The authors of Section 542 also have explained that the rider was intended to
 11 apply to cases like this one—and to *Mr. Lynch’s case in particular*. In an amicus brief
 12 in support of Mr. Lynch filed in the Ninth Circuit, U.S. Representatives Dana
 13 Rohrabacher (R-CA) and Sam Farr (D-CA) wrote that the purpose of their amendment
 14 was stopping federal prosecutions “like the one pending . . . against Charles Lynch.”
 15 Ex. D (Br. of Members of Congress Rohrabacher and Farr as Amici in Support of
 16 Charles C. Lynch’s Mot. for Reh’g En Banc) at 8. Referring specifically to Mr. Lynch’s
 17 case, the Congressmen explained that “[p]ermitting the DOJ to spend more federal
 18 funds to prosecute *one of the very cases* Congress intended for the DOJ to *cease*
 19 prosecuting defeats the purpose of the Rohrabacher-Farr Amendment *entirely*.” *Id.* at
 20 11 (second and third alterations in original).

21 In addition, State Senator Mark Leno, the principal coauthor of California’s
 22 MMPA, has expressed his view that Mr. Lynch’s operation of the CCCC complied with
 23 State law, and urged enforcement of Section 542 in this case. *See* Ex. E (Br. of Senator
 24

25
 26 ³ This Court also found that because “the *Mentch* case was decided in November
 27 of 2008, years after Lynch opened the CCCC in 2006 . . . Lynch could have reasonably
 28 believed that the CCCC’s operations complied with California law because it was
 acting in the capacity of a primary caregiver,” Dkt. 327 at 34 n.25.

1 Mark Leno, Senator Mike McGuire, and Former Senator Darrell Steinberg as Amici
2 Curiae in Support of Charles C. Lynch’s Mot. for Reh’g En Banc) at 7-21.

3 While perhaps not dispositive, these statements support Mr. Lynch’s position
4 that the appropriations rider applies to his case.

5 **B. The Appropriate Remedy Is for the Court To Issue an Injunction and**
6 **Order the Case Dismissed**

7 At a minimum, *McIntosh* compels an order enjoining the DOJ from spending
8 funds on any case covered by Section 542. *McIntosh* also expressly endorsed the
9 possibility of an order dismissing such a case. The appropriate remedy in Mr. Lynch’s
10 case is both an injunction and dismissal.

11 **1. Under *McIntosh*, this Court Should Enjoin the Department of**
12 **Justice from Spending Funds on Mr. Lynch’s Case**

13 In *McIntosh*, the Ninth Circuit held that, once a district court finds a federal
14 defendant complied with his State’s medical marijuana laws, the court should enjoin
15 the DOJ from spending funds on the case. *McIntosh*, 833 F.3d at 1171-80 (vacating
16 district court denials of injunctions prohibiting DOJ from spending funds on
17 defendants’ cases and remanding for determinations whether defendants’ conduct was
18 authorized by state law). As the court explained, “at a minimum, § 542 prohibits DOJ
19 from spending funds from relevant appropriations acts for the prosecution of
20 individuals who engaged in conduct permitted by the State Medical Marijuana Laws
21 and who fully complied with such laws.” *Id.* at 1177. The court cited “ancillary
22 jurisdiction, which is the power of a court to adjudicate and determine matters
23 incidental to the exercise of its primary jurisdiction over a cause under review,” as the
24 basis for district courts’ power to issue such injunctions. *Id.* at 1172 n.2 (internal
25 quotation marks omitted).

1 **2. The Court Also Should Issue an Order Dismissing Mr. Lynch’s**
2 **Case**

3 The Ninth Circuit also left the door open to additional relief beyond an
4 injunction, including dismissal of a Section 542 case in its entirety. The *McIntosh*
5 defendants asked their respective district courts to *either* issue injunctions *or* order their
6 cases dismissed. *See id.* at 1169-71. The Ninth Circuit did not address the requests for
7 dismissal directly because the procedural posture of the cases did not require it to do so.
8 Rather, the court exercised jurisdiction over the defendants’ interlocutory appeals
9 pursuant to its authority to review denials of injunctive relief. *See id.* at 1170-72. It
10 resolved the meaning of Section 542 on that basis alone, and remanded the cases for
11 further proceedings in district court. *See id.* at 1172-79.

12 But the Court of Appeals repeatedly signaled that dismissal could be an
13 appropriate remedy in a Section 542 case. Importantly, the court held that defendants
14 had standing to appeal in *McIntosh* “because their potential convictions constitute
15 concrete, particularized, and imminent injuries, which are caused by their prosecutions
16 *and redressable by injunction or dismissal of such prosecutions.*” *Id.* at 1174 (emphasis
17 added). The court also referred to injunctive relief as the “minimum” relief to which
18 qualifying defendants are entitled, *id.* at 1177, and deferred “to the district courts to
19 determine, in the first instance and in each case, the precise remedy that would be
20 appropriate,” *id.* at 1179; *see id.* at 1172 n.2.

21 The appropriate remedy in this case is not simply an injunction, but also an order
22 dismissing the case.⁴ Anything less will fail to satisfy Section 542 because the
23 government necessarily will spend funds monitoring the pending litigation.

24 _____
25 ⁴ Unlike in *McIntosh*, where the defendants raised their Section 542 arguments
26 pretrial, if this Court orders Mr. Lynch’s case dismissed, it will need to vacate his
27 conviction and sentence to fully effectuate that order. The Court has authority to do so
28 pursuant to its ancillary jurisdiction and inherent powers, *see McIntosh*, 833 F.3d at
1172 n.2 (and cases cited therein); *United States v. Ramirez*, 710 F.2d 535, 541 (9th
Cir. 1983); its power to grant relief under 28 U.S.C. § 2255, *see Hensley v. Municipal*

1 Even a de minimis expenditure of unauthorized funds violates the plain text of
2 Section 542 and the Anti-Deficiency Act, which makes it a felony for federal
3 employees to “make or authorize an expenditure or obligation exceeding an amount
4 available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C.
5 § 1341(a)(1)(A); *see id.* §§ 1350, 1517(a), 1519. It is a violation of constitutional
6 magnitude. *See McIntosh*, 833 F.3d at 1175 (“[I]f DOJ were spending money in
7 violation of § 542, it would be drawing funds from the Treasury without authorization
8 by statute and thus violating the Appropriations Clause.”). There is simply no way for
9 this Court to ensure compliance with Section 542, the Anti-Deficiency Act, and the
10 U.S. Constitution short of dismissing the case in its entirety.

11 Moreover, although *McIntosh* did not consider legislative intent in construing
12 Section 542, *see id.* at 1178-79, Congress plainly intended the rider to effect a
13 cessation, rather than temporary stay, of federal medical marijuana prosecutions, *see*
14 Ex. D at 17-23. Anything short of an order dismissing Mr. Lynch’s case will violate the
15 spirit of Section 542.

16 **C. At a Minimum, the Court Should Order a *McIntosh* Hearing on Mr.**
17 **Lynch’s Compliance with State Law**

18 To the extent the Court desires further factual development before resolving this
19 motion, Mr. Lynch requests a *McIntosh* hearing on the discrete issue of his compliance
20 with State law. However, Mr. Lynch notes that such a hearing would require the DOJ to
21 expend significant funds, in violation of Section 542, the Anti-Deficiency Act, and the
22 U.S. Constitution—a factor which cautions against evidentiary proceedings in this
23 already well-developed case.

24
25
26
27
28

Ct., 411 U.S. 345 (1973); or its power to grant *coram nobis* relief under the All Writs Act, 28 U.S.C. § 1651, *see United States v. Morgan*, 346 U.S. 502 (1954).

V. CONCLUSION

For the foregoing reasons, Mr. Lynch respectfully asks the Court to issue a written indication that it would grant or entertain a motion for injunctive relief, dismissal, or a *McIntosh* hearing.

Respectfully submitted,
HILARY POTASHNER
Federal Public Defender

DATED: December 12, 2016

By /s/ Alexandra W. Yates

ALEXANDRA W. YATES
Deputy Federal Public Defender
Attorneys for CHARLES C. LYNCH

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28