

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES C. LYNCH,
Defendant-Appellant.

) C.A. No. 10-50219
) D.C. No. CR 07-689-GW
) (Central Dist. Cal.)

) **GOVERNMENT’S REQUEST TO**
) **FILE OVERSIZED RESPONSE**
) **TO DEFENDANT’S MOTION**
) **FOR REMAND UNDER**
) **FED. R. APP. P 12.1**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CHARLES C. LYNCH,
Defendant-Appellee.

) C.A. No. 10-50264
) D.C. No. CR 07-689-GW
) (Central Dist. Cal.)

Plaintiff-Appellee/Cross-Appellant United States of America, by and through its counsel of record, hereby submits this motion to file an oversized response to Defendant-Appellant/Cross-Appellee Charles C. Lynch’s (“defendant”) Motion for Remand pursuant to Federal Rule of Appellate Procedure 12.1, filed on March 3, 2017.

The motion is made pursuant to Federal Rules of Appellate Procedure 27(d) is based on the files and records in this case and the attached declaration of David Kowal.

DATED: March 23, 2017

Respectfully submitted,

SANDRA R. BROWN
Acting United States Attorney

LAWRENCE S. MIDDLETON
Assistant United States Attorney
Chief, Criminal Division

/s/ David Kowal

JEAN-CLAUDE ANDRÉ
DAVID KOWAL
Assistant United States Attorney

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

DECLARATION OF DAVID KOWAL

I, David Kowal, hereby declare and state as follows:

1. I am an Assistant United States Attorney in the Central District of California. I am responsible for preparing the government's response to Defendant-Appellant/Cross-Appellee Charles C. Lynch's ("defendant") Motion for Remand pursuant to Federal Rule of Appellate Procedure 12.1, in *United States v. Lynch*, CA No. 10-50219, 10-50264, filed on March 3, 2017, as docket number ("CTA") 137 (the "Motion").

2. This declaration is made in support of the government's request that this Court accept the government's oversized response ("Response") to the Motion, which exceeds the 20-page (5,200-word) limit for motion responses under Fed. R. App. P. 27(d). This request is based on the following reasons.

3. An oversized response is needed due to the nature of the Motion itself. Defendant's Motion was oversized, at 27 pages and unspecified word length. It contained several arguments and sub-sections raising different legal issues. Defendant also filed ten exhibits covering approximately 300 pages including the sealed materials. In justifying his oversized Motion, defendant said that it raises "novel and important legal issues" regarding a congressional appropriations rider and an extensive procedural history. (CTA 139.) The Response needs to address these same issues, which are complex. It also needs

to be oversized because defendant is seeking by his Motion to circumvent and obviate a pending appeal that has had extensive briefs filed by both parties and has been pending completion in this Court for seven years. Thus, a failure to adequately respond to all issues raised by the Motion, and to make all the valid arguments against it, would be consequential and potentially prejudicial to the government.

4. The Response needed to be longer than the Motion for additional reasons. Well more than half of the Response (two of the three argument sections) points out major procedural flaws in the Motion and its requests for relief, which defendant did not address in the Motion, but which are dispositive to it. Much of that analysis, and the Response itself, requires explaining and citing parts of the extensive procedural history and record in this matter not referenced or adequately explained by defendant in the Motion. That procedural history and record not only includes a large pre-judgment record including 19 volumes of experts of record, but voluminous prior litigation in this Court (*see, e.g.*, CTA 91-112), and recent post-judgment filings and argument in the district court on defendant's indicative motion (including exhibits in the district court that defendant did not include with his Motion). Apart from these procedural arguments, the government's argument on the merits of the Motion is essentially a brief on an issue that would typically take

up much of an appellate brief to a merits panel. Indeed, when defendant previously raised to this Court the same issue that he raises in his Motion now, a motions panel rejected his request for relief “without prejudice to renewing the arguments in the third cross-appeal brief.” (CTA 100.) It includes not only legal analysis but an explanation of an extensive factual record on issues related to defendant’s compliance with state law, much of which the government believes was inaccurately described or ignored in the Motion.

5. I have exercised diligence with respect to the length of the Response, taking significant parts of the short time to respond to this complicated Motion to shorten it with the assistance of the Chief of my office’s Criminal Appeals Section, Jean Claude André. Although the Response is oversized, I believe that it is necessary to adequately address the complex issues and record raised by the Motion, and proper in light of the novel issues raised and the potential consequences of the Motion.

6. From my communications with him, I know that today Mr. André emailed defense counsel Alexandra Yates to get her position on this motion (although the defense did not seek the government’s position on their request to file an oversized brief.) As of the filing of this request, Ms. Yates has not

responded, likely because Mr. Andre's email to her was not sent until near the end of the business day.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 23rd day of March, in Los Angeles, California.

/s/ David Kowal

Assistant United States Attorney

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

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Mar 23, 2017 .

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.

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/s/

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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