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

DEFENDANT-APPELLANT'S *MCINTOSH* REPLY

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, replies to the government's opposition to his Federal Rule of Appellate Procedure 12.1 Notice and Request for a *McIntosh* Remand or Relief.

Respectfully submitted,

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DATED: April 24, 2017

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I. INTRODUCTION

Congress has the power to prioritize the enforcement of federal laws by appropriating funds to, or withholding them from, executive agencies. *See United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016). Since December 2014, by way of an appropriations rider, Congress continuously has exercised that power to prohibit the Department of Justice ("DOJ") from prosecuting federal medical marijuana cases where the defendant's conduct was authorized by state law. *See id.* at 1176-77. The question in this case is whether Charles Lynch's conduct was so authorized.

Following this Court's decision in *United States v. McIntosh*, Mr. Lynch asked the district court to indicate that it would grant or entertain a motion seeking a favorable ruling on this point. The district court demurred, seeking preliminary legal guidance from this Court. Mr. Lynch thus filed the instant motion for either a remand or outright relief.

In response, the government gets bogged down in irrelevant procedural minutiae; conflates the question of appropriate remedy with the question of whether the rider affects this case at all; and generally misrepresents the relevant facts and law. The rider plainly applies to Mr. Lynch, who ran a state-law compliant dispensary, just as its congressional authors repeatedly have said they intended it to. Because the government is illegally spending taxpayer dollars on

this case with each passing day, this Court should enforce the rider, enjoin the DOJ from further unlawful spending, and order Mr. Lynch's case dismissed.

II. ARGUMENT

A. This Court Can and Should Grant *McIntosh* Relief Regardless of Whether Rule 12.1 Applies

As Mr. Lynch explained in his motion to this Court, although Federal Rule of Appellate Procedure 12.1 imposed a duty on him to report the district court's indicative ruling, this Court has the authority to remand for a *McIntosh* hearing regardless of whether the district court wished to entertain the original motion. (Def. Mot., Dkt. 137-1, at 19 (citing 28 U.S.C. § 2106).)[1] This Court also has the authority to grant the motion outright. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In other words, the outcome of Mr. Lynch's current motion does not depend on Rule 12.1 in any way.

And yet, the government dedicates much of its opposition to arguing that Mr. Lynch's initial motion did not satisfy the standards set forth in Rule 12.1 and its sister rule, Federal Rule of Criminal Procedure 37. (Govt. Opp., Dkt. 142-1, at

[1] "Dkt." refers to pleadings in this Court in CA No. 10-50219. "CR" refers to pleadings in district court. All page citations are to the ECF docket heading pagination, not the internal pagination of the documents.

21-34.) Because the debate over these points is academic for purposes of this motion, Mr. Lynch addresses the government's contentions only briefly.

First, the district court plainly found that Mr. Lynch's motion presented substantial issues. Rules 12.1 and 37 do not define the term "substantial issue," but it arguably is equivalent to the standard for granting a certificate of appealability, which requires "a substantial showing of the denial of a constitutional right." *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (en banc) (internal quotation marks omitted). The movant's burden under that standard "is relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002.) A court need only find an issue "debatable among jurists of reason" or determine that the "court *could* resolve" the issue in the movant's favor. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (emphasis added), *partially superseded on other grounds by* 28 U.S.C. § 2253.

Here, the district court discussed numerous debatable issues (Ex. E, Dkt. 137-2, at 29-31, 43-44); twice referred to a specific issue as "substantial" (*id.* at 29, 31); and stated that "both sides have good arguments" (*id.* at 43). The court explained that the debatable issues were not only legal but also factual. (*See id.* at 31 ("[T]here are issues of both fact and law that have to be resolved, and that is going to take some time.").) And while the court preferred this Court to resolve the legal issues before remanding for factual findings, the court unquestionably

thought the motion had potential merit, or it would have denied the motion outright rather than "without prejudice." (*Id.* at 47.)

The later-issued, ministerial minute order prepared and signed by a deputy clerk (CR 466) cannot and does not override what the district judge said at the hearing. *See United States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir. 1974) (per curiam). And in any event, the minute order simply reiterates that the court denied the motion "without prejudice." (CR 466.)

Second, Mr. Lynch's motion in district court was timely under Rules 12.1 and 37, as the court held. (Ex. E, Dkt. 137-2, at 11-12 (rejecting government's timeliness objection).) Mr. Lynch sought an injunction barring the DOJ from spending funds on his case, which is a remedy a court may order at any time upon notice to the adverse party. *Cf.* Fed. R. Civ. P. 65; C.D. Cal. Local Crim. R. 57-1. There is no statute of limitations for filing such a motion. Although the government attempts to analogize to 28 U.S.C. § 2255 and its one-year statute of limitations, Mr. Lynch did not move for habeas relief, and the district court correctly rejected this line of argument. (Ex. E, Dkt. 137-2, at 12 ("I don't think that [the motion] is in any way, shape or form similar to a 2255.").)

What is more, the government's related suggestion that Mr. Lynch sat on his rights with respect to the appropriations rider is belied by the record, as the district court also found. (*Id.* at 9-12; *see* Ex. C, Dkt. 137-2, at 16-17.) Although the

Parties' cross-appeals progress slowly,[2] Mr. Lynch moved expeditiously to enforce Section 542. Within weeks of its enactment (as then-Section 538), Mr. Lynch drafted novel briefing on the issue, shared that briefing with the government as a courtesy before filing, and—within twenty-four hours of receiving a response from the government—filed a motion for relief in this Court. (*See* Def. Opp. to Govt. Mot. To Delay, Dkt. 96-1, at 23-24.) Mr. Lynch initially moved in this Court, rather than district court, because he believed the rider applied to any federal case where the defendant has a colorable claim of state-authorized medical marijuana conduct. Because no one seriously disputes that Mr. Lynch has such a claim, he did not believe district court fact-finding was necessary. (Def. Mot. To Enforce Sec. 538, Dkt. 91-1, at 19-29; Def. Opp. to Govt. Mot. To Delay, Dkt. 96-1, at 17.)

Proceedings on Mr. Lynch's Ninth Circuit motion concluded on June 22, 2015, without substantive resolution and with direction that Mr. Lynch re-raise his arguments in his third cross-appeal brief. (*See* Order, Dkt. 100; Order, Dkt. 112.) While Mr. Lynch was preparing that brief, this Court issued *McIntosh*, rejecting his

[2] Contrary to the government's repeated suggestions, Mr. Lynch has not unduly delayed the cross-appeals; indeed, doing so is not in his interest as he has raised multiple meritorious issues likely to result in a new trial. (*See* Def. First Cross-Appeal Br., Dkt. 37-1.) Mr. Lynch previously has detailed the procedural history of the cross-appeals, including protracted negotiations, and the reasons for lengthy extensions of time taken by both parties. (*See, e.g.*, Def. Reply to Obj. to Mot., Dkt. 132.) Relying on this history, the district court rejected out of hand the government's spurious claim of improper delay. (Ex. E, Dkt. 137-2, at 32.)

position that fact-finding is unnecessary and directing defendants with Section 542 claims to raise them in district court. *McIntosh*, 833 F.3d at 1177-79. The Court denied a petition for rehearing in *McIntosh* on November 29, 2016, at which point the decision became final;[3] Mr. Lynch moved for relief in district court less than two weeks later. He was diligent.

Third, the government distorts the record by claiming that Mr. Lynch's motion presents a purely legal issue and that he does not argue otherwise, making remand inappropriate. In district court, Mr. Lynch primarily argued that the evidentiary record was sufficiently developed to permit a finding of state-law compliance, especially because the burden of proof fell on the government. (Ex. B, Dkt. 137-2, at 11-18; Ex. D, Dkt. 137-2, at 7-9, 13.) Mr. Lynch similarly urges this Court to so find. (Def. Mot., Dkt. 137-1, at 28-29, 33-35.) However, Mr. Lynch *also* consistently has sought an evidentiary hearing if the courts believe the record inadequate to support a finding of compliance. (Ex. B, Dkt. 137-2, at 21; Def. Mot., Dkt. 137-1, at 9, 20, 22, 35; *see* Ex. E, Dkt. 137-2, at 32-33 (rejecting government's contrary argument).) Not only is such a hearing appropriate, it is specifically contemplated by *McIntosh*, 833 F.3d at 1179 ("Appellants are entitled

[3] *See United States v. McIntosh*, CA No. 15-10117, Dkt. No. 95.

to evidentiary hearings to determine whether their conduct was completely authorized by state law . . . .").

The government's citations to Rule 37 and *In re Saxman*, 325 F.3d 1168 (9th Cir. 2003), do not suggest otherwise. The former contains a nonexhaustive list of potential motions on which a defendant might seek an indicative ruling, and unsurprisingly fails to describe *McIntosh* motions specifically. *See* Fed. R. Crim. P. 37 advisory committee notes. *Saxman* simply acknowledges that an appeals court need not remand for "a purely mechanical or computational task," for "the resolution of [a] legal issue [that] is entirely independent of the factual issues," or where the facts "are admitted as true and not in dispute." *Saxman*, 325 F.3d at 1172 (internal quotation marks and alteration omitted). Unless the government concedes Mr. Lynch's compliance, this is not such a case.

Fourth and finally, the government misrepresents Ninth Circuit precedent as prohibiting remand when a district court declines to indicate it would grant or entertain a motion. (Govt. Opp., Dkt. 142-1, at 27-29.) Quite the opposite. In the government's cited cases, this Court recognized its authority to remand in precisely these circumstances. *See Davis v. Yageo Corp.*, 481 F.3d 661, 685-86 (9th Cir. 2007) (explaining proper procedure where district court declines to entertain motion is to move in appeals court for limited remand; denying limited remand on the merits); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869-70 (9th Cir. 1976)

(construing appeal from denial of indicative ruling as motion for remand, considering remand, and rejecting for lack of merit), *partially superseded on other grounds by* Fed. R. App. P. 4; *see also Canadian Ingersoll-Rand Co., Ltd. v. Peterson Products of San Mateo, Inc.*, 350 F.2d 18, 27 n.16 (9th Cir. 1965) ("Where a district court has denied a motion for an order indicating that it will 'entertain' a Rule 60(b) motion pending in that court, the appellant may renew the motion in the court of appeals.").

The government's citation to a case "holding that for new trial motions filed after appeal 'this court will remand in the event the trial court evidences a willingness to grant the motion, *and not otherwise*,'" is especially misleading. (Govt. Opp., Dkt. 142-1, at 29 (quoting *United States v. Frame*, 454 F.2d 1136, 1138 (9th Cir. 1972) (per curiam) (alteration in original)).) As *Frame* explained, there is no point to remanding for consideration of a new trial motion where the district court has stated it would deny the motion; remand under those circumstances is a pointless waste of time. *See Frame*, 454 F.2d at 1138. *Frame* manifestly did not prohibit remand where a district court envisions the possibility of relief, but desires guidance from the appellate court before deciding the matter.

B. Mr. Lynch's Motion To Enforce Congressional Legislation Is Both Prospective and Distinct from the Merits Case

Mr. Lynch seeks this Court's assistance in enforcing legislation, repeatedly passed by Congress, that prohibits the DOJ from spending funds on medical

marijuana cases. This request is forward-looking, implicating no retroactivity concerns. And it is wholly distinct from the merits case.

1. Retroactivity Is a Red Herring

The government's emphasis on retroactivity doctrines is misplaced. Mr. Lynch does not ask to apply the appropriations rider retroactivity; he seeks an order prospectively barring the DOJ from spending unauthorized funds on his case. Although Mr. Lynch also argues that the Court should dismiss his criminal case to fully effectuate such an order, that argument rests on the logical impossibility of the government ceasing all spending absent dismissal. Any expenditure of funds, no matter how insignificant, violates the Anti-Deficiency Act and the constitutional appropriations clause, as explained in Mr. Lynch's motion. (Def. Mot., Dkt. 137-1, at 21.) But this Court need not accept that secondary argument to issue an injunction. And if the Court does order dismissal, the Court would not be applying the appropriations rider retroactively; it would be recognizing the practical consequences of a prospective spending injunction.

The government's extended discussion of the federal savings statute is even farther afield. Mr. Lynch agrees that the appropriations rider does not repeal the Controlled Substances Act. His motion never suggests otherwise. But the rider assuredly does prevent the DOJ from spending funds prosecuting certain individuals for violations of the Controlled Substances Act. An order effectuating

its terms is entirely compatible with the federal drug statute, as this Court already has held. *See McIntosh*, 833 F.3d at 1179 n.5.

2. Mr. Lynch Does Not Seek Piecemeal Adjudication of His Case, But Enforcement of Entirely Separate Legislation

Mr. Lynch does not seek piecemeal adjudication of his case. He presented all of his challenges to his conviction and sentence in a single First Cross-Appeal Brief, and expects that when this Court addresses those arguments, it will do so all at once. But the issues Mr. Lynch raised in his merits brief—and the government's issues on cross-appeal—are distinct from his motion to enforce the appropriations rider, which does not depend on the outcome of his substantive appeal in any way. Despite the government's efforts to conjure up overlap between the merits case and the appropriations rider, there is none of consequence.

For example, the government notes that Mr. Lynch's motion refers to trial instructions that precluded the jury from considering his compliance with state law, and that Mr. Lynch has challenged the propriety of those instructions on appeal. But this Court does not need to decide the correctness of any jury instructions to resolve Mr. Lynch's motion. It is undisputed that the instructions prevented the jury from considering a defense analogous to California's affirmative medical marijuana defense. Whether the instructions were correct or not, this Court need only recognize their existence, for purposes of Mr. Lynch's motion.

Regarding compliance, Mr. Lynch initially observes that the government failed to respond to an amicus curiae brief submitted in the merits case, which detailed how and why Mr. Lynch was in strict compliance with state medical marijuana laws. (Amicus Curiae Br. of Americans for Safe Access, Dkt. 42, at 8-17 & nn.1-4.) Instead, in its Second Cross-Appeal Brief, the government referred to "the overwhelming and undisputed evidence of defendant's compliance with the rules of his city and county." (Govt. Second Cross-Appeal Br., Dkt. 79-1, at 88; *see also id.* at 81 ("Defendant offered ample evidence on the undisputed issue of his compliance with local law[.]"); *id.* at 84 (referring to "this undisputed and overwhelming evidence on the topic").) The government further recognized that the local rules required Mr. Lynch to "comply with all provisions of the Health and Safety Code"—i.e., California medical marijuana law. (Conditions for Issuance of Business License, CR 244-4, at 4; *see* Govt. Second Cross-Appeal Br., Dkt. 79-1, at 81-82 (conceding "undisputed" evidence, including that Mr. Lynch "[c]omplied with all eight provisions for obtaining Morro Bay's business license, including . . . complying with the California Health and Safety Code").)

To the extent the government believes that a merits panel must determine Mr. Lynch's compliance in order to resolve the issues raised in the cross-appeals, the government has waived any argument against compliance. Alternatively, perhaps the government did not contest compliance on appeal because it

recognized that—while an appellate panel would be remiss to ignore Mr. Lynch's history of state-law compliance—no specific finding on the matter is necessary to resolve any of the issues raised in the substantive case.

The government's additional objection to this Court resolving Mr. Lynch's motion because of a pending (frivolous) request for reassignment of the merits case is somewhat confusing. Procedurally, it makes little sense, because both parties have urged this Court to decide the *McIntosh* issue without remanding the case at all. Substantively, the government's concerns are belied by the district court's refusal to grant Mr. Lynch's initial motion or even an evidentiary hearing, despite a clear path to ruling in Mr. Lynch's favor. It is odd to claim that a judge who ruled in the government's favor on proceedings below cannot be fair to the government if this Court remands for reconsideration.

Moreover, there is nothing novel about an appellate court deciding an ancillary matter in advance of and separate from the substantive case. *See, e.g.*, *United States v. Loughner*, 672 F.3d 731, 742-43 (9th Cir. 2012) (discussing collateral order doctrine, under which this Court reviews important issues that are separate from the merits and that may be moot by the time the substantive appeal is ripe for decision). To the contrary, *McIntosh* explicitly endorsed this approach. *See McIntosh*, 833 F.3d at 1170-73 (rejecting government's argument that appeals court should consider application of appropriations rider along with appeal from

conviction and sentence). In doing so, *McIntosh* recognized that where Congress has set spending priorities, "it is for the courts to enforce them when enforcement is sought." *Id.* at 1172 (alteration and internal quotation marks omitted).

And so, the government has it backwards when it complains that consideration of Mr. Lynch's motion might delay adjudication of the substantive cross-appeals. The far greater concern is that delaying enforcement of the appropriations rider will allow the government to avoid complying with that congressional directive until such a time when it has expended all the (unlawful) funds it requires.

C. Dismissal Is an Appropriate Remedy; But Even if Not, That Does Not Mean Mr. Lynch Is Not Entitled to Relief

The government repeatedly conflates two distinct issues: (1) whether the appropriations rider applies to this case; and (2) if it does, the appropriate remedy. And so, the government mistakenly argues that because dismissal is inappropriate, the rider does not apply at all. (*See, e.g.*, Govt. Opp., Dkt. 142-1, at 52-55.) But Mr. Lynch need not convince this Court (or the district court on remand) that his case should be dismissed in order to prevail. At a minimum, he is entitled to an order barring the DOJ from spending funds on his case.

What is more, dismissal is an available option, and one that should be ordered here. *McIntosh* specifically contemplates dismissal as a potential remedy. *McIntosh*, 833 F.3d at 1172 n.2, 1174, 1177, 1179. This Court's decision in *United*

States v. Nixon, 839 F.3d 885 (9th Cir. 2016) (per curiam), does nothing to undermine *McIntosh* on this point. For *Nixon* holds only that the rider, which prohibits the DOJ from spending certain funds, does not bar a federal judge from restricting a probationer's marijuana use. *See Nixon*, 839 F.3d at 886-88. It does not, as the government claims, say anything about a court's authority to order dismissal to effectuate a prohibition on DOJ spending.

Nor does *Olive v. Commissioner*, 792 F.3d 1146 (9th Cir. 2015), somehow limit the scope of the rider in criminal cases. *Olive* is a civil case that predates *McIntosh* and only briefly addresses the appropriations rider. *See id.* at 1050-51. In it, this Court upheld the government's authority to tax a medical marijuana provider because the tax itself did not interfere with the state's medical marijuana laws. Specifically, enforcing the tax did "not prevent people from using, distributing, possessing, or cultivating marijuana." *Id.* at 1151. *Olive* has no application to the criminal context, where this Court (post-*Olive*) has held that federal prosecutions of individuals engaged in state-law-compliant medical marijuana activities *do* prevent states from "giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d 1176. *Olive* is simply inapposite.

Importantly, the government has never explained how it might comply with an injunction prohibiting all case expenditures, even de minimis ones, absent

dismissal of this case. So long as the case remains pending, someone in the DOJ will need to monitor it; review executive orders, DOJ directives, legislation, and case law that may be relevant to it; and communicate with the Court on procedural matters. If the government has a proposed solution, it should have presented it in district court; it did not. Dismissal is therefore the only way to effectuate the plain language of the rider and prevent DOJ from spending funds on this case.

Dismissal also is the only way to carry out Congress's intent in passing the rider, which this Court can and should consider. Although *McIntosh* did not rely on legislative intent, that was because the Court thought the plain language of the rider sufficiently clear on the question presented, i.e., whether the rider prohibited the DOJ from spending funds on criminal cases. *McIntosh*, 833 F.d at 1175-79. *McIntosh* appropriately recognized that legislative history cannot alter the meaning of the enacted text. *See id.* at 1178-79. But *McIntosh* did not bar later courts from reviewing that history if and when an issue arises on which the text is unclear. To the contrary, *McIntosh* expressly cited cases permitting just that. *Id.* at 1178; *see Cherokee Nation of Okla. V. Leavitt*, 543 U.S. 631, 640, 644 (2005) (considering legislative history where appropriation language ambiguous); *id.* at 647 (Scalia, J., concurring); *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Donovan*, 746 F.2d 855, 860-64 (D.C. Cir. 1984) (same).

Here, the plain language of the rider does not address potential remedies, but the legislative history does. That history demonstrates that Congress intended the rider to stop, rather than temporarily stay, federal medical marijuana prosecutions. In debate, several cosponsors of the rider explained that it was designed to prevent the DOJ from prosecuting state-authorized medical marijuana patients, doctors, and business owners entirely. *See* 160 Cong. Rec. H4968, at H4982-85 (daily ed. May 29, 2014); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (holding that explanations by sponsors of legislation deserve "substantial weight in interpreting the statute").

For example, lead sponsor Representative Farr described the rider as "essentially saying, look, if you are following State law, you are a legal resident doing your business under State law, the Feds just can't come in and bust you and bust the doctors and bust the patient." 160 Cong. Rec. H4984 (Statement of Rep. Farr); *see id.* (describing rider as "say[ing], Federal Government, in those States [that have legalized medical marijuana], in those places, you can't bust people"). Cosponsor Titus explained that in states

> with laws in place allowing the legal use of some form of marijuana for medical purposes, this commonsense amendment simply ensures that patients do not have to live in fear when following the laws of their States and the recommendations of their doctors. Physicians in those

> States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same.

Id. (Statement of Rep. Titus). Cosponsor Lee told colleagues that the rider would "provide much-needed clarity to patients and businesses in my home State of California and 31 other jurisdictions that provide safe and legal access to medicine. . . . In states with medical marijuana laws, patients face uncertainty regarding their treatment, and small business owners who have invested millions creating jobs and revenue have no assurances for the future." *Id*. (Statement of Rep. Lee). Congresswoman Lee continued, "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*.

Other cosponsors discussed their support for returning medical marijuana regulation and enforcement power to the States. Lead sponsor Rohrabacher "urge[d my colleagues to support our commonsense, States' rights, compassionate, fiscally responsible amendment," and argued, "For 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 Broun and Blumenauer made similar comments. *See, e.g.*, *id.* at 4984 (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.").

Put simply, Congress's aim in passing the appropriations rider was to stop the DOJ from spending money on medical marijuana enforcement, including prosecutions of state-authorized medical marijuana patients, doctors, and businesses. For some cosponsors, stopping these prosecutions was the entire point of the rider.

And of great importance here, the rider's lead authors repeatedly have explained that they intended it to stop the government from pursuing *this very case*. (*See, e.g.*, Br. of Members of Cong. Rohrabacher and Farr as Amici, Dkt. 108, at 8, 11; Supp. Exs., Dkt. 98-2, at 12, 16.) *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Although post-enactment developments cannot be accorded the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of" the law. (internal quotation marks omitted)).

This Court (or the district court) surely has the authority to effectuate Congress's intent and order Mr. Lynch's case dismissed. Even the government's cited cases demonstrate as much. As the Second Circuit has explained, federal courts have the authority to "decide collateral matters necessary to render complete

justice." *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) (cited favorably in *McIntosh*, 833 F.3d at 1172 n.2). The contours of these powers are not "overly rigid or precise," nor have courts limited them "with any degree of precision." *Id.* (internal quotation marks omitted). As particularly relevant here, in exercising inherent authority, courts must remember that "[a]t its heart, ancillary jurisdiction is aimed at enabling a court to administer justice." *Id.* (internal quotation marks omitted) (emphasis added). Where action is necessary "to insure that a judgment of a court is given full effect," i.e., "to enable a court to . . . effectuate its decrees," a court should take it. *Id.* (internal quotation marks omitted); *see also id.* at 207 (approving of courts expunging criminal records to fully effectuate other court orders).

To administer justice and fully effectuate an order prohibiting unlawful DOJ spending, this Court should order Mr. Lynch's case dismissed.

D. Mr. Lynch Satisfies *McIntosh*'s Test for Compliance

1. The Government Fails To Address the State-Law Burden of Proof Entirely, Which Is Dispositive in This Case

As Mr. Lynch explained in his motion, he does not put forth a traditional request for injunctive relief. Congress already has decided to enjoin the DOJ from spending funds on medical marijuana prosecutions. All this Court must determine is whether, as a factual matter, California law authorized Mr. Lynch's conduct. If

so, the rider applies. In California, whether a defendant's conduct is authorized by state medical marijuana law is a question on which the prosecution bears the burden of proof beyond a reasonable doubt. That, in turn, is the appropriate standard to apply here. (Def. Mot., Dkt. 137-1, 28-29.)

The government does not even engage with this argument, effectively conceding both the relevance of California law and its meaning. Nor does the government explain how its proposed standard—that the defendant bears the burden of proof, presumably by a preponderance of the evidence—squares with *McIntosh*. After all, *McIntosh* interpreted the rider as barring federal prosecutions where they would not be sustained in state court. *McIntosh*, 833 F.3d at 1176-77 ("By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.").

And the government's proposal flips the presumption of innocence on its head. Criminal defendants, of course, are innocent until proven guilty. *See In re Winship*, 397 U.S. 358 (1970). Mr. Lynch is entitled to a presumption that he complied with California law unless and until the government proves otherwise.

Furthermore, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the most closely analogous federal precedent on the matter, supports placing the burden on the government. The government's attempt to distinguish *O Centro* based on the text of the statute at issue in that case is misguided. For in *O Centro*, the Supreme Court made clear that the origin of the government's burden—whether based in statutory text or otherwise—was not actually relevant. Rather, because the government had the ultimate burden at trial, it also bore the burden at the injunction stage. *See id.* at 428-30. Similarly, because the prosecution would bear the burden of proving noncompliance at a state trial, it must shoulder that burden here.

The government's additional citations to authorities on burden of proof in unrelated contexts are simply irrelevant. (Govt. Opp., Dkt. 142-1, at 56 nn. 8-10.)

And the burden of proof is dispositive here, because the government repeatedly has sought to rest on the evidence presented at trial and sentencing. In district court, the government argued that no new evidence was required, and advanced no alternative request to present evidence if the court disagreed. (Ex. C, Dkt. 137-2, at 8, 12-15.) In this Court, the government takes a similar position, but drops a footnote suggesting that "on remand the government could provide additional proof of defendant's multiple violations of state marijuana law." (Govt. Opp., Dkt. 142-1, at 31 n.4.) The government also refers in passing to "violations

of California marijuana law by defendant's employees, which may be pertinent to his own compliance"—a theory not raised in district court. (*Id.* at 39.)[4] Having failed to proffer new evidence or theories of noncompliance in district court, the government cannot now take a second bite at the apple.

2. Mr. Lynch's Conduct Was Authorized by Then-Existing State Law, Which Is All the Rider and *McIntosh* Require

a. Mr. Lynch Always Argued That He Ran a Lawful Storefront Dispensary—A Position the District Court Recognized Has Potential Merit

The government's bid to estop Mr. Lynch from arguing compliance distorts the record and is meritless. Mr. Lynch consistently has asserted that he ran a state-legal storefront medical marijuana dispensary. At sentencing, in the face of unsettled and ambiguous California rules, he initially relied on California's Compassionate Use Act ("CUA") as authority for this position. After consulting with an expert in the field, he cited the Medical Marijuana Program Act ("MMPA") for additional support. But at all times his position was clear:

[4] Although some of Mr. Lynch's employees appear to have engaged in illicit marijuana sales outside of the CCCC, the district court made clear factual findings about Mr. Lynch's lack of knowledge of and culpability for those acts. (Ex. A, Dkt. 137-2, at 34 ("While the Government has cited to certain instances where some of the CCCC's marijuana may have been obtained by persons through fraudulent medical authorizations or may have been diverted by a few employees to unlawful recipients, there is no evidence . . . that Lynch himself was aware of and/or participated in that misfeasance."); *see also id.* at 16 n.13, 17-19 & nn.15-16, 39 (making similar findings).)

California permits storefront medical marijuana dispensaries. (Def. Sent. Reply, CR 255, at 13-18; Decl. of Joseph Elford, CR 279, at 1-7.)

When Mr. Lynch agreed at sentencing that he "did not operate a collective or cooperative" or a "classic collective, as now defined by the Attorney General's opinion," he did not waive any argument that the Central Coast Compassionate Caregivers ("CCCC") was legal under the MMPA during its existence. (Def. Sent. Reply, CR 255, at 18.) In that very paragraph, he described the CCCC as "a storefront dispensary," and explained why storefront dispensaries are lawful. *Id.* His obvious point was that, when he operated the CCCC from 2006 to 2007, he did not take certain steps outlined in the later-issued guidelines, such as incorporating as an agricultural cooperative or, in the alternative, establishing joint ownership with all collective members. (Ex. H, Dkt. 137-2, at 22.) But Mr. Lynch never conceded that his storefront dispensary was unlawful for those reasons, because it was not. Rather, at sentencing and throughout his litigation on the appropriations rider, Mr. Lynch has maintained the consistent position that retail medical marijuana dispensaries are legal under the MMPA, and were at the time Mr. Lynch operated the CCCC. (Def. Mot., Dkt. 137-1, at 27; Ex. B, Dkt. 137-2, at 17-18.)

It is true that, in a footnote to its sentencing memorandum, the district court wrote that "the CCCC was not operated in conformity with California state law because, as held by the California Supreme Court in [*People v. Mentch*, 45 Cal. 4th

274, 283-87 (2008)], medical marijuana distribution operations (such as the CCCC) cannot show that they fall within the CUA's or MMPA's definition of a 'primary caregiver.'" (Ex. A, Dkt. 137-2, at 33-34 n.25.) In his district court motion, Mr. Lynch candidly acknowledged this statement, but also explained that it was incorrect because the district court conflated the primary caregiver provision of the CUA with the collective/cooperative provision of the MMPA. (Ex. B, Dkt. 137-2, at 17-18.) At the hearing on Mr. Lynch's motion, the district court necessarily accepted the possibility that its earlier statement was in error; otherwise the court would have denied Mr. Lynch's motion outright. Instead, the court explained that it needed more guidance on the law, and possibility further factual development, to decide whether Mr. Lynch was in compliance. (Ex. E, Dkt. 137-2, at 30-31, 44, 47-48; *see id.* at 33.) This remark thus presents no obstacle to relief.

In fact, the more relevant sentencing statement is the district court's finding that because "the *Mentch* case was decided in November of 2008, years after Lynch opened the CCCC in 2006 . . . Lynch could have reasonably believed that the CCCC's operations complied with California law because it was acting in the capacity of a primary caregiver." (Ex. C, Dkt. 137-2, at 34 n.25.) *McIntosh* does not address how a court should determine compliance where state medical marijuana law is ambiguous. A fair reading of the appropriations rider is that a reasonable belief in compliance is sufficient in those circumstances. Importantly,

there is a distinction between such a scenario and one where state law is clear, but there is a debate about the defendant's compliance with that law. In the latter, a court must determine whether there was actual compliance. In the former, there was no clear law with which the defendant could comply.

b. Mr. Lynch's Consistent Position Has Been That the 2008 Advisory Guidelines Are Irrelevant, and *McIntosh* Supports That Position

As Mr. Lynch explained in his motion, the 2008 guidelines are irrelevant—both because they say nothing about whether Mr. Lynch's conduct was lawful in 2006 to 2007, when he operated the dispensary, and because they are nonbinding recommendations that do not have the force of law. (Def. Mot., Dkt. 137-1, at 26-28.) The government's strained argument that Mr. Lynch somehow relied on the guidelines in his district court motion and is changing tack is, frankly, ridiculous. (Govt. Opp., Dkt. 142-1, at 62-63, 67-68.)

Mr. Lynch did not even mention the guidelines in his district court motion. (Ex. B, Dkt. 137-2.) He argued that the court had made the necessary factual findings to support compliance at sentencing, and explained that those findings were consistent with the position of an amicus curiae, who opined that Mr. Lynch was in strict compliance with California law. (*Id.* at 15-16.) From this, the government envisions that Mr. Lynch adopted the amicus curiae's discussion of the guidelines and therefore expressly relied on them. Not only is this argument a

bit too clever, it ignores Mr. Lynch's clear position in district court that "the Attorney General's 2008 guidelines, which postdate Mr. Lynch's conduct, are irrelevant." (Ex. D, Dkt. 137-2, at 14; *see also id.* at 16 (arguing "the guidelines are nonbinding recommendations that postdate Mr. Lynch's conduct," and "[h]is failure to adhere to them says nothing about his conformity with 'State law' in 2006 and 2007").)

The government also misses the mark when it claims that the advisory guidelines qualify as relevant state law under *McIntosh*. In *McIntosh*, this Court construed the rider's reference to "laws that authorize" medical marijuana activities to include regulations and administrative decisions, *McIntosh*, 833 F.3d at 1178. But the Attorney General's guidelines are neither a regulation nor an administrative decision; they are a set of advisory guidelines. And contrary to *McIntosh*'s requirement that relevant laws be "binding," *id.* at 1177, the guidelines intentionally are not. (Ex. H, Dkt. 137-2, at 25 (requiring dispensaries only to "substantially comply with the guidelines").) *See also People v. Colvin*, 203 Cal. App. 4th 1029, 1040-41 & n.11 (2012) (explaining consistent view of California courts that guidelines are not binding).

At the most basic level, the government's citation to the 2008 guidelines violates fundamental notions of fairness and due process. We do not expect defendants to comply with rules not yet in effect. Were it otherwise, we would

deprive defendants of the opportunity to conform their conduct to changing laws. Similarly, to the extent California law was ambiguous when Mr. Lynch operated the CCCC, neither *McIntosh* nor the appropriations rider require him to have anticipated later crystalizing interpretations.

c. Mr. Lynch Complied With State Law

Mr. Lynch complied with California medical marijuana laws in effect during the relevant timeframe because those laws—specifically the CUA and the MMPA—permitted storefront dispensaries so long as they were not run for profit. (*See* Def. Mot., Dkt. 137-1, at 27 (citing authorities).) *See also* Cal. Health & Safety Code § 11362.5 (stating one of the purposes of the CUA is "to implement a plan to provide for the safe and *affordable distribution* of marijuana to all patients in medical need of marijuana" (emphasis added)). Whether Mr. Lynch also believed his conduct was lawful because he was a primary caregiver is irrelevant. And the government's citation to *People v. Hochanadel*, 176 Cal. App. 4th 997 (2009), for the proposition that a dispensary cannot be legal under a primary caregiver theory, is inapposite and misleading. (Govt. Opp., Dkt. 142-1, at 58-59.) For that case *also* held "that storefront dispensaries that qualify as 'cooperatives' or 'collectives' under the CUA and MMPA, and otherwise comply with those laws, may operate legally." *Hochanadel*, 176 Cal. App. 4th at 1003; *see id.* at 1016

(explaining "primary caregiver" ruling "does not end our inquiry"); *id.* at 1016-17 (explaining storefront dispensaries may be legal under MMPA).

Additionally, the government is simply wrong when it argues that the CCCC was not a legal dispensary because it did not meet the definition of a "collective" or "cooperative" set forth in the 2008 guidelines, which of course have no bearing on this case. The law at the time authorized the association of qualified patients and designated primary caregivers "collectively and cooperatively to cultivate marijuana for medical purposes," so long as they did not "distribute marijuana for profit." Cal. Health & Safety Code §§ 11362.765, 11362.775 (2007). There was no requirement under the CUA or MMPA that members of the collective jointly own the dispensary, be privy to all of its financial records, or have any relationship with each other beyond supplying and purchasing medical marijuana. *See People v. Jackson*, 210 Cal. App. 4th 525, 529-30 (2012) ("As we interpret the MMPA, the collective or cooperative association required by the act need not include active participation by all members in the cultivation process but may be limited to financial support by way of marijuana purchases from the organization."); *Colvin*, 203 Cal. App. 4th at 1037-41 (rejecting argument that MMPA "does not condone a large-scale, wholesale-retail marijuana network . . . with approximately 5,000 members" or requires "some united action or participation among all those

involved, as distinct from merely a supplier-consumer relationship" (internal quotation marks omitted)).

And as already discussed in Mr. Lynch's motion, the CUA and MMPA did not prohibit purchases like the limited ones Mr. Lynch made from other dispensaries and patients to get the CCCC up and running. (Def. Mot., Dkt. 137-1, at 34-35.) To the contrary, California law at the time allowed such purchases. *See People v. Urziceanu*, 132 Cal. App. 4th 747, 759 (2005). The Attorney General guidelines and government's cited cases requiring otherwise all postdate Mr. Lynch's conduct. (Govt. Opp., Dkt. 142-1, at 66.) Furthermore, *McIntosh* does not bar relief on these hyper-technical grounds; to the extent the Court disagrees, *McIntosh* reads the appropriations rider too narrowly and was wrongly decided.

The real issue is whether Mr. Lynch operated the CCCC for profit. That question is largely one of intent. *See People v. Mitchell*, 225 Cal. App. 4th 1189, 1201-02, 1207-08 (2014); *see also Black's Law Dictionary* 133 (8th ed. 2004) (defining nonprofit association as "[a] group organized for a purpose other than to generate income or profit"). Here, Mr. Lynch "didn't open the dispensary to make money," he "opened it to help people." (Ex. I, Dkt. 137-2, at 6.)

Indeed, it is undisputed that he never recouped his initial investment in the dispensary, which he got from refinancing his house. (*Id.* at 6-7.) The government's claim that he engaged in "unfettered salary-taking" ignores this

fundamental point. (Govt. Opp., Dkt. 142-1, at 65.) Because Mr. Lynch never got his investment back, he never even got to the point of salary-taking—though it was perfectly lawful for him to receive compensation for his work at the dispensary. *See People ex rel. City of Dana Point v. Holistic Health*, 213 Cal. App. 4th 1016, 1021 (2013) ("Valid nonprofit expenditures expressly include executive compensation."). His withdrawals of funds were efforts to recoup his expenses. That he used some of those recouped funds to pay off preexisting debt or other personal expenses does not undermine his intent to operate a nonprofit, nor his effective operation of a nonprofit.

Finally, contrary to the government's claim, Mr. Lynch did not set the CCCC's marijuana prices at for-profit levels. Rather, he added a small mark-up over what he paid for marijuana "to pay for the employees and all the expenses and stuff." (Ex. J, Dkt. 138, at 224; *see id.* at 226.) In doing so, he considered what other dispensaries charged, and endeavored to keep prices in line with or lower than those rates. (*See id.* at 225-27.) Mr. Lynch also "ran a discount program for patients who did not have a lot of money." (Ex. I, Dkt. 137-2, at 8.)

In sum, Mr. Lynch fully complied with California law. The rider applies to his case.

III. CONCLUSION

For the foregoing reasons, Mr. Lynch asks this Court to grant his motion and either remand to the district court with instructions or grant relief.

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, I electronically filed the foregoing **DEFENDANT-APPELLANT'S *MCINTOSH* REPLY** 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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