

files and records in this case and the attached declaration of David Kowal.

DATED: September 22, 2017

Respectfully submitted,

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/s/ David Kowal

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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 fourth cross-appeal brief in *United States v. Lynch*, CA No. 10-50219, 10-50264.

2. This declaration is made in support of the government's request that this Court accept the government's oversized response fourth cross-appeal brief, which exceeds the 6,500 word limit under Fed. R. App. P. 28.1(e)(2)(C) Federal Rule of Appellate Procedure. An oversized brief is needed because defendant raised a new issue on appeal in his third cross-appeal brief. The government's brief is oversized in order to respond to this new issue, and would otherwise comply with the word limit for a reply on cross-appeal.

3. The government's fourth cross-appeal brief address three issues. The first two were issues originally part of the cross-appeal in this case: the government's challenge to the district court's sentence, and a request for reassignment on remand. Those portions of the government fourth brief and the brief's introduction (Sections I through

II.B.) take up only 5,071 words (approximately 25 and one-half pages). This is well under the limits for a cross-appeal reply brief.

4. The final portion of the government's brief (Section II.C.) is 10,300 words, approximately 52 pages. It responds to a new issue raised in defendant's third cross-appeal brief regarding a Congressional appropriations statute that was passed while this appeal was pending. (*See* Court of Appeals docket number ("CTA") 152 at 1-3.) That issue was the subject of extensive litigation and two prior motions by defendant in this Court, and one in district court, during the three years that defendant's third brief was pending completion. (*See* CTA 91, 94-95, 97, 100-12, 137, 142, 144 147, 149-50.) On two occasions motions panels of this Court denied defendant's motions on this issue "without prejudice to renewing the arguments in the third cross-appeal brief." (CTA 100, 150.) In the second order, after fourteen extension requests by defendant for his third brief, the motion's panel also barred any further extensions. (CTA 150 at 2.)

5. Rather than raising the arguments on this issue in the third cross-appeal brief, defendant's oversized 79-page third cross-appeal brief seeks to incorporate the most recent round of motion pleadings in

this Court on the issue into his third brief by reference. (CTA 152 at 1-3). The government objected to raising the issue this way rather than presenting arguments in the third brief itself. (CTA 153). Given the three years of delay in filing the third brief and the asserted violations of court rules and orders, the government requested a ruling in advance of the government's fourth brief that defendant had abandoned any arguments from his prior motions on the rider, and that the government need not respond to it. (*Id.* at 8-10.) The government also noted that if forced to respond to the issue in the fourth brief, it would likely have to use a large portion of its fourth brief responding to the issue. (*See id.* at 9.)

6. On August 25, 2017, the clerk of this Court issued an order striking defendant's third brief. (CTA 155.) The order required defendant to file a substitute third brief by September 1, 2017 that complied with "the requirements of Fed. R. App. P. 28(a)(2)-(8) and 9th Cir. R. 28.1(c)(3). (*Id.*) The day before the substitute brief was due, defendant filed a motion requesting a further extension (his fifteenth for the third brief). (CTA 156.) In response, the clerk vacated its prior order striking defendant's third brief, deemed the brief filed, and

referred to the merit's panel the government's prior request that defendant's arguments on the rider be deemed abandoned. (CTA 157.)

7. As the government was unable to get an advanced ruling that it did not have to respond to this new issue, it was necessary to include its response within the fourth cross-appeal brief in order to preserve the government's arguments, and also to provide the Court with a coherent procedural history and set of arguments that would otherwise have been scattered throughout multiple prior pleadings. The length of this portion of the brief, 52 pages, is no greater than necessary. Defendant's most recent round of briefing in this Court on the new issue (which he incorporated into his third brief) totaled 67 pages with over 200 pages of exhibits (CTA 137, 147). The government's most recent opposition was 56 pages, which was accepted for over-sized filing by a motions panel of this Court. (CTA 142-43, 150 (grating government's motion to file oversized response)).

8. I have exercised diligence to include in the fourth brief only those arguments from the prior litigation on the appropriations rider appropriate for an appellate brief, and have cut many procedural arguments from the prior litigation. However, the issue presented is a

complex one, involving a new statute, with a long procedural history, and it was also necessary to set out a coherent procedural history and to preserve the government's argument that defendant had not properly raised the issue. In any event, as noted, the government's brief remains shorter than its prior motion response on the issue, which was accepted as an oversized filing by a motion's panel of this Court. In addition, with the help of my appellate unit, I have taken considerable parts of the 21-days we have had to complete this brief to reduce its size.

9. On September 21, 2017, I emailed defense counsel Alexandra Yates to get her position on this motion (although the defense did not seek the government's position on any of their requests to file an oversized brief.) Ms. Yates responded that she could not take a position until she reviewed the government's brief.

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

EXECUTED this 22nd day of September, in Los Angeles,
California.

/s/ David Kowal

Assistant United States Attorney

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

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