CA NO. 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

Panel: Rogers, Bybee, Watford
Decision: September 13, 2018

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# BRIEF OF THE CATO INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING BY PANEL AND REHEARING EN BANC

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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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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amici* and their members made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

## SUMMARY OF THE ARGUMENT

Under our Constitution, and within the Anglo-American legal tradition generally, the jury trial is the cornerstone of criminal adjudication. As long as there has been criminal justice in America, the independence of citizen jurors has been understood to be an indispensable structural check on executive and legislative power. This independence has always included "jury nullification"—that is, the inherent prerogative of jurors to decline to convict a defendant, even if factual guilt is shown beyond a reasonable doubt, when doing so would work a manifest injustice.[2]

Mr. Lynch's case perfectly illustrates why jury independence is both a necessary and a proper feature of our criminal justice system. Even assuming Lynch's prosecution and conviction were technically lawful,[3] they were manifestly unjust. A sufferer of debilitating migraines, Lynch sought to open a medical marijuana dispensary, in accordance with California state law. Pet. at 3. In a responsible and reasonable effort to ensure compliance with federal law, Lynch—a

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[2] *Amici* suggest that "jury nullification" is a misleading term for describing this power of juries, as the phrase seems to beg the question as to whether such acquittals are *lawful* exercises of the jury's discretion—"conscientious acquittal" would be a more apt description. Nevertheless, as both the opinions and briefs in this case use the phrase "jury nullification," *amici* will do so as well.

[3] *Amici* do not address Lynch's entrapment-by-estoppel defense, but for the reasons given in his petition, rehearing is also warranted to correct the panel majority's error in holding that Lynch had no right to present this defense. *See* Pet. at 2, 14–19.

non-lawyer—made four separate calls to the DEA, was ultimately told that regulation of medical marijuana dispensaries was a local issue, and reasonably drew the inference that his compliance with state law was sufficient to prevent criminal exposure. *See* Pet. at 3–4. Notwithstanding this assurance, the DEA later raided Lynch's home and business, and federal prosecutors charged him with five violations of federal drug laws, including one carrying a five-year mandatory-minimum sentence. Pet. at 4–5.

A fair-minded citizen would see the obvious injustice in Lynch's prosecution, and there is every reason to think a reasonable jury would have acquitted him—except that the district court issued a coercive anti-nullification instruction, in flat contradiction with Ninth Circuit precedent. The panel majority's decision to uphold this coercive instruction, over Judge Watford's powerful dissent, not only creates a severe intra-circuit split, but also imperils the very notion of jury independence—a foundational precept of Anglo-American law that is more ancient than Magna Carta. This error is especially serious today, in light of the fact that use of the jury trial itself is rapidly diminishing, and has been all but replaced by plea bargaining as the baseline for criminal adjudication. This Court should grant rehearing to correct serious mistakes in the panel majority's decision, and to ensure that the right to trial by an impartial, independent jury remains the bedrock of our criminal justice system.

## ARGUMENT

### I. THE INDEPENDENCE OF CITIZEN JURIES IS A WELL-ESTABLISHED AND CRUCIAL FEATURE OF OUR LEGAL AND CONSTITUTIONAL HISTORY.

The right to a jury trial developed as a necessary "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (right to trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Scholars have long debated the origin of so-called "jury nullification," but something resembling our notion of an independent jury refusing to enforce unjust laws pre-dates the signing of the Magna Carta, and probably even the Norman Conquest. *See* CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13 (2d ed. 2014); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 51–85 (1852) (discussing the practice of jury nullification both before and after Magna Carta). In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

One of the most famous illustrations of this principle in pre-colonial England was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Edward Bushell was a member

of a jury who refused to convict William Penn for violating the Conventicle Act, which prohibited religious assemblies of more than five people outside the auspices of the Church of England. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 236–49 (1985). In light of Penn's factual guilt, the trial judge essentially ordered the jury to return a guilty verdict, and thereafter imprisoned the jury for contempt when they nevertheless found Penn not guilty. But the Court of Common Pleas reversed, firmly establishing the principle that independent juries had the authority to acquit against the wishes of the Crown. *Id.*

This understanding of the jury trial was likewise firmly established in the American colonies. In the run up to the American Revolution, "[e]arly American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the colonies." CONRAD, *supra*, at 4. One of the most notable of such cases involved a publisher named John Peter Zenger, who printed newspapers critical of the royal governor of New York and was charged with seditious libel. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–72 (1994). Zenger's jury refused to convict notwithstanding his factual culpability, thus making Zenger an early symbol for freedom of the press and jury independence. *Id. at* 873–74 ("Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but

nullified the law of seditious libel in the colonies."). America's Founders thus "inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation." CONRAD, *supra*, at 4.

The community's central role in the administration of criminal justice has been evident since our country's founding. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349–350 (1898) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1779). Alexander Hamilton observed that "friends and adversaries of the plan of the [constitutional] convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government." THE FEDERALIST NO. 83 (Alexander Hamilton). This "insistence upon community participation in the determination of guilt or innocence" directly addressed the Founders' "[f]ear of unchecked power." *Duncan*, 391 U.S. at 156.

It is thus no surprise that the right to trial by jury occupies a central role in our nation's founding documents. The Declaration of Independence included among its

"solemn objections" to the King his "'depriving us in many cases, of the benefits of Trial by Jury,' and his 'transporting us beyond Seas to be tried for pretended offenses.'" *Duncan*, 391 U.S. at 152. Against the backdrop of those protestations, the Constitution was drafted to command that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed," U.S. CONST. art. III, § 2; that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," U.S. CONST. amend. VI; and that no person be "twice put in jeopardy of life or limb," U.S. CONST. amend. V. Together, these guarantees reflect "a profound judgment about the way in which law should be enforced and justice administered," *Duncan*, 391 U.S. at 155—namely, with the direct participation of the community.

Indeed, the jury is expected to act as the ultimate conscience of the community, and any system in which the "the discretionary act of jury nullification would not be permitted . . . would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976). In particular, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v.*

*Washington*, 542 U.S. 296, 306 (2004); *see also, e.g.*, Letter XV by the Federal Farmer (Jan 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed. 1981) (the jury "secures to the people at large, their just and rightful control in the judicial department"). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991), and "places the real direction of society in the hands of the governed," AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88 (1998) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed. 1945)).

In particular, the power of juries to acquit "in the teeth of both law and facts," *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920), provides crucial feedback to prosecutors, who may—in the absence of regular trials before independent juries—fail to realize just how much their enforcement efforts are at odds with the conscience of the community. Feedback from a *local* jury is especially valuable in cases like this one, involving serious questions not just of criminal justice, but also of federalism. The prerogative of local juries to reject unjust prosecutions is all the more important when such prosecutions are brought by federal authorities against individuals who engaged in non-wrongful conduct that was specifically authorized under state law.

## II. THE PANEL MAJORITY ERRED IN UPHOLDING THE DISTRICT COURT'S INSTRUCTION SUGGESTING THAT LYNCH'S JURY COULD BE PUNISHED FOR ENGAGING IN NULLIFICATION.

Notwithstanding the storied history of jury independence in the Anglo-American legal tradition, modern courts typically hold that defendants are not entitled to argue nullification directly to juries, and courts generally will not affirmatively instruct jurors as to their authority to engage in nullification. *See United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2018); *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1992). *But see United States v. Manzano*, No. 3:18-cr-00095, Dkt. #60 (D. Conn. Oct. 29, 2018) (permitting defense counsel to argue nullification and introduce evidence that conviction would carry a 15-year mandatory minimum).

As discussed in Judge Watford's dissent, there is serious reason to doubt the correctness of some of this Court's precedents upholding jury instructions that strongly discourage nullification. *See United States v. Lynch*, 903 F.3d 1061, 1088 (9th Cir. 2018) (Watford, J., dissenting) ("I have my doubts about whether we were right to endorse such an [anti-nullification] instruction, for it affirmatively misstates the power that jurors possess."). But even assuming the correctness of that law, the panel's decision is inconsistent with Circuit precedent. The irreducible core of Lynch's Sixth Amendment right is that "a court should not state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from

jury nullification is invalid." *Kleinman*, 880 F.3d at 1032. The panel decision impermissibly trespasses on that core constitutional right.

As explained in detail in both Lynch's petition and Judge Watford's dissent, the anti-nullification instruction issued and affirmed in this case impermissibly suggested that the jurors could be punished for engaging in nullification; indeed, it is functionally identical to the very instruction held invalid in *Kleinman*. *Compare Lynch*, 903 F.3d at 1079 ("Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court."), *with Kleinman*, 880 F.3d at 1031 ("You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case."). *See also* Pet. at 1–2, 10–13.

In the mind of a typical juror—who would naturally (and correctly) imagine serious legal consequences for violating their oath, *see Lynch*, 903 F.3d at 1089 (detailing criminal penalties for violating oath)—the instruction at issue is not far removed from the very instruction given to William Penn's jury, which was ordered to find the defendant guilty and then suffered serious penalties when it did not. Appellate reversal in that case helped secure the very notion of jury independence for centuries to come. But if the panel majority's decision here is permitted to stand, it will have effectively worked a reversal of one of the most hallowed principles of Anglo-American law. This Court should grant the petition for rehearing to maintain

uniformity of Circuit precedent, prevent a gross injustice, and ensure that this Court's jurisprudence appropriately accounts for the crucial, historical role that jury independence plays in our system of criminal justice.

## III. PROTECTING JURY INDEPENDENCE IS ALL THE MORE IMPORTANT BECAUSE OF THE VANISHINGLY SMALL ROLE THAT JURY TRIALS PLAY IN OUR CRIMINAL JUSTICE SYSTEM.

As discussed above, the jury trial is foundational to the notion of American criminal justice, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he Trial of all Crimes . . . *shall* be by Jury; and such Trial *shall* be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2 (emphases added). And the Sixth Amendment not only guarantees the right to a jury trial generally, but lays out in specific detail the form that such a trial shall take. *See Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . . In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.").

Yet despite its intended centrality as the bedrock of our criminal justice system, the use of jury trials is quickly evaporating. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the

country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014; Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25 ("[J]uries today decide only 1–4 percent of criminal cases filed in federal and state court.").

In short, criminal juries have been dramatically marginalized. The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders.

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But the least we can do to avoid further discouraging defendants from exercising their right to a jury trial is to ensure that juries maintain their historical, legal prerogative to issue conscientious acquittals in the face of manifestly unjust prosecutions (like Mr. Lynch's). At the very least, defendants must be assured that jurors potentially inclined to engage in nullification will not be dissuaded from doing so by unlawful threats of punishment, whether express or implied.

## CONCLUSION

For the foregoing reasons, as well as those presented by Defendant-Appellant, the Court should grant the petition for rehearing.

Respectfully submitted,

DATED: November 23, 2018.

*/s/ Jay R. Schweikert*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(2) because it contains 3,078 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Jay R. Schweikert*
November 23, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*
November 23, 2018