No. 18-8426

In the Supreme Court of the United States

Charles C. Lynch,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS 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 in particular 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.

Cato's concern in this case is ensuring that coercive anti-nullification jury instructions are not so coercive as to destroy the notion of jury independence and further erode the participation of citizen juries in the criminal justice system.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF 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 traditionally implied that jurors possess the power of conscientious acquittal, or "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 4. In a responsible and reasonable effort to ensure compliance with federal law, Lynch—a non-law-

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[2] *Amicus* suggests that "jury nullification" is a misleading term, 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, and *amicus* will use that phrase interchangeably in this brief.

[3] *Amicus* does not address Lynch's entrapment-by-estoppel defense, but for the reasons given in the petition, certiorari is also warranted to resolve the circuit split on this independently important question. *See* Pet. at 3, 29-40.

yer—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 4-5. Despite this assurance (and the blessings of his city and county officials), 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 5-6.

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. The panel majority's decision to uphold this coercive instruction, over Judge Watford's powerful dissent, imperils the very notion of jury independence—a foundational precept of Anglo-American law more ancient than Magna Carta. More generally, in the absence of recent guidance from this Court, lower courts have become increasingly confused and divided on the connection between jury independence and conscientious acquittals.

These errors are 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. The Court should grant certiorari to prevent the use of coercive jury instructions, resolve lower-court confusion on the subject of conscientious acquittal, and 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 unambiguously pre-dates the signing of Magna Carta. *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 significant illustrations of this principle in pre-colonial England was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), a landmark decision that came to represent the significance of both religious freedom and jury independence. The case arose

out of the trial of William Penn and William Mead, who were charged with 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). During this time, the Quakers as a group encountered heavy religious discrimination, and both William Penn and William Mead faced capital punishment for preaching in Grace Church Street "to a meeting of 300 to 400 Quakers." CONRAD, *supra*, at 24-25.

Edward Bushell was a member of William Penn's jury. Despite his factual guilt, Penn was able to persuade the jurors to thrice refuse to follow the trial judges' orders to return with a guilty verdict. The jurors were ultimately instructed by the court: "Now we are upon Matter of Fact, which you are to keep to, and observe as what hath been fully sworn, at your peril." Conrad, *supra*, at 26 (quoting *The Tryal of Wm. Penn and Wm. Mead for Causing a Tumult* . . . , How. St. Tr. 6:951, 960-961 (1670)). The jurors remained steadfast in their refusal to convict, however, and were then imprisoned for three days "without meat, drink, fire," or toilet facilities. *Id.* at 26-27. But Bushell filed a petition for a writ of habeas corpus, which the Court of Common Pleas granted—firmly establishing the principle that independent juries had the authority to acquit against the wishes of the Crown. GREEN, *supra*, at 236-49.

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 ju-

rors 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 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 both 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.

A necessary corollary of Colonial juries' authority to issue conscientious acquittals was their awareness of the consequences of a conviction. In an era with a far simpler criminal code, detailed instructions from the judge were often unnecessary to ensure that the jury was properly informed. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 22-29, 32, 34-35 (1994) ("[J]urors did not even need to rely on a judge's instructions to know the common law of the land . . . ."). Juries were thus able to tailor their verdicts to prevent excessive punishment. *See, e.g.*, 4 WILLIAM M. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *342-44 (1769) (juries often found value of stolen goods to be less than twelvepence in order to avoid mandatory death penalty for theft of more valuable goods).

The community's central role in the administration of criminal justice has therefore 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 (1833)). 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.'" *Id.* 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. Notably, the jury trial is the only individual right mentioned in both the original body of the Constitution and the Bill of Rights.

Ultimately, the jury is expected to act as the conscience of the community. "Just 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)).

As this Court explained in *Gregg v. Georgia*, 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." 428 U.S. 153, 199 n.50 (1976). 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. IN THE ABSENCE OF RECENT GUIDANCE FROM THIS COURT, LOWER COURTS HAVE BEEN CONFUSED AND DIVIDED ON HOW TO PROTECT JURY INDEPENDENCE.

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 issue conscientious acquittals. *See, e.g.*, *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2018); *United States v. Thomas*, 116 F.3d 606, 615-16 (2d Cir. 1997). Such decisions, however, are based almost entirely on an overly expansive interpretation of a Supreme Court decision from over a century ago—*Sparf v. United States*, 156 U.S. 51 (1895).

Sparf involved an appeal from a murder conviction of defendants who were jointly indicted for killing a man on the high seas. *Id.* at 52. The defendants objected that the trial court refused their proposed jury instruction, which would have informed the jury that

they were permitted to return a verdict for the lesser-included offense of manslaughter. *Id.* at 59-60. The Supreme Court affirmed the conviction, on the ground that "section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing." *Id.* at 63.

Sparf might have been little more than a run-of-the-mill affirmation of a trial court's jury instructions, except that the Court explained more broadly how "it was the duty of the court to expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them." *Id.* at 106. Lower courts have therefore taken *Sparf* to stand for the idea that criminal juries have a legal duty to do no more than adjudicate disputed facts, and they have in turn relied upon this principle to justify jury instructions discouraging conscientious acquittals. *See generally Thomas*, 116 F.3d at 615.

This reading of *Sparf* is, at best, an extension well beyond what the case actually held. In contemporary parlance, *Sparf* was not actually a case about "jury nullification" at all. The disputed issue was not whether the defendants could be permitted to urge the jury to acquit, notwithstanding factual guilt, but rather whether the jury was permitted to decide the legal question of whether a manslaughter verdict was available. By stating that the duty of the jury was to apply the law as given by the court, the *Sparf* Court was clearly establishing that it was not the job of juries to, for example, engage in statutory interpretation, or decide how to apply judicial precedent. But to say that this principle necessarily precludes "jury nullification" is question begging. After all, if the power of juries to

engage in conscientious acquittal is itself part of what the right to a jury trial *means* (as provided in both Article III and the Sixth Amendment), then a jury's decision to return such a verdict is obviously not in conflict with its duty to apply the law as given.

Thus, in light of the ample history discussed above, and as noted in Judge Watford's dissent below, there is serious reason to doubt the correctness of contemporary lower-court decisions 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."). And because lower courts are going well beyond what this Court instructed in *Sparf*, it is unsurprising that they are deeply divided on whether and how a trial court may discourage jurors from nullifying. *See* Pet. at 13-23.

Ultimately, however, this particular case does not require the Court to fully resolve these tensions, or make any grand pronouncements about the overall propriety of conscientious acquittal. The issue here, of course, was not whether Mr. Lynch was entitled to directly argue nullification, or obtain an affirmative instruction telling the jury about its authority to issue conscientious acquittals. Rather, it is simply whether Mr. Lynch has a right not to have his jury *coerced* into convicting, when it otherwise might have been inclined to acquit.

No matter how one reads *Sparf*, and even assuming it is appropriate for courts to *discourage* nullification, the bedrock foundation of jury independence is that jurors themselves must freely decide upon the verdict,

without explicit or implicit threat of punishment from the Court. And as both the petition and Judge Watford's dissent make clear, any reasonable juror in this case would have understood the judge's instructions as threatening punishment if the jury returned a verdict of not guilty. *See* Pet. at 6-8, 26-29; *Lynch*, 903 F.3d at 1090 ("Only the hardiest of jurors would remain committed to voting her conscience when threatened with the risk of fine or imprisonment. That is particularly true here, where the court required the jurors to affirm in open court that they could follow the court's command not to engage in nullification.").

In short, the coercive instruction in this case is the logical culmination of years of gradual erosion of jury independence. Although there is a range of reasonable viewpoints on how best to understand the *Sparf* decision—and more generally, how to understand the relationship between jury independence and conscientious acquittal—this case presents the extreme end of the spectrum. If the Ninth Circuit's decision is permitted to stand, then *Bushell's Case* itself—one of the most crucial victories for individual liberty and limited government in the history of the Anglo-American legal tradition—will effectively have been reversed.

III. PROTECTING JURY INDEPENDENCE IS ALL THE MORE IMPORTANT GIVEN 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.").

Yet despite its intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. 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"); 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.").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively *coerced* into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014. In a recent report, the NACDL has extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018).

Although the trial penalty has many complex causes, one of the biggest factors is the unbridled discretion of prosecutors to charge defendants in excess of what their alleged crimes actually warrant—especially when mandatory minimums remove the judge's sentencing discretion entirely, as in the present case. *See id.* 7, 24-38. Given the pressure that prosecutors can bring to bear through charging decisions alone, many defendants decide to waive their right to a jury trial, no matter the merits of their case.

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, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner contains 3,896 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 15th day of April, 2019, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 15th day of April, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
State of Nebraska
My Commission Expires Nov 24, 2020

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