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

MOTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE GEORGE H. WU
United States District Judge

HILARY POTASHNER
Acting Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5059
Facsimile: (213) 894-0081
E-mail: Alexandra_Yates@fd.org

Attorneys for Defendant-Appellant/
Cross-Appellee

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I. PRELIMINARY STATEMENT

This case presents an issue of exceptional, national, and urgent importance: Whether the Department of Justice ("DOJ") is prohibited from spending federal funds on the prosecution of state-authorized medical marijuana patients, doctors, and dispensary owners. Section 538 of the governing federal appropriations bill prohibits the DOJ from spending Fiscal Year 2015 funds "to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The legislative history of Section 538 and post-enactment statements by its congressional sponsors leave no doubt that the law was passed to prevent the DOJ from criminally prosecuting medical marijuana cases in federal court. Yet the Executive Branch has refused to recognize the clear limits on its authority enacted by the Legislative Branch.

Former California medical marijuana dispensary owner Charles Lynch filed an urgent motion asking this Court to enforce Section 538 and order the DOJ to cease spending funds prosecuting his case. A motions panel denied his motion without analysis or explanation, suggesting he raise it along with the merits of his direct appeal, or in Rule 12.1 proceedings in district court.[1] While the motions panel's ruling may appear at first glance to be benign, in actuality it ***substantively***

[1] *See* Fed. R. App. P. 12.1 (Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal).

interprets Section 538 as having no legal effect by allowing the DOJ to continue its unlawful expenditure of federal funds and sanctioning federal prosecutors' ongoing criminal acts.

Every day that passes without this Court's enforcement of Section 538, Congress's express will is thwarted. District courts have delayed proceedings in medical marijuana prosecutions awaiting guidance from this Circuit. If this Court does not act now, Section 538 effectively will be nullified by executive and judicial inaction. This Court should grant rehearing of the motions panel's Order and consider Mr. Lynch's urgent motion on the merits.[2]

II. BACKGROUND

A. Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015

On December 16, 2014, President Barack Obama signed into law a budget bill for Fiscal Year 2015, which ends on September 30, 2015. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (full text available at https://www.congress.gov/bill/113th-congress/house-bill/83/text). Section 538 of the Act provides:

> ***None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of*** Alabama, Alaska, Arizona, ***California***,

[2] The motions panel's Order is attached as Exhibit A.

> Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, ***to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.***

Id. § 538 (emphasis added). The DOJ includes the United States Attorney's Office for the Central District of California ("USAO"). *See* http://www.justice.gov/agencies/chart.

Despite Congress's clear intent in passing this legislation, ***Section 538 has had absolutely no effect*** on the Department of Justice's continued enforcement of federal law against state medical marijuana patients, doctors, and businesses ***because the DOJ maintains that Section 538 in inapplicable to criminal prosecutions***.[3] Federal district courts presented with Section 538 motions in the Ninth Circuit are in general agreement that the law *may* prohibit certain federal prosecutions, but have delayed proceedings or become mired down in unnecessary

[3] *See* Timothy M. Phelps, *Justice Department Says It Can Still Prosecute Medical Marijuana Cases*, L.A. Times (Apr. 2, 2015), *available at* http://www.latimes.com/nation/nationnow/la-na-nn-medical-marijuana-abusers-20150401-story.html.

litigation over compliance with state laws.[4] They are expressly awaiting guidance from this Court.[5] This Court's failure to act expeditiously to enforce Section 538 is effectively sanctioning the DOJ's illegal interpretation of the law.

1. The Plain Language of Section 538 Clearly Applies to Criminal Prosecutions

Section 538 prohibits the DOJ from using funds to *prevent* the *implementation* of state laws authorizing the use, distribution, possession, or cultivation of medical marijuana. Prevent means "to hinder or impede." *Black's Law Dictionary* 1307 (9th ed. 2009).[6] Implementation is the noun form of the transitive verb "implement," defined as "fulfillment," 7 *The Oxford English Dictionary* 722 (2d ed. 1989), or "execution," *New Oxford American Dictionary*

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[4] *See, e.g.*, *United States v. Walker et al.*, C.D. Cal. CR-12-240-JVS; *United States v. Pisarski*, N.D. Cal. CR-14-278-RS; *United States v. Harvey et al.*, E.D. Wash. CR-13-24-TOR.

[5] Where district court defendants have filed interlocutory appeals to this Court seeking immediate review of Section 538 rulings, this Court has dismissed the appeals for lack of jurisdiction or indicated its intent to do so. *See, e.g.*, *United States v. Iane Lovan*, CA No. 15-10122; *United States v. Steve McIntosh*, CA No. 15-10117; *United States v. Sinyo Silkeutsabay*, CA No. 15-30045.

[6] *See also* 12 *The Oxford English Dictionary* 444 (2d ed. 1989) (defining prevent as "to preclude, stop, hinder"); *The American Heritage Dictionary* 1397 (5th ed. 2011) (defining prevent as "impede," "avert," and "to keep from happening"); *Webster's Third New International Dictionary Unabridged* 1798 (2008) (defining prevent as "to hold or keep back," "hinder," "stop," and "to interpose an obstacle").

873 (3d ed. 2010).[7] By the plain terms of Section 538, the USAO may not spend funds hindering the fulfillment and execution of state laws authorizing medical marijuana.

But by prosecuting state-authorized medical marijuana defendants, the DOJ is hindering and impeding the fulfillment of state medical marijuana laws in at least three ways. First, the federal government's continued prosecution of medical marijuana patients, doctors, and business owners, such as Mr. Lynch, hinders the fulfillment and execution of state laws authorizing medical marijuana because federal marijuana defendants are prohibited from asserting a defense of compliance with state law—a defense that is at the heart of California's medical marijuana system. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001). It is only through the existence of this affirmative defense that California law authorizes the use, distribution, possession, or cultivation of medical marijuana because, in the absence of that defense, California law criminalizes these activities. *See* Cal. Health & Safety Code §§ 11357-60, 11366, 11362.5 (codifying Compassionate Use Act of 1996 or "CUA"), 11362.7 *et seq*. (chiefly, §§ 11362.765, 11362.775) (codifying Medical Marijuana Program Act or "MMPA"); *People v. Anderson*, 232 Cal. Rptr. 276 (Ct. App. 2015) (explaining that

[7] *See also Webster's Ninth New College Dictionary* 604 (1986) (defining implement as "to give practical effect to and ensure of actual fulfillment by concrete measures").

individuals operating storefront dispensaries may invoke the affirmative defense). Without the affirmative defense, California's medical marijuana laws are *de facto* nonexistent. When the federal government prosecutes a defendant who is prevented from presenting that affirmative defense, which state law permits, it hinders the fulfillment and execution of California's laws.

Second, because the federal government's stated policy is to prosecute individuals not in compliance with state laws,[8] each federal medical marijuana prosecution also interferes with the respective state's ability to determine what conduct is and is not lawful under its own medical marijuana laws. For example, in this case, California law enforcement officers surveilled Mr. Lynch's dispensary for almost a year, but never arrested Mr. Lynch for a violation of state law. *See* CR 224-2, at 38-39; CR 354, at 45-52, 140 (indicating local sheriff referred Mr. Lynch's case to the Drug Enforcement Administration after the sheriff was unable to cite Mr. Lynch for a violation of California law). ***No state charges ever were filed against Mr. Lynch.*** Yet state officials were not entrusted to make the determination of whether Mr. Lynch, a California citizen, operated his California

[8] *See* Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys, 1-2 (Oct. 19, 2009) ("As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

medical marijuana dispensary in compliance with California law. In other words, California was prevented from executing its own laws.

Third, Congress passed Section 538 to end federal medical marijuana prosecutions, which have a chilling effect on states' implementation of their medical marijuana laws. Individuals interested in using, possessing, distributing, or cultivating medical marijuana under state law are deterred from doing so by the federal government's continued prosecution of defendants such as Mr. Lynch. Indeed, this chilling effect appears to be one of the express goals of federal medical marijuana prosecutions.[9] Thus, in this additional way, the DOJ is hindering and impeding the fulfillment of state medical marijuana laws by prosecuting state-authorized medical marijuana defendants.

2. The Legislative History of Section 538 Reveals Congress's Intent To End Federal Medical Marijuana Prosecutions

Although the plain language of Section 538 is unambiguous and clearly sets forth the unlawfulness of federal medical marijuana prosecutions, it is worth noting

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[9] *See* Norimitsu Onishi, *Cities Balk as Federal Law on Marijuana Is Enforced*, N.Y. Times (June 30, 2012), *available at* http://www.nytimes.com/2012/07/01/us/hundreds-of-california-medical-marijuana-shops-close.html?_r=0; *see also* Nick Schou, *Obama Administration's Potpocalypse Not Limited to "Criminal" Dispensaries, Emails Show*, O.C. Weekly (Aug. 2, 2013) (quoting internal U.S. Attorney's Office e-mails, including from the lead prosecutor in Mr. Lynch's case), *available at* http://blogs.ocweekly.com/navelgazing/2013/08/internal_emails_contradict_oba.php.

that the legislative history of the bipartisan Rohrabacher-Farr Amendment that became Section 538 supports the same result. In debate, several cosponsors of the amendment explained that it was designed to prevent the DOJ from prosecuting state-authorized medical marijuana patients, doctors, and business owners. *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 amendment 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 the amendment 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 amendment 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 to the power of the States. Lead sponsor Representative 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, Section 538's aim was to stop the Department of Justice 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 amendment.

Even opponents understood that the amendment would prevent the DOJ from prosecuting medical marijuana cases; indeed, they believed it might go much further. *See, e.g.*, *id.* at 4983 (Statement of Rep. Harris) ("[T]he amendment as written would tie the DEA's hands beyond medical marijuana."); *id.* at 4985 (Statement of Rep. Fleming) (expressing concern that the amendment would "make it difficult, if not impossible, for the DEA and the Department of Justice to enforce the [Controlled Substances Act].").

Post-enactment statements by the lead sponsors of the amendment confirm that Section 538 was intended to end federal prosecutions of state-authorized medical marijuana patients, doctors, and dispensaries.[10] Representative Farr, for

[10] These post-enactment statements are relevant to this Court's interpretation of Section 538. *See Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 211 n.23 (1983) (relying on 1965 explanation by "an important figure in the drafting of the 1954 Act"); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-32 & n.23 (1982) (citing as relevant legislative history a bill summary placed in the Congressional Record by the bill's sponsor and

example, has publicly stated that Section 538 prohibits such prosecutions, adding, "No reasonable person thinks prosecuting patients doesn't interfere with a state's medical marijuana laws. . . . Congress was clear: Stop going after patients and dispensaries." Matt Ferner, *Congressmen Say DOJ's Interpretation of Their Medical Marijuana Amendment Is "Emphatically Wrong,"* Huffington Post (Apr. 30, 2015) (attached as Ex. B). Representatives Rohrabacher and Farr together wrote a letter to then-Attorney General Holder specifically refuting the idea that Section 538 does not apply "to specific ongoing cases against individuals and businesses engaged in medical marijuana activity." Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to Eric Holder, Attorney General (Apr. 8, 2015) (attached as Ex. C). ***"Rest assured," wrote the lead sponsors, "the purpose of our amendment was to prevent the Department from wasting its limited law enforcement resources on prosecutions . . . against medical marijuana patients and providers, including businesses that operate legally under state law."*** *Id.* (emphasis added). Representatives Rohrabacher and Farr further explained that "to the extent that there may be questions about whether the facts of . . . any . . . specific case constitute violations of state law, . . . state law

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explanatory remarks made by that sponsor after the bill's passage); *id.* at 535 ("Although postenactment 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)).

enforcement agencies are best-suited to investigate and determine free from federal interference." *Id.*

Indeed, specifically referring to Mr. Lynch's Ninth Circuit motion to enforce Section 538, ***the subject of this motion for rehearing***, Representatives Rohrabacher and Farr stated publicly that their amendment "was clearly intended to curb individual prosecutions and have accused the Justice Department of violating its spirit and substance." Erik Eckholm, *Legal Conflicts on Medical Marijuana Ensnare Hundreds as Courts Debate a New Provision*, N.Y. Times (Apr. 8, 2015) (attached as Ex. D.). Said Representative Rohrabacher, "***If federal prosecutors are engaged in legal action against those involved with medical marijuana in a state that has made it legal, then they are the ones who are the lawbreakers.***" *Id.* (emphasis added).

Representative Rohrabacher's statement that federal prosecutors are breaking the law is perhaps a reference to the Anti-Deficiency Act, which prohibits federal employees from spending unauthorized funds. *See* Anti-Deficiency Act, 31 U.S.C. §§ 1341(a)(1)(A), 1517(a) (2015). ***Any expenditure of unauthorized funds by a federal employee, no matter how insignificant***, violates the Anti-Deficiency Act and ***is a criminal offense*** punishable by up to two years in prison and a fine of $5,000. *See* 31 U.S.C. §§ 1350, 1519.

B. Brief Statement of Facts and Procedural History

Mr. Lynch operated Central Coast Compassionate Caregivers ("CCCC"), a medical marijuana dispensary, in Morro Bay, California. Following a ten-day trial, at which the jury was instructed that California medical marijuana laws were irrelevant to the case, Mr. Lynch was convicted of five federal drug counts.

The district court reluctantly sentenced Mr. Lynch to one year and one day in prison, followed by four years of supervised release. In its sentencing order, the court explained that Mr. Lynch "opened a marijuana dispensary under the guidelines set forth by the State of California. His purpose for opening the dispensary was to provide marijuana to those who, under California law, were qualified to receive it for medical reasons." CR 327, at 12 (alterations and internal quotation marks omitted); *see also id.* at 33 (finding "the purpose of the CCCC's distribution of marijuana was not for recipients to 'get high' or for recreational enjoyment. Rather, it was pursuant to the CUA's goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians").

Mr. Lynch appealed his conviction and sentence to this Court, and the government cross-appealed the sentence, seeking a five-year prison term. On February 24, 2015, Mr. Lynch filed an urgent motion asking this Court to enforce Section 538 and direct the DOJ to cease spending funds prosecuting his case. Instead of filing an opposition, the government moved to refer Mr. Lynch's motion

to the merits panel ultimately assigned to hear his case. Mr. Lynch opposed the government's motion, explaining that the requested delay defeats the purpose of Section 538 entirely because ***pursuing prosecution of this costly appeal is precisely what the law prohibits***. And postponing the resolution of his motion until after the fiscal year expires could potentially moot this issue, allowing the DOJ to violate Section 538 without oversight or consequence—precisely what the federal government sought to achieve in seeking the delay.

On April 13, 2015, a motions panel of this Court denied Mr. Lynch's motion in a brief Order, without explanation or prejudice to renewing his arguments in the merits briefing or returning to district court for resolution of the issue in the first instance.

III. REHEARING EN BANC IS NECESSARY AND APPROPRIATE

This Court's rules and precedents specifically contemplate that en banc reconsideration of a motions panel's decision is sometimes necessary and appropriate. *See* Ninth Cir. Gen. Order 6.11; Ninth Cir. R. 27-10(b); *SW Voter Reg. Educ. Proj. v. Shelley*, 344 F.3d 913 (9th Cir. 2003) (ordering rehearing en banc of decision by three-judge motion panel); *Andreiu v. Reno*, 237 F.3d 1168 (9th Cir. 2000) (same). In this case, Mr. Lynch presents an issue of exceptional, national importance that requires urgent judicial review. The motions panel's decision denies him that review and any practical relief, thereby rendering Section

538 effectively null and void. This Court should grant en banc rehearing and decide the merits of Mr. Lynch's motion.

A. This Court Sitting En Banc Is the Appropriate Court To Resolve the Purely Legal Questions Presented by Mr. Lynch's Motion

Whether Section 538 prevents the Department of Justice from prosecuting medical marijuana cases in federal court is a purely legal question that requires no factual development in district court. For a medical marijuana defendant to be covered by the legislation, his allegedly unlawful actions need only fall under the rubric of "medical marijuana" in a state that authorizes the use, distribution, cultivation, or possession of such medicine. A defendant's technical compliance with the authorizing state's laws is irrelevant, because by usurping the state's role in determining that compliance, the Department of Justice interferes with the state's ability to implement its own laws. Moreover, as already noted, the State of California declined to file charges against Mr. Lynch after local law enforcement officers surveilled his dispensary for almost a year.

Even if there is a dispute over Mr. Lynch's compliance with state law, there is no reasonable dispute that Mr. Lynch would have been entitled to invoke California's affirmative defense under the CUA and MMPA had he been prosecuted in state court—but was not permitted to do so at his federal trial. Any expenditure of funds by the DOJ to affirm Mr. Lynch's conviction or enforce or

enlarge his sentence prevents the implementation of California law authorizing medical marijuana.

The purely legal questions raised by Mr. Lynch's motion thus are ripe for review. In addition, because Mr. Lynch's motion seeks a ruling of great importance—not solely because of its practical implications for federal medical marijuana enforcement, but also because it must address sensitive issues of legislative and executive authority—an en banc court is the most appropriate court to consider it. Indeed, in all likelihood, this Court sitting en banc will have to face the question of Section 538's application to federal criminal cases at some point. Because, as discussed below, any delay in doing so effectively will nullify the legislation and deprive Mr. Lynch and other defendants of practical relief, this Court should take the opportunity to address the issue now.

B. This Court Must Act Expeditiously To Enforce Section 538

In December, members of the United States Congress took the time to draft, debate, and ultimately pass the amendment to the appropriations bill that became Section 538. The President signed the bill into law shortly thereafter. In enacting Section 538, Congress fully expected the DOJ to cease expenditures in cases such as this one. That has not occurred.

Instead, DOJ employees continue to spend funds on prosecutions Congress has expressly prohibited, violating the law without oversight or consequence.

Indeed, ***federal prosecutors appearing before this Court and district courts of this Circuit are committing criminal acts*** by spending unauthorized funds on medical marijuana prosecutions. This Court has the duty and authority to prevent the unlawful practice of law within the Court's jurisdiction, and should not abdicate its responsibility to decide a ripe issue presented in the proper forum, thereby allowing the government's unlawful conduct to continue unchecked.

Further, by failing to act now, this Court is sanctioning the continued expenditure of funds on this costly appeal for months to come. Mr. Lynch's third cross-appeal brief is not due until June. Even if Mr. Lynch managed to file the third cross-appeal brief far in advance of the deadline—an unrealistic possibility given that the initial two briefs on cross-appeal are 80 and 149 pages long, respectively, and the parties required more than a year of extensions each to complete those briefs—his case would not be placed on calendar for oral argument until at least ten weeks from the date of filing. *See* Ninth Cir. Gen. Order 3.3.b. At best, a merits panel would hear argument in August. More likely, argument would take place in September, October, or later. With the fiscal year expiring on September 30, the merits panel ultimately assigned to hear Mr. Lynch's case will not have a realistic opportunity to resolve Mr. Lynch's motion before it is rendered potentially moot.

Given the government's entrenched position and strategy of avoiding resolution of Mr. Lynch's motion by attempting to moot it, it is apparent that returning to district court similarly will render Section 538 without effect. Upon remand, the government will move to recuse the assigned district judge from hearing the motion, just as it has sought reassignment to a new judge in the event of remand from the direct appeal. That litigation, and any potential need for a new judge to familiarize him- or herself with Mr. Lynch's case, will take time. Then, as it did in this Court, the government will seek a lengthy extension to brief the matter. Even without these expected delays, the district court will need time to resolve the issue and may, erroneously, decide that it must make factual findings to do so, perhaps requiring an evidentiary hearing. Whatever the ultimate ruling, the losing party surely will appeal to this Court, a process that will take months. Again, the fiscal year will expire, and justice delayed will be justice denied.

IV. CONCLUSION

In a rare bipartisan move, Congress directed the Department of Justice to cease spending funds on medical marijuana prosecutions. Yet despite Congress's clear instruction, the DOJ remains undeterred and continues to enforce federal law against state-authorized medical marijuana patients, doctors, and dispensaries. To date, district courts have been unwilling to intervene. If this Court does not act

now, it is all but certain that Congress's legislation will have no practical effect and defendants such as Mr. Lynch will receive no practical relief.

For the foregoing reasons, Mr. Lynch respectfully asks this Court to grant this motion and rehear his motion to enforce Section 538 en banc.

Respectfully submitted,

HILARY POTASHNER
Acting Federal Public Defender

DATED: April 27, 2015

By */s Alexandra W. Yates*
ALEXANDRA W. YATES
Deputy Federal Public Defender

Attorneys for Defendant-Appellant/
Cross-Appellee

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1(a), the attached motion for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4152 words.

DATED: April 27, 2015

By */s Alexandra W. Yates*
ALEXANDRA W. YATES

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I electronically filed the foregoing **MOTION FOR REHEARING EN BANC** 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
LORENA MACIAS