NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

_____

LANCE EDWARD GLOOR

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

The question presented in this case is as follows:

Were the Tenth Amendment, Due Process Clause, and the separation of powers doctrine violated where Congress expressed its clear intent to respect states' rights by enacting the Rohrabacher-Farr amendment, an appropriations rider prohibiting the Department of Justice from spending funds to prevent the states and territories' implementation of their own medical marijuana laws, where the Ninth Circuit in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), eviscerated the federal law and subverted states' rights by holding that in order to enjoin federal prosecution pursuant to the appropriations rider defendants must show that they "strictly complied" with the state medical marijuana laws, and where in the petitioner's case the Ninth Circuit denied the petitioner an opportunity to present evidence in an evidentiary hearing to show compliance with Washington State's medical marijuana laws?

PARTIES TO THE PROCEEDING

The petitioner is Lance Edward Gloor. He is presently incarcerated by the United States Bureau of Prisons at FCI Sheridan, located in Sheridan, Oregon. The named respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lance Edward Gloor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished as United States v. Gloor, 725 F. App'x 493 (9th Cir. 2018), No. 16-30142 (9th Cir. February 20, 2018). Pet. App. 3a-7a. The district court's rulings, both oral and written, are unpublished. Pet. App. 8a-75a.

JURISDICTION

The judgment of the court of appeals, denying en banc review, was entered on March 30, 2018. Pet. App. 2a. Gloor filed his petition for writ of certiorari and a motion to proceed in forma pauperis, which were postmarked June 28, 2018. *See* Pet. App. 1a. The Supreme Court Clerk's Office returned the submission because it contained various defects. Pet. App. 1a. In its July 3, 2018 letter, the Supreme Court Clerk's Office specified that "[u]nless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5." Pet. App. 1a. The 60th day from this Court's July 3, 2018 letter is September 1, 2018, which falls on a Saturday. Accordingly, pursuant to Supreme Court Rule 30.1, the petition must be filed on or before Monday, September 3, 2018.

The procedural history of the disposition is set forth below.

The Ninth Circuit Court of Appeals entered its Memorandum Opinion on February 20, 2018. Pet. App. 3a-7a. Through counsel, the petitioner on February 27, 2018, filed with the Ninth Circuit his petition for rehearing with suggestion for rehearing en banc. *See* Ninth Cir. Dkt. #44.

Lance Gloor's petition for writ of certiorari is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Due Process Clause of the Fifth Amendment specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; . . . . U.S. Const. amend. V.

The Fourteenth Amendment states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

The Appropriations Clause specifies that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Const. art. I, § 9, cl. 7.

The relevant provisions of the Constitution relating to the separation of powers doctrine are as follows:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. I, § 2.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 3.

Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014), states:

> 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, 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.

On March 23, 2018, Congress passed the Consolidated Appropriations Act, 2018, PL 115-141, March 23, 2018, 132 Stat 348 (herein "§ 538" or "rider"), which contains virtually identical language to the earlier rider, and adds additional states and a territory which have enacted laws allowing for medical marijuana.

STATEMENT OF THE CASE

A. Procedural History.

On November 26, 2013, the government charged Mr. Gloor by indictment with four counts as follows:

1) One count of conspiracy to distribute marijuana along with co-defendants James Lucas and Matthew Roberts for a time frame covering five years prior to the date of indictment, and continuing through the then-present (count 1), 21 U.S.C. § 841(a)(1) and 841(b)(1)(A) and 846(1);

2) One count of conspiracy to commit money laundering with Mr. Lucas and Mr. Roberts during the same time frame, *supra* (count 2), 18 U.S.C. § 1956(h)(2);

3) One count of manufacturing marijuana on or about September 20, 2010 in Kitsap County, Washington (count 3), 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2;

4) One count of possession of a firearm in furtherance of drug trafficking on or about September 20, 2010 in Kitsap County, Washington (count 4), 18 U.S.C., §§ 924(c)(1)(A)(i).

ER 798.[1]

Co-defendants Lucas and Roberts pled guilty in sealed plea agreements. ER 732.

Lance Gloor filed a pre-trial motion to dismiss based on, *inter alia*, the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332-33 (2015), a funding rider that prohibited the Department of Justice (hereafter "DOJ") from spending funds to prevent states' implementation of their medical marijuana laws. ER 731. On December 11, 2015, the trial court orally denied the motion. ER 88.

On December 14, 2015, the district court entered an Order granting in full the government's motion in limine that barred Mr. Gloor from presenting evidence to the jury that compliance with Washington State's medical marijuana laws was a defense to the prosecution. ER 57. The Order provided:

> The Court expects the parties will present evidence that Gloor was operating a purported medical marijuana dispensary where marijuana was sometimes dispensed to individuals carrying medical marijuana cards. Such evidence will be allowed to the extent it does not conflict with this Order, e.g. to the extent it does not direct the jury that compliance (or intended compliance) with state law is a defense for alleged violation of federal law.

ER 58-59.

A five-day trial began on January 7, 2016, and eight days later the jury hung on the second count for conspiracy to commit money laundering, and rendered a guilty verdict on count 1 (conspiracy to distribute marijuana) and count 3 (manufacture of marijuana). Pet. App. 70a-

[1] Citation to "ER___" refers to Appellant's Excerpts of Record, which was filed before the Ninth Circuit. Citation to "Pet. App. ___" refers to documents in the appendix to the petition for writ of certiorari.

78a. The jury acquitted Mr. Gloor on count 4, finding that Mr. Gloor did not possess a firearm in furtherance of a drug trafficking crime. *Id*.

On June 3, 2016, District Court Judge Ronald B. Leighton sentenced Mr. Gloor to ten years (120 months) imprisonment, and five years' supervised released. *See* ER 48.

Mr. Gloor filed a timely notice of appeal on June 10, 2016. ER 46.

On August 18, 2016, Mr. Gloor filed before the district court a motion for reconsideration to stay his ten year sentence pursuant to 18 U.S.C. § 3143 and 3145(c), in light of the recent Ninth Circuit ruling in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), a decision adjudicating ten consolidated cases. ER 41. His motion for reconsideration addressed whether the government's criminal prosecution of Mr. Gloor was barred on the basis of the Ninth Circuit's interpretation of the congressional appropriations rider prohibiting the Department of Justice (DOJ) from using funds to prevent states' implementation of their medical marijuana laws. ER 41-45. The trial court denied the motion. Pet. App. 33a-34a.

B. Factual Background: Pre-Trial.

1. The State Investigation And Subsequent Dismissal Of Charges.

On September 20, 2010, law enforcement officials from the Kitsap County Sheriff's office executed a search warrant on Mr. Gloor's residence where officers located a grow operation consisting of 75 plants. ER 397, 571-572. As a result, the state charged Mr. Gloor in Pierce County, Washington Superior Court, but during the federal investigation the case was dismissed without prejudice. ER 698-699.

Later, as detailed, *infra*, three law enforcement officers engaged in a covert operation to purchase marijuana at four storefront medical marijuana dispensaries connected to all three co-defendants, located in Tacoma (Tacoma Cross), Lacey (Lacey Cross), Seattle (Seattle Cross),

and Kitsap Peninsula (KPN Cross). At each dispensary, staff turned away the undercover officers in turn because they did not have medical marijuana cards. ER 352-353, 470-471, 523-525. For that reason, the officers obtained medical marijuana cards from South Sound Medicine by giving false information to authorities issuing those cards. *Id*. The undercover officers returned to the dispensaries, medical cards in hand, and purchased marijuana. *Id*. The state and federal undercover operations culminated in execution of state and federal search warrants of all four dispensaries. On November 15, 2011, law enforcement raided the four stores and seized the inventory, including marijuana, edibles, and monies received from sales of those products. ER 151-152, 183, 185, 201-202, 206, 211-212, 216, 222-223, 375.

2. The Federal Investigation.

After the November 15, 2011 raid, the four dispensaries reopened. ER 276-277. Federal agents engaged in undercover operations at three of the four stores by, again, falsely obtaining medical cards to purchase product at the stores. ER 706.

In July 2013, the government executed new search warrants at three of the four dispensaries; the fourth dispensary, formerly known as Lacey Cross, had reopened in a new location under a new, Bayside Collective, by a former employee of Mr. Gloor's, discussed, *infra.* ER 195-196, 739.

In November 2013, Mr. Gloor was indicted along with Mr. Lucas and Mr. Roberts; Mr. Gloor self-surrendered on March 3, 2014 after a warrant was issued for his arrest. ER 708, 798.

3. Mr. Gloor's Pre-Trial Motion To Dismiss, And The Government's Cross-Motion In Limine.

During argument on Mr. Gloor's motion to dismiss and the prosecutor's cross-motion in limine, the following colloquy took place:

> THE COURT: I've been walking on this planet for 64 years. I haven't met many people -- some -- some who had a medical necessity for their cards.
>
> MR. LOMBARDI: Well –
>
> THE COURT: All of them were recreation dopers and they liked it recreational. And I don't -- I don't judge them. But I mean if they want it, they can buy it. They want to get high; they want to get high. But, you know, they make a mockery of the law. And it's always, since this decriminalization and legalization process, has all been tongue-in-cheek arguments.

Pet. App. 53a-54a.

The prosecutor asked the district court to grant its motion in limine to preclude Mr. Gloor from raising as a defense that he complied with Washington State law:

> THE COURT: They obviously have a right to the defense that they -- they ran a business compliant with the State of Washington, if they -- if they -- if they can make it.
>
> MR. LOMBARDI: I would actually respectfully disagree with that, because this Court applies federal law. The jury instructions in this case are going to be just regular Title 21 instructions. There is no defense in Title 21 that you're complying with state law. Now, I will grant the Court, there's really no way to try this case without the fact that they're calling it medical marijuana –
>
> THE COURT: Right.
>
> MR. LOMBARDI: -- coming in on some sense.
>
> THE COURT: Right.
>
> MR. LOMBARDI: Because I mean the pictures from the searches –
>
> THE COURT: Right.
>
> MR. LOMBARDI: -- the undercover videos of the control buys, it -- that sort of thing, it will come in.
>
> THE COURT: Right.
>
> MR. LOMBARDI: And so our motion is a little narrower than that. It is: The defense can't argue that the defendant thought -- or that somehow it is a defense to this prosecution that he thought he was prosecuting -- complying with state law, you know, that he was trying to comply with state law. Because it just legally is not a defense in this courtroom. The State can legalize or criminalize whatever it

wants. It doesn't change federal law one iota. And as the Court, I think, alluded to earlier, the Defendant knew. Everybody who does medical marijuana or was doing medical marijuana at this point in time, they knew that if we bestirred ourselves in federal law enforcement to come prosecute them, that they were -- to not put too fine a point on it -- screwed. Because they all know that if we come knocking, they don't have a legal defense. Their lawyers tell them that. There's disclaimers on everything they get, the disclaimer on the state website that I referred to earlier, so it's just not a defense in this case. I mean I think the fact that he was allegedly running a medical marijuana business may come up, but it is not a defense, and the defense shouldn't get to argue that it is.

Pet. App. 62a-63a.

Before the district court ruled, Mr. Gloor's counsel weighed in:

MS. UNGER: Thank you, Your Honor. I'm sitting here and I'm listening to the Government's argument, and I'm well aware of the challenges that I have before me. But I believe that if Mr. Gloor -- if the allegations against him came -- were alleged today, Mr. Gloor would not be in violation of state law. I don't believe there is anything that in today's -- under today's statutory scheme, that Mr. Gloor would be prosecuted in state court for anything.

THE COURT: Wait. That's two different questions. You said he wouldn't be prosecuted and he wouldn't be in violation.

MS. UNGER: Both. The Government is saying that Mr. Gloor was charged in state court, but the state court dismissed the case because the federal prosecutor agreed to take over the prosecution, so to speak, and the charges against Mr. Gloor and everyone else was dismissed, including one of the non-disclosed witnesses, that I believe is going to be a witness…But in today's -- under today's statutory scheme in Washington, Mr. Gloor would not be in violation of state law. He just wouldn't. Medical -- well, marijuana stores are everywhere now. And they sell for money. They don't sell for, "Oh, I'll donate to you, and you donate it back to me." No, it's money. And people have installed big safes, because theoretically you can't put the money in banks. And so that is another problem. But the Government is prosecuting Mr. Gloor right now for something that is now legal. It is legal now. And I guess for whatever argument the Government is making about going after Mr. Gloor for whatever it was, whatever he said in his proffer and all of those things, the bottom line is you are going to have people on the jury who are going to be sitting there thinking, "This is legal now." And maybe that doesn't mean anything.

THE COURT: I pass -- I pass five -- I think five medical marijuana dispensaries between here and my home.

MS. UNGER: Not even medical, they're just regular --

THE COURT: Regular --

MS. UNGER: Recreational marijuana dispensaries are everywhere, even more than there are liquor stores. I suppose you can buy liquor in the supermarket now, so you don't have any liquor stores. They are in the Safeway and they are at Albertson's and everywhere. So I hear what the Government is saying. I understand all that. My guy, according to him, was a bad guy in 2011. But guess what? In 2015, he is not a bad guy anymore, because it's not illegal in Washington. Yes, in Washington D.C. it's illegal, and maybe in Idaho it's illegal. But in Washington, it isn't; in Oregon, it isn't; in Colorado, it isn't.

Pet. App. 65a-67a.

The district court denied Mr. Gloor's motion to dismiss, and granted in full the prosecutor's motion in limine that precluded Mr. Gloor from presenting any evidence at trial as a defense to prosecution that he complied with Washington State law. Pet. App. 36a-38a, 67a-68a.

C. Factual Background: Trial.

1. Testimony From Co-Defendants And Owners Of Seattle Cross And Tacoma Cross.

James Lucas, a co-defendant in the case at bar, testified that he was the sole owner of Seattle Cross and Tacoma Cross, and had a fifty-percent interest shared with Mr. Gloor in Lacey Cross and KPN Cross. ER 249.

By Defense Counsel:

Q. So would it be safe to say that you were operating Seattle Cross and Tacoma Cross pretty openly and notoriously, in the sense that you weren't concerned about law enforcement coming into your store one day?

A. That's correct.

Q. And you intended to operate this business as a medical marijuana cooperative?

A. Correct.

Q. And you had received some sort of education about how to do that pursuant to Washington law?

A. I did.

Q. And just to clarify your testimony, you were the sole owner of Seattle Cross and Tacoma Cross; is that true?

A. I was. At the very beginning there were a few other people that had interests in it, but I had bought them out and taken charge of it.

Q. And none of those individuals were Lance Gloor; is that correct?

A. That is correct.

ER 284.

After the November 2011 raids, Mr. Lucas testified that he sold Seattle Cross and Tacoma Cross to co-defendant Matthew Roberts. ER 277-278. He testified that Mr. Gloor took over ownership of Lacey Cross and KPN Cross, and reopened the two stores after the raids. *Id*. He also testified that Mr. Gloor asked him to transfer ownership of Lacey Cross to Casey Lee. ER 278.

By Defense Counsel to co-defendant Mr. Lucas:

Q. And after this business was turned over to Casey Lee, you went and filled out the paperwork at the state level?

A. Correct.

Q. Because before that, you had gotten a business license?

A. Correct.

Q. And you paid taxes?

A. Correct.

Q. You gave your employees paychecks?

A. I did.

Q. And was it your understanding that Lacey Cross and KPN Cross employees would be paid similarly?

A. It was all ran through the same account.

Q. And the same accountant would write checks for Lacey Cross and KPN Cross from that bank account that Mr. Gloor was a signer on?

A. Correct.

Q. So some of the expenses that came out of that went to pay for salaries?

A. Correct.

Q. And it paid federal taxes, withholding, Social Security, et cetera?

A. It did.

Q. And it also went to pay for equipment?

A. Yes, it did.

Q. Did it pay for computers?

A. It did.

Q. Did it pay for a security system?

A. It did.

Q. What were some of the other items that you believed this bank account was supposed to pay for -- or the funds that came in were supposed to pay for?

A. We had Auphon software for keeping track of what people were purchasing, because there are limits on what people can purchase in a couple-month period – what people can legally have within a couple-month period. I think it is two pounds, or something like that.

Q. Can you explain that a little further? What kind of program was that, and what was that supposed to monitor?

A. It is the state law. Oh, the Auphon system was --when you would come in to sign up for our services or our store, I had a machine, very similar to the one, if you have ever been to Costco, that prints out an ID card that has a picture of you, a barcode, and your information on it. So you get a card that is printed out. We take a picture, just like you do at Costco. The customer comes in, not only do they show their license, but they scan their card, and that way we had programs where if you bought so many things, you received something free, along the same effects kind of deal. It also could alert us if somebody was over their share for the two-month period.

ER 291-293.

Matthew Roberts, co-defendant and subsequent owner of Seattle Cross and Tacoma Cross, testified that Mr. Lucas was the sole owner of the two dispensaries and that he operated the stores on his own. ER 116-117, 128-129; *see also* ER 277. Before becoming an owner, Mr. Roberts worked at the Tacoma store beginning in October 2011, as a general manager, and was paid by check. ER 105-106. After the November 2011 raids, Mr. Lucas asked Mr. Roberts to take over ownership of the two dispensaries; Mr. Roberts paid Mr. Lucas $6,000 cash and a large bottle of opiate pills in return for ownership of Seattle Cross and Tacoma Cross. ER 105-106, 116-117, 277.

2. Testimony From Employees Who Worked At The Dispensaries.

At trial, Mr. Gloor's former girlfriend, Kara Drew, testified for the prosecution that Mr. Gloor owned Lacey Cross and KPN Cross, and that Mr. Lucas owned Seattle Cross and Tacoma Cross. ER 607-608. She said she was paid $3,500 per month to manage KPN Cross by check with income taxes withheld therefrom. ER 613, 634-637. She also said she was instructed to not to serve anyone in the dispensary without a medical marijuana card, and that no one could enter the store without a medical card. ER 609, 622, 629-630.

Another witness for prosecution, John Nason, testified he was an employee at Tacoma Cross and was hired by Mr. Lucas. ER 411-412, 424. Mr. Nason testified that he relied on the advice of an attorney and everyone at Tacoma Cross – all the staff – met with an attorney and he understood that what he was doing was legal as long as "you adhered to certain things." ER 425-426.

Another witness for the prosecution, Joshua Hoelzer, testified that he worked at Lacey Cross beginning in June 2011. ER 515. Mr. Hoelzer testified that he did not track amounts of cash or amount of product at the stores but he did track patients because "we were trying to be as

legal as possible." ER 504. He said he understood that the business was legal in the state of Washington but illegal federally. ER 518.

Further, he testified that after the raids in 2011, Mr. Gloor moved to Las Vegas and managed the KPN and Lacey stores remotely. ER 497-499. At one point, Mr. Hoezler said he sent product to Mr. Gloor in Las Vegas in a doughnut box. ER 506.

Ultimately, Mr. Hoezler testified that he truly believed it was "a collective" and "I really believed in the system we had going." ER 509. Eventually, Mr. Hoezler quit because he was afraid of being arrested. ER 507.

Mr. Hoezler maintained during his testimony that he "relied on advice of lawyers… [and thought] the system we had, it seemed as legal as possible…I believed what the lawyers said." ER 509.

On re-direct, he answered the prosecutor's questions:

> Q. And you found a way [to legally sell marijuana] that you thought was a loophole, that you could do it more or less legally?
>
> A. Yeah, it became legal through the state.
>
> Q. You know it wasn't legal federally, though, right?
>
> A. I wasn't aware of the federal terms, necessarily. I knew it was state legal. That was good enough for me at the time.
>
> Q. Did you know you were in a gray area?
>
> A. I definitely know there was a gray area. I also know that every store out there right now is in a gray area.

ER 518.

Shannon O'Leary worked at Tacoma Cross and testified for the prosecution that she met Mr. Gloor through Mr. Lucas at Tacoma Cross because, one day, Mr. Gloor walked into Tacoma Cross and she stopped him to ask for his medical card - she did not know him. ER 316-318.

Ms. O'Leary said she was paid by Tacoma Cross and KPN Cross with a check and taxes were withheld therein. ER 319-321. She was not at work the day of the November 2011 raids on all four dispensaries. However, she did attend the staff meeting with employees from the dispensaries on the following Monday with lawyer Aaron Pelley. ER 325. After the meeting with Mr. Pelley, she went to the local Starbucks with the staff and it was decided they would reopen after Thanksgiving. ER 326-328.

Casey Lee, another witness for the prosecution, testified that he took over ownership of Lacey Cross after the November 2011 raids by completing the requisite paperwork with the state of Washington; he eventually closed the store and reopened it at another location under the new name of Bayside Collective. ER 194-196.

3. Testimony From Law Enforcement Officers Who Purchased Marijuana From The Dispensaries Under Cover.

Three law enforcement officers testified about their undercover operations. They purchased marijuana at the four dispensaries only after employing a "ruse" to obtain medical marijuana cards for the purpose of gaining entrance to the dispensaries to buy marijuana. This "ruse" was the basis for establishing probable cause to execute warrants on the dispensaries, and seize the products and monies therein from the sale of those products. ER 350, 351, 434, 437, 521-522.

Officer Randy Hedin-Baughn, a former detective with the Thurston County Narcotics Task Force, testified that he engaged in a covert buy of marijuana at the Lacey Cross dispensary. ER 437. At his initial visit to the dispensary, the officer was turned away because he did not have a medical marijuana card ER 437. He went to South Sound Medicine and obtained a card under false pretenses. ER 434, 437. Later, he returned to Lacey Cross and purchased the marijuana that was admitted into evidence against Mr. Gloor. ER 440-446.

In sum, the officer testified the first time he visited the store on August 15, 2011, Lacey Cross staff would not allow him to enter because he did not have a medical card; the second time on August 18, 2011, he showed his card and Lacey Cross staff asked him to fill out paperwork; and during the third visit on August 25, 2011, Lacey Cross staff looked him up in a database. ER 474-475. He returned on September 6 and September 21, 2011, and completed purchases at each visit. ER 457-464.

Detective James Strup, Washington State Patrol, also testified that he engaged in a covert buy at Lacey Cross dispensary. ER 521. On his first visit, August 12, 2011, he too was turned away by Lacey Cross staff because he did not have a medical card. ER 524. He went to South Sound Medicine, and "I provided a ruse [to the nurse]" to get a medical card. ER 524-525. On August 18, 2011, he purchased his first marijuana product from Lacey Cross ER 526-527, and made subsequent buys on August 25, September 6, and September 21, resulting in the purchased marijuana being admitted into evidence against Mr. Gloor. *Id*.

Officer Jeffrey Pullig from Seattle Drug Enforcement Agency testified that he engaged in covert buys at Seattle Cross, Tacoma Cross, Lacey Cross and KPN Cross after he visited HempFest 2011 in Seattle where he was offered a free medical exam for a medical card. ER 350-351. At the KPN store on January 18, 2013, KPN staff took a copy of his driver's license and medical card. ER 352-353. On February 8, 2013, he went to Lacey Cross to make a covert buy where the officer felt uncomfortable because, he said, there were "a little more tattooed types running around [in the store]…mostly males" and "more sketchy" than in KPN; at KPN he felt "more comfortable knowing there is women [sic] in the room." ER 357-358, 363.

The marijuana purchased by law enforcement during their undercover operation at all dispensaries was ultimately admitted as evidence against Mr. Gloor. ER 362, 457-464, 526-527.

The jury found Mr. Gloor guilty of manufacturing marijuana, and of conspiracy to manufacture marijuana. Pet. App. 76a-78a. Mr. Lucas and Mr. Roberts pleaded guilty in sealed plea agreements. ER 732.

D. Background Facts: Medical Marijuana Dispensaries In Washington State.

During the pre-trial phase, in support of his motion to dismiss, Mr. Gloor presented the following assertions into the record about medical marijuana dispensaries:

- Washington became one of the first states to approve the use of marijuana for medical purposes in 1998.
- The city of Seattle estimates that there are at least 300 marijuana businesses inside the city.[2]
- With only a handful of recreational stores and growers, that means most of those are medical. Plus, medical businesses haven't had to abide by the same location restrictions as recreational stores (1,000 feet from schools and parks), so there are more of them. *See*, Drastic Changes Are Coming to Washington State's Medical Marijuana Industry, by Heidi Groover, *The Stranger*, Apr 16, 2015.
- Medical marijuana legalization created an affirmative defense for a patient or designated provider who is authorized by their healthcare provider to possess a 60-day supply of marijuana. While the State Health Department would later define a 60-day supply as 24 ounces of marijuana, little else was done to clarify what medical patients could and could not do. In the absence of regulations, large medical marijuana cultivation cooperatives and dispensaries sprouted around the state.
- As far as Lacey and Seattle Cross and the rest are concerned, they were operating in full compliance with RCW 69.51A *et seq.* and were equipped and required that all patients provide the necessary prescription paperwork to substantiate their affirmative defense under that law for their collective garden management as access points.

[2] This statistic and all assertions in bullet points here were current as of October 24, 2015, when Mr. Gloor's Motion to Dismiss was filed with the district court. In a weekly marijuana report dated March 24, 2017, the Washington State Liquor and Cannabis Board reported 974 Producer/Processor licenses were issued, 490 retail licenses were issued and average daily sales in Washington State as of March 24, 2017 totaled $4,822,566 and FY 2017 total sales to date reported $1,181,675,336. Published on *Washington State Liquor and Cannabis Board* (http://lcb.wa.gov) Weekly Marijuana Report March 24, 2017.

- Under RCW 69.51A, there is no obligation to register a corporate entity with the secretary of state and there is no formal state licensing process (like there will be going forward), but Seattle Cross LLC/James Lucas and Seattle Cross/Matt Roberts secured their master state business licenses and were paying state taxes at the time. See attached Exhibit 1.

- While litigating a zoning issue against the City of Lacey, which refused to grant them a local business license to operate Lacey Cross, in Thurston County Superior Court in 2012, nowhere in any of the pleadings did anyone claim that this business was not operating pursuant to state law (See Lacey Cross v City of Lacey, Thurston County Superior Court cause no. 12-2-00521-1). Nowhere in any of the materials supplied by the Government do they provide any proof that Mr. Gloor, was acting in violation of RCW 69.51A.

ER 731-744; *Defendant's Motion to Dismiss; Exhibits included in ERs at 745-784.*

E. The Consolidated Appropriations Act Prohibiting The Department Of Justice From Using Funds To Prevent States From Implementing Their Medical Marijuana Laws, And The Ninth Circuit's Opinion In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), Applying The Appropriations Rider.

On August 16, 2016, after the jury verdict in Mr. Gloor's case, the Ninth Circuit issued *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), holding that defendants had an unequivocal right to an evidentiary hearing to demonstrate compliance with State law regulating the use of medical marijuana, and to bar continued federal prosecution based on, *inter alia*, the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332-33 (2015). The Ninth Circuit in *McIntosh* explained that this appropriations rider prohibits the Department of Justice from spending funds to prevent states' implementation of their medical marijuana laws. *Id.* at 1169-70.

The Ninth Circuit specified that in December 2014, Congress enacted the following rider in an omnibus appropriations bill (Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)), funding the government through September 30, 2015:

> 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, 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.

McIntosh, 833 F.3d. at 1169. The Ninth Circuit further detailed that various short-term measures extended the appropriations and the rider through December 22, 2015, and that on December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and included essentially the same rider in § 542. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (adding Guam and Puerto Rico, and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws"). *See McIntosh*, 833 F.3d at 1169-70.

While noting that § 542 is not a model of clarity, the Ninth Circuit construed § 542 to mean that the DOJ is prohibited "from spending money on actions that prevent the Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[3] *McIntosh*, 833 F.3d at 1175-76. The Ninth Circuit in *McIntosh* noted that the Controlled Substances Act (hereafter "CSA") (21 U.S.C. §§ 841(a), 844(a)) prohibits the use, distribution, possession, or cultivation of any marijuana, and thus prohibit what the states' medical marijuana laws permit. *Id.* at 1176. The Ninth Circuit provided that federal prosecution would prevent states from "giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct." *Id.* at 1176-

[3] *See also* 31 U.S. Code § 1341 (limiting government officials or employees from making expenditures beyond that which was appropriated).

77. The *McIntosh* court concluded that "*at a minimum*, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and *who fully complied with* such laws." *Id.* at 1177 (emphasis added).

Construing the text and ordinary meaning of § 542, the Ninth Circuit concluded that § 542 "prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1178. The Ninth Circuit concluded that the DOJ does not prevent "the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws." *Id.* The Ninth Circuit in *McIntosh* held that individuals who do not "strictly comply with" state medical marijuana laws "have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542." *Id.* The Court stated that Congress did not draft § 542 to prohibit "interference with laws" that address medical marijuana or those that regulate medical marijuana, but instead "chose to proscribe preventing states from implementing" medical marijuana laws. *Id.* at 1178. The Ninth Circuit stated that § 542 does not provide immunity from prosecution for federal marijuana offenses, but that Congress currently restricts the government from spending certain funds to prosecute certain individuals. *Id.* at 1179 n.5.

In remanding the cases, the Ninth Circuit specified that if the DOJ wishes to continue the prosecutions, the appellants are entitled to evidentiary hearings to determine whether their conduct was "completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law" regarding medical marijuana. *Id.* at 1179.

F. The Ninth Circuit Panel's Memorandum Decision Affirming Mr. Gloor's Conviction.

The Ninth Circuit panel noted that while Mr. Gloor's appeal was pending, the Ninth Circuit decided *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), and *United States v. Kleinman*, 880 F.3d 1020, 1027 (9th Cir. 2017). Pet. App. 4a-5a. The panel confirmed that in *McIntosh*, the Ninth Circuit held that a defendant may obtain an injunction under § 538 (the appropriations rider) against a federal prosecution charging conduct that was "completely authorized by state law," and that defendants are entitled to pretrial evidentiary hearings to determine whether their conduct "strictly complied with" or was "completely authorized" by state medical laws. Pet. App. 5a. The panel provided that faced with a similar issue in *United States v. Kleinman*, 880 F.3d 1020 (9th Cir. 2017), the Ninth Circuit declined to remand for an evidentiary hearing after trial and sentencing because the record clearly demonstrated that the defendant violated California's medical marijuana laws. *Kleinman*, 880 F.3d 1020, 1029 (9th Cir. 2017). Pet. App. 5a.

The panel concluded that the record clearly demonstrates that Mr. Gloor did not strictly comply with Washington's medical marijuana laws, which provided only affirmative defenses to state marijuana charges at the time of his relevant conduct.[4] Pet. App. 5a. Noting that Mr. Gloor had not argued on appeal or before the district court that his operations were not for-profit, or that he could otherwise prove the elements of the "collective gardens" affirmative defense, the Ninth Circuit panel concluded that the evidence presented at trial did not establish "factual allegations sufficient to warrant an evidentiary hearing." Pet. App. 6a.

[4] *Citing* Wash. Rev. Code § 69.51A.085(1) (2012). *See also Cannabis Action Coal. v. City of Kent*, 351 P.3d 151, 155-56 (2015).

As to the manufacture of marijuana count, the panel concluded that the record demonstrates that Gloor could not prove an affirmative defense, and that the jury returned a special verdict finding that Gloor manufactured between 50 and 99 marijuana plants. Pet. App. 6a. The panel explained that to prove the relevant affirmative defense under state law,[5] Gloor would have to demonstrate that (1) he was a "designated provider"; (2) he possessed written authorization to act as a designated provider; (3) he possessed no more than fifteen plants per qualifying patient; and (4) he presented the required paperwork to law enforcement upon request. In addition, the panel noted that Detective Menge testified that Gloor did not present the required paperwork upon request as required to satisfy the affirmative defense, and that Gloor did not challenge that testimony at trial or on appeal. Pet. App. 6a.

The Ninth Circuit panel concluded that Gloor had not made any factual allegations sufficient to warrant an evidentiary hearing. Pet. App. 6a-7a. The panel rejected Gloor's argument that the evidence presented at trial is not dispositive because the district court granted the government's pretrial motion in limine to exclude evidence "to the extent it . . . direct[s] the jury that compliance (or intended compliance) with state law is a defense for alleged violations of federal law." Pet. App. 6a. The panel concluded that Gloor has not made any factual allegations, which, if proven at an evidentiary hearing, would demonstrate that he strictly complied with the conditions necessary to prove his affirmatives defenses. Pet. App. 7a. The panel sidestepped the issue of whether the district court erred in failing to hold an evidentiary hearing by concluding that any such error was harmless. *Id.*

[5] *Citing* Wash. Rev. Code § 69.51A.040(2)–(4) (2008); *State v. Markwart*, 329 P.3d 108, 119-120 (Wash. Ct. App. 2014) (explaining that a "designated provider" can grow up to 15 plants per patient); *State v. Shupe*, 289 P.3d 741, 747-49 (Wash. Ct. App. 2012) (same).

G. Mr. Gloor's Petition For Rehearing With Suggestion For Rehearing En Banc.

Noting that the panel affirmed the conviction because Mr. Gloor did not present evidence before the trial court or on appeal to establish compliance with Washington's medical marijuana laws, Mr. Gloor argued that the panel ignored that the district court granted the prosecution's motion in limine. Ninth Cir. Dkt. #44, p. 1. The petitioner further argued that Federal Rule of Appellate Procedure 10, and established case law,[6] prevented him for presenting evidence on appeal establishing compliance with Washington's medical marijuana laws. Ninth Cir. Dkt. #44, pp. 1-2, 15. The en banc petition asserted that that if granted the opportunity, Gloor would present sufficient evidence to establish that he met the requirements of Washington law. Ninth Cir. Dkt. #44, p. 2. In support of the petition, Mr. Gloor submitted an affidavit to serve as a rebuttal to the evidence relied on by the panel, and to show prejudice from the district court's order in limine preventing him from presenting an affirmative defense that he was in compliance with Washington State law. Pet. App. 79a-81a. *See* Ninth Cir. Dkt. #44, pp. 11-12, 14-15.

The petitioner explained that Washington law specifies that a provider may grow marijuana for more than one patient at a time, including up to the number of plants at issue in his case, and further requires that the trier of fact must interpret the evidence most strongly in favor of the defendant.[7] Ninth Cir. Dkt. #44, pp. 2-3. The petitioner asserted that he can present a colorable argument that he was the provider for five or more patients with his 73 plants, with an allowance for 15 plants per patient under state law. *Id.* at 3, 11 & Pet. App. 79a-81a. Mr. Gloor's further asserted that he was a designated provider, possessed written authorization, and had the required paperwork posted on the walls when he was arrested. Ninth Cir. Dkt. #44, pp.

[6] *Citing United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979); *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988).

[7] *Citing State v. Markwart*, 182 Wn. App 335 (2014).

11-15 & Pet. App. 79a-81a. Citing *State v. Markwart*, 182 Wn. App. 335 (2014), the petitioner asserted in his affidavit that under Washington law, this evidence must be interpreted most strongly in favor of the defendant, and that he is allowed to present evidence that he was a provider for more than one patient, justifying the 73 plants in his grow operation. Ninth Cir. Dkt. #44, pp. 2-3, 11.

In his affidavit, Mr. Gloor stated, in part, (1) the medical marijuana grow authorizations and patient forms were clearly posted on the wall of the garage of the grow room, (2) the authorization forms posted on the wall were provided by a Washington State licensed doctor, (3) believing he was following Washington law, he understood that he could grow 15 plants per patient, but that they grew 73 plants, less than the maximum allowed, (4) during the raid on the grow room, authorities did not ask him to provide medical marijuana documents, (5) the authorities did not take the medical marijuana grow authorizations or patient forms posted on the wall of the grow room, and he gave the forms to his attorney, but they were not presented in district court because the district court prohibited evidence of compliance with Washington State law, (6) the binder federal authorities seized at the Lacey Cross location contained valid medical marijuana authorization forms, but he did not present the binder at trial as he did not know what the federal authorities had done with the binder, and the court prohibited evidence of compliance with Title 21, (7) given the opportunity, he would have presented as witnesses Dr. Karen La, who issued the medical marijuana authorizations for his grow operation, and attorneys Hilary Bricken and Charles Moure, who made sure each store was properly licensed in Washington State and had the necessary systems in place to ensure compliance with state law. Pet. App. 79a-81a. In addition, Mr. Gloor's affidavit detailed that he would have presented testimony of medical marijuana experts to show he "strictly complied" with Washington law. Pet. App. 81a.

He would also have shown that his businesses were properly licensed as non-profit organizations, and that his attorneys advised him that he was in compliance with state law for collective gardens. *Id.*

Gloor's en banc petition provided that the mere fact that his operation consisted of 73 plants does not show non-compliance because Washington law permitted him to grow up to fifteen plants for every regular/registered customer. Ninth Cir. Dkt. #44, pp. 13. He argued that in light of the government's successful motion in limine, the trial is not the equivalent of a *McIntosh* evidentiary hearing. *Id.* Asserting that he was not given the opportunity to make his case, the petitioner noted that the jury was not presented with the question of whether Gloor was in violation of Washington State law, as the court instructed the jury with regular instructions under federal Title 21. *Id.* at pp. 14-15.

On March 30, 2018, the Ninth Circuit denied the petition for rehearing with suggestion for rehearing en banc. Pet. App. 2a.

H. <u>Extension Of The Appropriations Rider</u>.

On March 23, 2018, Congress passed a budget which included a rider that continues to bar the DOJ from enforcing the federal marijuana ban in some circumstances. The new rider, § 538, is identical in substance to the amendments Congress has passed each budget cycle since 2014. The current rider will expire at the end of the federal government's current fiscal year, September 30, 2018. The text of the rider, which is virtually identical to the earlier riders,[8] states as follows:

[8] *See* Consolidated Appropriations Act, 2017, Pub.L.No. 115-31, Section 537, 131 Stat. 135, 228 (2017); Consolidated Appropriations Act, 2016, Pub.L.No. 114-113 Section 542, 129 Stat. 2242, 2332-33 (2015); and, Consolidated Appropriations Act, 2015, Pub.L.No. 113-235, Section 538, 128 Stat. 2130, 2217 (2014).

> SEC. 538. None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2018, PL 115-141, March 23, 2018, 132 Stat 348 (herein "§ 538" or "rider").

REASONS FOR GRANTING THE PETITION

A. A Petition For Writ Of Certiorari Should Be Granted To Address The Issue Of Exceptional National Importance Regarding How Courts Should Construe Congress' Appropriations Rider Prohibiting The Department Of Justice From Spending Funds To Prevent States' Implementation Of Their Medical Marijuana Laws.

Review is warranted to address how federal courts should interpret and construe the appropriations rider barring funding for federal medical marijuana prosecutions. There is a pressing need for review because the appropriations rider impacts nearly all of the states and territories. Indeed, the 2018 rider lists 46 states, and Washington, D.C., as well as Guam and Puerto Rico. Only Idaho, Kansas, Nebraska, and South Dakota are not included in the rider.

Review is necessary for the Supreme Court to engage in statutory analysis to define the scope of the rider, so that federal courts have the tools to determine such questions as whether the DOJ can prosecute a state-licensed medical marijuana supplier who commits a minor or purely technical violation of state law. The Ninth Circuit recognized that the rider is not a model of clarity. *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016). Accordingly, there is an urgent need for the Supreme Court to conduct statutory analysis of § 538 to give effect to

Congress' intent in adopting the rider, and to ensure that the rider is not narrowly construed to undermine states' rights under the Tenth Amendment and individual due process and equal protection rights under the Fifth Amendment and Fourteenth Amendment.

1. There Is A Compelling Need To Clarify The Meaning And Application Of The Appropriations Rider Limiting Federal Prosecution Relating To Medical Marijuana, Determine Whether Defendants Are Entitled To An Evidentiary Hearing To Bar Federal Prosecution For Medical Marijuana, And Determine The Standards For Such A Hearing.

Review is warranted to determine when, pursuant to § 538, federal courts must order an evidentiary hearing to allow the defendant to present evidence concerning whether the defendant complied with state medical marijuana laws. There is also an urgent need for review to address the standards that should be applied in such a hearing.

The variations in the state medical marijuana laws, and how they are enforced, create a compelling need for Supreme Court review. The Ninth Circuit in *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016), recognized that there is much variation in how the states, the District of Columbia, and the territories, implement their medical marijuana laws. The Ninth Circuit explained:

> Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations. Thus, § 542 applies to a wide variety of laws that are in flux.

Id. In short, Supreme Court review is warranted in light of the novel, complex, and fluid nature of state medical marijuana laws and regulations.

The Ninth Circuit in *McIntosh* held that individuals may not fall within the safe harbor of the appropriation rider's protection from federal medical marijuana prosecution without showing that they "strictly comply" with all state-law conditions regarding medical marijuana. *McIntosh*, 833 F.3d at 1178. The Ninth Circuit's strict compliance standard is untenable, and violates

protections under the Due Process Clause and Equal Protection Clause. Indeed, as in the State of Washington, states and territories' medical marijuana laws can be novel, vague, or irregularly and inconsistently enforced. The strict compliance standard is untenable because state medical marijuana laws contain many "gray areas," and law enforcement is inconsistent or haphazard. Under these circumstances, the Ninth Circuit's "strict compliance" standard cannot be fairly applied to satisfy the dictates of the Due Process Clause and Equal Protection Clause of the Fifth Amendment and Fourteenth Amendment.

Similarly, where states' medical marijuana statutes are novel, vague, not strictly enforced, or enforced in an inconsistent or arbitrary manner, individuals cannot have sufficient notice to know when they may be fairly subject to federal prosecution, or whether they are protected by the safe harbor of the appropriations rider. The Supreme Court's vagueness doctrine under the Due Process Clause is well-established, and serves to protect defendants from any criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). In the current legal landscape, individuals do not have a sufficient basis to know whether they are subject to federal prosecution or fall within the safe harbor of § 538. In Washington State, a "knowing" violation often requires subjective awareness of the rule allegedly being violated. *See, e.g.*, *State v. Clowes*, 104 Wn. App. 935, 943-44 (2001) (knowingly violating no-contact order required awareness of order); *State v. Castillo*, 144 Wn. App. 584, 589-90 (2008) (knowingly failing to register required awareness of registration laws); *cf. Liparota v. United States*, 471 U.S. 419 (1985).

Prosecuting Mr. Gloor violates § 542 (now § 538) because he is entitled to protection under Washington State law. Construing § 542 under the strict compliance standard of *McIntosh*

contravened the appropriations rider because the state law lacked clarity or regular enforcement, and was construed leniently in favor of patients and growers. During the period leading up to Mr. Gloor's arrest, the medical marijuana laws in the State of Washington State were vague, novel, in flux, and inconsistently enforced or applied. In seeking dismissal, Gloor argued that the fact that Washington's 1998 voter-approved medical marijuana initiative was ambiguous does not permit the government to violate the clear intent of § 538, particularly as it applies to him. Mr. Gloor asserted that Washington State allowed an affirmative defense for patients and designated providers to possess a 60-day supply of marijuana, later defined to be 24 ounces of marijuana, but did little else to clarify what medical patients could and could not do. ER 733-34.

Even if Washington State's medical marijuana laws and regulations had been crystal clear, their enforcement was not consistently or regularly applied. In seeking dismissal, Gloor asserted entrapment by estoppel, which applies when an official tells a defendant that certain conduct is legal, and the defendant believes the official. ER 734-738. Arguing that he was selectively prosecuted, Gloor asserted a due process, equal protection claim. ER 738-741. He noted that the only individuals prosecuted were the three defendants in his case, despite the existence of over 300 medical marijuana dispensaries in Washington State, and law enforcement conducting 15 raids of marijuana dispensaries. ER 738-738, 749-759.

The Ninth Circuit in *McIntosh* recognized that once Congress has exercised its delegated powers, and decided the order of priorities in a given area, it is for the courts to enforce them. *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). Similarly, the Ninth Circuit in *McIntosh* recognized that the Constitution's "Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them."

Id. at 1175. The Ninth Circuit also recognized that when Congress has enacted a legislative restriction like § 542 that expressly prohibits the DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds. *Id.*

Despite recognizing that Congress properly exercised its delegated powers, and the federal courts' role in enforcing those powers, the Ninth Circuit's analysis in *McIntosh* violates the separation of powers doctrine, and serves to undercut the power and effect of appropriations rider. Indeed, the Ninth Circuit improperly limited the reach of § 542 to cases where individuals can show "strict compliance" with state medical marijuana laws. There is no basis, either in the language of the statute, or in constitutional doctrine, to justify such a narrow application of the appropriations rider. The net result under the strict compliance standard is to undermine congressional intent by giving the Executive branch free rein to exercise broad prosecutorial powers.

The Ninth Circuit's statutory construction analysis in *McIntosh* is flawed because there is nothing in the text of § 538 limiting the reach of the federal statute to cases only in which the individual has proven "strict compliance" with state medical marijuana laws. The Ninth Circuit's strict compliance standard is contrary to its own statutory analysis, which concludes that courts must "implement" § 542 to give the rider its "practical effect." *McIntosh*, 833 F.3d at 1176. Significantly, § 542 is worded in broad terms. The term, to "implement" means "to 'carry out, accomplish; esp.: to give practical effect to and ensure of actual fulfillment by concrete measure.'" *Id.* at 1176 (quoting Merriam-Webster's Collegiate Dictionary (11th ed. 2003)). Because Congress chose the comprehensive term ("implementing"), rather than a narrower term, such as "establish" or "enforce," it must be concluded that Congress has a broad intent to

prohibit any direct or indirect interference with state medical marijuana laws, or to interfere with the states' interpretation and enforcement of those laws.

The analysis in *McIntosh* is flawed also because it gives no consideration to the Tenth Amendment's protection of states' rights. The Ninth Circuit's strict compliance standards cannot pass constitutional muster because in enacting § 542 and § 538, Congress clearly voiced its policy to give deference to states and territories' medical marijuana laws. The strict compliance standard cannot be applied because the Tenth Amendment, when considered in tandem with Congress' clear intent to respect states' rights concerning medical marijuana, leaves no doubt that the appropriations rider cannot be narrowly construed to muffle Congress' intent and undermine states' powers. This conclusion rings especially true in Mr. Gloor's case, as he was denied an evidentiary hearing to establish that he complied with Washington State law.

The strict compliance standard set forth in *McIntosh* is flawed, and violates the Constitution's due process and equal protection guarantees, because it is not based on the text of the appropriations rider, and presumes that state medical marijuana laws are crystal clear, well-established, and consistently and regularly enforced. Review is warranted because the analysis in *McIntosh* leaves many questions left unanswered. Notably, the Ninth Circuit in *McIntosh* provided that "*at a minimum*" § 542 prohibits prosecution of persons "who fully complied" with state medical marijuana laws. *McIntosh*, 833 F.3d at 1177 (emphasis added).

The Ninth Circuit's strict compliance standard is profoundly flawed, and contravenes congressional intent and states' rights, because it allows for federal prosecution for medical marijuana offenses, even in cases where the alleged violations of state law are merely technical or unwitting, or where the state laws are hopelessly unclear, ill-defined, and mired in uncertainty. Under these circumstances, allowing federal authorities wide berth to sidestep the appropriations

rider would serve to undermine the will of Congress. Illustrating this problem is Professor Robert Mikos' analysis of the Obama administration's now defunct Non-Enforcement Policy (NEP), which, like Congress in enacting the appropriations rider, had the goal of limiting federal prosecution in order to respect states' medical marijuana laws:

> The NEP discourages employees from prosecuting defendants who have complied with state law, but determining whether any given defendant has actually done so proves remarkably difficult, for several reasons. First, some defendants operate in a legal vacuum. Many states have neglected to address such rudimentary issues as how patients are supposed to obtain marijuana legally and who may supply it to them. Hence, it may be an open question whether a particular defendant (say, a dispensary) is operating in compliance with state law. Second, even if an authoritative regulation exists, it could prove extremely difficult to find. State medical marijuana laws are a mash-up of referenda approved by the voters, statutes passed by state legislatures, regulations issued by state agencies, ordinances passed by local governments, and judicial interpretations of all of the above. Third, complicating matters, some state and local laws are of dubious legal status. . . . Given the uncertain status of such regulations, the DOJ cannot easily discern whether the prosecution of someone who violated one of them constitutes a breach of the NEP. Fourth, even when the legal rules are clear, determining whether a given defendant has complied with them may be impractical. For example, a state might criminalize the sale of marijuana to anyone other than a qualified patient, but there may be no easy, reliable way to determine who is a qualified patient.

Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 Stan. L. & Pol'y Rev. 633, 644-45 (2011).

The Ninth Circuit did not address the limits that would apply to states, such as Washington State, which had ill-defined medical marijuana laws and a policy of lenient interpretation. Under such circumstances, federal prosecution prevents the state's medical marijuana laws from having their intended effect, contrary to § 542, and now § 538, as well as the Tenth Amendment.

Supreme Court review is warranted to determine which standards must be applied in implementing § 538. The appellants in *McIntosh* urged the Ninth Circuit to adopt a standard

providing that the DOJ must refrain from prosecution unless a person's activities are "so clearly outside the scope of a state's medical marijuana laws that reasonable debate is not possible." *McIntosh,* 833 F.3d at 1177. Petitioner Gloor urges that this standard be adopted because it fulfills the intent of Congress and respects states' rights guaranteed by the Tenth Amendment. In light of the clear intent of the appropriations rider, prohibiting funding of federal prosecutions for medical marijuana cases, the government should bear the burden of proof to show in an evidentiary hearing to determine whether federal prosecution is barred.

Further, petitioner Gloor urges that this Court grant review, and hold that appellate courts may not excuse the denial of an evidentiary hearing based on harmless error analysis, because harmless error analysis results in a denial of due process and undermines Congress' will in enacting the appropriations rider. In Gloor's case, the Ninth Circuit panel affirmed the conviction based on its view that Gloor had failed to present evidence before the trial court or on appeal that would support an argument that he was in compliance with Washington's medical marijuana laws. Pet. App. 6a-7a. That conclusion, however, ignores that the district court granted the prosecution's motion in limine to prevent the presentation of such evidence, and the jury was never presented with the question of whether Gloor substantially or strictly complied with Washington State medical marijuana laws. Pet. App. 36a-38a. Rather, the court presented the jury with regular instructions under Title 21 of the United States Code.

Review is warranted because in faulting Gloor for not presenting evidence on appeal to show compliance with Washington's medical marijuana laws (Pet. App. 6a-7a), the Ninth Circuit panel violated due process, and turned on its head the tiered federal judicial system, whereby the district courts serve as the find-finding forum, and the appellate courts are restricted to reviewing

the record below. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85-87. *See also* Fed. R. App. P. 10.

In addition, there is an urgent need for review in order to determine the proper procedure and remedy for review of § 538 challenges to federal prosecution of medical marijuana cases. In *United States v. McIntosh*, 833 F.3d 1163, 1170-72 (9th Cir. 2016), after the appellants sought injunctive relief to dismiss the prosecution under the appropriations rider, the Ninth Circuit held that it had jurisdiction to review the claim in an interlocutory appeal under 28 U.S.C. § 1292(a). While recognizing that in almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate, the Ninth Circuit held that it had jurisdiction over a district court's direct denial of a request for injunctive relief because Congress specifically restricted the DOJ from spending money to pursue certain activities, and it is for the courts to enforce the legislative policies established by Congress. *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016). The Ninth Circuit in *McIntosh* provided that even if the appellants cannot obtain injunctions of their prosecutions, they can seek to enjoin the DOJ from spending funds from the relevant appropriations acts on such prosecutions. *Id.* at 1172. Supreme Court review is warranted to determine whether circuit courts have jurisdiction to review interlocutory appeals of § 538 challenges. In addition, review is warranted to determine whether dismissal of the prosecution, or enjoining the DOJ from spending funds, is the proper remedy to enforce § 538. Further, the Supreme Court may also address the related question of whether § 538 enjoins the federal government from spending funds to incarcerate individuals, or to subject them to supervised release, where they complied with state medical marijuana laws.

2. In Light Of The Supreme Court's Recent Decision In *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), There Is An Urgent Need To Interpret The Appropriations Rider So To Preserve States' Powers Established In The Constitution's Tenth Amendment.

The Tenth Amendment states a "truism" that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *United States v. Darby*, 312 U.S. 100, 124 (1941). Supreme Court review is necessary to address federalism concerns arising from the interplay of (1) the Controlled Substances Act (21 U.S.C. §§ 841(a), 844(a)), (2) Section 538, the appropriations rider, and (3) the states' medical marijuana laws. The petitioner urges this Court to accept review so to construe the appropriations rider to give effect to the congressional mandate of § 538, which defers to state laws regarding medical marijuana. Likewise, review is necessary to ensure that states' rights guaranteed under the Tenth Amendment are properly enforced, and to address how § 538 should be construed and applied in light of the Supreme Court's May 14, 2018 opinion in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

In *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1474 (2018), the Supreme Court struck down provisions of the Professional and Amateur Sports Protection Act (hereafter "PASPA"), which generally made it "unlawful" for any "governmental entity" to sponsor, operate, advertise, promote, license, or authorize by law or compact a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on competitive sporting events. *See* 28 U.S.C. § 3702(1). The Supreme Court justices ruled that a federal law that bars states from legalizing sports betting violates the anti-commandeering doctrine.

In *Murphy*, the Supreme Court explained that the anticommandeering doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy*,

138 S. Ct. at 1475. The Court held that the PASPA provision violated the anticommandeering doctrine because it dictated what state legislatures may and may not do, as if federal officers were armed with the authority to stop legislators from voting on any offending proposals. *Murphy*, 138 S. Ct. at 1478. The majority in *Murphy* labeled as "empty" the distinction between compelling a State to enact legislation, and prohibiting a State from enacting new laws. *Id.*

The Supreme Court's decision in *Murphy* impacts the petitioner's case because his case involves the interplay of federal and state laws relating to the regulation or sanctioning of medical marijuana and its sale. The *Murphy* opinion appears to establish that states have the power to legalize marijuana under state law, or at least confirms that states must be afforded great latitude in regulating marijuana. Indeed, if states are constitutionally entitled to repeal their own ban on sports gambling, states are also constitutionally entitled to repeal their own bans on other activities relating to the possession, manufacture, and distribution of marijuana. In short, the Supreme Court's opinion in *Murphy* appears to shield state marijuana licensing laws from a federal preemption challenge.

Further, *Murphy* should offer guidance regarding how courts interpret and apply the Tenth Amendment and the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 542, 129 Stat. 2242, 2332-33 (2015), as this funding rider prohibits the DOJ from using funds to prevent states from implementing their medical marijuana laws. The Ninth Circuit in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), held that defendants have an unequivocal right to an evidentiary hearing to demonstrate compliance with state laws regulating the use of medical marijuana, so to bar continued federal prosecution. Review is warranted because in Gloor's case, the petitioner was denied the opportunity for an evidentiary hearing. Denying

individuals the opportunity to show compliance with state medical marijuana laws is contrary to the congressional prohibition of §538, the Tenth Amendment, and *Murphy*.

Federal preemption is based on the Supremacy Clause which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supreme Court recognizes three types of preemption – "conflict," "express," and "field." *Murphy*, 138 S. Ct. at 1480. Conflict preemption occurs "either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1098 (10th Cir. 2017). These conflicts should pose no obstacle in Mr. Gloor's case because in enacting § 538, Congress specifically determined to give deference to the medical marijuana laws of the designated states and territories.

While there is no federal law specifically prohibiting states from enacting laws which legalize medical marijuana, narrowly construing the reach of the federal appropriations rider would have the effect of commandeering state medical marijuana laws. Indeed, the State of Washington, and other states and territories, would be prevented, as a practical matter, "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *See* Consolidated Appropriations Act, 2018, PL 115-141, March 23, 2018, 132 Stat 348. At the very least, narrow construction of § 538 would have a chilling effect. In enacting § 538, and its nearly identical predecessor appropriations riders, Congress clearly intended no such outcome. In *Murphy*, the Supreme Court framed the issue as follows: "[w]e must decide whether this provision is compatible with the system of 'dual sovereignty' embodied

in the Constitution." *Murphy*, 138 S. Ct. at 1468. In order to protect our system of "dual sovereignty,[9] the appropriations rider should not be narrowly construed to authorize federal prosecution of Mr. Gloor, or other individuals, in states which have sanctioned the use and sale of medical marijuana.

In *Murphy*, the Supreme Court addressed the limits on congressional authority, and explained the anticommandeering doctrine as follows:

> The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Murphy, 138 S. Ct. at 1476. To narrowly construe the appropriations rider would be to run afoul of the Tenth Amendment, and, in effect, violate the anticommandeering doctrine. In Mr. Gloor's case, these bedrock constitutional principles cannot be reconciled with the Ninth Circuit's decision affirming the conviction, despite the fact that the district court denied Mr. Gloor the opportunity to establish in an evidentiary hearing that he complied with state law. In effect, the district court and Ninth Circuit rendered Washington State's medical marijuana laws toothless.

B. Review Should Be Granted To Address The Issue Of Exceptional National Importance Regarding Whether The Controlled Substance Act Is Enforceable As To Marijuana Offenses In States Which Have Enacted Laws And Regulations Allowing For The Sale And Use Of Medical Marijuana.

To date, challenges to the Controlled Substances Act (CSA) regarding the sale and use of marijuana have not met with success. *See Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (CSA provisions criminalizing marijuana for medical purposes do not violate the Commerce Clause).

[9] *Murphy*, 138 S. Ct. at 1475-76.

However, for the reasons detailed herein, the CSA's provisions regarding marijuana violate the Due Process Clause and the Tenth Amendment.

In light of the Supreme Court's recent decision in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), there is a compelling basis for this Court to review the CSA's constitutional viability with regard to medical marijuana. Specifically, review is warranted to address whether the CSA's provisions criminalizing medical marijuana can withstand judicial scrutiny, even though the CSA conflicts with the appropriations rider (§ 538), violates the Tenth Amendment, and runs afoul of the Due Process Clause.

Petitioner contends that the Due Process Clause bars federal prosecution because the legal prohibition or classification of marijuana in the CSA lacks any rational basis. Marijuana's status as a Schedule 1 drug under the Controlled Substances Act, reserved for substances with "no currently accepted medical use in treatment in the United States," is no longer defensible. This conclusion rings especially true because medical marijuana is an effective tool to treat chronic pain, and serves as a far safer alternative than the wave of opioids which have crashed upon our shores with such deadly effect. *See Raich v. Gonzales*, 500 F.3d 850, 861-66 (9th Cir. 2007) (recognizing that right to use marijuana to treat pain could become fundamental based on further developments). The National Academy of Sciences evaluated the evidence on marijuana's health effects, based on a review of over 10,000 studies. *See* National Academy of Sciences, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (2017), at xvii, 31.4. All but four of the states have enacted laws authorizing and otherwise acknowledging the use of marijuana for medical purposes. In light of these developments, there is no rational basis to conclude that marijuana has "no currently accepted medical use in treatment in the United States." *See* 21 U.S.C. § 812(b)(1)(B).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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