

No. 18-5858

In The
Supreme Court of the United States

LANCE EDWARD GLOOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF *AMICUS CURIAE* UNITED STATES
REPRESENTATIVE DANA ROHRABACHER (R-CA)
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus Dana Rohrabacher has represented Californians in the United States House of Representatives since 1989. In that capacity, he introduced the Rohrabacher-Farr Amendment (Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. B, Title V, §538, 128 Stat. 2130, 2217 (2014)), which establishes that federal funds provided to the Department of Justice may not be used to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. The current version of that appropriations rider is contained in the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348. Representative Rohrabacher submits this brief in order to clarify and emphasize the true legislative intent of the statute at issue, and to briefly describe the relationship between that intent and this case.

**SUMMARY OF ARGUMENT**

The purpose of the Rohrabacher-Farr Amendment was to limit federal power. Specifically, it sought to restrain the Department of Justice from opposing state

¹ All parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief. Printing and binding costs of this brief were paid by the Human Solution International. No other person made a monetary contribution intended to fund its preparation or submission.

medical marijuana programs. The court below fails to recognize the boundaries created by the Rohrabacher-Farr Amendment, and erred in two ways.

First, by utilizing a “strict compliance” standard that allows for federal prosecution where a medical marijuana provider violates any state regulation, the court below encourages and empowers the Department of Justice to become a regulatory body out of control, using the stiff penalties allowed under 21 U.S.C. §841(b) to punish even minor paperwork violations. This divests the state of its own discretion not to pursue such violations, and that discretion is of a whole with the remainder of the medical marijuana program. The Department of Justice cannot both overwhelm state discretion and comply with the Rohrabacher-Farr Amendment.

Second, the letter and spirit of this statute requires that Mr. Gloor be afforded an evidentiary hearing, at which a reasonable standard, properly deferential to the federalism concerns expressed in the statute, be employed in evaluating compliance with state law.



ARGUMENT

I. THE ROHRABACHER-FARR AMENDMENT IS INTENDED TO BROADLY LIMIT THE EXERCISE OF FEDERAL POWER IN RELATION TO STATE MEDICAL MARIJUANA PROGRAMS.

The facts relevant to this brief can be quickly stated. Petitioner Lance Edward Gloor, who operated medical marijuana dispensaries in Washington State, was charged with violating federal narcotics laws relating to marijuana. Prior to trial, Gloor moved to dismiss the indictment based on the Rohrabacher-Farr Amendment. The Court both denied this motion and refused to hold an evidentiary hearing to determine if Gloor was in compliance with state regulations regarding medical marijuana. *United States v. Gloor*, 725 Fed. Appx. 493, 494-495 (9th Cir. 2018). These rulings were in error, and run afoul of the controlling federal statute.

That controlling statute is the Rohrabacher-Farr Amendment, a bipartisan initiative that was sponsored by six Republicans and six Democrats, 160 Cong. Rec. H4983 (daily ed. May 29, 2014), and introduced by *Amicus* Rohrabacher. The original legislation was signed into law in December of 2014 as an appropriations rider, set forth in Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. B, Title V, §538, 128 Stat. 2130, 2217 (2014). With substantially similar language, the rider has been included in appropriations bills up to the present. Consolidated Appropriations

Act, 2018, PL 115-141, 132 Stat. 348. The relevant portion of that statute as passed in 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 . . . 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.

The face of this statute makes clear the intent: federal funds cannot be used to oppose state medical marijuana programs. It is a straightforward statement of federalism, a bedrock principle of our Constitution and our republic. Importantly, this assertion of federalism is not conveyed narrowly in the text of this law; rather, it broadly bars appropriated funds from being used to prevent the implementation of the state laws.

The breadth of the Rohrabacher-Farr Amendment was intended to shift freedom of action away from the federal Department of Justice and to the states and individual citizens. The Department of Justice's prosecution of this case, including its actions to deprive the state of its prosecutorial discretion and Lance Gloor of an evidentiary hearing, run contrary to the intent of the Rohrabacher-Farr Amendment. That amendment, as made clear in its facial wording, was crafted to limit the federal government, not to enable or encourage the federal government to become strict enforcers of state laws or to deny citizens the chance to present evidence regarding regulatory violations of state law. In the confines of this case, the Rohrabacher-Farr Amendment

has been turned on its head to make the Department of Justice a regulatory agency that is more intrusive of state and individual rights, rather than less intrusive.

The legislative history of the Rohrabacher-Farr Amendment reinforces this clear intent. At the time he first introduced the legislation on the floor of the United States House of Representatives in 2014, *Amicus* Rohrabacher described not only the broad bipartisan support for the bill, but the growing support for medical marijuana in the country, and in that context concluded that “[d]espite this overwhelming shift in public opinion, the Federal Government continues its hard-line opposition against medical marijuana.” 160 Cong. Rec. H4982-83 (Statement of Rep. Rohrabacher).

This Court has held that Congress may suspend or repeal a statute by restricting funds in an appropriations bill. *United States v. Will*, 449 U.S. 200, 222 (1980). Here, enforcement of 21 U.S.C. §841(a) was partially suspended by the rider on an appropriations bill, and the full scope and intent of that repeal deserves to be defended by this Court.

II. THE LANGUAGE AND INTENT OF THE ROHRABACHER-FARR AMENDMENT COMPELS THIS COURT TO ORDER AN EVIDENTIARY HEARING AND ARTICULATE A REASONABLE STANDARD OF COMPLIANCE WITH STATE LAW THAT RESPECTS THE FEDERALISM CONCERNS OF THE STATUTE.

A. The Usurping of State Discretion

There are a variety of ways that Department of Justice components can improperly try to prevent implementation of state medical marijuana laws, all of which violate the Rohrabacher-Farr Amendment. One of them, at issue here, is through over-aggressive prosecutions and legal proceedings that impinge on prosecutorial discretion that properly belongs to the state.

Washington's medical marijuana program had several components, but one was built into the existing system of prosecution: the ability to employ discretion in choosing whom to prosecute for violating the state law regarding medical marijuana, and how to do so. This Court has recognized that "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'" *McClesky v. Kemp*, 481 U.S. 279, 311-312 (1987), *quoting* 2 W. LaFare & D. Israel, *Criminal Procedure* §13.2(a), p. 160 (1984). The role of discretion is both positive and negative: it encompasses not only the ability to charge someone with a crime, but the ability *not* to charge someone, even where evidence has been presented to the prosecutor.

By hijacking that discretion and taking over what should have been (if anything) a state case, the Department of Justice made itself the regulator of state rules governing medical marijuana. Not only did it arrogate to itself the role of regulator, it did so with the threat of huge criminal penalties under 21 U.S.C. §841(b). This federal takeover of the state’s regulatory and prosecutorial discretion directly violates the Rohrabacher-Farr Amendment, because it operates to “prevent” the State of Washington from implementing its “own state laws” regarding medical marijuana. Discretion – the ability to choose whom to prosecute or sanction – is a crucial part of Washington’s state laws (as they are in every state). That aspect of state law is divested from the state because when the Department of Justice indicts a medical marijuana provider, the state loses the ability to decide whether or not that citizen will be prosecuted and how they will be punished.

This is especially true where, as here, the alleged violations of state regulations are not significant in the way that, say, selling marijuana to minors or into other states might be. The court below relied on two regulatory violations: first, the “for-profit” status of Gloor’s business; and second, that when a detective asked for Gloor’s paperwork he did not present it. *Gloor*, 725 Fed. Appx. at 495. These alleged violations simply are not enough to warrant overwhelming the federalism interest Congress clearly expressed in the Rohrabacher-Farr Amendment. And, of course, the problem was compounded by the denial of an evidentiary hearing at

which these asserted violations could be fleshed out and examined.

In this case, in fact, Mr. Gloor was charged in Washington Superior Court with marijuana charges, but those charges were dismissed prior to the filing of federal charges. ER 698-699. Whether those charges were dropped for a lack of evidence or in deference to the federal charges does not matter for purposes of this argument; either way, the federal indictment shifted to the Department of Justice a prosecution that had been abandoned by the state authorities.

After Lance Gloor's sentencing, but before appeal was completed, the Ninth Circuit issued its decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh*, the Circuit Court held that "§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. In so doing, the Circuit Court rejected the appellants' argument for a more expansive interpretation, which would prohibit federal charges against anyone licensed or authorized under a state medical marijuana law, whether or not they had violated state regulations in any conceivable way. *Id.* The same circuit, in reviewing this case, relied on *McIntosh* and described the relevant standard as whether or not the medical marijuana purveyor "strictly complied with all relevant conditions imposed by state law. . . ." *Gloor*, 725 Fed. Appx. at 495.

Put bluntly, whether or not to enforce, and how strictly to enforce, state regulations is presumptively a matter for the state to decide. That is what federalism generally, and the Rohrabacher-Farr Amendment specifically, requires. The “strict compliance” standard announced in *McIntosh* and determinative in this case is error, because it removes discretion from the state and gives it to the federal government – the precise opposite of the intent of the legislation at issue.

B. Denial of an Evidentiary Hearing

The court below held that an evidentiary hearing was not necessary, because “Gloor has not made factual allegations sufficient to warrant an evidentiary hearing.” *Gloor*, 725 Fed. Appx. at 495. The factual allegations the court was looking for, though – strict compliance with state regulations – is not the appropriate standard, given a fair reading of the Rohrabacher-Farr Amendment. As set forth in the preceding section, a “strict compliance” standard strips the state of prosecutorial discretion and thereby prevents the state from “implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Because the wrong standard was used, the evidentiary hearing was improperly denied.

Moreover, the denial of an evidentiary hearing makes a mockery even of the process that *McIntosh* allows. The legislation introduced by *Amicus* Rohrabacher was aimed at a government division, the Department of Justice, that too often bullies those it encounters.

Certainly, the government's resistance to even the simple procedure of an evidentiary hearing is yet another sad example of this dynamic.



CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the writ of certiorari, reverse the Court below, order an evidentiary hearing, and instruct that court to employ a standard that bars prosecution of medical marijuana businesses that are in the class of those generally authorized to grow and sell marijuana in that state.

Respectfully submitted,

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