No. 18-8426

IN THE
Supreme Court of the United States

CHARLES C. LYNCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Almost no criminal cases go to trial these days.[1] On those rare occasions when they do, courts should jealously protect the jury's historic duty to decide the defendant's guilt or innocence, and to issue a verdict on behalf of the community.

That didn't happen when Petitioner Charles Lynch defended himself against federal marijuana charges. After a prospective juror balked at the idea of convicting Lynch for running a state-legal medical marijuana dispensary, the trial judge issued an anti-nullification instruction that effectively threatened punishment if jurors disobeyed, and polled each juror individually to ensure none would. As Judge Watford compellingly explained in his dissent from the Ninth Circuit's published affirmance, "[o]nly the hardiest of jurors would remain committed to voting her conscience" in the face of this extraordinarily coercive instruction. *United States v. Lynch*, 903 F.3d 1061, 1090 (9th Cir. 2018) (Watford, J., dissenting).

Lynch could have prevailed at trial nonetheless, for he had a defense to the charges: a federal Drug Enforcement Administration official had told him that the legality of his proposed dispensary was a matter of local law. But when Lynch sought to present his entrapment-by-estoppel defense to the jury, the trial court

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[1] In recent years, more than 97% of federal and state criminal defendants pleaded guilty. *See* Nat'l Ass'n of Criminal Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 5 & n.2, 14 & n.18 (2018), www.nacdl.org/trialpenaltyreport.

limited it to certain counts and misinstructed on its elements. No matter, said the Ninth Circuit—Lynch had no right to present his defense in the first place.

With these two rulings, the appeals court relegated the jury to a useless role in a case pregnant with questions of federalism and fairness. Along the way, it broke from established Supreme Court precedent, and created two circuit splits. This Court's review is vital to preserve the historic role of the citizen-jury and to resolve confusion in the lower courts. Though the government produces a handful of red herrings, none diminish the importance of this case or the need for the Court's intervention.

ARGUMENT

I. The Court Should Grant Certiorari to Preserve the Historic Role of the Citizen-Jury to Issue Verdicts Without Fear of Punishment

A. When the trial court warned Petitioner's prospective jurors that nullification would "by definition" be "a violation of [their] oath[s]," polled them individually to make sure each understood, and dismissed any who refused to acquiesce, its actions "carried with [them] the implicit threat of punishment." *Lynch*, 903 F.3d at 1088-89 (Watford, J., dissenting). For "violating one's oath could be deemed either perjury or contempt, both of which are punishable by fine and

imprisonment." *Id.* at 1088. Respondent never disputes this point, waiving any contrary argument. *See* Sup. Ct. R. 15.2.

Instead, Respondent embraces the trial judge's language as an "'entirely appropriate . . . discharge of the court's own duty to forestall lawless conduct.'" (BIO 15 (quoting *Lynch*, 903 F.3d at 1079).) It is unclear how a conscience verdict could be "lawless," when the jury's power to nullify is "guaranteed" by the Sixth Amendment, and Respondent never squares this circle. *United States v. Gaudin*, 515 U.S. 506, 513 (1995).

In any event, even if courts have some discretion to forestall nullification, surely judges cannot threaten jurors against exercising their historic duty to serve as the community's conscience. This Court need go no further than affirm that modest principle to resolve Petitioner's case. By contrast, Respondent sees no limits to a judge's discretion to interfere with the jury's power to nullify.

And Respondent makes no effort to reconcile its position with *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670)—discussed at length in the petition and amicus brief, but left unmentioned in the opposition. For almost 350 years, that decision has stood as "an illustrious example" of "the freedom of the jury"—"fully known to the Founders of this country"—to "manfully st[an]d up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18-19 & n.13 (1955). But if this Court allows the Ninth Circuit's affirmance of Petitioner's coercive instruction to stand,

little will remain of *Bushell's Case*'s "historic vindication of the privilege of jurors to return a verdict freely according to their conscience." *Clark v. United States*, 289 U.S. 1, 16 (1933).

B. Though Respondent strains to show widespread agreement among the courts of appeals that a judge may prevent nullification by any means, the circuit split *Lynch* exacerbated is real and pernicious. Like the Ninth Circuit, the Sixth Circuit condones instructing jurors that "[t]here is no such thing as valid jury nullification," and "[y]ou would violate your oath and the law" if you nullified. *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988). But no other court of appeals has gone nearly so far.

Indeed, the First and D.C. Circuits take a diametrically opposite approach, each acknowledging the "long and sometimes storied past" of jury nullification, and cautioning against comments that might "chill[]" jurors' power to vote their consciences. *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *see United States v. Dougherty*, 473 F.2d 1113, 1130-32, 1134-35, 1137 (D.C. Cir. 1972).

Respondent's cited circuit authorities that purportedly align with *Lynch* and *Krzyske* actually highlight the chasm between the Sixth and Ninth Circuits, and all others. (BIO 15-16.) Some affirm the comparatively unobjectionable instruction that jurors have a "duty" to convict if the government proves its case beyond a reasonable doubt. *See United States v. Carr*, 424 F.3d 213, 218-21 (2d Cir. 2005); *United States v. Pierre*, 974 F.2d 1355, 1356-57 (D.C. Cir. 1992) (per curiam). Others

soundly advise jurors to base their verdicts on the law given by the court. *See United States v. Bruce*, 109 F.3d 323, 327 (7th Cir. 1997); *United States v. Trujillo*, 714 F.2d 102, 105-06 (11th Cir. 1983). The rest say nothing about the appropriateness of coercive or threatening anti-nullification instructions. *See United States v. Fattah*, 914 F.3d 112, 147-48 (3d Cir. 2019) (affirming trial court's inquiry into juror's alleged refusal to deliberate or follow the law); *United States v. Thomas*, 116 F.3d 606, 614-18 (2d Cir. 1997) (affirming dismissal of juror who intended to nullify).[2] Though a handful of circuits call nullification a violation of the juror's oath, none suggest instructing jurors on that point. *See Fattah*, 914 F.3d at 147-48; *Thomas*, 116 F.3d at 614, 616-17; *Trujillo*, 714 F.2d at 106.

The approaches of these courts of appeals differ in kind, not degree, from those of the Sixth and Ninth Circuits.

State courts are similarly divided, with Mississippi alone in approving a comparable instruction to the one endorsed in *Lynch*. *See Hansen v. State*, 592 So. 2d 114, 140 & n.10 (Miss. 1991). (Pet. 19-23.) By contrast, two states affirmatively forbid anti-nullification instructions like the one given in *Lynch*—and neither rests its conclusion on state law. *See State v. Smith-Parker*, 340 P.3d 485, 507 (Kan.

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[2] The Second Circuit, in *dicta* in *Thomas*, approved of "firm instruction or admonition" to prevent nullification, but didn't describe the permissible content of such a directive. *Thomas*, 116 F.3d at 616. In a prior case, the Second Circuit rejected the need for a pro-nullification instruction partly because the given instructions did not foreclose a possible conscience verdict, suggesting some limitation on anti-nullification charges. *United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996) (per curiam) (approving instruction that did "not go so far as to suggest that the jury could not nullify the law").

2014); *State v. Bonacorsi*, 648 A.2d 469, 471-72 (N.H. 1994) (relying on federal authorities). Thus, the split of opinion extends from the federal circuits through to the state courts.

It's been 124 years since this Court decided *Sparf v. United States*, 156 U.S. 51 (1895), and lower courts are in disarray over whether and to what extent that decision permits anti-nullification instructions. Petitioner's case offers a narrowly circumscribed opportunity to bring clarity to that certiorari-worthy question.

C. And Petitioner's case is a clean vehicle for deciding the appropriateness of coercive anti-nullification instructions. No one disputes that the question presented was raised and passed upon below. Petitioner preserved his objection to the offending instruction in district court (App. 36-53), and the Ninth Circuit addressed arguments for and against it in a split, published decision.

Respondent imagines "vehicle" problems based on Petitioner's supposed invitation of the trial court's error. (BIO 20.) But its argument depends on the factual and legal fallacy that counsel was warned not to voir dire on nullification, but forged ahead willfully, inviting a problematic juror response the trial court couldn't ignore.

In reality, the court never suggested a problem with counsel's questioning, which "didn't call for a response mentioning jury nullification, and . . . accurately reflect[ed] black-letter law" on the roles of jury and judge. *Lynch*, 903 F.3d at 1090 (Watford, J., dissenting). Instead, the prosecutors—worried from the outset about

nullification—expressed concern with counsel's line of inquiry, to which the court responded, "If you feel that way, raise an objection and I will make a ruling on the question." (ER 1258.) The court said nothing to the defense, and expressed no unease over counsel's voir dire. When a juror injected nullification into the discussion the next day, counsel "sincerely did not see that coming." (App. 40.)

In any event, "[a]ssuming without accepting [Respondent's] position that the defense counsel's [question] invited error, it did not invite this error." *Caldwell v. Mississippi*, 472 U.S. 320, 337 (1985) (internal quotation marks omitted). Even supposing some response was necessary, this one "went too far." *Lynch*, 903 F.3d at 1087 (Watford, J., dissenting); *see id.* at 1090.

II. The Court Should Grant Certiorari to Resolve a Circuit Split over the Elements of Entrapment by Estoppel

A. Respondent agrees that implied government assurances can support an entrapment-by-estoppel defense. (BIO 23-26.)[3] That is a wise concession, given this Court's clear holding "that the Due Process clause prevent[s] conviction of persons" who "relied upon assurances . . . either express or implied." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965).

Rather than dispute this established point, Respondent offers a counterfactual narrative of what happened below, asserting the Ninth Circuit never rejected

[3] By failing to contend otherwise, the government waives any such argument. *See* Sup. Ct. R. 15.2.

Petitioner's defense as grounded in implicit assurance. But that is exactly what the appeals court did. It discounted the DEA's response as "not the same as saying that Lynch was actively told he could violate federal law." *Lynch*, 903 F.3d at 1076. It objected that "Lynch never received the sort of clear sanction that entrapment by estoppel required." *Id.* And it concluded that "[e]ven if Lynch took the statement as implicit authorization for his actions, this is not the same as saying that the statement was an affirmative and unambiguous grant of permission." *Id.* In other words, the DEA only implied that medical marijuana dispensaries were legal.

B. In the Second, Third, and Fourth Circuits, that implicit assurance would have been enough. Petitioner could have presented his defense to the jury, and may have been acquitted. Instead, he faces five years in prison because the Ninth Circuit misunderstands this Court's precedent.

These sister circuits' holdings could not be clearer. They recognize entrapment-by-estoppel defenses based on assurances "express[] or implied[]," *United States v. Alba*, 38 F. App'x 707, 709 (3d Cir. 2002); on language that "states []or implies" the defendant's conduct is legal, *United States v. Aquino-Chacon*, 109 F.3d 936, 939 (4th Cir. 1997); and on "statements or . . . acts that produced in the defendants a reasonable belief that they were authorized to engage in the illegal conduct," *United States v. Abcasis*, 45 F.3d 39, 45 (2d Cir. 1995). The DEA's assurance to Petitioner that the legality of medical marijuana dispensaries was "up to the cities and counties" meets each of these tests. (ER 2374.)

C. This case is an excellent vehicle for resolving the circuit split and bringing the Ninth Circuit's entrapment-by-estoppel law in line with the Court's. Petitioner's case presents the entrapment-by-estoppel issue cleanly and on compelling facts. Respondent's contrary claims rest on a profound misunderstanding of what took place in the district and circuit courts.

First, Respondent misconstrues the effect of the Ninth Circuit's decision on Petitioner's case. Though the trial court, in theory, allowed Petitioner to present his defense to some (but not all) of the charges, it excluded crucial evidence to support the defense, and incorrectly instructed the jury on entrapment by estoppel's elements—including by refusing to instruct that the DEA's assurance could be "express or implied." (*Compare* ER 324, *with* ER 1594.) Petitioner raised all of these issues on appeal, but the Ninth Circuit rejected them in one fell swoop, based solely on its holding that Petitioner had no right to present an entrapment-by-estoppel defense based on implicit government assurances.[4]

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[4] As the appeals court explained:

> Lynch contends that the district court committed various errors with respect to Lynch's entrapment by estoppel defense. The court allegedly misinstructed the jury about this defense's elements, refused to allow the defense as against the distribution-to-minors charges, and did not permit the jury to consider evidence of Lynch's compliance with state law. All of Lynch's arguments on this point fail, however, because Lynch did not prove facts sufficient to establish a basis for entrapment by estoppel. Lynch therefore has no grounds to object to the district court's treatment of this defense, because Lynch's failure to provide a sufficient factual basis to establish the defense meant that Lynch was not entitled to any instruction on, or jury consideration of, this defense in the first place.

Lynch, 903 F.3d at 1075.

So Respondent is incorrect when it asserts that "any error was harmless" because "Petitioner was allowed to raise an entrapment-by-estoppel defense as to three of the charges against him, and the jury nonetheless found him guilty." (BIO 27.) The jury's verdict resulted from multiple trial court errors that the Ninth Circuit never reviewed because of its erroneous holding.

And that erroneous holding on implied assurances was determinative. The circuit court's additional conclusion that Petitioner unreasonably relied on the DEA's advice depended on the theory "that two questions posed to an anonymous and apparently confused source could [not] have definitively resolved all legal questions" about Petitioner's proposed conduct. *Lynch*, 903 F.3d at 1077. Said differently, the Ninth Circuit found Petitioner's reliance unreasonable because the DEA's assurance was insufficiently express, inextricably linking this alternative holding with the court's earlier flawed analysis.

Second, Respondent misrepresents the relevant facts, exaggerating Petitioner's legal acumen, and minimizing his exemplary efforts at complying with the law. (*See, e.g.*, BIO 5-6, 22.) Though college-educated, Petitioner had no legal training, and struggled to understand how federal law seemed to criminalize marijuana, while California openly embraced medical marijuana. He studied the conflicting laws as best he could, and tentatively concluded that the Tenth Amendment reserved to the States authority to legalize *medical* marijuana. How else to explain the hundreds of dispensaries operating in plain sight? Petitioner's call to the DEA

confirmed the apparent correctness of that understanding, which he then included on dispensary forms.[5] (Pet. 5-6, 38-39.)

Relying on the DEA's assurance that it was up to local authorities to determine the legality of his dispensary, Petitioner—as recounted by the district court—hired a lawyer and sought advice on complying with State law; applied for and obtained a local business license; worked hand-in-hand with the City Mayor, City Attorney, City Planner, and City Council; hired security guards and installed surveillance; ran background checks on prospective employees; kept detailed business records; and strictly enforced State rules requiring medical-marijuana authorizations and identification. (ER 403-06.) "Were all purported criminals so accommodating, this country would be a much safer and law-abiding place." (ER 428-29.)

Petitioner's entrapment-by-estoppel defense was well-supported by the evidence, and should have gone to the jury in full.

III. This Is Not an Interlocutory Appeal

The Ninth Circuit issued a final judgment affirming Petitioner's conviction. *Lynch*, 903 F.3d at 1087. Short of habeas relief, no alternatives remain for overturning that conviction beyond this petition for certiorari.

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[5] The forms stated, "I understand that Federal Law prohibits cannabis but California Law Senate Bill 420 allows Medical Cannabis and gives patients a constitutional exception based on the 10th Amendment to the United States of America." (GER 1044.)

True, the appeals court remanded for resentencing, after the government cross-appealed the trial judge's rejection of a five-year mandatory minimum sentence. *Id.* at 1083-84. But that is no bar to review, practically or jurisdictionally. *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (explaining judgment is "final" and certiorari appropriate where conviction affirmed but resentencing remains). Whether the court on remand imposes the mandatory minimum or seizes upon a new legal theory to support a lesser term, Petitioner's conviction will stand. And he will be precluded from re-raising the issues here presented in a new appeal. *See United States v. Crooked Arm*, 853 F.3d 1065, 1067-69 (9th Cir. 2017).

Likewise, even if Petitioner convinces the district and appeals courts that the Department of Justice is violating a congressional appropriations rider by spending funds on his state-law-compliant medical marijuana prosecution (*see* Pet. 10 n.1), that holding "would *not* vacate [his] conviction." *United States v. Kleinman*, 880 F.3d 1020, 1028 (9th Cir. 2017) (as amended). For the Ninth Circuit has held that the appropriations rider "does not require a court to vacate convictions that were obtained before the rider took effect." *Id.*[6]

This case is ripe for review.

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[6] Petitioner disagrees with *Kleinman*'s holding on this point, but *Kleinman* controls in the Ninth Circuit.

CONCLUSION

The Ninth Circuit's decision doubly diminishes the historic role of the citizen-jury in a criminal case, deepens divisions among the lower courts, and contradicts Supreme Court precedent. The Court should grant the petition.

May 28, 2019

Respectfully submitted,

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