No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner opened a state-legal medical marijuana dispensary after seeking guidance from the Drug Enforcement Administration, and being told it was a matter of local law. Nonetheless, the government charged Petitioner with violating federal marijuana laws, and he went to trial. During voir dire, a prospective juror mentioned jury nullification; in response, the judge instructed that jurors have no authority to nullify, warned that nullification would violate jurors' sworn oaths, polled jurors individually on whether they could follow those commands, and dismissed any who demurred. Petitioner proffered an entrapment-by-estoppel defense based on his calls to the DEA, but the court precluded the defense on some counts and limited it on others. The jury convicted, and the court imposed a mandatory minimum sentence. In a split, published decision, the Ninth Circuit affirmed the anti-nullification instruction, and held Petitioner had no right to present a defense based on implicit government assurances at all.

The questions presented are:

1. May a trial judge issue a coercive anti-nullification instruction to criminal jurors?
2. May a federal defendant present an entrapment-by-estoppel defense based on implicit government assurances that his conduct is legal, as this Court and the Second, Third, and Fourth Circuits have held, or must the assurances be express, as the Ninth Circuit held in Petitioner's case?

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The opinion of the Ninth Circuit Court of Appeals is reported at *United States v. Lynch*, 903 F.3d 1061 (9th Cir. 2018), and is reproduced in the Appendix at App. 3-31. The district court's relevant prior decisions in the case are unreported; they are reproduced at App. 1-2.

JURISDICTION

The Court of Appeals entered judgment on September 13, 2018 (App. 3), and denied Petitioner's timely petition for rehearing on December 11, 2018 (App. 1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2, Clause 3:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed . . . .

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .

INTRODUCTION

Before Petitioner Charles Lynch opened a medical marijuana dispensary in California, he placed four calls to the Drug Enforcement Administration, asking if he could do so. When Lynch finally reached someone able to answer his questions, that person explained it was "up to the cities and counties to decide how they want to handle the matter." This made sense to Lynch, a layperson who had researched the law and believed the Tenth Amendment excepted state-authorized medical marijuana from the general federal ban on the drug. Lynch contacted his city and county officials, and opened his dispensary with their blessing and in compliance with local rules.

Though the State never charged Lynch with any violation of California law, the DEA—the very agency from whom Lynch sought guidance—arrested him, and the government prosecuted him for violating federal marijuana laws carrying mandatory minimum sentences.

This is just the sort of case where our Founders envisioned a local jury checking the federal government's overreach and refusing to sanction a manifestly unjust prosecution. It is also squarely what this Court had in mind when it thrice held that due process prohibits the conviction of one misled by a responsible authority into believing his conduct lawful. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655 (1973); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).

And yet, the district court coerced jurors into abandoning their historic role as the community's conscience by issuing a forceful anti-nullification instruction that any reasonable juror would have understood as threatening punishment if the jury failed to convict. In a divided opinion, the Ninth Circuit upheld this instruction over Judge Watford's powerful dissent. That decision conflicts with the holdings of the First and D.C. Circuits and two state courts of last resort, centuries of Anglo-American jurisprudence, and an original understanding of the Sixth Amendment right to trial by jury.

What is more, the Ninth Circuit held that Lynch had no right to present his entrapment-by-estoppel defense because the DEA's assurances to him were implicit, not express. That holding conflicts with this Court's pronouncements that a defendant may rely on government assurances "express or implied." *Cox*, 379 U.S. at 571, i.e., not "explicit," *Raley*, 360 U.S. at 439. And it creates a circuit split with the Second, Third, and Fourth Circuits, which each correctly interpreted this Court's precedent to permit entrapment-by-estoppel defenses based on implicit assurances of lawful conduct. *United States v. Alba*, 38 F. App'x 707 (3d Cir. Apr. 8, 2002) (unpublished); *United States v. Aquino-Chacon*, 109 F.3d 936 (4th Cir. 1997); *United States v. Abcasis*, 45 F.3d 39 (2d Cir. 1995).

To be clear, this case does not raise questions about a defendant's Sixth Amendment right to inform jurors of their power to nullify though argument or instruction; the lower courts generally agree that such affirmative steps are

unnecessary to protect jury independence. Rather, this case presents a question that divides the lower courts: How far may a judge go in dissuading jurors from exercising their historic power to acquit "in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

By affirming the trial court's coercive anti-nullification instruction, and holding Lynch had no right to present his defense, the Circuit majority relegated the jury to a meaningless role in exactly the kind of case where its function as a bulwark against oppression was most needed and intended. This Court should grant certiorari to protect the jury's historic power to issue conscience verdicts, and to resolve the significant legal conflicts the Ninth Circuit created. Lynch's closely-watched prosecution, which has drawn nationwide attention, is precisely the right case in which to address these issues of exceptional importance.

STATEMENT OF THE CASE

1. Through voter proposition in 1996, and state legislation in 2003, California legalized medical marijuana, including its sale by non-profit dispensaries. *See* Cal. Health & Safety Code § 11362.5 *et seq.*; *People v. Hochanadel*, 176 Cal. App. 4th 997 (2009). Lynch, who suffers from debilitating migraines, traveled far from his home county of San Luis Obispo, which had no dispensary, to obtain medical marijuana. Recognizing the need for a local dispensary, Lynch explored the possibility of opening one. (ER 403, 2356.)

Lynch was not a lawyer, and found the legal landscape confusing. Federal law seemed to criminalize marijuana, but California law authorized medical marijuana, and dispensaries operated openly throughout the state. After researching the matter, he concluded the Tenth Amendment carved out an exception to the federal prohibition for medical use of marijuana, where legalized by a state. (ER 2357-67.) Not content to rely on his own analysis, Lynch called the DEA. (ER 2367, 2453-55.)

Lynch's phone bill confirmed he made four calls to the DEA. (ER 2368, 3700-02.) The man who answered the first call directed Lynch to contact his local field office, which Lynch did. (ER 2368-69.) However, that office was unable to answer Lynch's questions, and referred him to another number. (ER 2369-70.) Lynch placed a third call, asked about the DEA's dispensary policy, and was directed to a fourth number, which Lynch immediately dialed. (ER 2371-73.) A woman answered, "Marijuana Task Force," and when Lynch explained he wanted information on dispensaries, she put someone else on the line. (ER 2373-74.)

Lynch testified he asked that individual—apparently recruited to answer his inquiry—"what you guys are going to do about all of these medical marijuana dispensaries around the State of California." The man responded that "it was up to the cities and counties to decide how they wanted to handle the matter." Lynch pressed on: "[W]hat if I wanted to open up my own medical marijuana dispensary[?]" The DEA official "seemed a little bit perturbed, . . . and he slowed

his words down to make sure [Lynch] understood him and he said it's up to the cities and counties to decide how they want to handle the matter." (ER 2374.)

The DEA's response made sense to Lynch. (ER 2374, 2456.) It accorded with his lay understanding of the law, and explained how hundreds of dispensaries existed across California. (ER 2458-59.) Lynch contacted city and county officials, and opened his business with their blessing and under their rules. (ER 2460-88.)

From approximately April 2006 through March 2007, Lynch ran the Central Coast Compassionate Caregivers medical marijuana dispensary in Morro Bay. As the district court explained, "the purpose of the CCCC's distribution of marijuana was not for recipients to 'get high' or for recreational enjoyment. Rather, it was pursuant to the [authorizing state law's] goal of providing marijuana to Californians for medical uses as prescribed by their treating physicians." (ER 423.)

In March 2007, the DEA raided the CCCC and Lynch's home; shortly thereafter, the government charged Lynch with five violations of federal drug laws, including three counts requiring mandatory minimum sentences. (ER 409, 437-49.) The district court had jurisdiction under 18 U.S.C. § 3231. The State of California never charged Lynch with any crime.

2. At jury selection, several prospective jurors expressed confusion and concern over the conflict between state and federal law, prompting the court to instruct repeatedly that state law was irrelevant to Lynch's case and to question jurors on whether they could follow that instruction. (*See, e.g.*, ER 986-1012.) At one point, a

juror responded: "I will follow what you say. And I want to follow the law and I don't want to be put in the jail, so I will follow what you say." The court clarified that it had "never thrown a juror in jail." (ER 1192.)

Later in voir dire, as counsel attempted to rehabilitate a prospective juror, the juror raised the issue of nullification:

> [DEFENSE COUNSEL]: You also mentioned that it would be difficult for you to follow the law as instructed by the judge or that—I believe your words were, it would be hard for you to follow the law as the court would wish you to. Do you understand that the court is going to instruct you on the law but will not instruct you about the decision that you need to come to after being instructed on the law? Do you understand the difference?
>
> [THE PROSECUTOR]: Objection. Misstates the law.
>
> THE COURT: I'll sustain the objection. You can attempt to rephrase the question.
>
> [DEFENSE COUNSEL]: Do you understand that the ultimate decision as to whether to find a person guilty or not guilty is your decision?
>
> JUROR: You finally said something I can relate to. I understand that completely. I believe there is something called jury nullification, that if you believe—
>
> THE COURT: No—
>
> JUROR: —the law is wrong—
>
> THE COURT: No. Let me stop you—
>
> JUROR: —you don't have to convict a person.

(ER 1263.) The court terminated defense voir dire, and, over objection, instructed the venire-members as follows:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a . . . juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

(ER 1282; *see* ER 1264-86.) The court then questioned prospective jurors one by one, asking each, "Could you follow that instruction?" (ER 1282-85.) Those who balked were dismissed for cause. (ER 1284-90, 1298.)

In a post-verdict letter to the judge, one seated juror wrote:

> When the jury first met, I told the other jurors that the instructions appeared to leave no room for considering that Mr. Lynch might not be guilty, and I asked if this was fair . . . . I was assured by a number of jury members . . . that we had promised the honorable judge to comply with his instructions, and that we would be breaking our promise if we did not vote to convict.

(ER 3327-28.)

3. At trial, Lynch sought to present an entrapment-by-estoppel defense, based on his calls to the DEA. The defense is rooted in due process and fairness, and "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official." *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (internal quotation marks omitted); *see Cox*, 379 U.S. at 571. The court ruled Lynch proffered sufficient evidence to present his defense on three counts, but disallowed it on two counts of distributing marijuana to "minors" because Lynch did not tell the DEA he planned to sell to persons under twenty-one. (ER 2413-28, 2971-72.)

Lynch objected to the court's limitation on his right to present a defense. California permits medical-marijuana sales to persons between eighteen and twenty-one, and Lynch presented evidence suggesting a DEA official would have understood that operating a dispensary meant selling to so-called "minors." (ER 2548-53, 2862-63.) He also objected to the jury instructions, which misstated the elements of his defense, and to rulings precluding crucial evidence supporting it.

Following a ten-day trial, the jury convicted Lynch of all charges. (ER 3157.)

4. The trial court struggled with its purported obligation to impose a mandatory prison sentence. It recognized Lynch was "caught in the middle of the shifting positions of governmental authorities," which Congress could fix by rescheduling marijuana. (ER 431.) And it explained Lynch never would have committed a crime but for California's legalization of medical marijuana, so incarceration served no purpose. (ER 428-29.) "Indeed, arguably Lynch displayed his respect for the law herein by notifying governmental authorities and law enforcement entities of his planned activities prior to engaging in them. Were all purported criminals so accommodating, this country would be a much safer and law abiding place." (*Id.*)

Ultimately, the court interpreted federal law to support a "safety-valve" departure below the five-year mandatory minimum. But the court found no authority to decrease the mandatory one-year sentences for the "minors" counts, and reluctantly sentenced Lynch to one year in prison. (ER 420-31.) Lynch remains on bond pending appeal. (ER 353.)

5. In a split decision, the Ninth Circuit affirmed Lynch's conviction and reversed the district court's application of the safety valve—effectively mandating a five-year sentence. *United States v. Lynch*, 903 F.3d 1061 (9th Cir. 2018).[1]

The Circuit majority was not troubled by the district court's anti-nullification instruction because, in its view, jurors have the "power" but not the "right" to engage in nullification, and a defendant has no concomitant right to a jury uninhibited from exercising that power. *Id.* at 1080. Rather, the giving of an anti-nullification instruction is a "permissible" and "appropriate exercise of a district court's duty to ensure that a jury follows the law," *id.* at 1078, and the specific admonition in this case—that nullification would violate jurors' oaths and that jurors have no authority to act on their sense of injustice—"accurately stated the law," *id.* at 1079. Indeed, the instruction was particularly appropriate because Lynch's counsel asked a prospective juror if she understood "that the ultimate decision as to whether to find a person guilty or not guilty is your decision?" (ER 1263.) *See Lynch*, 903 F.3d at 1080.

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[1] The Circuit also remanded for a hearing on the applicability of a recently-enacted congressional appropriations rider that prohibits the Department of Justice from spending funds on state-compliant medical marijuana prosecutions. *Lynch*, 903 F.3d at 1085-87. Even if Lynch prevails in those proceedings, his convictions will remain, and he will be subject to potential incarceration. That is because, under Ninth Circuit law, the rider is a temporary funding measure that "does not require a court to vacate convictions that were obtained before the rider took effect." *United States v. Kleinman*, 880 F.3d 1020, 1028 (9th Cir. 2017). Moreover, "Congress could restore funding tomorrow," removing any barrier to Lynch serving a five-year sentence. *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

Judge Watford dissented: "One of the fundamental attributes of trial by jury in our legal system is the power of the jury to engage in nullification" and "to act as the conscience of the community." *Id.* at 1087-88 (Watford, J., dissenting) (internal quotation marks omitted). That power "has ancient roots," and is particularly important in "a case of this sort [that] touches a sensitive nerve from a federalism standpoint." *Id.* at 1087.

Though Judge Watford accepted the premise that "a defendant may not insist that the jury be instructed on its ability to nullify," he found "the district court went too far in trying to dissuade the jury from engaging in nullification." *Id.* Specifically, the anti-nullification instruction in this case "crosse[d] the constitutional line" because "it state[d] or implie[d] that jurors could be *punished* if they engage[d] in nullification." *Id.* at 1088. "Telling jurors that nullification is a violation of their oath, standing alone, implies the potential for punishment because violating one's oath could be deemed either perjury or contempt, both of which are punishable by fine and imprisonment." *Id.* at 1089. "Only the hardiest of jurors would remain committed to voting her conscience when threatened with the risk of fine or imprisonment." *Id.* at 1090. Furthermore, the instruction "affirmatively misstate[d] the power that jurors possess." *Id.* at 1088.

In a "case[] like this one, where nullification was an obvious possibility given the popularity of medical marijuana in California," *id.* at 1089, the court's instruction "subvert[ed] the jury's longstanding role as a safeguard against government

oppression"—a role that "members of the Founding generation with fresh memories of the colonists' experiences under royal judges" believed essential, *id.* at 1088.

And counsel in no way invited the error by asking a question that "didn't call for a response mentioning jury nullification, and [that] accurately reflects black-letter law." *Id.* at 1090. In any event, counsel's colloquy with the prospective juror "did not by any stretch authorize the court to give" such a coercive anti-nullification instruction. *Id.* Because the improper instruction violated Lynch's Sixth Amendment right to jury trial, Judge Watford would have reversed. *Id.* at 1087.

As Judge Watford would have vacated Lynch's convictions on instructional grounds, he did not address Lynch's right to present an entrapment-by-estoppel defense. The majority, however, held that the district court's limitations on that defense were irrelevant because Lynch had no right to present the defense to the jury in the first place. *Id.* at 1075-78. As the Ninth Circuit viewed the matter, Lynch's calls to the DEA were "insufficient to provide a basis for the defense" because "[e]ven crediting Lynch's testimony for all that it is worth," he was not "actively told he could violate federal law" or given "the sort of clear sanction that entrapment by estoppel requires," but received only "implicit authorization." *Id.* at 1075-76. In other words, the DEA's statements "lacked sufficient concreteness to have served as an affirmative authorization for Lynch's defense." *Id.* at 1076. The majority did not explain how its conclusion accorded with this Court's prior holding

"that the Due Process Clause prevent[s] conviction of persons . . . when they relied upon assurances . . . either express or implied." *Cox*, 379 U.S. at 571.[2]

Lynch unsuccessfully petitioned the Ninth Circuit for rehearing.

REASONS FOR GRANTING THE WRIT

I. Whether and How a Trial Court May Dissuade Jurors from Nullifying Is a Recurring Issue of Exceptional Importance That Has Divided the Lower Courts

Jury nullification, or the power of jurors to vote their consciences, has a vaunted history in Anglo-American jurisprudence. The right of jurors to issue conscientious acquittals without fear of reprisal goes back centuries, and was front and center in

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[2] The Ninth Circuit also rejected Lynch's defense because it believed, contrary to the considered view of the trial court, that his reliance on the DEA's assurance was unreasonable as a matter of law. *Lynch*, 903 F.3d at 1077-78. But this holding was premised in part on the court's mistaken understanding that a defendant cannot reasonably rely on an implicit government assurance, and is inextricably intertwined with that error. *Id.* at 1077 ("It was not reasonable to think that two questions posed to an anonymous and apparently confused source could have definitively resolved all legal questions relating to Lynch's operations.").

Moreover, reasonableness is a quintessential "question of fact—which means not only that it is meant for the jury rather than the judge, but also that there is no single 'right' answer. It could go either way." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181 (1989); *see also R.R. Co. v. Stout*, 84 U.S. 657, 664 (1873) ("It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."). Whether reasonableness is a pure question of fact or one mixed with law, its determination was for the jury. *See United States v. Gaudin*, 515 U.S. 506, 510-15 (1995); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

the minds of our Founders when they included the right to trial by jury of one's peers in both the Constitution and the Bill of Rights.

Perhaps its most celebrated example in pre-Colonial England culminated in *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). It began as the trial of William Penn for unlawful assembly and disturbing the peace, based on his public preaching to Quakers. Penn did not dispute he had so preached, but asked the jury to acquit him nonetheless based on their sense of justice. Such arguments were common at the time. But the case acquired notoriety when jurors refused to convict, prompting the trial court to throw them in prison. Juror Bushell appealed. *See* Jenny E. Carroll, *The Jury's Second Coming*, 100 Geo. L.J. 657, 664-66 (2012); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 912 (1994). "[I]n a ruling that effectively ended longstanding controversy over the issue, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts." Alschuler & Deiss, *supra*, at 912. *Bushell's Case*, in time, "came to be understood as exalting the juror as a worthy barometer of what was truly just and moral," and effectively cemented the right of jury nullification. Carroll, *supra*, at 667-68.

In Petitioner's case, the Ninth Circuit failed to protect the jury's role as the community's conscience, affirming an anti-nullification instruction that misstated the jury's power and implicitly threatened punishment if jurors resisted. That decision puts the appeals court on the wrong side of a circuit split over the extent to

which judges may dissuade jurors from nullifying. And it effectively reverses one of the most hallowed principles of Anglo-American jurisprudence—jury independence.

A. Lower courts are divided on whether and how a trial court may dissuade jurors from nullifying

The Ninth Circuit's decision to allow coercive anti-nullification instructions aligns only with the positions of the Sixth Circuit and the Supreme Court of Mississippi, while directly conflicting with decisions of the First Circuit, D.C. Circuit, Supreme Courts of Kansas, and Supreme Court of New Hampshire.

1. The Sixth and Ninth Circuits condone coercive anti-nullification instructions, in conflict with the First and D.C. Circuits, which prohibit judges from instructing on nullification at all

The position of the Ninth Circuit, set forth in Petitioner's case, is that a judge may instruct jurors that they will violate their sworn oaths if they nullify, and that they lack authority to act on their sense of injustice. Though such an instruction is coercive, implying jurors could be punished for nullifying, and plainly misstates the jury's historic power to "find a verdict of guilty or not guilty as their own consciences may direct," *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (internal quotation marks omitted), the Ninth Circuit held the instruction "accurately state[s] the law," *Lynch*, 903 F.3d at 1079, and its issuance is an "appropriate exercise of a district court's duty to ensure that a jury follows the law," *id.* at 1078.

Only one other federal court of appeals has gone as far as the Ninth Circuit, and endorsed an anti-nullification instruction both coercive and legally incorrect: the Sixth Circuit, in a divided decision.[3] *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988). In *Krzyske*, the defendant "mentioned the doctrine of jury nullification in his closing argument," and the jury subsequently "asked the court what the doctrine stood for." *Id.* at 1021. In response, the court instructed:

> There is no such thing as valid jury nullification. Your obligation is to follow the instructions of the Court as to the law given to you. You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case.

Id. A majority of the three-judge panel, treating the question presented as whether the trial judge should have *affirmatively* instructed on nullification in response to the jury's inquiry, *id.* at 1015, 1021, held that "[t]he right of a jury, as a buffer between the accused and the state, to reach a verdict despite what may seem clear law must be kept distinct from the court's duty to uphold the law and to apply it

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[3] Arguably, even the Ninth Circuit once recognized that coercive anti-nullification instructions are problematic. In an earlier case, the Ninth Circuit disapproved of an anti-nullification instruction similar but not identical to the one issued in Petitioner's case. *United States v. Kleinman*, 880 F.3d 1020, 1031-33 (9th Cir. 2017) (as amended). Though the court was troubled by part of the instruction—"There is no such thing as valid jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case."—it nonetheless affirmed the defendant's convictions. *Id.* (alteration omitted); *see id.* at 1033-36. And the court specifically approved of language instructing the jury, "You cannot substitute your sense of justice, whatever that means, for your duty to follow the law, whether you agree with it or not. It is not for you to determine whether the law is just or whether the law is unjust. That cannot be your task." *Id.* at 1031; *see id.* at 1032. Whatever remains of *Kleinman*'s holding following *Lynch*, that decision, too, rejected the premise that an anti-nullification instruction sufficiently interferes with a defendant's jury trial right to require reversal.

impartially," and affirmed. *Id.* at 1021. The majority did not address whether the instruction was coercive, and, notably, the trial judge made no effort to poll jurors individually on whether they could follow his instruction. *See id.*

Judge Merritt dissented. *Id.* at 1021-22. He would have vacated the defendant's conviction because the trial court "gave short shrift to [the Anglo-American] legal tradition" of conscientious acquittal by failing to "explain to the jury its historical role as the protector of the rights of the accused in a criminal case." *Id.* at 1022. What is more, the instruction "conveyed a sense of threat to the jurors that a nullification verdict 'willfully' taken would 'violate . . . the law' and, by implication, invite sanctions"—something "contrary to the venerable rule to the contrary established in the London prosecution of William Penn more than three centuries ago." *United States v. Krzyske*, 857 F.2d 1089, 1094 (1988) (Merritt, J., dissenting from order denying reconsideration) (alteration in original). Because "the instruction given to the jury deprived the defendant of his Sixth Amendment right to trial by jury," Judge Merritt would have reversed. *Id.* at 1095.

In conflict with the Sixth and Ninth Circuits, the First and D.C. Circuits have held that trial judges must refrain from instructing on nullification.

In *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), the First Circuit considered a trial court's response to jurors—who inquired about nullification at the defense's urging—that "[f]ederal trial judges are forbidden to instruct on jury nullification," and that repeated "its earlier instruction that if the government

proved its case the jury 'should' convict, while if the government failed to carry its burden the jury 'must' acquit." *Id.* at 1189-90. The circuit affirmed because the first statement was not "a judicial prohibition against the jury's use of its inherent power" to nullify, "convey[ed] no such chilling effect," and was combined with the "should" language, leaving "pregnant the possibility that the jury could ignore the law if it so chose." *Id.* at 1190. The First Circuit's decision suggests it would not have allowed the chilling anti-nullification instruction in Petitioner's case.

Likewise, in *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972), the D.C. Circuit cautioned that instructing the jury on nullification would disrupt a well-balanced system that permits jurors to vote their consciences if justified. Because, in *Dougherty*, nothing impeded the jury's ability to issue a conscience verdict, the appeals court affirmed the denial of a pro-nullification instruction. *See id.* But its holding contained an explicit warning: "The way the jury operates may be radically altered if there is alteration in the way it is told to operate." *Id.* at 1135. This language suggests the D.C. Circuit, too, would have ruled differently in Petitioner's case. *See also United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996) (per curiam) (citing *Sepulveda* to support affirmance of instruction that did "not go so far as to suggest that the jury could not nullify the law").

2. State courts of last resort also are divided on the propriety of anti-nullification instructions

Two state courts of last resort have issued rulings directly in conflict with the Ninth Circuit's decision in this case. Most recently, the Supreme Court of Kansas held it was "clear error" for a judge to "essentially forb[id] the jury from exercising its power of nullification." *State v. Smith-Parker*, 340 P.3d 485, 507 (Kan. 2014). The problematic instruction at issue in that case? "If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you *will* enter a verdict of guilty." *Id.* at 506 (alteration in original). According to the Supreme Court of Kansas, although a defendant has no right to an affirmative nullification instruction, the "judge's instruction in this case went too far in the other direction." *Id.* 507. It "fl[ew] too close to the sun of directing a verdict for the State"—something a judge cannot do. *Id.* A fortiori, if the Kansas high court found the rather mild *Smith-Parker* instruction untenable, it would reverse in Petitioner's case.

Two rulings of the Supreme Court of New Hampshire similarly conflict with the Ninth Circuit's decision. In *State v. Richards*, 531 A.2d 338 (N.H. 1987), the court considered a trial judge's affirmative nullification instruction, which told jurors, "You take an oath when you take the jury duty to follow the law as the court gives it to you, but this jury and every jury has the power to return a verdict of not guilty if that be their unanimous, conscientious conviction. I think you all know that, too."

Id. at 342. The high court held that, the trial court having taken "upon itself the task of telling the jury of its nullification power . . . , it was bound to explain the law correctly." *Id.* Though the reviewing court found the "explanation not so clear as it could be," and did "not urge it as a standard instruction," it held the instruction did "not so distort the law as to constitute reversible error." *Id.* The plain import of the decision being that it would have been reversible error, had the trial judge misinformed the jury of its power to nullify—as it did in Petitioner's case.

The Supreme Court of New Hampshire underscored that point in *State v. Bonacorsi*, 648 A.2d 469 (1994). There, when the jury inquired about nullification, "[t]he trial judge refused the defendant's request to inform the jury of 'the prerogative to return not guilty verdicts, even if the State has proven the defendant guilty,'" *id.* at 470—though the judge permitted the defense to argue nullification to the jury, *id.* at 469, and "twice instructed the jury that if it found the State had proved all the elements of the offenses charged beyond a reasonable doubt, it 'may' find the defendant guilty," *id.* at 470. Defendant complained on appeal that these instructions "left the jurors with the mistaken impression that the prerogative did not exist, thus superseding the exercise of their own judgment." *Id.* at 470. The high court disagreed, finding the instructions sufficiently apprised the jury of its power to nullify. *Id.* at 470-72. But, the court explained, "[h]ad the trial court answered in the negative" when the jury asked if it had legal authority to nullify, "the jury might have understood the response to remove nullification from their consideration." *Id.*

at 471-72. Because the judge did not do so, there was no error. *Id.* Implicit in that holding is the converse conclusion: that an instruction informing jurors they have no power to nullify—as was given in Petitioner's case—constitutes reversible error.

To Petitioner's knowledge, the only state high court to approve a comparably coercive anti-nullification instruction is the Supreme Court of Mississippi, which, with little analysis, found proper the following admonition in a capital case:

> [Y]ou made an oath that you would follow and apply these rules of law which I shall now state to you. You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of law than that given you in these instructions by the Court.

Hansen v. State, 592 So. 2d 114, 140 & n.10 (Miss. 1991).

Though a small handful of state courts of last resort have endorsed anti-nullification instructions, with a single exception, those instructions are far more tepid than what the Sixth and Ninth Circuits allow.

For example, the Vermont Supreme Court recently approved the following instruction in response to a complaint by one seated juror that another was discussing nullification:

> You must follow the law we'll give you and its instructions. You must find the facts from the evidence in the case and you must apply the law that the Court gives you. Juries do not have the power to decide questions of law and are not permitted to override the law laid down by the Court and to declare the law for themselves. You should not concern yourself with the wisdom of any rule or any opinion you might have about what the law should be. You must decide the facts based on the evidence that has been presented and you must apply the law that

> the Court gives you in its instructions. You may not base any verdict on bias, prejudice, or sympathy.

State v. Kebbie, 2018 WL 6173595, at *1-3 (Vt. Nov. 21, 2018) (unpublished) (alteration omitted). While that instruction misstated the law, it was not coercive. The California Supreme Court found a pattern instruction obliging jurors to inform the judge "should any juror refuse to deliberate or express an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis" did not require reversal, but disapproved of its use in future cases. *People v. Engelman*, 49 P.3d 209, 211 (Cal. 2002) (alterations omitted). And the Supreme Court of Kentucky upheld a short instruction "that 'Not to follow the law would be a breach of your duty. It violates the very system in which we are participating.'" *Powell v. Comm.*, 2017 WL 1536249, at *2 (Ky. Apr. 27, 2017) (unpublished).

Similarly, various state high courts permit instructions that jurors "must" convict if the government proves its case beyond a reasonable doubt, despite objection that those instructions undermine the jury's right to nullify. *See, e.g.*, *State v. Ragland*, 519 A.2d 1361, 1365-73 (N.J. 1986); *Watts v. United States*, 362 A.2d 706, 711 (D.C. 1976) (collecting cases).[4] Notably, there are dissenting voices on whether even this mild language improperly impinges on the jury's powers. *See, e.g.*, *State v. Carter*, 380 P.3d 189, 205 (Kan. 2016); *State v. Prudent*, 13 A.3d 181,

[4] Several federal circuits likewise allow judges to instruct jurors that they have a "duty to" convict if the government proves its case beyond a reasonable doubt. *See, e.g.*, *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); *United States v. Johnson*, 462 F.2d 423, 429 (3d Cir. 1972).

184-85 (N.H. 2010); *Ragland*, 519 A.2d at 1374-78 (Handler, J., concurring in part and dissenting in part); *Watts*, 362 A.2d at 713-17 (Fickling. J., dissenting).[5]

B. The question presented is recurring and exceptionally important

Whether and to what extent judges may instruct jurors that they *cannot* nullify is an issue of exceptional importance given the well-established right of jurors to vote their consciences without fear of punishment. And it's one that arises with surprising frequency, as the cases above demonstrate. At least in the Ninth Circuit, anti-nullification instructions apparently have become the norm in medical marijuana cases. *See Lynch*, 903 F.3d at 1079; *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (as amended); *United States v. Rosenthal*, 266 F. Supp. 2d 1068, 1085 (N.D. Cal. 2003), *rev'd on other grounds*, 454 F.3d 943 (9th Cir. 2006).

But the right of jurors to refuse to sanction an unjust prosecution goes back centuries, to *Bushell's Case*. Unquestionably, our Founders had this history in mind when they enshrined the right to trial by a local, lay jury in the U.S. Constitution. U.S. Const., Art. III, § 2, cl. 3; *see* Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 Colum. L. Rev. 959, 964 & nn.28-31 (2006). Indeed, at the time our nation adopted the Bill of Rights, courts regularly instructed juries on their power to issue conscience verdicts. *See United States v.*

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[5] In *Watts*, the D.C. Court of Appeals thought the wiser course, going forward, was to abandon the "must" language. *Watts*, 362 A.2d at 711.

Polizzi, 549 F. Supp. 2d 308, 404-21 (E.D.N.Y. 2008) (describing historical practice), *rev'd sub. nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009).

Though a juror's right to vote his conscience was well-established, there remained, throughout America's first century, active debate over whether jurors also had the "power to determine . . . pure questions of law in a criminal case." *Gaudin*, 515 U.S. at 513 (emphasis omitted). "[M]any thought" they did. *Id.* This Court settled the matter in a divided opinion in *Sparf v. United States*, 156 U.S. 51 (1895). *Sparf* clarified that federal jurors may not engage in statutory or constitutional construction; the law is for the judge to decide, the facts for the jury. *Id.* at 99-107 (1895). "But [that] decision in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue," including bringing "a verdict of guilty or not guilty as their own consciences may direct." *Gaudin*, 515 U.S. at 513-14 (internal quotation marks omitted). After *Sparf*, "[l]aw-defining by juries is no more, but the jury's right to acquit for conscience's sake lives on." *State v. Elmore*, 123 P.3d 72, 78 (Wash. 2005) (internal quotation marks omitted).

Given this history, one might argue that denial of an affirmative nullification instruction infringes on the right to trial by jury, as originally understood. Some have. *See, e.g.*, James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 Litigation 6 (Summer 1996); *Polizzi*, 549 F. Supp. 2d at 423-25; *cf. Dougherty*, 473 F.2d at 1138-44 (Bazelon, C.J., dissenting in part) (urging

pro-nullification instructions on policy grounds). That position is supported by *Sparf* itself, where this Court left undisturbed the judge's instructions that jurors had the power to nullify. *Sparf*, 156 U.S. at 60-62 & n.1. And by this Court's repeated recognition that our Founders adopted the Sixth Amendment's jury trial right with the knowledge and intent that the jury, and nullification specifically, would serve as "the grand bulwark" protecting defendants from overzealous prosecutions. *Jones v. United States*, 526 U.S. 227, 244-48 (1999); *Gaudin*, 515 U.S. at 510-15; *Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968). This history is consequential because "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Oregon v. Ice*, 555 U.S. 160, 170 (2009); *see Johnson v. Louisiana*, 406 U.S. 356, 370-71 (1972) (Powell, J., concurring) ("The reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law.").

But Petitioner did not request a *pro*-nullification instruction at his trial, and he does not protest the judge's failure to provide one.[6] Rather, over Petitioner's

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[6] The federal circuits consistently have interpreted *Sparf* to preclude affirmative instruction on a jury's power to nullify. *See, e.g.*, *United States v. Anderson*, 716 F.2d 446, 449-50 (7th Cir. 1983); *Dougherty*, 473 F.2d at 1130-37; *United States v. Simpson*, 460 F.2d 515, 518-20 (9th Cir. 1972); *United States v. Moylan*, 417 F.2d 1002, 1005-07 (4th Cir. 1969). State courts of last resort largely agree. *See, e.g.*, *State v. Findlay*, 765 A.2d 483, 488-89 (Vt. 2000); *State v. Hatori*, 990 P.2d 115, 122 (Haw. 1999); *Davis v. State*, 520 So. 2d 493, 494 (Miss. 1988) (collecting cases). But not uniformly. *See Prudent*, 13 A.3d at 184-85 (approving pattern instruction that jurors "must" acquit if evidence is wanting, but "should" convict if case is proved beyond a reasonable doubt, intended as "the equivalent of" a pro-nullification

objection, the judge issued a forceful, chilling *anti*-nullification instruction. This case thus presents an arguably easier question—but one that nevertheless divides the lower courts: May a judge affirmatively mislead the jury into believing it lacks the power to nullify, and may the court do so with implicit threats of punishment?

That is an issue of exceptional importance over which the lower courts require guidance. Though this Court has never retreated from its statement that a criminal defendant's jury trial right encompasses the right to a jury with the power to issue conscience verdicts, *see Gaudin*, 515 U.S. at 513-14, it has not addressed jury nullification directly since *Sparf*. Because the propriety of an anti-nullification instruction is an exceptionally important question that has divided the lower courts, and because the Ninth Circuit sanctioned a coercive instruction that significantly departs from accepted and usual trial practice, this Court should grant the petition.

C. The Ninth Circuit's decision is wrong and, if allowed to stand, effectively would reverse one of the most hallowed principles of Anglo-American jurisprudence—jury independence

Even courts that refuse to instruct jurors affirmatively on their power to nullify recognize the value of conscience verdicts in our democracy. In its influential *Dougherty* decision, the D.C. Circuit described how "[t]he pages of history shine on

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instruction (internal quotation marks omitted)); *State v. Parsons*, 589 S.E.2d 226, 238 (W. Va. 2003) (per curiam) (finding no right to pro-nullification instruction, but taking no position on whether trial court could exercise its discretion to issue one).

instances" of jury nullification, *Dougherty*, 473 F.2d at 1130, and extolled nullification's virtue "as a protection against arbitrary action" that, in the words of Judge Learned Hand, "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions," *id.* at 1131 & n.34 (internal quotation marks omitted).

This Court similarly has explained that conscience verdicts play a valuable role in "guard[ing] against the exercise of arbitrary power" by "mak[ing] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). For "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan*, 391 U.S. at 157.

Nullification's benefits in our constitutional democracy are, perhaps, at their apex in cases, like Petitioner's, where a central federal government seeks to punish a citizen for conduct deemed lawful by his state. Conscience verdicts in cases rife with federalism concerns provide valuable feedback to distant legislators and potentially-out-of-touch prosecutors. Our nation's early cases of "pious perjury"—where jurors acquitted despite evidence of guilt to avoid oppressive punishment—spurred Congress to authorize greater sentencing discretion for federal crimes. *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality). That tradition of

feedback from jury to legislature continues to this day. *See State v. Lynch*, 309 P.3d 482, 496 (Wash. 2013) (explaining nullification verdicts prompted state legislature to divide rape statute into multiple degrees).

In recognition of the importance of conscience verdicts, we do not permit judges to request specific verdicts in criminal cases, *see United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969); direct guilty verdicts, *see id.*; or overturn acquittals, *see Dougherty*, 473 F.3d at 1130-32. So, too, must courts refrain from interfering with a jury's power to nullify through direct instruction.

Importantly, pro-nullification instructions have been deemed unnecessary only because, in their absence, "jurors often reach 'conscience' verdicts without being instructed that they have the power to do so" and "American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear." *United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972); *see Dougherty*, 473 F.2d at 1130-37. Thus, in the usual case, "existing safeguards"—the jury's independent role in the judicial system and courts' non-interference with this role—"are adequate" to protect a defendant's right to a jury with the power to nullify. *Simpson*, 460 F.2d at 520.

In Petitioner's case, the judge disrupted that delicate balance with his coercive instruction and questioning, suggesting the possibility of sanctions. From the outset, prospective jurors expressed concern they would be obliged to convict and might face punishment if they refused. Rather than allay those fears, the judge

gave an instruction any reasonable juror would have understood as affirming them. "Only the hardiest of jurors would remain committed to voting her conscience" in such circumstances. *Lynch*, 903 F.3d at 1090 (Watford, J., dissenting).

The judge's anti-nullification instruction deprived our democratic process of a verdict of the People, and Petitioner of "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue," including "find[ing] a verdict of guilty or not guilty as their own consciences may direct." *Gaudin*, 515 U.S. at 513-14 (internal quotation marks omitted). Because Petitioner did not receive the trial by jury the Sixth Amendment guarantees, the Ninth Circuit should have vacated his convictions. If the court of appeals' decision is allowed to stand, then *Bushell's Case*—a hallmark of jury independence in the face of tyranny—effectively becomes a dead letter.

II. The Ninth Circuit's Entrapment-by-Estoppel Ruling Conflicts with Prior Holdings of This Court and Creates a Circuit Split

This Court's decisions unambiguously recognize a defense of entrapment by estoppel based on implicit assurances that conduct is legal. Prior to Petitioner's case, each federal circuit to consider the question—the Second, Third, and Fourth—followed that precedent. The Ninth Circuit split from the others by rejecting Petitioner's defense because the official misleading was implicit, not express. That decision was wrong, and will sow confusion.

A. The Ninth Circuit's decision conflicts with this Court's repeated holdings that a defendant may rely on implicit government assurances to support an entrapment-by-estoppel defense

In a trilogy of cases, this Court held that due process prohibits the conviction of one misled by a responsible authority into believing his conduct lawful. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655 (1973) ("*PICCO*"); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959). The Ninth Circuit, like other circuits, calls this "official misleading" defense "entrapment by estoppel." *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 825 (9th Cir. 1985). Its basis in due process gives it constitutional underpinnings, *see Cox*, 379 U.S. at 571; *Raley*, 360 U.S. at 425, 437, 439, and it sounds in "traditional notions of fairness inherent in our system of criminal justice," *PICCO*, 411 U.S. at 674.

Raley concerned four defendants convicted "for refusal to answer certain questions put to them at sessions of the 'Un-American Activities Commission' of the State of Ohio." *Raley*, 360 U.S. at 424. At those sessions, the defendants purportedly were "informed by the Commission that they had a right to rely on the privilege against self-incrimination afforded by" the state constitution. *Id.* at 425. But those assurances were incorrect. *See id.* Each defendant "therefore had committed an offense by not answering the questions as to which they asserted the privilege." *Id.* Yet this Court reversed,[7] holding, "After the Commission, speaking for the State,

[7] The Court was equally divided over whether one defendant could claim the defense for his refusal to answer one question, where the Commission expressly

acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State . . . ." *Id.* at 425-26.

Just six years later, this Court revisited the "official misleading" doctrine in *Cox*. In that case, the defendant participated in a protest approximately 125 feet from a courthouse in Louisiana, and was charged with unlawfully demonstrating "near" the court. *Cox*, 379 U.S. at 560, 567-68. He testified, and the Court accepted as true, that a police chief "gave him permission to conduct the demonstration" at that location, "on the far side of the street." *Id.* at 569-70. The specific language of the chief was that defendant "'must confine' the demonstration 'to the west side of the street,'" *id.* at 570—though the chief "testified that he did not subjectively intend to grant permission" by this statement, *id.* at 570 n.4. The "effect," however, was to "advise[] that a demonstration at the place it was held would not be one 'near' the courthouse." *Id.* at 571. Based on these facts, this Court unanimously held that defendant's conviction violated due process because, as in *Raley*, it "sanction[ed] an indefensible sort of entrapment by the State." *Id.*

Most recently, in *PICCO*, this Court considered whether a corporate defendant could assert entrapment by estoppel to defend against a charge of criminal pollution based on "its alleged reliance on the Army Corps of Engineers' longstanding administrative construction of [the relevant statute] as limited to water deposits

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directed him to do so. *Raley*, 360 U.S. at 425, 440. As to the defense's applicability on all other counts, the Court was unanimous. *See id.* at 443 (Clark, J., concurring in part and dissenting in part).

that impede or obstruct navigation," *PICCO*, 411 U.S. at 657, where the plain language of the statute contained no such limitation, *see id.* at 658, 671. Notably, the agency's published regulation did not except water deposits that failed to impede or obstruct navigation from the statute entirely; rather, it explained the agency typically only prosecuted obstructive discharges. *See id.* at 672. Moreover, no federal agent directly discussed the matter with PICCO; the company relied solely on the agency's longstanding practice. *See id.* at 673. Despite all this, PICCO argued "it was affirmatively misled by the responsible agency into believing that the law did not apply" to its actions. *Id.* at 674. This Court agreed that the agency's regulations may have "deprived PICCO of fair warning as to what conduct the Government intended to make criminal," *id.*, and on that basis held that PICCO was entitled to present its entrapment-by-estoppel defense, *id.* at 670, 675.

Petitioner's case involves precisely the sort of official misleading this Court found problematic in *Cox*, *Raley*, and *PICCO*. And yet, the Ninth Circuit held that Petitioner could not present an entrapment-by-estoppel defense, because he was not "actively told he could violate federal law" or given "the sort of clear sanction that entrapment by estoppel requires," but received only "implicit authorization." *Lynch*, 903 F.3d at 1076. That holding is contrary to this Court's unambiguous precedent.

Both the facts and language of *Raley* make the Ninth Circuit's misinterpretation plain. Three of the defendants in *Raley* were told nothing at all before they first (incorrectly) invoked their rights against self-incrimination. Only after each

defendant invoked several times—those times forming the basis for some of the charges—did the Commission say anything affirmative about the privilege. *See Raley*, 360 U.S. at 426-32, 439. Given these facts, *Raley* suggests the possibility of an entrapment-by-estoppel defense based on silent acquiescence. *See id.* at 439 (reversing counts arising from conduct predating verbal assurances where "the positive assurances given only made explicit an attitude that the Commission had manifested throughout its interviews with these appellants"). But Petitioner's case does not present that thorny question, for it involves more than quiet assent.

Instead, the question here is whether implicit verbal assurances support a claim of official misleading. The Ninth Circuit said no, but *Raley* held otherwise, expressly rejecting the State's argument that no defense could be had because "certain refusals to answer occurred before the Chairman's assurances to the various appellants that the privilege existed became explicit." *Id.*

True, a relied-upon assurance cannot be "vague or even contradictory"; it must constitute "active misleading." *Id.* at 438. But that is a low threshold. One of the *Raley* defendants was "never told . . . in so many words" that his conduct was legal. *Id.* at 430. He could claim the defense anyway, because the assuring official's "concern [wa]s inexplicable on any other basis than that he deemed the privilege available at the inquiry, and his statements would tend to create such an impression in one appearing at the inquiry." *Id.* at 430-31; *see id.* at 437 (noting official "by his behavior . . . gave the . . . impression" that conduct was legal). As to

the four defendants generally, their convictions violated due process because, though the Commission's words were not express, its "actions were totally inconsistent with a view on its part that the privilege against self-incrimination was not available." *Id.* at 432; *see id.* at 437-38 (referring to "statements which were totally inconsistent with any belief" that defendants' invocations were unlawful).

To the extent *Raley* left any ambiguity on whether implicit assurances suffice, *Cox* eliminated it. For in *Cox*, this Court unequivocally "held that the Due Process Clause prevent[s] the conviction of persons . . . when they relied upon assurances of [officials] *either express or implied*." *Cox*, 379 U.S. at 571 (emphasis added). Furthermore, *PICCO* only makes sense if explicit assurances aren't required, because in that case the defendant received no personal assurance at all. Even the dissenters in *PICCO* framed the relevant question as whether "reliance upon" the agency's "attitude" either "express or by implication" was reasonable. *PICCO*, 411 U.S. at 676 (Blackmun, J., dissenting). (According to the dissent, it was not. *Id.*)

In sum, under this Court's precedent, to establish the defense of entrapment by estoppel a defendant must prove he was given official "assurances . . . either express or implied." *Cox*, 379 U.S. at 571. While these assurances cannot be "vague or even contradictory," *Raley*, 360 U.S. at 438, the bar to meet that standard is low. The Ninth Circuit's decision in Petitioner's case directly conflicts with these holdings.

B. The Ninth Circuit's decision conflicts with decisions of the Second, Third, and Fourth Circuits, which hold that implicit government assurances can support an entrapment-by-estoppel defense

True to this Court's precedent, and in direct conflict with the Ninth Circuit's decision in *Lynch*, the Second, Third, and Fourth Circuits each countenance entrapment-by-estoppel defenses based on implicit government assurances.

In *United States v. Abcasis*, 45 F.3d 39 (2d Cir. 1995), the Second Circuit considered three defendants' claims that their entrapment-by-estoppel defenses should have gone to the jury. Two were prior law enforcement informants. *See id.* at 40-41. After their discharge from service, one of the ex-informants (Ralph) met with an individual (Danneal) to plan the importation of a large quantity of heroin in the United States. The other two defendants soon joined the endeavor. None realized Danneal was, himself, a DEA informant. *See id.* at 41.

The following year, with the plan in motion, Ralph contacted one of his former handlers and provided information about the illegal operation. *See id.* There was some evidence to support the conclusion that Ralph did so because the defendants, "realized their importation scheme was under observation." *Id.* Not long after, the defendants were charged with federal drug crimes. *See id.* at 42.

At trial, the ex-informants "testified that they believed they were authorized by the DEA agents to engage in the importation scheme as confidential informants." *Id.* Ralph further claimed "that on the day he was terminated . . . he mentioned a

possible deal involving Danneal," "[t]he agents told him to call when he got the drugs," and he remained in contact with them. *Id.* The third defendant, who had no contact with law enforcement, argued she was helping the other two, "whom she believed were authorized by the DEA to engage in the deal as informants." *Id.* The trial court refused to instruct on entrapment by estoppel. *See id.*

Though the agents' communications with Ralph were "unclear and confusing," *id.* at 44; they never spoke about the scheme with the other ex-informant; and they had no contact at all with the third defendant; the Second Circuit reversed everyone's convictions, and ordered the district court to instruct the jury on entrapment by estoppel at retrial. *Id.* at 45. That holding, by its nature, precludes an express-assurance requirement. But the circuit put a finer point on the matter, holding, "On retrial, the defendants will have the burden of convincing the jury that a government agent in fact *made statements or committed acts that produced in the defendants a reasonable belief* that they were authorized to engage in the illegal conduct . . . ." *Id.* (emphasis added).

Like the Second Circuit, the Third and Fourth also accept entrapment-by-estoppel defenses may arise from implicit government assurances. *United States v. Alba*, 38 F. App'x 707 (3d Cir. Apr. 8, 2002) (unpublished); *United States v. Aquino-Chacon*, 109 F.3d 936 (4th Cir. 1997). Both circuits addressed the issue in cases of illegal reentry into the United States. In each, the defendant argued he was misled by immigration Form I-294, which read in part, 'Should you wish to return to the

United States, you must first write this office . . . as to how to obtain permission to return after deportation. By law . . . any deported person who within five years returns without permission is guilty of a felony . . . ." *Alba*, 38 F. App'x at 708 (first and third alterations in original); *see Aquino-Chacon*, 109 F.3d at 937.

In the Third Circuit, the defendant claimed the text of the form "permitted him to reasonably infer that he could enter the United States without permission" ten years after deportation, as he tried to do. *Id.* at 709. The court disagreed, but not because the form was not express. To the contrary, the Third Circuit accepted defendant's argument that, under *PICCO* and *Cox*, he could rely on affirmative misleading express or "implied." *Id.* (internal quotation marks omitted). The problem was that, "regardless of what Form I-294 may or may not imply regarding penalties for reentry after five years," it also mandated permission to return—which the defendant did not seek—regardless of the timeframe. *See id.* at 709-10. Because "nothing in Form I-294 revoke[d] or vitiate[d], *expressly or impliedly*, this . . . requirement," there was no affirmative misleading. *Id.* at 709 (emphasis added).

In so holding, the Third Circuit relied on the Fourth Circuit's earlier decision in *Aquino-Chacon* that denied a similar claim because "'[t]he language contained in Form I-294 . . . neither states nor implies that reentry without permission after five years is permissible.'" *Id.* at 709 (quoting *Aquino-Chacon*, 109 F.3d at 939). The defendant in that case had "argue[d] that Form I-294 invited the charged conduct by implying that it was permissible for him to return to the United States without

the express approval of the Attorney General as long as he did so more than five years after his deportation," *Aquino-Chacon*, 109 F.3d at 939, relying on *Raley* and *Cox*, *id.* at 938. Again, the court accepted that affirmative misleading could be express or implied. *See id.* at 939. But the Fourth Circuit held "[t]here was no active misleading here because Form I-294 . . . unequivocally provided that Aquino-Chacon was required to obtain permission prior to entry." *Id.* The form "neither state[d] nor implie[d]" otherwise. *Id.* For that reason, the Fourth Circuit rejected the defendant's attempt to argue entrapment by estoppel.

The Ninth Circuit's decision conflicts with each of these rulings, which correctly derive from this Court's unambiguous precedent.

C. The Ninth Circuit's decision is wrong and unjust

As *Raley*, *Cox*, and *PICCO* make clear, Petitioner had a right to present his entrapment-by-estoppel defense. Even assuming the Ninth Circuit correctly categorized as "implicit" the DEA's assurance that opening a medical marijuana dispensary would not violate federal law, Petitioner was entitled to rely on it.[8]

But the Ninth Circuit's decision not only is wrong. It is unjust.

Recall that Petitioner, an otherwise-law-abiding citizen with no legal training, did his best to understand apparently-conflicting laws, and came to the tentative conclusion that the Tenth Amendment must carve out an exception to the federal

[8] Arguably, the DEA expressly assured Petitioner that local law governed the legality of medical marijuana dispensaries.

prohibition on marijuana for its medical use, when legalized by a state. That conclusion was wrong, but Petitioner was not alone in reaching it. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 65-66, 69-71, 74 (2005) (Thomas, J., dissenting).

A less-conscientious citizen might have stopped there. But Petitioner wished to be certain his proposed conduct was lawful. So he called the Drug Enforcement Administration, the agency charged with enforcing federal marijuana laws. It took him four tries to reach someone who could answer his question. But when, after being directed from one DEA number to another—and another, and another—someone finally answered, "Marijuana Task Force," and then recruited an official to answer his inquiry, Petitioner thought he had arrived at the right place.

He asked "what you guys are going to do about all of these medical marijuana dispensaries around the State of California," and was told "it was up to the cities and counties to decide how they wanted to handle the matter." Still not content, Petitioner reframed his question to make clear his intentions, and asked, "what if I wanted to open up my own medical marijuana dispensary"? The DEA official "seemed a little bit perturbed, . . . and he slowed his words down to make sure [Petitioner] understood him and he said it's up to the cities and counties to decide how they want to handle the matter." (ER 2374.) This answer made sense to Petitioner, was consistent with his own understanding of the law, and explained how dispensaries flourished across California. So Petitioner hung up, contacted city and county authorities, and followed their rules to a T.

On these facts, prosecuting Petitioner and subjecting him to a mandatory minimum five-year sentence is inconsistent with the "traditional notions of fairness inherent in our system of criminal justice," *PICCO*, 411 U.S. at 674, and due process of law. For it "sanction[s] an indefensible sort of entrapment by the State." *Raley*, 360 U.S. at 425-26. As such, the Ninth Circuit would have been well within its authority to rule Petitioner's entire prosecution unconstitutional, just as this Court did in *Raley* and *Cox*. At a minimum, the circuit court should have allowed the jury to decide whether Petitioner had a valid entrapment-by-estoppel defense. Its decision otherwise violated Petitioner's rights to due process and to present a defense, and worked a grave injustice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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