No. 21-

IN THE

Supreme Court of the United States

BRIAN BILODEAU,

Petitioner,

v.

UNITED STATES OF AMERICA, MR, LLC,
TYLER POLAND, TY PROPERTIES, LLC,
AND TY CONSTRUCTION, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whereas Maine has enacted the Maine Medical Use of Marijuana Act, 22 M.R.S. § 2421 et seq., which authorizes and circumscribes the use, distribution, possession, and cultivation of medical marijuana, federal law, specifically the Controlled Substances Act, 21 U.S.C. § 801 et seq., makes it unlawful for any person to manufacture, distribute or dispense marijuana. Since 2015, Congress has attached a rider to its annual appropriations bill which provides that none of the funds made available to the Department of Justice (DOJ) may be used with respect to Maine and other states to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Consolidated Appropriations Act, 2019 Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019) ("the rider"). After being indicted on charges of committing medical marijuana-related offenses, Bilodeau argued that his prosecution ran afoul of the rider's prohibition. The question presented is:

Whether and under what circumstances the rider prohibits the DOJ from spending federal funds to prosecute criminal defendants for medical marijuana-related offenses.

PARTIES TO THE PROCEEDING

Petitioner in this Court is defendant-appellant Brian Bilodeau. Respondents in this Court are the United States of America, and MR, LLC, Tyler Poland, TY Properties, LLC, and TY Construction, LLC.

RELATED CASES

- *United States v. MR, LLC*, 20-1034, U.S. Court of Appeals for the First Circuit. Judgment entered January 26, 2022.

- *United States v. Tyler Poland, TY Properties, LLC, TY Construction, LLC*, 20-1054, U.S. Court of Appeals for the First Circuit. Judgment entered January 26, 2022.

- *United States v. Daniels et al.*, 2:18-cr-63, U.S. District Court for the District of Maine. The Orders that were the subject of the interlocutory appeal to the First Circuit were entered on December 20, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Bilodeau respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals of the First Circuit.

OPINION BELOW

The decision of the First Circuit under review is reported at *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022) and included in the Appendix at 1a – 26a. The antecedent orders of the district court are as follows: Order of the United States District Court for the District of Maine, filed December 20, 2019, reported at *United States v. Daniels et al.*, 2019 WL 7041749 (D.Me. Dec. 20, 2019), and included in the Appendix at 27a – 33a; Order of the United States District Court for the District of Maine, filed December 20, 2019, reported at *United States v. Daniels et al.*, 435 F.Supp.3d 214 (D.Me. 2019), and included in the Appendix at 34a – 60a; Denial of rehearing of the United State Court of Appeals for the First Circuit, filed February 23, 2022, which was not reported, and included in the Appendix at 61a.

STATEMENT OF JURISDICTION

The First Circuit issued its opinion on January 26, 2022. On February 9, 2022, Bilodeau timely filed a petition for panel rehearing. On February 23, 2022, the First Circuit denied that petition. The time within which to petition for certiorari extends to May 24, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provision implicated by this Petition provides:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to [Maine and other states], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

STATEMENT OF THE CASE

I. Proceedings in the district court

Between 2016 and 2018, federal law enforcement officers began investigating Bilodeau and his alleged association with a "drug organization" that "grows and distributes hundreds of pounds of marijuana per month under the cover of Maine's Medical Marijuana program" ("MMMP"). (8a). Federal agents surveilled Bilodeau and his associates, tapped their phones, and spoke with confidential sources. (8a).[1]

As explained in greater detail below, on February 27, 2018, law enforcement officers executed search warrants at grow sites connected to Bilodeau, and seized marijuana and documents relating to payroll and sales for the operation. (8a). Law enforcement officers also executed a search warrant at Bilodeau's home, where they found marijuana, a loaded handgun, and supposed drug ledgers. (9a).

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1. Bilodeau states the case in conformity with the factual findings made by the district court by a preponderance of the evidence. Nothing herein should be construed as an admission of guilt.

In due course, the government indicted Bilodeau and others for, *inter alia*, the knowing and intentional manufacture and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). (10a). In response, Bilodeau moved to enjoin his prosecution pursuant to the appropriations rider, arguing that the prosecutions were a prohibited use of federal funds to prevent Maine from implementing its medical marijuana laws. (10a). Bilodeau also moved to suppress the results of the search of his home and requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). (10a). The district court denied Bilodeau's motion to suppress and his request for a *Franks* hearing. Following an evidentiary hearing on Bilodeau's motion to dismiss or enjoin prosecution, the district court made extensive factual findings before denying that motion, as well. (11a).

A. The district court's factual findings

1. 230 Merrow Road

The warehouse at 230 Merrow Road had multiple rooms for growing marijuana. (38a). From sometime in 2016 until February 2018, the grow rooms were regularly used by Danny Bellmore and Brandon Knutson, both of whom were registered with the MMMP as medical marijuana caregivers growing on the property. (38a-39a). In accordance with the MMMP, Knutson and Bellmore displayed the requisite MMMP paperwork outside their grow rooms. (39a). However, Knutson himself never distributed the marijuana he grew to the people whose patient cards hung outside his grow room, and he never met or knew those patients. (39a). Knutson also never paid tax on any medical marijuana sales. (39a).

Up until sometime in 2017, Timmy Bellmore and Bilodeau managed operations at 230 Merrow Road and they paid Knutson and Danny Bellmore for tending and harvesting the marijuana plants. (39a). At some point in 2017, Bellmore and Bilodeau severed ties, but Bilodeau continued to manage operations at 230 Merrow Road. (39a).

Bellmore and Bilodeau also provided the growers at 230 Merrow Road with patient cards. (40a). On February 27, 2018, Lorraine Acheson's medical marijuana card hung outside Knutson's grow room, but Acheson was paid to obtain the card by someone she believed was working for Bellmore; Acheson never used the card herself; and she did not know Knutson and never received marijuana from him. (40a). On one occasion, Bilodeau sent Knutson to the "Cascades" warehouse to obtain patient cards that were not expired. (40a).

Law enforcement agents who executed the search warrant for 230 Merrow Road observed five, locked, independent grow rooms. (43a). Agents removed 321 plants, 30 of which were "large." (43a). Agents preserved a representative sample of the marijuana, but the rest was destroyed. (43a). Video and photographic evidence of the seized marijuana before its destruction was insufficiently detailed to evaluate whether the plant totals would have been complaint with all MMMP regulations. (43a).

Agents also found about 181 pounds of processed marijuana contained in clear plastic bags. (44a). It is unclear whether this marijuana could be classified as "prepared or processed" under the MMMP. (44a).

2. 586 Lewiston Junction Road

The warehouse at 586 Lewiston Junction Road, dubbed "Cascades," also contains multiple individual rooms for growing marijuana. (40a). This facility was inspected by MMMP authorities on January 10, 2018, and found to be compliant. (40a). At the time, Bilodeau was registered as a caregiver with an indoor grow at the site. (40a). In addition to the indoor grows, this facility had an unfenced outdoor grow area for which no caregiver was registered. (41a). Knutson regarded Bilodeau as the site's "boss." (41a).

3. Trim crews

"Trim crews" are groups of five to ten people who were paid to trim buds from flowering marijuana plants. (42a). Bilodeau generally paid for the trimmers' work at 230 Merrow Road and 586 Lewiston Junction Road. (43a). Keith Williams, who acted as the leader of a trim crew from sometime in 2015 until February 2018, testified that Bilodeau would give him a "heads-up" when trim crews were needed at his locations. (43a. Williams would coordinate payment between Bilodeau and the trimmers. (43a).

4. 72 Danville Corner Road

Bilodeau lived at the residence on 72 Danville Corner Road. (43a). From this location, law enforcement agents seized about twelve trash bags and seven bins containing clear plastic bags of harvested marijuana buds. (45a). They retained a representative sample, which was tested to confirm the presence of marijuana, but the rest was

destroyed. (45a). Pictures of the marijuana suggested that it had characteristics of black-market marijuana. (45a). Bilodeau's expert in MMMP compliance found it impossible to determine whether the marijuana qualified as prepared or incidental under the MMMP, and based on her analysis, the quantity of marijuana seized at 72 Danville Corner Road was consistent with a MMMP-sanctioned grow at 586 Lewiston Junction Road. (45a). Agents also seized several large sheets of marijuana concentrate, which they did not weigh before destroying. (45a).

In a room that also contained a safe, agents found "bulk marijuana," a money counter, a loaded handgun, and a number of documents which agents deemed to be drug ledgers. (46a). These documents included notations regarding profits and expenses, including amounts owed to different people like "Tim," "Brian," "Kevin," and "Kev." (BA: 10). One page listed "$347,000 total sales" under the heading "Cascades 32 199lbs." (46a). Bilodeau's MMMP-compliance expert testified that in her experience, "$40,000 and up" was the upper bound of annual revenue for a totally complaint caregiver. (46a).

B. The district court's legal conclusions

The district court determined that the level of noncompliance averred in the search warrant application and established at the evidentiary hearing was "so contrary to the basic purpose and fundamental scope" of the MMMP that, *inter alia*, there was a sufficient nexus to search Bilodeau's home; including information in the search warrant affidavit about Bilodeau's licensed caregiver status wouldn't have made a difference to the

probable cause determination; and "the precise limits of strict compliance" under the rider were irrelevant to the outcome. (31a-32a, 48a).

II. The First Circuit decision

A. Jurisdiction

Bilodeau and the government both asserted that the First Circuit had interlocutory appellate jurisdiction over the district court's denial of the motion to enjoin prosecution pursuant to 28 U.S.C. § 1292(a)(1). (11a). The First Circuit agreed and its logic is sound. As the First Circuit explained, the motion to enjoin "conclusively determinates a disputed question, resolves an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment." (12a (cleaned up, quoting *Midland Asphalt Corp.*, 489 U.S. 794, 799 (1989)). The Ninth Circuit reached the same conclusion in its seminal case, *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016). Bilodeau does not seek this Court's review of the question of interlocutory appellate jurisdiction and, given the government's position below, he does not expect a question of interlocutory appellate jurisdiction to arise now.

Bilodeau additionally asserted that the First Circuit had pendent appellate jurisdiction over the district court's ruling on his motion to suppress and for a *Franks* hearing. (21a). He argued that the district court's suppression and *Franks* rulings were inextricably intertwined with the motion to enjoin because those rulings shaped the record considered by the district court in assessing Bilodeau's compliance with Maine medical marijuana laws. (21a-22a). The First Circuit disagreed:

> [T]he exclusionary rule is rarely if ever applied outside the context of a criminal trial. Grand juries, for example, can consider evidence gathered in an illegal search. *See United States v. Calandra*, 414 U.S. 338, 350-52 (1974). The exclusionary rule embodies no "personal right," *Stone v. Powell*, 428 U.S. 465, 486 (1976); rather, it is employed to deter police overreaching by denying the government the ability to prove guilt in a criminal proceeding, *see Hudson v. Michigan*, 547 U.S. 586, 591 (2006). The rule serves as a "last resort, not our first impulse." *Id.*

(22a). The Court continued:

> [T]he issue giving rise to appellate jurisdiction concerns the DOJ's compliance with a limitation in an appropriations bill. We see nothing about the nature of such an issue that would require a court assessing that issue to close its eyes to otherwise competent evidence that even a grand jury could consider. For that reason, resolution of Bilodeau's Fourth Amendment challenge to the search of his home and warehouse could have no effect on the resolution of the supposedly intertwined question raised in this appeal. We therefore decline his request to entertain now his challenge to the district court's denial of his suppression motion and request for a *Franks* hearing.

(22a-23a).

B. Evaluating compliance with the appropriations rider

The rider expressly forbids the DOJ from spending congressionally appropriated funds in a manner that "prevents" a state such as Maine "from implementing its own laws that authorize the use, distribution, possession, or cultivation of medial marijuana." (12a, cleaned up). The First Circuit explained that the rider meant "that the DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws," and noted that in this regard, it agreed with the Ninth Circuit's reading of the text. (13a-14a (citing *McIntosh*, 833 F.3d at 1176)).

The court then turned to the thornier question of "deciding under what circumstances federal prosecution would prevent Maine from giving practical effect to the Act." (14a). The court described three approaches (not counting the various approaches suggested by the moving defendants and amicus, which it summarily rejected). (17a-18a).

Everyone agrees, the Court observed, that "the prosecution of persons whose conduct *fully complied* with [the state's marijuana laws] and its associated regulations would prevent the law from having much practical effect," and "[t]his is precisely what the rider forbids." (14a, emphasis added).

The Ninth Circuit and the government promoted the opposite extreme: prosecution of anyone *not in strict compliance* with state law is permissible. However, as the First Circuit explained:

> The line the government would have us draw is between *strict compliance* and less-than-strict compliance. That is, it would have us rule that persons involved in growing or distributing medical marijuana are safe from federal prosecution only if they fully comply with every stricture imposed by Maine Law. The government contends that the Ninth Circuit adopted this kind of strict-compliance test to differentiate between prosecutions that prevent a state's medical marijuana laws from having practical effect and those that do not.

(14a (citation to *McIntosh*, 833 F.3d at 1178, and *United States v. Evans*, 929 F.3d 1073, 1076 (9th Cir. 2019) (stating flatly that the court in *McIntosh* "stressed that defendants would not be able to enjoin their prosecutions unless they *strictly complied* with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.") (*Evans* quoting *McIntosh*; emphasis in *Evans*)).

The First Circuit rejected that test, finding it "inapplicable here." (14a). The court reasoned that if Congress had intended prosecution only when the defendant was in strict compliance with state law, it would have said so; instead, it eschewed "such an obvious, bright-line rule in favor of one that bars the use of federal funds" to prevent a state "from implementing its own medical marijuana laws. (15a). This, the court suggested, means that "Congress likely had in mind a more nuanced scope of prohibition – one that would consider the practical effect of a federal prosecution on the state's ability to implement its laws." (15a).

Additionally, the court explained, "the potential for technical noncompliance is real enough that no person through any reasonable effort could always assure strict compliance." (15a). The court then gave a list of examples of how a caregiver acting in good faith would be deterred from market participation by "federal prosecution hanging as a sword of Damocles, ready to drop on account of any noncompliance with Maine law…." (15a).

Having rejected the Ninth Circuit's strict-compliance test, the First Circuit adopted its own test, charting a "middle course" without "precise boundaries. (18a: "[W]e adopt an approach that falls between the parties' positions. In charting this middle course, we need not fully define its precise boundaries.").

C. Burdens allocation and the government's destruction of evidence.

The district court assigned to criminal defendants the burden to demonstrate that a prosecution may not proceed, and the First Circuit saw "no error" in that regard. (20a). The court explained that it saw "no reason to deviate from the normal rule that parties seeking injunctive relief bear the burden of proving entitlement to that relief," and in support it cited to *Munaf v. Green*, 553 U.S. 674, 690 (2008) and to the Ninth Circuit's decision in *Evans*, 929 F.3d at 1077. The court did not address Bilodeau's arguments about the government's destruction of evidence, or how that might impact the burdens allocation.

D. Application

The First Circuit concluded: "The record in this case amply supports the finding that the defendants were knowingly engaged in a large scale black-market marijuana operation aimed at supplying marijuana to persons known not to be qualifying patients," and it affirmed the district court's order denying Bilodeau's motion to enjoin the prosecution. (19a).

REASONS FOR GRANTING THE WRIT

I. The First Circuit's decision creates an unworkable test at odds with the test adopted by the Ninth Circuit.

The First Circuit rejected the Ninth Circuit's strict-compliance test as at odds with both congressional intent and the realities of marijuana farming – and it was correct to do so. For all of the reasons articulated by the First Circuit, the Ninth Circuit's strict-compliance test is not the proper measure of when and under what circumstances a prosecution may proceed against licensed medical marijuana caregivers such as Bilodeau.[2]

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2. The Sixth and the Tenth Circuits have assumed, without deciding, that the Ninth Circuit's strict-compliance test is the proper measure insofar as the rider is concerned. *See United States v. Trevino*, 7 4th 414, 422 (6th Cir. 2021) (assuming, without deciding, that the rider prohibits expenditures for the prosecution of individuals who have "strictly complied" with state medical-marijuana law); *United States v. Griffith*, 928 F.3d 855, 875 (10th Cir. 2019) (assuming, without deciding, that the *McIntosh* standard applied, an evidentiary hearing was not required because there was undisputed evidence that the defendant was not "in full compliance" with Colorado law).

The Ninth Circuit's "bright line" test was, at least, identifiable. It established clear boundaries for caregivers and for the government. The First Circuit's undefined less-than-strict-compliance test is so amorphous as to be unworkable. The parties have no idea what target to aim for when arguing about the rider's applicability. Indeed, the First Circuit expressly refused to "fully define its precise boundaries" leaving parties, their lawyers, and the DOJ in suspense as to when a prosecution may proceed. (18a). This case-by-case approach offers no protection against unlawful prosecution. Rather than stymie the expenditure of federal funds, it encourages federal prosecution as the only way to build a jurisprudence that overtime develops lines of demarcation.

II. The First Circuit's test is at odds with the Fifth Amendment.

The First Circuit's test is problematic in other ways, as well. Assigning the burdens of proof and production to a criminal defendant creates a Hobson's choice: waive the protection against self-incrimination and prematurely present a trial defense or relinquish the protection that the rider affords. This offends the Fifth Amendment.

Both the First and Ninth Circuits assign the burden of proof and production to criminal defendants because the "normal rule" is that "parties seeking injunctive relief bear the burden of proving entitlement to that relief." (20a, *see also United States v. Evans*, 929 F.3d 1073, 1077 (9th Cir. 2019) (so stating)). In support, the First Circuit cites to a highly unusual habeas case that has nothing to do with criminal proceedings in an American court operating under federal constitutional standards, and to

Evans, which cites to a civil case. (20a, citing *Munaf v. Green*, 553 U.S. 674, 690 (2008) and *Evans*, 929 F.3d at 1077 (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

What may be required of civil litigants is different than what may be required of criminal defendants, who have greater constitutional protections. *See e.g. Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) ("Civil procedure is incompatible with the accepted rules and constitutional guarantees governing the trial of criminal prosecutions…."). Assigning the burden of proof and production to criminal defendants raises important constitutional implications that the First Circuit's decision does not address.

The government maintains that documents found at Bilodeau's residence are drug ledgers and that a conversation between Bilodeau and a confederate about "500 to move" refers to illicit drug sales. The only way for Bilodeau to refute these assumptions is to testify about what the documents really are and what he meant during the conversation. Doing that, however, requires him to relinquish his Fifth Amendment privilege against self-incrimination and put forth evidence before the trial has begun. Not surprisingly, Bilodeau opted not to do that – to his obvious detriment at this stage of the proceedings.

The court's burdens allocation is a far cry from the only other instance where a criminal defendant bears a burden of persuasion to enjoin a prosecution: a double jeopardy argument based on a collateral-estoppel theory. But that argument is purely legal; it requires no factual development.

Allocating the burdens to a defendant raises a related problem: forcing a defendant to prematurely reveal his trial defense offends the Fifth Amendment, too. The very same evidence that satisfies the less-than-strict compliance standard also exonerates a criminal defendant at trial: "*Those aren't drug ledgers*" and "*500 to move has nothing to do with drugs*" are equally availing arguments in support of compliance and actual innocence. Making a defendant put forward proof of compliance simultaneously makes him show his hand for trial, which likewise offends the Fifth Amendment. *See United States v. Ferrer-Cruz*, 899 F.2d 135, 142 (1st Cir. 1990) (with exceptions, "[t]he Fifth Amendment prevents a trial court from requiring a criminal defendant to disclose his defense until trial[.]") (Torruella, J., dissenting); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 13-16 (1st Cir. 2002) (sealing of documents reflecting potential trial strategy warranted to ensure a fair trial); *United States v. Arrington*, 941 F.3d 24, 43 (2d Cir. 2019) (recognizing the strategic advantage of hearing an opponent's case before trial).

If a defendant must bear the burdens of proof and persuasion, then they must shift back to the government whenever it destroys evidence that a defendant could use to support an injunction. Otherwise, the burden allocation incentives the government to destroy evidence.

The law enforcement officers who executed search warrants at the grow sites and at Bilodeau's home preserved what they believed to be "representative samples," even though they had no training or experience in evaluating compliance with Maine's marijuana laws. (43a). They also took pictures, but Bilodeau's expert testified that it was impossible for her to determine compliance from the

pictures alone. (43a). The district court credited testimony from the agents that the representative samples had attributes of black-market marijuana. (45a). But Bilodeau could not adequately rebut that characterization because agents destroyed all the other marijuana. (43a). Normally, the party who possesses the relevant evidence must bear the burden of proof, but here, Bilodeau did not possess relevant evidence because the government destroyed it.

Of course, it does not matter that *the government's* theory of the case didn't rely on the number of plants [or] the quantity of marijuana seized. The actual marijuana was relevant to *Bilodeau's* theory of the case, and the burden of persuasion (erroneously) belongs to Bilodeau. *See e.g. California v. Trombetta*, 467 U.S. 479, 488-89 (1984) (The due process clause requires the preservation of evidence "that might be expected to play a significant role in the suspect's defense" and that has "an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."). The First Circuit ignored altogether the legal impact of the government's destruction of evidence had on this case.

III. The First Circuit's approach is at odds with the Fourth Amendment.

Whatever the proper measure of compliance, and regardless of which party bears the burdens of proof and production, illegally seized evidence should play no role in the analysis. The First Circuit's suggestion that the Fourth Amendment exclusionary rule does not apply for purposes of assessing compliance, (21a-22a), signals to the

government that it may search for and seize evidence with impunity (and then destroy any evidence that does not fit with the government's theory of noncompliance). None of that comports with basic constitutional protections.

The First Circuit reasoned that application of the exclusionary rule outside the context of a criminal trial is inappropriate because the exclusionary rule embodies no personal right and is instead employed to deter police overreaching by denying the government the ability to prove guilt in a criminal proceeding. (22a). But the interests that the Fourth Amendment promotes are aligned perfectly with the congressional intent motivating the rider: deterrence of federal government overreach in criminal prosecutions. Because the interests are the same, the exclusionary rule must apply at the injunction stage.

It makes little sense to allow a prosecution to proceed based on evidence that would not be admissible at trial. This just forces defendants (or taxpayers, in court-appointed cases) to spend money twice: once to litigate the injunction and then, once the defendant has lost (and he will, if the government can use illegally-obtained evidence and it can destroy evidence at will), again in order to litigate a motion to suppress.

The instant case illustrates the problem. The overarching theme of the government's warrant application was that Bilodeau was growing and distributing marijuana under the cover of Maine's Medical Marijuana Program. This theory was directly undercut by the omitted – but known – information that Bilodeau was a licensed caregiver, and that one of his growing sites was inspected by the Maine Sheriff's Association and found to be in

compliance with state law. These omissions made it so that the magistrate did not have all the legally pertinent information – the *totality* of the circumstances – at his or her disposal to fairly judge whether criminal activity was afoot.

A court cannot allow federal law enforcement officials to either remain purposefully ignorant of whether a defendant is in compliance (with at last some) aspects of state law or, if these facts are known, to exclude them from the warrant application. Doing so undermines the congressional goal of preventing federal officials from interfering in state medical marijuana regulations, and it fundamentally contravenes the nature of judicial oversight in the warrant process. Omitting from a warrant application information about state compliance that is either known or should have been known to an affiant is (at a minimum) reckless because it is manifestly critical to the probable cause determination.

The fact that Bilodeau was a licensed caregiver with at least one complaint growing facility casts an entirely different light about the affiant's averments about what cryptic statements between licensed caregivers might have meant; what his training and experience about *illegal* narcotics trafficking causes him to believe; and the inferences that follow from Bilodeau's possession, cultivation, and distribution of marijuana.

The First Circuit's refusal to entertain pendent appellate jurisdiction over the suppression issue, and its willingness to consider evidence seized in violation of the Fourth Amendment when ascertaining compliance does not comport with congressional intent in enacting the rider and it contravenes the purposes of the exclusionary rule.

IV. The First Circuit's decision is at odds with state interests that the rider aims to protect.

Federal law notwithstanding, the people of the State of Maine have decided for themselves that, within the bounds of the MMMP, marijuana cultivation should be legal. No one doubts the authority of Mainers and their elective representatives to make that principled decision, and Congress, through the rider, has expressed a willingness to respect that choice. The First Circuit's vague test, coupled with its erroneous treatment of the Fifth and Fourth Amendment interests implicated by its ruling, fail to provide sufficient protection to Maine medical marijuana growers who have chosen to participate in the marketplace that Maine has purposefully desired to create. Congress intended a much greater degree of deference than the First Circuit's decision affords. Constitutional protections demand it.

CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, DATED JANUARY 26, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-2292, No. 20-1034, No. 20-1054

UNITED STATES,

Appellee,

v.

BRIAN BILODEAU,

Defendant, Appellant.

UNITED STATES,

Appellee,

v.

MR, LLC,

Defendant, Appellant.

UNITED STATES,

Appellee,

v.

Appendix A

TYLER POLAND; TY CONSTRUCTION, LLC;
TY PROPERTIES, LLC,

Defendants, Appellants.

January 26, 2022, Decided

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE. Hon. George Z. Singal, U.S. District Judge.

Before Kayatta, Barron, Circuit Judges, and O'Toole,[*] District Judge. Barron, Circuit Judge, concurring.

KAYATTA, Circuit Judge.

This interlocutory appeal requires us to consider whether and under what circumstances a congressional appropriations rider prohibits the Department of Justice (DOJ) from spending federal funds to prosecute criminal defendants for marijuana-related offenses. After being indicted on charges of committing such offenses, Brian Bilodeau, Tyler Poland, and three companies associated with them claimed that their prosecutions ran afoul of the rider's prohibition. After the district court denied those claims, the defendants filed this appeal, arguing that the prosecutions should be halted.[1] For the following reasons, we disagree.

* Of the District of Massachusetts, sitting by designation.

1. Independent of the other defendants, Bilodeau also argues on appeal that certain evidence seized in a search of his home and

I.

We begin by surveying the statutory and regulatory landscape governing the medical use of marijuana under Maine and federal law at the time of the relevant events. In 2009, Maine enacted the Maine Medical Use of Marijuana Act (the "Act"), Me. Rev. Stat. Ann. tit. 22, § 2421 *et seq.*, which authorizes and circumscribes the use, distribution, possession, and cultivation of medical marijuana. Pursuant to the Act, Maine's Department of Health and Human Services issued seventy-two pages of detailed regulations setting out numerous technical requirements for establishing compliance with the law. *See* 10-144-122 Me. Code R. §§ 1-11 (2013). Together, the Act and the corresponding regulations govern the medical use of marijuana in Maine.

During the time period covered by the operative indictment, the Act permitted only the "medical use"[2] of marijuana and then only subject to certain stringent

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warehouse should have been excluded because the search violated his Fourth Amendment rights. For reasons detailed below, we decline to consider the merits of Bilodeau's separate contentions on appeal because we lack appellate jurisdiction to review now the ruling on the suppression motion.

2. At the time, Maine's definition of "medical use" encompassed "the acquisition, possession, cultivation, manufacture, use, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition." Me. Rev. Stat. Ann. tit. 22, § 2422(5) (2016).

conditions. Me. Rev. Stat. Ann. tit. 22, § 2422(5) (2016).[3] Under these conditions, a "[q]ualifying patient," *id.* § 2422(9), was permitted to "[d]esignate one primary caregiver . . . to cultivate marijuana for the medical use of the patient," Me. Rev. Stat. Ann. tit. 22, § 2423-A(1)(F) (2014). A primary caregiver was only authorized to assist a maximum of five qualifying patients. *Id.* § 2423-A(2)(C).

Primary caregivers could possess marijuana solely "for the purpose of assisting a qualifying patient" and then only in certain quantities and forms. *Id.* § 2423-A(2). For instance, Maine law allowed a primary caregiver to possess up to six mature, flowering marijuana plants for each patient served. *See id.* § 2423-A(2)(B); 10-144-122 Me. Code R. § 5.8.1.1.2 (2013). For each patient, the primary caregiver could also have "up to 12 female nonflowering marijuana plants," 10-144-122 Me. Code R. § 5.8.1.2.1 (2013), which are plants above twelve inches in height or width that are not flowering. There was no limit on the amount of "marijuana seedlings" a primary caregiver was permitted to possess, *id.*, but a plant was only considered a seedling if it "ha[d] no flowers" and "[wa]s less than 12 inches in height and diameter," *id.* § 1.17.5. A primary caregiver could also only possess "up to 2 1/2 ounces of prepared marijuana for each qualifying patient served." *Id.* § 5.8.1.1.1.; Me. Rev. Stat. Ann. tit. 22, § 2423-A(2)(A) (2014).

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3. The following discussion of the Act and the operative regulations refers to those in effect from "about 2015" to February 27, 2018, when the events relevant to the indictment allegedly occurred.

Primary caregivers who possessed excess prepared marijuana could transfer it to another caregiver or registered dispensary but only if nothing of value was provided to the primary caregiver in return. *See* Me. Rev. Stat. Ann. tit. 22, § 2423-A(2)(H) (2014); 10-144-122 Me. Code R. § 2.8.2 (2013). Otherwise, a person who possessed marijuana or marijuana plants "in excess of the limits provided" had to "forfeit the excess amounts to a law enforcement officer." Me. Rev. Stat. Ann. tit. 22, § 2423-A(7) (2014); 10-144-122 Me. Code R. § 2.9 (2013).

Primary caregivers were permitted to "[r]eceive reasonable monetary compensation for costs associated with assisting a qualifying patient." Me. Rev. Stat. Ann. tit. 22, § 2423-A(2)(D) (2014). And they could "[e]mploy one person to assist in performing the duties of the primary caregiver." *Id.* § 2423-A(2)(I). However, Maine law prohibited the formation of a "collective," *id.* § 2423-A(9), meaning "an association, cooperative, affiliation or group of primary caregivers who physically assist each other in the act of cultivation, processing or distribution of marijuana for medical use for the benefit of the members of the collective," *id.* § 2422(1-A).

While Maine state law permitted certain conduct relating to the medical use of marijuana, federal law, specifically the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, did not. The CSA made it "unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense," *id.* § 841(a)(1), or simply to possess, *id.* § 844(a), a controlled substance

such as marijuana, *see id.* § 802(6) (defining the term "controlled substance" by referring to drug schedules); *id.* § 812, sched. I(c)(10) (listing "marihuana" as a controlled substance). The CSA included no exception for medical marijuana and "designate[d] marijuana as contraband for *any* purpose." *Gonzales v. Raich*, 545 U.S. 1, 27, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).[4]

Nevertheless, for each fiscal year since 2015, including over the time period of the defendants' prosecutions, Congress has attached a rider to its annual appropriations bill that states:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to [Maine and other states], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019). Sometimes referred to as the "Rohrabacher-Farr Amendment" or the "Rohrabacher-Blumenauer Amendment," this appropriations rider places a practical limit on federal prosecutors' ability to enforce the CSA with respect to certain conduct involving medical marijuana.

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4. Federal law did permit a limited carve-out for the use of marijuana "as a part of a strictly controlled research project." *Raich*, 545 U.S. at 24. Of course, that is plainly not what is at issue here.

II.

We next consider the particular circumstances prompting this appeal. We accept the factual findings of the district court unless they are clearly erroneous. *See Jean v. Mass. State Police*, 492 F.3d 24, 26 (1st Cir. 2007); *see also United States v. Parigian*, 824 F.3d 5, 9 (1st Cir. 2016). And we review the record in light of those findings.

As relevant to this appeal, the defendants owned or operated three sites used to grow marijuana in Auburn, Maine: (1) a property at 230 Merrow Road; (2) a property at 249 Merrow Road; and (3) a property at 586 Lewiston Junction Road (referred to as "Cascades"). The facility at 230 Merrow Road was a large warehouse containing multiple grow rooms that was largely operated by Bilodeau. Bilodeau paid two caregivers, Danny Bellmore and Brandon Knutson, to tend to the marijuana growing at the site. Bilodeau bought growing supplies for Bellmore and Knutson and picked up their prepared marijuana from the site. Bellmore and Knutson displayed facially compliant paperwork and patient designation cards outside their grow rooms. The warehouse at 230 Merrow Road was owned by defendant MR, LLC, an entity closely associated with Bilodeau. Neither Bilodeau nor any other caregiver operating there had a lease agreement with MR.

The grow site at 249 Merrow Road was owned by defendant Ty Properties, LLC and operated by Tyler Poland. 249 Merrow Road consisted of multiple warehouses with offices and individual grow rooms. Several caregivers were registered to operate the grow

rooms and had lease agreements with Poland. Like 230 Merrow Road, the 249 Merrow Road site had facially valid documents showing grows run by registered caregivers designated by qualified patients.

The Cascades facility was a warehouse with multiple individual grow rooms located at 586 Lewiston Junction Road. Cascades was owned by Kevin Dean, but Bilodeau was involved in its operation. Bilodeau was also registered as one of the caregivers at Cascades. Knutson, who worked for Bilodeau at the 230 Merrow Road site, was deployed by Bilodeau to Cascades on at least a few occasions.

For all three of the grow sites, the defendants and their associates procured and maintained paperwork from people claiming to be qualifying patients who designated Bilodeau, Poland, or one of their associates as their caregivers, which made the sites appear facially compliant with the Act's requirements. Indeed, after a scheduled visit on January 10, 2018, state inspectors found that the Cascades site was largely in compliance with Maine law.

Between 2016 and 2018, federal law enforcement officers began investigating Bilodeau and his association with a "drug organization" that "grows and distributes hundreds of pounds of marijuana per month under the cover of Maine's Medical Marijuana program." In the course of their investigation, federal agents surveilled Bilodeau and his associates, tapped their phones, and spoke with confidential sources.

On February 27, 2018, federal agents executed search warrants for Bilodeau's grow site at 230 Merrow Road, Poland's grow site at 249 Merrow Road, and Bilodeau's residence. Federal agents seized significant quantities of marijuana at both grow sites. At 230 Merrow Road, agents recorded approximately 181 pounds of marijuana in plastic bags, along with 321 marijuana plants. At 249 Merrow Road, agents seized approximately 145 pounds of marijuana and 574 marijuana plants.[5] Agents also recovered from 249 Merrow Road several handwritten documents recording payments to marijuana "trimmers" and a notebook that documented marijuana sales from December 2016 to early February 2018. The notebook listed quantities of different types of marijuana, noted cash payments of more than $50,000, and used what appeared to be abbreviations for states such as "MD," "NY," and "GA" as headers.

Agents also found marijuana and marijuana concentrate at Bilodeau's home. A search of a safe room in the house revealed marijuana, a money-counting machine, a loaded handgun, and several documents. Some of the documents appeared to itemize sales (including a notation listing "$347,700" in "total sales"), costs associated with marijuana grows (including payments to trimmers to harvest marijuana), and amounts owed to different people (including sums for "Brian," "Kevin," and "Kev").

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5. Agents also seized alprazolam and MDMA from 249 Merrow Road.

In due course, the government indicted the defendants and several others for, among other things, knowing and intentional manufacture and possession of marijuana with intent to distribute in violation of the CSA and conspiracy to do the same. *See* 21 U.S.C. § 841(a)(1). In response, the defendants moved to enjoin their prosecutions pursuant to the appropriations rider, arguing that the prosecutions were a prohibited use of federal funds to prevent Maine from implementing its medical marijuana laws. Bilodeau also moved to suppress the results of the search and requested a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

After holding an evidentiary hearing, the district court concluded that prosecution of all counts of the indictment against each of the defendants could proceed. The district court reasoned that the defendants were not entitled to an injunction based on the appropriations rider because they were patently out of compliance with the Act, such that it was clear to the district court that Maine's marijuana laws did not authorize the sort of conduct evidenced at the hearing. In particular, the district court found that Bilodeau, Poland, and their associated LLCs did not engage in marijuana-related conduct for the purposes of assisting qualifying patients but instead were part of a "large-scale . . . black-market marijuana operation." The district court acknowledged that it was a "closer question" as to whether MR was entitled to relief under the appropriations rider. However, noting the "ample evidence" establishing that Dean (MR's sole member) and Bilodeau were "close associates" in their marijuana-related activities, the district court held that

MR had not shown "by a preponderance of evidence that it acted in strict compliance with Maine's medical marijuana laws." The district court also denied Bilodeau's motion to suppress and his request for a *Franks* hearing. The defendants then filed these interlocutory appeals.

III.

A.

As an initial matter, we must consider our jurisdiction to hear these appeals. Both the defendants and the government assert that we may exercise jurisdiction over the district court's denial of the defendants' motion to enjoin prosecution pursuant to 28 U.S.C. § 1292(a)(1).[6] We agree.

Typically, appellate review must wait "until after conviction and imposition of [a] sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989). Here, though, the alleged wrong is not the prosecution per se, but rather the use of federal funds in a manner that prevents the implementation of Maine's medical marijuana laws. Absent an injunction, the funds will be spent and cannot be unspent. In such circumstances, the defendants stand not so much as criminal defendants seeking to vindicate a

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6. Although styled as motions to dismiss or to enjoin prosecution, the defendants' motions are in substance aimed at preventing the DOJ from spending federal funds to continue their prosecution. These motions are best seen as requests for injunctions, so we refer to them henceforth solely as motions to enjoin prosecution.

personal right but as parties with a particularly concrete interest in seeing a congressional spending ban vindicated. We can therefore safely treat the denial of their motion as outside the ordinary rule, *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016), or as a collateral order, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949): It "conclusively determine[s] the disputed question," "resolve[s] an important issue completely separate from the merits of the action," and would "be effectively unreviewable on appeal from a final judgment." *Midland Asphalt Corp.*, 489 U.S. at 798-99 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)).

As to Bilodeau's separate appeal of the denial of the motion to suppress and the request for a *Franks* hearing, we conclude otherwise for reasons explained in Part IV of this opinion.

B.

Our analysis of the merits of the spending challenge begins with the text of the appropriations rider. *See Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 223-24 (1st Cir. 2003). The rider expressly forbids the DOJ from spending congressionally appropriated funds in a manner that "prevent[s]" a state such as Maine "from implementing [its] own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2019 § 537.

We can safely conclude that by "marijuana" the rider means the same substance described as "marihuana" in the CSA. *See* 21 U.S.C. § 802(16). And, although neither the rider nor the CSA defines it, we assume that the term "medical marijuana" means marijuana prescribed by a qualified medical care provider to treat a health condition. *See Medical*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/medical (last visited Oct. 20, 2021) (defining "medical" to mean "of, relating to, or concerned with physicians or the practice of medicine" or "requiring or devoted to medical treatment").[7]

The parties' arguments largely train on what Congress meant when it prohibited the DOJ from spending money to "prevent" a state "from implementing [its] own laws that authorize" medical marijuana activity. Consolidated Appropriations Act, 2019 § 537. To date, the Ninth Circuit is the only federal court of appeals to have interpreted the rider. Heeding Congress's choice of the word "implementing," the Ninth Circuit reasoned that the rider "prohibits DOJ from spending money on actions that prevent [states with medical marijuana laws from] giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1176. We agree with this

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7. The applicable Maine statute, at the time, limited the authorization of medical marijuana use to persons with debilitating medical conditions. We do not in this case confront a situation where a so-called "medical marijuana" authorization scheme in practice allows for recreational use, so we have no occasion to speculate about how the rider might or might not apply in those circumstances.

reading of the rider and conclude, as the Ninth Circuit did, that the DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws.

We turn next to deciding under what circumstances federal prosecution would prevent Maine from giving practical effect to the Act. Certainly, the prosecution of persons whose conduct fully complied with the Act and its associated regulations would prevent the law from having much practical effect. Such actions would render strict compliance with Maine's medical marijuana laws cause for conviction and imprisonment. This is precisely what the rider forbids. On this all parties agree.

The line the government would have us draw is between strict compliance and less-than-strict compliance. That is, it would have us rule that persons involved in growing or distributing medical marijuana are safe from federal prosecution only if they comply fully with every stricture imposed by Maine law. The government contends that the Ninth Circuit adopted this kind of strict-compliance test to differentiate between prosecutions that prevent a state's medical marijuana laws from having practical effect and those that do not. *See id.* at 1178; *see also United States v. Evans*, 929 F.3d 1073, 1076 (9th Cir. 2019) (stating flatly that the court in *McIntosh* "stressed that defendants would not be able to enjoin their prosecutions unless they '*strictly complied* with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.'" (quoting *McIntosh*, 833 F.3d at 1179)) (emphasis supplied by the *Evans* court). For two reasons, we find such a test inapplicable here.

First, if Congress had intended the rider to serve as a bar to spending federal funds on a prosecution only when the defendant was in strict compliance with state law, it would have been very easy for Congress to so state. By eschewing such an obvious, bright-line rule in favor of one that bars the use of federal funds to "prevent [a state] from implementing [its] own [medical marijuana] laws," Consolidated Appropriations Act, 2019 § 537, Congress likely had in mind a more nuanced scope of prohibition -- one that would consider the practical effect of a federal prosecution on the state's ability to implement its laws.

Second, the potential for technical noncompliance is real enough that no person through any reasonable effort could always assure strict compliance. For instance, a caregiver whose twelve nonflowering marijuana plants comported with the Act's limit immediately would have fallen out of compliance when just one of the caregiver's unlimited number of seedlings grew beyond twelve inches in height or diameter. *See* 10-144-122 Me. Code R. §§ 1.17.5, 5.8.1.2 (2013). And if the drying and curing process happened to yield more than 2 1/2 ounces of marijuana per qualifying patient, a caregiver would have been in violation of the Act until they disposed of the excess. *See id.* § 5.8.1.1.1.; Me. Rev. Stat. Ann. tit. 22, § 2423-A(2)(A) (2014). With federal prosecution hanging as a sword of Damocles, ready to drop on account of any noncompliance with Maine law, many potential participants in Maine's medical marijuana market would fasten fearful attention on that threat. The predictable result would be fewer market entrants and higher costs flowing from the expansive efforts required to avoid even tiny, unintentional violations. Maine, in turn, would feel pressure to water

down its regulatory requirements to avoid increasing the risk of noncompliance by legitimate market participants. Likely anticipating these concerns, the district court below appeared to acknowledge that "some sort of technical noncompliance" with Maine's regulations might be tolerated even under the strict compliance standard.

The government attempts to downplay these concerns by arguing that prosecutorial discretion and resource allocation can properly ensure that legitimate participants in Maine's medical marijuana market will not be subject to federal criminal prosecution. But the point is not that caregivers acting in good faith *will* be prosecuted for even tiny infractions of state law but that they *can* be prosecuted. The government's vague assurances in this case will likely be cold comfort to anyone facing fears that imperfect compliance with the Act could lead to indictment and imprisonment.

It is true that requiring strict compliance with state law would not necessarily "prevent" the Act from having some practical effect. No matter the risks, there would likely be some participants in Maine's medical marijuana market. After all, there have always been participants in the market for unlawful drugs who are undeterred by even life sentences. But we do not think this is the kind of market that Maine sought to create when it enacted its medical marijuana laws. Because Maine limited the size of a primary caregiver's operations and restricts compensation to a "reasonable" amount, there do not appear to be great riches to be made in the medical marijuana market. A strict compliance approach would skew a potential participant's incentives against entering that market.

Strict compliance as construed by the government does have the benefit of identifying a bright line body of statutes, rules, and decisions that determine whether conduct violates state medical marijuana law and thus becomes subject to federal prosecution. *See McIntosh*, 883 F.3d at 1178 (looking to "those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana"). But those rules were not drafted to mark the line between lawful activity and cause for imprisonment. Rather, as with most every regulated market, Maine declined to mandate severe punishments (such as, for example, the loss of a license) on participants in the market for each and every infraction, no matter how small or unwitting. *See, e.g.*, 10-144-122 Me. Code R. § 10.5.7 (2013) (providing that "[g]rounds for revocation of a registry identification card include . . . *repeat* forfeiture of excess marijuana" (emphasis added)). To turn each and every infraction into a basis for federal criminal prosecution would upend that decision in a manner likely to deter the degree of participation in Maine's market that the state seeks to achieve.

Although we reject the government's proposed strict compliance approach, we also decline to adopt the defendants' interpretations of the rider. Offering several slightly different formulations, the moving defendants and amicus argue that the rider must be read to preclude the DOJ, under most circumstances, from prosecuting persons who possess state licenses to partake in medical marijuana activity. These proposed formulations stretch the rider's language beyond its ordinary meaning. Congress surely did not intend for the rider to provide a safe harbor to all caregivers with facially valid documents without regard

for blatantly illegitimate activity in which those caregivers may be engaged and which the state has itself identified as falling outside its medical marijuana regime.

Instead, we adopt an approach that falls between the parties' positions. In charting this middle course, we need not fully define its precise boundaries. The conduct that drew the government's attention was the defendants' cultivation, possession, and distribution of marijuana aimed at supplying persons whom no defendant ever thought were qualifying patients under Maine law. The record is clear that the posted patient cards and licenses, as well as the outward physical appearances of the grows, were facades for selling marijuana to unauthorized users.

Maine's medical marijuana regulations themselves expressly anticipated that a cardholder could be "convicted of selling, furnishing, or giving marijuana to a person who is not allowed to possess marijuana for medical purposes in accordance with [the rules promulgated under the Act]." 10-144-122 Me. Code R. § 10.5.1 (2013). Accordingly, convicting someone under 21 U.S.C. § 841(a)(1) who knowingly engages in such conduct would likely have no effect unwelcomed by Maine, much less prevent Maine's medical marijuana laws from having their intended practical effect.[8]

8. In resting on the fact that the defendants have engaged in conduct for which Maine law expressly anticipates the possibility of a conviction, we need not reach the question of whether any other conduct that could serve as grounds for -- but does not in fact result in -- license revocation under Maine law can provide cause for the DOJ to spend funds prosecuting a licensee.

The record in this case amply supports the finding that the defendants were knowingly engaged in "a large-scale . . . black-market marijuana operation" aimed at supplying marijuana to persons known not to be qualifying patients. Bilodeau does not even offer a plausible narrative to the contrary in his briefs on appeal.

One defendant, MR, claims that it was a mere landlord that thought it was leasing space to legitimate medical marijuana caregivers. But as the district court found, MR's sole member, Kevin Dean, was up to his eyeballs in the actual substance of the marijuana distribution scheme. He was a close associate of Bilodeau, on whose ledgers were recorded various payments to "Kevin" and "Kev." Dean was himself registered to grow and partnered with Bilodeau to buy a marijuana trimming machine. Dean came up with no evidence that any of the marijuana that he grew or trimmed went to any qualifying patient. There is no evidence that MR charged anyone growing at 230 Merrow Road any rent on its premises, which was purchased with money loaned to Dean and Bilodeau.

As for Poland, he ran a grow site that provided no marijuana to medical marijuana patients and coordinated with Bilodeau to pay people who helped tend the illicit crop. Moreover, as the district court found, the record demonstrates that he oversaw the production and distribution of the grows at 249 Merrow and likely supplied marijuana to out-of-state purchasers in bulk quantities.

Given these facts, we have no trouble concluding that the defendants have failed to establish that their pending

prosecution under the CSA is in any way barred by the rider.

C.

The defendants' last redoubt takes the form of a procedural challenge. They argue that we should not rely on the facts as found by the district court because the district court assigned them the burden of proof. Instead, they contend that the burden to demonstrate that a prosecution may proceed irrespective of the appropriations rider should lie with the government. We see no error in the district court's assessment that the defendants bear this burden. The issue here is not one of guilt or innocence in a criminal case. Rather, the defendants are requesting that we enjoin an otherwise plainly authorized government expenditure. We therefore see no reason to deviate from the normal rule that parties seeking injunctive relief bear the burden of proving entitlement to that relief. *See, e.g., Munaf v. Geren*, 553 U.S. 674, 690, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008); *Evans*, 929 F.3d at 1077 (allocating the burden of proof to the defendants seeking to enjoin their prosecution pursuant to the rider because "the party seeking an injunction bears the burden of showing that he is entitled to such a remedy").

Accordingly, we agree that the appropriations rider does not bar the pending federal prosecution against the defendants.[9]

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9. Suffice it to say, nothing in this opinion suggests that fact-finding by the district court in this challenge to government spending will be preclusive or even admissible in any ensuing criminal trial.

IV.

Bilodeau also raises two more traditional issues of criminal procedure -- a request for a *Franks* hearing and a motion to suppress. Bilodeau argues that the search-warrant affidavit for both his home and 230 Merrow Road was intentionally or recklessly misleading because it did not state that Bilodeau was a licensed marijuana caregiver who managed a grow site that passed inspection. And he argues that the government lacked probable cause to search his home in connection with any suspected criminal activity.

We normally do not review the denial of a criminal defendant's interlocutory motions prior to the entry of final judgment. *See United States v. Cunningham*, 113 F.3d 289, 295 (1st Cir. 1997). Bilodeau points to an exception sometimes referred to as "pendent appellate jurisdiction" that is applicable when (1) "the pendent issue is inextricably intertwined with the issue conferring the right of appeal" or (2) "review of the pendent issue is essential to ensure meaningful review of the linchpin issue." *Limone v. Condon*, 372 F.3d 39, 50-51 (1st Cir. 2004); *cf. Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (leaving open the question of "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable"). He insists that

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We affirm only that these prosecutions may proceed unimpeded by the rider; whether the defendants are guilty as charged beyond a reasonable doubt remains to be proven in ordinary course.

the district court's suppression and *Franks* rulings are inextricably intertwined with the motion to enjoin because those rulings shaped the record considered by the district court in assessing the bona fides of his medical marijuana business.

Bilodeau's claim of intertwinement presumes that a finding in his favor on his motion to suppress evidence gathered pursuant to the challenged search would also bar use of that evidence in deciding whether the appropriations rider precludes his prosecution. Neither party cites any precedent directly bearing on this presumption. As the government points out, however, the exclusionary rule is rarely if ever applied outside the context of a criminal trial. Grand juries, for example, can consider evidence gathered in an illegal search. *See United States v. Calandra*, 414 U.S. 338, 350-52, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). The exclusionary rule embodies no "personal constitutional right," *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); rather, it is employed to deter police overreaching by denying the government the ability to prove guilt in a criminal proceeding, *see Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006). The rule serves as a "last resort, not our first impulse." *Id.*

Here, the issue giving rise to appellate jurisdiction concerns the DOJ's compliance with a limitation in an appropriations bill. We see nothing about the nature of such an issue that would require a court assessing that issue to close its eyes to otherwise competent evidence that even a grand jury could consider. For that reason,

resolution of Bilodeau's Fourth Amendment challenge to the search of his home and warehouse could have no effect on the resolution of the supposedly intertwined question raised in this appeal. We therefore decline his request to entertain now his challenge to the district court's denial of his suppression motion and request for a *Franks* hearing.

V.

For the foregoing reasons, we *affirm* the denial of the defendants' motions to dismiss or enjoin their prosecutions and *dismiss* as premature Bilodeau's appeal of the denial of his motion to suppress and his request for a *Franks* hearing.

BARRON, Circuit Judge, concurring.

I join the majority's opinion because I agree that, on this record, the federal prosecution of these defendants would not "prevent" Maine from "implementing" its laws permitting the sale and use of medical marijuana. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019). As the majority explains, the record "amply supports the finding" that the District Court made for the purpose of determining whether the federal rider applies that the defendants were engaged in an operation "aimed at supplying marijuana to persons known not to be qualifying patients." Maj. Op. 21. And, as the majority points out, Maine's own medical marijuana regulations expressly provide that when an individual "is convicted of selling, furnishing, or giving marijuana to a person who is not" a qualifying patient, that constitutes "[g]rounds for revocation" of that individual's license to grow and distribute medical marijuana. 10-144-122 Me. Code R. § 10.5.1 (2016); *see also* Me. Rev. Stat. tit. 22, § 2422(13) (2016).

True, Maine makes a "convict[ion]" for the conduct described above the ground for revoking a license to participate in the medical marijuana market. 10-144-122 Me. Code R. § 10.5.1 (2016). But, I am persuaded that a federal prosecution of conduct that Maine defines to be (when successfully prosecuted) conduct that warrants license revocation in no way "prevent[s]" the state from "implementing" its own medical marijuana laws. Consolidated Appropriations Act, 2019 § 537. *Cf. United States v. Evans*, 929 F.3d 1073, 1077 (9th Cir. 2019) (looking "to the state law's *substantive* authorizations, not to the *procedural rules* that give practical effect to the

state's medical-marijuana regime" to determine whether the rider bars federal prosecution).

I also agree with the majority's reasons for not applying the standard that the government asks us to apply here, which the government dubs a "strict compliance" standard. The appropriations rider, given its text and history, is hard to square with that standard, insofar as it would permit the federal prosecution of a defendant who holds a state-conferred license to participate in the medical marijuana market for conduct that could not lead under that state's law to the revocation of that license.

I do note, though, that although the government purports to borrow this "strict compliance" standard from the Ninth Circuit, it is not clear to me that the government is being faithful to the standard as the Ninth Circuit articulated it. The Ninth Circuit applied the standard bearing the "strict compliance" name in cases that involved a very different factual context from this one. None of the defendants in those cases had shown that they held a state-provided license to sell or use medical marijuana at the time of their federal prosecutions.[10] Moreover, those

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10. *See, e.g., United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016) (describing various defendants including some defendants that "ran four marijuana stores" without discussing whether the state had formally licensed or otherwise sanctioned the defendants' conduct and remanding for an evidentiary hearing); *United States v. Lynch*, 903 F.3d 1061, 1075-78, 1086 (9th Cir. 2018) (explaining that the defendant "'does not dispute the government's assertion that he made no attempt to operate as a classic collective'" as permitted by a "California statute [] allowing medical marijuana collectives"); *United States v. Evans*, 929 F.3d 1073, 1078 (9th Cir. 2019) ("The district court found that Evans and Davis were not qualifying

cases turned on the strength of the defendants' showing that they would have been able to avail themselves of an affirmative defense to criminal prosecution under state law if they had been prosecuted in state court for the alleged involvement in the sale and use of medical marijuana that grounded their federal prosecutions.[11] Thus, it may well be that, once that difference in context is accounted for, the legal standard that we apply here pursuant to the federal appropriations rider is not materially different from the one that the Ninth Circuit applied, notwithstanding that the government's proposed "strict compliance" standard is untenable for all the reasons that the majority convincingly sets forth.

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patients [under Washington law], and we agree. During the hearing, neither defendant introduced a 'green card' . . . and neither called a physician witness to testify to prescribing marijuana to Evans or Davis."); *United States v. Gloor*, 725 F. App'x 493, 495 (9th Cir. 2018) ("Gloor did not present the required paperwork upon request as required to satisfy the affirmative defense."); *see also United States v. Trevino*, 7 F.4th 414, 420 (6th Cir. 2021) (applying the Ninth Circuit's "strict compliance" standard in a case in which the defendant "'could never have been licensed' as a caregiver because he had a prior felony conviction" that disqualified him from such a license) (citing Mich. Comp. Laws § 333.26423(k)).

11. *See, e.g., Evans*, 929 F.3d at 1076 (citing Wash. Rev. Code § 69.51A.043 (2013)); *Gloor*, 725 F. App'x at 495 (citing Wash. Rev. Code §§ 69.51A.085 (2012), 69.51A.040(2)-(4) (2008)); *Trevino*, 7 F.4th at 422-23 (citing Mich. Comp. Laws § 333.26428).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED DECEMBER 20, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket no. 2:18-cr-00063-GZS

UNITED STATES OF AMERICA,

v.

RICHARD DANIELS, *et al.*,

Defendant.

December 20, 2019, Decided
December 20, 2019, Filed

ORDER ON DEFENDANTS' MOTION RE: SUPPRESSION OF EVIDENCE AND *FRANKS* HEARING (ECF NO. 405)

Before the Court is a Motion to Suppress Evidence and for a *Franks* Hearing by Defendants Brian Bilodeau & Brian Bilodeau, LLC (together, the "Bilodeau Defendants") (ECF No. 405).[1] Having fully considered the filings related

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1. The Bilodeau Defendants joined the Motion for *Franks* Hearing filed by Tyler Poland, Ty Construction, LLC, & Ty Properties, LLC (together, the "Poland Defendants") (ECF No. 333), and they adopted and incorporated the Declaration of Mark Cayer attached to that Motion (ECF No. 333-6) in the present Motion. Since

to the Motion as well as relevant developments noted on the docket, the Court DENIES the Motion.

I. LEGAL STANDARD

"A warrant application must demonstrate probable cause to believe that (1) a crime has been committed—the 'commission' element, and (2) enumerated evidence of the offense will be found at the place searched—the so-called 'nexus' element." *United States v. Dixon,* 787 F.3d 55, 59 (1st Cir. 2015) (quoting *United States v. Feliz,* 182 F.3d 82, 86 (1st Cir. 1999)). "Probable cause to issue a warrant exists when, 'given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found *in a particular place*.'" *United States v. Silva,* 742 F.3d 1, 9 (1st Cir. 2014) (emphasis added) (quoting *United States v. Reiner,* 500 F.3d 10, 15 (1st Cir. 2007)).

"Affidavits supporting search warrants are presumptively valid. A defendant may rebut this presumption and challenge the veracity of a warrant affidavit at a pretrial hearing commonly known as a *Franks* hearing." *United States v. Owens,* 917 F.3d 26, 38 (1st Cir.), *cert. denied,* 140 S. Ct. 200, 205 L. Ed. 2d 123 (2019) (internal citations and quotations omitted). "To get a *Franks* hearing, a party must first make two 'substantial preliminary showings': (1) that a false

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the Bilodeau Defendants do not further develop any arguments from the Poland Motion and the Mark Cayer declaration in this Motion, the Court discusses the applicability of those arguments to the Bilodeau Defendants in its separate Order on the Poland Defendants' Motion.

statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth; and (2) the falsehood or omission was necessary to the finding of probable cause." *United States v. Rigaud,* 684 F.3d 169, 173 (1st Cir. 2012). "Failure to make a showing on either element dooms a party's hearing request." *Id.* As to the second prong, the Court must "determine whether the totality of the revealed circumstances makes out a showing of probable cause, even with false facts stripped away, inaccurate facts corrected, and omitted facts included." *United States v. Barbosa,* 896 F.3d 60, 69 (1st Cir. 2018).[2]

II. BACKGROUND

On February 26, 2018, DEA Task Force Officer ("TFO") Kelly applied for a warrant to search a commercial building located at 230 Merrow Road, Auburn, Maine; Defendant Bilodeau's residence at 72 Danville Corner Road, Auburn, Maine; and other locations. TFO Kelly filed an affidavit in support of the search warrant application. A United States magistrate judge issued

2. To ultimately have evidence suppressed based on alleged false statements or omissions in a search warrant affidavit, "the defendant must meet an even more exacting standard [than for a *Franks* hearing]." *United States v. Graf,* 784 F.3d 1, 11 (1st Cir. 2015) (quoting *United States v. Tzannos,* 460 F.3d 128, 136 (1st Cir. 2006)). That is, the defendant "must (1) show that the affiant in fact made a false statement knowingly and intentionally, or with reckless disregard for the truth, (2) make this showing by a preponderance of the evidence, and (3) show in addition that with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." *Id.* (citations and quotations omitted).

the warrants, and they were subsequently executed on February 27, 2018. At 230 Merrow Road, law enforcement seized marijuana plants as well as harvested marijuana. At 72 Danville Corner Road, law enforcement identified evidence of drug trafficking, suspected proceeds of drug trafficking, and significant amounts of marijuana. Since their search warrant did not contemplate the seizure of controlled substances, law enforcement applied for a second warrant expanding the list of items to be seized. After the second warrant was issued, officers seized marijuana and firearms from 72 Danville Corner Road.

III. DISCUSSION

The Bilodeau Defendants contend that the Court should suppress the evidence seized from 72 Danville Corner Road and 230 Merrow Road on February 27, 2018, because the warrants were deficient. Specifically, Defendants argue: (1) there was not probable cause to search 72 Danville Corner Road; (2) the original warrant was stale; and (3) the warrants are invalid pursuant to *Franks.*

A. Probable Cause

The Bilodeau Defendants argue that probable cause was lacking with respect to the search of 72 Danville Corner Road. But there were numerous facts in the warrant's supporting affidavit that provided probable cause to search Bilodeau's residence. For example, the affidavit stated that Bilodeau owned 72 Danville Corner Road and lived there, that multiple informants had discussed the presence of a large safe at his residence, and

that Bilodeau was recently engaged in communications related to marijuana trafficking. Moreover, the First Circuit has regularly held that probable cause of a nexus between a drug dealer's criminal activities and his residence does not require direct evidence that the residence was used for drug dealing; rather, nexus may be shown where the nature of the person's drug dealing supports an inference that his or her residence would be used for storing items associated with that activity. *See, e.g., United States v. Feliz,* 182 F.3d 82, 86-87 (1st Cir. 1999). Here, the information in the warrant affidavit supported a reasonable inference that Bilodeau engaged in drug trafficking and that there was a fair probability his residence contained contraband or evidence of that criminal activity.

The Bilodeau Defendants next argue that conflicting information regarding the contents of the safe at 72 Danville Corner Road in Fall 2016 was impermissibly stale at the time the warrant was issued. But where a warrant involves probable cause of "ongoing and entrenched activity," such as drug trafficking, older information is less likely to be rendered stale by the passage of time. *United States v. Schaefer,* 87 F.3d 562, 568 (1st Cir. 1996); *see also Feliz,* 182 F.3d at 87 (noting that "courts have upheld determinations of probable cause in trafficking cases involving" information as much as two years old). Here, the affidavit indicated that Bilodeau was involved in drug trafficking through mid-February 2018, and that he sometimes stored proceeds from this drug trafficking operation in his home safe. Because of the ongoing, entrenched nature of his suspected criminal activity, the information was not rendered stale by its age.

B. The Request for a *Franks* Hearing

Finally, the Bilodeau Defendants contend that because the warrants omitted the fact that Bilodeau was a Maine medical marijuana caregiver, they are entitled to a *Franks* hearing and suppression of the evidence uncovered at Bilodeau's residence and 230 Merrow. Defendants contend that had Bilodeau's status as a medical marijuana caregiver been included in the affidavit, further information would be needed to establish probable cause that he was involved in criminal activity. According to Defendants, because a federal appropriations rider commonly known as the "Rohrabacher-Blumenauer Amendment" (hereinafter, "the Amendment") bars the Department of Justice from expending funds to interfere with state medical marijuana programs, the warrant would need to include additional information establishing that Bilodeau was out of compliance with Maine's medical marijuana law. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019) ("None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, . . . Maine, . . . or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."). However, the Court concludes that the omission was not necessary to a finding of probable cause because there was ample information in the affidavit supporting probable cause of noncompliant marijuana activity, even if Bilodeau was known to be a licensed medical marijuana caregiver. For example, wire interceptions and text messages obtained by search

warrant in the month before February 27, 2018, indicated that Bilodeau possessed and was in the process of moving 500 pounds of marijuana, a bulk amount not at all consistent with compliant medical marijuana caregiving. Because the criminal activity for which the warrant provided probable cause was so clearly unauthorized by Maine's medical marijuana laws, the omission of Bilodeau's status as a medical marijuana caregiver does not invalidate the warrant.[3]

IV. CONCLUSION

Therefore, the Court hereby DENIES the Bilodeau Defendants' Motion to Suppress Evidence or for *Franks* Hearing (ECF No. 405).

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 20th day of December, 2019.

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3. The Court additionally notes that there is no precedent for applying the Amendment in the search warrant context as the Bilodeau Defendants argue for here. They and other Defendants have sought an injunction enjoining their prosecution pursuant to the Amendment (ECF Nos. 334, 404 & 410), and the Court followed the Ninth Circuit in holding an evidentiary hearing in which the moving Defendants had the opportunity to establish their strict compliance with Maine's medical marijuana laws (ECF No. 565 & 566). The extent to which the Amendment bars federal action against the Defendants has been determined through those proceedings and may be found in the Court's Order on Defendants' Motions to Enjoin Prosecution (ECF No. 675).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED DECEMBER 20, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket no. 2:18-cr-00063-GZS

UNITED STATES OF AMERICA,

v.

RICHARD DANIELS, *et al.*,

Defendants.

December 20, 2019, Decided
December 20, 2019, Filed

ORDER ON DEFENDANTS' MOTIONS TO DISMISS OR ENJOIN PROSECUTION

On October 5, 2018, the Government filed a Superseding Indictment (ECF No. 82) charging a number of individuals and corporate entities with a range of counts related to alleged marijuana distribution. Defendants Tyler Poland, Ty Properties, LLC & Ty Construction, LLC (together, the "Poland Defendants") filed a Motion to Dismiss Prosecution Pursuant to the Rohrabacher-Farr Amendment (ECF No. 334) in May 2019, and, in July, Defendants Brian Bilodeau & Brian Bilodeau, LLC (together, the "Bilodeau Defendants") moved to dismiss

or enjoin prosecution under what they referred to as the "Rohrabacher-Blumenauer Amendment" (ECF No. 404). MR, LLC ("MR") joined the Bilodeau Defendants' Motion (ECF No. 410). On October 3 and 4, this Court held an evidentiary hearing on the Defendants' Motions and, at the close, ordered post-hearing briefing. Having reviewed that briefing (ECF Nos. 616, 619, 620, 648, 651, 655, & 659) and considered all of the evidence presented, the Court DENIES the Motions for the reasons explained herein.

I. BACKGROUND

Since 2014, the annual federal appropriations law has included a rider that prohibits the Department of Justice ("DOJ") from using congressionally appropriated funds to interfere with the implementation of state medical marijuana laws. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019); Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). The current rider, which is in all relevant ways identical to any previous iterations implicated by these Motions, states:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, . . . Maine, . . . or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

The rider is commonly known as the "Rohrabacher-Farr Amendment" or the "Rohrabacher-Blumenauer

Amendment," in recognition of certain legislative sponsors. For the purposes of this Order, the Court refers to it simply as "the Amendment."

In 2016, the Ninth Circuit, the only court of appeals yet to have considered the effect of the Amendment on prosecutions for alleged marijuana crimes, concluded that "federal criminal defendants may," based on the rider, "seek to enjoin the expenditure" of DOJ funds on their prosecution. *United States v. McIntosh*, 833 F.3d 1163, 1173 (9th Cir. 2016). The Ninth Circuit held that such defendants are entitled to enjoin their prosecution if, following an evidentiary hearing, the court concludes "their conduct was completely authorized by state law" governing medical marijuana, i.e., "they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *Id.* at 1179.

Defendants argue that their conduct was completely authorized by the Maine Medical Use of Marijuana Act. *See* 22 M.R.S.A. § 2421 *et seq.* Thus, they move to enjoin prosecution pursuant to the Amendment. For its part, the Government opposes the relief sought by Defendants, but did not oppose an evidentiary hearing under the *McIntosh* framework.[1]

1. Because the Government has not opposed proceeding under the framework developed in the Ninth Circuit, the Court proceeds on the assumption that the First Circuit would adopt the standing analysis found in *McIntosh*. In that case, the Ninth Circuit found individual standing based on *Bond v. United States*, 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011). *See McIntosh*, 833 F.3d

On October 3 and 4, 2019, the Court held an evidentiary hearing on the moving Defendants' strict compliance with Maine's medical marijuana laws. In advance of the hearing, the Poland Defendants filed a Motion Regarding the Parties' Burdens Under Rohrabacher-Farr, which MR and the Bilodeau Defendants joined (ECF Nos. 549, 552 & 554). On October 2, 2019, the Court denied their Motion (ECF No. 559), concluding that the moving Defendants bore the burden of establishing their strict compliance with Maine's medical marijuana laws by a preponderance of the evidence.[2] In the section that follows, the Court

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at 1173-74. However, the challenge in *Bond* involved reliance on a claimed violation of the Tenth Amendment, whereas the challenge here relies on a violation of an appropriations rider, which, in turn, is focused on protecting the ability of various states to implement medical marijuana statutes. *See Bond*, 564 U.S. at 214. On a blank slate, this Court might find that this difference should limit standing to the States themselves. However, in the absence of any guidance from the First Circuit on its interpretation of *Bond* and any objection from the Government, the Court finds no basis to depart from the standing analysis of *McIntosh*.

2. *See United States v. Evans*, 929 F.3d 1073, 1077 (9th Cir. 2019) (clarifying that in an evidentiary hearing to determine whether defendants are entitled to an injunction barring their prosecution pursuant to the rider, the defendants bear the burden of "persuading the court that it is more likely than not that the state's medical-marijuana laws 'completely authorized' their conduct"); *United States v. Gentile*, 782 Fed. App'x 559, 562 (9th Cir. 2019) ("[W]hen a criminal defendant seeks to enforce the [Amendment,] the defendant is seeking *injunctive* relief. As with any request for an injunction, the criminal defendant seeking such an injunction bears the burden of proving compliance by preponderance of the evidence."); *Boston Beer Co. Ltd. P'ship v. Slesar Bros. Brewing Co., Inc.*, 9 F.3d 175, 177 (1st Cir. 1993) (affirming the district court's application of a preponderance standard to the appellant's request for an injunction).

lays out the facts Defendants ultimately established by a preponderance of the evidence submitted at the hearing.

II. FACTUAL FINDINGS

By early 2018, law enforcement was investigating the possible illegal distribution of marijuana under the guise of the Maine Medical Use of Marijuana Program (MMMP).[3] In relevant part, their investigation focused on three different marijuana growing facilities located in Auburn, Maine: (1) 230 Merrow Road, (2) 249 Merrow Road, and (3) 586 Lewiston Junction Road.

A. 230 Merrow Road

The 230 Merrow property is a warehouse that was purchased by MR on November 1, 2016.[4] (Gov't Ex. A-11.) The warehouse contains multiple grow rooms for the cultivation of marijuana at different stages of maturity. (MR Exs. 4-8; Tr. (ECF Nos. 599 & 600) 444-45.)

From sometime in 2016 until February 27, 2018, the grow rooms at 230 Merrow were regularly used by two

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3. The MMMP is the name given to the program run by the Department of Health and Human Services; that program is governed by technical rules promulgated pursuant to 22 M.R.S.A. § 2422-A(2).

4. At the time of sale, MR also entered into a separate agreement whereby 230 Merrow's seller loaned MR, Kevin Dean (MR's sole member), and Brian Bilodeau $450,000, to be repaid in monthly no-interest installments of $50,000; 230 Merrow served as security for the loan. Gov't Ex. A-12.

individuals, Danny Bellmore and Brandon Knutson, both of whom were registered with the MMMP as medical marijuana caregivers growing at 230 Merrow. Knutson described 230 Merrow Road as "on its face . . . fully compliant" with the MMMP. (Tr. 472.) He and Bellmore aimed to grow only the number of plants authorized by law and to tag plants per MMMP regulations. (Tr. 472, 480.) The MMMP required that caregivers be "designated" by the patients for whom they cultivated and possess designation cards provided by those patients. So, in accordance with this requirement, Knutson and Bellmore displayed their MMMP registration paperwork and patient designation cards outside their grow rooms. However, Knutson himself never distributed the marijuana he grew to the people whose patient cards hung outside his grow room, and he never met or knew those patients. (Tr. 451.) Knutson also never submitted sales tax returns for any medical marijuana sales, and he did not have a lease or pay for rent or utilities at 230 Merrow. (Gov't Ex. A-7; Tr. 447-48.)

Up until sometime in 2017, Timmy Bellmore and Brian Bilodeau managed operations at 230 Merrow.[5] That is, they paid Knutson and Danny Bellmore an hourly wage for tending the marijuana grows, purchased nutrients and soil necessary for the grows, and picked up marijuana from the site once it was cured and ready for use. (Tr. 448.) At some point in 2017, Timmy Bellmore and Bilodeau severed ties. Bilodeau continued to manage operations at 230 Merrow in similar fashion, but without Bellmore.

5. Timmy Bellmore is not a party to this proceeding, but he was charged in the Superseding Indictment.

Timmy Bellmore and Bilodeau also provided the growers at 230 Merrow with patient cards.[6] (Tr. 451.) A patient whose card hung outside Knutson's grow room on February 27, 2018, Lorraine Acheson, was paid to obtain that patient card by someone she believed to be working for Bellmore. Acheson never used the card herself. She did not know Knutson and never received marijuana from him. (Tr. 434-37.) Once, when a couple of Knutson's patient cards expired, Bilodeau sent him to a grow site known as "Cascades" to obtain new ones. (Tr. 451-53.)

B. 586 Lewiston Junction Road

The Cascades facility, where Knutson was sent to obtain patient cards, is located at 586 Lewiston Junction Road. Like 230 Merrow, Cascades is a warehouse containing multiple individual grow rooms. The grow operation at Cascades was established sometime after Knutson started work at 230 Merrow. In fact, he helped start the Cascades grow by moving in its first plants, staking them up, and cloning plants. (Tr. 453.)

The Cascades facility was inspected by MMMP authorities on January 10, 2018, and found compliant. (Gov't Ex. A-37.) At that time, Bilodeau, Kevin Dean, Cecile Dean, and Marshall Dean were all registered as caregivers with indoor grows at the site. In addition to

6. Knutson testified that his patient cards were given to him by Timmy Bellmore and Bilodeau and that he and Danny played similar roles and were managed similarly at 230 Merrow. (Tr. 451.) On this record, the Court finds it more likely than not that Danny also received patient cards from Timmy and Bilodeau.

the indoor grows, the Cascades facility had an unfenced outdoor grow area for which no caregiver was registered. (Gov't Exs. A-8-A-10, A-37; Tr. 378.)

Cascades was generally understood to belong to Kevin Dean.[7] However, Knutson regarded Bilodeau as the site's "boss." (Tr. 479.) Knutson believed Dean and Bilodeau to be partners in the marijuana business at both 230 Merrow and Cascades; he reached this conclusion because he knew of Bilodeau and Dean attending marijuana grower conventions together, from which they had once brought back a marijuana trimming machine, and he understood them both to be involved in establishing the grow facilities at the two locations. (Tr. 457-60.) Knutson saw Dean at 230 Merrow at least once and at Cascades, with Bilodeau, a handful of times. (Tr. 470.) Knutson also transported a trimming machine between 230 Merrow and Cascades, as directed by Timmy or Bilodeau. (Tr. 474.)

C. 249 Merrow Road

Since December 2017, 249 Merrow Road has been owned by Ty Properties, LLC.[8] (Gov't Ex. A-13.) One warehouse on the property contains several rooms on the first floor and offices on the second. (Tr. 37-38.) Another

7. Bilodeau told MMMP authorities that Dean owned the building. *See* Gov't Ex. A-37. Knutson believed Dean to be the building's owner.

8. Tyler Poland filed to register Ty Properties, LLC as a business with the purpose of holding real estate, under the address of 249 Merrow Road, on September 8, 2017, and its status as an LLC was current in 2018. Gov't Ex. A-32.

warehouse contains a large garage bay area and individual grow rooms for mature and immature marijuana plants. For at least some time during the relevant period, the property also housed an unfenced outdoor grow. (Gov't Ex. E-30; Tr. 418-19.) It is not clear who grew at 249 Merrow before roughly 2018 or when marijuana growing at this location commenced. But as of February 27, 2018, six individual caregivers were registered to operate indoor grow rooms at the site and had lease agreements with Tyler Poland to rent out those spaces. (Poland Exs. 1-6.) According to Catherine Lewis, an expert retained by the Poland Defendants, the paperwork on site at 249 Merrow on February 27, 2018 was in "full compliance" with the MMMP. (Tr. 59-60.) Lewis also concluded that the caregivers registered there as of that date were in compliance with MMMP licensing requirements. (Tr. 67.)

D. The Trim Crews

From sometime in 2015 up until February 27, 2018, so-called "trim crews" provided services to marijuana grow facilities in the Lewiston-Auburn area, including the three just described. (Tr. 235-37, 371-73, 408, 410.) Trim crews were groups of people ranging in number from five to ten who would assemble at a growing facility to trim buds from flowering marijuana plants.[9] Certain members of the crew would access the grow and harvest the plants, and the rest would trim the plants down further. Trimmers were paid an hourly wage in cash, the source of which depended on

9. There was a stable of trimmers who could be called to staff crews. Among this group, a son of Kevin Dean occasionally showed up for trims. Tr. 414.

the grow site where they had completed the trim. Bilodeau generally paid for trimmers' work at Cascades and 230 Merrow, Poland paid for work at 249 Merrow, and Timmy Bellmore paid for work at other locations. (Tr. 240, 382-83, 387, 395.) Keith Williams, who acted as head of a trim crew during some of this period, testified that either Bilodeau or Poland would give him a "heads-up" as to when trim crews were needed at particular locations. (Tr. 411.) Then, Williams would tally up the hours for trim crew members and send those tallies to either Bilodeau or Poland, who, in turn, gave him money to pay the trimmers. (Tr. 415.)

E. The Execution of the Search Warrants

On February 27, 2018, federal law enforcement executed search warrants on the 230 and 249 Merrow facilities, as well as on Bilodeau's residence at 72 Danville Corner Road. The agents who searched 230 Merrow encountered a locked building into which they forced entry. (Tr. 167.) Inside, they observed five independent grow rooms, some number of which (perhaps all) were locked. (Tr. 169-70.) In total, the agents removed 321 plants, 30 of which they described as "large;" the remaining 291 were described as "varying smaller, less mature" sizes. (Tr. 170-71.) After the search and seizure, the agents preserved a representative sample of the seized marijuana; the rest was destroyed. (Tr. 177-78.) Video and photographic evidence of the seized marijuana before its destruction corroborates the agents' recorded counts but is insufficiently detailed to evaluate whether the plant totals would have been compliant with all MMMP regulations. (MR Exs. 5-8.)

The seizing team at 230 Merrow also uncovered what they recorded as 82.42 kilograms (approximately 181 pounds) of processed marijuana contained in clear plastic bags. (MR Ex. 15; Tr. 166.) Whether this marijuana could be classified as prepared marijuana under the MMMP was called into question by Hillary Lister, an expert retained by the Bilodeau Defendants. (Tr. 232.) Lister observed at least one "Boveda pack" in a photograph of the bags seized at 230 Merrow; she testified that the Boveda pack's presence indicated the marijuana was still curing and therefore would not be properly classified as "prepared or processed" under the MMMP. (Tr. 232.)

Federal agents who searched 249 Merrow seized 41 pounds of marijuana in 76 heat-sealed bags, 34 marijuana plants, and 186 pounds of "shake"—the fan leaves, stalks, roots and other parts of the marijuana plant generally discarded once the buds have been harvested—from the warehouse with the second-floor offices. (Tr. 32, 70.) In that building, they observed a vacuum oven for making marijuana extract with butane hash oil. (Gov't Exs. E-11 & E-12.) Agents seized approximately 104 pounds of marijuana from the other warehouse. (Tr. 34.) In total, 574 marijuana plants were seized. (Tr. 37.) The agents also seized pills (later identified as alprazolam and MDMA) and a variety of documents from the second-floor offices in the first warehouse. (Gov't Exs. E-26 & E-27.)

The documents seized from the offices at 249 Merrow included paperwork required under the MMMP. They also included a variety of handwritten documents that recorded apparent payments to trimmers and a notebook

documenting apparent marijuana sales transactions. (Gov't Exs. E-15-E-21.) The notebook is dated in a manner indicating records spanning December 2016 to February 6, 2018; the pages list the pounds of various marijuana strands that were apparently sold in different transactions, with multiple pages documenting cash payments of over $50,000. (Gov Ex. E-17; Tr. 142.) Additionally, many lists of figures appear below state abbreviations, such as "MD," "NY," and "GA," suggesting out-of-state distribution.

At 72 Danville Corner Road, agents seized approximately twelve trash bags and approximately seven plastic blue bins of clear plastic bags containing harvested marijuana buds. They retained a representative sample, which was tested to confirm the presence of marijuana. (Gov't Ex. 15.) The rest of the seized marijuana was destroyed. Agents also seized several large sheets of "shatter" (marijuana concentrate), which they did not weigh before destroying. (Tr. 330.) The seized marijuana had "a lot of stem, leaves, seeds, and other debris" characteristic of black-market marijuana. (Tr. 261.) Based on the limited photo and video documentation, Lister (the Bilodeau Defendants' expert witness) found it impossible to determine what portion of the seized marijuana qualified as prepared and which would qualify as incidental under the MMMP. (Tr. 211-14, 216-17, 264, 290-91, 294-95.) Nonetheless, based on her analysis, the quantity of marijuana seized at 72 Danville Corner Road was consistent with a MMMP-sanctioned grow at Cascades. (Tr. 286-87.)

Agents also seized a number of documents from a safe room that also contained bulk marijuana, a money counter, and a loaded handgun at the time of the search. A Task Force Agent who reviewed the seized documents identified them as drug ledgers. (Gov't Exs. B-22-B-24, B-47-B-56, B-61; Tr. 340-41.) They included various notations as to amounts of sales; costs of "trimmers," electricity, labor, etc.; and amounts owed to different people, including a "Tim," "Brian," "Kevin," and "Kev." One sheet of notations listed "$347,700 total sales" under the heading "Cascades 32 199lbs." (Gov't Ex. B-29.) Catherine Lewis indicated that in her experience "$40,000 and up" was the upper end of annual revenue for a totally compliant caregiver. (Tr.127.)

III. DISCUSSION

The Maine Medical Use of Marijuana Act effective at the time of the charged conduct authorized so-called "primary caregivers" to carry out a variety of specified activities "for the purpose of assisting a qualifying patient who ha[d] designated the primary caregiver" to assist him or her with the medical use of marijuana. 22 M.R.S.A. § 2423-A(2) (2016) (amended July 1, 2018). These activities included, *inter alia*, cultivating up to six mature marijuana plants per patient; possessing up to 2.5 ounces of prepared marijuana per patient and an unlimited amount of "incidental" marijuana; assisting a maximum of five patients; receiving reasonable monetary compensation for costs associated with cultivating marijuana plants; disposing excess prepared marijuana by "transfer[ring] prepared marijuana to a registered

dispensary, a qualifying patient or another primary caregiver if nothing of value is provided to the primary caregiver" or "to a registered dispensary for reasonable compensation;" and "[e]mploy[ing] one person to assist in performing the duties of the primary caregiver." *Id.* The MMMP Rule effective at the time of the charged offenses stated, "The protections and requirements of these rules are for conduct that is expressly authorized by these rules for the legal medical use of marijuana by qualifying patients, and for those who assist qualifying patients as primary caregivers." (Ex. A-15, Rule 2.1.)[10] A "qualifying patient" was defined as "a person who has been diagnosed by a medical provider as having a debilitating medical condition and who possesses a valid written certification regarding medical use of marijuana." 22 M.R.S.A. § 2422(9) (2016) (amended May 2, 2018).

At the outset, the Court acknowledges that the moving Defendants raise a variety of interesting arguments regarding the strict compliance standard. Urging that "strict compliance" should allow some level of noncompliance that would otherwise be tolerated by state authorities, they contend that imposing a higher compliance standard will chill and therefore interfere

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10. At the evidentiary hearing, the Government entered two versions of the Maine Medical Marijuana Program Rules as Exhibits A-15 and A-16. Defendants disputed whether the second version, Exhibit A-16, was in effect at the time of the charged conduct. Since the Government cites only to Exhibit A-15 in its post-hearing briefing and the Court concludes that its strict-compliance analysis is not affected by which version of the Rule was in effect at the time, it cites to the Rule as published in Exhibit A-15.

with Maine's medical marijuana laws, contrary to the Amendment's intent. They also argue that they cannot be found noncompliant with Maine medical marijuana law because it remains unclear whether their conduct would provide grounds for or, as a practical matter, be subject to enforcement by Maine authorities. The Court leaves these arguments about the nature of "strict compliance" for another day. Simply put, the noncompliance established at the evidentiary hearing is so contrary to the basic purpose and fundamental scope of Maine's medical marijuana laws that the outcome here does not depend on the precise limits of strict compliance.

Even assuming reasonable limits to Maine's enforcement capacity and some uncertainty as to specific parameters of the MMMP during the time period in question, Maine's medical marijuana laws did not authorize the sort of misconduct evidenced at the hearing—namely, a fundamental disregard of the rules regarding how and to whom medical marijuana may be lawfully distributed.[11] *See also Evans*, 929 F.3d at 1077 (stating that the rider-applicability analysis should focus on "the state law's *substantive* authorizations" rather than "the *procedural rules* that give practical effect to the state's medical-

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11. This conclusion also causes the Court to disregard the Poland Defendants' argument that Maine's medical marijuana laws, the Controlled Substances Act, and the Amendment ought to be interpreted under the Rule of Lenity and with Due Process concerns in mind. While there may have been some ambiguities in the proper interpretation of federal and state law governing marijuana, it was entirely clear that these laws did not authorize the conduct evidenced at the hearing.

marijuana regime"). Thus, the Court's conclusion that Defendants did not strictly comply with Maine's medical marijuana laws is not based on some sort of technical noncompliance that might plausibly be tolerated under Maine law.[12] Rather, it is based on a conclusion that the noncompliance evidenced at the hearing is precisely the sort that Congress did *not* intend the appropriations rider to shelter from federal prosecution.

In determining whether the Defendants have established strict compliance, the Court analyzes the Amendment's applicability on a count-by-count basis. The Ninth Circuit has held that the applicability inquiry "focuses on the conduct forming the basis of a particular charge, which requires a count-by-count analysis to determine which charges, if any, are" barred from prosecution under the rider. *United States v. Kleinman*, 880 F.3d 1020, 1028 (9th Cir. 2017). This is necessary to ensure "[t]he prosecution cannot use a prosecutable charge . . . to bootstrap other charges that rely solely upon conduct that would fully comply with state law," and thereby prevent states "from implementing their own laws that authorize . . . medical marijuana." *Id.* (alteration in

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12. To be clear, technical noncompliance—for example, violation of the requirement that caregivers employ only one assistant—was established at the hearing. However, beyond mere technical noncompliance with this one-assistant-per-caregiver limitation, the Government established that the Defendants employed trim crews of five to ten people, who were paid in cash by Bilodeau or Poland. This blatant violation constituted yet another indicia of black market marijuana activity in no way authorized by Maine's medical marijuana laws.

original) (citing Consolidated Appropriations Act, 2016, 129 Stat. at 2332-33). Finding this persuasive, the Court undertakes a count-by-count approach to determining whether each Defendant has established the requisite strict compliance.

A. The Bilodeau Defendants' Compliance with Maine Medical Marijuana Law

The Bilodeau Defendants are charged with conspiring to distribute marijuana, manufacturing a controlled substance, possessing marijuana with intent to distribute, possessing a firearm in furtherance of drug trafficking, conspiring to money launder, and engaging in illegal monetary transactions. They maintain that the January 10, 2018 inspection report by MMMP authorities (Gov't Ex. A-19), which found Bilodeau's grow site at 586 Lewiston Junction Road compliant, establishes that he grew in compliance with Maine medical marijuana law. They additionally rely on their expert witness's analysis that the marijuana seized on February 27, 2018, from Bilodeau's residence was consistent with the yield from the plants inspected on January 10 (Tr. 287:1-9) to argue that his marijuana possession was compliant with state medical marijuana law. The Bilodeau Defendants contend that this evidence establishes their compliance at all times relevant to the charged offenses and, therefore, their prosecution must be enjoined.

However, the Government presented evidence that threw into significant doubt whether the Bilodeau Defendants' marijuana activity was completely authorized

by Maine's medical marijuana laws. The drug ledgers seized from Bilodeau's residence indicate a sales operation that extended far beyond patient supply consistent with the MMMP. Knutson's testimony that his patient designation cards were supplied to him by Bilodeau and Bellmore, the evidence that at least one of Knutson's patients never received marijuana from his grow, the fact that Bilodeau and Bellmore were responsible for distributing marijuana grown at 230 Merrow, and the evidence that Bilodeau managed operations at 230 Merrow and Cascades, a site with an unregistered outdoor grow area, further support the inference that Bilodeau was involved in distribution practices at both locations that were substantially noncompliant with Maine's medical marijuana laws.

Given this evidence, the Court cannot conclude it is more likely than not that the Bilodeau Defendants fully complied with a core tenet of the MMMP—that caregivers' marijuana-related conduct be for the purpose of assisting qualifying patients with their use of medical marijuana. While their evidence may establish that the physical and technical aspects of the grow at Lewiston Junction Road were compliant with Maine medical marijuana law at about the time of the search, they offered nothing to refute the evidence of Bilodeau's involvement in fundamentally noncompliant distribution and sales there and at 230 Merrow Road during the time periods relevant to the charged offenses.[13] Since the evidence indicates Bilodeau

13. In their post-hearing Reply Brief, the Bilodeau Defendants state that the marijuana seized at Bilodeau's residence on February 27, 2018 "was intended for the Safe Alternatives Dispensary, where

was involved in noncompliant distribution of marijuana produced at Lewiston Junction Road and 230 Merrow at the time of the February 27, 2018 searches, he cannot claim immunity from prosecution for possession of marijuana and a firearm on that day.[14] Further, his failure to establish full compliance with Maine's medical marijuana laws means his prosecution for money laundering and monetary transactions alleged to involve the proceeds of said noncompliant marijuana activity may also proceed.

The Bilodeau Defendants argue that the Amendment requires application of a heightened standard to federal investigations and searches of MMMP participants.

Mr. Bilodeau was starting a new job." ECF No. 655 PageID # 2649. But beyond a mention of this intention recorded by the state investigators who visited Cascades on January 10, 2018 (Gov't Ex. A-37), the Bilodeau Defendants provided no evidence to support this contention during the evidentiary hearing and offer nothing more to support it in their Reply. Weighing this relatively unsupported claim against the substantial evidence of noncompliance put forth at the hearing, the Court does not find it more likely than not that Bilodeau intended the marijuana at his residence for the Safe Alternatives Dispensary.

14. The Bilodeau Defendants argue that evidence suggesting Bilodeau withdrew from an alleged conspiracy with Bellmore should support a finding of compliance, if not with respect to Count 1, with respect to the charged offenses limited to February 27, 2018. But Knutson's testimony that he continued working as normal at 230 Merrow after the alleged Bilodeau-Bellmore split (Tr. 468) and the trimmer testimony that crews continued to work for Bilodeau after the alleged split (Tr. 237, 398) establish the likelihood that Bilodeau continued to engage in noncompliant conduct even after his alleged withdrawal from a conspiracy with Bellmore.

Specifically, they argue (1) that federal agents who wish to investigate MMMP participants should be required to first gain permission from the U.S. Attorney's Office, which should grant permission only where there is adequate evidence of unauthorized conduct and (2) that search warrants for MMMP caregivers must be supported by a warrant affidavit that establishes evidence of unauthorized conduct in addition to probable cause. These are interesting (and not entirely fanciful) arguments as to what the Amendment's prohibition on the use of DOJ resources to interfere with state medical marijuana programs demands. However, there is no precedent for imposing such requirements based on the Amendment, and imposing them here would lead the Court to engage in an essentially legislative exercise to which Congress is better suited. The Court declines the Bilodeau Defendants' invitation to announce explicit rules governing federal investigations based on the Amendment.

Prosecution of all counts against the Bilodeau Defendants may go forward.

B. The Poland Defendants' Compliance with Maine Medical Marijuana Law

The Poland Defendants were charged with ten counts in the Superseding Indictment.[15] At the evidentiary

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15. These are: conspiracy to distribute marijuana (Count 1), manufacturing a controlled substance at 249 Merrow Road (Count 15), possession with intent to distribute MDMA (Count 16), possession with intent to distribute alprazolam (Count 17), possession with intent to distribute marijuana (Count 18), maintaining a drug involved

hearing, the Poland Defendants presented testimony from an expert witness, Catherine Lewis, who had reviewed discovery evidence and the caregiver paperwork from 249 Merrow Road and conducted a tour of the site with Poland some time after the February 27, 2018 search. (Tr. 99-104.) Lewis testified that, based on her analysis, the facility and the caregivers operating at the site complied with the MMMP. The Poland Defendants argue that this expert testimony and the 249 Merrow caregivers' compliance documents establish a prima facie case of strict compliance on February 27, 2018. They contend that this is enough to enjoin prosecution for all charges involving alleged misconduct on that date, including the Count 1 conspiracy charge, because if defendants were required to prove strict compliance for "every minute of every hour" of a multi-year conspiracy such as the one charged here, the Amendment's prohibition on interference with state medical marijuana laws would be rendered unenforceable.[16] (ECF No. 620 PageID # 2487, 2492.)

As counterpoint, the Government points to evidence seized from an office at 249 Merrow as well as the testimony of several witnesses who described work they had done there. Similar to the documents seized at 72 Danville Corner Road, those taken from 249 Merrow

premises (Count 22), money laundering (Count 35), destruction or removal of property to prevent search or seizure (Count 36), and illegal monetary transactions (Counts 40-41).

16. Because Count 35 alleges transactions that totally predate February 27, 2018, the Poland Defendants concede that its prosecution is not barred by proof of compliance on that date.

documented large-scale transactions inconsistent with compliant distribution. Witness testimony supported the inference that the grows at 249 Merrow were part of a large-scale marijuana operation unauthorized by Maine's medical marijuana law and to which Poland was linked. Trimmers who cycled between properties in the Lewiston-Auburn area were paid by Poland for trimming at his 249 Merrow site, and he, along with Bilodeau, was one of the individuals who notified the head of the trim crews when trimming services were needed. Additionally, Poland's site contained an outdoor grow unregistered with the MMMP. Based on this evidence, the Court cannot conclude that the Poland Defendants substantially complied with Maine medical marijuana law for over a year prior and up to the February 27, 2018 search. Rather, in the Court's view, the preponderance of the evidence shows that marijuana cultivated at 249 Merrow was distributed to nonpatients and that Poland managed operations at 249 Merrow as part of a large-scale Lewiston-Auburn black-market marijuana operation with Bilodeau and Bellmore.[17]

17. The Poland Defendants argue that "[t]he fact that there is alleged evidence of defendant Poland's involvement in drug trafficking cannot be inferred to the six caregivers." ECF No. 620, PageID # 2493. They also argue that the evidence of trimming at 249 Merrow cannot be linked to any of the caregivers registered there on February 27, 2018. But Poland and his companies are the parties charged in the indictment, not the caregivers. The evidence indicates he was responsible for noncompliance of the marijuana grows at 249 Merrow because he oversaw production and distribution there that in part supplied out-of-state purchasers in bulk quantities.

Defendants' failure to rebut the Government's evidence is fatal to their motion to enjoin prosecution.[18] They have not established compliance on February 27, 2018, or on any other date relevant to the charged offenses.[19] The Court rejects the Poland Defendants' claim that requiring them to prove compliance during the entire period of a charged conspiracy would result in an impossible evidentiary burden. To prove compliance throughout a multi-year conspiracy by a preponderance of evidence, defendants must put forward evidence sufficient to establish the *likelihood* of their compliance throughout

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18. The Poland Defendants argue that it would be impossible for them to prove legitimate sales to registered patients given the confidentiality requirements of the MMMP. Poland Reply (ECF No. 659), PageID # 2654. But there are other, non-confidential, forms of evidence they could have offered to rebut the inference of illegality raised by the Government's evidence. For example, they might have found qualified patients willing to testify about purchasing medical marijuana from 249 Merrow caregivers, or they might have offered evidence to show that the records of illegal drug sales at 249 Merrow were someone else's and entirely unknown to Poland. The Court therefore concludes that Defendants cannot use the MMMP's confidentiality requirements to relieve them of their evidentiary burden to show compliant distribution of the marijuana grown at 249 Merrow.

19. The Court does not need to decide whether proof of compliance at 249 Merrow on February 27, 2018, should immunize a defendant from prosecution for all counts involving conduct on that date since the Poland Defendants have not made that showing. But the Court notes its deeps skepticism as to this argument. It seems unlikely that the Amendment was intended to protect defendants from prosecution in a situation where there is ample evidence of noncompliance in the time leading up to the date of a search but suddenly, on that date, defendants manifest compliance.

the relevant time period. This does not require the sort of impossible evidentiary production the Poland Defendants seem to imagine (i.e., minute-by-minute documentation of compliance), but it certainly requires more than what was provided here, especially given the strength of the Government's evidence of noncompliance.

The Court also notes that a stay based on the Amendment is entirely inapplicable to Counts 16 and 17 (alleging possession with intent to distribute controlled substances other than marijuana) because nothing in Maine's medical marijuana laws authorizes the possession or distribution of controlled substances besides marijuana. *See United States v. Kleinman*, 880 F.3d 1020, 1029 (9th Cir. 2017) (holding that the appropriations rider could not bar prosecution of Counts charging offenses involving the sale of marijuana to out-of-state customers since out-of-state sales were not authorized by state medical marijuana law).[20] Prosecution of all counts against the Poland Defendants may go forward.

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20. Given that certain parties charged in the Count 1 conspiracy have already entered guilty pleas to that count, it might similarly be reasoned that a stay based on the appropriations rider is inapplicable to Count 1—certainly, Maine's medical marijuana laws do not authorize caregivers to conspire with individuals in marijuana activity not authorized by the state medical marijuana program. But rather than delve into the question whether guilty pleas from alleged members of a conspiracy who are not participants in this proceeding may serve as evidence relevant to the Court's findings, the Court bases its findings of noncompliance on the ample evidence of such presented at the hearing.

C. MR's Compliance with Maine Medical Marijuana Law

MR is charged with three counts: manufacturing a controlled substance, maintaining a drug-involved premises, and participating in a money laundering conspiracy. MR takes the position that its role in the 230 Merrow Road cultivation was limited to that of a landlord, and in this role, it was strictly compliant with the MMMP because its only requirement was to lease space nondiscriminately to caregivers and patients, which it did. In support of this position, MR notes that Government witnesses who testified about their involvement at 230 Merrow indicated that Kevin Dean, MR's sole member, was not "at all" involved in marijuana cultivation there and, since he was registered to grow at Lewiston Junction Road, he was in fact prohibited from entering the grow rooms at 230 Merrow. (Tr. 472.) Because 230 Merrow appeared compliant with Maine medical marijuana laws, MR contends that even if Dean had an affirmative duty to ensure the grows at MR's property were legal, he had no lawful way of discerning they were not.

But the Government's evidence links both Dean and MR to Bilodeau in a way that contradicts MR's portrayal of itself as a mere landlord, totally unaware of illegal marijuana production occurring at 230 Merrow. For one, MR did not produce any evidence of a lease agreement between itself and any particular tenant(s) at 230 Merrow; instead, the evidence indicated that Bilodeau ran the show there and at the Cascades site, which Dean owned and where he was registered to grow. It also indicated

that Dean and Bilodeau shared a common, cooperative interest in marijuana—they went in together on a secured loan at 230 Merrow and on a trimming machine, and they registered to grow at the same site, Cascades. Finally, among the alleged drug ledgers seized from Bilodeau's residence, multiple pages include notations of apparent payments to "Kev" and "Kevin." (Gov't Ex. B-61.)

The ample evidence that Dean and Bilodeau were close associates with respect to their marijuana-related activities makes it difficult for the Court to credit MR's argument that Dean, the LLC's sole member, was entirely unaware of the noncompliant practices at 230 Merrow such that his LLC's involvement could fairly be characterized as that of a mere landlord. Certainly, the question here is whether MR, not Kevin Dean, has established its compliance with state law for which it can be held responsible. But the Government's evidence raises the inference that MR, acting through its sole member, was not simply holding property and collecting legitimate rent payments from compliant medical marijuana caregivers. MR, which has the burden of persuasion in this proceeding, has put forward virtually no evidence to overcome this inference and establish, in the face of its sole member's close business relations with Bilodeau and the various payments to "Kev" and "Kevin" noted in the 72 Danville Corner Road ledgers, the likelihood that it lacked any interest in the allegedly noncompliant aspects of marijuana production and distribution at 230 Merrow Road.[21] *See cf. United States v. Agosto-Vega*, 617 F.3d 541,

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21. Because it is irrelevant to the Court's decision, the Court disregards MR's argument that questions regarding the character

553 (1st Cir. 2010) (stating that a factfinder need not "turn a blind eye to the inextricable relationship" between two corporate entities when determining whether one could be culpable for acts of the other's employee). Though it is a closer question here than it is for the other moving Defendants, MR has not proven by a preponderance of evidence that it acted in strict compliance with Maine's medical marijuana laws. Thus, MR's prosecution for unlawful manufacture of a controlled substance at 230 Merrow, maintenance of a drug-involved premises, and conspiracy to commit money laundering may go forward.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss or Enjoin their Prosecution (ECF Nos. 334 & 404) are DENIED.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 20th day of December, 2019.

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of the physical evidence seized at 230 Merrow must be resolved against the Government. The Court concludes that whether or not the marijuana seized at 230 Merrow on February 27, 2018, was technically compliant with MMMP regulations, to meet its burden, MR must establish a likelihood that the company had no interest in the allegedly noncompliant aspects of marijuana production at the site (e.g., distribution and sales to non-patients, fraudulent acquisition of patient cards, etc.). It has not done so.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED FEBRUARY 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-2292

UNITED STATES,

Appellee,

v.

BRIAN BILODEAU,

Defendant - Appellant.

Before

Kayatta, Barron, *Circuit Judges*,
and O'Toole,* *District Judge*.

ORDER OF COURT

Entered: February 23, 2022

Appellant's Petition for Rehearing is *denied*.

By the Court:

Maria R. Hamilton, Clerk

* Of the District of Massachusetts, sitting by designation.