Nos. 10-50219, 10-50264

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

CHARLES C. LYNCH,

Defendant-Appellant/Cross-Appellee.

APPLICATION AND *AMICUS CURIE* BRIEF OF AMERICANS FOR SAFE ACCESS IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Americans for Safe Access reports that it is a non-profit corporation that does not have parent corporations.

DATED: July 9, 2012

Respectfully submitted,

/s/ Joseph D. Elford
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Counsel for *Amicus Curiae*
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APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Americans for Safe Access moves for leave of this Court to file the attached brief *Amicus Curiae* in support of Appellant Charles Lynch ("Lynch"). This application is timely made within seven (7) days after the filing of Appellant's First Cross-Appeal Brief, pursuant to Rule 29(e) of the Federal Rules of Appellate Procedure.

Americans for Safe Access ("ASA") is the nation's largest member-based organization of patients, medical professionals, scientists, and concerned citizens working to promote safe and legal access to marijuana for therapeutic use and research. ASA works to overcome political and legal barriers to the provision of medical marijuana to the seriously ill through legislation, education, litigation, grassroots activism, advocacy, and services for patients and their providers. ASA has over 30,000 active members with chapters and affiliates in more than forty states.

ASA, and its undersigned counsel, have litigated many significant medical marijuana cases in state and federal court, including: *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006) (criminal case in both trial court and appellate proceedings); *United States v. Teague*, No. 03-50425 (9th Cir. 2005) (criminal case on appeal); *Americans for Safe Access v. Drug Enforcement Administration*, No. 11-1265 (D.C. Cir. 2011) (marijuana rescheduling petition); *Ross v. RagingWire*

Telecommunications, Inc., 42 Cal.4th 920 (2008) (employment discrimination under California law); *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798 (2008) (federal preemption of California's medical marijuana law); and *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355 (2007) (return of medical marijuana under state law). ASA has also appeared as an *amicus curiae* in *People v. Mentch*, 45 Cal.4th 274 (2008) and *Qualified Patients Assn. v. City of Anaheim*, 187 Cal.App.4th 734 (2010). The undersigned counsel submitted a declaration and appeared as an expert on California medical marijuana law in the proceedings below. *See* Doc. No. 279.

The outcome of this case is of great concern to ASA because federal prosecutions of California medical marijuana patients and providers are designed to thwart the intent of the California electorate and Legislature to ensure safe access of medical marijuana to seriously ill persons who need it, as promised by California law. Unless Lynch's convictions and sentence are reversed, medical marijuana patients who provide needed medicine to other persons like them who would benefit from it will be deterred from doing so, which will result in needless suffering. Because the trial court, among others, displayed some confusion over the proper application of California's medical marijuana laws, ASA requests leave of this Court to file this instant brief, which addresses this confusion.

Pursuant to Rule 29(c)(5), I certify that no party or counsel for any party in this matter participated in authoring this brief, and no person or entity, except for ASA has made any monetary contribution to fund the preparation or filing of this brief.

DATED: July 9, 2012

Respectfully submitted,

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ARGUMENT

I. INTRODUCTION

Disagreeing with the federal government, both the California electorate and its Legislature have declared that seriously ill Californians who might benefit from the use of marijuana as medicine have the right to obtain and use it where that therapy has been deemed appropriate by a physician. Because many of these seriously ill persons are too sick or unable to cultivate the medicine they need to alleviate their suffering for other reasons, the California electorate challenged the Legislature to design a system for cultivating and distributing marijuana to the seriously ill when they enacted California's Compassionate Use Act ("CUA") in 1996. To meet the voters' challenge, in 2003, the Legislature enacted California's Medical Marijuana Program Act ("MMPA"), which provides that medical marijuana patients who associate collectively or cooperatively to cultivate marijuana shall not be subject to criminal sanctions for marijuana cultivation or sales, or maintaining a place where marijuana is sold. This law establishes that medical marijuana collectives, also known as "dispensaries," that dispense marijuana to their members are legal under state law.

In accordance with this law; indeed, precisely as this law was intended, appellant Charles Lynch ("Lynch") formed the medical marijuana collective Central Coast Compassionate Caregivers ("CCCC") in Morro Bay, California. *See*

Sentencing Memorandum (Doc. No. 327) at 1. Despite Lynch's compliance with state law, on March 29, 2007, the Drug Enforcement Administration ("DEA") raided CCCC, which led to Lynch's federal convictions for: conspiracy to possess and distribute at least 100 kilograms of marijuana; maintaining a premise for the distribution of marijuana; distribution of marijuana to persons under the age of 21 years; possession with intent to distribute marijuana; and cultivating and distributing marijuana. *See* Sentencing Memorandum (Doc. No. 327) at 3-4 & 19. This appeal followed.

II. CALIFORNIA'S MEDICAL MARIJUANA LAWS

On November 4, 1996, the California electorate enacted the Compassionate Use Act, Cal. Health and Safety Code § 11362.5 ("CUA"), "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." Cal. Health & Safety Code § 11362.5(b)(1)(A). Although this law did not expressly provide for a distribution system of marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to

all patients in medical need of marijuana." Cal. Health & Safety Code § 11362.5(b)(1)(C). The 1996 initiative also provided for "primary caregivers" to cultivate marijuana for seriously ill persons who are unable to cultivate their own, Cal. Health & Safety Code § 11362.5(e), but that provision is not at issue here.[1]

To meet the voters' challenge, on September 10, 2003, the California Legislature enacted S.B. 420, also known as the "Medical Marijuana Program Act" or "the MMPA," Cal. Health & Safety Code §§ 11362.7 *et seq*., which provides that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357 [possession of marijuana or concentrated cannabis (hash)], 11358 [cultivation of marijuana], 11359 [possession of marijuana for sale], 11360 [transporting, importing, selling, furnishing, or giving away marijuana], 11366 [maintaining a place for the sale, giving away, or use of marijuana], 11366.5 [making real property available for the manufacture, storage, or distribution of controlled

[1] Many, including the trial court in this case, conflate the "primary caregiver" provision of the CUA, Cal. Health & Safety Code § 11362.5(e), which is not at issue here, with the collective/cooperative provision of the MMPA, Cal. Health & Safety Code § 11362.775, which is. *See* Sentencing Memorandum (Doc. No. 327) at 33 n.25 (discussed *infra* at 14 n.4).

substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage, or distribution of controlled substance]." Cal. Health & Safety Code § 11362.775; *see County of Los Angeles v. Alternative Medical Cannabis Collective*, -- Cal.Rptr.3d --, 2012 WL 2511800, at *4 (Cal. Ct. App. July 2, 2012) ("*AMCC*"); *People v. Urziceanu,* 132 Cal.App.4th 747, 785, 33 Cal.Rptr.3d 859 (2005); *see also People v. Colvin*, 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856, 860 (2012) ("In response to the CUA's encouragement to 'implement a plan to provide for the safe and affordable distribution of marijuana to all patients' in need of it (§ 11362.5, subd. (b)(1)(C)), our Legislature enacted the MMPA (§ 11362.7 et seq.)."); *People v. Hochanadel,* 176 Cal.App.4th 997, 1014 (2009) (noting that the CUA "directed the state to create a statutory plan to provide for the safe and affordable distribution of medical marijuana to qualified patients").

In passing the MMPA, the Legislature declared at its outset its purpose to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." Cal. Stats. 2003, ch. 875 (S.B. 420), § 1, subd. (b)(3). Based on this 2003 law, in August of 2008, the California Attorney General opined that a "properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law. . . ." (*Attorney General Guidelines for the Security and Non-*

Diversion of Marijuana Grown for Medical Use (Aug. 2008) at 11 (Doc .No. 244-6 at 18); *see also* Cal. Health & Safety Code § 11362.778 (recognizing that localities may pass laws to regulate medical marijuana "dispensaries").

In an early case interpreting the MMPA, *People v. Urziceanu*, 132 Cal.App.4th 747, 33 Cal.Rptr.3d 859 (2005), the court went to great lengths to emphasize the difference between the "primary caregiver" model of medical marijuana cultivation provided by the CUA and the new "collective/cooperative" model of distribution provided by the MMPA. *See id.* at 773-86. Like appellant Lynch, Mr. Urziceanu operated a retail medical marijuana dispensary and was charged with conspiracy to sell marijuana. *See id.* at 760-61. After the court observed that such medical marijuana dispensaries are not protected by California law as "primary caregivers" under the CUA (Cal. Health & Safety Code § 11362.5(e)), *id.* at 773-82, the court, then, discussed the later-enacted collective/cooperative provisions of the MMPA, Cal. Health & Safety Code § 11362.775, as follows:

> This new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the [primary caregiver]

> cases we discussed in Part IA which took a restrictive view of the activities allowed by the Compassionate Use Act.

Id. at 785.

Lest there remain any doubt after *Urziceanu* that properly organized storefront medical marijuana dispensaries are legal under California law, as the Attorney General of California opined, *see* Doc. No. 244-6 at 18, the court in *People v. Colvin*, 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856 (2012), reaffirmed this. In *Colvin*, the defendant operated two storefront medical marijuana dispensaries in the Los Angeles area. *See id.* at 858-59. While he was transporting just over a pound of marijuana from one collective to the other, he was arrested and charged with transportation of marijuana, in violation of California Health and Safety Code section 11360. *Id.* at 859. After the trial court precluded him from presenting a medical marijuana collective defense under the MMPA to the marijuana transportation charges against him, since it did not believe that section 11362.775 applied to retail medical marijuana establishments, Colvin appealed. The court of appeal reversed the trial court, reasoning as follows:

> [I]n general, cooperatives are organizations that provide services for use primarily by their members. (Gurnick, Consumer Cooperatives: *What They Are and How They Work* (July/Aug.1985, 8 L.A. Lawyer No. 5, p. 23.) "Entities such as production, service, purchasing, and marketing cooperatives engage on a cooperative basis in producing or procuring goods, services or supplies for members and patrons and promoting use of their members' products and services." (*Ibid.*) Cooperatives perform functions its individual members could not do alone as effectively and conduct business for

> the mutual benefit of members. (*Id.* at pp. 23, 24.). . . . A grocery cooperative, for example, may have members who grow and sell the food and run a store out of which the cooperative's products are sold.
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> * * *
>
> [N]othing on the face of section 11362.775, or in the inherent nature of a cooperative or collective, requires some unspecified number of members to engage in unspecified "united action or participation" to qualify for the protection of section 11362.775.

Id. at 862-63 & 865.

And, very recently, in *County of Los Angeles v. Alternative Medical Cannabis Collective*, -- Cal.Rptr.3d --, 2012 WL 2511800 (Cal. Ct. App. July 2, 2012) ("*AMCC*"), the court held that the County of Los Angeles' complete ban on medical marijuana dispensaries conflicts with, and is thus preempted by, California's medical marijuana laws. *Id.* at *2. The court reasoned that, "[b]y enacting the MMP[A], the Legislature expressly authorized collective, cooperative cultivation projects as a lawful means to obtain medical marijuana under California law." *Id.* at p. *5 (citing Health & Safety Code, § 11362.775). Because "[t]he Legislature also expressly chose to place such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis of the project's medical marijuana activities," a complete ban on medical marijuana dispensaries in a municipality as a zoning ordinance is foreclosed by the MMPA. *Id.* at pp. *5-7. Stated succinctly:

> [The] County's per se ban on medical marijuana dispensaries prohibits what the Legislature authorized in section 11362.775. The contradiction is direct, patent, obvious, and palpable: County's total, per se nuisance ban against medical marijuana dispensaries directly contradicts the Legislature's intent to shield collective or cooperative activity from nuisance abatement "solely on the basis" that it involved distribution of medical marijuana authorized by section 11362.775. Accordingly, County's ban is preempted.

Id. at p. *7. Together with *Urziceanu* and *Colvin*, *AMCC* establishes that properly organized storefront dispensaries are legal under California law.[2]

III. LYNCH ACTED IN COMPLIANCE WITH CALIFORNIA LAW BY FOUNDING AND OPERATING CCCC

Under the collective/cooperative provisions of the MMPA, Lynch opened and operated a storefront medical marijuana dispensary in Morro Bay in compliance with state law. As recommended by the Attorney General Guidelines, *see* Doc. No. 244-6 at 16-18, he applied to the City of Morro Bay for a business license to operate a medical marijuana dispensary, which he obtained. *See* Sentencing Memorandum (Doc. No. 327) at 14. Before allowing anyone to purchase marijuana from CCCC, the patient applying for membership would have to provide valid identification and present a physician's recommendation to use

[2] In one outlying case, *People ex rel. Trutanich v. Joseph*, 204 Cal.App.4th 1512, 140 Cal.Rptr.3d 9 (2012), the court conclusory stated that § 11362.775 "does not cover dispensing or selling marijuana." *Id.* at 1523. This statement appears limited to the unique facts of the case. *See id.* at 1521 ("Joseph failed to present any admissible evidence to establish a defense under the MMPA"). To the extent one construes this statement more broadly to preclude all sales of medical marijuana to qualified patients, such interpretation conflicts with the courts' decisions in *Urziceanu, Colvin* and *AMCC, supra.*

marijuana, which was verified by CCCC. *See* Sentencing Memorandum (Doc. No. 327) at 15-16; *cf.* Cal. Health & Safety Code § 11362.5(b)(1)(A) (defining "qualified patient" as a seriously ill person with a physician's recommendation to use marijuana). The patient would also have to sign a "Membership Agreement Form" wherein he agreed to numerous conditions of CCCC membership, including an agreement to abide by all California laws regarding medical marijuana. *See* Sentencing Memorandum (Doc. No. 327) at 16. Under California law, regardless whether CCCC sold marijuana to persons under the age of twenty-one (21) years,[3] Lynch's operation of the CCCC medical marijuana dispensary was legal. *See Urziceanu; Colvin; AMCC*.[4] At the barest minimum, Lynch reasonably believed

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[3] Whereas federal law makes it a crime to sell marijuana to persons under the age of twenty-one, 21 U.S.C. § 859, California law does not expressly prohobit such conduct and, instead, only prohibits the unauthorized furnishing of maijuana to "minors," who are persons below the age of eighteen. *See* Cal. Health & Safety Code § 11361(a) ("Every person 18 years of age or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale, or peddling any marijuana, who unlawfully sells, or offers to sell, any marijuana to a minor, or who furnishes, administers, or gives, or offers to furnish, administer, or give any marijuana to a minor under 14 years of age, or who induces a minor to use marijuana in violation of law shall be punished by imprisonment in the state prison for a period of three, five, or seven years."); CALJIC § 12.25 (defining "minor" as person below the age of eighteen years); *cf.* Pappas, Tiago, *Providing Property Owners Increased Security in the Conflicting Medical Marijuana Landscape*, 39 Real Estate L.J. 249 (Winter 2010) (noting that some states, including California, allow sales of medical marijuana to minors in certain circumstanes).

[4] The trial court incorrectly concluded that CCCC was not operated in conformity with California law because it did not qualify as a "primary caregiver" under California Health and Safety Code § 11362.5(e). *See* Sentencing Memorandum

this was so, which is a proper consideration at sentencing. *See United States v. Rosenthal*, 266 F.Supp.2d 1091, 1099 (N.D. Cal. 2003), *rev'd on other grounds in* 454 F.3d 943 (9th Cir. 2006).

CONCLUSION

For the foregoing reasons, Lynch's convictions should be reversed and his sentence vacated.

DATED: July 9, 2012

Respectfully submitted,

/s/ Joseph D. Elford
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AMERICANS FOR SAFE ACCESS

(Doc. No. 327) at 33 n.25. This may be so, but Lynch is not now contending that he is a "primary caregiver" under California law; rather, he contends that his activities were legal under California law because he was operating a collective under California Health and Safety Code section 11362.775. The trial court cites the California Supreme Court's decision in *People v. Mentch*, 45 Cal.4th 274 (2008) for the proposition that a medical marijuana dispensary does not qualify as a "primary caregiver," but that provision of law is not at issue here. Instead, the provision of California law at issue is the collective/cooperative provision of the MMPA, Cal. Health & Safety Code § 11362.775, which was not discussed in *Mentch*. The authorities cited *supra – Urziceanu, Colvin* and *AMCC* – pre- and post-date the *Mentch* decision and establish that, under Califonia law, Lynch's conduct was legal.

CERTIFICATE REGARDING BRIEF FORM

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for *Amicus Curiae* Americans for Safe Access in this matter. Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, on July 9, 2012, I performed a word count of the above-enclosed brief, which revealed a total of 2,632 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of July in Oakland, California.

/s/ Joseph D. Elford
JOSEPH D. ELFORD

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: July 9, 2012

Respectfully Submitted,

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