No. 24-

IN THE

Supreme Court of the United States

LUCAS SIROIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Since December 2014, Congressional appropriations for the Department of Justice have included the following provision:

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

Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022) (the "Rohrabacher-Farr Amendment").

The questions presented are:

> (1) Given this prohibition on the use of appropriated funds, under what circumstances may the Department of Justice criminally investigate and prosecute an individual who is licensed or otherwise authorized to use, distribute, possess, or cultivate medical marijuana?
>
> (2) Does the burden fall on the Government to show it is in continued compliance with appropriation law; or does it fall with the Petitioner-defendant to demonstrate "substantial compliance" with state laws and

regulations regarding medical marijuana, as the First Circuit has held or that he or she is in "strict compliance," as the Ninth Circuit has held?

(3) What would be the proper test for the Petitioner-defendant to demonstrate either strict or substantial compliance?

RELATED CASES

There are two related cases from the First Circuit: *United States v. Sirois*, No. 23-1721, United States Court of Appeals for the First Circuit, Judgment Entered October 15, 2024, Petition for Rehearing Denied November 14, 2024; and *United States v. Sirois*, No. 23-1723, United States Court of Appeals for the First Circuit, Judgment Entered October 15, 2024, Petition for Rehearing Denied November 14, 2024. There is one related case from the District Court: *United States v. Sirois*, No. 21-cr-00175, United States District Court for the District of Maine, Pending.

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Lucas Sirois respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 119 F.4th 143. The district court's opinion denying petitioner's motion to enjoin prosecution is unreported and reproduced at App., *infra*, 34a.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2024. A petition for rehearing *en banc* was denied on November 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision involved in this case is the Rohrabacher-Farr Amendment:

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

Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022).

The Appropriations Clause of the U.S. Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. Const. art. I, § 9, cl. 7.

STATEMENT

This case presents a critical question at the intersection of congressional appropriations law, the separation of powers, and the state-legalized (yet federally prohibited) medical marijuana industry. To date, 38 States, the District of Columbia, Puerto Rico, and other American jurisdictions have legalized marijuana for medical or recreational purposes.[1] As of 2024 the U.S. industry for state-legalized marijuana is estimated to be over $38 billion, with medicinal cannabis sales, protected by the Rohrabacher-Farr Amendment estimated at $11.4 billion.[2]

For a decade, Congress has blessed the domestic medical marijuana industry by prohibiting the Department of Justice ("DOJ") from interfering with state-legalized medical marijuana markets. In an annual appropriations rider known as the "Rohrabacher-Farr Amendment," ("Rohrabacher-Farr," or the "Amendment"), Congress has used broad language to restrict DOJ from expending funds in such a manner as to restrict a State's ability to

1. U.S. Centers for Disease Control and Prevention, Cannabis and Public Health, "State Medical Cannabis Laws", *available at* https://www.cdc.gov/cannabis/about/state-medical-cannabis-laws.html.

2. MJ Biz Daily, U.S. Cannabis Retail Sales Estimates: 2022–28 & U.S. Medical Cannabis Sales Estimates: 2022–28, *available at* https://mjbizdaily.com/us-cannabis-sales-estimates/.

"implement" its laws and regulations with respect to the use, distribution, possession, or cultivation of medical marijuana.

The United States Courts of Appeals for the First and Ninth Circuits have come to differing and incompatible conclusions as to the breadth of Congress's restriction. Those conclusions are also in conflict with the text and intent of Rohrabacher-Farr. This case presents an opportunity for the Court to resolve the circuit split and provide a definitive interpretation of Congress's language. Doing so would also guide Congress on how to craft limiting language that appears now or might appear in the future in appropriations bills—and guide courts on how to properly interpret such limiting language—so that Congress may better exercise its Article I powers. Put simply, the Court has an opportunity uphold Congress's "power of the purse" and clarify how the first branch of government may check the executive within our constitutional separation of powers. In doing so, the Court can settle the substantial uncertainty that exists related to the protections afforded to the medical marijuana patients, distributors, cultivators, and regulators pursuant to the Rohrabacher-Farr Amendment.

Petitioner argues that the government's actions in this case violate Rohrabacher-Farr resulting in DOJ spending funds not appropriated by Congress. Therefore, DOJ's actions were invalid and the Court of Appeals for the First Circuit must be reversed.

BACKGROUND

A. Federalism and the Development of State-Sanctioned Medical Marijuana Markets

The Supreme Court has long recognized that States are the laboratories of democracy and must have some opportunity to experiment with policy—wise or unwise. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) ("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

For approximately three decades, States have experimented with legalizing the possession, sale, and use of marijuana for various purposes despite ongoing federal prohibition. Maine began that experiment in 1979, legalizing research into the therapeutic potential of marijuana. In 1999, the State legalized the use, possession, and sale of marijuana for medical usage and legalized it for recreational usage in 2016.

A few States before—and many States after—followed Maine's example. Today, some 38 States and the District of Columbia have legalized marijuana for medicinal purposes comprising approximately 74% of the population.[3] This has left the Federal Government with

3. Athena Chapekis and Sono Shah, "Most Americans now live in a legal marijuana state—and most have at least one dispensary

a quandary: marijuana remains a Schedule I drug under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (the "CSA"), making its possession and use illegal under federal law, but the vast majority of Americans live in States where their "first sovereign" has said it is legal.

B. The Rohrabacher-Farr Amendment

For various structural and political reasons, Congress has been unable to cut this Gordian knot. Instead, through negotiation and use of Congress's spending power, it has pursued a middle ground that balances federal and state law and policy priorities.

Since December 2014, Congressional appropriations for the DOJ have included the following provision:

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

Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022).[4] This rider

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in their county," PEW Research Center (Feb. 29, 2024), *available at* https://www.pewresearch.org/short-reads/2024/02/29/most-americans-now-live-in-a-legal-marijuana-state-and-most-have-at-least-one-dispensary-in-their-county/.

4. Due to differences between the Senate and House Parliamentarian rules, the Amendment, having originated in the

is commonly referred to as the "Rohrabacher-Farr Amendment."[5]

Although the Amendment's history goes back to 2001, it gained Congressional approval and became law in 2014. By that time, the nascent state-legalized and regulated medicinal cannabis industry had grown to over 20 States and billions of dollars. Congressman Dana Rohrabacher, the Amendment's original Republican sponsor, was concerned about interfering with the industry's growth through the use of criminal prosecutions. Rep. Rohrabacher explained that the amendment was needed because "[d]espite this overwhelming shift in public opinion, the Federal Government continues its hard-line oppression against medical marijuana." 160 Cong. Rec. H4983 (daily ed. May 29, 2014) (Statement of Rep. Rohrabacher). Among the justifications for resolving this conflict of laws in the favor of states, Congressman Rohrabacher argued that the Federal Government's hard-line approach failed to respect the Tenth Amendment. *Id.*

Representative Earl Blumenauer, who later became the lead Democratic sponsor after Congressman Farr's retirement, stated, "[t]his amendment is important to get the Federal Government out of the way [of the state-

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House, must enumerate each territory to which it applies. As new States pass medicinal marijuana provisions, congress must update the provision to add those new States.

5. It was later called the "Rohrabacher-Blumenauer" amendment after Congressman Farr left congress in January 2017. It was also called the Mikulski Amendment once Senator Barbara Mikulski became its lead sponsor in the Senate Appropriations Committee. However, it will be referred to in this Petition as the Rohrabacher-Farr Amendment.

legalized medical marijuana industry]." *Id.* at H4984 (statement of Rep. Blumenauer). The Amendment's original Democratic sponsor made the Amendment's purpose in balancing the relationship between state and federal authority abundantly clear: it tells people "if you are following State law, . . . doing your business under State law, the Feds just can't come in and bust you . . . ." *Id.* (statement of Rep. Farr). In other words, the traditional legal enforcement regime was stymied; Congress instructed DOJ to let the States enact and enforce state laws concerning medical marijuana.

Representatives Rohrabacher and Farr sent a letter to then-Attorney General Eric Holder to clarify the meaning and intent of the Amendment, explaining DOJ's interpretation of their amendment was emphatically wrong. "Rest assured, the purpose of our amendment was to prevent the Department from wasting its limited law enforcement resources on prosecutions and asset forfeiture actions against medical marijuana patients and providers, including businesses that operate legally under state law." Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to U.S. Attorney General (Apr. 8, 2015), available at https://american-safe-access.s3.amazonaws.com/documents/Rohrabacher-Farr_Letter_to_DOJ.pdf.

As Reps. Rohrabacher and Farr further explained in their letter to Attorney General Holder, "to the extent that there may be questions about whether the facts of . . . [a] specific case constitute violations of state law, we suggest that state law enforcement agencies are best-suited to investigate and determine [the legality of such actions] *free from federal interference*." *Id.* at 2 (emphasis added).

It is unusual for the co-sponsors of a bill to write a letter to cabinet member advising them on the proper interpretation and application of the law.[6] The Representatives had reason to be worried about federal law enforcement, some with entrenched and inflexible views on relaxing cannabis prohibition, failing to heed the clear prohibition laid out in their Amendment.

What is clear is that Congress intended the Amendment to serve as a check on the Federal Government's power to criminally prosecute those acting pursuant to state law even if they were violating the CSA.

C. *United States v. Bilodeau*

In *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022), the First Circuit considered how the prohibition on DOJ spending acts to prevent prosecution of a defendant operating under Maine's medical marijuana laws. The *Bilodeau* court rejected the notion that only a defendant in strict compliance with the requirements of state medical marijuana laws is entitled to protection from prosecution (which was the approach adopted by the Ninth Circuit), recognizing the practical infeasibility of any person always remaining in strict compliance. *Id.* at 713.

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6. Representatives Rohrabacher and Farr also submitted an amicus brief to the Ninth Circuit in 2015 detailing their position. *See* Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as Amici In Support of Charles C. Lynch's Motion for *Rehearing En Banc* at 17, *United States v. Lynch*, No. 10-50219, Dkt. 103 (9th Cir. May 4, 2015) (quoting Letter from Dana Rohrabacher and Sam Farr, U.S. House of Representatives, to Eric Holder, Attorney General (Apr. 8, 2015), *available at* https://cdn.ca9.uscourts.gov/datastore/general/2015/05/08/10-50219%20Amicus%20by%20Rohrabacher.pdf.

The Court of Appeals noted the very real danger that "federal prosecution hanging as a sword of Damocles, ready to drop on account of any noncompliance with Maine law" would interfere drastically with participation in and Maine's regulation of its medical marijuana market. *Id.* at 713–14. The Court of Appeals likewise rejected the idea that the Rohrabacher-Farr Amendment creates a safe harbor for any defendant who holds a state license to partake in medical marijuana activity, regardless of intentionally blatantly illegal activity. *Id.* at 714.

Instead, the Court of Appeals charted a "middle course" to effectuate Congress's intended "nuanced scope of prohibition." *Id.* at 713. At one end of this sliding scale, a defendant in strict compliance with Maine law and a defendant who engages in minor or technical noncompliance under the law are both clearly within the scope of conduct protected from prosecution. On the other end, those who are using the façade of compliance to sell illicitly, or other conduct that Maine explicitly warned could subject a cardholder to conviction, are not protected from prosecution. *Id.* at 715 (citing 10-144-122 Me. Code R. § 10.5.1 (2013)).

Following *Bilodeau*, then, a defendant is protected from prosecution when it is more likely than not that the defendant was in substantial compliance with Maine law and regulation, or that any noncompliance was not of the extent anticipated under Maine law to result in severe punishment.

D. Maine's Medical Marijuana Laws and Regulations

Maine first enacted the Maine Medical Use of Marijuana Act ("the Act"), Me. Rev. Stat. Ann. Tit.

22, § 2421 *et seq*., to authorize the use, distribution, possession, and cultivation of medical marijuana and the operation of marijuana dispensaries in 2009. Seventy-two pages of detailed regulations set out numerous technical requirements for establishing compliance with the law soon followed. *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. In general, the laws provide for issuance of a caregiver card to a person who is then permitted to possess, cultivate, and transfer marijuana for qualifying patients. *See* 2.22 MRSA §2422 sub-§8-A; §2423-A, sub-§2. Caregivers may pay assistants to perform services for them as an employee or as an independent contractor. *Id*. §2422 sub-§1-D.

The Act also includes protections from prosecution, search, seizure, and similar penalties for persons engaged in conduct authorized under the Act. *Id.* §240-C. On the other hand, if program participants sell, furnish, or give cannabis to a person not authorized to possess it, their registration may be suspended or revoked. *Id.* §2430-F. The specific requirements of Maine's program have changed significantly over the years as the law developed with a trend toward an increasingly less restrictive market approach. In 2011, for example, LD 1296 added a prohibition on "collectives," defined as "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." The Act specifies collectives are *not* caregivers assisting each other for the benefit of the same patient, transferring cannabis plants, engaging in an employer-assistant relationship, and sharing common areas and utilities within a facility

are all permissible, non-collective arrangements and activities. *Id.* §2430-D.

Beginning in December 2018, Maine's law underwent another major change: LD 1539 enacted seven new provisions, amended seventeen, and repealed five. Importantly, this change permitted caregivers to serve patients without completing a patient designation form or obtaining a patient designation card because patients were no longer required to designate a specific caregiver. Additionally, cultivation limits were increased to allow up to 30 flowering and 60 vegetative plants, regardless of how many patients the caregiver served. Most importantly, LD 1539 designed a new wholesale program that allowed caregivers to transfer, for profit, up to 30 percent of the mature marijuana plants grown by the caregiver over the course of a calendar year, including harvested marijuana, marijuana products, or concentrates manufactured from that 30 percent.

In 2019, Maine's governor transferred oversight of medical marijuana to the newly created Office of Marijuana Policy ("OMP"). Also in 2019, the regulations changed to increase the percentage of marijuana allowed to be sold wholesale from 30 percent to 75 percent. A registered caregiver was also allowed to transfer or receive an unlimited amount of immature marijuana plants and seedlings in wholesale transactions from other registered caregivers and dispensaries. Significantly, a registered caregiver acquiring marijuana in such a wholesale transaction was permitted to resell the marijuana to a qualifying patient or to another registered caregiver or dispensary to assist a qualifying patient. 2.22 MRSA §2423-A sub-§2, para K-1.

E. Federal Investigation of Petitioner's Licensed Marijuana Business Operations

Petitioner obtained a caregiver license to participate in Maine's medical marijuana program in 2010. He and his wife, Alisa, applied to operate four medical marijuana dispensaries as soon as the law allowing for such was enacted, speaking publicly on their plans to enter the legal marketplace.[7]

That same year, DOJ initiated an investigation into Petitioner. *See* Case No. 23-1723, Document: 00118065754, 10/20/2023 (Appendix to Petitioner's Appellate Briefing) at JA 231. As Petitioner was a licensed lawful participant in the State's new medical marijuana program, the investigation went nowhere. Petitioner spent the next several years attempting to build a business within the evolving regulatory framework of Maine's medical marijuana marketplace. He purchased the old "Shoe Shop" in Farmington, Maine, transforming the historically significant structure into a modern commercial medical cannabis cultivation facility, within which individual caregivers rented rooms. *See id. at* JA 164. He also formed Lakemont, LLC, which, among other things, purchased marijuana wholesale from Shoe Shop caregivers and conducted medical marijuana sales under Mr. Sirois' caregiver license. *Id.* He also owned the Homegrown Connection, a garden supply store catering specifically to the needs of cannabis cultivators. *Id*. at JA 235. Mr. Sirois worked closely with lawyers to design and modify his businesses throughout continued changes in Maine's laws and regulations. *See*, *e.g.*, *id*. at JA170, JA 402, 577–576.

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7. *See* https://www.pressherald.com/2010/06/13/man-aims-to-oversee-half-of-pot-operations_2010-06-13.

Meanwhile, in 2018, a suspect in another large-scale marijuana investigation mentioned Petitioner as someone with an extremely large grow operation during a proffer session. *Id. at* JA 229. Although Petitioner was a licensed caregiver under Maine's laws, the mention of his large grow operation sparked a preliminary investigation and caused DOJ to reopen its investigation of Defendant. *Id.* In the words of the agent in charge of the investigation, the DOJ "just opened the investigation to see if we can learn anything else." *Id.* at JA 230. That is, they went on a fishing expedition. Despite their best efforts, however, DOJ caught no evidence to corroborate any allegations against Petitioner. *Id.* at JA 233, 262.

When Maine altered their laws in 2019, Petitioner and other medical marijuana providers set up meetings with their new regulator, OMP, and the Maine Attorney General's office to ensure that all parties had the same understanding of the new statutory language. On June 28, 2019, OMP inspected Petitioner's caregiver facility for compliance, going through the compliance checklist to inspect total plant counts for mature and immature plants; employee registrations, cards and personnel files; required food licenses; designation forms and required paperwork for minors, family, household members and out of state visiting patients; packaging and labeling; security features such as locks, fencing and other measures; and all trip tickets. *Id.* at JA 61–66. The Inspector discussed concerns, including as related to potential "collective" issues, and requested a plan of correction, which Petitioner immediately prepared and submitted. Thereafter, OMP concluded there was no finding of non-compliance with Maine law and regulation. *Id.* at JA 60.

Although still having no evidence linking Petitioner himself to any illegal activity, in July 2020, DOJ applied for a search warrant to raid Petitioner's businesses. In his application, the Drug Enforcement Agency ("DEA") agent claimed the "Rohrabacher-Farr amendment does not apply to this investigation [because] . . . members of the conspiracy traffic in both marijuana and cocaine which takes the conspiracy's activities far outside Maine's Marijuana laws." *Id.* at JA 269. The DEA agent admitted at the evidentiary hearing in the district court that there was no evidence of Defendant having anything to do with cocaine. *Id.* at JA 243, 270. Because of the federal raid, Maine's OMP suspended Petitioner's license and investigated the allegations of conduct outside program rules that were at issue in the search warrant. *Id.* at JA 221, 225. OMP then reinstated his license on September 15, 2020. *Id*. at JA 178. OMP indicated its intent to soon conduct a thorough inspection of Petitioner's activities and reserved the right to take action pending OMP's findings. *Id.* at JA 67. Thereafter, OMP issued Petitioner a new caregiver license on March 22, 2021. *Id.* at JA 68. His businesses have undergone additional inspections by OMP on January 5, 2022; March 3, 2022; March 17, 2022, and May 16, 2022. *Id.* at JA 33, n.13. Each inspection found no non-compliance with state law, and Petitioner's license was again renewed in June 2022 and again in June 2023. *Id.* at JA 33, 738.

F. Procedural History

On October 20, 2021, DOJ filed a sealed criminal complaint charging Petitioner with a laundry list of offenses, beginning with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances

in violation of 21 U.S.C. § 846. Each count, as it applied to Petitioner, arose from his business and activities as a licensed medical marijuana provider. On November 9, 2021, the United States District Court for the District of Maine received and filed an indictment charging Petitioner and his "conspirators" based on conduct "from at least about 2016," and asserting forfeiture allegations to result in forfeiture of real property, vehicles, significant sums of U.S. Currency, and the full contents of numerous bank accounts. Petitioner surrendered himself. Pre-Trial Services recommended Petitioner's release and he immediately, through counsel, protested the illegal nature of this prosecution undertaken in violation of the Rohrabacher-Farr restrictions upon DOJ spending.

On September 9, 2022, Petitioner sought to enjoin DOJ from prosecuting him for offenses related to his cultivation and distribution of marijuana under the CSA. Petitioner did so on the ground that the conduct for which the DOJ investigated and indicted him under the CSA was in "substantial compliance" with the Maine Medical Use of Cannabis Act, Me. Rev. Stat. Ann. tit. 22, § 2421 *et seq.*, which sets forth conditions under which it is lawful to possess, use, cultivate, and distribute marijuana for medical purposes.

A three-day evidentiary hearing was held on June 26 through June 28, 2023. Evidence from hearing showed that Petitioner was found to comply with Maine law by Maine regulators. *See*, *e.g.*, Hearing Testimony of Vernon Malloch, Deputy Director of Operations at OCP, who testified that Petitioner was "in good standing with the OCP at [all relevant times] as far as the state is concerned." *See* District Court ECF Docket No. 422 (Tr. 6/26/23) at p. 78).

The District Court subsequently ruled on Petitioner's Motion to Enjoin Prosecution. *See* App, infra, 34a. The District Court denied the motion. *See* App. at 35a. Citing *Bilodeau*, the District Court found that, as written, the Rohrabacher-Farr Amendment, "expressly forbids" DOJ spending from 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 medical marijuana. App. 35a. The District Court found that, based on the Amendment and *Bilodeau*, a person who participates in a state medical marijuana program who is charged federally with marijuana trafficking may prevail on a motion to enjoin if that person makes a showing demonstrating (1) full compliance with state law, (2) evidence that any noncompliance with state law involved only technical violations, or perhaps even (3) evidence on a nontechnical violation where the violation would not be grounds under state law to revoke the person's participation in the state program. *See* App. at 36a.

The District Court ultimately ruled that a "reasonable mind" might accept that DOJ's investigation arose from a sufficient amount of nontechnical noncompliance with the Maine medical marijuana law. *See* App. at 39a. The District Court based its decision, in large part, on Petitioner's "possible" violation of the rule against collective grow operations. *See* App. at 41a. The court noted, but gave no weight to, the fact that Maine's OMP did not find Petitioner to be in violation of Maine's relevant regulations during the pendency of DOJ's investigation. App. at 40a.

Petitioner timely appealed the District Court's denial of his Motion to Dismiss. The First Circuit denied

Petitioner's appeal and affirmed the District Court. *See United States v. Sirois*, 119 F.4th 143 (1st Cir. 2014). The First Circuit emphasized that it had not announced in *Bilodeau* the "precise" level of compliance with state medical marijuana laws and regulations that *a party must show* to be entitled to enjoin a federal prosecution pursuant to the Rohrabacher-Farr Amendment. *See id.* at 148. Instead, the first Circuit "held in *Bilodeau* that the party seeking an injunction pursuant to the Rohrabacher-Farr Amendment bears the burden of demonstrating that the challenged DOJ action would 'prevent[] a state from giving practical effect to its medical marijuana laws.'" *Id.* at 152 (quoting 24 F.4th at 713, 715–16). It thus concluded that *Petitioner* "therefore bear that burden of proof here." *Id.* (quoting *United States v. Dockray*, 943 F.2d 152, 155 (1st Cir. 1991)).

The First Circuit here found that the evidence at the hearing "tended to show" that Petitioner's business operation at the Shoe Shop operated as a "collective" in violation of Maine's marijuana regulations, reading into the regulations a financial test that examines financial, rather than physical, relationships between caregivers. The court based this analysis not on a physicality test (as set forth in relevant regulations), but instead on Petitioner's financial operations. *See*, 119 F.4th at 154–57 (discussing the Shoe Shop's financial operations and records and finding them to be indicative of a prohibited collective). There is no financial test enumerated in Maine's Medical Use of Cannabis Act. The First Circuit improperly read a financial test into the statute and did not focus its analysis on the physicality test set forth in the statute.

The First Circuit suggested in its denial of Petitioner's Motion to Dismiss that the appropriate standard should be a "substantial compliance" standard. *Id*. at 156–57. In doing so, the First Circuit made two critical errors. First, it required the defendant to, essentially, prove his or her innocence instead of making the government prove that its investigation and prosecution had continued justification sufficient to expend appropriated funds. Second, as in *Bilodeau*, the First Circuit failed to define the contours of that standard or provide appreciable guidance to criminal defendants as to how to demonstrate such "substantial compliance." The panel simply noted, "to be entitled to the injunctive relief that they seek, [defendant] must show by a preponderance that, notwithstanding the affirmative evidence of what the governments asserts is their respective non-compliance, it is more likely than not that they were in substantial compliance with the Act and its associated regulations." *Sirois*, 119 F.4th at 153.

Given the gravity of the potential consequences in cases such as this one, this outcome is not tenable. This "guidance" is unclear—if not completely lacking. Current and prospective participants in Maine's medical marijuana program deserve clarity as to what showing must be made to establish substantial compliance.

The First Circuit's decision below and this Court's decision in *Bilodeau* both leave unresolved the specific extent of compliance with state law that a defendant must demonstrate to successfully invoke protections under Rohrabacher-Farr.

Petition timely petitioned the First Circuit for rehearing *en banc* on October 29, 2024. The First Circuit

denied the petition for rehearing and the petition for rehearing *en banc* on November 14, 2024. *See* App. at 42a-43a. A mandate was issued on November 22, 2024.

REASONS FOR GRANTING THE PETITION

The Court should review the First Circuit decision, resolve the circuit split between it and the Ninth Circuit, and remand for the First Circuit while providing guidance to lower courts as to the proper interpretation of the Rohrabacher-Farr Amendment. It should further hold that the Federal Government bears a continuing burden to ensure whether an investigation or prosecution of an individual working within a state-legalized medical marijuana regime complies with the Amendment's funding prohibition, and must end the investigation or prosecution if it becomes more likely that the targeted individual is, in fact, in compliance. Requiring the Petitioner, as the First Circuit did, to prove his or her innocence absolves the Executive Branch of ensuring compliance with Congress's funding limitations and dictates.

Granting this petition will allow this Court to address issues of fundamental importance to the U.S. Constitution, including Congress's "power of the purse" and role within the separation of powers. There is an urgent need to intervene. Whatever may be gained by waiting to take on this question is significantly outweighed by the need to get Congress, DOJ, and the courts on the same page as to the proper meaning of the Rohrabacher-Farr Amendment.

A. There is an Intractable Split between the Ninth and First Circuits

The Ninth and First Circuits agree on one issue but diverge on others. They both agree—incorrectly—that a defendant bears the burden of proving his or her compliance with state medical marijuana laws in order to avail themselves of the Amendment's protections. However, they disagree as to the degree of compliance required. Neither provides sufficient direction as to how a defendant can prove compliance.

Specifically, the split is between the First Circuit's opinions in *United States v. Sirois*, 119 F.4th 142 (1st Cir. 2024) and *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022) on one side, and the Ninth Circuit's opinions in *United States v. Evans*, 929 F.3d 1073 (9th Cir. 2019) and *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) on the other. The split concerns whether a defendant would need to show whether they were in "substantial compliance" (the First Circuit's position) or "strict compliance" (the Ninth Circuit's position) with their state's marijuana laws and regulations in order to invoke the Rohrabacher-Farr Amendment.

The First Circuit agrees with the Ninth to an extent, stating that they "follow[ed] the lead of the Ninth Circuit Court of Appeals in [McIntosh]" by concluding that "by the terms of the Rohrabacher-Farr Amendment, 'the DOJ may not spend funds to bring prosecutions of doing so prevents a state from giving practical effect to its medical marijuana laws.'" *Sirois*, 119 F.4th at 148 (quoting *Bilodeau*, 24 F.4th at 713). The court "disagreed with our Ninth Circuit colleagues, however, as to how to determine

'under what circumstances federal prosecution would prevent [a State] from giving practical effect to' its medical marijuana laws." *Id.* (quoting *Bilodeau*, 24 F.4th at 713 (alteration in original)).

The First Circuit had "made clear in *Bilodeau* that a party who seeks to enjoin their prosecution for an alleged marijuana-related CSA violation need not demonstrate 'strict compliance' with a state's laws and regulations that make the possession, cultivation, or distribution of medical marijuana lawful." *Id.* (quoting *Bilodeau*, 24 F.4th at 713). While *Bilodeau* "did not attempt to decide precisely *how* compliant such a party must have been with such laws and regulations to be entitled to an injunction pursuant to the Rohrabacher-Farr Amendment," *id.*, a "substantial compliance" standard was used in *Sirois*, *id.* at 149, 152.

This stands in contrast to the approach of the Ninth Circuit. The court in *McIntosh* concluded:

> Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such conduct does not violate [the Rohrabacher-Farr Amendment].

833 F.3d at 1178 (alteration added). The Ninth Circuit later reaffirmed this view in *Evans*, stating that while the

> DOJ could not spend appropriated funds to prosecute 'individuals who engaged in conduct permitted by the State Medical Marijuana

> Laws.' Nevertheless, because prosecution of *non*-compliant defendants 'does not prevent the implementation' of such laws,' we stressed that defendants would not be able to enjoin their prosecutions unless they 's*trictly complied* with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.'

929 F.3d at 1076 (quoting *McIntosh*, 833 F.3d at 1173, 1177 (emphasis in original)).

Therefore, we have a clear divergence between the two Courts of Appeals that have addressed it as to the basic standard applicable to defendants seeking to enjoin prosecutions under Rohrabacher-Farr. This issue will be dispositive to many potential defendants and determine whether they will face an intrusive, disruptive, and lengthy criminal investigation and prosecution.

To resolve the problems caused by the split, this Court should (1) clarify that the Federal Government has a continuing obligation to ensure compliance with the Amendment; (2) should the defendant bear a burden to show compliance, determine the correct standard to apply; and (3) provide guidance as to how a citizen could demonstrate compliance based on that standard.

B. Both Circuits Conflict with the Text and Intent of the Rohrabacher-Farr Amendment

Not only are precedential decisions of the First and Ninth Circuits at odds with one another, creating uncertainty as to how courts will interpret and implement the Rohrabacher-Farr Amendment, but both courts also incorrectly interpret and apply the scope of the

Amendment. It places a limitation on *DOJ*. The Federal Government should have an ongoing obligation to make sure they have not exceeded the limits of their authority by violating Rohrabacher-Farr. DOJ should not be able to act illegally and then place the burden on defendants to prove *their own* compliance with the law.

Should defendants be required to show that they have been in accordance with the law, the Court must explain how defendants could show such compliance. Potential criminal defendants have no predictable way to determine whether their conduct is illegal; the First Circuit has failed to provide a rubric for how a defendant can demonstrate compliance. The Court needs to state the correct standard and how it will apply. Whatever test the Court determines must respect the broad meaning of the Amendment and how it intersects with Congress's power of the purse and the separation of powers principles represented therein. The test must also give effect to the Amendment's purpose of promoting federalism—allowing States with medical marijuana programs to regulate and police themselves free from DOJ interference.

While the First Circuit's "substantial compliance" test would sound more favorable to criminal defendants than the Ninth's "strict compliance," neither provides potential criminal defendants with the protection Congress promised to them via the Amendment. And neither court has provided potential criminal defendants with any workable and predictable standard against which they could judge whether they could be subject to federal prosecution.

In explaining why both Circuits are wrong, let us start, as we should always, with the text. The Rohrabacher-Farr Amendment reads:

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

Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022).

Courts should interpret statutes to give effect to the clearly stated will of Congress. *See*, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("[T]he basic and unexceptional rule [is] that courts must give effect to the clear meaning of a statute as written."). The Amendment is a broad and complete ban on DOJ interfering with state-authorized medical marijuana programs.

By forbidding the use of funds, Congress effectively suspended any powers DOJ may have had under other federal laws to criminally prosecute those engaged in medical marijuana activity for such activity.

The Amendment says that "*[n]one* of the funds" appropriated to DOJ may be used in this manner. 136 Stat. at 4561 (2022) (emphasis added). This is absolute, giving States primary power in ensuring their citizens comply with state marijuana laws. The First and Ninth Circuits have nullified the meaning of the Amendment by (1) converting a restriction on the DOJ as a burden for a defendant to demonstrate; and (2) subjecting this total prohibition to the conditional and contingent "substantial" and "strict compliance" tests—classic judge-made tests that have no rooting in the statute being enforced—and then placing a burden on the illegally investigated and

prosecuted defendants to show *their* compliance with the law.

Congress has the power of the purse and the ability to dictate how and whether the public's money may be spent. The Appropriations Clause of the U.S. Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. Const. art. I, § 9, cl. 7. This "straightforward and explicit command . . . means simply that no money may be paid out of the Treasury unless it has been appropriated by an act of Congress." *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted); *see also McIntosh*, 833 F.3d at 1174.

Congress can, by forbidding the use of funds for a particular purpose, effectively suspend or repeal a conflicting law. *See United States v. Will*, 449 U.S. 200, 222 (1980) ("when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriations bill'") (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). Congress may achieve its policy objectives, just as it would through any other type of legislation, through an appropriations rider. *See id.*; *see also Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 229 (1st Cir. 2003) (upholding one-year ban on use of fish spotters, effectuated through an appropriations bill, because "[d]eciding what funds shall be appropriated from the public fisc and how that money is to be spent is a task that the Constitution places in the congressional domain.").

The First and Ninth Circuits take the approach that, while the Amendment may say "none," some federal intervention is nonetheless permitted under their

understanding of what it means to expend funds "to prevent any [State with a medical marijuana program] from implementing their own laws." 136 Stat. at 4561 (2022). The First Circuit held that the position 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" was "stretch[ing] the rider's language beyond its ordinary meaning." *Bilodeau*, 24 F.4th at 714; *see also id.* ("Congress surely did not intend for the rider to provide a safe harbor to all caregivers with facially valid documents[.]"). The Ninth Circuit, after analyzing the meaning of the Amendment's phrase "laws that authorize the use, distribution, cultivation of medical marijuana," concluded that DOJ does not violate the Amendment "when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws." *McIntosh*, 833 F.3d at 1178.

The interpretations of each Court of Appeal are inconsistent with the Amendment's text and purpose. It seems as if neither Circuit could imagine a world in which Congress wanted the Federal Government to keep its nose out of state-authorized medical marijuana programs and to allow the States to regulate and police their own citizens when violations happen. In doing so, the Courts of Appeals have undermined the separation of powers inherent in Congress's power of the purse and have undermined the basic notions of federalism embodied by leaving this issue to the States (for the time being).

DOJ does not have some inherent authority to investigate and arrest those adhering to the strictures of state medical marijuana programs. Congress passed the legislation that made marijuana a controlled substance

and gave DOJ related law enforcement powers. Congress may then choose to suspend DOJ's powers to enforce these laws in certain circumstances, as it has done with the Amendment. Even when license-holders act outside of their State's laws and regulations pertaining to medical marijuana, there should not be an assumption that the Federal Government must, then, be able to step in when *the Federal Government* determines that state law has been violated. It is okay to let the States regulate and police themselves in this area, including determining when people have violated medical marijuana laws and punishing them accordingly.

To the First Circuit, it was inconceivable that "none of the funds" could actually mean "none"—there must be some allowance for federal intervention in States that have medical marijuana programs. *See Bilodeau*, 24 F. 4th at 714 (rejecting defendant's argument in one paragraph without citations to case law). The Ninth Circuit was more thorough, but rejected the clear import of the Amendment because it only forbade DOJ interference with state laws that "*authorize* the use, distribution, possession, or cultivation of marijuana." *McIntosh*, 833 F.3d at 1178 (emphasis added). In the Ninth Circuit's opinion, Congress should have said something to the effect of "prohibit the interference with laws that address medical marijuana or those that regulate medical marijuana." *Id.*

The Ninth Circuit waived away the clear and thorough legislative history showing that Congress intended Rohrabacher-Farr to direct DOJ to cease prosecuting people involved in medical marijuana, and to leave the matter to the States to regulate and police. *Id.* at 1178–79. In the typical case, legislative history *would*

be of diminished importance. But here the legislative history is being used to show that—*yes*—Congress really meant what it said in the Amendment. *See supra* sec. B, Background (providing statements from Amendment's sponsors); *see also* Amici Brief of Reps. Rohrabacher & Farr, *supra* note 6, at 11–17 (collecting strong and consistent statements from legislators). The legislative history is not offered to alter or add to the meaning of the words in the statute. It serves to convince a skeptical jurist—and a recalcitrant Executive Branch[8]—that the words mean that they say and are in no need of a cabining interpretation.

Furthermore, Congress did not define terms like "interference" because it did not have to. Congressional appropriators and Congress itself are not courts. They makes policy through law. The expression of that policy is sometimes made specific and sometimes, as here, intentionally broad. The language was meant to protect individuals and States that choose to enact state-level medical marijuana laws from federal interference—at least as far as criminal prosecutions are concerned.

In sum, not only are the First and Ninth Circuits at odds with one another, but they are also at odds with the Amendment and the intent behind it as expressed by its legislative sponsors. And even if defendants have some obligation to demonstrate compliance, under the First Circuit's test there is no clear guidance to defendants as to

8. *See* Ltr. from Rohrabacher and Farr to U.S. Attorney General (Apr. 8, 2015), available at https://american-safe-access.s3.amazonaws.com/documents/Rohrabacher-Farr_Letter_to_DOJ.pdf (stressing that DOJ's continued prosecution of persons involved in medical marijuana violated the Amendment bearing their names).

how they can show the requisite level of compliance. This court needs to step in not only so there is one rule that can predictably guide behavior, but so that the principles of separation of powers and federalism are protected through a proper interpretation of the Amendment.

C. This Case Raises Questions of Exceptional Importance as to the Separation of Powers

The Rohrabacher-Farr Amendment legislates policy in a temporary but powerful way. The provision does not directly amend the laws governing the legality of possessing or selling marijuana. Instead, Congress grants States the right to experiment with legalizing and regulating marijuana free from fear that the Federal Government will interfere. It gives the States and their citizens breathing room to experiment with this new industry and refocuses DOJ's limited resources on other, more pressing, policy challenges. In doing so, Congress can determine, with real world evidence, what the best course for the country vis-à-vis medical marijuana policy should be. And Congress accomplishes this by evoking its most significant power—the "power of the purse." *See*, *e.g.*, *Will*, 449 U.S. at 222; *Dickerson*, 310 U.S. at 555 (as explained courts have repeatedly recognized that Congress may make policy—including suspending or repealing federal law—via their power over appropriations).

This manner of legislating has clear roots in the Constitution. Specifically, it is rooted in Congress's enumerated power to appropriate federal funds, U.S. Const. Art. 1 Sec. 8, and the further admonishment that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, Sec.

9, Clause 7. The Rohrabacher-Farr Amendment, if given its full and proper effect, is an example of the separation of powers working as the Framers intended.

In this case, the First Circuit and DEA have run roughshod over Congress's enumerated powers and the Appropriations Clause's important role in the separation of powers. In *McIntosh*, Judge Diarmuid O'Scannlain spoke eloquently on the importance of the Appropriations Clause, what this Court has held as to the subject, and how it intersects with the Rohrabacher-Farr Amendment:

> The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the treasury." [*Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 424 (1990)]. The Clause has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agencies." *Id.* at 427-28. Without it, Justice Story explained, "the executive branch would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

> Thus, if DOJ were spending money in violation of [the Amendment], it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

833 F.3d at 1175 (ellipses in original). While we contend that the Ninth Circuit (as well as the First) failed to properly police the separation of powers between the branches, Judge O'Scannlain recognizes the Appropriations Clause's critical importance and that it is at issue in cases involving the Rohrabacher-Farr Amendment. The Amendment is a significant expression of Congress's power of the purse, and that power must be protected against interpretations that cabin its plain language and intent.

DOJ has disregarded Rohrabacher-Farr, with federal agents not feeling bound by the limitations Congress has placed on them. Both the First and Ninth Circuits have failed to give full meaning to Rohrabacher-Farr through their impermissibly narrow interpretations thereof. Action by this Court is needed to resolve the circuit split and provide a proper interpretation of the Rohrabacher-Farr Amendment that preserves the constitutional power of Congress to direct the use of appropriated funds.

D. This Case Raises Questions of Exceptional Importance as to Federalism

As emphasized *supra*, the point of the Rohrabacher-Farr Amendment is to allow States to continue to adopt and refine regulatory schemes for legalizing marijuana. It

is to give the States—and the persons and companies who operate within their laws—some assurance that federal law enforcement will not come in put their businesses and liberty in jeopardy.

State medical marijuana programs sit within a precarious position—permitted under state law but prohibited under federal. Rohrabacher-Farr serves to resolve that contradiction and allow the States to continue to experiment. In the ongoing discussions around federal cannabis law reform, the different experiences of the many States who have allowed medical (and recreational) marijuana will be immensely informative. That is the very essence of what we mean when we say that States are "laboratories of democracy" under federalism.

This case serves as a key example of the threat to federalism that an improper interpretation of Rohrabacher-Farr presents. The First Circuit determined that the Shoe Shop operated at Petitioner's direction as a "collective" in violation of the Act. *See* 119 F.4 at 155-56. *See also* Me. Rev. Stat. Ann. Tit. 22, §§ 2430-D, 2422(1-A) They did so despite the fact that the relevant regulatory authorities in Maine had *never* made such a determination. The *States* should be making the determination in the first instance. This is particularly true given the Federal Government's own investigator admitted that DEA "just opened the investigation to see if we can learn anything else."

E. Medical Marijuana Patients, Cultivators, Distributors, and Regulators Need Clear, Consistent, and Predictable Rules

With the near-ubiquity of state-approved medical marijuana across the county, an incredible number of stakeholders are affected by the uncertainty that the Courts of Appeals' inconsistent and incorrect interpretations of Rohrabacher-Farr has wrought. This includes patients who rely on medical marijuana to alleviate cancer pain. It includes the States themselves, whose voters and legislators have adopted programs that reflect the will of the citizens. It includes a multi-billion-dollar industry that employs thousands nationwide—thousands who would be at risk of criminal prosecution under the CSA and other federal laws should the courts and DOJ ignore the full meaning of Rohrabacher-Farr.

People are already going to jail on the back of prosecutions that have no underlying legal authority, as Congress has forbidden DOJ to spend funds on these prosecutions. While the Court's purpose is not merely to correct mistakes, the widespread and deep impact that the First and Ninth Circuit's errors has on citizens' lives speaks to the issue's importance. In this case, States and their licensed growers and distributors have relied in good faith on the promise, made annually by Congress, that no federal funds will be spent to interfere with state-legal markets. In this way, it is as if the Federal Government has set a trap for unsuspecting and well-intentioned people—with Congress telling them not to fear federal prosecution, and DOJ (and the courts) revoking this promise and putting people in jail. This manifestly unfair situation needs to be resolved; the stakes are incredibly high for

those involved, and the threat is constantly hanging over their head absent action by this Court.

Significant investments and jobs are at risk of being wiped out if DOJ brings prosecutions against cultivators and distributors. A whole industry has built up around state-regulated medical marijuana, serving and employing thousands. The well-being and liberty of patients and workers is under threat. The Rohrabacher-Farr Amendment can only serve its purpose—to allow States and their citizens to participate in medical marijuana activity without threat of federal prosecution—if there is a clear, consistent, and *correct* interpretation of the Rohrabacher-Farr Amendment.

F. There are Few, if Any, Reasons to Delay Consideration of this Critical Issue

This is not the sort of case that would benefit significantly from further development in the lower courts or in the political arena. While only the First and Ninth Circuit have yet to speak directly on the issue, they have done so definitively. The First Circuit's present opinion further affirms the approach that the same court took in *United States v. Bilodeau*, 24 F.4th 705 (2022). The First Circuit declined the opportunity to review this case *en banc*. There is a similar pattern in the Ninth Circuit. In *United States v. Evans*, 929 F.3d (9th Cir. 2019), the Ninth Circuit cemented the precedent established by *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

With the First and Ninth Circuits entrenched, the conflict between the two will not be resolved absent a clear ruling from this Court. While the First Circuit has

yet to "'define [the] precise boundaries" of its substantial compliance approach, *Sirois*, 119 F.4th at 148 (quoting *Bilodeau*, 24 F.4th at 715), the First Circuit "disagree[s] with [their] Ninth Circuit colleagues" and their "strict compliance" rule,'" *id.* In addition, both courts disagree with a commonsense understanding of how Rohrabacher-Farr should be implemented, per its text and animating intent.

Further development by other Courts of Appeals is also unlikely to resolve the issue. These courts might gravitate towards the respective approaches of the First or Ninth Circuits or develop tests of their own. However, these developments would not change the fact that both tests we currently have are out of step with each other *and* the text of the Rohrabacher-Farr Amendment. This is a special concern for the Ninth Circuit, which contains within its jurisdiction the largest single share of the market for medical marijuana. The Ninth Circuit's strict compliance test nullifies the text and intent of Rohrabacher-Farr and allows the Executive Branch to engage in behavior that Congress has explicitly forbidden.

Nor will imminent political developments moot the questions that this case presents. The purpose of the Rohrabacher-Farr Amendment was to allow state marijuana markets to develop without fear of being dismantled by the Federal Government, which still classifies marijuana as a Schedule I drug, regardless of which political party controls the White House.

The problem Rohrabacher-Farr addresses—the conflict between state and federal law on the legal status of marijuana—is unlikely to go away anytime soon. This

Court cannot take for granted that any permanent change to federal marijuana law or policy which would obviate the need for Rohrabacher-Farr is imminent or even inevitable and should act now to clarify the important legal issues present in this case.

CONCLUSION

In the face of circuit decisions that are inconsistent with one another *and* the text and intent of the law being interpreted, this Court should review this case and provide clarity. The burden should continuously be on DOJ, not a defendant, to ensure the Executive complies with Congress's spending dictates. It can most effectively do so by working with state law and regulatory enforcement agencies in reviewing the legality of those operating in the medical marijuana business pursuant to state law. If an individual is complying with state law, DOJ simply cannot prosecute him or her for actions related to violations of the CSA that fall under applicable state laws.

This case involves crucial questions with unclear and inconsistent answers. What is at stake is Congress's power of the purse, the separation of powers, federalism, and whether federal law enforcement can openly flout a clear command by Congress that they cease spending any money towards work that would interfere with state-legal medical marijuana markets.

Congress has made the decision for a decade straight to allow this multi-billion dollar medical marijuana market to develop. It is not for the Executive or the courts to undermine Congress's determination—even when they disagree with the wisdom's of Congress's decisions.

The time to review these issues is now. There is a clear split amongst the First Circuit and Ninth Circuit on how to interpret and apply the Rohrabacher-Farr Amendment, and the First Circuit has reiterated its holding that it disagrees with the Ninth.

For the reasons stated above, Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOS. 23-1721, 23-1723

UNITED STATES OF AMERICA,

Appellee,

v.

LUCAS SIROIS; ALISA SIROIS,

Defendants-Appellants.

October 15, 2024

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MAINE
[Hon. Lance E. Walker, U.S. District Judge]

Before
Barron, *Chief Judge*,
Gelpí and Rikelman, *Circuit Judges*.

BARRON, *Chief Judge*. In each fiscal year since 2015, Congress has included in its annual appropriations bill a rider that provides:

> None of the funds made available under this Act to the Department of Justice may be used, with

> respect to any of [an enumerated list of states and territories, including Maine], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022). This rider is commonly referred to as the "Rohrabacher-Farr Amendment."[1]

Based on this provision, Lucas Sirois and Alisa Sirois seek to enjoin the United States Department of Justice ("DOJ") from prosecuting them for offenses related to their cultivation and distribution of marijuana under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904. The defendants do so on the ground that the conduct for which the DOJ investigated and indicted them under the CSA was in "substantial compliance" with the Maine Medical Use of Cannabis Act (the "Act"), Me. Rev. Stat. Ann. tit. 22, § 2421 *et seq.*[2] That measure, which was enacted in 2009, sets forth conditions under which it is lawful under Maine law to possess, use, cultivate, and distribute marijuana for medical purposes.

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1. The rider is also sometimes referenced as the "Rohrabacher-Blumenauer Amendment."

2. Because the indictment alleges that the defendants' violations of the CSA occurred "through at least about July 21, 2020," all citations to provisions of the Maine Medical Use of Cannabis Act are to the versions of those provisions that were in effect as of July 21, 2020. The parties generally refer to the Act under its original name, the Maine Medical Use of Marijuana Act. *See* Me. Rev. Stat. Ann. tit. 22, § 2421 (2009) (amended 2010).

Appendix A

The United States District Court for the District of Maine denied the defendants' request for injunctive relief, and they now challenge the ruling in these consolidated appeals. We affirm.

I.

We begin by describing the legal landscape—both state and federal—that bears on the issues before us. We then review the procedural path that led to these appeals.

A.

As relevant here, the Act and its associated regulations permit, for purposes of Maine law, individuals who participate in the Maine Medical Use of Marijuana Program ("MMMP")[3] as "caregivers" and caregiver "assistants" to engage in certain "authorized conduct" "for the purpose of assisting . . . qualifying patient[s] with the patient[s'] medical use of marijuana." *Id.* § 2423-A(2). To participate in the MMMP, caregivers and assistants generally must register with and be licensed by Maine's Office of Cannabis Policy ("OCP").[4] *See id.* § 2425-A. The OCP, an office within Maine's Department of Administrative and Financial Services, is tasked under the Act with administering the MMMP. *Id.* § 2422-A; 18-691-001 Me. Code R. § 1.

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3. The program's name now uses the term "Cannabis" in place of "Marijuana." 18-691-001 Me. Code R. § 2.

4. The OCP was formerly known as the Office of Marijuana Policy. *See* 18-691-001 Me. Code R. § 1.

Appendix A

A registered caregiver may pay registered assistants to perform services related to the cultivation and distribution of marijuana. Me. Rev. Stat. Ann. tit. 22, § 2423-A(2)(I). A caregiver may cultivate up to six mature marijuana plants, twelve immature marijuana plants, and unlimited marijuana seedlings on behalf of each qualifying patient who has designated the caregiver as the patient's caregiver. *Id.* § 2423-A(1)(B). No caregiver may cultivate more than thirty mature plants or more than sixty immature plants at any one time. *Id.* § 2423-A(2)(B).

Caregivers who are authorized to cultivate marijuana on behalf of at least one qualifying patient are required to keep their cultivated marijuana plants in a "cultivation area" unless the plants are being transported for an authorized purpose. *See id.* § 2423-A(3)(B). As part of the OCP registration process, a caregiver who is authorized to cultivate marijuana is required to disclose to the OCP the location of her cultivation area. 18-691-002 Me. Code R. § 6(H)(1)(c). With limited exceptions, a cultivation area may only be accessed by the caregiver to whom it belongs and that caregiver's registered assistants. Me. Rev. Stat. Ann. tit. 22, § 2423-A(3)(B).

Caregivers may "[r]eceive reasonable monetary compensation for costs associated with cultivating marijuana plants or assisting a qualifying patient with that patient's medical use of marijuana." *Id.* § 2423-A(2)(E). Caregivers may also wholesale, in exchange for "reasonable compensation or for no remuneration," up to 75 percent of the mature marijuana plants and marijuana products that they produce in any given year to "other

registered caregivers," provided that the receiving caregivers do "not resell" those wholesaled plants and products "except to a qualifying patient or to another registered caregiver or dispensary to assist a qualifying patient." *Id.* § 2423-A(2)(K-1).

Multiple caregivers are permitted to "operat[e] separately and occupy[] separate spaces within a common facility" so long as they "do not share [marijuana] plants or harvested [marijuana] resulting from the cultivation of those plants." *Id.* § 2430-D(3). Caregivers may "share utilities or common areas" within that common facility. *Id.*

Caregivers are expressly prohibited from "form[ing] or participat[ing] in a collective." *Id.* § 2430-D. A "collective" is "an association, cooperative, affiliation or group of 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).

The OCP is responsible for assessing caregivers' and assistants' compliance with the Act and its associated regulations. Noncompliance "may result in remedial action" by the OCP. 18-691-002 Me. Code R. § 10(A)(4). The remedial action that the OCP may take includes: "directed corrective action; suspension, revocation and denial of [OCP licensing]; civil penalties; and referral to the appropriate agency, department or entity if the conduct is determined to be outside the scope of MMMP, is not appropriate for agency directed corrective action, or has not been rectified through correct[ive] action." *Id.*

A caregiver who "sells, furnishes[,] or gives marijuana to a person who is not authorized to possess marijuana for medical purposes" is subject to mandatory license revocation by the OCP and is also "liable for any other penalties for selling, furnishing[,] or giving marijuana to a person." Me. Rev. Stat. Ann. tit. 22, § 2430-F(2).

B.

Notwithstanding the Act and its associated regulations, federal law, through the CSA, makes it "unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense," or possess marijuana. 21 U.S.C. §§ 841(a)(1), 844(a), 802(6) (defining the term "controlled substance" by referring to drug schedules), 812 sched. I(c)(10) (listing "marihuana" as a Schedule I controlled substance). Thus, the CSA makes the conduct permitted by the Act a federal crime.

In *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022), we addressed—for the first time in our Circuit—"whether and under what circumstances" the Rohrabacher-Farr Amendment "prohibits the [DOJ] from spending federal funds to prosecute criminal defendants for marijuana-related offenses" under the CSA. 24 F.4th at 708. Following the lead of the Ninth Circuit Court of Appeals in *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016), we concluded in *Bilodeau* that, by the terms of the Rohrabacher-Farr Amendment, "the DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws." 24 F.4th at 713.

We disagreed with our Ninth Circuit colleagues, however, as to how to determine "under what circumstances federal prosecution would prevent [a state] from giving practical effect to" its medical marijuana laws. *Id.* We rejected the determination in *McIntosh* that "defendants would not be able to enjoin their [CSA] prosecutions unless they '*strictly complied* with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.'" *United States v. Evans*, 929 F.3d 1073, 1076 (9th Cir. 2019) (emphasis supplied by the *Evans* court) (quoting *McIntosh*, 833 F.3d at 1179). We reasoned that "the potential for technical noncompliance [with state regulatory regimes] is real enough that no person through any reasonable effort could always assure strict compliance," and that "[t]o turn each and every infraction into a basis for federal criminal prosecution would upend [state regulatory regimes] in a manner likely to deter the degree of participation in [state] market[s] that the state[s] seek[] to achieve." *Bilodeau*, 24 F.4th at 713, 714.

At the same time, we rejected in *Bilodeau* the suggestion by the defendants there that the Rohrabacher-Farr Amendment "must be read to preclude the DOJ, under most circumstances, from prosecuting persons who possess state licenses to partake in medical marijuana activity." *Id.* at 714. We reasoned that "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." *Id.*

Although we announced in *Bilodeau* our intention to "chart[] [a] middle course" with respect to the Rohrabacher-Farr Amendment's application, we had no occasion there to "define its precise boundaries." *Id.* at 715. We explained that was so because the "record [was] clear" that (1) the defendants' efforts to appear compliant with the Act and its associated regulations were merely "facades for selling marijuana to unauthorized users" and (2) the defendants had engaged in a "large-scale . . . black-market marijuana operation" as a matter of Maine law itself. *Id.* On that basis, we affirmed the denial of the requested injunction. *Id.*

In other words, we made clear in *Bilodeau* that a party who seeks to enjoin their prosecution for an alleged marijuana-related CSA violation need not demonstrate "strict compliance" with a state's laws and regulations that make the possession, cultivation, or distribution of medical marijuana lawful. *Id.* at 713. However, we did not attempt to decide precisely *how* compliant such a party must have been with such laws and regulations to be entitled to an injunction pursuant to the Rohrabacher-Farr Amendment.

C.

On November 9, 2021, a grand jury in the District of Maine indicted then-estranged spouses Lucas Sirois and Alisa Sirois, along with several other individuals, for conspiracy to distribute and possess with intent to distribute marijuana in violation of § 841(a)(1) of the CSA.[5]

5. The indictment also charged Lucas Sirois with conspiracy to commit money laundering, conspiracy to commit honest services

Shortly after Lucas Sirois was indicted, he filed a "Motion to Enjoin Prosecution Pursuant to the Rohrabacher-Farr Amendment," which Alisa Sirois subsequently joined.[6] The motion contended that, because the defendants' underlying conduct "[is] and [was] in compliance with" the Act, the DOJ was subjecting each of these defendants to "an unauthorized and illegal prosecution of a legal, licensed medical marijuana business."

The District Court granted the defendants' request for a hearing on the motion. In a procedural order prior to the hearing, the District Court determined that the movants bore the burden of persuasion but that the government bore "the initial burden of establishing the existence of a substantial evidentiary basis for both its investigative and prosecutorial decisions." The District Court then determined that to establish that evidentiary basis:

> [T]he record produced by the government should be such that a reasonable person might accept it as adequate to support the conclusion that the conduct under investigation was not only violative of federal law but also outside the bounds of what is authorized by Maine's medical

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fraud, bank fraud, tax fraud, tax evasion, and conspiracy to defraud the United States and impede and impair the IRS. In addition, the indictment charged Alisa Sirois with bank fraud. Those charges are not at issue here.

6. This opinion uses the appellants' first names solely for purposes of clarity.

> marijuana law, such that an investigation was warranted, and that the investigation, in turn, revealed evidence that warranted criminal charges.

The District Court elaborated, based on *Bilodeau*, that "the evidence should depict something more than a technical violation of Maine law." At the same time, the District Court acknowledged "that the 'precise boundaries'" of that requirement "are not at present well defined." The District Court also explained that "[u]pon the government's production of the record, the burden of persuading the court that the government's investigation and prosecution were unsubstantiated will fall on the movants."

The government objected to the procedural order and argued that "the operative question" should be "whether the defendants were in fact in substantial compliance with Maine's law during the time period alleged." (Emphasis omitted). Accordingly, the government argued that "the court's 'inquiry begins with the charged conduct,' and it is the defendants' burden to prove their substantial compliance with Maine law 'at the time of their arrest.'" (Quoting *United States v. Pisarski*, 965 F.3d 738, 742-743 (9th Cir. 2020)).

The government also objected to the District Court's order on an additional ground, arguing that the District Court's "administrative law standard [would be] improperly applied here to a criminal grand jury investigation." The government claimed that applying

such a standard to that investigation would provide "an invitation to conduct a sweeping review into the origins and evolution of the investigation that resulted in the instant prosecution" and would "call[] into question the 'presumption of regularity' that applies to prosecutorial decision-making." (Quoting *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)). Relatedly, the government argued that applying the administrative standard in the criminal context would be "problematic" because, in order to meet the standard, the government "must produce materials to the defendants in advance of the hearing that they are not entitled to receive until the eve of trial, such as *Jenks* [sic] material for federal agents who are now obliged to testify, and the identities of cooperating witnesses who would otherwise continue to remain publicly anonymous."

The District Court overruled the objection, and the hearing proceeded under the framework set forth by the District Court in its order. During the hearing, which was held over the course of three days in June 2023, the government introduced documentary evidence and presented testimony from eight witnesses. The testimony and evidence put forward by the government concerned, among other things, the operations of a medical marijuana "grow operation," known as the "Shoe Shop," located at 374 High Street in Farmington, Maine. The government witnesses included law enforcement officials, individuals who had worked at the Shoe Shop, an OCP official, and an individual who allegedly purchased marijuana from Lucas Sirois to sell on the black market.

The government witnesses testified that the operations of the Shoe Shop were directed primarily by Lucas Sirois and that Alisa Sirois assisted in the administrative operations of the Shoe Shop. There was also testimony submitted that Alisa Siros split profits from the sale of Shoe Shop marijuana with Lucas Sirois. The government also introduced documentary evidence that it contended supported the testimony concerning the Shoe Shop and the involvement of Lucas Sirois and Alisa Sirois in its operations.

The government relied on the witnesses' testimony and the documentary evidence to argue that the Shoe Shop operated, unlawfully, as a "collective" within the meaning of the Act. In addition, the government relied on the witnesses' testimony as well as documentary evidence to argue that Lucas Sirois was involved in black-market sales of marijuana, in that the sales of marijuana were not directed to registered patients or caregivers within the meaning of the Act and its regulations.

Although Lucas Sirois and Alisa Sirois bore the burden of persuasion at the hearing under the District Court's order, they did not put on any witnesses of their own. In his motion to enjoin the prosecution, Lucas Sirois did introduce evidence that the OCP, after an "On-Site Assessment," issued a document that read "No finding of Non-Compliance on this date: 7/8/19." He also submitted to the District Court two letters: one from Representatives Rohrabacher and Farr to then-U.S. Attorney General Eric Holder regarding the proper interpretation of the Amendment, and another from his counsel to the U.S. Attorney's Office for the District of Maine detailing his

compliance with the Act. He also submitted a caregiver compliance checklist. In addition, both Lucas Sirois and Alisa Sirois introduced evidence that they maintained OCP-provided caregiver registry licenses, along with documentation that the OCP rescinded its initial decision to suspend those registry licenses.

Following the presentation of evidence at the hearing, the parties made closing arguments. The District Court found that the government had met its burden of production, but that Lucas Sirois and Alisa Sirois had failed to meet their burden of persuasion. In explaining its conclusion that the movants had not carried their burden of persuasion, the District Court reasoned:

> The presentation they made at the hearing and the argument presented in their post-hearing briefs are designed more to sow doubt as to the existence of knowledge on their part of the illegal distribution of Shoe Shop marijuana by others (in particular co-defendant Brandon Dagnese) and the failure of [the OCP] to find them in violation of Maine regulations during the pendency of the investigation.

The District Court then explained that, while such a presentation might be "effective" at a criminal trial, "it was not sufficient to demonstrate that either the decision to investigate or the decision to prosecute lacked a substantial evidentiary basis" or that either decision "was arbitrary or irrational."[7]

7. The District Court elaborated that it "d[oes] not believe that it is necessary or wise for a district court to perform an

The District Court acknowledged Alisa Sirois's "observ[ation] that the Government's presentation did little, if anything, to justify the grand jury's indictment of [her] for participating in a black-market drug distribution conspiracy." Nonetheless, the District Court explained that it was "not persuaded that the individual movants enjoy a private right under the Rohrabacher-Farr Amendment to compel the Government to prove its case in advance of trial." (Citation omitted). The District Court further concluded that, "[i]n any event, given the evidence of both black-market transactions in Shoe Shop marijuana and the collective nature of the operation . . . the prosecution of Alisa [Sirois] . . . does not undermine Maine's implementation of a medical marijuana program." The District Court noted, too, that Alisa Sirois did not introduce "evidence to suggest the existence of special circumstances that would make it unreasonable to include [her] in a conspiracy prosecution."

Finally, the District Court concluded that "an order enjoining prosecution . . . would be ill-advised here, as the State of Maine, through [the OCP], ultimately requested

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analysis that amounts to a constitutional review of each step of an investigation and prosecution, similar to how it would review a warrant application or motion to suppress." Continuing, the District Court explained that it "do[es] not read *Bilodeau* as requiring district courts to assess the likelihood of a conviction and ha[s] instead focused on whether the record demonstrates conduct by agents of the Department of Justice that, if unchecked, would prevent a state from implementing its medical marijuana program, such as through unjustified prosecution of participants based on technical violations of state laws and regulations."

an investigation based upon, among other things, the report of black market sales by an insider and possible violation of the rule against collective grow operations." Accordingly, the District Court denied the defendants' motion to enjoin prosecution. The defendants timely filed these appeals, which then were consolidated.

II.

Ordinarily, we may exercise appellate review in a criminal case only "after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989). In *Bilodeau*, however, we concluded we have jurisdiction under 28 U.S.C. § 1292(a)(1) over a party's appeal from the denial of a motion to enjoin the party's prosecution pursuant to the Rohrabacher-Farr Amendment. 24 F.4th at 711-12. We then further concluded that, in the alternative, we could "safely treat" a district court's denial of a Rohrabacher-Farr injunction "as a collateral order" over which we have appellate jurisdiction pursuant to 28 U.S.C. § 1291. *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)). We thus proceed to the merits.

III.

We review the denial of an injunction for abuse of discretion. *Waldron v. George Weston Bakeries Inc.*, 570 F.3d 5, 8 (1st Cir. 2009). "Within that framework, we scrutinize the district court's findings of fact for clear error and its handling of abstract legal questions de novo."

Id. In conducting this review, "we may affirm the District Court on an independent ground if that ground is manifest in the record." *Brox v. Hole*, 83 F.4th 87, 98 (1st Cir. 2023).

We held in *Bilodeau* that the party seeking an injunction pursuant to the Rohrabacher-Farr Amendment bears the burden of demonstrating that the challenged DOJ action would "prevent[] a state from giving practical effect to its medical marijuana laws." 24 F.4th at 713, 715-16. Lucas Sirois and Alisa Sirois therefore bear that burden of proof here.[8] *United States v. Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) ("[A]bsent en banc consideration we are bound by our own precedent.").

As we noted above, and as the District Court recognized, we did not announce in *Bilodeau* the precise

8. Although the parties each raise concerns about how the District Court allocated burdens of proof below, we bypass those disagreements because *Bilodeau* is clear in holding that the party seeking the injunction based on the Rohrabacher-Farr Amendment bears the burden of showing an entitlement to it by a preponderance of the evidence. *See* 24 F.4th at 715-16. To the extent that Lucas Sirois argues that he does not bear that burden because there are "Fifth Amendment problems attendant to assigning the burden of proof to a criminal defendant," he offers no persuasive reason for our so concluding, given our reasons in *Bilodeau* for allocating the burden of proof as we did in that case. *See id.* at 716 ("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.").

level of compliance with state medical marijuana laws and regulations that a party must show to be entitled to enjoin a federal prosecution pursuant to the Rohrabacher-Farr Amendment. We concluded instead merely that the scale and nature of the movants' noncompliance with the state's medical marijuana laws and regulations in that case was so substantial that it sufficed to permit the prosecution to go forward notwithstanding the Rohrabacher-Farr Amendment. *Id.* at 715.

Based on their understanding of *Bilodeau*, however, Lucas Sirois and Alisa Sirois on appeal ask us to evaluate their request for injunctive relief based on a "substantial compliance" standard. Under this standard, according to Lucas Sirois and Alisa Sirois, they are entitled to such relief if the record shows, by a preponderance of the evidence, that they were in substantial compliance with the Act and its associated regulations at all relevant times. They then contend that we must reverse the District Court's ruling denying their motion for injunctive relief because the record shows that they have met their burden to show that they were in substantial compliance.

The government does not contest the substantial compliance standard that Lucas Sirois and Alisa Sirois ask us to apply. Instead, the government contends that, even under that standard and notwithstanding the way the District Court proceeded below, we must affirm the District Court's order denying the defendants' motion to enjoin the prosecution because of what the record shows regarding Lucas Sirois's and Alisa Sirois's noncompliance in the relevant time period.

Before diving into the record, we emphasize that Lucas Sirois and Alisa Sirois each bears the burden of persuasion under the applicable standard for determining whether the expenditure of DOJ funds they seek to enjoin would "prevent [a state] from giving practical effect to" its medical marijuana laws. *Bilodeau*, 24 F.4th at 713; *id.* at 716 ("[P]arties seeking injunctive relief bear the burden of proving entitlement to that relief.") (citations omitted). Moreover, the government put forth a significant amount of affirmative evidence of what the government contends was the movants' noncompliance with the Act and its regulations. This evidence, according to the government, shows that the Shoe Shop operated as a "collective" and that Lucas Sirois engaged in "black-market sales" in violation of the Act and its regulations. Thus, to be entitled to the injunctive relief that they seek, Lucas Sirois and Alisa Sirois must show by a preponderance that, notwithstanding the affirmative evidence of what the government asserts is their respective noncompliance, it is more likely than not that they were in substantial compliance with the Act and its associated regulations. *Cf. Pérez-Pérez v. Hosp. Episcopal San Lucas, Inc.*, 113 F.4th 1, 8 (1st Cir. 2024) ("[O]ne charged with proving a negative often relies on simply disproving the affirmative.").

In assessing whether Lucas Sirois and Alisa Sirois have shown as much, we recognize that, because of the way that the District Court allocated the burdens of proof in denying the motion to enjoin the prosecution, we are not in the position of simply evaluating the District Court's factual findings regarding whether Lucas Sirois and Alisa Sirois were in substantial compliance with the Act and

its regulations. Nonetheless, as we observed above, "we may affirm the District Court on an independent ground if that ground is manifest in the record." *Brox v. Hole*, 83 F.4th 87, 98 (1st Cir. 2023). As we will explain, we conclude that it is manifest from the record that the movants have failed to make the required showing, at least given not only what the record shows but also the arguments that they have put forth to us.

We start by considering Lucas Sirois's grounds for challenging the District Court's denial of his motion for an injunction. We then address Alisa Sirois's grounds for challenging the District Court's denial of her motion for the same kind of relief.

A.

Lucas Sirois concedes, as we observed in *Bilodeau*, that his mere possession of a state license to cultivate and distribute marijuana for medical purposes is not by itself necessarily proof that he was in substantial compliance with the Act and its regulations at all relevant times. *See* 24 F.4th at 714 ("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."). He argues, however, that the evidence shows by a preponderance that he was in substantial compliance because (1) he remained a licensed OCP caregiver before, during, and following the conduct at issue here; (2) there was evidence in the

record of his interest in complying with the Act and its regulations; *and* (3) the evidence at the hearing shows that, in "direct contrast" to the facts of *Bilodeau*, "75 [percent] of [his] sales were completely legal under Maine's medical marijuana laws" *and* "there is no evidence of [him] conducting black market sales" of marijuana. We are not persuaded.

1.

We begin by setting to one side the evidence that the government put forward concerning Lucas Sirois's involvement in black-market sales and focusing instead on what the record shows regarding whether the Shoe Shop operated at Lucas Sirois's direction as a "collective" in violation of the Act. *See* Me. Rev. Stat. Ann. Tit. 22, §§ 2430-D, 2422(1-A). The government introduced significant affirmative evidence that the Shoe Shop did so operate. This evidence tended to show that the marijuana purportedly belonging to individual caregivers in fact belonged to Lakemont LLC, a limited liability corporation co-owned by Lucas Sirois and another individual, Randall Cousineau, who at no point was an OCP-registered caregiver. The government also put forth evidence that Lucas Sirois closely controlled the operations of the Shoe Shop and that Shoe Shop-affiliated caregivers, in exchange for weekly flat-rate payments, provided their caregiver licenses to others but did not participate in cultivating or selling marijuana.

For example, the government introduced a spreadsheet titled "Shoe Shop" that contains one column labeled

"Income" and thirty-four columns, each labeled with the name of an individual, grouped under the heading "Caregivers." The spreadsheet is further divided into rows that correspond to weekly periods. The government elicited testimony from Dave Burgess, who worked at the Shoe Shop, who confirmed the document was, as to that business, a "tally of the caregivers, maintenance people, and trimmers and what they got paid each week." The amounts listed within each caregiver column generally repeat week after week without regular variation, even as the corresponding amounts listed in the "Income" column vary widely between from one week to the next. For example, in the weeks marked 2/17, 2/24, 2/28 and 3/6, income varies from $3,590 to $240,120, but the amounts listed in the caregiver columns generally repeat consistently throughout this period.

The government also introduced a services agreement signed by Lucas Sirois and a caregiver who had a grow room at the Shoe Shop. This agreement indicates that Lakemont would provide services including drying and curing, packing, production of marijuana extract, facilitating sales, and delivering marijuana for the caregivers.

Additionally, individuals who had worked at the Shoe Shop testified that, in exchange for flat weekly payments, they allowed marijuana to be grown and sold in their name and with their license without their necessary participation in cultivating marijuana, selling marijuana, or interacting with patients. For example, Juneva Stratton, who was an OCP-licensed caregiver and

had a grow room at the Shoe Shop, testified that someone at the Shoe Shop applied for the OCP caregiver license on her behalf, that she "wasn't involved in [the operations] at all," and that she nonetheless received an envelope with cash in it every week from her daughter, who was herself a licensed caregiver who also was affiliated with the Shoe Shop. Burgess himself testified that he was paid weekly flat-rate payments to assign his caregiver license to a particular grow room, but he never did any work in the room; did not select, supervise, or pay the people who worked in the room; and did not participate in selling the marijuana grown in the room. In addition, a former Shoe Shop employee, Seth Neal, testified that Lakemont employed a number of "trimmer[s]" at the Shoe Shop who, rather than acting as assistants to individual caregivers, worked together to gather and process for distribution all the marijuana cultivated at the Shoe Shop.

The government also called OCP Director Vernon Malloch as a witness. Malloch testified that "sharing plants" and "sharing . . . proceeds" from marijuana transactions serve as a "bright-line distinction that [the OCP] look[s] at" to identify collectives. He further testified that if "a single caregiver facilitated the paperwork transaction to get [other caregivers] licensed, that would be a "red flag." In addition, Malloch testified that a business entity comprised of multiple caregivers is "not authorized" and that such a company "[w]ould likely be considered a collective." He testified, too, that a business model like that of Lakemont LLC, in which one OCP-licensed caregiver and one unlicensed individual share profits from the licensed caregiver's distribution of marijuana, would

be illegal under the Act. Finally, Malloch testified that if the OCP became aware of such an arrangement it "would make a referral to law enforcement" and "potentially take action against the caregiver who is partnering with [the unlicensed individual]."

Notably, Lucas Sirois does not directly dispute any of this testimony.[9] Lucas Sirois does note that Stratton, Burgess, and Neal cooperated with the government or received immunity for providing truthful testimony. But he does not suggest at any point that, in consequence, we must disregard their testimony in assessing whether he has failed to show that he was in substantial compliance with the Act.

Lucas Sirois does state, in recounting the testimony of Stratton, that "Stratton obtained a caregiver card but knew nothing about the Shoe Shop than that her

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9. Lucas Sirois does argue in his reply brief that the "consistent" payments to caregivers reflect the fact that he "purchased the consistent harvest wholesale, paying the caregiver a consistent amount minus rent, fees for services, and utilities." Thus, in his reply brief, he contends the consistent payments paid to caregivers do not show the Shoe Shop operated as a collective. "New arguments, however, may not be made in reply briefs." *United States v. Toth*, 33 F.4th 1, 19 (1st Cir. 2022) (citation omitted). Moreover, this explanation of the consistent payments does not address other evidence of the collective nature of the operation, including that the amounts in the "Income" column of the "Shoe Shop" spreadsheet vary widely week to week, or the testimony from Stratton and Burgess that they were paid to be caregivers affiliated with the Shoe Shop despite not participating in cultivating, harvesting, or selling marijuana.

daughter worked there and paid her in cash." But this lack of knowledge on Stratton's part does not contradict Stratton's testimony that someone at the Shoe Shop registered for a caregiver license on her behalf, that she did not participate in cultivating or selling marijuana, or that she was paid a flat rate as a caregiver. And Lucas Sirois does not dispute that he signed an agreement, introduced by the government, to provide Stratton professional services related to her growing and selling marijuana at the Shoe Shop as a licensed caregiver.

Lucas Sirois does also assert that Neal "had no knowledge of black-market sales," but he does not suggest that Neal lacked knowledge of whether the Shoe Shop operated as he described it. And the same is true as to what he contends on appeal as to Burgess.

In responding more broadly to the government's collective-related evidence, Lucas Sirois argues that the government only asserted that the Shoe Shop operated as a collective after the government had initiated an investigation of him for engaging in black-market sales. But, in highlighting that point, he does not argue—nor do we see how he could—that, in consequence, the government may only rely on evidence of black-market sales, and not on evidence of the Shoe Shop operating as a collective, to defend against his request for injunctive relief. So, we do not see how this point regarding the government's initial black-market-sales-related theory of Lucas Sirois's noncompliance provides us with any reason to disregard the evidence of the Shoe Shop having operated as a collective in assessing whether Lucas Sirois

has met his burden to show his substantial compliance with the Act.

In support of the argument that he was in substantial compliance, Lucas Sirois does separately invoke our admonition in *Bilodeau* that technical noncompliance with a state's medical marijuana laws would not suffice to defeat a request for an injunction under the Rohrabacher-Farr Amendment. *See Bilodeau*, 24 F.4th 705, 715. But, in doing so, he does not then go on to develop an argument that, even if the evidence established that he operated the Shoe Shop as a collective, his conduct in so running that operation would only constitute a technical violation of the Act and its regulations. Rather, he argues only that, given this admonition in *Bilodeau*, the government's evidence of the Shoe Shop operating as a collective fails to constitute evidence of his substantial noncompliance because the record shows that the "[OCP] expressed concerns over this exact issue—a collective—and [Lucas] Sirois addressed them to [the OCP]'s satisfaction" as evidenced by the OCP reinstating his license and the OCP's multiple investigations that resulted in no findings of noncompliance.

In advancing this argument, Lucas Sirois highlights evidence in the record that shows both that the OCP's 2019 investigation into his operations resulted in no finding of noncompliance and that the OCP reinstated his caregiver license after it was suspended following the execution of federal search warrants. He then contends that "[t]o permit the Federal government to overrule the State's determination of compliance with State law and find [him]

in violation of federal law . . . is to fly in the face" of the Rohrabacher-Farr Amendment. (Emphases omitted).

But, as we noted above, Lucas Sirois concedes that state licensure does not in and of itself prove his substantial compliance with state law. Indeed, in *Bilodeau*, we held that the defendants were not entitled to injunctive relief because of the level of their noncompliance—notwithstanding the fact they, too, held caregiver licenses and were found to be "largely in compliance with Maine law" by state inspectors after an inspection. 24 F.4th 705, 710. Moreover, Malloch, the OCP Director, testified that the OCP's actions in not finding noncompliance and reinstating a license following its suspension only indicate that the OCP found the caregiver in compliance on the "day that [the OCP] conduct[ed] the inspection for the elements [the OCP] inspected against." Malloch also testified that the OCP's enforcement of the Act and associated regulations occurred "a hundred percent [on] the honor system" due to the Office's lack of investigative power and policy to "try to take the approach of compliance first and enforcement only when needed."

In sum, on his own account of what must be shown on appeal insofar as he bears the burden of persuasion, Lucas Sirois bears the burden to show that he was in substantial compliance with the Act and its regulations. To show that he could not meet that burden, the government introduced the significant affirmative evidence described above that the Shoe Shop, at Lucas Sirois's direction, operated as a collective in violation of the Act and its regulations. Yet, in arguing that he has shown by a preponderance

that he was in substantial compliance with the Act and its regulations, Lucas Sirois does not directly dispute or otherwise provide a basis for our disregarding this body of evidence that the government has set forth. Nor does he develop an argument that, insofar as the Shoe Shop was operating as a collective, such noncompliance was merely technical rather than substantial. Instead, he contends only that we must treat the evidence of the Shoe Shop operating as a collective as a technical violation simply because Maine investigated the Shoe Shop for being a collective and ultimately did not find noncompliance. Thus, considering the record as a whole, we conclude that it is manifest that, even if we were to accept that Lucas Sirois did not participate in any black-market sales, he has failed to show by a preponderance of the evidence that he was in substantial compliance with the Act and its regulations.

2.

Although Lucas Sirois's challenge to the District Court's denial of his request for injunctive relief fails for the reason just explained, we will also address his contention regarding the second factual predicate for his challenge. In advancing this contention, which is equally necessary to his challenge, he argues that he has shown by a preponderance of the evidence that he did not engage in any black-market sales. Here, too, it is clear from the record that he has not made that showing.

In pressing this aspect of the challenge, Lucas Sirois contends that the record contains no "evidence that [he] himself sold marijuana on the black market, [or] that

he knew any of his sales went to parties who intended to resell on the black market." But the record contains testimony from Burgess and Brandon Dagnese that tends to show that Lucas Sirois not only knew of, but personally conducted and directed, black-market sales of marijuana through Dagnese between 2018 and 2020.

Burgess testified that he conducted sales of marijuana at the direction of Lucas Sirois to Dagnese and that Burgess understood these sales were intended for the black market. Burgess further testified that Lucas Sirois offered him additional income to facilitate the sales to Dagnese, that the volume of sales was unusually large, and that the sales were generally not recorded in Lakemont LLC's books.

Further, Dagnese testified that he had never held an OCP caregiver or patient license, that he had purchased approximately $1 to $1.5 million dollars' worth of marijuana from Lucas Sirois between 2018 and 2020 with the intention to resell on the black market despite not having a license, that some of those sales had been conducted by Lucas Sirois himself, and that Lucas Sirois never requested a caregiver license from him.

Lucas Sirois did not introduce any evidence that would tend to directly rebut the relevant testimony of Burgess or Dagnese. Lucas Sirois does appear to argue that we must disregard the testimony concerning his involvement in black-market sales because Burgess and Dagnese testified pursuant to cooperation agreements and because Dagnese previously lied to law enforcement and wiped his phone while being investigated.

Ultimately, however, the burden of proof to show substantial compliance lies with Lucas Sirois. Even if we were to set the testimony of Dagnese to one side, notwithstanding that Lucas Sirois does not challenge the testimony's relevant content specifically, there would remain the undisputed testimony of Burgess. And we do not see how the mere fact that Burgess gave testimony pursuant to a cooperation agreement requires us to negate his testimony for the purpose of evaluating what the record shows regarding the black-market sales that Burgess describes. Moreover, Lucas Sirois does not directly dispute the relevant testimony of Burgess or Dagnese. Indeed, there is undisputed evidence of text messages between Lucas Sirois and Dagnese evidencing sales of marijuana between them. And at oral argument, Lucas Sirois's attorney acknowledged it was "undisputed that transactions were made between [Lucas] Sirois and Mr. Dagnese." It is also undisputed that Dagnese never held an OCP license.

Lucas Sirois has argued that the record does not show he *knew* that Dagnese would resell the marijuana on the black market and that, instead, he believed Dagnese was purchasing the marijuana on behalf of a licensed dispensary called New Horizons. Lucas Sirois does not argue, however, that he would have been in substantial compliance with the Act and its regulations if he *knew* during the relevant period that Dagnese was unlicensed.

To the extent Lucas Sirois argues that he *did not know* that Dagnese was unlicensed, he clearly cannot make that showing by a preponderance of the evidence

on the facts in the record. Lucas Sirois does not dispute that Maine law required him to sell marijuana only to OCP-licensed patients or caregivers, and he does not dispute that Dagnese never held an OCP license. Lucas Sirois also does not dispute that he only requested a resale certificate from Dagnese more than one year into their working relationship, that the resale certificate belonged to a third party, or that, despite never seeing an OCP license for Dagnese, he continued to sell to him. With these facts in mind, it is significant that Malloch testified that "[i]t's the responsibility of the caregiver making the transaction to verify either the patient's credentials or the caregiver's registration card."

Given these features of the record and the arguments presented to us, we do not see how the record could support a finding that, insofar as Lucas Sirois bears the burden, he has shown what he himself acknowledges he must as to the alleged black-market sales—namely, that it is more likely than not that he did not knowingly engage in them. Thus, just as we conclude that it is manifest in the record that Lucas Sirois has failed to show by a preponderance of the evidence that he was not operating the Shoe Shop as a collective, we also conclude that it is manifest in the record that he has failed to show that he engaged in no black-market sales.

3.

For these reasons, we conclude that it is clear that, on this record, Lucas Sirois cannot prove by a preponderance of the evidence either of the grounds

on which, in combination, he predicates his claimed substantial compliance with Maine's medical marijuana laws.[10] We therefore affirm the District Court's denial of a Rohrabacher-Farr injunction as to Lucas Sirois.

B.

Alisa Sirois, like Lucas Sirois, appears to argue that she is entitled to an injunction because she showed that she was in substantial compliance with Maine's medical marijuana laws. But she does not dispute that, as an OCP-registered caregiver, she was required under Maine law to conform her conduct to the strictures of the Act and its regulations, which prohibited her from, among other things, participating in a collective. *See* Me. Rev. Stat. Ann. tit. 22, §§ 2430-D, 2422(1-A). Moreover, Alisa Sirois does not dispute that to meet her burden to satisfy the substantial compliance standard that she contends applies, she must show by a preponderance of the evidence that she was not participating in a collective. For the reasons

10. In seeking to enjoin his prosecution, Lucas Sirois contends that the DOJ's pre-indictment investigation was itself carried out in violation of the Rohrabacher-Farr Amendment. It is not evident how that contention relates to the prospective relief that he now seeks, however, given that he seeks to enforce a prohibition against the expenditure of funds by the DOJ on a going-forward basis. In any event, in light of what the record shows regarding the operations of the Shoe Shop and the black-market sales as well as Lucas Sirois's acceptance of the "substantial compliance" standard as the correct one, we do not see how on this record he has shown by a preponderance of the evidence that the pre-indictment investigation here "prevent[ed] a state from giving practical effect to its medical marijuana laws." *Bilodeau*, 24 F.4th at 713.

we will next explain, we conclude that it is manifest in the record that she has not done so.

On appeal, Alisa Sirois does not dispute any of the evidence in the record described above that the government put forward to show that the Shoe Shop operated as a "collective." Nor does she dispute on appeal the evidence that the government put forward through testimony by Stratton and Neal that tends to show that she personally distributed flat-rate weekly payments to Shoe Shop caregivers and trimmers, including Stratton and Neal themselves. Moreover, she fails to dispute to us the documentary evidence that the government introduced that indicated that she used unregistered individuals who worked at the Shoe Shop to assist her in growing marijuana and that she sold nearly all her harvested marijuana to Lakemont LLC. And, similarly, she does not dispute evidence that the government put forward that indicated that she was not paid the same weekly flat rate as other Shoe Shop caregivers and that, through her co-ownership with Lucas Sirois in a company called Narrow Gauge Botanicals, she was splitting Lucas Sirois's share of Lakemont LLC's significant profits from the distribution of Shoe Shop marijuana. For example, the government introduced a balance sheet for "NGB" that reflected income of $55,000 from "S[hoe] S[hop] split 100k with Randy [Cousineau]" followed by a $20,000 expense for "Lisa's [p]ortion of split (55k)."

In response, Alisa Sirois points to the fact that she was a licensed caregiver, and that, although her license was suspended by the OCP in response to the DOJ

investigation concerning the Shoe Shop marijuana, the license was reinstated after she requested a hearing concerning its suspension. The mere fact that she was a licensed caregiver during the relevant times is, as *Bilodeau* makes clear, however, not dispositive of whether she is entitled to injunctive relief under the Rohrabacher-Farr Amendment. And, apart from her argument about her license having been suspended but then reinstated, she develops no argument as to why the record shows by a preponderance that she was in substantial compliance with the Act and its regulations, notwithstanding the evidence described above about the Shoe Shop having operated as a collective and her particular role in that business's operations. Because we conclude that it is clear from the record that she has not carried her burden of persuasion, at least given the arguments that she has advanced on appeal, we affirm the District Court's denial of her request for injunctive relief.[11]

IV.

For the foregoing reasons, the District Court's denial of the defendants' motion to enjoin prosecution is ***affirmed***.

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11. Because our decision to affirm rests on grounds different from those relied on by the District Court in denying Alisa Sirois's request for an injunction, we need not reach her argument that the District Court's denial of the injunction as to her was erroneous because it did not rest on a "defendant-specific showing" justifying the DOJ prosecution that she seeks to enjoin.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED AUGUST 18, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

1:21-cr-00175-LEW

UNITED STATES OF AMERICA,

v.

LUCAS SIROIS, *et al.*,

Defendant.

ORDER ON DEFENDANTS' MOTION TO ENJOIN PROSECUTION

The Grand Jury charged Defendants Lucas Sirois, Alisa Sirois, Robert Sirois (and others) with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances (Marijuana), in violation to 21 U.S.C. § 841(a)(1), and related crimes. The matter is before the Court on the Sirois Defendants' Motions to Dismiss or Enjoin Prosecution (ECF Nos. 285/288/292).[1]

The Court conducted an evidentiary hearing on June 26, 27 and 28, 2023, and received closing arguments in writing. Based on the testimony and evidence entered

1. Other defendants who joined in the request for injunctive relief have since changed their pleas to guilty.

on the record and careful consideration of the parties' prehearing briefs and final written arguments, the motions to enjoin are denied.

LEGAL BACKGROUND

Although Maine has legalized the medical use of marijuana and authorizes participants in its medical marijuana marketplace to grow and distribute marijuana to other participants, trafficking in marijuana is still illegal under federal law. *United States v. Bilodeau*, 24 F.4th 705, 712 (1st Cir. 2022) (citing 21 U.S.C. §§ 801 *et seq.* and *Gonzales v. Raich*, 545 U.S. 1, 27, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)). However, pursuant to federal law, specifically a congressional appropriations rider known as the "Rohrabacher-Farr Amendment" or the "Rohrabacher-Blumenauer Amendment" (hereafter "the rider"), Congress instructed the Department of Justice that "[n]one of the funds" appropriated to the Department by Congress may be used "to prevent [the states] 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).

As written, "[t]he 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.'" *Bilodeau*, 24 F.4th at 712 (quoting Consolidated Appropriations Act, 2019 § 537). Based on the rider, in this Circuit a person

who participates in a state medical marijuana program who is charged federally with marijuana trafficking may bring a motion to enjoin prosecution, but success on such a motion requires a showing that the prosecution, if allowed to proceed, would "prevent[] a state from giving practical effect to its medical marijuana laws." *Id.* at 711, 713 & n.6, *cert. denied*, 142 S. Ct. 2875, 213 L. Ed. 2d 1094. This showing might be based on evidence demonstrating full compliance with state law and related regulations, evidence that any noncompliance with state law involved only technical violations, or perhaps even evidence of a nontechnical violation where the violation would not be grounds under state law to revoke the person's participation in the state program. *Id.* at 713-14. Proceedings on a motion to enjoin prosecution logically precede trial and a decision on such a motion is amendable to interlocutory review by the First Circuit. *Id.* at 712.

FACTUAL BACKGROUND

The Sirois Defendants have been participants on the supply side of Maine's medical marijuana program, conducting operations primarily from a facility located on High Street in Farmington, known locally as the Shoe Shop. The Sirois Defendants also used a second facility located in Avon. The Sirois Defendants and others used these facilities primarily for growing, harvesting, and sorting marijuana. They also used the Shoe Shop location to transact business operations associated with the purchase and sale of marijuana.

In 2018, the Sirois operations, headed by Defendant Lucas Sirois, came under investigation for suspected illicit activity. Though there was, at that time, merely

the scent of illicit marijuana sales in the air, in 2019 the Government obtained information that Ryan Nezol, an individual associated with Lucas Sirois, had unlawfully sold marijuana of unknown origin to out of state buyers. The investigators arranged for a controlled buy from Nezol. Immediately after the buy, they observed Nezol travel to a marijuana grow supply shop owned by Lucas Sirois. By means of a wiretap placed on Nezol's phone, investigators were able to determine that Nezol was working at the Shoe Shop, even though Nezol was not registered to participate in Maine's medical marijuana program. Based on these developments, investigators inferred that the marijuana Nezol trafficked in and was continuing to traffic in was sourced from the Shoe Shop. Although they lacked evidence to prove that the Shoe Shop was Nezol's source or that the Sirois Defendants knew of Nezol's illicit activity, from an investigative standpoint smoke was now emerging from the Shoe Shop (and by association from other Sirois grow facilities).

In April of 2020, the investigation took on added dimension when the Maine Office of Marijuana Policy referred the Shoe Shop and related Sirois operations for investigation based on the report of a disgruntled former Shoe Shop employee that she was witness to and participated in several black-market sales involving Brandon Dagnese during her tenure. This same individual also provided information to support the inference that Lucas Sirois conducted his medical marijuana operations as a "collective" in violation of Maine marijuana law and policy. Code of Me. R. tit. 18-691, Ch. 2, § 6(K). Based on these and other evidentiary developments, investigators secured warrants to search the Shoe Shop and other

Sirois facilities and the Government eventually obtained an indictment from the grand jury.

DISCUSSION

The Sirois Defendants contend that the Government's investigation of their involvement in Maine's medical marijuana program, execution of a search warrant, seizure of marijuana and related products, institution of a criminal complaint, presentation to the grand jury, and prosecution of this case pursuant to grand jury indictment would not have been possible but for the Government's unlawful expenditure of funds in violation of the rider. They therefore request an order dismissing the case against them or enjoining any further proceedings.

In a prior order, I ruled that the hearing on the motions to enjoin prosecution would encompass not merely the decision to prosecute, but also the decision to investigate, but that I would review these administrative decisions using a substantial evidence standard based on administrative law. I also explained that because the rider does not confer an individual right on persons subject to investigation or prosecution for violation of federal law the Government's substantial evidentiary showing did not need to be personalized to each and every defendant. Lastly, I explained that the burden to show that the investigation and prosecution were and are unsubstantiated would fall upon the movants, though I ruled that the Government would proceed first by producing a record in support of its actions. Procedural Order (ECF No. 348).[2]

2. I do not see why a proceeding of this kind could not be decided on a paper record. Here, the Sirois Defendants received a

Based on the evidence presented during the hearing, I find that the Government carried its burden of producing a record containing substantial evidence in support of both the 2018 and continuing[3] investigation and its decision to prosecute. In short, a reasonable mind might accept that the investigation and prosecution arose from sufficient evidence of nontechnical noncompliance with Maine medical marijuana law and that, by extension, the Department of Justice has not expended federal dollars in support of this proceeding in a manner that would "prevent Maine's medical marijuana laws from having their intended practical effect." *Bilodeau*, 24 F.4th at 715.[4]

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more fulsome process, including the opportunity to cross-examine witnesses.

3. Although the evidence suggests that some investigative activity transpired prior to 2018, the record does not suggest that early investigative efforts amounted to anything that as a practical matter would have prevented or interfered with the State of Maine's implementation of its medical marijuana program.

4. I do not believe that it is necessary or wise for a district court to perform an analysis that amounts to a constitutional review of each step of an investigation and prosecution, similar to how it would review a warrant application or motion to suppress. In *Bilodeau*, this Court and the First Circuit observed that the evidence against the movants was strong, a fact that tended to simplify the courts' determination that the rider was not violated. *Bilodeau*, 24 F.4th at 715. I do not read *Bilodeau* as requiring district courts to assess the likelihood of a conviction and have instead focused on whether the record demonstrates conduct by agents of the Department of Justice that, if unchecked, would prevent a state from implementing its medical marijuana program, such as through unjustified prosecution of participants based on technical violations of state laws and regulations.

As for the Sirois Defendants'[5] burden to persuade me of the lack a substantial evidentiary basis, I am left unpersuaded. The presentation they made at the hearing and the argument presented in their post-hearing briefs are designed more to sow doubt as to the existence of knowledge on their part of the illegal distribution of Shoe Shop marijuana by others (in particular co-defendant Brandon Dagnese) and the failure of the Office of Marijuana Policy to find them in violation of Maine regulations during the pendency of the investigation. Such a showing could prove effective at trial, where the Government must prove guilt beyond a reasonable doubt, but it was not sufficient to demonstrate that either the decision to investigate or the decision to prosecute lacked a substantial evidentiary basis. Nor was it sufficient to suggest that either decision was arbitrary or irrational. Furthermore, although I do not consider it necessary to make a probable cause

5. Defendants Alisa Sirois and Robert Sirois observe that the Government's presentation did little, if anything, to justify the grand jury's indictment of them for participating in a black-market drug distribution conspiracy. I am not persuaded that the individual movants enjoy a private right under the Rohrabacher-Farr Amendment to compel the Government to prove its case in advance of trial, *United States v. Evans*, 929 F.3d 1073, 1077 (9th Cir. 2019), though I recognize that overzealous conspiracy prosecutions might dissuade individuals from participating in Maine's medical marijuana program. In any event, given the evidence of both black-market transactions in Shoe Shop marijuana and the collective nature of the operation, I conclude that the prosecution of Alisa and Robert Sirois does not undermine Maine's implementation of a medical marijuana program. Furthermore, neither Alisa nor Robert Sirois introduced evidence to suggest the existence of special circumstances that would make it unreasonable to include them in a conspiracy prosecution.

assessment, the Sirois Defendants' presentation did not persuade me of the absence of probable cause, but rather suggested to me that there are evidentiary issues for a jury to evaluate, in particular the credibility of witnesses. I also conclude that an order enjoining prosecution based on the Rohrabacher-Farr Amendment would be ill-advised here, as the State of Maine, through its Office of Marijuana Policy, ultimately requested an investigation based upon, among other things, the report of black market sales by an insider and possible violation of the rule against collective grow operations.[6]

CONCLUSION

For the reasons set out above, the Sirois Defendants' Motions to Dismiss or Enjoin Prosecution (ECF Nos. 285/288/292) are DENIED.

SO ORDERED.

Dated this 18th day of August, 2023

/s/ Lance E. Walker
United States District Judge

6. Given these conclusions, I also am not persuaded that the Sirois Defendants have made a compelling showing on likelihood of success, the equities of the matter, or service of the public interest to warrant the extraordinary remedy of a preliminary, let alone final injunction.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED NOVEMBER 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1723

UNITED STATES,

Appellee,

v.

LUCAS SIROIS,

Defendant-Appellant.

Before

Barron, *Chief Judge*,
Gelpí, Montecalvo, Rikelman, and Aframe
Circuit Judges.

ORDER OF COURT

Entered: November 14, 2024

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and

the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk