Case No. 13-15391

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Appellant,

vs.

ERIC HOLDER, Attorney General of the United States;
MELINDA HAAG, U.S. Attorney for the Northern District of California,

Appellees.

Appeal from the United States District Court for the Northern District of California, Case No. CV 12-05245-MEJ

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

A. The District Court Has Jurisdiction to Review the Federal Agency's Action under 28 U.S.C. § 1331 and the Administrative Procedure Act

This appeal presents the question whether the district court has subject matter jurisdiction over the City of Oakland's ("Oakland") challenge to the U.S. Department of Justice's ("DOJ") effort to shut down the Harborside Health Center ("Harborside"). Harborside is one of four permitted and operational medical cannabis dispensaries in Oakland. It is at the forefront of Oakland's efforts to develop responsible and safe dispensaries for patients for whom cannabis is prescribed for medical treatment. The center has been operating openly since 2006 in accordance with Oakland's detailed regulatory scheme.

At the heart of the jurisdictional dispute is the right of Oakland and its 400,000 residents to have access to the courts to redress the multiple injuries the federal agency action already has inflicted, and will inflict in the future, upon Oakland and its residents. The district court has jurisdiction over Oakland's lawsuit under 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

Because Oakland challenges a decision of a federal agency applying federal law, the case falls within the federal question jurisdiction of 28 U.S.C. § 1331.

W. Radio Servs. Co. v. Qwest Corp., 530 F.3d 1186, 1193-94 (9th Cir. 2008). That much is undisputed.

The key disputed issue is whether the DOJ's filing of a forfeiture action to close Harborside is a "final agency action for which there is no other adequate remedy in a court," and thus reviewable under the APA, 5 U.S.C. § 704. As shown in this brief, the answer to this question is "yes." Because this standard is met, the district court has jurisdiction to review the DOJ's action under the APA. *See* 5 U.S.C. § 704; *Bowen v. Massachusetts*, 487 U.S. 879, 910-11 (1988).

B. This Court Has Jurisdiction under 28 U.S.C. § 1291

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this is an appeal from a final order dismissing the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Miller v. Wright*, 705 F.3d 919, 922 (9th Cir.), *cert. denied*, No. 12-1237, 2013 WL 1625135 (U.S. June 17, 2013). That order disposed of all parties' claims in the action.

C. The Appeal Was Timely Filed

The district court entered its order granting Defendants' motion to dismiss on February 14, 2013. Excerpts of Record ("ER") 1-10. Oakland filed its notice of appeal on February 27, 2013. ER 11-12. Thus, Oakland's appeal is timely under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal concerns the question whether the district court has subject matter jurisdiction under the APA over Oakland's complaint challenging the DOJ's decision to bring the Harborside forfeiture action. The district court's denial of jurisdiction deprives Oakland of any access to the courts to redress the federal government's disruption of its regulatory scheme, endangerment of the health and safety of its 400,000 residents, and elimination of a source of tax revenue.

The ultimate issue is whether the district court's denial of access to the courts is inconsistent with the APA's expansive provisions authorizing judicial review of agency actions. This issue turns on two subsidiary questions of law:

1. Whether Oakland has "no other adequate remedy in a court" than to pursue its action under the APA to protect its regulatory scheme, to protect the health and safety of its residents, and to safeguard its tax revenues, when (a) the city lacks standing to intervene in the forfeiture action, (b) no other statute provides a judicial remedy, and (c) Oakland's grievances are distinct from the grievances addressed by the forfeiture statute.
2. Whether the DOJ's decision to file a forfeiture action for the purpose of shuttering Oakland's largest permitted medical cannabis dispensary

constitutes a "final agency action" under § 704 of the APA when (a) the DOJ's filing of the Harborside forfeiture action marked the consummation of its decision-making process, (b) that decision has direct and appreciable legal consequences for Oakland and its residents, and (c) judicial review of the DOJ's decision will not disrupt any ongoing administrative proceedings.

Attached to this brief is an Addendum containing 5 U.S.C. §§ 701-706.

III. STATEMENT OF THE CASE

In July 2012, the DOJ filed a forfeiture action against the real property on which Harborside operates. The forfeiture action is captioned *United States v. Real Property and Improvements Located at 1840 Embarcardero, Oakland, California*, N.D. Cal. Case No. CV 12-3567-MEJ (the "Harborside forfeiture action"). Harborside is one of four permitted medical cannabis dispensaries in Oakland and is reputed to be the largest dispensary in the country. ER 1055-56 (Compl. ¶¶ 36, 37). Harborside has been operating openly since 2006 in accordance with Oakland's regulatory scheme and California law. ER 1055-56.

In response to this disruption of its long-standing efforts to protect the health, safety, and welfare of its residents, Oakland filed this lawsuit against Attorney General Eric Holder and U.S. Attorney Melinda Haag under the APA. In this lawsuit, Oakland seeks to enjoin the government's Harborside forfeiture action

to enable Oakland's continued regulation of a safe medical cannabis marketplace in compliance with state and local law. ER 1062 (Compl. ¶¶ 69-70).

Oakland's complaint alleges claims based on the statute of limitations and doctrine of equitable estoppel. ER 1048-1064. First, Oakland alleges that the five-year statute of limitations bars the Harborside forfeiture action because it was filed nearly six years after the DOJ knew or should have known of Harborside's opening. ER 1055-56, 1061-62 (Compl. ¶¶ 36-41, 61-70). Second, Oakland alleges that the doctrine of equitable estoppel bars the federal government from pursuing the Harborside forfeiture action. ER 1056-63 (Compl. ¶¶ 42-60, 71-80). The equitable estoppel claim is based on Oakland's reasonable reliance on (1) multiple statements by the federal government's highest officials articulating its policy of non-enforcement against dispensaries operating consistently with state law, and (2) the government's actual pattern of non-enforcement. ER 1056-63.

The DOJ moved to dismiss Oakland's complaint under Federal Rule of Civil Procedure 12(b)(1) and (6). ER 789-809. The DOJ argued that the district court lacks jurisdiction over Oakland's claims because the government did not waive sovereign immunity. ER 789-809.

The district court granted the DOJ's motion. ER 1-10. The district court ruled as a matter of law that Oakland could challenge the federal agency's decision only by filing a claim in the forfeiture action, which provided an adequate remedy

and thus barred judicial review under the APA. ER 6-7. The district court made this ruling despite the undisputed fact that Oakland has no standing to participate in the forfeiture action because it lacks any interest in the real property subject to forfeiture. ER 5. The district court also ruled as a matter of law that there was no "final agency action" within the meaning of the APA. ER 8-9. The district court made this ruling despite the fact that the DOJ's decision to file the forfeiture action is final and judicial review of that decision would not disrupt any ongoing administrative proceedings.

Oakland promptly appealed. ER 11-12. Oakland also moved to stay the Harborside forfeiture action pending the outcome of this appeal. ER 1086 (Dkt. 56, 61). The DOJ opposed the motion, and a hearing took place on June 20, 2013. ER 1086-87 (Dkt. 60, 70). On July 3, 2013, the district court granted Oakland's motion to stay the Harborside forfeiture action until this appeal is resolved. ER 1066-78.

In granting Oakland's request for a stay, the district court found that Oakland's appeal raises "serious legal questions sufficient to satisfy the requirement of likelihood of success on the merits." ER 1072. The district court explained: "While the Court ultimately held that Oakland's claims did not fit within the parameters of the APA, this Court is not infallible in its rulings and Oakland's appeal allows the Ninth Circuit to provide guidance on whether this

Court's construction of the applicable statutory provisions was correct." ER 1072. The district court observed that "Oakland raises novel legal questions about the interplay between the APA and the civil forfeiture statutory scheme" that constitute "an issue of first impression in this Circuit." ER 1072. The district court further explained: "If this Court's analysis was incorrect, the Court's dismissal will have foreclosed Oakland from protecting its interests. Thus, at the heart of Oakland's appeal is its right to access the federal court to assert its claims – a right of paramount importance." ER 1072.

IV. STATEMENT OF FACTS

A. California Voters Approved the Use and Sale of Medical Cannabis

California state voters approved the Compassionate Use Act in 1996 to allow patients to obtain and use medical cannabis with a doctor's prescription without fear of criminal prosecution or sanction. ER 1051 (Compl. ¶ 12). The Act also sought to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." *Id*. (quoting Cal. Health & Safety Code §§ 11362.5(b)(1)(A)-(C)). The California Legislature expanded the law in 2003 to exempt sellers of medical cannabis from prosecution under state law. ER 1052-53 (Compl. ¶¶ 17-19).

B. Relying on California Law, Oakland Developed a Detailed Regulatory Scheme for Medical Cannabis Dispensaries

The City of Oakland adopted comprehensive regulations in February 2004 to approve, oversee, tax, and issue permits to a limited number of nonprofit companies to sell medical cannabis to patients with prescriptions from medical practitioners. ER 1053; 558; 99-106 (Compl. ¶ 21; Sanchez Decl. ¶¶ 9-10; RJN Ex. 2). These regulations comport with California state law and advance Oakland's broad public interest in promoting the health, safety, and welfare of its citizens. ER 1053-55; 558-60 (Compl. ¶¶ 20, 28, 29, 33; Sanchez Decl. ¶¶ 9, 13-15). To support these efforts, Oakland residents passed Measure Z in November 2004, requiring Oakland to tax and regulate the use of medical cannabis. ER 1053 (Compl. ¶ 21). The Oakland City Administrator's Office has dedicated substantial resources to educating its staff about cannabis regulation and administering the medical cannabis dispensary permit program. ER 1060; 558; 953-71 (Compl. ¶¶ 55, 59; Sanchez Decl. ¶¶ 13, 14; Chao Decl. Ex. 1).

Oakland's model regulatory program imposes many requirements on medical cannabis dispensaries to ensure the health, safety, and welfare of Oakland residents and the patients who rely on the dispensaries. ER 99-106 (Supp. RJN Ex. 2). The regulations require dispensaries to provide medical cannabis only to those patients with valid patient identification cards or with a doctor's recommendation. ER 1054 (Compl. ¶ 28). The regulations restrict excessive profits, thus ensuring

medical cannabis remains affordable for patients. ER 1054; 105 (Compl. ¶ 28; Supp. RJN Ex. 2 p. 7). Oakland's regulations also prevent the diversion of cannabis for non-medical use. ER 1054; 979-81 (Compl. ¶ 28; Chao Decl. Ex. 2 pp. 8-9, ¶¶ 33-34, 37). Arturo Sanchez, Oakland's Deputy City Administrator with responsibility for oversight of the program, explained: "Dispensaries must track patient visits and purchases, and maintain records of the expiration dates of patients' medical cannabis recommendations." ER 559-60 (Sanchez Decl. ¶ 15). Only patients, caregivers, and employees of the dispensary are permitted inside any dispensary. ER 976 (Chao Decl. Ex. 2 p. 5, ¶ 3). Consumption of cannabis is not permitted on dispensary premises. ER 104; 112 (Supp. RJN Ex. 2 p. 6, § 5.80.040; Supp. RJN Ex. 3 p. 6, ¶ 11).

As part of the application process, applicants are required to undergo background checks, and persons with felony convictions are prohibited from obtaining a permit or working at a dispensary. ER 1053; 104-05; 112-13 (Compl. ¶ 23; Supp. RJN Ex. 2 pp. 6-7; Supp. RJN Ex. 3, ¶ 16). Background checks must also be performed on all new employees. ER 112-13 (Supp. RJN Ex. 3 pp. 6-7, ¶ 16). The regulations prohibit dispensaries from operating within six hundred feet of schools, libraries, youth centers, parks and recreation facilities, residential zones, or another dispensary. ER 114 (Supp. RJN Ex. 3 p. 8, ¶ 24). Dispensaries must provide security guards, security cameras, and adequate lighting to ensure a

safe environment. ER 1055; ER 114-15 (Compl. ¶ 33; Supp. RJN Ex. 3 pp. 8-9, ¶¶ 29-35).

Oakland protects the health of patients by requiring the dispensaries to send their cannabis to an independent laboratory for quality control testing "to ensure it is free of harmful contaminants." ER 1054; 559 (Compl. ¶ 29; Sanchez Decl. ¶ 15). In this way, the regulations ensure the quality and safety of the medical cannabis and prevent adverse health impacts from the use of fertilizer, insecticide, and other harmful substances and contaminants that might exist in unregulated medical cannabis. ER 1054; 111 (Compl. ¶ 29; Supp. RJN Ex. 3 p. 5, ¶ 9).

Oakland actively monitors the dispensaries to ensure compliance with state and local law. ER 1053; 558-60; 109-11 (Compl. ¶¶ 20-23; Sanchez Decl. ¶¶ 14-15; Supp. RJN Ex. 3 pp. 3-5). Indeed, Oakland revoked two permits when the dispensaries failed to comply with Oakland's regulations. ER 558; 955-56 (Sanchez Decl. ¶ 11; Chao Decl. Ex. 1, pp. 3-4). Dispensary permits are valid for only twelve months. ER 110 (Supp. RJN Ex. 3 p. 4). To renew their permits, dispensaries must undergo annual review, including public hearings and annual audits of their financial statements, to ensure continued compliance with all regulations and laws. ER 1053-54; 109-11 (Compl. ¶¶ 23, 28; Supp. RJN Ex. 3 pp. 3-5).

C. Oakland Issued a Permit to Harborside to Operate a Medical Cannabis Dispensary, and Harborside Has Operated Openly Since 2006

After adopting its regulatory scheme, Oakland commenced a competitive and rigorous application process that resulted in the granting of four permits to medical cannabis dispensaries, including one to Harborside in 2006. ER 1053, 1055-56; 558; 954-59 (Compl. ¶¶ 21, 24, 37; Sanchez Decl. ¶ 11; Chao Decl. Ex. 1 pp. 2-7). Oakland subsequently devoted considerable time and effort to closing unlicensed dispensaries. ER 1053 (Compl. ¶ 22).

Federal authorities have been aware of Oakland's regulations and the operations of Harborside and the three other dispensaries from their inception. ER 1055 (Compl. ¶ 36). Since it commenced business, Harborside has operated transparently in the public domain. ER 1055-56 (Compl. ¶¶ 37-39). For example, it has a public website, a Facebook page, and reviews on Yelp. ER 1056 (Compl. ¶ 38). Its website openly lists its inventory and notifies the public of its business address and contact information. ER 1055-56 (Compl. ¶ 37). Harborside was also the subject of press coverage during its early days of operation. ER 1056; 982-89 (Compl. ¶ 39; Chao Decl. Exs. 3-4).

D. The Federal Government Has Validated and Extolled the Significant Benefits of Medical Cannabis

Scientists employed or funded by the federal government are at the forefront of the research identifying and validating the significant medical benefits of

cannabis. ER 341-94; 568-781 (RJN Exs. 1-3; Brinker Decl. Exs. 1-17). In fact, the U.S. Department of Health and Human Services has applied for both U.S. and international patents and owns a U.S. patent for synthetic cannabinoids. ER 341-94 (RJN Exs. 1-3). The government's patent applications extol the medical benefits of cannabinoids. *Id*.

The government's U.S. patent, for example, recommends cannabinoid use for the treatment and prevention of a broad range of diseases, including several cardiovascular and neurodegenerative diseases. ER 341-55 (RJN ¶ 1 Ex. 1). The abstract of that patent states cannabinoids are effective "in the treatment and prophylaxis of a wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases … [and] in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia." ER 342 (RJN Ex. 1 p. 2). The government extolled the benefit of cannabis for "treatment and prevention of intraoperative or perioperative hypoxic insults that can leave persistent neurological deficits following open heart surgery requiring heart/lung bypass machines, such as coronary artery bypass grafts (CABG)." ER 346 (RJN Ex. 1 p. 6, col. 7:3-7).

The government's International Patent Application discusses the "analgesic and healing properties" of cannabis that "have been known through documented history" and acknowledges the "legitimate medical use[s] of marijuana," including treatment of chemotherapy-induced nausea, appetite stimulation in patients with HIV/AIDS, and "movement disorders caused by multiple sclerosis." ER 392-93 (RJN Ex. 3 pp. 3-4). The National Institutes of Health has even licensed its cannabis patent for commercial development. ER 579-80 (Brinker Decl. Ex. 2).

Since filing its patent applications, the U.S. government has continued to explore additional medical benefits of cannabinoids. For example, Dr. Pál Pacher at the National Institute on Alcohol Abuse and Alcoholism has discovered numerous benefits of cannabinoids, including the prevention of diabetic complications in the heart, such as fibrosis, and protection from chemotherapy-induced kidney damage and transplantation-related liver damage. ER 704; 723; 732 (Brinker Decl. Ex. 14 p. 2; Ex. 15 p. 2; Ex. 16 p. 3).

A wide spectrum of the scientific community has likewise identified numerous medical benefits from cannabis. ER 579-781 (Brinker Decl. Exs. 2-17). Medical cannabis has been found, for example, to effectively alleviate severe neuropathic pain in HIV patients, including in patients who did not respond to some of the strongest traditional pain medications, such as opioids. ER 598, 604 (Brinker Decl. Ex. 4 pp. 2, 8).

E. The Federal Government Adopted and Repeatedly Affirmed a Policy of Non-Prosecution of Parties Acting in Compliance with State and Local Law

The federal government recognized a groundswell in the change in attitudes toward and knowledge about medical cannabis by announcing it would not prosecute parties that act in compliance with state and local law. ER 1056-59 (Compl. ¶¶ 42-51). For more than six years, the federal government observed a policy of non-prosecution of the Controlled Substances Act with respect to medical cannabis dispensaries that comply with state and local law. ER 1056-60 (Compl. ¶¶ 40-51, 56). Before it filed the forfeiture action, the federal government had allowed Oakland's medical cannabis market to develop and grow by directing DOJ resources only against persons not acting in conformity with state and local law. ER 1056-60 (Compl. ¶¶ 40-51, 56).

The Obama Administration made this policy of non-prosecution explicit. ER 1056-59 (Compl. ¶¶ 42-51). Beginning during his first campaign for president, in August 2007, President Obama avowed: "I would not have the Justice Department prosecuting and raiding medical marijuana users. It's not a good use of our resources." ER 1056-57 (Compl. ¶ 43). President Obama also stated: "I'm not going to be using Justice Department resources to try and circumvent state laws on this issue." ER 1056-57 (Compl. ¶ 43).

Once President Obama was elected, these promises of non-prosecution became the DOJ's official policy. In February 2009, a White House spokesperson told The Washington Times: "The president believes that federal resources should not be used to circumvent state laws, and as he continues to appoint senior leadership to fill out the ranks of the federal government, he expects them to review their policies with that in mind." ER 1057 (Compl. ¶ 44).

In a press conference later that month, Attorney General Eric Holder announced that what President Obama promised during the campaign "is now American policy." ER 1057 (Compl. ¶ 45). In March 2009, Attorney General Holder repeated that "[t]he policy is to go after those people who violate *both* federal and state law." ER 1057 (Compl. ¶ 46, emphasis added).

On October 19, 2009, Deputy Attorney General David W. Ogden distributed a memorandum (the "Ogden Memo") that was made public via an official press release of the same date. ER 1058 (Compl. ¶ 47). The purpose of the memorandum was to provide "clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana" and "uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities." ER 1058 (Compl. ¶ 47). While the Justice Department would continue to pursue and prosecute "drug traffickers" such as supporters of "the Mexican cartels," U.S. Attorneys were told they "should not

focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." ER 1058 (Compl. ¶ 47).

In May 2010, Attorney General Holder appeared before the House Judiciary Committee and was asked about federal enforcement policy regarding marijuana and the Ogden Memo. Attorney General Holder testified: "We look at the state laws, and what the restrictions are . . . Is marijuana being sold consistent with state law?" ER 1059; 999-1002 (Compl. ¶ 50; Chao Decl. Ex. 8). The committee specifically pressed him regarding statements by a Drug Enforcement Agency ("DEA") agent in Colorado that were contrary to the Ogden Memo. ER 1059 (Compl. ¶ 50). The committee asked if the agent's statements could be taken as "threatening" to dispensaries operating legally under state law. *Id.* In response, Attorney General Holder reiterated the official policy set forth in the Ogden Memo. *Id.* He acknowledged that it was "incumbent upon me as Attorney General to make sure that what we have set out as policy is being followed by all of the components within the Department of Justice" including the DEA and the Assistant U.S. Attorneys. *Id.* "[I]t is my responsibility to make sure that the policy is clear, that the policy is disseminated, and that people act in conformity with policies that we have determined." *Id.*

As recently as June 2012, Attorney General Holder testified to the House Judiciary Committee that "we limit our enforcement efforts to those individuals, organizations that are acting out of conformity . . . with state laws, or . . . where distribution centers were placed within close proximity to schools." ER 1059; 1003-06 (Compl. ¶ 51; Chao Decl. Ex. 9).

F. Despite Repeatedly Affirming Its Policy of Non-Prosecution, the DOJ Filed a Forfeiture Action Against the Property Where Harborside Operates, Causing Immediate Harm to Oakland's Regulatory Program

In a sudden about-face, on July 9, 2012, the DOJ instituted a forfeiture action against the property where Harborside operates based solely on an alleged violation of the Controlled Substances Act. ER 1049 (Compl. ¶ 1). The action was *not* based on any violation of state or local law. ER 1049 (Compl. ¶ 1). This came on the heels of Attorney General Holder's June 2012 congressional testimony affirming the DOJ's official policy of non-prosecution of persons acting in compliance with state and local law regarding medical cannabis. The reversal of the policy came without warning or explanation. ER 560-61 (Sanchez Decl. ¶¶ 16-24). After operating publicly for more than six years, Harborside's very existence – and with it, Oakland's entire regulatory framework for the safe use and sale of medical cannabis – is in peril.

The DOJ's action has had a ripple effect throughout the struggling City of Oakland. Oakland relies on its well-regulated medical cannabis market both to

reduce the street crime associated with illegal cannabis sales and to provide a safe environment for patients to obtain their medicine. ER 1055; 562 (Compl. ¶¶ 32-35; Sanchez Decl. ¶¶ 25-26). Oakland's authorized and regulated dispensaries have served thousands of patients with doctors' prescriptions. ER 1049, 1059-61 (Compl. ¶¶ 1-3, 52-60). Without this safe, closely-monitored marketplace, many patients will undoubtedly seek unchecked cannabis from the black market. ER 1055; 554; 562 (Compl. ¶¶ 32-33; Quan Decl. ¶ 8; Sanchez Decl. ¶ 26). Oakland Mayor Jean Quan, and others, fear this will create a public health and safety crisis for Oakland and its 400,000 residents, including the many patients who have come to rely on the dispensaries that the federal government's policy of non-prosecution allowed to flourish. ER 1055; 554-55; 562 (Compl. ¶¶ 32-33; Quan Decl. ¶¶ 8-11; Sanchez Decl. ¶¶ 25-26).

Oakland also depends on the substantial tax revenues generated from sales of medical cannabis. ER 1054-55 (Compl. ¶ 31). It was projected to receive over $1.4 million in tax revenues from the dispensaries in 2012. ER 1060 (Compl. ¶ 54). This amount is sufficient to pay for a dozen badly needed additional police officers or firefighters. ER 1060 (Compl. ¶ 54). As a city facing the double impact of soaring crime levels and budget-driven reductions in the size of its police force, Oakland will make good use of the tax revenue generated by the dispensary program. ER 1060; 553-54 (Compl. ¶ 54; Quan Decl. ¶¶ 3-5).

Mayor Quan testified that closing down the dispensaries will divert police resources to the increased street crime that will result from a renewed illegal cannabis market and will "further strain[] the limited resources of the Oakland Police Department (OPD)." ER 554 (Quan Decl. ¶ 8). Mayor Quan explained the predicament the federal government's action has created:

> It is important that the OPD focus its scarce resources on the gun violence that costs so many lives and on enhancing investigations and responses to calls for service. Oakland cannot afford to divert its scarce police resources to address crimes associated with illegal underground sales of medical cannabis.

ER 554-55 (Quan Decl. ¶ 9). The government's illegal forfeiture action will not only divert millions of dollars of cannabis sales from the regulated market to the streets, but will also deprive cash-strapped Oakland of a significant source of revenue, and increase crime. ER 555 (Quan Decl. ¶ 11)

The government's foreclosure action also has had a chilling effect on the emergence of other regulated medical cannabis dispensaries. In March 2012, Oakland issued four additional dispensary permits. ER 1061 (Compl. ¶ 60). But the new permit holders have had trouble finding commercial space to lease because the federal government's threats to seize real property associated with the distribution of medical cannabis have deterred landlords from providing space. ER 1061 (Compl. ¶ 60).

Oakland Deputy City Administrator Arturo Sanchez, who has been responsible for overseeing the dispensary permit program since 2010, testified to the dire consequences from the government's action:

> Closing Harborside will lead to an increase in street crime. The black market for cannabis has decreased over the past six years, but will heat up again as soon as patients have nowhere else to turn to obtain their medicine. In my position as a Deputy City Administrator with first-hand knowledge of City operations and of Oakland's medical cannabis regulatory scheme, it is my observation that if the government succeeds in closing down Oakland's dispensaries, the ill patients will be forced to choose between foregoing their medicine or going into the streets to buy unregulated and possibly adulterated cannabis.

ER 562 (Sanchez Decl. ¶ 26). The government's reversal creates a grave threat to public health and safety – the very dangers that Oakland's successful and nation-leading regulatory scheme was designed to prevent in the first place.

In sum, the government's about-face has impaired Oakland's ability to continue its regulatory scheme, rely on the tax revenues generated by medical cannabis prescription sales, and provide a safe market for patients to acquire cannabis. The forfeiture action has had a chilling effect on Oakland's regulated marketplace for medical cannabis. If successful, it will destroy what Oakland expended considerable time and resources to build under California law. Unless it can challenge the federal government's inconsistent, arbitrary, capricious, and unlawful actions, Oakland cannot defend its interest in promoting public health,

welfare, and safety by providing a safe, affordable, and reliable source of medical cannabis. Oakland's lawsuit is the only way to achieve these goals. Without judicial review under the APA, Oakland and its 400,000 residents will be denied access to the courts, the most basic of rights in a country founded on the rule of law.

V. SUMMARY OF ARGUMENT

The federal government's decision to file the Harborside forfeiture action is a final agency action for which Oakland has no adequate remedy unless it can proceed with this lawsuit under the APA. The district court's contrary ruling is based on legal error. Specifically, the district court erred in ruling that (1) the forfeiture action gave Oakland an adequate remedy even though Oakland had no standing to participate in that action, and (2) the DOJ's final decision to file the forfeiture action was not a final agency action. As a result, Oakland has been denied access to the courts to secure the health, welfare, and safety of its 400,000 residents through its continued regulation of the marketplace for medical cannabis. If the district court's decision is allowed to stand, a federal agency will be permitted to destroy a local government's well-established regulatory scheme without judicial review. Oakland asks this Court to reverse the district court's decision and hold that both prongs of APA § 704's test for reviewability of the DOJ's action are met here.

First, the APA provides the only avenue for Oakland to challenge the federal government's decision to file the Harborside forfeiture action. That decision reversed the DOJ's long-standing policy of non-prosecution of medical cannabis dispensaries operating in compliance with state and local law. Because Oakland has no property interest in the real property housing Harborside, it lacks standing to pursue a claim in the forfeiture action. And no other statute provides an avenue for Oakland to obtain judicial relief. This is a classic situation where the "no other adequate remedy" prong is met.

The Supreme Court's recent holding in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), is directly on point. In *Patchak*, the Court held that a local resident could pursue an APA challenge to the government's decision to transfer neighboring land to an Indian tribe intending to build a casino even though he was not claiming a property interest in the land. The government had argued that a carve-out in the Quiet Title Act barred the plaintiff's claim because that statute was the exclusive means by which the local resident might challenge the government's action. The Supreme Court reasoned, however, that the Quiet Title Act did not apply because only a person with a property interest can pursue such a claim, and the plaintiff lacked a property interest. This reasoning likewise compels the conclusion that Oakland may obtain judicial review under the APA because its lack of a property interest means it has no

remedy in the forfeiture action. This conclusion comports with the very purpose of the APA: to allow parties to challenge federal agency actions when judicial review would otherwise be foreclosed.

Second, the government's decision to file the forfeiture complaint constitutes a final agency action because it is the "consummation of the [DOJ's] decisionmaking process" from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotations omitted). The DOJ's decision to try to shutter Harborside is neither "tentative" nor "interlocutory." *See id.* The forfeiture action now rests in the hands of a court. The DOJ's decision to disrupt Oakland's long-standing regulatory scheme by filing the action is as final as it can be.

Moreover, the DOJ's decision has a host of legal and practical consequences for Oakland and its 400,000 residents whose health, welfare, and safety are entrusted to the city. *First*, the DOJ's action overrides Oakland's continued regulation of medical cannabis by reversing its long-standing policy of non-prosecution. The action thereby alters the legal regime to which Oakland and its regulated medical cannabis dispensaries are subject. *Second*, the DOJ's reversal of its non-prosecution policy subjects those operating under the auspices of Oakland's regulatory scheme to possible civil and criminal sanctions. *Third*, the DOJ's decision has had a chilling effect on the operation of other medical cannabis

dispensaries that Oakland has licensed. *Fourth*, the DOJ's action jeopardizes the health, welfare, and safety of Oakland residents protected by the city's regulatory scheme.

Accordingly, both prongs of the test for judicial review of the DOJ's action under APA § 704 are met, and the district court has subject matter jurisdiction over Oakland's claims.

As the district court acknowledged, this case raises issues of first impression under the APA. The district court, however, erred in its resolution of the legal questions presented. Its decision therefore should be reversed and the case should be remanded for an adjudication of Oakland's claims on the merits.

VI. ARGUMENT

Section 704 of the APA provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The question on appeal is whether the DOJ's decision to file the Harborside forfeiture action is subject to judicial review under this standard. Because both prongs of this standard – "no other adequate remedy" and "final agency action" – are met, the answer to this question is "yes."

A. Standard of Review

This Court reviews *de novo* a district court's decision to dismiss a case for lack of subject matter jurisdiction. *See Atwood v. Fort Peck Tribal Ct. Assiniboine*,

513 F.3d 943, 946 (9th Cir. 2008). Where, as here, the defendant's attack on subject matter jurisdiction is based on the pleadings, the Court accepts as true all allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The Court may also consider "any other particularized allegations of fact, in affidavits or in amendments to the complaint." *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001).

B. Without Judicial Review under the APA, Oakland Lacks an Adequate Legal Remedy Because It Has No Other Means to Challenge the Government's Action

Contrary to the district court's ruling, the Harborside forfeiture action does not provide Oakland with an adequate legal remedy for the government's unlawful action. ER 5-7. The district court acknowledged that "the interests Plaintiff has identified – while significant and wide-reaching – are too far removed from the defendant property to give it standing to challenge the *in rem* proceeding." ER 6. But the district court then ruled that, even though Oakland cannot participate in the forfeiture action, it gives Oakland an adequate remedy that bars judicial review under APA § 704. ER 6-7. In short, the district court ruled, incongruously, that a proceeding that cannot give Oakland any remedy at all somehow gives Oakland an adequate remedy that forecloses all access to the courts.

Neither law nor logic supports the district court's ruling on this point. As recent Supreme Court precedent shows, the fact that Oakland lacks standing in the forfeiture action means it lacks an alternate legal remedy. Unless Oakland can obtain judicial review under the APA, it has no opportunity to defend its 400,000 residents' significant interests by challenging the government's decision to pursue the forfeiture action. As a result, the first prong of the test for judicial review under the APA is met.

1. Recent Supreme Court Authority Establishes that the Civil Forfeiture Statute Does Not Preclude Oakland's Suit under the APA

The Supreme Court's analysis in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012) ("*Patchak*"), confirms that the civil forfeiture statute does not preclude Oakland from proceeding under the APA. In *Patchak*, the Supreme Court allowed the plaintiff to proceed under the APA in circumstances nearly identical to this case. *See id.* In both cases, the plaintiff could not sue under an alternative statute, but sought relief for grievances different from the grievances addressed by that statute. In *Patchak*, the Supreme Court held that the alternative statute did not bar relief and the plaintiff could obtain judicial review under the APA. *Id.* The same is true here.

In *Patchak*, the plaintiff sued under the APA to strip the government of title to certain tribal land. *Id*. at 2202-03. The plaintiff, a neighbor of a land on which

an Indian tribe sought to open a casino, alleged that the federal government lacked authority under the Indian Reorganization Act to take title to the land to hold it in trust for the tribe. *Id*. As his injury, the plaintiff alleged economic, environmental, and aesthetic harms from the casino's operation, including "increased crime." *Id*. at 2203. The plaintiff did not have, nor did he assert, a property interest in the land. *Id*.

The federal government argued that the Quiet Title Act ("QTA") barred the plaintiff's APA action because the QTA does not authorize quiet title suits relating to trust or restricted Indian lands. *Id*. at 2205. The government argued, in other words, that the plaintiff could not circumvent the QTA by proceeding under the APA – just as the government accuses Oakland of circumventing the civil forfeiture statute by suing under the APA.

The Supreme Court rejected the federal government's argument: "When a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit." *Id*. (quoting a 1976 letter authored by Justice Scalia when he served as Assistant Attorney General). The QTA applies "to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property." *Id*. at 2206. The plaintiff in *Patchak*, however, was "not an adverse claimant." *Id.* He did not contend he owned the property, nor did he seek any relief corresponding to such a

claim. Instead, he "want[ed] a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it." *Id*. at 2207. The Court held that, precisely because the QTA did not address the plaintiff's grievance, the QTA did not bar his APA claim. *Id.*; *see also Pine Bar Ranch LLC v. Interior Bd. of Indian Appeals*, No. 11-35564, 2012 U.S. App. LEXIS 25488 (9th Cir. Dec. 13, 2012) (holding that the QTA did not bar an APA lawsuit where the plaintiff did not assert a property interest in the land but instead "assert[ed] a right of access akin to the right of the public").

Patchak is directly on point here. In both cases, the plaintiffs challenged a federal agency action with respect to real property even though they did not have, and did not claim, an interest in the real property. Neither Oakland nor the plaintiff in *Patchak* sought to own or possess the property at issue. Rather, they both filed suit to stop the federal government from making a certain disposition of that property. Further, Oakland's grievances include that the government's pursuit of forfeiture of the Harborside property will harm public health and safety, deprive Oakland of tax revenues, and undermine its carefully crafted regulatory scheme. It is undisputed that the forfeiture statute does not address Oakland's grievances, just as the QTA did not address the grievances – economic, environmental, and aesthetic harm flowing from a casino's operation – in *Patchak*. *See* 132 S.Ct. at

2202-03. Accordingly, just as the QTA did not bar the APA action in *Patchak*, so too the forfeiture statute does not bar Oakland's APA action here.

Under *Patchak*'s grievance analysis, the nature of the relief that Oakland seeks is irrelevant. The plaintiff in *Patchak* was allowed to proceed under the APA even though he sought to divest the United States of title to the land. *Id.* at 2203. The Supreme Court's analysis turned on whether the QTA addressed the plaintiff's particular "grievance" – not on whether the same result was available under the QTA to a person with a property interest. *Id.* at 2205-06. Here, the district court – which did not even mention, much less analyze, *Patchak* – erred by focusing on the asserted similarity of the desired result and not, as the Supreme Court requires, on the nature of the grievance. Here, because the forfeiture statute does not address Oakland's grievances, it does not bar Oakland's APA lawsuit. Unless it can challenge the government's unlawful action under the APA, Oakland lacks an adequate legal remedy.

2. The Correct Test Is Whether Oakland, Not *Other* Injured Parties, Has an Adequate Remedy under the Civil Forfeiture Statute

Recognizing Oakland's lack of standing in the forfeiture action, the district court relied on the availability of a remedy to others – those with an interest in the real property subject to forfeiture – to deny Oakland access to the courts. But this analysis ignores "the well-established meaning of 'adequate remedy,'" which

Justice Scalia explained means "the adequacy of a remedy for a *particular* plaintiff in a particular case . . . ." *Bowen*, 487 U.S. at 927 (Scalia, J., dissenting) (emphasis added). The proper test is whether *Oakland*, not some *other* injured party, has an adequate remedy under the civil forfeiture statute. Contrary to the district court's decision, the availability of a remedy to claimants to the property subject to the forfeiture action is irrelevant to Oakland's right to judicial review under the APA.

Under the civil forfeiture statute, 18 U.S.C. § 983 and Supplemental Rule G, only "[a] person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending." Fed. R. Civ. P. Supp. R. G(5)(a)(i). Here, Oakland does not have an interest in the property at issue in the forfeiture action and thus cannot be a claimant in that action. Both the government and the district court acknowledged that "it is undisputed that Plaintiff lacks standing to file a claim or otherwise participate in the *1840 Embarcadero* forfeiture proceeding as a claimant." ER 5. Because Oakland – the "particular plaintiff" in this "particular case" – cannot be a claimant in the forfeiture action, it does not have an adequate remedy under the civil forfeiture statute.

The purpose of the requirement that a party seeking APA review have "no other adequate remedy in a court" is to prevent duplication of procedures available to the party seeking relief. *See Bowen*, 487 U.S. at 903-04. The Court in *Bowen* held that APA review was available for Massachusetts' equitable action for

specific relief seeking reimbursement of monies owed even though it could pursue a claim for money damages in the Federal Court of Claims. *Id.* at 901. The Court reasoned that because the "Claims Court does not have the general equitable powers of a district court to grant prospective relief," Massachusetts could not obtain specific relief and thus lacked an adequate remedy in that court. *Id*. at 905.

Just as Massachusetts could not obtain its desired remedy in the Federal Court of Claims, Oakland cannot obtain the remedy it seeks in the forfeiture action. Therefore, just as Massachusetts had standing to obtain judicial review under the APA, judicial review is available to Oakland under the APA.

Similarly, other courts have recognized that, where a statute provides *other* injured parties an adequate remedy for the alleged governmental misconduct, but not the particular plaintiff before the court, that plaintiff may proceed under the APA. For example, the D.C. Circuit has held that physicians who challenged the denial of medical malpractice coverage had no adequate remedy under the Federally Supported Health Centers Assistance Act of 1995. *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1267, 1272 (D.C. Cir. 2005). This was because, while that statute provides a remedy for those who receive *affirmative* coverage determinations, it is "silent" regarding remedies available to those who are *denied* coverage. *Id.* at 1272. The plaintiffs therefore could sue under the APA. *Id*. at 1275.

Likewise, here, Oakland cannot obtain the remedy it seeks under the civil forfeiture statute. Oakland therefore lacks an adequate remedy unless it can access the courts under the APA.

C. The DOJ's Decision to File the Forfeiture Action Constitutes Final Agency Action Reviewable under the APA

The district court also erred as a matter of law by failing to recognize that the DOJ's decision to file the forfeiture action was a final agency action under the APA. The Supreme Court has held that courts must view finality through the prism of the APA's broad mandate to facilitate judicial review of agency action: "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation." *Bowen*, 487 U.S. at 904 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)). This Court likewise has made clear that "[i]t is the effect of the action and not its label that must be considered." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006) ("*ONDA*") (quoting *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987)).

Taking an incorrectly formalistic approach to the statute, the district court contradicted Congress's mandate, as well as the Supreme Court's and this Court's precedent. Under the correct analysis – pragmatic and flexible – the government's

decision to file the forfeiture action constitutes a final agency action under the APA. *ONDA*, 465 F.3d at 982.

1. The DOJ's Decision to File the Forfeiture Action Constitutes "Agency Action" under the APA

As a threshold matter, the DOJ's decision to file the forfeiture action is "agency action" under the APA. Because the DOJ is not excluded from the definition of "agency" in the APA, its actions unquestionably constitute "agency actions" under the APA. 5 U.S.C. § 701 ("'agency' means each authority of the Government of the United States" other than certain enumerated exceptions). Next, "agency action" in 5 U.S.C. § 704 "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001). Filing a forfeiture action on behalf of the United States is unquestionably an exercise of agency power. It therefore meets the broad definition of "agency action" under the APA.

To the extent it is necessary to identify any of the specific categories of agency action enumerated in 5 U.S.C. § 551(13), the DOJ's decision qualifies on multiple grounds. Section 551(13) provides that "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." The DOJ's action constitutes an "order" or "the equivalent . . . thereof" because it is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a

matter other than rule making but including licensing," 5 U.S.C. § 551(6). *Cf. F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 (1980) ("*Standard Oil*") (holding that issuance of an administrative complaint is "agency action" because it is "part of a final disposition"); *see also id.* ("'The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction.'") (quoting S.Doc. No. 248, 79th Cong., 2d Sess., 255 (1946)). The DOJ's action also constitutes a "sanction" or "the equivalent . . . thereof" because it overrides Oakland's regulatory scheme, declares previously permitted conduct unlawful, and subjects some of its residents to possible civil or criminal penalties. *See* 5 U.S.C. § 551(10).

The key question on appeal is simply whether the federal government's decision to disrupt Oakland's regulatory scheme by filing the forfeiture action is a *final* agency action:

> The bite in the phrase "final action" . . . is not in the word "action," which is meant to cover comprehensively every manner in which an agency may exercise its power. [citation] It is rather in the word "final," which requires that the action under review "mark the consummation of the agency's decisionmaking process." [citation] Only if the "EPA has rendered its last word on the matter" in question, [citation] is its action "final" and thus reviewable.

Whitman, 531 U.S. at 478 (citing and quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980); *Standard Oil*, 449 U.S. at 238 n.7; *Bennett*, 520 U.S. at 177-78).

2. The Government's Decision to Commence the Forfeiture Action Satisfies Both Elements of the Supreme Court's Test for Finality under the APA

A straightforward application of the Supreme Court's two-part test for finality articulated in *Bennett*, 520 U.S. at 157, shows that the DOJ's filing of the forfeiture action was a "final agency action" under the APA. In *Bennett*, the Court explained that "[a]s a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, [citation] – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' [citation]." *Id.* at 177-78 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); and *Port of Bos. Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

In discerning whether this test is met, the "core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992); *see also Darby v. Cisneros*, 509 U.S. 137, 144 (1993)

("[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . ." (internal quotations omitted)). Actions that are merely "tentative" or "interlocutory" do not qualify as final agency actions under the APA. *ONDA*, 465 F.3d at 984 (quoting *Bennett*, 520 U.S. at 178).

Bennett itself illustrates why the test for finality is met here. The plaintiffs in *Bennett* filed a citizen suit under the Endangered Species Act against the Fish & Wildlife Service. 520 U.S. at 157. They challenged the lawfulness of the Service's biological opinion regarding the impact of the Bureau of Reclamation's water use practices on certain endangered fish species in the Klamath Irrigation District. *Id.* The plaintiffs alleged the Service had unlawfully failed to consider the economic impact of the biological opinion's proposed alternative water use practices. *Id.* at 160.

The government, in opposition, argued that the biological opinion "does not constitute 'final agency action,' 5 U.S.C. § 704, because it does not conclusively determine the manner in which Klamath Project water will be allocated." *Id.* at 177. Rather than being conclusive, the government contended, the biological opinion merely proposed alternate action to the Bureau of Reclamation, which was under no legal obligation to implement the proposed changes to its water use practices and could, instead, exercise "discretion." *Id.*

The parties in *Bennett* did not dispute that the issuance of the biological opinion marked the consummation of the Service's decision-making process. *Id.* at 178. On the second prong, the Supreme Court held the action was "final" because it had "direct and appreciable legal consequences." *Id.* at 178. The Court explained that the Service's action met this standard because it "alter[ed] the legal regime to which the [Bureau of Reclamation] is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* The Court distinguished the biological opinion from advisory opinions that were "more like a tentative recommendation than a final and binding determination." *Id.* (discussing *Franklin*, 505 U.S. 788; and *Dalton v. Specter*, 511 U.S. 462 (1994)).

Likewise here, as explained below, the government's filing of the forfeiture action constitutes the culmination of its decision-making process, and legal consequences will flow from that decision. The government's position articulated in the forfeiture complaint is neither tentative nor advisory, and its impact on Oakland's regulatory scheme is profound. Accordingly, the Court has subject matter jurisdiction over Oakland's challenge to the federal government's about-face in bringing the forfeiture action.

(a) The Forfeiture Action Marks the Consummation of the DOJ's Decision-making Process Because It Reflects a Definitive Decision Rather than One that Is Tentative or Interlocutory

The government's decision to file the forfeiture action is not tentative, interlocutory, or otherwise non-final. By filing the forfeiture action, the federal government has declared Harborside's actions illegal and has called Oakland's regulatory scheme into question. The government aims to shutter Harborside and prevent Oakland from regulating medical cannabis dispensaries. Filing the Harborside forfeiture action unquestionably has had a chilling effect on Oakland's regulated marketplace for medical cannabis. The consequences of denying judicial review underscore the conclusive nature of the government's position: Oakland would have no recourse but to watch idly as the federal government destroys its regulated medical cannabis marketplace.

When analyzing the finality element, what matters is "the practical and legal effects of the agency action" because the "'finality element must be interpreted in a pragmatic and flexible manner.'" *ONDA*, 465 F.3d at 982 (citing *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995); and *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987)). When an agency utters its "last word" on a subject, it takes a "definitive position" that is final even if further action (such as an enforcement action) may be necessary. *Id*. at 984. The federal government's decision to file the forfeiture action is a final agency action because the DOJ took a

definitive position regarding the lawfulness of dispensaries acting in compliance with Oakland's regulatory scheme, as well as its authority to enforce the CSA against those dispensaries, and it put that decision into effect by filing a forfeiture action.

This Court's case law strongly supports this conclusion. In *Oregon v. Ashcroft*, this Court found the issuance of a statement by the U.S. Attorney General declaring Oregon's physician-assisted suicide law in violation of the Controlled Substances Act to be a final agency action even before the commencement of a legal action. 368 F.3d 1118, 1120-21 (9th Cir. 2004).[1] Even though the statement did not have the "force of law," it nonetheless constituted a final agency action because it "clearly marks the consummation of the Attorney General's decision making process" and "reflects internal agency deliberation, on a matter of public importance, and commands immediate implementation." *Id.* at 1147 (Wallace, J., dissenting on the merits and concurring as to jurisdiction). Additionally, nothing in the statement suggested it was not final. *Id.* (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 702 (D.C. Cir. 1971) (holding that "when [an agency's] interpretation is not labeled as tentative or otherwise qualified

[1] While the majority opinion analyzed the issue of finality in terms of ripeness, the dissenting opinion by Judge Wallace, which dissented on the merits but concurred with the majority on the issue of the Court's subject matter jurisdiction, analyzed finality more fully in light of *Bennett*. *See Oregon*, 368 F.3d at 1146-48 (Wallace, J., dissenting).

by arrangement for reconsideration," there is "no basis" for concluding that the "'agency action' is 'not final' for purposes of the APA and judicial review.")).

The same is true here. By commencing the forfeiture action, the DOJ uttered its "last word" on the subject of Oakland's regulation of dispensaries. Had the U.S. Attorney General issued a directive declaring the DOJ's reversal of position regarding its intention to prosecute Oakland's permitted dispensaries, "the in terrorem effect" would be functionally the same as the federal government's commencement of the forfeiture action. *See Oregon*, 368 F.3d at 1121 n.2. The filing of the forfeiture action "clearly marks the consummation of the Attorney General's decision making process" and "reflects internal agency deliberation, on a matter of public importance, and commands immediate implementation." *Oregon*, 368 F.3d at 1147; s*ee also Alaska Dept. of Envtl. Conservation v. EPA*, 244 F.3d 748, 749-50 (9th Cir. 2001) (holding that the EPA's statement that Alaska's Department of Environmental Conservation failed to identify the "Best Available Control Technology" for reduction of emissions, as required by the Clean Air Act, was a "final agency action" because "the EPA asserted its final position" and "last word" regarding the issue, even though the EPA had not commenced an enforcement action).

The fact that the government must still prosecute the forfeiture action to complete its mission does not render its decision-making any less complete. To be

a final agency action, the action need not be the last action the agency can take. *See, e.g.*, *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983) (finding "[t]he possibility of further proceedings" does not negate the fact the agency made a "definitive statement of its position"); *Abbott Labs.*, 387 U.S. at 140 (finding that pre-enforcement action constitutes final agency action); *ONDA*, 465 F.3d at 987-88 (same). Moreover, the legal question before the Court would not be impacted by further development of the factual record. *See Alaska*, 244 F.3d at 750. Accordingly, the forfeiture action need not conclude for the DOJ's action to be "final."

(b) The Government's Decision to Undermine Oakland's Regulatory Scheme by Filing the Forfeiture Action Imposes Harsh Legal Consequences on Oakland

Without citing a single case, the district court ruled that the government's filing of the forfeiture action does not meet the second prong of *Bennett* because "filing the complaint did not determine any rights or obligations and has not resulted in any legal consequences." ER 8. By addressing only the forfeiture action's legal impact on *the defendants and claimants in that action*, rather than on Oakland, the district court misapplied the second prong of the *Bennett* test. It ignored the legal consequences flowing to *Oakland* from the federal government's decision to commence the forfeiture action. The Supreme Court and this Court have consistently held that pre-enforcement decisions may have appreciable legal

consequences and thus constitute final agency actions. *See, e.g.*, *Abbott Labs.*, 387 U.S. at 140 (finding that pre-enforcement action constitutes final agency action); *Oregon*, 368 F.3d at 1147 (same); *Alaska*, 244 F.3d at 749 (same); *ONDA*, 465 F.3d at 987-88 (same). In light of these precedents, the district court's ruling cannot stand.

A decision is final when it is not merely "abstract, theoretical, or academic" or if it "has an immediate and practical impact," such as putting persons at risk of civil and criminal penalties and providing a "basis for . . . ordering and arranging their affairs." *Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956). When the consequences of a determination are real and immediate, and "not conjectural," it is deemed a final action subject to judicial review. *Id.* at 44-45. There is nothing remotely abstract, theoretical, academic or conjectural about the impact of the government's forfeiture action on Oakland's regulatory scheme and the many persons who rely on it. Accordingly, the government's decision to file the forfeiture action is a final agency action, subject to review under the APA.

The DOJ's action has had at least four types of direct and appreciable legal consequences for Oakland and its residents. Any one of these consequences is sufficient to meet the second prong of *Bennett*'s test for finality. *First*, the DOJ's action overrides Oakland's continued regulation of medical cannabis by reversing its long-standing policy of non-prosecution. The action thereby "alters the legal

regime" to which Oakland and its regulated medical cannabis dispensaries are subject. *Bennett*, 520 U.S. at 169. *Second*, the DOJ's reversal of its non-prosecution policy subjects those operating under the auspices of Oakland's regulatory scheme to possible civil and criminal sanctions. *See Alaska*, 244 F.3d at 750. *Third*, the DOJ's decision has had a chilling effect on the operation of other medical cannabis dispensaries that Oakland has licensed. *See* Statement of Facts, *supra* at 19-20. *Fourth*, the DOJ's action jeopardizes the health, welfare, and safety of Oakland residents protected by the city's regulatory scheme. *See* Statement of Facts, *supra* at 17-21.

These consequences are well within the range of consequences that this Court previously has held sufficient for judicial review. For example, this Court held that "legal consequences will flow" from the EPA's notice to Alaska's Department of Environmental Conservation regarding its approval of inadequate emissions control equipment. *Alaska*, 244 F.3d at 750. This was because, if the mining company proceeded with construction of inadequate equipment, the EPA could assess civil and criminal penalties against the company and its employees. *Id.* While the EPA argued the notice was not a final action because it had discretion whether to pursue such penalties, the Court found that to be irrelevant to the EPA's conclusive determination that the equipment violated the Clean Air Act. *Id.*

The many persons relying on Oakland's regulatory scheme (*e.g.*, patients, physicians, dispensaries, landlords) may similarly face civil and criminal penalties because of the DOJ's about-face on its policy of non-prosecution. Legal consequences flow from the decision to file the forfeiture action because of the omnipresent threat of sanctions. *See ONDA*, 465 F.3d at 986-88. The forfeiture action thus has a "legal effect" under *Bennett*, even before it concludes, because it has a "'direct and immediate . . . effect on the day-to-day business'" of dispensaries, landlords, and others with direct interests in the real property housing dispensaries. *ONDA*, 465 F.3d at 987 (quoting *Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 (9th Cir. 1990)).

Further buttressing this conclusion, this Court held that legal consequences flow from the Attorney General's pronouncement that Oregon's physician-assisted suicide law violates the Controlled Substances Act because, even though it did not have "the force of law," it nonetheless "significantly and immediately alters the legal landscape for Oregon physicians." *Oregon*, 368 F.3d at 1147 (citing *Bennett*, 520 U.S. at 178); *see also Abbott Labs.*, 387 U.S. at 152–53 (holding that where plaintiffs must either comply with unfavorable regulations immediately or "risk serious criminal and civil penalties," the agency action satisfies *Bennett*'s second prong). This Court explained:

> It is of no moment that physicians will not experience the Ashcroft Directive's concrete legal effects unless they

> actually choose to prescribe controlled substances for assisted suicide. *An agency action can be final even if its concrete legal effects are contingent upon a future event*.

Oregon, 368 F.3d at 1148 (citing *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003)) (emphasis added). Appreciable legal consequences flow from the threat of sanctions, making the decision final and subject to review under the APA.

The DOJ's decision to undermine Oakland's regulatory scheme by acting to shut down Harborside is functionally no different from the EPA's notifying the State of Alaska that it is in violation of the Clean Air Act because of its approval of inadequate emission control equipment. *See Alaska*, 244 F.3d at 749. The DOJ's decision is also functionally no different from the Forest Service's issuing annual operating instructions to recipients of cattle grazing permits. *See ONDA*, 465 F.3d at 987-88. In each instance, legal consequences flow from the action because it impacts day-to-day business decisions and sanctions can result. Like the physicians at risk of prosecution or loss of their medical licenses in light of the Attorney General's pronouncement regarding Oregon's assisted suicide law, Oakland's entire regulatory scheme and the persons who rely on it are immediately impacted by the "in terrorem effect" of the government's decision. *See Oregon*, 368 F.3d at 1121 n.2. All of Oakland's regulated dispensaries, and their landlords and others with an interest in the real property housing the dispensaries, are at risk of substantial penalties, including loss of property, despite having acted in

compliance with state and local law. Patients and physicians likewise are now at risk of legal sanction. Oakland cannot protect the health, welfare, and safety of its citizens with the specter of the federal government's forfeiture action hanging over it. For any and all of these reasons, legal consequences unquestionably flow from the DOJ's action aimed at shuttering Harborside.

3. The Filing of a Civil Complaint Constitutes Final Agency Action to Which the APA's Broad Judicial Review Provisions Apply

Cases involving administrative complaints also confirm that the DOJ's filing of a civil complaint in this case constitutes a final agency action under the APA. For example, in *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983), the court held that filing an administrative complaint was a final agency action because the agency had taken a definitive position regarding its authority to file the complaint. The government in *Athlone* had relied on *Standard Oil* in arguing that filing an administrative complaint was not a final agency action. *Athlone*, 707 F.2d at 1489 n.30. *See Standard Oil*, 449 U.S. 232. The D.C. Circuit disagreed, distinguishing *Standard Oil* on the ground that the complaint in that case was replete with non-definitive statements, like the agency merely had "reason to believe" the petroleum companies were violating the law. *Athlone*, 707 F.2d at 1489 n.30. In contrast, the agency in *Athlone* filed its complaint to assess civil penalties, having already determined the defendant had

violated the law. *Id.* at 1486. The court explained: "By filing a complaint in the present case, the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction." *Id.*

The *Athlone* court's reasoning applies equally to an agency's filing of a civil complaint, and the same approach warrants reversal of the district court's judgment here. Consistent with Supreme Court precedent, the court in *Athlone* took a pragmatic and flexible approach to finality. *See also Abbott Labs.*, 387 U.S. at 149 ("The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way."). The agency's definitive *filing of a complaint* in court marks the consummation of its decision-making process about whether to pursue enforcement of the CSA in the courts. While the government must still prove the alleged violation, it has nonetheless spoken its "last word" on its view of the illegality of the defendant's conduct. *Whitman*, 531 U.S. at 478.

The agency action in this case thus stands in stark contrast to a complaint filed with an agency that merely commences an investigation, as in *Standard Oil*. As the court in *Athlone* observed, the FTC's complaint in *Standard Oil* did not represent a "definitive statement of position" that the oil companies had violated the law. *Athlone*, 707 F.2d at 1489 n.30 (quoting *Standard Oil*, 449 U.S. at 241). Here, by contrast, the government has declared Harborside in violation of the CSA, asserted its authority to override Oakland's regulatory scheme, and asked the

courts to validate and enforce its view of the law. This is the epitome of a final agency action.

Standard Oil is not factually analogous for the additional reason that the oil companies could defend their interests in the context of the administrative proceedings and could appeal any adverse ruling. In contrast, Oakland cannot defend its interests in the context of the forfeiture action or appeal any ruling because it lacks standing. Moreover, the complaint in *Standard Oil* had no immediate effect on the defendants' business. *Standard Oil*, 449 U.S. at 242. In stark contrast, as discussed in section F of the Statement of Facts, the government's decision to nullify Oakland's regulatory scheme has had immediate and profound effects. Taking the "pragmatic" approach that the Supreme Court has mandated, it is clear that the government's filing of the forfeiture action constitutes a final agency action under the APA.

4. Judicial Review of the Forfeiture Action Will Not Disrupt Administrative Proceedings

The finality requirement's purpose also confirms that the DOJ's filing of the forfeiture suit is a final agency action. The finality requirement is intended to ensure that judicial review does not disrupt ongoing administrative proceedings. *Cal. Dep't of Educ.*, 833 F.2d at 833 ("A court looks to whether the agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process."). As the Supreme Court

explained: "Our cases have interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell*, 461 U.S. at 779.

In *Bell*, the Supreme Court permitted judicial review of agency action notwithstanding "[t]he possibility of further proceedings in the agency" because the agency had made a "definitive statement of its position" and "[r]eview of the agency's decision at this time will not disrupt administrative proceedings." *Id.* at 779-80. Waiting until an agency action is final also ensures judicial efficiency. *See Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary.").

Judicial review of the Harborside forfeiture action will not disrupt any administrative proceedings. The filing of the forfeiture action constitutes the DOJ's final decision that it will no longer abide by its earlier proclamations not to prosecute parties acting in compliance with state and local law. There is no ongoing administrative proceeding. Accordingly, the DOJ's filing of a civil complaint in these circumstances is a final agency action, reviewable under the APA.

D. The District Court's Decision Improperly Denies Oakland Access to the Courts and Undermines Principles of Federalism

Judicial review is a cornerstone of the rule of law. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The dismissal of Oakland's lawsuit, however, denies Oakland's right to judicial review of the DOJ's decision to override its efforts to protect the health, welfare, and safety of its residents. This denial of Oakland's access to the courts is also inconsistent with bedrock principles of federalism and comity. Oakland should be given an opportunity to persuade the courts that the federal government exceeded its authority in thwarting the will of California's voters and undermining Oakland's carefully crafted regulatory scheme. This regulatory program serves as a model for cities in the 18 states and the District of Columbia that have approved the use and distribution of cannabis for medical purposes. ER 534. The interests Oakland seeks to protect are thus at the heart of our federal system. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). The grievances that Oakland seeks to redress should be aired on the merits and not silenced at the threshold.

VII. CONCLUSION

The district court erred in ruling that Oakland has an adequate remedy in the forfeiture action and that the DOJ's decision to file a forfeiture action did not constitute a "final agency action" under the APA. This ruling improperly denied Oakland its right of access to the courts to vindicate its unique interest in protecting the health, welfare, and safety of its residents. Oakland therefore asks this Court to reverse the district court's dismissal of the case and remand the case to proceed on the merits.

Dated: July 8, 2013

Respectfully submitted,

DLA PIPER LLP (US)

By: *s/ Cedric C. Chao*
Cedric C. Chao

Attorneys for Appellant City of Oakland

STATEMENT OF RELATED CASES

There are no known related cases before this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,846 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel relies on the word count of the Microsoft Word software program used to prepare Appellant's Opening Brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman 14-point font, using Microsoft Word.

Dated: July 8, 2013

Respectfully submitted,

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Case No. 13-15391

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Appellant,

vs.

ERIC HOLDER, Attorney General of the United States;
MELINDA HAAG, U.S. Attorney for the Northern District of California,

Appellees.

Appeal from the United States District Court for the Northern District of California, Case No. CV 12-05245-MEJ

ADDENDUM TO APPELLANT'S OPENING BRIEF

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Key Provisions of the Administrative Procedure Act

5 U.S.C. § 701 Application; Definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702 Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703 Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704 Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 705 Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CERTIFICATE OF SERVICE

Case No. 13-15391

I hereby certify that on July 8, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Cedric C. Chao
Cedric C. Chao