No. 13-15391

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR THE FEDERAL GOVERNMENT APPELLEES

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JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. ER 1050. On February 14, 2013, the district court dismissed the case. ER 1, 10. On February 27, 2013, plaintiff filed a timely notice of appeal. ER 11-12. As discussed *infra*, this case does not present a justiciable controversy.

STATEMENT OF THE ISSUES

In this action under the Administrative Procedure Act, the City of Oakland seeks to enjoin a forfeiture proceeding initiated by the United States against real

property that is being used to commit violations of the Controlled Substances Act. This appeal presents the following questions:

1. Whether a city has Article III and prudential standing to challenge federal action taken against private property within the city.
2. Whether the federal government's decision to initiate forfeiture proceedings is reviewable under the Administrative Procedure Act.

STATEMENT OF THE CASE

Under 21 U.S.C. § 881(a)(7), real property which is used "in any manner or part, to commit, or to facilitate the commission of" a crime in Title 21 of the U.S. Code, which concerns drug crimes, "shall be subject to forfeiture" and "no property right shall exist in them." Pursuant to 21 U.S.C. § 881(a)(7) and (b), 18 U.S.C. §§ 981(b)(1), 983, 985(b)(1) and (c), and Federal Rule of Civil Procedure G, the federal government filed a complaint for forfeiture against real property used to operate a retail marijuana store in violation of Title 21. A number of parties filed claims in the district court, asserting interests in the property and contesting the forfeiture. That action remains ongoing.

The plaintiff in this case, the City of Oakland, did not file a claim. Instead, Oakland sued the Attorney General and U.S. Attorney for the Northern District of California under the Administrative Procedure Act "to restrain and declare unlawful ongoing and threatened attempts" to forfeit that property. ER 1049. Oakland urged that because the federal government knew or should have known about the marijuana

business more than five years ago, the statute of limitations on civil forfeiture has run. ER 1061. Thus, although the marijuana store continues to operate in violation of federal law, Oakland contended, the federal government is forever barred from taking action. *See* ER 1061-62. Oakland additionally posited that the federal government should be estopped from forfeiting the property because Oakland has relied on the fact that the federal government has not previously taken action against this marijuana dispensary and that federal officials have stated they will generally not focus prosecutorial resources on individuals who are in clear compliance with state laws providing for medical marijuana use. ER 1062-63; *see also* ER 1056-59.

The district court dismissed Oakland's suit, explaining that it could not enjoin collateral proceedings initiated under the statute governing forfeitures. ER 1-10. The court noted that Oakland has no property interest at issue in the forfeiture proceedings and that it therefore has no claim to file in the ongoing forfeiture action. ER 5. The absence of a property interest does not, the court stressed, entitle Oakland to assert a collateral challenge under the Administrative Procedures Act that could not be brought by other entities. ER 5-7. In any event, the court observed, the government's filing a forfeiture action is not a "final agency action" reviewable under the APA. ER 7-9.

STATEMENT OF FACTS

A. Legal Background

Property involved in the violation of federal drug laws—including raw materials, equipment, vehicles, firearms, drug paraphernalia, and drugs themselves—"shall be subject to forfeiture" and "no property right shall exist in them." 21 U.S.C. § 881(a). This statutory provision extends to real property which is used "in any manner or part, to commit, or to facilitate the commission of" a crime in Title 21 of the U.S. Code, which concerns drug crimes. 21 U.S.C. § 881(a)(7).

The governing statute establishes comprehensive procedures for civil asset forfeiture. *See* 21 U.S.C. § 881(b)-(*l*); 18 U.S.C. §§ 981, 983, 984, 985; *see also* Fed. R. Civ. P. G (Forfeiture Actions In Rem). As relevant here, "all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures." 18 U.S.C. § 985(a). Unlike other tangible property, *see* 18 U.S.C. § 981(b), real property is ordinarily not subject to seizure prior to the entry of a forfeiture order, *see* 18 U.S.C. § 985(d). When real property is subject to civil forfeiture, the government initiates a civil forfeiture action against that property by filing a complaint for forfeiture, posting a notice on the property, and serving notice. 18 U.S.C. §§ 983, 985(c); *see also* Fed. R. Civ. P. G. "[A]ny person claiming an interest in the seized property may file a claim asserting such person's interest[s]" within specified time periods—ordinarily 30 days after notice is received. 18 U.S.C. § 983(a)(4); Fed. R. Civ. P. G(5)(a).

The government bears the burden of proof of establishing that the property is subject to forfeiture, 18 U.S.C. § 983(c), and any person with a property interest may assert a defense that they are an "innocent owner," 18 U.S.C. § 983(d). As is the case with any civil action, other persons with appropriate interests may intervene and participate as parties. *See* Fed. R. Civ. P. 24(a) and (b).

B. The Forfeiture Action

On July 9, 2012, pursuant to 21 U.S.C. § 881(a)(7), the United States initiated a civil forfeiture action against the real property located at 1840 Embarcadero Street, Oakland, California. *See United States* v. *Real Property and Improvements Located at 1840 Embarcadero, Oakland, California* ("*1840 Embarcadero*"), No. 12-cv-3567 (N.D. Cal.). The United States alleged that on that property, the "Harborside Health Center" operates a retail facility that sells marijuana in violation of 21 U.S.C. §§ 841 and 856. Complaint, ECF No. 1, *1840 Embarcadero* (July 6, 2012).

A number of parties filed claims in the district court, asserting interests in the property and contesting the forfeiture. *1840 Embarcadero*, ECF Nos. 14, 27, 28, 29, 30, 31, 33. These claimants include the owner of the property, the company that leases the property and operates the marijuana dispensary, a bank that purports to have a security interest in the property, and a number of persons who allege that they purchase marijuana at the facility. *See ibid.* The City of Oakland did not a file a claim or move to intervene. That action remains ongoing.

C. The Present Lawsuit

1. On October 10, 2012, after the deadline to raise a claim in the civil forfeiture proceeding had passed, the City of Oakland filed suit under the Administrative Procedure Act and Declaratory Judgment Act against the Attorney General of the United States and U.S. Attorney for the Northern District of California, "to restrain and declare unlawful ongoing and threatened attempts" to forfeit the 1840 Embarcardero property. ER 1049. Oakland alleged that if the 1840 Embarcardero property were seized, it would interfere with the ongoing distribution of marijuana at that property to persons who could lawfully obtain marijuana under California—but not federal—law. *Ibid.* Oakland urged that it has a "public interest in promoting the health, safety, and welfare of its citizens," "protecting the regulatory framework it adopted" under California law "concerning medical cannabis," *ibid.* (Oakland's licensing dispensaries, ER 1053, 1060-61), and "receiving tax revenue" from marijuana dispensaries, ER 1049. Oakland further alleged that if the 1840 Embarcardero property were forfeited, persons who buy marijuana there may resort to "the black market" which, in turn, would "creat[e] a public safety hazard." ER 1055. This, Oakland posited, will increase crime and, in turn, divert police resources. *Ibid.* It could also lead to the use of marijuana "tainted or produced with harmful chemical additives or pesticides." *Ibid.*

Oakland's complaint cited two grounds for its assertion that initiation of the forfeiture proceedings was contrary to law within the meaning of the APA. First,

Oakland urged that the federal government knew or should have known about the marijuana business more than five years ago, and therefore the statute of limitations on civil forfeiture has run. ER 1061-62; *see also* ER 1055-56. Thus, although the marijuana store continues to operate in violation of federal law, Oakland contended, the federal government is forever barred from taking action. *See* ER 1061-62.

Second, Oakland alleged that the federal government should be "estopped" from forfeiting the 1840 Embarcadero property because government officials have not previously taken action against dispensaries in Oakland and have stated that limited prosecutorial resources should not generally be focused on individuals who are in clear compliance with state laws providing for medical marijuana use. ER 1062-63; *see* ER 1056-59. Oakland pointed, for example, to an August 2007 statement made in New Hampshire by then-candidate Obama about "good use of [Justice Department] resources," ER 1056; a February 2009 statement from a White House spokesperson reported in the *Washington Times* about use of "federal resources," ER 1057; an October 2009 memo by former-Deputy Attorney General David Ogden explaining that U.S. Attorneys should not "focus federal resources" on "individuals" who are in clear compliance with state medical marijuana laws, ER 1058; and a press release and 2010 and 2012 congressional testimony reiterating the substance of that memo, ER 1058-59. Oakland urged that it "[r]easonably [r]elied" on "[t]he federal government's stated position" and "conduct consistent with that position" when Oakland "further legitimize[d] the medical cannabis industry by taxing its revenue." ER 1059-60.

Oakland stated that in June 2009 (before the Ogden memo), "a voter approved ballot measure" established the local business tax rate for marijuana dispensaries, and that Oakland spends money administering its licensing scheme and regulating dispensaries. ER 1060.

2. The district court granted the federal government's motion to dismiss. The court held that the statutory procedures for challenging property forfeiture must govern, and that the APA does not provide a collateral means of contesting forfeitures. *See* ER 5-7. The court noted that there "appear[s] to be [no] dispute" that Oakland would be required to present any claim in the forfeiture proceeding, rather than in a collateral action, if it had a property interest to assert. ER 5. The absence of a property interest, the court explained, does not uniquely privilege Oakland to seek to enjoin the proceedings involving all the claimants with actual claims. ER 6. The court observed that Congress has "created a mechanism for individuals to raise challenges to a forfeiture proceeding . . . and in doing so, has also demarcated the class of individuals who are authorized to raise such challenges." *Ibid.* The fact that cities without a property interest in the property at issue "fall[] outside the scope of that class does not render the remedy . . . inadequate." *Ibid.* "Stated another way," the court explained, "the forfeiture proceeding is focused on the defendant property and only those with specific interests in that property are authorized to participate in the proceeding." *Ibid.* The court further reasoned that "allowing [Oakland] to raise a collateral challenge to the forfeiture proceeding pursuant to the APA would vitiate

both the standing and time-limit restrictions" in the scheme governing forfeiture. ER 7. It would "grant [Oakland] greater ability to challenge the forfeiture proceeding" than those with actual property interests—"those who Congress identified as having the strongest interest" in the forfeiture. *Ibid.*

The court further held that, independent of these defects in Oakland's suit, the government's initiation of a forfeiture action does not constitute "final agency action" reviewable under the APA. ER 8-9. The court noted that "the filing of a civil action"— here "the forfeiture complaint"— "does not fit within the APA's definition of agency action; it is not a rule, order, license, sanction, form of relief, or failure to act." ER 8. Further, the court explained, the filing of a civil complaint does not meet the criteria for *final* agency action. "Even assuming that the filing of the forfeiture action amounted to the consummation of the DOJ's decisionmaking process, filing the complaint did not determine any rights or obligations and has not resulted in any legal consequences." *Ibid.* "To be sure," the court noted, "as the forfeiture action proceeds, there will be determinations as to the claimant's rights and defenses and ultimately as to whether forfeiture of the defendant property is appropriate." *Ibid.* "However, those determinations and legal consequences will flow from the Court's and jury's findings and decisions, not a decision by the DOJ." *Ibid.* "At most," the court held, "the Government's conduct merely initiated that process, which it is authorized to do pursuant to 21 U.S.C. § 881(a)(7)." *Ibid.* "[A]ccepting [Oakland's] reasoning would mean that every civil or criminal lawsuit an agency filed pursuant to

federal law would represent that agency's final determination that it has authority to take such action, and thus bring the agency's decision within § 704 of the APA." ER 9.[1]

SUMMARY OF ARGUMENT

The United States filed an *in rem* action to obtain forfeiture of the 1840 Embarcadero property. Pursuant to the comprehensive statutory framework governing civil forfeitures, persons with ownership or possessory interests can and have filed objections. That action remains ongoing. It is not controverted that the City of Oakland lacks standing to participate in the forfeiture proceedings. The City has no greater right to challenge the prospective forfeiture in a collateral proceeding, and the Administrative Procedure Act provides no authority for such an action.

A. To demonstrate standing, Oakland must establish a concrete and cognizable injury to its own proprietary interests. Oakland's contentions that a forfeiture would cause the City to divert police resources or lose tax revenue are far too attenuated and speculative to establish Article III standing. *See Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013). Moreover, even if these injuries were far less speculative, the injuries—such as the hypothesized increase in violent crime—

[1] Subsequent to the district court's dismissing the case, the magistrate judge who heard this case and is hearing the *1840 Embarcadero* forfeiture case issued orders in both cases halting any further proceedings in the forfeiture action until this appeal is resolved. ER 1072. For this reason, the federal government will move to expedite the appeal.

would result not from the filing of a civil forfeiture action but from a string of independent actions of third parties.

Even if Oakland could establish Article III standing, it plainly lacks prudential standing. A city cannot collaterally attack federal litigation concerning private property on the theory that the outcome of the litigation may have downstream effects on municipal interests. Oakland's assertions—that the limitations period for forfeiting property has run, and that the federal government must be equitably estopped—concern the rights of third parties who are able to assert their own interests in the forfeiture proceeding, and the City cannot plausibly claim to be in the zone of interests protected by the federal law at issue.

B. Even if the City could establish Article III and prudential standing, the Administrative Procedure Act would not provide a basis for a collateral action to enjoin a forfeiture proceeding. As a threshold matter, the City identifies no final agency action because filing a lawsuit does not "determine[] rights or obligations." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371 (2012) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997)) (internal quotation marks omitted). And if the decision to file a lawsuit were final agency action, it would plainly be action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

In any event, even if the filing of a lawsuit constituted final agency action, the APA cannot be used to supplement a comprehensive judicial scheme. "[A]ll civil forfeitures of real property and interests in real property shall proceed as judicial

forfeitures." 18 U.S.C. § 985(a). To undertake a civil forfeiture of real property, the government must file a complaint and serve notice, 18 U.S.C. §§ 983, 985(c); Fed. R. Civ. P. G, and "any person claiming an interest" in the property may file a claim asserting those interests and raising various defenses, *see* 18 U.S.C. § 983(a)(4), (c), and (d); Fed. R. Civ. P. G(5)(a). These procedures are the exclusive means of determining whether a civil forfeiture may proceed.

As the district court recognized, Congress has "created a mechanism for individuals to raise challenges to a forfeiture proceeding . . . and in doing so, has also demarcated the class of individuals who are authorized to raise such challenges." ER 6. Oakland's position that it may, instead, sue under the APA "would vitiate both the standing and time-limit restrictions" in the scheme governing forfeiture. ER 7. And it would grant Oakland "greater ability to challenge the forfeiture proceeding" than those with actual property interests—"those who Congress identified as having the strongest interests" in the forfeiture. *Ibid.*

STANDARD OF REVIEW

A district court's dismissal under 5 U.S.C. § 704 is reviewed *de novo*. *Rattlesnake Coalition* v. *EPA*, 509 F.3d 1095, 1100 (9th Cir. 2007).

ARGUMENT

The District Court Correctly Held That Oakland Cannot Collaterally Attack An Ongoing Civil Forfeiture

A. Oakland lacks standing.

Oakland does not claim an ownership or possessory interest in the 1840 Embarcadero property and would plainly lack standing to participate in the forfeiture proceedings, in which standing requires a claimant to assert "a sufficient interest in the property" such as "actual possession, control, title, or financial stake," *United States* v. *Real Property Located at 5208 Los Franciscos Way, Los Angeles, Cal.*, 385 F.3d 1187, 1191 (9th Cir. 2004); *see also United States* v. *$1,333,420 in U.S. Currency*, 672 F.3d 629, 637-38 (9th Cir. 2012). The City's suit rests on the mistaken premise that a claimant that lacks a sufficient interest to participate in the forfeiture proceedings nevertheless has standing to enjoin the forfeiture in a collateral action.

Even if Oakland could satisfy the irreducible minimum requirements of Article III standing, its suit would plainly be barred by principles of prudential standing. A plaintiff's claim must rest on its own legal rights or interests, not those of third parties who are "able to assert their own rights" as demonstrated by their having "challenged" the action at issue. *McCollum* v. *Cal. Dep't of Corr. & Rehab.*, 647 F.3d 870, 878-80 (9th Cir. 2011). And "the interest sought to be protected" must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*,

397 U.S. 150, 153 (1970); *see Cetacean Cmty.* v. *Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). Where a "plaintiff is not itself the subject of the contested regulatory action," that plaintiff lacks prudential standing if its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Oakland cannot plausibly contend that it has prudential standing as a representative of its "400,000 citizens" and "their health and their safety," under a theory that the Controlled Substances Act was passed to "promote the public health and welfare." ER 48-49, 538-39. A city cannot base its standing on the welfare of its citizens. *See City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *see also infra* p. 17. Moreover, this theory concerns the rights of third parties who may represent themselves or are represented by the business from which they buy marijuana. *See, e.g., Craig* v. *Boren,* 429 U.S. 190, 195 (1976). And the zone of interests of the legal provisions at issue cannot be conceptualized at such a high level of generality—"health and welfare."

Oakland cannot claim to be within the zone of interests protected by the five-year statute of limitations that it invokes in this suit or to be asserting its own right of limitation. The limitations period is an integral part of the statutory procedures for obtaining an *in rem* forfeiture judgment, s*ee* 21 U.S.C. § 881(d); 19 U.S.C. § 1621; *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)—a procedure

that speaks only to those with property interests, *see* 18 U.S.C. § 983(a)(2). It furthers the "basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). Oakland is therefore resting on the legal rights of others. And Oakland's asserted interests in collecting taxes and preventing crime are far removed from the interests of a statute of limitations. "It cannot reasonably be assumed that Congress intended to permit th[is] suit," *Clarke,* 479 U.S. at 399, to assert a statute of limitations defense in a collateral action. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 192, 215, 581 (1983) (one purpose of the Comprehensive Crime Control Act of 1984, of which § 881(a)(7) is a part, was "to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies"); *see also Air Courier Conf.* v. *Am. Postal Workers Union*, 498 U.S. 517, 524-530 (1991) (postal workers not within zone of interests of statute authorizing postal monopoly because that provision is "not to secure employment for postal workers"); *San Xavier Dev. Auth.* v. *Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001) (private development authority lacks standing to assert that sublease is invalid under statutes concerning appropriation of Indian land, because those statutes were not designed to protect non-tribal or non-governmental litigants).

Oakland's claim that the federal government is "[e]stopped from [s]eeking forfeiture of 1840 Embarcadero" is similarly barred by principles of prudential

standing. This claim rests on the City's contention that it relied on its belief that the federal government would not focus prosecutorial resources on individuals who are in clear compliance with state laws providing for medical marijuana use, ER 1056-59, 1062-63, a claim that Oakland has clarified is one of "equitable estoppel," ER 420. Equitable estoppel is a doctrine that bars a party from asserting a claim against a person who has relied on its affirmative misrepresentations when taking the action that gave rise to that claim. *See generally Heckler* v. *Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59-61 (1984); *Schweiker* v. *Hansen*, 450 U.S. 785, 787-90 (1981) (per curiam); *Watkins* v. *U.S. Army*, 875 F.2d 699, 706-09 (9th Cir. 1989). Even if this doctrine applied to the government's implementation of a statutory scheme, it could be asserted only by the persons with a property interest in the property at issue in the forfeiture on the theory that *they* relied on the government's actions. The doctrine does not extend indefinitely to permit collateral attacks based on an asserted general reliance interest in the way that the government enforces the law against third parties.

Because the City fails to meet the standards for prudential standing, the Court need not determine whether it satisfies the irreducible minimum requisites of Article III standing. *See Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004). If the Court were to reach that question, however, the City has signally failed to establish "a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013).

Oakland, as a municipality, may not assert injuries to its citizens, but must instead rest its claim to standing on its own "proprietary interests." *City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *see Colorado River Indian Tribes* v. *Town of Parker,* 776 F.2d 846, 848-49 (9th Cir. 1985); *see also Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007) (holding that a state cannot file suit "to protect her citizens from the operation of federal statutes").

Oakland's contention that a forfeiture will cause it to divert police resources is far too speculative to identify a cognizable proprietary interest. Oakland alleges that if the federal government succeeds in the forfeiture action, "and if Oakland's [other] medical cannabis dispensaries are shut down," then people will "resort to the black market," including "street level drug dealers," which, in turn, "will increase crime," which will then "divert scarce Oakland Police Department resources from addressing the violent crime, illegal guns, and other public safety crises." ER 1055. A "threatened injury," however, "must be certainly impending to constitute injury in fact" and "[a]llegations of possible future injury are not sufficient." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks and emphases omitted). The "highly attenuated chain of possibilities," *id.* at 1148, offered by the City do not describe a "certainly impending" injury. Even assuming that the district court decides for the government in the *1840 Embarcadero* action, it is entirely speculative that if 1840 Embarcadero were forfeited, people "will resort to the black market," ER 1055, rather than ceasing marijuana use or buying from another

dispensary, *see, e.g.,* ER 1060-61 (describing other dispensaries in Oakland), that such purposes would increase the level of violent crime in the City, and that Oakland would deem it necessary to divert resources from other matters.

Moreover, even if this injury were far less speculative, it would not be fairly traceable to the federal government's filing the *1840 Embarcadero* action. The alleged causal chain impermissibly depends upon "the independent action[s] of . . . third part[ies] not before the court." *Bennett* v. *Spear*, 520 U.S. 154, 166-69 (1997). The conduct challenged here does not have a "determinative or coercive effect," *id.* at 169, in producing those third-party decisions and therefore the ultimate alleged injury.

Oakland is on no firmer ground in seeking to base standing on the claim that "the government's pursuit of forfeiture of the Harborside property will . . . deprive Oakland of tax revenues," Br. 28; *see also* ER 1060. The claim of lost tax revenues assumes that a forfeiture will be ordered, that marijuana sales are not diverted to other dispensaries in Oakland, and that the new tenant of the 1840 Embarcadero property will provide the City with less revenue than the dispensary. These conjectures are not sufficient to demonstrate standing.

Finally, Oakland's reference to "undermin[ing]" its regulatory scheme, Br. 28; *see also* ER 1049, is far too vague to constitute a "concrete and particularized" injury. Oakland does not allege that the federal government has imposed any obligation on the City or barred any "regulatory" action. Forfeiture of private property under a concededly valid federal law cannot "undermine" the City's "regulatory scheme."

And a city cannot create for itself a cognizable injury by regulating action that is illegal and property in which "no property right shall exist," 21 U.S.C. § 881(a), and then asserting that federal law enforcement "undermine[s]" its regulation. *See Oregon* v. *Legal Servs. Corp.,* 552 F.3d 965, 973-74 (9th Cir. 2009).

B. The Administrative Procedure Act does not authorize a challenge to the federal government's filing of the *1840 Embarcadero* forfeiture lawsuit.

Even if the City could establish Article III and prudential standing, the Administrative Procedure Act would not provide a basis for a collateral action to enjoin a forfeiture proceeding.

The Administrative Procedure Act provides for judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. Even when a plaintiff identifies agency action subject to review, the APA does not authorize suit if another statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1), another "statute that grants consent to suit expressly or impliedly forbids the relief which is sought," 5 U.S.C. § 702, or the challenged action is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2).

As a threshold matter, the City identifies no final agency action. Even were the filing of a civil complaint "agency action" as defined by the APA[2], a *final* agency action

[2] The district court correctly held that filing a lawsuit "does not fit within the APA's definition of agency action." ER 8. Oakland is mistaken in urging that because the term "agency action" broadly covers the exercise of agency power, filing a civil complaint therefore constitutes an "order" or "sanction" as defined by the APA.

is one that "determine[s] rights or obligations." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371 (2012) (quoting *Bennett*, 520 U.S. at 178) (internal quotation marks omitted); *see* *Franklin* v. *Massachusetts*, 505 U.S. 788, 796-99 (1992); *Dalton* v. *Specter*, 511 U.S. 462, 469-70 (1994). A decision to initiate a lawsuit does not determine rights and obligations: rights and obligations are determined by the judgment of the court. In contrast, the plaintiff in *Bennett* v. *Spear*, relied on by Oakland (Br. 36-37), challenged a "Biological Opinion" that, when issued, "alter[ed] the legal regime" to which another agency "[wa]s subject." 520 U.S. at 169-70, 178.[3]

Moreover, if the decision to file a lawsuit were final agency action, it would plainly be action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). *See* *Didrickson* v. *U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992) ("[L]itigation

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See Br. 33-34. Litigation conduct simply is not of the kind of activity defined as "agency action." *See* 5 U.S.C. §§ 701(b)(2), 551(13) (defining "agency action").

[3] The other cases on which Oakland relies similarly concerned agency action that itself imposed an obligation, altered a right, or otherwise fixed a legal relationship. *See, e.g., Or. Natural Desert Ass'n* v. *U.S. Forest Serv.*, 465 F.3d 977, 980, 986-88 (9th Cir. 2006) (signed agreement between agency and permittee including instructions for permittee's annual operations that "fix[ed] [the] legal relationship"); *Alaska* v. *EPA*, 244 F.3d 748, 749-50 (9th Cir. 2001) (order invaliding construction permit, violation of which was subject to penalties), *aff'd* 540 U.S. 461, 483 (2004); *see also Oregon* v. *Ashcroft*, 368 F.3d 1118, 1147 (9th Cir. 2004) (Wallace, J., dissenting) (cited without reference to it being a dissenting opinion at Br. 40, 42, 44, 45) (regulation purporting to criminalize doctor's behavior that "significantly and immediately alter[ed] the legal landscape"), *aff'd sub nom. Gonzales* v. *Oregon*, 546 U.S. 243 (2006).

decisions are generally committed to agency discretion by law, and are not subject to judicial review under the APA."); *see also Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985).[4]

In any event, even if the filing of a lawsuit constituted final agency action, the APA cannot be used to supplement a comprehensive judicial scheme. As relevant here, "all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures." 18 U.S.C. § 985(a). To undertake a civil forfeiture of real property, the government must file a complaint and serve notice, 18 U.S.C. §§ 983, 985(c); Fed. R. Civ. P. G, and "any person claiming an interest" in the property may file a claim asserting that interest and raising various defenses, *see* 18 U.S.C. § 983(a)(4), (c), and (d); Fed. R. Civ. P. G(5)(a).

These procedures are the exclusive means of determining whether a civil forfeiture may proceed. They provide an "adequate remedy" against forfeiture, 5 U.S.C. § 704, "impliedly forbid[]" collateral attacks on forfeiture proceedings by those who are not permitted by statute to file an objection, 5 U.S.C. § 702, and preclude other forms of judicial review, 5 U.S.C. § 701(a)(1). Congress has "created a mechanism for individuals to raise challenges to a forfeiture proceeding . . . and in doing so, has also demarcated the class of individuals who are authorized to raise such challenges." ER 6. *See generally Hinck* v. *United States,* 550 U.S. 501, 506 (2007) (When

[4] There would also then be a question whether the federal government's filing of the *1840 Embarcadero* complaint under 21 U.S.C. § 881 is a "final determination[], finding[], [or] conclusion[] of the Attorney General" under Title 21's forfeiture provisions and therefore must have proceeded as a petition for direct review to a court of appeals. *See* 21 U.S.C. § 877.

Congress enacts a specific and carefully tailored remedial scheme—particularly one creating a remedy against the United States that did not previously exist—that scheme, with all of its limitations, "is generally regarded as exclusive"); *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433, 434 (2007) (the "better fitted statute" "'pre-empts more general remedies'"); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (where "statute's precisely drawn provisions" provide review of one kind of determination but not another, the "omission" bars review of such claims); *Brown* v. *GSA,* 425 U.S. 820, 834 (1976) (holding that "a precisely drawn, detailed statute pre-empts more general remedies," even when, on the facts of a particular case, the narrower statute provides no relief).

Oakland appears to concede that if it had an interest in the 1840 Embarcadero property, it would be required to assert that interest in the forfeiture action and could not institute a separate suit. *See* ER 5; *cf. Malladi Drugs & Pharms., Ltd.* v. *Tandy*, 552 F.3d 885, 890 (D.C. Cir. 2009); *Cole* v. *United States (In re U.S. Currency $844,520)*, 136 F.3d 581, 582 (8th Cir. 1998) (per curiam); *Town of Sanford* v. *United States*, 140 F.3d 20, 23 (1st Cir. 1998); *Sarit* v. *DEA,* 987 F.2d 10, 17 (1st Cir. 1993). As the district court recognized, Oakland's position "would vitiate both the standing and time-limit restrictions" in the scheme governing forfeiture. ER 7. Indeed, it would grant Oakland "greater ability to challenge the forfeiture proceeding" than those with actual property interests—"those who Congress identified as having the strongest interests" in the forfeiture. *Ibid.* *Compare* Fed. R. Civ. P. G(5)(a)(normally 30 days to file

objection)) and 18 U.S.C. § 983(a)(4) (same), *with* 28 U.S.C. § 2401(a) (six-year limitations period for general civil actions, including APA action (*Sierra Club* v. *Penfold,* 857 F.2d 1307, 1315 (9th Cir. 1988)).[5]

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*, 132 S. Ct. 2199 (2012), on which the City purports to rely (Br. 26-29), only underscores the flaws in its analysis. In that case, the Supreme Court held that a plaintiff could seek to enjoin under the APA the government's purchase of land to be held in a trust for an Indian tribe on the ground that the tribe was not entitled to the benefits conferred by the authorizing statute. *Id.* at 2203. The Court held that the APA suit was not impliedly forbidden (5 U.S.C § 702) by the Quiet Title Act, which authorizes "suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or

[5] Oakland mistakenly relies on a dissenting opinion to urge that there is "no other adequate remedy in a court" (5 U.S.C. § 704) because the statutory scheme does not allow suit by this "particular plaintiff." Br. 28-29 (quoting *Bowen* v. *Massachusetts*, 487 U.S. 879, 927 (1988) (Scalia, J., dissenting)). The majority of the Court in *Bowen* declined to rely on—or, in the dissent's words, "completely ignore[d]" (*id.* at 927)—the principle that Oakland advocates here. *See* 487 U.S. at 901-08. Moreover, even the dissent's commentary addressed a very different question: whether an agency order requiring repayment of erroneous Medicaid reimbursements, for which there was *no* statutory review scheme, should proceed under the Tucker Act or the APA. *Id.* at 904-05. The majority held that the Tucker Act was inadequate because it allowed no prospective relief relevant to the ongoing reimbursement relationship at issue and allowed no monetary award unless the plaintiff had already repaid the money. *See id.* at 904-06. It was the dissent, on which Oakland relies, that would have barred the APA suit. Oakland's only other case for this point is even further removed. *See El Rio Santa Cruz Neighborhood Health Ctr., Inc.* v. *U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1271-72 (D.C. Cir. 2005) (holding that ability to remove to federal court a tort suit against a doctor who is shielded by federal immunity is not adequate remedy for agency decision not to extend federal immunity to a doctor).

interest' the United States claims" and which "'does not apply to trust or restricted Indian lands.'" 132 S. Ct. at 2204 (quoting 28 U.S.C. § 2409a(a) and (d)).

The City is quite mistaken to derive from *Patchak* the proposition that when "plaintiffs challenge[] a federal agency action with respect to real property even though they d[o] not have, and did not claim, an interest in the real property," they may sue under the APA. *See* Br. 28. *Patchak* turned on the narrow scope of the Quiet Title Act, and the Supreme Court explained that the plaintiff in that suit was "bringing a different claim" and "seeking different relief" from "the kind the [Quiet Title Act] addresses." 132 S. Ct. at 2209; *see also id.* at 2205-10. Here, by contrast, the sole purpose of Oakland's suit is to obtain dismissal of a collateral judicial proceeding under the forfeiture statute. Oakland's suit presents circumstances analogous to those of a hypothetical statute posited by the Court in *Patchak* which authorized suit "only by adverse claimants who could assert a property interest of at least a decade's duration." 132 S. Ct. at 2209. If a "claimant failing to meet that requirement (because, say, his claim to title went back only five years) brought suit under a general statute like the APA," the Court "would surely bar that suit" because "Congress delineated the class of persons" who could bring that action, "and that judgment would preclude others from doing so." *Ibid.*

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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SEPTEMBER 2013

STATEMENT OF RELATED CASE

Counsel for appellees are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

/s/ Adam Jed

Adam C. Jed

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,235 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Adam Jed

Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2013, I filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system.

/s/ Adam Jed

Adam C. Jed