

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

CITY OF OAKLAND,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 13-15391

**MOTION FOR RECONSIDERATION  
OF MOTION TO EXPEDITE APPEAL**

Defendants-Appellees, Eric H. Holder, Jr., Attorney General of the United States, and Melinda Haag, U.S. Attorney for the Northern District of California, respectfully ask this Court to reconsider their request for expedited consideration of this appeal.

The district court dismissed Oakland's suit, which seeks to enjoin an ongoing civil forfeiture proceeding in which Oakland is not, and concededly could not, be a party. The court, however, subsequently entered an order that effectively enjoins the United States from proceeding with the forfeiture proceeding pending Oakland's appeal in this case. In addition, the court *sua sponte* halted a second forfeiture proceeding as to which Oakland did not even seek relief.

It is entirely appropriate that this Court hear oral argument in this case at an early date to address these anomalous orders that undermine the workings of the comprehensive civil forfeiture scheme. Doing so will result in no prejudice to the City of Oakland and will further the orderly operation of the judicial system consistent with the statutory framework established by Congress.

### **A. Background**

1. In this suit, Oakland seeks to enjoin a civil forfeiture action instituted by the United States pursuant to 21 U.S.C. § 881(a)(7) 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 forfeiture action alleges that on that property, an entity known as the Harborside Health Center 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 have filed claims in the forfeiture action, asserting interests in the property and contesting the forfeiture. *1840 Embarcadero*, ECF Nos. 14, 27, 28, 29, 30, 31, 33. Oakland has not filed a claim in the civil forfeiture proceeding, and it undisputed that Oakland has no interests that can be asserted in the judicial proceedings established by Congress to consider forfeiture claims. *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),

In this case, Oakland seeks to obtain the relief it cannot seek in the forfeiture proceedings. Invoking the Administrative Procedure Act, Oakland brought suit

against the Attorney General of the United States and the U.S. Attorney for the Northern District of California “to restrain and declare unlawful ongoing and threatened attempts” to forfeit the 1840 Embarcadero property. The district court granted the federal government’s motion to dismiss, holding that the APA does not authorize a collateral means of contesting forfeitures. Oakland appealed.

2. Oakland filed motions in this APA action (No. 12-cv-5245) and the forfeiture action (No. 12-cv-3567) — which are pending before the same magistrate judge — to “stay” the forfeiture action until this Court rules on Oakland’s appeal in this case. Declaring that Oakland’s appeal presented “novel legal questions,” the court granted the City’s request and ordered that the *1840 Embarcadero* case (No. 12-cv-3567) cannot proceed until this Court resolves this appeal. *See* Order, ECF No. 72, *Oakland v. Holder*, No. 12-cv-5245 (July 3, 2013).

The district court also ordered that a second forfeiture action, *United States v. Real Property and Improvements Located at 2106 Ringwood Ave., San Jose, California*, No. 12-cv-3566, cannot proceed, on the theory that this Court’s ruling in the present appeal may provide guidance in addressing defenses asserted in that suit. *See* Order at 12-13, ECF No. 72, *Oakland v. Holder*, No. 12-cv-5245 (July 3, 2013).

3. In light of these orders, the government asked this Court to hear oral argument on an expedited basis. After the government contacted Oakland for its position on this motion to expedite, Oakland sought and obtained a 30-day extension for filing its reply brief, which is now due on October 21, 2013. The City then filed a

response to our expedition motion, which took no position as to whether the motion should be granted. ECF No. 32 (Sept. 12, 2013). The response included a number of extra-record assertions about the federal government's policies concerning use of federal prosecutorial resources on marijuana-related crimes.

Before the government filed its reply, the Court denied the motion to expedite. ECF No. 34 (Sept. 16, 2013). The Court additionally treated Oakland's response as a motion to take judicial notice of the extra-record facts and referred that motion to the merits panel. *Ibid.*

## **B. Discussion**

It should be beyond dispute that the City of Oakland cannot file an action under the Administrative Procedure Act to collaterally enjoin a federal forfeiture action under 21 U.S.C. § 881(a). Persons with a cognizable interest in the property may urge defenses to the government's action in the forfeiture proceeding, and several persons have done so. It is not controverted, however, that Oakland has no interest that can be asserted in the forfeiture proceeding. As the district court correctly recognized, the APA cannot be used to expand the scope of the statutory forfeiture provisions by allowing parties without a property interest to assert defenses in a separate action. These arguments are set out fully in the government's appellee brief filed on September 6, 2013.

The district court nevertheless effectively enjoined the United States from proceeding in the civil forfeiture action against property on which the Harborside

Health Clinic allegedly sells marijuana, pending this Court's resolution of the present appeal. It also ordered that a second forfeiture action cannot proceed on the ground that this Court's decision may cast light on arguments presented in that case. Until this appeal is resolved, neither forfeiture action can proceed (and persons who have properly filed claims in those forfeiture actions cannot present their defenses).

In light of these rulings, it is wholly proper that this Court hear oral argument at an early date. Granting the motion will not prejudice Oakland or shorten its briefing time. Indeed, as noted, while the government was waiting for Oakland to express its position on expediting the appeal, Oakland sought and obtained a 30-day extension of time in which to file its reply brief.

For these reasons, we respectfully ask the Court to reconsider its denial of our motion for expedition and to schedule oral argument at the earliest date available on the Court's calendar.

## CONCLUSION

For the foregoing reasons, the Court should reconsider its denial of the government's motion for expedition.

Respectfully submitted,

MARK B. STERN

*s/ Adam Jed*

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SEPTEMBER 2013

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Adam Jed*

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Adam C. Jed