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 REPLY BRIEF

Cedric C. Chao
Stanley J. Panikowski
Roy K. McDonald
Kathleen S. Kizer
Saori Kaji
DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105
415.836.2500 Telephone
415.836.2501 Facsimile

Barbara J. Parker
Kiran C. Jain
Oakland City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
510.238.3601 Telephone
510.238.6500 Facsimile

Attorneys for Appellant City of Oakland

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I. INTRODUCTION

Unable to defend the actual bases of the district court's ruling, the DOJ introduces a host of new arguments not made below and not addressed by the district court. In its opening brief, Oakland showed that the DOJ's decision to enforce the Controlled Substances Act against Harborside by bringing the forfeiture action is a final agency action for which Oakland has no other adequate remedy at law. In response, the DOJ largely tries to change the subject by injecting issues of standing and other APA provisions not argued below. The DOJ's arguments on these points fail as a matter of law. Because this is the first time Oakland has had an opportunity to respond to these arguments, they are the principal focus of this reply brief. And the DOJ's half-hearted attempt to defend the district court's actual ruling fails for reasons that already have been articulated in Oakland's opening brief.

As a result, this Court should reverse the district court's dismissal of Oakland's complaint and reject the DOJ's new arguments so that the case may proceed on the merits upon remand. At a minimum, this Court should reverse the dismissal of the complaint and leave the DOJ's new arguments for the district court to decide in the first instance after full development of the pertinent factual record on remand.

II. ARGUMENT

A. Oakland Has Article III Standing

Faced with the imminent dismantling of its regulatory scheme, its corresponding loss of tax revenues, and the additional demands on its already-overstretched police force if the DOJ's forfeiture action succeeds, Oakland satisfies the constitutional requirements of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (stating Article III requires injury traceable to the defendant's conduct that is redressable by the court).

1. Oakland Will Suffer Injury to Its Own Proprietary Interests in the Immediate Future if the Forfeiture Action Succeeds

If the DOJ succeeds in its forfeiture action, Harborside will not have a secure and reliable place in which to operate, and Oakland will not be able to comply with California voters' mandate to provide patients safe and affordable access to medicinal quality cannabis. Without real property safe from the federal government's overreaching, Oakland cannot regulate medical cannabis. And without the ability to regulate the cannabis market, Oakland will lose the tax revenues generated from cannabis sales. Further, without regulated dispensaries providing safe and affordable access to medicinal quality cannabis, patients cannot obtain the medicine that California voters have decided should be available to them.

(a) Loss of Tax Revenues, Increase in Crime, and Diversion of Police Resources Are Concrete and Specific Harms

In showing the government's conduct will undermine Oakland's regulatory scheme and result in loss of tax revenues, Oakland shows "a very significant possibility of future harm," as required to have standing to assert a claim seeking injunctive relief. *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979-81 (9th Cir. 2013) (holding prospective firearm manufacturer has standing because he is likely to suffer economic injury if federal law is applied to him). Oakland's harms are "concrete and particularized" as well as "actual or imminent." *Lujan*, 504 U.S. at 560.

The threatened loss of tax revenues alone satisfies the injury in fact requirement of Article III standing. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (holding Wyoming had standing to sue Oklahoma under the Commerce Clause because Oklahoma enacted a law that reduced Wyoming's tax revenues earned from coal extraction). This Court has previously held that a municipality had standing to seek an order enjoining enforcement of a neighboring Indian tribe's ordinance because the ordinance "threatened injury to its proprietary interest in revenues earned from its two percent sales tax on liquor sales, and the possibility of actual injury to its ability to function as a municipality in regulating persons and property within its jurisdictional control." *Colo. River Indian Tribes v.*

Town of Parker, 776 F.2d 846, 848-49 (9th Cir. 1985). *See also South Dakota v. U.S. Dept. of Interior*, 665 F.3d 986, 990 (8th Cir. 2012) (holding a state's loss of tax revenues satisfies Article III injury in fact); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994) (holding a county's loss of tax revenues satisfies Article III injury in fact). Likewise here, the Harborside forfeiture action poses a grave threat both to the substantial tax revenues Oakland earns on cannabis sales and to Oakland's ability to regulate "persons and property within its jurisdictional control" – i.e., its ability to regulate cannabis dispensaries and the patients who rely on them. *Colo. River Indian Tribes*, 776 F.2d at 848-49.

Moreover, Oakland will suffer a rise in crime and diversion of police resources due to the increase in black market sales of cannabis that will follow if the forfeiture action succeeds. The D.C. Circuit has held that a county in California had standing under the APA to challenge the Department of the Interior's inaction with respect to an Indian tribe's plan to open a casino in the county because "the planned gaming would increase the County's infrastructure costs and impact the character of the community." *Amador Cnty. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011). Such "allegations are more than sufficient to establish 'concrete and particularized harm.'" *Id.* (quoting *Lujan*, 504 U.S. at 560). Like Amador County's increased costs, Oakland's loss of tax revenues, expected increase in crime and diversion of police resources are sufficiently concrete and

particularized to satisfy Article III standing. *See also Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) ("We hold that Fair Housing of Marin has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission."); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("Certainly he who is 'likely to be financially' injured . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case.").

(b) Oakland Will Also Suffer Injury to Its Proprietary Interest in Regulating Medical Cannabis

This Court has determined that municipalities have a proprietary interest in enforcing their regulations sufficient to satisfy Article III standing. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) ("The 'proprietary interests' that a municipality may sue to protect are as varied as a municipalities' responsibilities, powers, and assets."); *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 927-28 (9th Cir. 1990) (finding city has a protectable interest in its taxing and regulating powers). Consistent with this precedent, Oakland has a proprietary interest in regulating and taxing medical cannabis and providing patients safe and affordable access to medicinal quality cannabis in accordance with California law. And the forfeiture action's negative impact on those interests is sufficiently concrete and particularized to confer Article III standing.

2. Oakland's Injuries Are Neither Speculative nor Vague

The DOJ's characterization of Oakland's injuries as speculative and vague misconstrues both Oakland's allegations and the case law. Loss of tax revenues is certain to occur if the forfeiture action succeeds because Harborside will have no place to conduct business and thus will cease paying substantial taxes on medical cannabis sales. And given the DOJ's publicized efforts to discourage landlords from renting to dispensaries, it is unrealistic to expect Harborside will find another location to operate its dispensary.

Likewise, if the DOJ succeeds in its forfeiture action, Oakland's ability to regulate medical cannabis will be thoroughly undermined. As explained above, Oakland's regulatory system depends on its dispensaries' having secure locations at which to operate. Oakland's other regulated dispensaries will undoubtedly be negatively impacted by a forfeiture of Harborside's dispensary, as the owners of the properties on which the other dispensaries operate will face the threat of similar action. It is difficult to imagine what property owner would risk the DOJ's very real and concrete threats.

The government suggests Oakland can mitigate its injury by receiving tax revenues from an alternate lessee of the property, but the government provides no authority for its novel suggestion that a plaintiff suffers no injury if it has the ability to mitigate its losses. *See* Answering Brief (Dkt. No. 27) at 18. Indeed, the

ability to mitigate losses proves the existence of injury in the first instance. *See Maya v. Centex Corp*., 658 F.3d 1060, 1069 (9th Cir. 2011) (holding plaintiffs stated injury-in-fact in alleging they were induced to purchase their homes at inflated prices, and possibility that plaintiffs could sell their homes at a profit if the market improves does not negate that injury).

Oakland's injuries bear no resemblance to the uncertain harms found insufficient to confer standing in the cases cited by the DOJ. For example, Oakland's loss of tax revenues and the undermining of its regulatory scheme are much more certain and concrete than the harm alleged in the case cited by the DOJ concerning a challenge to the federal government's surveillance of non-citizens located outside the United States under the Foreign Intelligence Surveillance Act ("FISA"). *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013). The plaintiffs in *Clapper* alleged they risked having their own "sensitive and sometimes privileged" communications intercepted "at some point in the future." *Id.* But the Court found that risk depended on "a highly attenuated chain of possibilities" such as whether the government will target the persons with whom plaintiffs communicate, whether the government will rely on the challenged FISA provision to target those persons, whether the FISA court judges will approve the government's surveillance of those persons, and whether the government will succeed in intercepting plaintiffs' communications with those persons. The Court

found their "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* at 1143 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis in original).

Here, by contrast, the impact on Oakland's ability to regulate medical cannabis and receive tax revenues is certain to result from the forfeiture of the property on which Harborside operates. Oakland's injuries are much more like the injuries this Court found sufficient in an earlier challenge to FISA in which the plaintiff identified in detail how her own communications were actually intercepted and did not depend on uncertain government action and other conditions in the future. *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 910-12 (9th Cir. 2011).

The government's reliance on *Oregon v. Legal Services Corp.* is likewise misplaced. This Court held Oregon lacked standing to challenge the constitutionality of regulations governing private legal services providers that receive federal funding because it did not suffer an injury to its own proprietary interest that was separate from the harm to the legal services providers. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972-73 (9th Cir. 2009). Here, Oakland alleges distinct injury to its own proprietary interests in taxing and regulating. *See Colo. River Indian Tribes*, 776 F.2d at 848-49.

Further, requiring Oakland to wait to challenge the DOJ's decision until after the forfeiture action has concluded would be inefficient and a waste of resources. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (agreeing to resolve constitutional challenge to Defense of Marriage Act even though principal parties agree on its unconstitutionality, because not resolving the issue would adversely impact many persons and "the cost in judicial resources and expense of litigation for all persons adversely affected would be immense"); *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) (stating "a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence").

Moreover, because the DOJ forfeiture action has emboldened the DEA to take additional steps to shut down the Harborside dispensary (notwithstanding the stay pending appeal) – i.e., by barring armored car services companies from doing business with Oakland's dispensaries – the forfeiture action has already had a negative impact on public safety. *See* Chao Decl., ¶ 4 & Ex. A (Dkt. No. 36-2). That impact was underscored at a Senate Judiciary Committee hearing on September 10, 2013, at which the DOJ explained its renewed policy of non-prosecution of persons acting in compliance with state and local law governing cannabis. *See* Transcript (Dkt. No. 32-5) and Order (Dkt. No. 34). Both Senator

Patrick Leahy and Deputy Attorney General James Cole, the author of the memo outlining the policy issued on August 29, 2013 (Dkt. No. 32-4), acknowledged the significant public safety threat posed by the government's interference with armored car services companies. *See* Transcript (Dkt. No. 32-5) at 10.

3. Oakland's Injuries Are Caused by the DOJ's Forfeiture Action

Oakland's injuries are also directly traceable to the DOJ's Harborside forfeiture action. *See City of Sausalito*, 386 F.3d at 1199. These are the natural consequences of the DOJ's forfeiture action, and at least some of them – e.g., the loss of tax revenues from sales of medical cannabis at Harborside, the inability to regulate cannabis, and the inability to provide patients safe and affordable access to medicinal quality cannabis – do not require any independent action of third parties.

4. Oakland's Injuries Are Redressable

Halting the Harborside forfeiture action will also redress Oakland's injuries. *See, e.g.*, *City of Sausalito*, 386 F.3d at 1199 (holding "because Sausalito's asserted injuries will not occur if the Plan is not implemented, Sausalito has alleged injury that can be redressed by a decision blocking implementation of the Plan"). The government does not argue otherwise. *See* Answering Brief at 17-19.

In sum, because Oakland alleges concrete injury traceable to the DOJ's decision to bring the forfeiture action, and Oakland's injuries are redressable in this lawsuit, Oakland has Article III standing. *See Lujan*, 504 U.S. at 560-61.

B. Oakland Satisfies Any Prudential Standing Requirements

The Supreme Court has long confirmed the "'generous review provisions'" of the APA, which serve "a broadly remedial purpose." *Ass'n of Data Processing*, 397 U.S. at 156 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955), and citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). Prudential standing does not diminish the "presumption of reviewability" of federal agency action; in fact, the test "'is not meant to be especially demanding.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1986)). "[T]he benefit of any doubt goes to the plaintiff." *Id.*

Prudential standing "forecloses suit only when a plaintiff's '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.'" *Patchak*, 132 S. Ct. at 2210 (quoting *Clarke*, 479 U.S. at 399). Courts have long held that judicial review under the APA is precluded "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). The statute in question need not indicate that Congress intended to benefit the plaintiff's interests. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

Courts determine whether a plaintiff satisfies the zone of interests test by "discern[ing] the interests 'arguably . . . to be protected' by the statutory provision at issue," and then by "inquir[ing] whether the plaintiff's interests affected by the agency action in question are among them." *Id.* For example, in *Patchak*, the statute in question authorized the federal government to take land into trust for Indians, and the plaintiff alleged economic, environmental and aesthetic harms due to the proposal to use the land for a casino. *Patchak*, 132 S. Ct. at 2210-11. The Supreme Court determined both the statute and the plaintiff's interests concerned land use, and the plaintiff thus satisfied prudential standing. *Id.* at 2211-12. Oakland likewise has prudential standing here.

The zone of interests test limits review under the APA to persons "aggrieved by agency action within the meaning of *a relevant statute*." *Ass'n of Data Processing*, 397 U.S. at 153-54 (quoting 5 U.S.C. § 702) (emphasis added). The Supreme Court recently explained this means a plaintiff must be "'arguably within the zone of interests to be protected or regulated by the statute' *that he says was violated*." *Patchak*, 132 S. Ct. at 2210 (quoting *Ass'n of Data Processing*, 397 U.S. at 153) (emphasis added) (considering statute authorizing government to take title to land for use by Indians when analyzing neighbor's challenge based on economic, environmental and aesthetic harms); *see also Nat'l Credit Union Admin.*, 522 U.S. at 489 (considering the purposes of the entire National Bank Act

in analyzing a competitor's challenge to a decision by the Comptroller of the Currency allowing banks to operate discount brokerages).

The Supreme Court recently underscored the broad and flexible nature of prudential standing, finding the requirement satisfied where the party's "sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." *Windsor*, 133 S. Ct. at 2688. In *Windsor*, a non-litigant congressional group had standing to advocate for upholding the Defense of Marriage Act ("DOMA"). *Id.* The Court focused on the group's ability to provide an adversarial presentation of the issues, rather than on whether its interests fit within the zone of interests of DOMA. *Id.*

1. Oakland's Interests in the Health, Safety and Welfare of Its Citizens Are Within the Zone of Interests of the Controlled Substances Act

Oakland seeks to halt the DOJ's enforcement of the Controlled Substances Act ("CSA") against Harborside through the forfeiture statute. Because Oakland lacks an interest in the property subject to the forfeiture action, the DOJ tries to narrow the focus of inquiry to the forfeiture action. But the forfeiture action is simply the mechanism that the DOJ is using to enforce the CSA against Harborside. The government's real goal is to prevent sales of cannabis.

Accordingly, Oakland can satisfy prudential standing requirements by showing its claims are within the zone of the interests of the CSA.

California state voters approved the Compassionate Use Act to allow patients to obtain and use medical cannabis with a doctor's prescription without fear of criminal prosecution or sanction. ER 1051 (Dkt. No. 21-6). 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)). In keeping with those goals, and to advance Oakland's broad public interest in promoting the health, safety, and welfare of its citizens, Oakland adopted comprehensive regulations 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. *See* Opening Brief (Dkt. No 21-1) at 8-10. Oakland's interests in public health, safety, and welfare support its extensive regulation of cannabis dispensaries. *See id.* These regulations, in turn, are intended to ensure the dispensaries operate safely, that they provide medicinal quality cannabis, and that they dispense cannabis only to patients with valid prescriptions and identification cards. *See id*.

The DOJ contends "the zone of interests of the legal provisions at issue cannot be conceptualized at such a high level of generality—'health and welfare.'"

Answering Brief at 14. But the DOJ cites no authority for this proposition. Nor could it, because it is not the law. Courts routinely characterize the zone of interests in comparably general terms. *See, e.g.*, *Patchak*, 132 S. Ct. at 2210 n.7 (stating "[t]he question is . . . whether issues of land use (arguably) fall within § 465's scope"); *Am. Independence Mines & Minerals Co. v. USDA*, 494 Fed. Appx. 724, 727 (9th Cir. 2012) (finding plaintiff's "purely economic interests do not fall within NEPA's environmental zone of interests"); *City of Las Vegas v. Fed. Aviation Admin.*, 570 F.3d 1109, 1114 (9th Cir. 2009) (finding "the city alleges a concrete injury to its interests in the environment and in safety which falls within the zone of interests of NEPA").

When Congress adopted the CSA, it did so with a view to protecting the "health and general welfare of the American people." 21 U.S.C. § 801(1), (2). The CSA reflects Congress's concerns with drug abuse and the "international and interstate traffic in illicit drugs." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). The CSA aimed to "provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs." *Id.* at 10. The CSA regulates cannabis. *Id.* at 14.

Oakland's interests in public health and welfare, and in restricting the distribution of cannabis to patients with prescriptions, fall squarely within the zone

of interests of the CSA. Both Oakland and the CSA are interested in protecting public health and welfare, and in restricting access to cannabis. And it is irrelevant for prudential standing purposes that the CSA does not benefit Oakland. *See Nat'l Credit Union Admin.*, 522 U.S. at 488-89 ("Although our prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff.").

2. Oakland's Interests in Public Safety and Controlling Access to Cannabis Are Within the Zone of Interests of the Forfeiture Statute

Even if Oakland's interests were analyzed in light of the forfeiture statute alone, Oakland still has prudential standing. Congress adopted the forfeiture statute to provide a "law enforcement tool" for use in "combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. Congress noted that "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." *Id.* Thus, "[i]f law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspect of these crimes. Forfeiture is the mechanism through which such an attack may be made." *Id.*

By providing safe and affordable access to medicinal quality cannabis to patients with prescriptions, Oakland's regulatory system prevents patients from having to resort to black market criminal enterprises. Enabling patients to avoid the illegal drug trade has the logical effect of reducing the illegal drug trade. Thus, by regulating nonprofit dispensaries at which patients can obtain medicinal quality cannabis at affordable prices, Oakland undercuts the profiteering of illegal drug trafficking and racketeering enterprises, a goal of the forfeiture statute. While Oakland's overarching goal is to provide a safe and affordable cannabis market for patients with prescriptions, it also shares the federal government's interest in combatting illegal drug trafficking and racketeering.

By attacking racketeering activity, the forfeiture statue also reflects the federal government's interest in public safety, which is another interest shared by Oakland. That interest is reflected throughout the regulations it adopted governing medical cannabis. For example, the regulations specify security measures dispensaries must employ (e.g., security guards, cameras), require employee background checks, prohibit employment of felons, and require audits on demand to ensure compliance with nonprofit rules. *See* Opening Brief at 8-10. If the Harborside forfeiture action succeeds, Oakland's regulated market for medicinal quality cannabis will be destroyed and patients will resort to the black market,

which will in turn increase criminal activity, endanger patients, and harm public safety.

Cases concerning challenges to CSA enforcement actions and rules show Oakland has prudential standing to challenge the DOJ's enforcement of the CSA against Harborside by seeking forfeiture of the property on which Harborside operates. For example, in *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 793-94 (D.C. Cir. 2004), the D.C. Circuit held that a drug manufacturer had prudential standing to challenge the DEA's decision to prohibit another company from importing an ingredient used in both legal and illicit drugs even though the manufacturer was not an importer. It reasoned that the "practical future consequences" of the order on the manufacturer were sufficient to place it within the zone of interests of the statute regulating drug importation. *Id.* at 793. *See also MD Pharm., Inc. v. DEA*, 133 F.3d 8, 12-13 (D.C. Cir. 1998) (finding drug producer had standing to sue the DEA where agency issued operating permit to a competitor).

3. Oakland Shares the Interests in Certainty and Repose of the Forfeiture Statute's Statute of Limitations

As the DOJ recognizes, statutes of limitations serve multiple purposes, including "'repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" Answering Brief at 15 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). By fixing a deadline to bring claims, statutes of limitations enable parties to order their affairs. *Wood v.*

Carpenter, 101 U.S. 135, 139 (1879) ("Statutes of limitation are vital to the welfare of society and are favored in the law. . . . They promote repose by giving security and stability to human affairs.").

At the heart of Oakland's claims are the federal government's repeated assurances that the DOJ would not prosecute persons acting in compliance with state and local law concerning cannabis. Time and again Oakland heard the same message as it devoted considerable resources to establishing and implementing its regulatory scheme, conducting annual audits of its permitted dispensaries, renewing annual permits, and reviewing and either accepting or rejecting applications for dispensaries. Throughout the years, Oakland came to rely on the substantial tax revenues generated by cannabis sales, and its patients came to rely on having safe and affordable access to medicinal quality cannabis. Oakland thus ordered its affairs in reliance on the federal government's repeated pronouncements of the DOJ's policy of non-prosecution. Oakland's interests in stability and repose thus fall squarely within the purposes of the statute of limitations.

The DOJ presumes Oakland asserts the statute of limitations on behalf of third parties, but that is not the case. Rather, Oakland asserts its own interests in certainty and repose. While statutes of limitations are routinely asserted as

affirmative defenses, nothing in the statute prohibits interested parties with a clear stake in the outcome of the action from asserting the time bar:

> *No suit or action . . . shall be instituted* unless such suit or action is commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later . . . .

19 U.S.C. § 1621 (emphasis added).

The statute speaks only in terms of prohibiting the *commencement of an action*. It says nothing about who may assert the time bar. Moreover, Oakland's application of the doctrine is consonant with its purposes of repose and enabling persons to order their affairs.

4. To the Extent Prudential Standing Even Applies to Equitable Estoppel, Oakland Has Standing to Assert an Equitable Estoppel Claim

The government identifies no authority for the proposition that prudential standing can limit common law claims like Oakland's estoppel claim. In fact, the D.C. Circuit has acknowledged doubt as to whether the zone of interests test applies to common law claims and noted that "[t]he First Circuit has held that prudential standing is demonstrated when a plaintiff either satisfies the zone-of-interests test or 'show[s] that the harm of which he complains amounts to a "common law" injury, such as a tort.'" *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 68 n.62 (D.C. Cir. 2011) (quoting *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st

Cir. 1983)). But even if the Court were to consider the zone of interests of Oakland's equitable estoppel claim, Oakland satisfies the test because the purpose of equitable estoppel is to prevent injustice caused by relying on another's misrepresentations. *See Watkins v. U.S. Army*, 875 F.2d 699, 707-08 (9th Cir. 1989). Oakland seeks to estop the DOJ from forfeiting the property on the basis that the federal government misrepresented and inconsistently applied its policy of non-prosecution of persons acting in compliance with state and local law. Oakland's claims are thus squarely within the zone of interests of the equitable estoppel doctrine.

C. No Statute Bars Oakland's Suit

Next, the government misconstrues § 701(a)(1) of the APA when it argues the forfeiture statute precludes review of Oakland's claim. That section bars review only where Congress has expressed an intent to preclude judicial review. Absent an explicit statutory bar, the circumstances in which a court will find review "impliedly" barred are narrow. *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1374 (2012) (finding "there is no suggestion that Congress has sought to exclude compliance-order recipients from the [Clean Water] Act's review scheme"). For example, "[w]here a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not

subject to the administrative process, is strong." *Id*. at 1374 (discussing *Block v. Cmty. Nutrition Inst*., 467 U.S. 340 (1984)). This is not a circumstance where judicial review will disrupt a detailed administrative scheme. *See*, *e.g.*, *Block*, 467 U.S. at 348 (finding that allowing consumers to sue would disrupt "complex and delicate administrative scheme" governing milk producers because a producer could avoid the administrative process by suing in the capacity of a consumer).

The civil forfeiture statute in 18 U.S.C. § 983 provides that "any person claiming an interest in the seized property" may file a claim to challenge the forfeiture. 18 U.S.C. § 983(a)(4)(A). Such a claimant must proceed under the Supplemental Rules for Certain Admiralty and Maritime Claims. *Id.* Rule G directs a "person who asserts an interest in the defendant property" to file a claim identifying "the specific property claimed." Fed. R. Civ. P. Supp. G(5)(a)(i).

Both § 983 and Rule G are silent about challenges to the government's decision to commence a forfeiture action brought by persons not claiming an interest in the seized property. The government provides no authority for its assertion that the procedures under § 983 and Rule G "are the exclusive means of determining whether a civil forfeiture may proceed." Answering Brief at 21. The statutory provisions thus do not contain "specific language or specific legislative history that is a reliable indicator of congressional intent" to prohibit judicial review by non-claimants. *See Bowen*, 476 U.S. at 673 (provision expressly

granting review of amounts of benefits under Part A of Medicare did not prohibit review of the method for determining benefits under Part B) (quoting *Block*, 467 U.S. at 349). Because nothing in the procedures suggests Congress intended to prohibit review under the APA by persons not claiming an interest in the property subject to forfeiture, the DOJ has not overcome the presumption that judicial review is available for Oakland's claims. *PDK Labs. Inc.*, 362 F.3d at 793 (finding "there is no language" and "no legislative history" to "overcome the presumption in favor of judicial review" under the APA).

D. No Statute Expressly or Impliedly Precludes the Relief Oakland Seeks

The government likewise misconstrues § 702 of the APA when it argues the forfeiture statute impliedly forbids the relief Oakland seeks. Answering Brief at 21. Section 702 provides an exception to the government's broad immunity waiver where the statute at issue "expressly or impliedly forbids the relief sought." 5 U.S.C. § 702. Courts have barred review under section 702 in very limited circumstances, none of which is analogous to this case. *See, e.g.*, *Block v. North Dakota*, 461 U.S. 273, 286 n.3 (1983) (finding relief barred by statute of limitations); *Fornaro v. James*, 416 F.3d 63, 66-67 (D.C. Cir. 2005) (finding APA review proscribed because Civil Service Retirement Act provides sole avenue for review of decisions regarding civil service employee disability benefits). In fact, the DOJ itself does not identify a single case barring review under this provision.

The government in *Patchak* argued the plaintiff's claim was barred by § 702 because the Quiet Title Act did not extend to challenges to Indian lands, but the Supreme Court held otherwise because the plaintiff alleged a grievance and sought relief different than the kind the Quiet Title Act addresses. 132 S. Ct. at 2205-06. Likewise here, no statue precludes the relief that Oakland seeks.

E. The DOJ's Decision to Bring the Forfeiture Action Is Not Committed to Agency Discretion by Law

The DOJ argues for the first time that § 701(a)(2) of the APA bars Oakland's claims because the DOJ's decision to commence the forfeiture action is committed to its discretion. This argument is incorrect. *See, e.g.*, *Socop-Gonzalez v. Immigration & Naturalization Serv.*, 208 F.3d 838, 844 (9th Cir. 2000) (finding action reviewable even though agency had "unfettered discretion"); *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (stating "the mere fact that a statute contains discretionary language does not make agency action unreviewable").

Courts have interpreted that provision to provide a "very narrow exception" to the presumption of reviewability under the APA "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-11 (1971) (finding review not barred because relevant statute offered "clear and specific directives" to agency) (quoting S. Rep. 79-752, at 26 (1945)), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). This

Court has made clear that agency actions are reviewable so long as there are meaningful standards and established policies to apply. *See Socop-Gonzalez*, 208 F.3d at 844.

The DOJ has made no showing that the CSA and forfeiture statute lack standards or established policies to evaluate its decisionmaking. In fact, the clear purpose of those statutes is to target criminal enterprises, which provides an avenue to demonstrate the DOJ's targeting of the nonprofit Harborside dispensary is an abuse of discretion. Section 701(a)(2) provides no obstacle to Oakland's action. Moreover, both the statute of limitations and doctrine of equitable estoppel provide meaningful standards and established policies for evaluating whether the DOJ can proceed with the forfeiture action at this late stage in light of Oakland's reliance on its policy of non-prosecution.

Finally, the DOJ's reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332 (9th Cir. 1992), is misplaced. *Heckler* provided only that § 701(a)(2) creates a presumption of nonreviewability of an agency's decision *not* to undertake enforcement action. 470 U.S. at 832-33. While this Court stated in *dicta* that *Heckler*'s presumption of nonreviewability applied generally to "litigation decisions," that interpretation is an anomaly that has not been followed, and it was stated in the context of an agency decision not to undertake an appeal. *Didrickson* 982 F.2d at 1339. *See Port of Seattle, Wash. v.*

F.E.R.C., 499 F.3d 1016, 1027 (9th Cir. 2007) (stating that under *Heckler*, only agency decisions *not* to enforce are presumptively nonreviewable; decisions to initiate proceedings are reviewable).

F. The DOJ's Decision to Bring the Forfeiture Action Is Final Agency Action for Which Oakland Has No Other Adequate Remedy in Court

1. The DOJ Fails to Show that Oakland Has an Adequate Remedy

Oakland has already rebutted in detail the DOJ's contention that Oakland has an adequate remedy. *See* Opening Brief at 25-32. The DOJ argues inconsistently that the forfeiture procedures both (1) "impliedly forbid[]" review under the APA and (2) provide an adequate remedy to Oakland. Answering Brief at 21. Yet the DOJ does not attempt to explain how Oakland has an adequate remedy given Oakland's lack of standing to pursue a claim under the forfeiture statute. Nor does the DOJ identify any pertinent authority where a party so clearly aggrieved by federal action has no avenue for redress but nonetheless is deemed to have an adequate remedy. Rather, the four cases cited by the DOJ for the dual proposition that the forfeiture procedures provide Oakland an "adequate remedy" and "impliedly forbid" Oakland's claims do not concern the APA, and none is on point. *See* Answering Brief at 21-22 (citing *Hinck v. United States*, 550 U.S. 501, 506 (2007) (holding the Tax Court has exclusive jurisdiction to review interest abatement decisions made by the IRS); *EC Term of Years Trust v. United States*,

550 U.S. 429, 433, 434 (2007) (dismissing wrongful levy action against the IRS because it was brought after the statute of limitations expired); *United States v. Erika, Inc*., 456 U.S. 201, 208 (1982) (no judicial review of private insurance carriers' determination of certain Medicare benefits); and *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) (Civil Rights Act of 1964 provides exclusive procedures for federal employment discrimination claims)).

2. The DOJ's Decision to Enforce the CSA Against Harborside by Seeking Forfeiture of the Property Is a Final Agency Action Because It Determines Oakland's Rights

With respect to final agency action, the DOJ argues only that the decision is not final because it does not determine rights and obligations; instead, those are to be determined "by judgment of the court." Answering Brief at 20. But the pendency of the forfeiture action does not diminish the finality of the DOJ's decision to pursue it.

The filing of the forfeiture action is not simply a step in the DOJ's deliberative process. *Sackett*, 132 S. Ct. at 1373-74 (finding compliance order is a final agency action even though it is not "self-executing but must be enforced by the agency in a plenary judicial action"). That the ultimate outcome of the forfeiture action is decided by the Court instead of the DOJ simply underscores the finality of the *DOJ's* decisionmaking, which is the decisionmaking that matters for purposes of APA review.

As explained more fully in Oakland's opening brief, the DOJ's decision is final and has had and will have a direct impact on Oakland. *See* Opening Brief at 17-21, 35-46. The DOJ does not dispute that the legal regime under which Oakland operated before the DOJ commenced the forfeiture action was one in which Oakland could create a regulatory system governing medical cannabis free of federal government interference in reliance on the DOJ's policy of non-prosecution. Nor does the DOJ dispute that Oakland now faces the specter of losing the entire regulatory system it spent considerable time and resources to establish.

In sum, all of the requirements for APA review of Oakland's claims have been met, and the case should proceed on the merits.

G. If the Court Finds the Record on Appeal Insufficient to Resolve the DOJ's New Arguments, It Should Remand the Case to Develop the Record

At the very least, this Court should remand the case for the district court to consider the DOJ's new arguments in the first instance. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (citing *Jenkins v. McKeithen*, 395 U. S. 411, 421-422 (1969)). When a defendant moves to dismiss for lack of standing under Rule 12(b)(1), the plaintiff

may submit affidavits to establish facts supporting standing. *Id.* *See also Maya*, 658 F.3d at 1067, 1073 (holding court erred in finding lack of Article III standing and remanding to permit plaintiffs to amend their complaint and submit expert testimony on causation). When, as here, standing is raised for the first time on appeal, the Court may remand the case for development of the record if it finds the allegations in the complaint are insufficient to establish standing. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002) (instructing the district court to address newly raised standing issue on remand).

III. CONCLUSION

The DOJ's newly-minted challenges to Oakland's complaint on standing and other grounds have no merit. To the extent the Court does not simply reject those challenges on appeal, it should remand the case to the district court to consider them in the first instance.

The DOJ has also failed to show that the district court's actual ruling – that Oakland cannot seek judicial review under the APA – is correct. 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: October 21, 2013

Respectfully submitted,

DLA PIPER LLP (US)

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

Attorneys for Appellant City of Oakland

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,814 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 reply 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: October 21, 2013

Respectfully submitted,

DLA PIPER LLP (US)

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

Attorneys for Appellant City of Oakland

CERTIFICATE OF SERVICE

Case No. 13-15391

I hereby certify that on October 21, 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