No. 13-15391

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Appellant,

vs.

LORETTA E. LYNCH, 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
The Honorable Maria-Elena James

PETITION FOR REHEARING AND REHEARING EN BANC

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I. THE PANEL DECISION CONFLICTS WITH *MATCH-E-BE-NASH* AND RAISES AN EXCEPTIONALLY IMPORTANT QUESTION OF STANDING TO SEEK REDRESS OF UNIQUE GRIEVANCES

In this case, the United States Attorney for the Northern District of California targeted a large medical marijuana facility for civil forfeiture in the City of Oakland ("Oakland"). Oakland filed an action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, to challenge the legality of that action, because it was barred from participating in civil forfeiture proceedings by the rules governing those proceedings. The district court dismissed Oakland's suit, and, on appeal to this Court, the panel decision affirmed the district court.

This Petition seeks rehearing or rehearing *en banc* because the panel decision conflicts with the decision of the United States Supreme Court in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) ("*Match-E-Be-Nash*"). In *Match-E-Be-Nash*, the Supreme Court created a pathway under the APA for injured parties to have access to the courts to challenge federal agency proceedings despite the existence of another statute covering a similar subject that expressly or impliedly forbids their participation. Fed. R. App. P. 35(a)(1), 40(a)(2). The Supreme Court held that where that statute "addresses a kind of grievance different" (132 S. Ct. at 2206) from the one advanced by the APA plaintiff, there is no bar under Section 702 of the APA, which provides that the government's waiver of immunity from suit does not apply "'if any other

statute that grants consent to suit expressly or impliedly forbids the relief sought.'" *Id.* at 2204.

There is no dispute that the civil forfeiture claim filed by Harborside Health Clinic ("Harborside") in the Government's forfeiture action "addresses a kind of grievance different" from that advanced by Oakland. Harborside, a medical marijuana dispensary, seeks to prevent the forfeiture by the United States Department of Justice of the real property in which Harborside's operations are housed. 21 U.S.C. § 881(a)(7). In concluding that Oakland has established Article III injury from the loss of tax revenue that would result from the forfeiture, the panel necessarily recognized that Oakland has a "grievance" arising from that loss. Nonetheless, the panel concluded that the "existing forfeiture framework also impliedly forbids judicial review of Oakland's claims." *City of Oakland v. Lynch*, No. 13-15391, slip op. at 11 (9th Cir. Aug. 20, 2015). The panel gave short shrift to *Match-E-Be-Nash*, declaring that the principle articulated by the Supreme Court did not apply "because both parties do in fact seek the same *relief*: to stop the forfeiture." *Id.* at 13 (emphasis added).

The panel's conclusion conflicts with the Supreme Court's core holding in *Match-E-Be-Nash*. In that case, the Quiet Title Act allowed only parties with an interest in the land to challenge the Government's assertion of title and further provided that Indian trust land was exempt from challenge. The plaintiff in *Match-*

E-Be-Nash did seek the same *relief* that the Quiet Title Act provided: to deprive the Government of title to the land. However, the plaintiff's protest concerning the economic, environmental and aesthetic harms that would result from use of the land as a tribal casino was a different *grievance* from that of a party in a Quiet Title Act suit claiming an interest in land the Government had acquired. Therefore, the Supreme Court held that the APA action in *Match-E-Be-Nash* could go forward. Under *Match-E-Be-Nash*, it is not the kind of relief sought but rather the kind of *grievance* that determines whether access to the courts is available under the APA.

The panel's decision here greatly curtails the effect and scope of *Match-E-Be-Nash* and, in fact, undermines that decision. Therefore, rehearing *en banc* is warranted to address the following question of exceptional importance:

> Can a party with Article III standing and unique grievances be denied access to the courts to seek redress, where a federal agency has made a final decision to enforce a statute in a proceeding that forbids participation by that injured party?

II. THE PANEL DETERMINED THAT OAKLAND HAS STANDING UNDER ARTICLE III OF THE CONSTITUTION

As an important threshold matter, the panel correctly determined that Oakland has standing under Article III of the United States Constitution to assert its unique grievances.

Oakland asserts three direct injuries resulting from the Government's forfeiture action: (1) loss of tax revenue, (2) an increase in crime and concomitant

increase in demand on police resources resulting from black market sales of marijuana, and (3) injury to its proprietary interest in regulating and taxing marijuana and providing safe and affordable medical marijuana in the community, consistent with California law. *Oakland*, slip op. at 7. Among these, the panel focused on Oakland's projected loss of $1.4 million tax revenues if Harborside were shut down. *Id.* The panel held "[a]n expected loss of tax revenue can constitute sufficient injury for purposes of Article III standing." *Id.* at 8, citing *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004). Having found this injury, the panel found it unnecessary to address Oakland's other injuries. *Oakland*, slip op. at 7.

The panel rejected the Government's argument that Oakland's lost tax revenue was "uncertain." *Oakland*, slip op. at 8-9. The panel agreed that a loss of revenue would only occur if the forfeiture were ordered but found "that this alone is not so speculative as to undermine the claim," citing the rule that an allegation of future injury is sufficient if "'there is a substantial risk that the harm will occur.'" *Id.* (citation omitted). The panel concluded that "what is certain is that closing Harborside will lead to a real and immediate erosion of Oakland's tax revenues." *Id.*

The panel summarized its holding as follows:

> We find that Oakland has standing to bring suit under Article III. Oakland has alleged a sufficient injury with

> respect to the erosion of its tax revenues. The loss of revenues would be directly attributable to the Government's forfeiture action and redressable by a favorable ruling.

Oakland, slip op. at 9.

III. THE PANEL DECISION CONFLICTS WITH *MATCH-E-BE-NASH*

Having found that Oakland would sustain a direct and substantial injury if the Government's civil forfeiture action goes forward, the panel held that under Section 702 of the APA, Oakland lacks standing to maintain a suit to stop the forfeiture. In so doing, the panel attempted to distinguish *Match-E-Be-Nash*:

> Oakland argues that, because its grievances concern public health and safety, tax revenues, and its regulatory scheme, which are different from Harborside's grievances, it is not barred from bringing suit under the APA. The argument fails, however, because both parties do in fact seek the same relief: to stop the forfeiture.

Oakland, slip op. at 13.

The panel's conclusion is based squarely on the kind of relief sought, as opposed to the kind of grievance asserted, and thereby directly conflicts with the Supreme Court's in decision *Match-E-Be-Nash*. In fact, the panel's decision is aligned with the dissent in *Match-E-Be-Nash*. The dissent made the same point about the plaintiff's suit in *Match-E-Be-Nash* that the panel makes about Oakland's suit here. The dissent correctly pointed out that the plaintiff basically sought the same relief as an action under the Quiet Title Act: to deprive the Government of

title to the property. In the case of Indian trust land, the statute forbade such a suit. *See Match-E-Be-Nash*, 132 S. Ct. at 2215.

The majority responded directly to the dissent in footnote 3:

> According to the dissent, we should look only to the kind of *relief* a plaintiff seeks, rather than the type of *grievance* he asserts, in deciding whether another statute bars an APA action. See *post*, at 2214 (opinion of SOTOMAYOR, J.). But the dissent's test is inconsistent with the one we adopted in *Block*, which asked whether Congress had particularly dealt with a "claim." See *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286 , n. 22, 103 S. Ct. 1811, 75 L.Ed.2d 840 (1983). And the dissent's approach has no obvious limits. Suppose, for example, that Congress passed a statute authorizing a particular form of injunctive relief in a procurement contract suit except when the suit involved a "discretionary function" of a federal employee. Cf. 28 U.S.C. § 2680(a). Under the dissent's method, that exception would preclude *any* APA suit seeking that kind of injunctive relief if it involved a discretionary function, no matter what the nature of the claim. That implausible result demonstrates that limitations on relief cannot sensibly be understood apart from the claims to which they attach.

Match-E-Be-Nash, 132 S. Ct. at 2205, n.3 (emphasis added).

The Supreme Court in *Match-E-Be-Nash* rejected the type of *relief* sought as the determinative factor in whether an APA action could proceed. Rather, if the type of *grievance* or *claim* was different from what the supposedly preclusive statute contemplated, an APA action would not be barred. To the majority, "the dissent's approach has no obvious limits," because the exception could end up

barring any APA suit seeking the same relief as another statute. Therefore, it must be the nature of the grievance that is determinative.

The majority in *Match-E-Be-Nash* addressed another significant point raised in the panel's decision. The tribe and the Government in *Match-E-Be-Nash* invoked "cases holding that 'when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons,' the statute may 'impliedly preclude[]' judicial review 'of those issues at the behest of other persons.'" *Match-E-Be-Nash*, 132 S. Ct. at 2208 (citations omitted). The panel here similarly invoked the principle that judicial review is not available under the APA where another statute "'provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief.'" *Oakland*, slip op. at 11, citing *Hinck v. United States*, 550 U.S. 501, 506 (2007).

The majority thought "that argument faulty, and the cited cases inapposite, for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses." *Match-E-Be-Nash*, 132 S. Ct. at 2209. The panel in this case has reversed the meaning of the Supreme Court's holding, focusing on "relief" and disregarding "claim" as the determinative factor. *Oakland*, slip op. at 11-12. The panel's interpretation of *Match-E-Be-Nash* fails to account for the Supreme Court's fundamental endorsement of the principle that

"[w]hen a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit." *Match-E-Be-Nash*, 132 S. Ct. at 2205.

In another parallel to the present case, the dissent urged the majority to consider the consequences of allowing APA suits where the Quiet Title Act would prohibit them, including that "the majority's holding will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously." *Match-E-Be-Nash*, 132 S. Ct. at 2217. The dissent pointed out that suits like the plaintiff's would be governed by the "APA's ordinary 6-year statute of limitations." *Id.* However, "[u]ntil today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review." *Id.*

The panel offered a nearly identical reason for concluding that Oakland's suit was impliedly forbidden by the forfeiture framework. The panel noted that the rule governing civil forfeiture actions "requires an interested party to file a claim within 30 days of service," but a civil action "under the APA, however, is governed by a six-year limitations period." *Oakland*, slip op. at 12. The panel concluded that "[p]ermitting parties to file under the APA and circumvent the short deadlines Congress established in the forfeiture law would make mush of the law." *Id.* In this respect, as in the others discussed above, the panel entertained

arguments that were strikingly similar to those offered in *Match-E-Be-Nash*, but came to the exact opposite conclusion as the Supreme Court in that case.

In sum, the panel did not dispute that Oakland has a different grievance from Harborside. To the contrary, the panel recognized that Oakland has a different injury from Harborside for which Oakland seeks redress. Oakland's grievance is, if anything, more substantial than the plaintiff's grievance in *Match-E-Be-Nash*, which consisted of the economic, environmental and aesthetics harms resulting from the proposed casino. Oakland's grievance arises from more tangible harms, such as loss of tax revenue, increase of street crime and risk to the public, loss of regulatory oversight over medical marijuana, and loss of a large facility providing a medical service to the city. Yet, like the plaintiff in *Match-E-Be-Nash*, there is no way to have Oakland's unique grievances considered in a proceeding where only those with an economic interest in the real property subject to forfeiture can participate. It is not significant that the subject matter of the two suits – the continuing operation of the Harborside facility – is generally the same. As the majority in *Match-E-Be-Nash* concluded, "[w]e have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect." *Match-E-Be-Nash*, 132 S. Ct. at 2209.

IV. THE RIGHT TO SEEK REDRESS IN COURT FOR UNIQUE GRIEVANCES ARISING FROM FINAL AGENCY ACTION IS A QUESTION OF EXCEPTIONAL IMPORTANCE

The question of exceptional importance raised in this case is apparent. The panel's decision dramatically narrows the scope of the principles stated in *Match-E-Be-Nash* and directly undermines the holding of that case. Under the panel's interpretation of that decision, a "general similarity of subject matter" (*Match-E-Be-Nash*, 132 S. Ct. at 2209) to a suit under another statute is sufficient to bar an APA action, and thus, in this case, to deprive a municipality with acknowledged injuries access to the courts. In other words, it will take no great effort to find that the relief sought is the same or similar, because the same Government action triggers both suits.

The panel's interpretation of *Match-E-Be-Nash* constitutes a reversion to the state of the law as it existed prior to *Match-E-Be-Nash*. The debate between the Supreme Court majority and the dissent reveals that the majority intended to change the status quo. The majority was concerned that, under the dissent's approach, there would be no limits to the suits barred if only the "kind of relief" is considered, "no matter what the nature of the claim." *Match-E-Be-Nash*, 132 S. Ct. at 2205, n.3. The dissent's concern was the opposite: that there would be no limits to APA suits such that "the majority's rule will impose a substantial burden on the Government and leave an array of uncertainties." *Id.* at 2218. The majority

concluded that access to the courts under the APA for plaintiffs with a "different claim" from that which could be asserted pursuant to an otherwise preclusive statute was the more important consideration. *Id.* at 2209.

It is no coincidence that in both *Match-E-Be-Nash* and the present case the issue of broader access to the courts to vindicate grievances has arisen in litigation when the Government's action is controversial. *Match-E-Be-Nash* involved the expansion of tribal gaming on land that was not Indian land until the Government acquired it for that purpose, a subject of intense controversy and of widespread interest. *See* http://www.law360.com/articles/656558/reps-trade-barbs-over-doi-s-tribal-land-to-trust-process. This case involves closing medical marijuana dispensaries that are legal under California law and, according to the U.S. Attorney, illegal under federal law, which is no less controversial. *See* http://www.usnews.com/debate-club/should-federal-authorities-be-able-to-close-medical-marijuana-dispensaries-in-california. The majority rule in *Match-E-Be-Nash* favors more access to the courts for the various types of claims and grievances that naturally arise when the Government's action is controversial. The rule serves the common sense notion that Government action is more acceptable to the affected community when a broader range of grievances has been adjudicated, rather than stifled and ignored by rules that serve the important but less

fundamental purpose of expeditious resolution of disputes involving the Government.

Given the significance of *Match-E-Be-Nash* and the panel's dismissal of that decision in just three paragraphs of its opinion (*Oakland*, slip op. at 12-14), *en banc* review is necessary to resolve the question whether *Match-E-Be-Nash* truly grants greater access to the courts under the APA. If the panel's view prevails, it would undermine the Supreme Court's evident desire to provide access to the courts to those parties with grievances different from the grievances addressed by a statutory scheme with a supposedly preclusive effect. The rule of *Match-E-Be-Nash* would then amount to nothing more than that an APA action could be brought by neighbors of property acquired by the Government for a tribal casino. Whether *Match-E-Be-Nash* can be diminished in that fashion and whether a major municipality can be denied access to the courts to seek redress for unique and significant injuries, is a question of exceptional importance that this Court should consider and resolve *en banc*.

V. CONCLUSION

Appellant City of Oakland respectfully requests this Court to grant rehearing, because the panel's decision conflicts with Supreme Court precedent and because this case raises an issue of exceptional importance about the scope of access to the courts under *Match-E-Be-Nash*. Since Oakland indisputably asserts

different grievances from Harborside in the civil forfeiture proceedings, Oakland should be allowed to proceed in district court under the APA for redress of those grievances.

Dated: October 5, 2015

Respectfully submitted,

DLA PIPER LLP (US)

By: */s/ Cedric C. Chao*
CEDRIC C. CHAO
Attorneys for Appellant City of Oakland

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that, pursuant to Circuit Rule 35-4 and 40-1, the attached petition for rehearing and rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more and contains 3310 words.

Dated: October 5, 2015

/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 5, 2015, 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

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, *Plaintiff-Appellant*, v. LORETTA E. LYNCH, Attorney General of the United States; MELINDA HAAG, United States Attorney for the Northern District of California, *Defendants-Appellees*.	No. 13-15391 D.C. No. 3:12-cv-05245-MEJ OPINION

Appeal from the United States District Court
for the Northern District of California
Maria-Elena James, Magistrate Judge, Presiding

Argued and Submitted
February 3, 2015—San Francisco, California

Filed August 20, 2015

Before: Richard C. Tallman and Johnnie B. Rawlinson, Circuit Judges, and Stephen Joseph Murphy, District Judge.*

Opinion by Judge Murphy

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* The Honorable Stephen Joseph Murphy, III, District Judge for the U.S. District Court for the Eastern District of Michigan, sitting by designation.

SUMMARY**

Article III Standing / Jurisdiction

The panel affirmed the district court's order dismissing for lack of jurisdiction the City of Oakland's collateral attack under the Administrative Procedure Act challenging the government's filing of a civil *in rem* forfeiture action against Harborside Health Clinic, a medical marijuana dispensary.

The panel held that Oakland had standing to bring suit under Article III where Oakland alleged a sufficient injury with respect to the erosion of its tax revenues. The panel also held, however, that judicial review under the Administrative Procedure Act was precluded because the government's decision to file the forfeiture action was committed to agency discretion by law, and because allowing the suit to proceed would impermissibly disrupt the existing forfeiture framework.

COUNSEL

Cedric C. Chao (argued), Stanley J. Panikowski, Roy K. McDonald, Kathleen S. Kizer, and Saori Kaji, DLA Piper LLP (US), San Francisco, California; Barbara J. Parker and Kiran C. Jain, Oakland City Attorney, Oakland, California, for Plaintiff-Appellant.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Stuart F. Delery, Assistant Attorney General, Melinda Haag, United States Attorney, Mark B. Stern and Adam C. Jed (argued), Attorney, Civil Division, United States Department of Justice, Washington, D.C., for Defendants-Appellees.

OPINION

MURPHY, District Judge:

I. INTRODUCTION

The City of Oakland contests the Government's filing of a civil *in rem* forfeiture action against Harborside Health Clinic, a medical marijuana dispensary acting in accordance with local and state laws but in violation of the Controlled Substances Act. Because Oakland lacks a property interest in Harborside, it was unable to participate in the forfeiture action. Instead, Oakland initiated a collateral attack against the Government under the Administrative Procedure Act. The Government moved for dismissal pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction, and Rule 12(b)(6), for failure to state a claim.

Oakland appeals from the district court's order granting dismissal for lack of subject matter jurisdiction. The Government asserts that Oakland lacks Article III standing, that judicial review is precluded, and that, if the APA applies, Oakland's suit is barred because the forfeiture action does not constitute "final agency action" and because Oakland has another "adequate remedy in court." We have jurisdiction under 28 U.S.C. § 1291. We conclude that Oakland has Article III standing, but that judicial review is precluded. We therefore affirm the district court.

II. BACKGROUND

On July 9, 2012, the United States filed a civil *in rem* forfeiture action pursuant to 21 U.S.C. § 881(a)(7) against the real property and improvements located at 1840 Embarcadero, Oakland, California. *United States v. Real Prop. & Improvements Located at 1840 Embarcadero, Oakland, Cal.*, Case No. C 12-3567. The action targeted Harborside Health Center, a retail marijuana store that distributes medical marijuana legally under state law but allegedly in violation of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 841 and 856. Because of Harborside's purported violations of the CSA, the Government asserts the property is subject to forfeiture. 21 U.S.C. § 881(a)(7).

Pursuant to 18 U.S.C. § 983 and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, "[a] person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending." Fed. R. Civ. P. Supp. R. G(5)(a)(i). Because Oakland does not assert an interest in the Harborside property, it did not file a claim in the forfeiture action.

Instead, Oakland filed the instant action, seeking a "declaratory judgment that Defendants and any agency under their authority have no right to seek civil forfeiture of the real property located at 1840 Embarcadero, Oakland, California based on purported violations of the Controlled Substances Act," as well as injunctive relief prohibiting the Government from seeking forfeiture of the property. The Government moved to dismiss Oakland's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter

jurisdiction, and Rule 12(b)(6), for failure to state an actionable claim.

Oakland asserts federal question jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. Although the United States is generally immune from suit, the APA waives sovereign immunity and provides for judicial review of executive action if certain requirements are met. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012). Generally, a plaintiff must be seeking non-monetary relief for legal wrongs resulting from a final action undertaken by an agency or by an agency officer or employee. *Id.* The plaintiff must also show a lack of another adequate judicial remedy. 5 U.S.C. § 704. In this case, the district court granted the Government's 12(b)(1) motion, finding both that the Government's action was not final under the APA, and that Supplemental Rule G(5)(a)(i) constitutes an adequate judicial remedy. Because the district court found it lacked subject matter jurisdiction, it did not consider the Government's 12(b)(6) motion.

Oakland timely appealed from the district court's decision. In addition to the issue of whether the district court has subject matter jurisdiction over Oakland's action for declaratory judgment and injunctive relief, the Government questions, for the first time, whether Oakland has standing to sue.

III. STANDING

On appeal, the Government asserts that Oakland lacks standing under Article III.[1] "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). "If a plaintiff lacks Article III standing, Congress may not confer standing on that plaintiff by statute." *Id.* Because constitutional standing implicates jurisdiction, "a challenge to constitutional standing is one 'which we are required to consider, even though raised for the first time on appeal.'" *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003) (quoting *Newdow v. U.S. Congress*, 313 F.3d 500, 503 (9th Cir. 2002)).

Standing requires injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "[A]n injury must be concrete, particularized, and actual or imminent . . . ." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal citations and quotation marks omitted). The Government does not dispute that, if Oakland demonstrates an injury "fairly traceable to the challenged action," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,*

[1] The Government also asserts, for the first time on appeal, that Oakland should not be permitted to bring suit on the basis of prudential standing. We will not consider the argument, because "a party waives objections to nonconstitutional standing not properly raised before the district court." *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). In any case, the Supreme Court's recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–87 (2014), calls into question the viability of the prudential standing doctrine.

Inc., 528 U.S. 167, 180 (2000), it would be redressable by a favorable decision.

Oakland cites three direct injuries. First, it asserts injury from an expected loss of tax revenue. Second, it states that it "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." Third, Oakland argues that a forfeiture of the Harborside dispensary will injure its "proprietary interest in regulating and taxing medical cannabis and providing patients safe and affordable access to medicinal quality cannabis in accordance with California law." Because we find the expected loss of tax revenue constitutionally sufficient, we decline to address the other two alleged injuries.[2]

Oakland projected it would receive more than $1.4 million in tax revenues from the city's four permitted dispensaries in 2012, "enough to pay for a dozen badly needed additional police officers or firefighters." A substantial portion of this sum would be attributable to Harborside, as it is "reputed to be the largest dispensary in the country." As of October 10, 2012, Harborside had "paid city and state taxes in excess of one million dollars," and "customers pay an 8.75% sales tax on all purchases."

[2] Oakland also briefly references potential injuries to its citizens. "If the DOJ succeeds in its forfeiture action, Harborside will not have a secure and reliable place in which to operate," and "patients cannot obtain the medicine that California voters have decided should be available to them." As a municipality, however, Oakland may not assert injuries to its citizens, but must allege injury of its own. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004).

An expected loss of tax revenue can constitute a sufficient injury for purposes of Article III standing. In *City of Sausalito v. O'Neill*, Sausalito, California brought suit to enjoin the National Park Service ("NPS") from implementing a plan to develop and rehabilitate a former military base adjacent to the city. 386 F.3d 1186, 1194 (9th Cir. 2004). Sausalito alleged the plan violated a number of environmentally-oriented federal statutes. *Id.* To establish Article III injury, it cited the harm that would result from the addition of an expected 2,700 daily visitors to the city, including congested roadways, increased crime, and lost sales and property tax revenue ("due to impaired vehicular movement and commerce rendering Sausalito less attractive to business"). *Id.* at 1198. The district court held that Sausalito sufficiently demonstrated Article III injury, and we affirmed, finding the asserted harm "cognizable as both an aesthetic injury and . . . as an economic injury." *Id.* at 1198–99.

Oakland's expected loss of tax revenue satisfies the requirements of Article III. In *Sausalito*, it was conceded that the NPS plan would "result in an increase in local traffic, an increase in air pollutant emissions, and an incremental contribution to the cumulative noise environment." *Id.* at 1199. Because Sausalito alleged "that the aesthetic damage will erode its tax revenue," we found economic injury that was actual or imminent, and not conjectural or hypothetical. *Id.* Oakland's injury is even less speculative. If Harborside is closed, it will no longer provide Oakland with tax revenue, either directly through income taxes or indirectly through customer sales taxes. And our precedent makes clear that the deprivation of revenue constitutes injury under Article III.

The Government's argument to the contrary is unavailing. It argues that Oakland's "claim of lost tax revenues" is

uncertain, because it "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." We agree that Oakland's claim relies on a forfeiture being ordered, but find that this alone is not so speculative as to undermine the claim. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("An allegation of future injury may suffice if . . . there is a substantial risk that the harm will occur." (internal quotation marks omitted)). We give no weight to the unsupported claims that other dispensaries will see increased sales to make up for Harborside's losses, or that a new tenant might provide more tax revenue than Harborside. It is the Government's assertions that are speculative; what is certain is that closing Harborside will lead to a real and immediate erosion in Oakland's tax revenues.

We find that Oakland has standing to bring suit under Article III. Oakland has alleged a sufficient injury with respect to the erosion of its tax revenues. The loss of revenues would be directly attributable to the Government's forfeiture action and redressable by a favorable ruling.

IV. JUDICIAL REVIEW UNDER THE APA

In addition to meeting the requirements of constitutional standing, "[a] plaintiff must also satisfy the non-constitutional standing requirements of the statute under which he or she seeks to bring suit." *City of Sausalito*, 386 F.3d at 1199. Unlike Article III standing, non-constitutional analysis is a "purely statutory inquiry" that "does not go to our subject matter jurisdiction." *Id.* The Government argues that the APA

provides no basis for Oakland to bring a collateral action to enjoin the forfeiture proceeding. We agree.

As a threshold matter, the APA does not apply if the "agency action is committed to agency discretion by law" or if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1), (2). The APA does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* § 702. Because the Government's decision to file the forfeiture action is committed to agency discretion, and because Oakland's suit is impliedly forbidden by the existence of the forfeiture statute, judicial review is precluded.

"[L]itigation decisions are generally committed to agency discretion by law, and are not subject to judicial review under the APA." *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992). "[R]eview is precluded when plaintiff's complaint is primarily that the agency made the wrong choice when making an informed judgment." *Merrill Ditch-Liners, Inc. v. Pablo*, 670 F.2d 139, 140 (9th Cir. 1982) (internal quotation marks omitted).

Here, the Government made an informed judgment to initiate a civil forfeiture proceeding against Harborside. It had to consider the likelihood that a violation actually occurred, whether agency resources were available and should be expended, whether an action would be likely to succeed if initiated, and whether the action was consistent with the Government's policies and goals. *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (identifying these factors as important when considering whether an exercise of discretion is suitable for judicial review). The Government's decision relied on the exercise of the equivalent of prosecutorial

discretion and is thus immune from judicial review under the APA. *See Didrickson*, 982 F.2d at 1339.

The existing forfeiture framework also impliedly forbids judicial review of Oakland's claims. It is a "well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted). "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). In *Hinck*, the Supreme Court held that a section of the Internal Revenue Code provided the plaintiff taxpayers with an adequate remedy, and that judicial review was therefore not available, because the code section "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." 550 U.S. at 506.

Granting Oakland a legal remedy under the APA would impermissibly provide for duplicative review. As with the statute in *Hinck*, the forfeiture statute provides a forum for adjudication (the court in which the action is brought), a limited class of potential plaintiffs ("any person claiming an interest in the seized property"), a limitations period (claims must be filed within "30 days after the date of service of the Government's complaint or . . . after the date of final publication of notice of the filing of the complaint"), a standard of review (the claimant may dispute that the property in question was involved in a prohibited transaction or attempted transaction), and authorization for judicial relief (in the forfeiture proceeding). 18 U.S.C. §§ 981–983. Oakland's complaint seeks "a declaratory judgment that [the Government has] no right to seek civil forfeiture of the

[Harborside] property" and "a permanent injunction enjoining [the Government] . . . from seeking forfeiture of the [Harborside] property." The forfeiture proceeding, and not a collateral action, is the proper venue to seek such relief.

The fact that Oakland is unable to participate in the forfeiture action, because it does not possess an interest in the Harborside property, is irrelevant. Congress created a framework permitting only certain parties to bring claims, and allowing collateral attacks would disrupt that framework by giving third parties a greater ability to initiate challenges. Supplemental Rule G(5)(a)(ii) requires an interested party to file a claim within 30 days of service. A general civil action under the APA, however, is governed by a six-year limitations period. 28 U.S.C. § 2401(a). Permitting parties to file under the APA and circumvent the short deadlines Congress established in the forfeiture law would make mush of the law. Additionally, allowing a collateral action to proceed would render meaningless the forfeiture statute's clear language limiting parties who may institute a forfeiture challenge to those with a property interest.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012), upon which Oakland relies, is inapposite. In that case, the owner of property near the site of a proposed Indian casino filed an action under the APA challenging the Secretary of the Interior's decision—made pursuant to the Indian Reorganization Act—to take land into trust on behalf of the tribe. *Id.* at 2202–03. The plaintiff alleged economic, environmental, and aesthetic harms, but did not assert a property interest in the land. *Id.* Because the APA's waiver of immunity does not apply if another statute "grants consent to suit [and] expressly or impliedly forbids the relief which is sought," 5 U.S.C.

§ 702, and because a separate statute, the Quiet Title Act, authorized suits by plaintiffs with a "right, title, or interest" in real property, 28 U.S.C. § 2409a(d), the federal government argued that the plaintiff's suit was barred. *Match-E-Be-Nash*, 132 S. Ct. at 2204–05.

But the Supreme Court held that the suit was not barred, reasoning that "[w]hen a statute is not addressed to the type of grievance which the plaintiff seeks to assert, then the statute cannot prevent an APA suit." *Id.* at 2205 (internal quotation omitted). The Supreme Court explained that the plaintiff was "bringing a different claim" and "seeking different relief" from "the kind the [Quiet Title Act] addresses." *Id.* at 2209. Oakland argues that, because its grievances concern public health and safety, tax revenues, and its regulatory scheme, which are different from Harborside's grievances, it is not barred from bringing suit under the APA. The argument fails, however, because both parties do in fact seek the same relief: to stop the forfeiture.

Finally, even if Oakland overcame the preceding, Section 704 of the APA would nonetheless bar its claims. Judicial review only applies to "[a]gency action made reviewable by statute" (not relevant here), and "*final agency action* for which there is *no other adequate remedy* in a court . . . ." 5 U.S.C. § 704 (emphasis added). The Government's decision to file the forefeiture action is not "final," because it is not an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal citations and quotation marks omitted). A forfeiture action simply makes evident the Government's intention to challenge the status quo; any rights, obligations, and legal consequences are to be

determined later by a judge. And as discussed above, there is another adequate remedy—the forfeiture action.

V. CONCLUSION

The City of Oakland has Article III standing to challenge the Government's forfeiture action because the closing of Harborside will lead to a decrease in property and sales tax revenues. Judicial review under the Administrative Procedure Act is precluded, however, because the Government's decision to file the forfeiture action is committed to agency discretion by law, and because allowing the suit to proceed would impermissibly disrupt the existing forfeiture framework.

For these reasons, we **AFFIRM** the district court's dismissal in favor of the defendant, the United States.

Each party shall bear its own costs on appeal.