

**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

RESPONSE TO MOTION FOR JUDICIAL NOTICE

Defendants respectfully respond to plaintiff's motion of January 26, asking the Court to take judicial notice of a provision of this year's federal budget, Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 (2014) (Section 538), which was signed into law several weeks earlier, on December 16, 2014. The Court may of course take judicial notice of a federal statute. But plaintiff is quite mistaken to suggest that this provision governing the Department of Justice's budget in 2015 has any bearing on plaintiff's appeal.

1. This case involves a collateral challenge under the Administrative Procedure Act to an ongoing civil forfeiture action. Pursuant to 21 U.S.C. § 881(a)(7), the United States initiated a civil forfeiture action against the real property located at 1840 Embarcadero Street, Oakland, California. Pursuant to a comprehensive statutory

scheme, *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), a number of parties have filed claims in the forfeiture action, asserting interests in the property and contesting the forfeiture. That civil action remains ongoing.

The plaintiff in this case, the City of Oakland, did not file a claim in the pending forfeiture action or move to intervene in that case. Instead, after the deadline to raise a claim in the civil forfeiture proceeding had passed, Oakland sued the U.S. Attorney for the Northern District of California and the Attorney General under the Administrative Procedure Act “to restrain and declare unlawful ongoing and threatened attempts” to forfeit the property. ER 1049. The district court granted the federal government’s motion to dismiss, holding that the statutory procedures for challenging property forfeiture must govern, and that the APA does not provide a collateral means of contesting forfeitures. Oakland appealed.

2. The questions presented by this appeal are whether Oakland has standing to collaterally attack a forfeiture action against private property and whether Oakland’s suit is permitted under the APA. Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015 has no bearing on those questions. This Court thus has no occasion to address the question of what sorts of federal action would “prevent” the “State[] [of California] from implementing [its] own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana” (Section 538).

Oakland mistakenly suggests (Mot. 2-3) that Section 538 bears on Oakland's Article III standing. Section 538 does not purport to create any right, the invasion of which would constitute an Article III injury. (And, indeed, Section 538 speaks only to "States" and "State laws," not municipalities.) As we have explained (U.S. Br. 16-19), Oakland's claimed injuries—such as a hypothesized diversion of police resources to additional violent crime—are far too attenuated and speculative to establish Article III standing and would result not from the filing of a civil forfeiture action but from a series of independent actions by third parties.

Oakland additionally posits (Mot. 3) that Section 538 shows that Oakland falls within the zone of interests of the Controlled Substances Act (CSA). Oakland's suit alleged that the CSA provides a five-year statute of limitations for civil forfeitures, that the federal government knew or should have known about the marijuana business more than five years ago, and that the government's suit is barred by the statute of limitations even though the marijuana business continues to operate in violation of federal law. ER 1061-62; *see* ER 1055-56. As we have urged (U.S. Br. 14-15), statutes of limitations concern "repose, elimination of stale claims, and certainty about a *plaintiff's* opportunity for recovery and a *defendant's* potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (emphases added); *see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Oakland's asserted interests in collecting taxes and preventing crime are "so marginally related to or inconsistent with the purposes implicit in the [CSA's statute of limitations] that it cannot reasonably be assumed that Congress authorized [Oakland] to sue." *See*

Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014) (internal quotation marks omitted). Indeed, the CSA's limitations period is an integral part of the statutory procedures for obtaining an in rem forfeiture judgment, *see* 21 U.S.C. § 881(d); 19 U.S.C. § 1621; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)—a procedure that speaks only to those with property interests, *see* 18 U.S.C. § 983(a)(2)—and was added as part of a statute intended “to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies,” S. Rep. No. 225, 98th Cong., 2d Sess. 192, 215, 581 (1983). Section 538's limit on expenditures by the Department of Justice has no bearing on whether Oakland is within the zone of interests of the CSA's statute of limitations.

If Oakland means to argue that it would fall within Section 538's zone of interests, that argument is not properly part of this appeal. The zone-of-interests question is whether “the interest sought to be protected” is “arguably within the zone of interests to be protected or regulated *by the statute or constitutional guarantee in question.*” *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added). Oakland's suit did not invoke Section 538, which was passed in 2014 as a restriction on 2015 spending. In any event, as we explained in our brief, affirmance is required on several grounds apart from Oakland's failure to fall within the zone of interests protected by the relevant statutory provisions.

Respectfully submitted,

MARK B. STERN

s/ Adam Jed

ADAM C. JED

(202) 514-8280

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave., NW, Rm. 7240

Washington, DC 20530

JANUARY 2015

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2015, 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

Adam C. Jed