

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 **INSTITUTE FOR JUSTICE**
Lawrence G. Salzman (SBN: 224727)
2 lsalzman@ij.org

3 Scott G. Bullock*
sbullock@ij.org

4 Justin M. Pearson*
jpearson@ij.org

5 901 North Glebe Road, Suite 900
Arlington, VA 22203

6 Telephone: (703) 682-9320

7 Facsimile: (703) 682-9321

*Admitted pro hac vice

8 **MATTHEW S. PAPPAS** (SBN: 171860)
matt.pappas@mattpappaslaw.com
9 22762 Aspan Street, Suite 202-107

10 Lake Forest, CA 92630

Phone: (949) 382-1485

11 Facsimile: (949) 242-2605

12 Attorneys for Claimants/Counter-Claimants,
TONY JALALI and MORGAN JALAEI

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **SOUTHERN DIVISION**

16 UNITED STATES OF AMERICA,

Plaintiff,

v.

18 REAL PROPERTY LOCATED AT 2601
W. BALL ROAD, ANAHEIM,
19 CALIFORNIA (JALALI AND JALAEI),

20 Defendants,

21 TONY JALALI AND MORGAN JALAEI,

22 Claimants.

23 TONY JALALI AND MORGAN JALAEI,

24 Counter-Claimants,

25 v.

26 UNITED STATES OF AMERICA; and
DOES 1 TO 10,

27 Counter-Defendants,
28

No.: SACV 12-1345 AG (MLGx)

**CLAIMANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO DISMISS
COUNTERCLAIM OF CLAIMANTS
TONY AND MORGAN JALALI**

Date: August 26, 2013

Time: 10:00 a.m.

Dept: 10D, Santa Ana

Hon. Andrew Guilford

TABLE OF CONTENTS

1

2 Page(s)

3 INTRODUCTION 1

4 THE GOVERNMENT’S MOTION TO DISMISS..... 2

5 STATEMENT OF FACTS 3

6 ARGUMENT 4

7 I. Standard of Review 5

8 II. The Answer and Counterclaim Sufficiently Alleges That the United

9 States’ Forfeiture Action Violates the Jalalis’ Constitutional Rights 6

10 A. The collusion between the United States and local Anaheim officials

11 to bring the forfeiture action violates the Tenth Amendment..... 7

12 B. The forfeiture of the Jalalis’ property violates their Fifth Amendment

13 due process rights..... 12

14 III. The Counterclaim Sufficiently Alleges That the United States’ Forfeiture

15 Action Violates the Jalalis’ Rights under the Civil Asset Forfeiture

16 Reform Act of 2000..... 14

17 A. The Jalalis’ property is only incidentally connected to conduct giving

18 rise to forfeiture..... 15

19 B. The Government’s proposed forfeiture is grossly disproportionate

20 to any alleged conduct giving rise to forfeiture by third parties 16

21 CONCLUSION..... 17

22

23

24

25

26

27

28

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

TABLE OF AUTHORITIES

1		
2	<u>Cases</u>	<u>Page(s)</u>
3	<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
4	<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	5
5	<i>Bond v. United States</i> , 131 S. Ct. 2355 (2011).....	7, 8
6	<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005)	7, 10, 11
7	<i>Hudson v. United States</i> , 522 U.S. 93 (1997).....	12
8	<i>New York v. United States</i> , 505 U.S. 144 (1992)	9
9	<i>Oregon v. Legal Servs. Corp.</i> , 552 F.3d 965 (9th Cir. 2009).....	8
10	<i>OSU Student Alliance v. Ray</i> , 699 F.3d 1032 (9th Cir. 2012).....	5
11	<i>Pinnacle Armor, Inc. v United States</i> , 648 F.3d 708 (9th Cir. 2011).....	5
12	<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir. 2000) (<i>en banc</i>)	6
13	<i>Raich v. Gonzales</i> , 500 F.3d 850 (9th Cir. 2007)	10, 11
14	<i>Schneider v. Cal. Dep’t of Corr.</i> , 151 F.3d 1194 (9th Cir. 1998)	6
15	<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987).....	9
16	<i>United States v. \$191,910 in U.S. Currency</i> , 16 F.3d 1051 (9th Cir. 1994)	12
17	<i>United States v. 434 Main Street</i> , Civ. A. No. 09-11635-JGD, 2013 WL 308981 (D. Mass. Jan. 24, 2013)	14, 15
18		
19	<i>United States v. One 1936 Model Ford V-8 De Luxe Coach</i> , 307 U.S. 219 (1939)	12
20		
21	<i>United States v. Ferro</i> , 681 F.3d 1105 (9th Cir. 2012)	16
22	<i>United States v. Riverbend Farms, Inc.</i> , 847 F.2d 553 (9th Cir. 1988)	12
23	<i>United States v. Santoro</i> , 866 F.2d 1538 (4th Cir. 1989).....	15
24	<i>United States v. Schifferli</i> , 895 F.2d 987 (4th Cir. 1990).....	15
25	<i>United States v. Two Tracts of Real Prop.</i> , 998 F.2d 204 (4th Cir. 1993).....	15
26	<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974).....	12
27		
28		

INSTITUTE FOR JUSTICE
 901 N. GLEBE ROAD, SUITE 900
 ARLINGTON, VA 22203 • (703) 682-9320

INSTITUTE FOR JUSTICE
 901 N. GLEBE ROAD, SUITE 900
 ARLINGTON, VA 22203 • (703) 682-9320

1	<u>Constitutional Provisions</u>	
2	U.S. CONST. amend. V	<i>passim</i>
3	U.S. CONST. amend. X.....	<i>passim</i>
4	U.S. CONST. art. I, § 8, cl. 1	7
5		
6	<u>Statutes, Codes and Rules</u>	
7	18 U.S.C. § 983(c)	14, 15
8	18 U.S.C. § 983(g).....	14, 15
9	18 U.S.C. § 983(g)(2)	16
10	21 U.S.C. § 881 (a)(7)	4, 6, 13
11	Cal. Health & Safety Code	
12	§11470(h).....	7
13	§11488.4(i)(3).....	7
14	Federal Rule of Civil Procedure	
15	Rule 12(b)(1)	10, 11
16	Rule 12(b)(6)	5
17	<u>Other Authorities</u>	
18	U.S. Attorney for the Central District of California , <i>Commercial Marijuana</i>	
19	<i>Businesses in Santa Ana Targeted with Justice Department Warning Letters and</i>	
20	<i>Asset Forfeiture Lawsuits</i> (April 18, 2013),	
21	http://www.justice.gov/usao/cac/Pressroom/2013/053.html	
22	(last visited July 30, 2013).....	1
23	U.S. Department of Justice, <i>Guide to Equitable Sharing for State and Local Law</i>	
24	<i>Enforcement Agencies</i> 3, http://www.justice.gov/usao/ri/projects/esguidelines.pdf	
25	(last visited, August 1, 2013).....	9
26	U.S. Drug Enforcement Administration, <i>California’s Top Federal Law</i>	
27	<i>Enforcement Officials Announce Enforcement Actions Against State’s Widespread</i>	
28	<i>and Illegal Marijuana Industry</i> (Oct. 7, 2011),	
	http://www.justice.gov/dea/pubs/pressrel/pr100711.html	
	(last visited July 30, 2013).....	1

1 Claimants Tony and Morgan Jalali (“Jalalis”) respectfully submit this
2 memorandum in opposition to the United States’ Motion to Dismiss Counterclaim
3 of Claimants Tony and Morgan Jalali (Pl.’s Mot.) [Docket No. 37], filed on July
4 15, 2013.

5 **INTRODUCTION**

6 Since 2011, the United States has waged an unprecedented campaign in
7 California to enforce its prohibition on the possession and sale of marijuana,
8 aggressively using civil forfeiture as its primary tool.¹ The United States
9 Attorney’s Office for the Central District of California has filed more than 30
10 forfeiture actions against landlords and issued more than 525 letters threatening
11 lawsuits against additional property owners during this time.² Using a federal
12 program known as “equitable sharing,” the United States has recruited municipal
13 officials in California to assist in the enforcement of federal law, subverting
14 California’s own law concerning both forfeiture and medical marijuana. The
15 equitable sharing program makes those municipalities eligible to receive
16 substantial payments from the proceeds of forfeitures which they would be barred
17 from accomplishing under state law.

18 Civil forfeiture is a draconian penalty that has long been disfavored by
19 courts for its harsh punishment of innocent property owners who often lose their
20 property without being convicted, or even charged, with any crime. While the
21 government would like to portray this case as a simple controlled-substances

22 _____
23 ¹ Press Release, U.S. Drug Enforcement Administration, *California’s Top Federal*
24 *Law Enforcement Officials Announce Enforcement Actions Against State’s*
25 *Widespread and Illegal Marijuana Industry* (Oct. 7, 2011),
<http://www.justice.gov/dea/pubs/pressrel/pr100711.html> (last visited July 30,
2013).

26 ² Press Release, U.S. Attorney for the Central District of California, *Commercial*
27 *Marijuana Businesses in Santa Ana Targeted with Justice Department Warning*
28 *Letters and Asset Forfeiture Lawsuits* (April 18, 2013),
<http://www.justice.gov/usao/cac/Pressroom/2013/053.html> (last visited July 30,
2013).

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 enforcement action, it is not: it is about an overreaching federal policy which, left
2 unchecked, abuses the property rights of innocent owners and attacks the system of
3 federalism at the heart of the U.S. Constitution.

4 In the instant civil forfeiture action, the United States attempts to take the
5 Jalalis’ \$1.5 million office building in Anaheim, Calif., for allegedly facilitating
6 the sale of marijuana. *See Verified Complaint for Forfeiture (“Compl.”)* [Docket
7 No. 1]. On May 1, 2013, after unsuccessfully moving to dismiss the government’s
8 action, the Jalalis answered the government’s Complaint. *See Claimants’ Answer,*
9 *Affirmative Defenses, and Counter-Claim (“Answer and Counterclaim”)* [Docket
10 No. 29]. The Jalalis asserted counterclaims seeking injunctive and declaratory
11 relief against violations of their rights under the Tenth and Fifth Amendments to
12 the U.S. Constitution and the Civil Asset Forfeiture Reform Act of 2000
13 (“CAFRA”). The United States now seeks to dismiss those counterclaims.

14 **THE GOVERNMENT’S MOTION TO DISMISS**

15 The government erroneously states that the “majority of [the Jalalis’] claims
16 have already been rejected by the Supreme Court and the Ninth Circuit.” Pl.’s
17 Mot. at 2. It further argues that the Jalalis “have failed to state either a factual or
18 legal basis for any of their claims” and asks this Court to dismiss the counterclaims
19 “with prejudice.” *Id.* at 6. The government’s argument proceeds from the wrong
20 premise that the Jalalis’ claims are “essentially identical to” claims raised in past
21 cases involving an alleged right to use medical marijuana. *Id.* at 7. The Jalalis’
22 claims do not concern a right to use medical marijuana, but rather challenge the
23 *limits of the federal civil forfeiture power.*

24 The government’s motion relies entirely, therefore, on precedent that has no
25 application to this case. Not one of the cases raised by the government in its
26 motion even concerns the particular claims that the Jalalis have made. And none
27 of the Jalalis’ actual claims are foreclosed by precedent because they are genuine
28 issues of first impression that have neither been considered nor decided by the

1 United States Supreme Court or the Ninth Circuit (or by any district court within
2 the circuit). The government’s motion simply ignores the Jalalis’ actual claims,
3 which have been adequately pled. The Jalalis are entitled to have their claims
4 decided on a full factual record. For the reasons set forth below, the government’s
5 motion must be denied.

6 **STATEMENT OF FACTS**

7 The Jalalis own the property at 2601 W. Ball Road, Anaheim, Calif., which
8 is the subject of this case. Answer and Counterclaim at 2. They purchased the
9 property in 2003 and, during February 2012, they paid off the mortgage. *Id.* In
10 August 2012, the government filed the instant action asking the Court to “decree
11 forfeiture of the defendant [property] to the plaintiff” for allegedly facilitating
12 narcotics violations at the property. Compl. at 9. During 2011 and 2012, two
13 separate medical marijuana businesses leased space from the Jalalis and operated
14 openly at the property—“Patient Premium Collective,” for about four months
15 during 2011, and “Releaf Health and Wellness,” for approximately one year.
16 Answer and Counterclaim at 3-6.

17 The forfeiture action is based on an investigation by the Anaheim Police
18 Department, in which an undercover officer made a \$37 transaction, using a
19 medical marijuana card evidencing a doctor’s recommendation for the drug under
20 California state law. *See* Compl. ¶ 22. On information and belief, Anaheim
21 officials reported their investigation of the Jalalis’ property and its tenants to the
22 U.S. Attorney’s Office, which then launched this action as part of its campaign in
23 which municipalities are cooperating with the federal government to bring federal
24 forfeiture actions against medical marijuana dispensary landlords in the Central
25 District of California. Answer and Counterclaim at 11-12. Pursuant to a federal
26 forfeiture program known as “equitable sharing,” up to 80 percent of the proceeds
27 from the forfeiture of the Jalalis’ property may be paid to the Anaheim Police
28 Department for its assistance.

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 One day after receiving the Complaint from the government, Mr. Jalali
2 asked the only medical marijuana tenant on the premises to leave. The tenant
3 agreed and no medical marijuana dispensary is located at the property today.
4 Answer and Counterclaim at 5-6. When Mr. Jalali corresponded with the U.S.
5 Attorney’s Office to request that it withdraw the case, explaining the history of the
6 property, that he had evicted all medical marijuana tenants, and that he had no
7 interest or intention to rent to such tenants in the future, he was told that the case
8 would not be dropped and it was recommended to him that he should get a lawyer
9 to defend his property. Neither the Jalalis or their dispensary tenants, nor any of
10 the dispensaries’ patients, have been charged with any crime. *Id.* at 5-6, 9. Nor
11 have any civil forfeiture actions been filed against the dispensaries or their patients.
12 *Id.* at 5-6.

13 **ARGUMENT**

14 The Jalalis’ Answer and Counterclaim makes three claims for injunctive and
15 declaratory relief. There are two constitutional claims based on the Tenth
16 Amendment and the Fifth Amendment, respectively, and one statutory claim,
17 based on CAFRA. First, the Jalalis have pled that the federal government’s effort
18 to recruit local officials to subvert California state law, particularly through the
19 federal equitable sharing program, violates the Tenth Amendment. Answer and
20 Counterclaim at 12-13. Second, the Jalalis have pled that 21 U.S.C. § 881(a)(7), as
21 applied to them in this action and others similarly situated, violates their Fifth
22 Amendment rights to due process. *Id.* Third, the Jalalis have pled that the
23 government’s actions violate CAFRA by attempting to forfeit property that does
24 not have a “substantial connection” to criminal activity within the meaning of that
25 statute and by seeking a “grossly disproportionate” forfeiture. *Id.* at 8 & 13.

26 The government moves the Court to dismiss the Jalalis’ counterclaims on the
27 grounds that (1) the claims have been foreclosed by Ninth Circuit or Supreme
28 Court precedent, thereby allegedly depriving the Court of subject-matter

1 jurisdiction and (2) the Jalalis' Answer and Counterclaim fails to state a plausible
 2 claim. Neither the Ninth Circuit nor the Supreme Court has ruled on the questions
 3 presented by the Jalalis' counterclaims, however, and the Jalalis have more than
 4 sufficiently pled facts establishing causes of action under the Tenth and Fifth
 5 Amendments and CAFRA.

6 Part I of this response will set the context for deciding the government's
 7 motion by establishing the proper standard of review. Part II will demonstrate that
 8 the Jalalis' Answer and Counterclaim sufficiently alleges constitutional claims and
 9 will explain why the government's assertion that those claims are barred by
 10 precedent is wrong. Part III will demonstrate that the Jalalis' Answer and
 11 Counterclaim sufficiently alleges statutory claims to relief under CAFRA and why
 12 the government's motion to dismiss must fail.

13 **I. Standard of Review.**

14 The inquiry in a motion to dismiss is straightforward: A court must take all
 15 the facts in the pleadings as true and determine whether the pleadings state a
 16 plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Pinnacle*
 17 *Armor, Inc. v United States*, 648 F.3d 708, 721 (9th Cir. 2011) (A plaintiff is "not
 18 required to demonstrate anything in order to survive a Rule 12(b)(6) motion to
 19 dismiss. Rather, it only needs to *allege* sufficient factual matter, accepted as true,
 20 to state a claim to relief.") (emphasis in original) (internal quotation marks
 21 omitted). The counterclaim must be more than mere "labels and conclusions,"
 22 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but need not include
 23 "detailed factual allegations." *Iqbal*, 556 U.S. at 678. The pleadings "must
 24 contain sufficient factual matter, accepted as true, to state a claim to relief that is
 25 plausible," *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570), "meaning
 26 something more than a sheer possibility, but less than a probability." *OSU Student*
 27 *Alliance v. Ray*, 699 F.3d 1032, 1078 (9th Cir. 2012) (internal quotation marks
 28

1 omitted). As is shown further below, the Jalalis’ counterclaim more than
2 sufficiently pleads plausible claims.

3 To the extent that pleadings may be deemed insufficient, however, dismissal
4 without leave to amend is improper unless it is clear that the pleading could not be
5 cured by any amendment. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir.
6 2000) (*en banc*) (explaining that leave to amend should be given unless no possible
7 amendment could cure the deficiencies in the pleading); *Schneider v. Cal. Dep’t of*
8 *Corr.*, 151 F.3d 1194, 1997 (9th Cir. 1998).

9 **II. The Answer and Counterclaim Sufficiently Alleges That the**
10 **United States’ Forfeiture Action Violates the Jalalis’**
11 **Constitutional Rights.**

12 Two constitutional claims are raised by the Jalalis’ Counterclaim. First, the
13 United States has violated the Tenth Amendment by using the federal equitable
14 sharing program to recruit Anaheim officials to subvert California state law
15 concerning both civil forfeiture and medical marijuana. Second, the government’s
16 overreaching application of 21 U.S.C. § 881(a)(7) to the Jalalis’ property violates
17 the Jalalis’ right to due process under the Fifth Amendment. Although the
18 government argues that the Jalalis’ Tenth and Fifth Amendment claims are
19 foreclosed by precedent, none of the cases cited by the government even contain
20 the same claims as the Jalalis have made. Part A below discusses the Jalalis’
21 Tenth Amendment claim; Part B discusses their Fifth Amendment claim. Taking
22 all of the facts in their pleadings as true, as the Court must in considering any
23 motion to dismiss, the Jalalis have stated plausible constitutional claims for relief
24 on both counts.

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. The collusion between the United States and local Anaheim officials to bring the forfeiture action violates the Tenth Amendment.

The forfeiture of the Jalalis’ property could not occur under California state law. The City of Anaheim would be powerless to take the Jalalis’ property because California law prohibits the forfeiture of real property except upon the conviction of the property owner for a felony. *See* Cal. Health & Safety Code §§ 11470(h) & 11488.4(i)(3) (West 2013). Moreover, medical marijuana dispensaries operating in compliance with California state law would give local law enforcement officials no cause or authority to pursue the Jalalis’ property.

The federal equitable sharing program, however, encourages Anaheim officials to team up with the federal government to circumvent state law protections for property owners like the Jalalis and benefit from a forfeiture they are prohibited from accomplishing under California law. The Jalalis claim that the equitable sharing program and Section 881 subvert the sovereignty reserved to the states under the Tenth Amendment by co-opting local law enforcement agencies into the implementation of a federal forfeiture program contrary to state policy. The Jalalis assert that their individual rights under the Tenth Amendment are violated by the equitable sharing program because that program exceeds the lawful exercise of the federal spending power (U.S. CONST. art. I, § 8, cl. 1).

The government’s motion to dismiss this claim assumes that the Jalalis’ case is similar to past cases involving an alleged right to use and possess marijuana, such as *Gonzales v. Raich*, 545 U.S. 1 (2005), but the Jalalis’ claim is entirely different. Their pleadings raise a new claim in an area of law that is completely undeveloped and certainly not foreclosed by precedent. It would be inappropriate, therefore, to resolve their claim on a motion to dismiss.

It was only in 2011, after seventy years of silence on this issue, that the United States Supreme Court held in *Bond v. United States*, 131 S. Ct. 2355

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 (2011), that individuals such as the Jalalis had standing to assert individual rights
2 against the federal government under the Tenth Amendment. Previously, the Ninth
3 Circuit barred such claims. *See Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971-
4 972 (9th Cir. 2009) (“Only states have standing to pursue claims alleging
5 violations of the Tenth Amendment by the federal government.”).

6 As explained in *Bond*, “[f]ederalism is more than an exercise in setting the
7 boundary between different institutions of government for their own integrity.
8 State sovereignty is not just an end in itself: Rather, federalism secures to citizens
9 the liberties that derive from the diffusion of sovereign power.” *Bond*, 131 S.Ct. at
10 2364 (citations and quotation marks omitted). The Tenth Amendment preserves
11 the balance of authority between the federal and state governments by reserving to
12 the states and to the people all rights not given to Congress through the enumerated
13 powers of Article I. “By denying any one government complete jurisdiction over
14 all the concerns of public life, federalism protects the liberty of the individual from
15 arbitrary power. When government acts in excess of its lawful powers, that liberty
16 is at stake.” *Id.*

17 While Congress has substantial powers to govern citizens directly, including
18 prohibiting the use and possession of marijuana, the Tenth Amendment prohibits
19 the federal government from recruiting local officials, who derive their authority
20 from state law, into a campaign to subvert their own state law. Here, California
21 residents, through their legislature, have chosen to enact heightened protections for
22 property rights that are in direct conflict with federal forfeiture law and the
23 equitable sharing program. They mandated that real property could be forfeited
24 only if the owner was convicted of a crime. Moreover, California residents—as
25 the government points out in its motion—“exercised the state’s reserved powers
26 [under the Tenth Amendment] to not punish certain marijuana offenses under state
27 law.” *See Pl.’s Mot.* at 3.

1 The state’s power to regulate its forfeiture policies, and to have its law
 2 enforcement agencies obey those policies and those concerning medical marijuana,
 3 are under attack from the equitable sharing program. When federal programs
 4 recruit local officials to enforce federal priorities, the Tenth Amendment demands
 5 that the “residents of the State retain the ultimate decision” whether their officials
 6 participate in the program, *see New York v. United States*, 505 U.S. 144, 168
 7 (1992), and that the decision be made “knowingly,” *see South Dakota v. Dole*, 483
 8 U.S. 203, 207 (1987). The terms of the federal equitable sharing program deprive
 9 California’s legislature and its residents from making such a knowing decision and,
 10 therefore, overstep the limits of the Tenth Amendment.

11 The choice to receive equitable sharing funds resides entirely in the
 12 Anaheim Police Department.³ These executive officials, and not the state
 13 legislature, are given the unilateral power to determine whether they will
 14 participate in the federal program. Further, the funding that the Anaheim Police
 15 Department receives under the program is restricted such that it “shall not be used
 16 to replace or supplant” money appropriated to the police department by the State of
 17 California or Anaheim city council.⁴ Simply put, the equitable sharing program
 18 gives local law enforcement officers the unilateral power to receive funding from
 19 the federal government in exchange for pursuing federal law enforcement priorities
 20 at the expense of polices established by state law. The equitable sharing program
 21 therefore, deprives the residents of California, or their legislature, from making a
 22 knowing and voluntary choice to participate in that program, as required by the
 23 Tenth Amendment.

24 _____
 25 ³ *See* U.S. Department of Justice, *Guide to Equitable Sharing for State and Local*
 26 *Law Enforcement Agencies 3*,
 27 <http://www.justice.gov/usao/ri/projects/esguidelines.pdf> (last visited, August 1,
 28 2013).

⁴ *Id.* at 22.

1 The government erroneously believes that the Jalalis’ Tenth Amendment
 2 claim is barred by precedent and subject to dismissal pursuant to Fed. R. Civ. P.
 3 12(b)(1) for lack of subject matter jurisdiction. Its mistaken belief arises because it
 4 likens the Jalalis’ claim to the Tenth Amendment claims made and decided by the
 5 cases *Gonzales v. Raich*, 545 U.S. 1 (2005) (“*Raich*”) and *Raich v. Gonzales*, 500
 6 F.3d 850 (9th Cir. 2007) (“*Raich II*”). See Pl.’s Mot. at 7 (“Plaintiffs’ description
 7 of their claim is essentially identical to that which the *Raich* plaintiffs asserted, and
 8 which the Ninth Circuit rejected—that is, that state law can somehow provide a
 9 superior right to violate federal law.”). The claims made by the plaintiff in *Raich*
 10 were, although also premised on the Tenth Amendment, completely different from
 11 the claim made by the Jalalis, and no other case cited by the government even
 12 suggests that the Jalalis’ claim is foreclosed by precedent.

13 The *Raich* cases involved an alleged right of a qualified patient under state
 14 law to possess and use marijuana for medical purposes. A Tenth Amendment
 15 argument was raised to the effect that the federal prohibition on marijuana could
 16 not be enforced by federal law enforcement officials where state law allowed the
 17 drug’s use. *Raich* and *Raich II* settled those questions, holding that federal law
 18 was supreme and that the federal government had authority under its commerce
 19 power to enforce the federal prohibition, even in states that did not criminalize
 20 marijuana. The Jalalis’ claim, by contrast, does not argue any right to use or
 21 possess marijuana and does not contest the commerce power of the federal
 22 government to regulate marijuana. Rather, the Jalalis challenge the limits of the
 23 *federal civil forfeiture power* and, particularly, the power to use state officials to
 24 engage in forfeitures allowed under federal law and prohibited by state law.

25 Through specific allegations, the Jalalis state a claim that the federal
 26 government’s use of the federal equitable sharing program and its recruitment of
 27 Anaheim officials to subvert California state law violate the Tenth Amendment.
 28 According to the Answer and Counterclaim, the equitable sharing program is used

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 by the federal government to “compensate local law enforcement officers [to]
2 advance *federal law enforcement priorities*.” Answer and Counterclaim at 7
3 (italics added). The Jalalis’ further state that “local authorities requested the
4 assistance of California prosecutors to take similar action against the property, but
5 were denied.” *Id.* at 11. The pleadings allege that “local government officials,
6 including Anaheim police officers, were directly involved in the federal
7 government’s investigation of the Jalalis’ property, even though doing so placed
8 those local government officials and police officers in direct violation of California
9 law.” *Id.* It is alleged that financial incentives are offered to those officials by the
10 federal government. *Id.* Finally, the Jalalis’ allege that the equitable sharing
11 program:

12 violates the Tenth Amendment because it encourages
13 local officials to subvert state law. California cities are
14 creatures of state law and the authority of local law
15 enforcement officials is prescribed by state law.
16 California explicitly permits the sale of medical
17 marijuana and specifically prohibits the use of real
18 property forfeiture where the property owner is not
19 convicted of a crime. The equitable sharing program,
20 however, allows local law enforcement agencies to
21 benefit from forfeitures that they are prohibited from
22 pursuing and could not accomplish under state law.

23 *Id.* at 7.

24 The government asks the Court to disregard the Jalalis’ specific claims and
25 decide that because this case and *Raich* involve marijuana and Tenth Amendment
26 claims in some way, the Jalalis’ claim must be dismissed pursuant to Fed. R. Civ.
27 P. 12(b)(1) for lack of subject matter jurisdiction. The government is simply
28 mistaken. The Jalalis’ present a different Tenth Amendment claim than any raised
by the *Raich* cases and one that has not been heard by either the Supreme Court or
the Ninth Circuit. The Jalalis have sufficiently pled that cause of action, entitling
them to a hearing on the merits.

1 **B. The forfeiture of the Jalalis’ property violates their Fifth**
2 **Amendment due process rights.**

3 The Supreme Court has said that “[t]he Due Process [Clause] protect[s]
4 individuals from sanctions which are downright irrational.” *Hudson v. United*
5 *States*, 522 U.S. 93, 103 (1997). To pass constitutional muster, there must be a
6 meaningful relationship between legitimate governmental ends and the means used
7 by the government to achieve them. “The touchstone of due process is the
8 protection of the individual against arbitrary action of government.” *Wolff v.*
9 *McDonnell*, 418 U.S. 539, 558 (1974).

10 In this case, the government seeks to impose the most draconian deprivation
11 of property possible—forfeiture—without charging, let alone convicting, the
12 property owner of any crime, while turning a blind eye to the actual perpetrators of
13 the conduct giving rise to forfeiture. The campaign presently being waged by the
14 U.S. Attorney in this district is an unprecedentedly aggressive use of that forfeiture
15 power. The government’s action seeks the most severe punishment for the party
16 least responsible for the conduct underlying the forfeiture.

17 Due process protections are particularly important in forfeiture cases, in
18 which the law is “strictly construed against the government.” *United States v.*
19 *\$191,910 in U.S. Currency*, 16 F.3d 1051, 1068 (9th Cir. 1994) (“the burden on the
20 government to adhere to procedural rules should be heavier than on claimants” in
21 forfeiture actions); *see also United States v. One 1936 Model Ford V-8 De Luxe*
22 *Coach*, 307 U.S. 219, 226 (1939) (“forfeitures are not favored”). This is because
23 civil forfeitures “impose ‘quasi-criminal’ penalties without affording property
24 owners all of the procedural protections afforded criminal defendants.” *\$191,910 at*
25 *1069* (citing *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 558 (9th Cir.
26 1988)).

27 Through specific allegations, the Jalalis’ Answer and Counterclaim states a
28 claim that the federal government’s attempt to take their property is an

1 overreaching, arbitrary application of 21 U.S.C. § 881(a)(7) that violates their due
2 process rights.

3 The government argues that this claim should be dismissed because several
4 cases have found that there is no fundamental right to use or possess marijuana.
5 Pl.’s Mot. at 8-9. The Jalalis’ assert no such right, however, because their due
6 process claim concerns not marijuana but the arbitrary and irrational application of
7 the federal forfeiture statute, 21 U.S.C. § 881(a)(7), against their property. The
8 Jalalis’ Answer and Counterclaim alleges that “there is a constitutionally
9 insufficient fit between [the government’s purported] end” of enforcing the
10 Controlled Substances Act “and civil forfeiture of their property pursuant to
11 pursuant to [Section 881].” Answer and Counterclaim at 7. This claim is again
12 one of first impression and the government cites no cases, apart from those
13 inapposite cases involving an alleged right to use marijuana, to support its motion
14 to dismiss the claim.

15 While the government seeks the forfeiture of a commercial building worth
16 \$1.5 million from the Jalalis for having rented a small portion of its space to
17 medical marijuana dispensaries that were operating within the bounds of California
18 law, the Jalalis allege that the government has “shown no interest in prosecuting
19 either the operators or patients” of those dispensaries. *Id.* at 5. The pleadings,
20 moreover, allege that Mr. Jalali understood the statements and the behavior of the
21 city, state, and federal government to mean that he was free to lawfully rent space
22 to medical marijuana dispensaries operating in compliance with state law. *Id.* at 5-
23 6. The pleadings allege that the federal government’s policy has been to “not
24 prosecute cases concerning medical marijuana where state law had made the use
25 and sale of medical marijuana legal.” *Id.* at 5. The Jalalis further allege that they
26 have “no direct involvement in the operation of any medical marijuana
27 dispensary,” and also that the United States has turned “a blind eye to the activities
28 of medical marijuana dispensaries, their patients, and even the activities of the City

1 of Anaheim, which continues to profit from a well-publicized, massive marijuana-
 2 related event operating in the city-owned convention center each year.” *Id.* at 6.
 3 The Answer and Counterclaim also makes clear that Mr. Jalali took prompt and
 4 complete action to terminate any illegal use of his property by others after
 5 becoming aware of the federal government’s view that his medical marijuana
 6 dispensary tenant was violating federal law. In short, the government’s application
 7 of Section 881 metes out the harshest penalty against the least blameworthy party
 8 associated with the conduct alleged by the government to give rise to the forfeiture.
 9 *Id.* “Having failed to notify [a property owner] that he had a significant problem,
 10 and having failed to take any steps to advise him on what to do, the Government’s
 11 resolution of the crime problem should not be to simply take his Property.” *See*
 12 *United States v. 434 Main Street*, Civ. A. No. 09-11635-JGD, 2013 WL 308981* at
 13 27 (D. Mass. Jan. 24, 2013).

14 Forfeiture of the Jalalis’ property is an overreaching application of Section
 15 881, which violates due process. Despite the government’s contentions, the
 16 Jalalis’ pleadings sufficiently allege this due process claim and it deserves to be
 17 heard on the merits.

18 **III. The Counterclaim Sufficiently Alleges That the United States’**
 19 **Forfeiture Action Violates the Jalalis’ Rights under the Civil**
 20 **Asset Forfeiture Reform Act of 2000.**

21 In addition to making Tenth and Fifth Amendment claims, the Jalalis allege
 22 one statutory claim seeking relief under CAFRA. Answer and Counterclaim at 13.
 23 Although the government objects to this claim as “incomprehensible,” Pl.’s Mot. at
 24 11, the Answer and Counterclaim sufficiently alleges that the government’s actions
 25 in filing this forfeiture case violate two sections of CAFRA, namely 18 U.S.C. §§
 26 983(c) and (g). Section 983(c) prohibits property from being forfeited unless it has
 27 a “substantial connection” to felony conduct giving rise to the forfeiture; Section
 28 983(g) prohibits forfeitures that are “grossly disproportionate” to the underlying

1 conduct. Whether there is a substantial connection between the Jalalis' property
 2 and conduct giving rise to forfeiture is a factual question not susceptible to
 3 judgment on a motion to dismiss. Whether the forfeiture of the Jalalis' building is
 4 grossly disproportionate in light of the Jalalis' conduct and the circumstances
 5 surrounding the conduct of third parties is again a question requiring the full
 6 consideration of the facts.

7 **A. The Jalalis' property is only incidentally connected to conduct**
 8 **giving rise to forfeiture.**

9 Other courts have held that the mere fact that "land is the situs of a crime"
 10 does not, in and of itself, render it forfeitable as the government contends in this
 11 case. *See 434 Main Street*, 2013 WL 308981 at * 20 (internal quotation marks
 12 omitted); *United States v. Two Tracts of Real Property*, 998 F.2d 204, 212 (4th Cir.
 13 1993) ("[W]e twice have rejected[] the notion that simply because land is the situs
 14 of crime, it is forfeitable."). The requirement of a substantial connection "is
 15 consonant with the congressional intent that the instrumentalities of the drug trade
 16 be reached, while ensuring that property only fortuitously connected with drug
 17 trafficking be preserved." *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir.
 18 1989). Property that does not make prohibited conduct "less difficult or more or
 19 less free from obstruction or hindrance" is merely incidentally, not substantially,
 20 connected to the conduct giving rise to forfeiture. *See United States v. Schifferli*,
 21 895 F.2d 987, 990 (4th Cir. 1990) (internal quotation marks and citations omitted).

22 The Jalalis' pleadings include many allegations supporting the claim that
 23 their property is not substantially connected to conduct giving rise to forfeiture,
 24 within the meaning of CAFRA Section 983(c). The pleadings explain, for
 25 instance, that the property was not purchased with any proceeds of drug-related
 26 activity. Answer and Counterclaim at 4-5. The pleadings state that the Jalalis
 27 immediately evicted a tenant whom they believed was not in full compliance with
 28 California's medical marijuana laws. *Id.* at 5. The pleadings state that no one has

1 ever been arrested at the property for drug-related activity and the Jalalis were
2 never informed by the federal government that it was concerned about any activity
3 at the property until they received notice of the forfeiture action. *Id.* at 5-6.

4 Moreover, there is no allegation in the government’s complaint that any
5 party operating the dispensaries that rented from the Jalalis has any interest in the
6 property. Nothing about the property sets it apart from the dozens of other
7 commercial buildings that rented space to medical marijuana dispensaries in
8 Anaheim during the period at issue in this case, and certainly nothing about the
9 building or the Jalalis’ actions made prohibited conduct any less difficult or more
10 or less free from obstruction than other locations in the city. And although the
11 controversy in this case arises because the Jalalis rented space in their building to
12 two medical marijuana dispensaries during the last two years, the greater portion of
13 the building has always been and is presently occupied by more prosaic tenants,
14 including insurance companies, dentists, and administrative business offices. *Id.* at
15 9.

16 These factors render the connection between the Jalalis’ office building
17 tenuous and fortuitous, rather than substantial as required by CAFRA.

18 **B. The Government’s proposed forfeiture is grossly**
19 **disproportionate to any alleged conduct giving rise to**
20 **forfeiture by third parties.**

21 CAFRA requires the Court to compare proposed forfeitures “to the gravity
22 of the offense giving rise to the forfeiture,” in order to eliminate grossly
23 disproportionate seizures. 18 U.S.C. § 983(g)(2). When examining forfeitures for
24 excessiveness, the Ninth Circuit has explained that in cases where a third party,
25 rather than the property owner, is solely alleged to have committed a crime “which
26 gave rise to forfeitability . . . the culpability of the owner must be considered in the
27 analysis.” *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012). The
28 culpability of the Jalalis cannot be adequately considered without a review of facts

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1 not yet in evidence. It is, therefore, inappropriate to dispose of their statutory
2 counterclaim on a motion to dismiss.

3 The Jalalis’ pleadings allege that they have had “no involvement with the
4 dispensaries themselves apart from being landlords.” Answer and Counterclaim at
5 5. They allege a good-faith belief that the operation of the dispensaries on their
6 property was legal. *Id.* at 5-6. The Jalalis state that Mr. Jalali evicted the tenant
7 located on the property at the time of the government’s complaint immediately
8 upon receiving that complaint. *Id.* at 5. As noted above, the pleadings also allege
9 that no one has ever been arrested at the property for drug-related activity and the
10 Jalalis were never informed by the federal government that it was concerned about
11 any activity at the property until they received notice of the forfeiture action. *Id.* at
12 5-6.

13 In light of these facts, which the Court must accept as true, the Jalalis have
14 sufficiently pled their statutory claim that the forfeiture of their \$1.5 million
15 building is grossly disproportionate to the conduct alleged by the government and
16 that the government’s action, therefore, violates [CAFRA]. *See id.* at 13.

17 **CONCLUSION**

18 For the foregoing reasons, the United States’ Motion to Dismiss
19 Counterclaim of Claimants Tony and Morgan Jalali should be denied.

20
21 Respectfully submitted this 2nd day of August 2013 by:

22 INSTITUTE FOR JUSTICE

23 /s/ Lawrence G. Salzman
24 Lawrence G. Salzman, CA Bar No. 224727
25 Scott G. Bullock, *pro hac vice*
26 Justin M. Pearson, *pro hac vice*
27 901 North Glebe Road, Suite 900
28 Arlington, VA 22203
Tel: (703) 682 – 9320
Fax: (703) 682 – 9321
Email: lsalzman@ij.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

sbullock@ij.org
jpearson@ij.org

Matthew S. Pappas, CA Bar No. 171860
22762 Aspan Street, Suite 202-107
Lake Forest, CA 92630
Tel: (949) 382-1485
Fax: (949) 242-2605
Email: matt.pappas@mattpappaslaw.com

Attorneys for Claimants/Counter-Claimants

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2013 the **CLAIMANTS’ OPPOSITION TO PLAINTIFF’S MOTION TO DISMISS COUNTERCLAIM OF CLAIMANTS TONY AND MORGAN JALALI** was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Lawrence G. Salzman
Lawrence G. Salzman, CA Bar No. 224727

INSTITUTE FOR JUSTICE
901 N. GLEBE ROAD, SUITE 900
Arlington, VA 22203 • (703) 682-9320