IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ARLENE HARJO,

Plaintiff,

v.

CITY OF ALBUQUERQUE,

Defendant.

No. 1:16-cv-01113-JB-JHR

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

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Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7 and 56, Plaintiff Arlene Harjo hereby moves for entry of summary judgment on her claims challenging the City of Albuquerque's civil forfeiture program as a violation of the Fourteenth Amendment Due Process Clause. *See* First Am. Compl. ¶¶ 96-103 (Count II), 104-110 (Count III). Plaintiff submits the following Memorandum in support of this Motion.[1]

INTRODUCTION

This is a case about civil forfeiture, a legal tool that "has led to egregious and well-chronicled abuses." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari). The City of Albuquerque operates an aggressive civil forfeiture program, which brought in revenues of $11.8 million between July 2008 and December 2016. Of this revenue, over $3 million was used to pay the salaries of officials in the forfeiture program, including the entire salaries (plus benefits) of the attorneys who file forfeiture cases. Money left over, after salaries, was used to pay the program's necessary expenses as well as discretionary costs such as new vehicles and equipment. Much of this revenue came from property owners—like Plaintiff here—who were not even *accused* of a crime.

Arlene Harjo fell into this program in April 2016. Although Arlene did not break the law, the City seized her car because *her son* committed a crime. Officials whose salaries are paid by forfeiture revenue failed to realize the car was seized outside city limits—and therefore not legally subject to forfeiture—although the location of the seizure was noted on the police report.

[1] On October 4, 2017, Plaintiff filed an unopposed motion seeking to expand the page limit for this Memorandum from 27 to 32 pages. *See* Doc. 64. The Court has not yet ruled on that motion. In keeping with Local Rule 10.3 and what Plaintiff understands to be local practice—and to allow for a full recitation of the relevant facts—Plaintiff is filing this document at 32 pages but stands ready to revise down to 27 pages if so directed by the Court.

Then, a city attorney whose salary is paid by forfeiture revenue offered to return Arlene's car if she paid $4,000. Arlene refused, so she was given a hearing before an administrative judge whose docket consists almost entirely of cases generated by this self-funding civil forfeiture program. At the hearing, Arlene bore the burden to prove her own innocence.

Arlene is entitled to summary judgment on the merits of her constitutional challenge to the City's forfeiture program. The Supreme Court, in *Marshall v. Jerrico*, held that a financial incentive to enforce the law violates due process if it gives rise to "a realistic possibility that [an enforcement official's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement." 446 U.S. 238, 250 (1980). This is such a case. Indeed, the undisputed facts show that the City's forfeiture program is funded by forfeiture revenues, that the program is financially dependent on those revenues, that the City plans for forfeitures in its annual budget, and that the City tracks actual revenues against its budget targets. The City also uses forfeiture to pay the salaries of the very officials who enforce its forfeiture law.

Nor is that financial incentive the only unconstitutional aspect of the City's program. The procedures employed by the program—including requiring property owners to prove their own innocence—also give rise to an unacceptable "risk of an erroneous deprivation" under *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Earlier this year, in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), the Supreme Court reaffirmed the fundamental constitutional principle that every man and woman is presumed innocent until proven guilty. The City violated the Constitution when it required that Arlene prove her own innocence instead.

STATEMENT OF MATERIAL FACTS

A. The City's Forfeiture Program.

1. The City's civil forfeiture ordinance provides that a vehicle is "subject to immediate seizure and forfeiture . . . if it is . . . [o]perated by a person in the commission of a DWI offense" and the driver has at least one prior DWI arrest, summons, or conviction. Revised Ordinances of Albuquerque ("ROA") § 7-6-2.

2. City ordinances also provide for forfeiture based on other types of violations, including any "felony offense" involving "use of a firearm." ROA § 7-9-3; *see also id.* § 7-14-2.

3. If the seized vehicle is owned by somebody other than the alleged offender, the owner bears the burden to "demonstrate[ ] by a preponderance of evidence that the owner . . . could not have reasonably anticipated that the vehicle could be used" to commit the alleged offense. ROA § 7-6-7(A).

4. Vehicles seized under this ordinance are brought for intake to the City's DWI Seizure Unit. Ex. 5 at 11-13.[2] The DWI Seizure Unit is housed within the Albuquerque Police Department ("APD") and consists of two uniformed officers and five civilian employees. Ex. 8 at 7-10. The DWI Seizure Unit works closely with the City's Legal Department, where two city attorneys are assigned to handle vehicle forfeiture cases. Ex. 5 at 19-20; Ex. 17.

5. Pepe Hernandez, an employee at the DWI Seizure Unit, conducts an investigation into the alleged drunk driver. Ex. 8 at 46; Ex. 10 at 8. This investigation consists mostly of a search of electronic databases. Ex. 5 at 13; Ex. 10 at 8.

[2] Throughout this memorandum, "Ex." refers to the exhibits to the Declaration of Robert E. Johnson in Support of Plaintiff's Motion for Summary Judgment.

6. As part of this investigation, Pepe is responsible for verifying that the seizure occurred inside city limits. Ex. 8 at 45-46. About "once a year" or so, Pepe determines that a vehicle is not subject to forfeiture because it was seized outside city limits. Ex. 10 at 13-14.

7. There is "no type of different investigation" if the vehicle is owned by somebody other than the alleged drunk driver. Ex. 8 at 12. Nobody from APD contacts the owner to conduct an interview prior to proceeding with the forfeiture. Ex. 5 at 15-16; Ex. 10 at 21. And nobody from APD investigates to determine whether the owner might have a valid innocent owner defense. Ex. 5 at 15-16; Ex. 10 at 20-21.

8. When a vehicle is seized, the owner has ten days to pay a $50 fee to request an administrative hearing. ROA §§ 7-6-5(D), (F). If the owner does not request a hearing, the vehicle is deemed "abandoned" and sold at auction. Ex. 8 at 35. This happens "about 60" times per month. Ex. 9 at 20.

9. Vehicle owners are eligible to bid for their vehicles at auction—even if they were the one driving at the time of the offense—and the City is aware that owners sometimes choose to buy back their vehicle rather than contest the forfeiture. Ex. 5 at 63; Ex. 9 at 24.

10. If the owner requests a hearing, a city attorney conducts settlement negotiations with the owner or her representative prior to the hearing. Ex. 5 at 19-20. The City's 30(b)(6) witness agreed that, during those negotiations, the city attorney "would be exercising discretion about what kind of settlement offer to make." *Id.* at 21.

11. City attorneys can offer a broad range of settlement terms, ranging all the way from a $500 payment and no requirement to boot the car to a $5,100 payment and a requirement to boot the car for two years. Ex. 8 at 42-43; Ex. 9 at 35.

12. While city attorneys are guided by a "matrix" setting forth approved settlement offers for various circumstances, city attorneys "have discretion to depart from the matrix." Ex. 5 at 36; *see also* Ex. 8 at 62-63. For instance, a city attorney could exercise discretion to make a favorable settlement offer if he felt the owner had a valid innocent owner defense. Ex. 5 at 23-25; *see also id.* at 24 (city attorneys can "exercise leniency").

13. If the owner does not agree to settle, the case proceeds to a hearing before the City's administrative hearing officer. Ex. 5 at 19-20.

14. The hearing officer is responsible for determining whether the owner has proved that she is innocent. ROA § 7-6-7(A). The City's 30(b)(6) witness testified that a number of factors can go into that decision (including the number of prior incidents and the time elapsed since the most recent) and agreed that the hearing officer exercises "discretion" to weigh those factors. Ex. 5 at 40-41.

15. Even if the hearing officer rules for the owner, the hearing officer can require payment of storage fees as a condition of the vehicle's release. ROA § 7-6-5(D). Fees can be waived in "unusual" cases, but the "default" is that they are imposed. Ex. 5 at 48.

16. If the hearing officer rules in favor of the City, the City proceeds to file a forfeiture case in state court. ROA § 7-6-5(D).

17. Even if the owner ultimately prevails in state court, the state court can impose storage fees as a condition of the vehicle's release. ROA § 7-6-7(E).

18. Storage fees accumulate at a rate of $10 per day. Ex. 5 at 51. There is no ceiling on the amount of storage fees that can be imposed, meaning that "if a vehicle was held . . . for an entire year, that could be a storage charge of over $3,000." *Id.*

19. The City's Chief Hearing Officer has stated that "about half of the vehicles that APD seizes are not owned by the offender that we confiscate it from." Ex. 33 at 4:29:05.[3] Rather, "[i]t's the mothers, the fathers, the wives, the girlfriends, the brothers, the uncles." *Id.*

B. Following The Money.

20. Under the City's ordinance, the proceeds of forfeiture actions must be "used to carry out the purpose and intent" of the ordinance. ROA § 7-6-5(E). By law, proceeds go first to cover "the costs of administering" the ordinance, with any excess "used for DWI enforcement, prevention and education." *Id.*

21. The APD's Fiscal Officer testified that the vehicle forfeiture program operates as "a special revenue fund," which he described as "accounting terminology for a program that has a particular—a specific revenue funding source and a specific restricted use." Ex. 6 at 18-19. The vehicle forfeiture program primarily generates revenue through settlements and auctions. Ex. 6 at 22; Ex. 7 at 21. That revenue is then used to pay expenses associated with the program, including employee compensation, tow fees, supplies, and purchases of vehicles and other equipment. Ex. 6 at 37; Ex. 7 at 22.

22. The City accounts for revenues and expenses associated with its vehicle forfeiture program using a unique project identification code, which allows it to segregate those revenues and expenses from other city funds. Declaration of Joseph T. Gardemal III ("Gardemal Dec.") at ¶ 7; *see also* Ex. 6 at 51, 53.

[3] The City has stipulated to the admissibility of this and other statements made by the Chief Hearing Officer, as well as the authenticity of the video recording in which they appear. *See* Doc. 61 ¶ 4. The video has been lodged with this Court as Exhibit 33 to the Declaration of Robert E. Johnson. Citations are to the times the statements appear in the video recording.

23. The amount of money generated by the program determines the amount available to spend. *See* Ex. 6 at 135-36. The APD Fiscal Manager testified that purchases are sometimes disallowed because the program has not generated sufficient revenue to pay for them, *id.* at 135, and that "[i]f more revenue comes in, then yes, our expenditures can increase," *id.* at 136.

24. Revenue over and above expenses carries over from year to year, and the program is allowed to draw on accumulated surplus to pay expenses in later years. Ex. 7 at 15-16.

25. Revenue from forfeiture, settlements, and fees exceeded expenses paid from the program's special revenue fund in fiscal years 2009, 2010, 2011, 2013, and 2014, meaning the program generated surplus fund balance in each of those fiscal years. Gardemal Dec. ¶ 25; *see also* Ex. 7 at 15 ("[P]revious years . . . they've had extra revenues.").

26. During fiscal years 2009 to 2016, the vehicle forfeiture program generated $11.8 million in revenue in the form of forfeitures, settlements, and fees. Gardemal Dec. ¶ 25. During that same period, the City accounted for a total of $13.5 million in revenue using the program's project identification code, meaning that a full 87% of revenue associated with the program was generated via forfeitures, settlements, and fees. *Id.* ¶ 26.

27. That 87% figure would be even higher if not for approximately $1.7 million in insurance payments that were accounted for using the program's project identification code. Gardemal Dec. ¶ 26. The City's Executive Budget Analyst testified that this insurance money was "kind of separate I believe from the DWI" and that it was deposited in the program's special revenue fund "just to kind of hold it." Ex. 7 at 21.

28. One of the most significant expenses paid out of program revenues is employee compensation. During fiscal years 2009 to 2016, the City used $3.7 million in program revenues

to pay employee compensation, amounting to a full 27% of all expenses paid with program revenues. Gardemal Dec. ¶ 30.

29. Every fiscal year, the City makes a lump-sum transfer out of the program's special revenue fund to pay the salaries and benefits of employees associated with the program. Gardemal Dec. ¶¶ 32-35; *see also* Ex. 7 at 22, 25; Ex. 11 at 53. The employees covered by this transfer include civilian employees at the DWI Seizure Unit and the city attorneys who handle forfeiture cases. Ex. 2 at 12-15; Ex. 7 at 25. The transfer is calculated to pay the *entire* annual salaries and benefits of the covered employees. Ex. 7 at 26, 29; *see also* Gardemal Dec. ¶ 34.

30. The City also uses program revenue to cover the program's non-payroll costs. Gardemal Dec. ¶¶ 31, 44-48. For instance, program revenue goes to pay tow fees, process server fees, and other costs incurred during forfeiture proceedings. *Id.* ¶ 48. In addition, the City uses program revenues to pay to lease its impound lot. *Id.* ¶ 47. Between fiscal years 2009 and 2016, the cost to lease the lot was $1.8 million, all of which was paid with program revenue. *Id.*

31. Money left over above program expenses is used to fund discretionary purchases. For instance, over fiscal years 2009 to 2016, the City used $989,719 in program revenues to pay for new police vehicles, $379,894 to pay for radar guns, and $236,322 to pay for advertising in the local newspaper. Gardemal Dec. ¶¶ 55-56. Then, in fiscal year 2016, the City made a lump sum transfer of $3.3 million in accumulated fund balance to pay for additional new vehicles and a new educational building. *Id.* ¶¶ 52-54.

32. A city policy document describes "provid[ing] equipment" as the "Concept of Operations" for the vehicle forfeiture program. Ex. 16; *see also* Ex. 8 at 15.

C. Budgeting and Tracking Forfeiture Revenue.

33. The forfeiture program cannot spend money without an appropriation from City Council, so every year the City Council includes the program in its appropriations bill. Gardemal Dec. ¶¶ 21-22; Ex. 6 at 54. The City sets the amount of this appropriation by estimating program revenues for the coming fiscal year. *See* Ex. 7 at 17 ("[B]ecause we think we're going to get a million dollars in revenue, we'll allow them to spend a million.").

34. As a practical matter, the program's spending is limited by its revenue, not by the City Council. Ex. 6 at 134-36. The program cannot spend money it does not have. *Id.* And if the program has *more* funds available than City Council appropriated, it can spend even more and City Council will pass a "clean up" bill retroactively authorizing the spending. Ex. 7 at 17-18.

35. Every year, the City's annual budget includes "performance measures" for the vehicle forfeiture program. Ex. 11 at 181; Ex. 12 at 183; Ex. 13 at 185; Ex. 14 at 192. These performance measures set targets for the coming fiscal year for numbers of vehicles auctioned, numbers of vehicles released pursuant to settlements (broken down further between vehicles released with or without a boot and the accompanying payment of money), and revenue to be generated selling vehicles at auction. Ex. 11 at 181; Ex. 5 at 70-73.

36. For instance, in fiscal year 2016, the City set a target to raise $615,000 selling 625 vehicles at auction. Ex. 11 at 181. The City also set a target to enter into 600 settlement agreements involving a boot and a payment of money and 350 settlements where the vehicle would be released without a boot for a smaller payment of money. *Id.*

37. The head of the DWI Seizure Unit described these performance measures as a "forecast of how we think we should do." Ex. 8 at 30. He explained that, "overall, whether it's

the private sector or the public sector, you've got to have goals," and that these performance measures provide "goals" for the forfeiture program. *Id.*

38. The "performance measures" section of the annual budget also includes data on the program's actual performance in the prior fiscal year, as well as the targets set for that prior year. Ex. 11 at 181; Ex. 8 at 30-31. This format makes it possible to see, at a glance, whether the program is meeting its performance targets.

39. These annual performance measures are compiled by program personnel, including the city attorneys who handle forfeiture cases. Ex. 5 at 69; Ex. 8 at 30-31.

40. The forfeiture program also tracks performance on a monthly basis. Ex. 15; Ex. 8 at 20. Every month, program personnel update a spreadsheet with the number of vehicles checked into the impound lot, the amount of revenue generated by settlement agreements, and the amount of revenue generated selling vehicles at auction. Ex. 9 at 33-43. The spreadsheet then automatically generates a percentage comparison to the same month the year before, providing an immediate check on whether intake and revenue are trending up or down. Ex. 8 at 22-23.

41. Annual performance evaluations for employees in the DWI Seizure Unit—which serve to assess individual job performance—list as an "Output Measure[ ]" to "[i]ncrease the amount of revenue generated from Seized vehicles." Ex. 18 at 1; Ex. 19 at 1. The head of the DWI Seizure Unit agreed that these Output Measures serve as a "measure of the unit's success or failure at meeting its objectives." Ex. 8 at 29; *see also* Ex. 9 at 55; Ex. 10 at 30.

42. The City's budget for fiscal year 2016 lists as an "accomplishment" of the Legal Department: "Auctioned 570 vehicles . . . generating $471,000 in proceeds." Ex. 11 at 182.

D. A Fiscal Squeeze.

43. In recent years, the amount of revenue generated by the program has declined, as fewer people are being caught driving under the influence. Ex. 8 at 15-16. The City ascribes this decline to a variety of factors, including the rise of companies like Uber and Lyft that make it easier to drink outside the home without driving. Ex. 5 at 86-87; *see also* Ex. 8 at 15-16.

44. Whereas the program generated over $1.8 million in revenue in fiscal year 2010, the program generated only $760,466 in revenue in fiscal year 2016. Gardemal Dec. ¶ 25.

45. In fiscal years 2015 and 2016, the program's expenses exceeded its revenues, and the program was able to make up the difference only by spending accumulated surplus revenue from past fiscal years. Ex. 7 at 16-17; *see also* Ex. 6 at 140.

46. Several witnesses testified that this ongoing decline in revenue has adversely affected morale in the DWI Seizure Unit. Ex. 8 at 17; Ex. 9 at 48.

47. This decline in revenue has also placed the forfeiture program under financial strain. Ex. 8 at 17 ("obviously, financially, it's hurting the program"); *see also* Ex. 7 at 14 ("we are concerned about the expenditures and, you know, having a discussion with them about what we're going to do with the program"). The program has already had to cut expenses. Ex. 8 at 17. The decline in revenues has also been discussed at citywide budget meetings, and the program will have to make additional cuts going forward. Ex. 7 at 71-72, 74, 76; *see also* Ex. 22.

48. The City's Executive Budget Analyst testified that declines in revenue could affect the job security of program personnel. Ex. 7 at 77. She testified that "it probably will be a discussion . . . if revenues are going down, do we need all these positions?" *Id.*

49. Declines in program revenues could also affect the job security of the hearing officers who decide forfeiture cases. In 2012, when the City ended a red light ticketing program, the City eliminated six positions from the office of administrative hearings to cover the "reduction in operations." Ex. 14 at 137.

50. In 2013, an APD officer listed as an "[a]ccomplishment[ ]" that the program was able to "maintain[ ] program revenue despite drop of intake." Ex. 26; *see also* Ex. 5 at 78-79.

51. In April 2016, the time at issue in this case, monthly data collected by the program shows that vehicle seizures were down 22% from the same time the year before, program revenues were down 9%, and the number of vehicles returned to owners with the minimum possible financial penalty was down a full 58%. Ex. 15 at 2. In other words, seizures were down and program officials were being less lenient with property owners.

52. Although revenues were down in 2016, the City's annual targets were not. The City Council budgeted for the program to bring in $500,000 *more* in 2016 than in 2014. Ex. 3 at 3; Gardemal Decl. ¶ 8. The 2016 annual budget, meanwhile, set a "performance measure" for the program to generate $615,000 selling vehicles at auction—the *same* goal as in fiscal year 2015—even though the program was on track to fall well short of that goal in 2015. Ex. 11 at 181.

E. The Seizure And Attempted Forfeiture Of Arlene Harjo's Car.

53. On Saturday, April 23, 2016, at around 2 o'clock in the afternoon, Arlene Harjo's son asked if he could borrow Arlene's car to take a trip to the gym with a friend. Declaration of Arlene Harjo ("Harjo Dec.") ¶ 9. Arlene agreed, expecting that he would return within a few hours. *Id.* She became worried when he did not return as expected. *Id.* ¶ 15.

54. The next morning, Arlene learned that her son had lied to her and had been arrested for DWI while returning from a rendezvous with his girlfriend. *Id.* ¶ 15. She also learned that the City had seized her car for forfeiture. *Id.* ¶ 16.

55. To avoid the automatic forfeiture of her car, Arlene requested a hearing before the City's administrative hearing officer, paying $50. *Id.*

56. When Arlene showed up for the hearing she was put in touch with a city attorney, who then offered to settle the case if Arlene agreed to pay $4,000 and boot her car for 18 months. *Id.* ¶ 17. Arlene declined this settlement offer, as she could not afford to pay. *Id.*

57. The city attorney who extended this settlement offer has his entire salary, plus benefits, paid out of the vehicle forfeiture program's revenues. Ex. 2 at 12; Gardemal Dec. ¶¶ 32-35. In fiscal year 2016, he was paid $70,776 in program revenues. Ex. 2 at 15.

58. In the months leading up to this settlement offer, this city attorney received multiple emails referencing the fact that program revenues go to pay the salaries of program employees, including city attorneys. Ex. 24; Ex. 25.

59. Months after this settlement offer, in July 2016, this city attorney was tasked to provide an update on the program's progress towards its annual performance measures for settlements, auctions, and auction revenues. Ex. 23.

60. [redacted]

61. Because Arlene turned down the city attorney's settlement offer, she received a hearing before the City's Chief Hearing Officer. Harjo Dec. ¶ 18.

62. The Chief Hearing Officer is aware of the financial importance of the forfeiture program. At a September 2014 forfeiture conference, he stated that the "ordinance is written specifically" to provide that revenue must be returned to the program and that this "allowed me to resist former mayors wanting to transfer it all to the general fund." Ex. 33 at 1:20:30; *see also id.* at 2:32:50 (stating that city officials "would rather not talk about" program revenue because it provides "a bullet-point for people that are trying to fight the program"); *id.* at 2:33:05 (stating that, when he worked as an attorney for the program, "it was making a net-net").

63. When the City sought to negotiate a revenue-sharing agreement with Bernalillo County, city officials consulted with the Chief Hearing Officer about the percentage of program revenues that go to cover the program's costs. *See* Ex. 6 at 157-59; Ex. 27.

64. The Chief Hearing Officer's docket consists largely of forfeiture cases. Of the 1668 hearings that he conducted in 2016, a full 1288 (or 77%) were conducted under the City's vehicle forfeiture ordinance. Ex. 4 at 3.

65. At the conclusion of the hearing, the Chief Hearing officer found that Arlene did not carry her burden to establish that she was an innocent owner. Ex. 29 at 18.

66. The City proceeded to file a forfeiture complaint in state court. Ex 30. Arlene contested the forfeiture *pro se*, and the City sent her a packet of discovery requests, including several whose relevance the City's 30(b)(6) witness could not explain. Ex. 5 at 57-58; Ex. 31. The cover letter for these discovery requests, authored by a paralegal whose salary is paid by forfeiture revenues, invited Arlene to sign a disclaimer giving up the vehicle. Ex. 2 at 15; Ex. 31.

67. Months later, and only after Arlene filed this case, the City dismissed its forfeiture complaint because it determined that the car was outside city limits when it was seized. Ex. 32.

68. The police report for the seizure included a mile marker number, and the DWI Seizure Unit employee who conducted the background investigation could have used that information to determine if the seizure occurred inside city limits. Ex. 10 at 15-16. This employee has his entire salary paid by program revenues, and in 2016 he received $80,966 in program revenues as compensation. Ex. 2 at 13-14; Gardemal Dec. ¶¶ 32-35.

69. The police officer who seized Arlene's car also mentioned the mile marker number at the hearing, Ex. 29 at 6, and the city attorney included the mile marker number in the complaint that he filed in state court, Ex 30 ¶ 4. Both the hearing officer and the city attorney could have determined that the seizure did not occur within city limits, if they had consulted a map. Ex. 5 at 44, 54-55.

70. As a result of the City's actions, Arlene suffered damages. Harjo Dec. ¶ 24-27. Her car was damaged by sitting unused in the City's impound lot for an extended period, and Arlene also had to go without access to her car for eight months—although she continued to make loan payments for a vehicle that she could not use. *Id.* ¶¶ 24-26. Her lender also added its attorney fees in the forfeiture action to the amount owed on her loan. *Id.* ¶ 27.

LEGAL STANDARD

Plaintiff is entitled to summary judgment if she can show that "there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). While Plaintiff bears the initial burden to identify "portions of the record" showing the absence of a material factual dispute, the burden then shifts to the City to "set forth specific facts showing that there is a genuine issue for trial." *Lowery v. City of Albuquerque*, No. 09-cv-0457, 2011 WL 1336670, at *16 (D.N.M. Mar. 31, 2011) (Browning, J.) (citations omitted).

ARGUMENT

I. City Officials Have An Unconstitutional Financial Incentive To Seize And Forfeit Property.

When the City seizes and forfeits vehicles, the revenues generated by the forfeiture action are used to pay the expenses of the forfeiture program, including to pay the salaries of the very officials who pursue forfeiture cases. This arrangement affects both enforcement personnel and the City's hearing officers; both are subject to an institutional financial incentive because of their involvement with the City's self-funding forfeiture program, while enforcement personnel are also subject to a direct, personal incentive, as their salaries are paid with program revenues. This financial incentive—both institutional and personal—violates due process.

The Supreme Court has held that government violates due process when it establishes a system where judicial officers, like the City's hearing officers, face a financial incentive to raise revenue through their decisions. *See*, *e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). This kind of financial incentive can involve a personal benefit to the judicial officer—in other words, money directly into the judge's pocket—but that is by no means necessary. In *Ward*, for instance, a citizen charged with traffic offenses claimed that trial before the village's mayor violated due process, as "[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by [the mayor] in his mayor's court." *Id.* at 58. The Court agreed, reasoning that the mayor would face institutional pressure "to maintain the high level of contribution." *Id.* at 60. This was true even though no money went into the mayor's pocket. Moreover, this was true regardless of whether the plaintiff could show actual bias, as due process protects against a financial incentive that would offer "a possible temptation to the average man." *Tumey*, 273 U.S. at 532.

The Supreme Court also has held that due process limits the financial incentives of enforcement personnel. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The Court laid the groundwork for such claims in *Marshall*, flatly rejecting the claim that due process "imposes no limits on the partisanship of administrative prosecutors." *Id.* at 249. To the contrary, the Court held that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. Then, in *Young v. United States*, 481 U.S. 787, 814 (1987), the Court cited *Marshall* in the course of exercising its supervisory power to reverse a conviction obtained by a prosecutor with improper dual loyalties, explaining that prosecutors must "be guided solely by their sense of public responsibility for the attainment of justice." As with judicial officers, a financial incentive need not put money directly into the officer's pocket to be ruled improper. In *Marshall*, for instance, the Court asked whether the officer's "judgment will be distorted by the prospect of *institutional gain* as a result of zealous enforcement." 446 U.S. at 250 (emphasis added). And again, this is true regardless of whether enforcement personnel are *actually* biased, so long as bias is a "realistic possibility." *Id.*

In recent years, a number of courts have applied these principles to law enforcement's retention of civil forfeiture proceeds. *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 709 (E.D. Pa. 2015), held that plaintiffs stated a due process claim when they alleged that the Philadelphia D.A.'s Office "allocat[ed] forfeiture proceeds for both institutional and personal benefit." *Cox v. Voyles*, No. 15-cv-1386, Doc. 65, at 17 (D. Ariz. Aug. 18, 2017) (unpublished), held that plaintiffs stated a due process claim when they alleged that "law enforcement agencies rely on forfeiture money for a variety of expenses, including funding entire departments." And,

finally, *Platt v. Moore*, No. 16-cv-8262, Doc. 60, at 20 (D. Ariz. Aug. 30, 2017) (unpublished), held that plaintiffs stated a due process claim that the retention of forfeiture proceeds "create[s] a financial incentive that may impermissibly distort decision-making." While these cases were all decided on motions to dismiss, they squarely held that the retention of forfeiture proceeds could give rise to a due process violation if the facts bore out the allegations.[4]

The undisputed facts in this case show that the retention of forfeiture revenues by the City's forfeiture program gives rise to a "realistic possibility that [officials'] judgment will be distorted," and thus violates due process. *Marshall*, 446 U.S. at 250. This is true for three reasons, discussed at length below. First, the City's forfeiture program is "financially dependent on the maintenance of a high level of penalties," *id.* at 251, as forfeiture revenues fund a significant part of the program's budget as well as major costs (including salaries) that would otherwise have to be paid some other way. Second, the "administration" of the program has increased this "potential for bias," *id.*, as the City budgets for future forfeiture revenues and evaluates the program based on the amount of revenue that it generates. Third, this incentive affects city officials who exercise discretion to return or forfeit property, including city attorneys who have their entire salaries paid by forfeiture revenues and a hearing officer whose docket is largely made up of forfeiture cases. While this Court need not find that any of these officials are *actually* biased—and thus need not judge the motives of any particular individual—the undisputed facts make clear that these officials face a financial incentive that gives rise to a significant possibility of bias.

[4] The plaintiffs in *Sourovelis* and *Platt*, like Plaintiff here, are represented *pro bono* by counsel from the Institute for Justice.

A. The City's Forfeiture Program Is Financially Dependent On Maintenance Of Forfeiture Revenues.

In *Marshall*, the Supreme Court looked to the financial details of the relevant government agency to determine whether the retention of penalties gave rise to an impermissible financial incentive. 446 U.S. at 250. Observing that penalties "represent[ed] substantially less than 1% of the budget" of the agency, the Court found that "the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties." *Id.* at 250-51. Precisely the opposite is true here, as analysis of the City's forfeiture program shows the program is financially dependent on maintaining a steady stream of forfeiture revenue.

There is no dispute that forfeiture revenues make up a very substantial part of the budget of the forfeiture program. The City tracks revenues and expenses associated with the program, and unrebutted expert analysis of this financial data shows that settlements, auctions, and related fees make up a full 87% of revenues associated with the program. *See* Gardemal Dec. ¶¶ 2-3, 26; *see also* Statement of Material Facts ("SMF"), *supra*, ¶¶ 26-27. The City's Executive Budget Analyst, meanwhile, agreed that until recently "the program's revenues have covered its expenditures" and testified that in some years "they've had extra revenues." Ex. 7 at 15. This stands in stark contrast to *Marshall*—where revenue from penalties made up less than 1% of the agency's budget—and shows the program's extreme financial dependence on forfeiture revenue.

A more detailed examination of the expenses paid using forfeiture revenues confirms this basic reality, as the undisputed facts show that the program depends on forfeiture revenues to pay major expenses. SMF ¶¶ 28-30. Plaintiff's expert witness analyzed the City's financial data and determined that the use of forfeiture revenue to cover major fixed expenses (such as salaries and the lease for the impound lot) creates pressure to bring in revenue to cover those costs. *See*

Gardemal Dec. ¶¶ 44-49. Meanwhile, testimony from the City's own officials confirms the point. The APD Fiscal Manager testified that, if forfeiture revenues were no longer able to cover those expenses, it would become necessary to find room elsewhere in the City's already thinly-stretched budget. *See, e.g.*, Ex. 6 at 139, 149. The City's Executive Budget Analyst likewise explained that, if the program "start[s] charging more stuff to General Fund . . . then, now we've got to watch General Fund. . . . So what are you going to do in [the General Fund]? Maybe not have a contract that you normally have, or you need to cut that contract." Ex. 7 at 72; *see also* Ex. 5 at 82. In other words, the program depends on forfeiture revenue to pay its bills.

This financial dependence is vividly illustrated by testimony discussing recent declines in program revenues, from over $1.8 million to just over $760,000 in fiscal year 2016. SMF ¶¶ 43-52. The City's Executive Budget Analyst stated that, as a result, "we are concerned about the expenditures and, you know, having a discussion with them about what we're going to do with the program," because "if the revenue is dropped, their expenditures should be dropping as well." Ex. 7 at 14. She testified that, as revenues declined, it might even become necessary to cut personnel from the program. *Id.* at 77 ("[I]t probably will be a discussion . . . do we need all these positions?"). The head of the DWI Seizure Unit, meanwhile, frankly acknowledged that the decline in revenue is "hurting the program." Ex. 8 at 17; *see also* Ex. 6 at 55-58. This testimony, detailing the adverse impact of declining program revenues, leaves no question that the program is dependent on maintaining that revenue stream.

B. The City Plans For Forfeiture Revenues In Its Budget And Tracks Program Revenues Against Annual Targets.

In *Marshall*, the Supreme Court also deemed it significant that the "administration of the Act has minimized any potential for bias." 446 U.S. at 251. This was because officials had "no

assurance" their office would benefit from the penalties they imposed, as the agency allocated funds on the basis of expenses rather than revenues. *Id.* Once again, the opposite is true here. The administration of the City's forfeiture ordinance maximizes the potential for bias, as the City guarantees that the program will benefit from forfeitures, budgets based on anticipated forfeiture revenue, uses forfeiture revenue to pay for bonus equipment and supplies, tracks forfeiture revenues against budgeted revenue goals, and treats revenue generation as an explicit purpose of the forfeiture program.

Whereas in *Marshall* government agents had "no assurance" that their office would benefit from the revenue that they generated, in this case such a benefit is written into law. The City's forfeiture ordinance specifically provides that revenue must be used first to pay program expenses and then to fund related DWI enforcement efforts. ROA § 7-6-5(E). Program personnel are well aware of this fact: One employee testified that she read the ordinance when she started working at the DWI Seizure Unit and understood the ordinance to say that "we use the money to enforce DWI seizure laws, to educate people on the DWI seizure laws, and that's it." Ex. 9 at 73. The hearing officer for Arlene's case, meanwhile, stated that he personally had relied on this language to "resist former mayors wanting to transfer it all to the general fund." Ex. 33 at 1:20:30.

In actual practice, as well, the amount of money the program has to spend is determined by the amount of money it is able to generate. SMF ¶¶ 33-34; *see also* Gardemal Dec. ¶¶ 58-61. The City's witnesses openly admitted that the City Council appropriates the program's budget based on projected forfeiture revenue. *See* Ex. 7 at 17 ("[B]ecause we think we're going to get a million dollars in revenue, we'll allow them to spend a million."). Actual spending then adjusts

to reflect actual forfeiture revenue: The APD's Fiscal Manager testified that, "[i]f more revenue comes in, then yes, our expenditures can increase" and that, conversely, "[i]f less revenue comes in, then we don't—we have less availability to expend funds." Ex. 6 at 136. This direct relationship between revenue and spending creates precisely the type of incentive that *Marshall* deems inconsistent with due process.

To the extent that program revenue exceeds the program's necessary expenses, the City also uses the program to pay for bonus equipment and supplies—purchases the City might not otherwise be able to afford. SMF ¶ 31. Some of these purchases directly benefit program staff. *See, e.g.*, Ex. 10 at 36-37 (testimony of program employee about his new computer). And all of these purchases alleviate potential shortfalls in the City's budget—either freeing up resources for other priorities, or else funding expenses that otherwise could not be incurred. *See* Gardemal Dec. ¶¶ 52-57. There is no question that the City's overall budget is "very, very tight," Ex. 6 at 148, requiring "difficult choices" about what to fund, Ex. 21, and the ability to supplement that budget gives rise to an additional institutional incentive.

The City ramps up this incentive in another way, as well, as the City sets annual targets for forfeiture revenues and tracks performance against those goals. SMF ¶¶ 35-42. The City's annual budget includes "performance measures" setting targets for the number of seizures, the number of vehicles returned via settlement, and the amount of money raised at auction. *Id.* ¶ 35. Every annual budget also includes the program's actual performance on those metrics during the prior fiscal year, as well as that last year's goals. *Id.* ¶ 38. And the program also tracks monthly performance: Program personnel maintain a spreadsheet tracking monthly intake of vehicles, monthly income from settlements and forfeitures, and a comparison of those figures to

the same time the last year. *Id.* ¶ 40. Program personnel are acutely aware of these numbers; one employee testified that she would discuss these monthly numbers with the head of the unit, including "looks like our numbers are going up or looks like our numbers are going down" and "trying to average out what a car was—is bringing in." Ex. 9 at 21-22; *see also* Ex. 28 (email stating: "Wow! Their numbers are dropping!"). This kind of overt benchmarking of revenues amplifies the incentive faced by program personnel.

The evidence also shows that the City treats revenue generation as an explicit objective of the forfeiture unit. Annual performance evaluations for program personnel list "increas[ing] the amount of revenue generated from Seized vehicles" as one of the unit's "Output Measures." Ex. 18 at 1; Ex. 19 at 1; *see also* Ex. 8 at 29 (agreeing that these "Output Measures" serve as "a measure of the unit's success or failure"). City policy documents describe "provid[ing] equipment" as the program's "Concept of Operations." Ex. 16; *see also* Ex. 8 at 15. And the City's 2016 budget openly listed as an "accomplishment[ ]" that the program "generat[ed] $471,000 in proceeds to fund law enforcement efforts." Ex. 11 at 182. One does not have to look far between the lines to see the financial incentive in this case. The City openly instructs program employees that generating revenue is their goal.

C. This Financial Incentive Affects City Officials Who Exercise Considerable Discretion To Return Or Forfeit Property.

Finally, moving from the institutional level to the level of personnel, the undisputed facts show that city officials who exercise significant discretion to return or forfeit property are subject to this financial incentive. These officials are aware of the use made of forfeiture revenues, are involved in the tracking of forfeiture revenues, and face possible personal and professional consequences if forfeiture revenues falter.

1. City Attorneys.

The first personnel subject to this incentive are the two city attorneys assigned to the forfeiture program. These city attorneys exercise considerable discretion to return property and are exposed to this incentive in myriad ways.

The undisputed facts show that these city attorneys have latitude to set the financial consequences associated with vehicle seizures. Most obviously, these city attorneys conduct settlement negotiations and enjoy discretion to set settlement terms. SMF ¶¶ 10-12. This is precisely the type of prosecutorial discretion that *Marshall* and *Young* hold must be exercised free from bias, as "the decision to enforce—or not to enforce—may itself result in significant burdens." 446 U.S. at 249; *see also Young*, 481 U.S. at 814 ("[W]e must have assurance that those who would yield this power will be guided solely by their sense of public responsibility."). City attorneys in civil forfeiture proceedings wield the unparalleled power of the government to deprive individuals of property, often without any meaningful judicial oversight. In wielding that power, the City's attorneys must act as impartial public servants and cannot be subject to the kind of extraordinary financial incentives at issue in this case.

The undisputed facts also show that these attorneys are aware of the fiscal importance of forfeiture revenues. On this score, evidence concerning the particular city attorney who offered to return Arlene's car at a cost of $4,000 is instructive. Months before making this settlement offer, both the APD's Fiscal Manager and the attorney's supervisor emailed him information about the financial benefits provided by program revenues—including the fact that revenues are used to pay attorney salaries. SMF ¶ 58. Then, not long after making that settlement offer, the

attorney was tasked with compiling data on the program's progress towards meeting its annual performance measures. *Id.* ¶ 59.

Finally, the undisputed facts show that city attorneys receive a direct personal benefit as a result of forfeiture revenues. Specifically, the entire annual salaries of these city attorneys (plus benefits like health insurance) are paid by program revenues. SMF ¶ 29. So, for instance, the attorney responsible for settlement negotiations in Arlene's case received $70,776 in forfeiture revenues during that fiscal year. *Id.* ¶ 57. [redacted] That kind of direct personal benefit is not required by the case law, which holds that an institutional incentive alone may violate due process. *See, e.g.*, *Marshall*, 446 U.S. at 250-51. While not necessary, however, this kind of direct personal benefit is sufficient *by itself* to give rise to a violation, as it prevents the necessary "assurance that those who would wield [prosecutorial] power will be guided solely by their sense of public responsibility." *Young*, 481 U.S. at 814.[5] The combination of both institutional and personal benefit in this case gives rise to a uniquely powerful incentive that cannot be squared with the requirements of due process.

[5] *See also Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding, in view of the "vast quantum of discretion" exercised by prosecutors, that prosecution by attorney with a financial conflict violated due process); *Clancy v. Superior Court*, 705 P.2d 347, 352 (Cal. 1985) (disapproving contingency arrangements for government attorneys in nuisance abatement actions and stating that a "financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated"); *Baca v. Padilla*, 26 N.M. 223, 228-229 (N.M. 1920) ("To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused . . . is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.").

2. Enforcement Personnel.

The undisputed facts show that enforcement officials assigned to the DWI Seizure Unit are also subject to this unlawful financial incentive. These individuals have the ability to affect the direction of forfeiture proceedings, as in fact occurred in this case.

These enforcement officials are responsible for conducting the only investigation following a seizure, including verifying that (as is particularly relevant here) the location of the seizure falls within city limits. SMF ¶¶ 4-7. The diligence with which officials conduct such investigations affects both the outcome for property owners and the amount of revenue generated: In Arlene's case, the city official who conducted this investigation could have determined the location of the seizure based on the information provided in the police report but failed to do so. *Id.* ¶ 68. If Arlene had not challenged the forfeiture, the official's lackluster investigation would have resulted in Arlene losing her car—and the City making a profit—even though it was not subject to forfeiture.

These officials are also aware of the importance of forfeiture revenues. The official who failed to verify the location of the seizure in Arlene's case admitted that he has a "sense" that program revenue benefits the program, as new equipment "has to come from somewhere." Ex. 10 at 34. He testified that "I got a new computer," that he appreciated this benefit because the computer "run[s] faster and better," and that his "sense" was that it was paid for by forfeiture revenues. *Id.* at 36-37. Other personnel likewise testified that they are aware that program revenues go to fund the program's budget. Ex. 9 at 71-73.

Finally, the undisputed facts show that these enforcement officials receive a direct personal benefit from the program, as they too have their salaries paid by program revenues.

SMF ¶¶ 28-29, 68. So, for instance, the official who failed to verify the location of the seizure in Arlene's case received $80,966 in program revenue as salary and benefits in that same fiscal year. Ex. 2 at 14. Again, while the institutional incentive in this case would be sufficient on its own to violate due process, this kind of personal benefit gives rise to an even more powerful incentive and vividly confirms the presence of a due process violation.

3. The Administrative Hearing Officer.

Finally, the City's administrative hearing officers are also subject to this incentive. This is particularly significant, as the Supreme Court has made clear that—while financial incentives for enforcement personnel do implicate due process—due process imposes even more significant constraints on judicial officers. *See Marshall*, 446 U.S. at 247-48. While the hearing officer in Arlene's case does not have his salary paid by forfeiture revenues, and is not formally part of the forfeiture program, he is nonetheless affected.

The hearing officer is aware of the importance of forfeiture revenues to the forfeiture program. SMF ¶¶ 62-63. When the City considered a possible revenue-sharing agreement with Bernalillo County, city employees consulted with the hearing officer about the percent of forfeiture revenues that go to cover program expenses. *Id.* ¶ 63. And, attending a conference event for forfeiture attorneys in 2014, the hearing officer stated that he personally had relied on language in the forfeiture ordinance directing funds back to the program to "resist former mayors wanting to transfer it all to the general fund." Ex. 33 at 1:20:30.

While the hearing officer is not formally part of the forfeiture program, his job is still inextricably bound up with the program. Of the 1668 hearings that the hearing officer conducted in 2016, a full 1288 (over 77%) were conducted under the City's forfeiture ordinance. SMF ¶ 64.

If the program were to go away—for instance, because it became financially unsustainable—the hearing officer's stream of cases would dry up as well. And that could impact the hearing officer personally: When the City shut down its red light ticketing program in 2013, the City cut six positions from the administrative hearing office as a result. *Id.* ¶ 49.

While there is no question that the personal benefit to the hearing officer is less direct than the benefit to enforcement personnel—because he is not formally part of the program and does not have his salary paid by forfeiture revenues—this kind of *institutional* incentive is sufficient to establish a due process violation under the stringent standards that apply to judicial officers. In *Ward*, for instance, the Court found a violation where cases were adjudicated by a mayor who did not derive any personal benefit from penalties, but who nonetheless faced institutional pressure to bring in revenue. *See* 409 U.S. at 58-60. Even if the mayor did not benefit personally, the Court reasoned that the mayor, by virtue of his institutional role, would feel improper pressure to "maintain the high level of contribution" from his decisions. *Id.* at 60. The City's hearing officer is subject to the same kind of pressure, as his decisions finance a self-funding forfeiture program that makes up almost the entirety of his docket.

II. The Procedures Employed By The City's Program Give Rise To An Unacceptable Risk That The Program Will Be Used To Punish Innocent Parties.

This financial incentive is not the only constitutional flaw with the City's forfeiture program. The program also violates due process by creating an unacceptable risk that innocent property owners will be deprived of their property. Primarily, this is because the City places the burden on property owners to prove their own innocence, requiring proof that they "could not have reasonably anticipated that the vehicle could be used" to violate the law. ROA § 7-6-7(A). This constitutional infirmity, moreover, is exacerbated by other aspects of the program, including

the fact that the City uses mounting storage fees to pressure property owners into settlements, and the fact that the City requires that vehicle owners prove their innocence before a hearing officer who faces an institutional financial incentive to generate forfeiture revenues. These procedures give rise to an unacceptable "risk of an erroneous deprivation" under *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).[6]

Just this year, in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), the Supreme Court found a violation of due process where individuals whose criminal convictions were overturned on appeal were required to present affirmative proof of innocence to obtain a refund of costs, fees, and restitution imposed as part of their convictions. The Court in *Nelson* applied the *Matthews* framework—the same framework that applies here—and found that forcing people to prove their own innocence gave rise to an unacceptable risk of erroneous deprivation. *Id.* at 1256-57. The Court explained that such a burden violates the "[a]xiomatic and elementary" principle that individuals are "entitled to be presumed innocent." *Id.* at 1255-56. This case follows from *Nelson*: If people who have previously been convicted of a crime cannot be required to prove their own innocence, then people who have never been convicted of anything certainly cannot be put to such a burden. The City violated Arlene's due process rights by putting the burden on her to prove her own innocence.

[6] The risk of erroneous deprivation is one of three factors under the *Matthews* due process inquiry. The City has previously conceded the first factor, the existence of a property right. *See* Doc. 44 at 11-12 ("The City does not dispute that the use of a vehicle is a protected property interest."). And the third factor—the state interest involved—is not seriously in play because, while the City obviously has an interest in deterring violations of the criminal laws, the City cannot advance that interest by punishing innocent people. *See Nelson*, 137 S. Ct. at 1257 (holding, in analogous context, that the government "has no interest in withholding [property] to which the [government] currently has zero claim of right").

The City's earlier Motion for Judgment on the Pleadings argued that this claim was foreclosed by *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), which the City reads as holding that "provision of an innocent owner defense is not even required by the Constitution." Doc. 44 at 16. But *Bennis* addressed a different claim on a different set of facts. *Bennis* rejected the due process claim of a wife whose car was forfeited because her husband—an equal co-owner—violated the law. 516 U.S. at 443. The Supreme Court emphasized that the forfeiture court had "authority to order the payment of one-half of the sale proceeds" to the wife as co-owner and had only "declined to order such a division of sale proceeds . . . because of the age and value of the car." *Id.* at 445. The couple had recently purchased the car for just $600, and the judge found that there would be "'practically nothing left minus costs.'" *Id.* On those facts, the Supreme Court found that the forfeiture's impact on the wife did not constitute punishment and instead was a kind of unavoidable collateral damage from the punishment of the husband. *Id.* at 452. By contrast, the forfeiture of Arlene's car would not have punished her son at all, as it is not his car. *See* Harjo Dec. ¶¶ 4-5. The impact of the forfeiture on Arlene—far from a kind of unavoidable collateral damage—was the primary thrust of the forfeiture action. In other words, unlike the property owner in *Bennis*, Arlene was threatened with punishment for something she did not do. And *Bennis* does not hold that the government can punish innocent people.

In fact, the inadequacy of the City's procedures is underscored by the concurring opinions of Justices Ginsburg and Thomas in *Bennis*. Those Justices provided essential votes for the 5-4 decision, and their opinions both stressed the low value of the car and the fact that the husband was a co-owner. *See* 516 U.S. at 456 (Thomas, J., concurring); *id.* at 457 (Ginsburg, J., concurring). Justice Thomas concluded that the forfeiture of the wife's interest, on those facts,

could "be characterized as 'remedial,'" with the result that "the more severe problems involved in punishing someone not found to have engaged in wrongdoing of any kind do not arise." *Id.* at 456.[7] And Justice Ginsburg likewise concluded that the state had "not embarked on an experiment to punish innocent third parties." *Id.* at 458. The City has embarked on just such an "experiment" here, raising precisely the "severe problems" that Justice Thomas warned about. Under the reasoning of both concurrences, the City's program violates the Constitution.

The constitutional issues raised by the allocation of the burden of proof are exacerbated by other aspects of the City's program. In *Nelson*, the Supreme Court held that the due process problems associated with forcing people to prove their own innocence were magnified by "the cost of mounting a claim . . . and retaining a lawyer," which could prove "prohibitive." 137 S. Ct. at 1257. Here those costs are even greater. Most notably, under the City's ordinance, property owners rack up steadily-accumulating storage fees every day they litigate and risk being charged fees even if they prevail.[8] In addition, because the City retains seized property for the full length of the litigation, property owners must go without access to their cars—for many, among their most important possessions—for as long as they choose to fight. *See Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.) (noting the "particular importance of motor vehicles," which "derives from their use as a mode of transportation and, for some, the means to earn a

[7] Justice Thomas also noted the apparent lack of any significant financial incentive to forfeit the car, observing that the "'costs'" to be covered by the $600 value of the car most likely constituted only "the costs of sale" or at most the "costs of keeping the car and law enforcement costs *related to this particular proceeding*." 516 U.S. at 456 n.* (emphasis added).

[8] Here, the Tenth Circuit's decision in *Goichman v. City of Aspen*, 859 F.2d 1466 (10th Cir. 1988), is instructive. *Goichman* upheld a scheme under which property owners were charged tow and storage fees, but the court also specifically noted that the city provided a prompt hearing where, if the vehicle owner prevailed, all "towing and impound fees were waived and reimbursed if already paid." *Id.* at 1467 n.3; *see also id.* at 1468 & n.5.

livelihood"); *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) ("Automobiles occupy a central place in the lives of most Americans."). Faced with these costs, even innocent property owners may be compelled to accept the settlement offers that the City routinely extends.

These constitutional infirmities are exacerbated even further by the use of forfeiture revenues to fund the forfeiture program's budget. Courts hold that procedural protections assume "particular importance" in the forfeiture context, where the government "has a direct pecuniary interest." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993); *see also Krimstock*, 306 F.3d at 51. After all, "it makes sense to scrutinize governmental action more closely when the [government] stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (citing cases). As discussed above, while civil forfeiture nearly always gives rise to a financial incentive, that incentive is particularly strong here where the forfeiture program is financially dependent on forfeiture revenue, salaries are paid with forfeiture revenue, and the City plans for forfeiture revenue in its annual budget. That extraordinary financial incentive is itself a constitutional violation, but it also provides an additional reason to hold the City's procedures inadequate to protect the innocent.

CONCLUSION

Plaintiff's Motion for Partial Summary Judgment should be granted.

Dated: October 16, 2017

Respectfully submitted,

/s/ Robert Everett Johnson

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CERTIFICATE OF SERVICE

I hereby certify that, on October 16, 2017, I caused the foregoing Motion for Partial Summary Judgment to be filed via the Court's ECF system and that the Court's ECF system automatically served counsel for Defendant.

/s/ Robert Everett Johnson