

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

The Honorable LISA TORRACO and
the Honorable DANIEL A. IVEY-SOTO,
in their individual and official capacities
as New Mexico State Senators,

Plaintiffs,

v.

CITY OF ALBUQUERQUE,

Defendant.

Civil Action No. D-202-CV-2015-08736

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Lisa Torraco and Daniel A. Ivey-Soto, New Mexico State Senators, hereby respectfully move the court for entry of judgment on the pleadings pursuant to Rule 1-012(C). Because this case “raises issues of law only, and the essential facts . . . are uncontroverted,” *W. Commerce Bank v. Reliance Ins. Co.*, 1987-NMSC-009, ¶ 3, 105 N.M. 346, judgment may be entered without any need for fact-finding or further proceedings.

This action seeks to enforce New Mexico’s landmark civil forfeiture reforms. Civil forfeiture inverts the principle of “innocent until proven guilty,” as it allows government to take property without convicting anyone of a crime. And civil forfeiture creates a financial incentive for abuse, as it allows law enforcement to keep forfeiture proceeds to fund their budgets.¹

In 2015, New Mexico’s Legislature enacted reforms intended to “ensure that *only criminal forfeiture* is allowed in this state.” NMSA 1978, § 31-27-2(A)(6) (emphasis added). In

¹ As stories of abuse have proliferated, civil forfeiture has become increasingly controversial. For a thorough treatment of the issues, see Dick M. Carpenter II, *et al.*, *Policing for Profit* (2d ed. 2015), available at bit.ly/1kNs0Fu.

other words, state law now makes a criminal conviction a necessary prerequisite to every forfeiture action. *Id.* § 31-27-4(A). And the reforms also eliminate law enforcement’s financial incentive to take property, as state law now provides that forfeiture proceeds must be deposited in the state’s general fund. *Id.* § 31-27-7(B).

The City of Albuquerque, however, admits that it continues to take property using *civil* forfeiture from people accused (but not convicted) of a broad range of criminal offenses. *See* Answer ¶¶ 23-24, 70-73. And Albuquerque also admits that it continues to retain forfeiture proceeds for use by law enforcement—including to pay law enforcement salaries—and even plans for those proceeds in its annual budget. *See id.* ¶¶ 25-27.

Where an “ordinance is inconsistent with a general State statute then the State statute controls.” *Protection and Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 48, 145 N.M. 156; *see also ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶¶ 10-11, 128 N.M. 315. The legislature has abolished civil forfeiture in New Mexico, and Albuquerque must comply.

ARGUMENT

Albuquerque’s Answer raises two legal arguments in defense of its conduct, and this motion addresses both in turn. First, Albuquerque disputes Plaintiffs’ standing. *See* Answer ¶¶ 12, 17-21; Affirmative Defenses ¶ 1. And, second, Albuquerque claims that municipalities enjoy an “exemption” from state forfeiture law. *See* Answer ¶¶ 51-52; Affirmative Defenses ¶¶ 2-3. Both arguments lack merit: This Court has power to confer standing on Plaintiffs to litigate this question of great public importance, and the “exemption” claimed by Albuquerque is nowhere to be found in the text of the law and was in fact *repealed* by the Legislature.²

² Albuquerque’s Answer also includes a laundry list of additional defenses, all of which are plainly inapposite. *See* Affirmative Defenses ¶¶ 4-10. This is not a tort action, so the New

(continued on next page)

I. THIS COURT MAY CONFER STANDING ON PLAINTIFFS.

It is black letter law in New Mexico that courts may confer standing on litigants—often, like Plaintiffs, elected officials seeking to vindicate institutional interests—to litigate cases that raise questions of “great public importance.” *See, e.g., New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶ 9, 149 N.M. 207; *Baca v. Dep’t of Pub. Safety*, 2002-NMSC-017, ¶ 3, 132 N.M. 282; *Clark v. Johnson*, 1995-NMSC-048, ¶ 15, 120 N.M. 562; *Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359. This is such a case.

The application of the 2015 reforms—hereinafter, the Forfeiture Reform Law—to Albuquerque’s forfeiture program is a matter “of fundamental importance to the people of New Mexico.” *Baca*, 2002-NMSC-017, ¶ 4. The Forfeiture Reform Law was enacted amidst a wave of outrage, as municipal forfeiture programs garnered substantial public attention.³ The law passed unanimously through the Legislature and was adopted to promote the vitally important aim of “protect[ing] the constitutional rights of persons whose property is subject to forfeiture.” NMSA 1978 § 31-27-2(A)(2). Now that the reforms have become law, the public has a pressing interest in determining the legality of a municipal forfeiture program that results in the seizure of

Mexico Tort Claims Act is irrelevant. *See id.* ¶ 5. The parties have not previously litigated these issues, so *res judicata* and collateral estoppel have no application. *See id.* ¶ 6. Plaintiffs do not seek damages, so judicial, legislative, and qualified immunity are beside the point. *See id.* ¶¶ 7-9. Albuquerque has identified no basis whatsoever for its cursory suggestion that this suit is barred by waiver and estoppel. *See id.* ¶ 10. And the availability of attorney fees may be litigated at the conclusion of the action and has no relevance to the underlying merits. *See id.* ¶ 4.

³ *See, e.g.,* Editorial, *Property Forfeiture Should Apply to Those Found Guilty*, Albuquerque Journal, Mar. 31, 2015, available at <http://bit.ly/1NSLFf5>; Hal Stratton, Op-Ed, *Legislature Tackles ‘Policing for Profit,’* Albuquerque Journal, Mar. 29, 2015, available at <http://bit.ly/1mLqogU>; Rob Nikolewski, *A ‘Gold Mine’ or a Civil Liberties Outrage? Civil Forfeiture Remarks Go Viral*, Capitol Report New Mexico, Nov. 14, 2014, available at <http://bit.ly/1JclzHq>; James Staley, *Critics Hammer Las Cruces City Attorney for Forfeiture Comments*, Albuquerque Journal, Nov. 12, 2014, available at <http://bit.ly/1TmR0z8>.

more than one thousand vehicles and collects over \$1 million every year, to say nothing of similar programs in other cities across the state.⁴

Standing is also doubly appropriate because a decision in this case will “contribute to this State’s definition of itself as sovereign.” *Clark*, 1995-NMSC-048, ¶15. On that basis, the New Mexico Supreme Court has repeatedly conferred standing to determine the proper allocation of governmental power in cases where government officials “have exceeded their constitutional authority.” *New Energy Economy*, 2011-NMSC-006, ¶ 9; *see also Clark*, 1995-NMSC-048, ¶15. Here, Albuquerque has exceeded the authority granted by the home rule provision of the New Mexico Constitution. By enforcing that constitutional limit on municipal authority, this Court will help define the relationship between municipalities and the Legislature.

Although *ACLU v. City of Albuquerque*, 2008-NMSC-045, ¶¶ 33-34, 144 N.M. 471, declined to confer standing to raise a due process challenge to Albuquerque’s vehicle forfeiture ordinance, that case is easily distinguished on at least two separate grounds. First, the Court reasoned that the due process challenge in that case—which concerned limitations on the scope of the hearing officer’s review—pertained to the rights of forfeiture claimants and not “the state’s definition of itself as a sovereign.” *Id.* ¶¶ 5, 34. As explained above, the same cannot be said for the dispute between state and municipal officials at issue here. And, second, the Court reasoned that the due process issue was “best addressed in the context of a specific case.” *Id.* ¶ 34. After all, the scope of the hearing officer’s review could best be assessed on the basis of the

⁴ *See* Answer ¶ 1 (admitting that Albuquerque seized more than 6,800 vehicles between 2010 and 2014 and that its program brings in over \$1 million per year). Even before this suit was filed, the public was concerned with Albuquerque’s defiance of the Forfeiture Reform Law. *See, e.g.,* Ryan Boetel, *New Place to Park Seized Cars*, Albuquerque Journal, Sept. 29, 2015, available at bit.ly/1KNZcSW; Daniel J. Chacón, *Attorneys Say Cities Won’t Budge on DWI Seizures, Despite New State Law*, Santa Fe New Mexican, Sept. 2, 2015, available at bit.ly/1JDvzhzb.

actual record of a forfeiture proceeding. That reasoning is likewise inapposite, as the purely legal questions raised by this case do not depend on facts and circumstances and would not be made any more “concrete” in a different procedural posture.

Nothing would be gained—and much would potentially be lost—by waiting to address these questions in a specific forfeiture proceeding. Few property owners have the resources or incentives to fully litigate this issue to recover a single vehicle. And even cases that do reach the court may be decided on individualized grounds peculiar to the case. If Plaintiffs do not have standing, Albuquerque’s forfeiture program may continue for years without a court ruling on its legality. The “great public importance” doctrine serves to avoid precisely that result.

II. THE FORFEITURE REFORM LAW PREEMPTS ALBUQUERQUE’S VEHICLE FORFEITURE ORDINANCE.

The preemption analysis in this case is straightforward. Albuquerque’s vehicle forfeiture ordinance conflicts with—and is therefore preempted by—the Forfeiture Reform Law because it allows government to continue taking property through civil forfeiture even after that practice has been abolished. Albuquerque claims that it enjoys an “exemption” from state forfeiture law, Answer ¶ 52, but that exemption can be found nowhere in the text of the law. To the contrary, an earlier version of the law provided just such an exemption, but that exemption was repealed.

A. Albuquerque’s Forfeiture Ordinance Conflicts With—And Is Therefore Preempted By—The Forfeiture Reform Law.

Notwithstanding Albuquerque’s status as a home rule municipality, Albuquerque cannot enact ordinances that depart from “general law” enacted by the Legislature. N.M. Const. art. X, § 6(D). State law need not expressly say that municipal ordinances are preempted. *See Cause v. City of Gallup*, 1987-NMSC-112, ¶ 6, 106 N.M. 571. Rather, “if the ordinance is inconsistent with a general State statute then the State statute controls.” *Protection and Advocacy Sys.*, 2008-NMCA-149, ¶ 48; *see also ACLU*, 1999-NMSC-044, ¶¶ 10-11.

The conflict between the Forfeiture Reform Law and Albuquerque’s vehicle forfeiture ordinance appears plainly on the face of the enactments. Among other things:

	State Forfeiture Reform Law	Albuquerque Vehicle Forfeiture Ordinance
Is a criminal conviction required?	<u>Yes.</u> See NMSA 1978, § 31-27-4(A) (2015).	<u>No.</u> See ROA 1994, §§ 7-6-2; 7-9-3; 7-14-2.
What is the burden to prove the alleged offense?	<u>Beyond a reasonable doubt.</u> See NMSA 1978, § 31-27-4(A) (2015).	<u>Probable cause.</u> See ROA 1994, §§ 7-6-5(D); 7-9-3(C); 7-14-5(E).
Can government forfeit property based on conduct of a non-owner?	<u>No.</u> See NMSA 1978, §§ 31-27-6(F), (G)(2) (2015).	<u>Yes.</u> See ROA 1994, §§ 7-6-7(A); 7-9-3(G); 7-14-7(A).
In cases involving a co-owner, what is the legal standard?	After co-owner proves an ownership interest, the <u>government</u> must prove by <u>clear and convincing evidence</u> that the co-owner had “ <u>actual knowledge</u> ” of the alleged offense. NMSA 1978, § 31-27-7.1(D) (2015).	The <u>co-owner</u> must show by a <u>preponderance of the evidence</u> that he or she “ <u>could not have reasonably anticipated</u> ” the alleged offense. ROA 1994, § 7-6-7(A); <i>see also id.</i> §§ 7-9-3(G) (outside DWI context, co-owner must prove lack of “knowledge or consent”); 7-14-7(A) (same).
Can successful claimants be charged storage fees?	<u>No.</u> See NMSA 1978, § 31-27-10(B) (2015).	<u>Yes.</u> See ROA 1994, § 7-6-7(E).
What is the disposition of forfeiture proceeds?	Deposited in <u>state general fund.</u> See NMSA 1978, § 31-27-7(B) (2015).	Retained by <u>law enforcement.</u> See ROA 1994, §§ 7-6-5(E), 7-9-3(F); 7-14-5(F).

These conflicts are all the more stark given that Albuquerque’s ordinance authorizes forfeiture for alleged violations of *state* criminal laws and is enforced through forfeiture actions filed in *state* court. *See, e.g.*, ROA 1994, § 7-6-2(A) (citing state DWI law). Albuquerque’s ordinance operates in an area permeated by state law, yet entirely ignores state forfeiture legislation.

These conflicts go to the heart of the Legislature’s purpose in enacting the Forfeiture Reform Law. *See ACLU*, 1999-NMSC-044, ¶ 13 (considering express statement of legislative purpose in preemption analysis). The law states in its very first section that it was enacted to “ensure that *only criminal forfeiture* is allowed in this state.” NMSA 1978, § 31-27-2(A)(6) (2015) (emphasis added). Yet Albuquerque continues to operate a *civil* forfeiture program. The

Forfeiture Reform Law also was intended to “protect the constitutional rights” of people targeted for forfeiture, *id.* § 31-27-2(A)(2), and to “protect against the wrongful forfeiture of property,” *id.* § 31-27-2(A)(5). Allowing Albuquerque to disregard the law’s limitations on the use of civil forfeiture “would circumvent and thereby frustrate the Legislature’s intent to protect” property owners. *ACLU*, 1999-NMSC-044, ¶ 13.⁵

Indeed, this case is strikingly similar to three other cases, all involving laws that (like the Forfeiture Reform Law) were enacted to protect individuals from the government. First, in *ACLU*, 1999-NMSC-044, a law enacted to “protect and preserve the legal rights of children” by defining the kinds of sanctions that could be imposed on juveniles preempted an Albuquerque ordinance that exposed juveniles to greater sanctions. *Id.* ¶¶ 11-14. Second, in *Protection and Advocacy System*, 2008-NMCA-149, a law enacted to “respect the treatment decisions” of the mentally ill by defining “the circumstances in which an individual can be required to take treatment” preempted an Albuquerque ordinance that authorized forced medication in additional circumstances. *Id.* ¶ 71. And, finally, in *O’Connell v. City of Stockton*, 41 Cal.4th 1061 (Cal. 2007), California law sought to protect property owners from the “harsh effects” of civil forfeiture by predicating forfeiture for certain offenses on proof beyond a reasonable doubt. *Id.* at 1071.⁶ This law preempted an ordinance that “allow[ed] the harsh penalty of vehicle forfeiture upon proof merely by a *preponderance of evidence*.” *Id.* The same reasoning applies here: The

⁵ Albuquerque’s characterization of its ordinance as a “nuisance abatement” scheme does not change this analysis. Albuquerque’s ordinance provides that vehicles are “subject to immediate seizure *and forfeiture*.” ROA 1994, § 7-6-2 (emphasis added). And Albuquerque admits that it files “nuisance abatement *vehicle forfeiture* actions.” Answer ¶ 73 (emphasis added). Albuquerque’s use of the word “nuisance” cannot change the fact that it is engaged in the practice of civil forfeiture. *See ACLU*, 1999-NMSC-044, ¶ 16.

⁶ California, like New Mexico, is a home rule state, and the New Mexico Supreme Court has looked to the California Supreme Court for guidance when determining the home rule powers of New Mexico municipalities. *See Apodaca v. Wilson*, 1974-NMSC-071, ¶¶ 10-12, 86 N.M. 516.

Legislature has acted to protect property owners by abolishing civil forfeiture, and Albuquerque's ordinance is preempted because it disregards that limit on government action.

B. The Forfeiture Reform Law Makes No Exception For Inconsistent Municipal Ordinances.

In its Answer, Albuquerque brushes away this conflict on the theory that the Forfeiture Reform Law includes an "exemption" for municipal ordinances. Answer ¶ 52. Albuquerque purports to find authority for this exemption in the statutory text and legislative history. But the exemption claimed by Albuquerque does not exist.

1. Statutory Text.

Albuquerque locates this supposed "exemption" in a provision that, on its face, only identifies a category of cases to which the Forfeiture Reform Law *does* apply. The law states that it applies to forfeitures "pursuant to laws that specifically apply the Forfeiture Act." NMSA 1978, § 31-27-2(B)(1) (2015). Albuquerque urges this Court to read that language as pregnant with the implication that the law does *not* apply to forfeitures pursuant to municipal ordinances that fail to "specifically apply" the Forfeiture Act. *See* Answer ¶ 52. However, both context and history make plain that the statutory language carries no such latent implication.

Albuquerque's purported "exemption" from the Forfeiture Reform Law is immediately adjacent to language that expressly *does* limit the law's application: The provision that follows states that the law "does not apply to contraband." NMSA 1978, § 31-27-2(B)(2) (2015). This is the only actual exemption included in the Forfeiture Reform Law, and it has nothing at all to do with vehicle forfeiture ordinances.⁷ The presence of this exemption is significant for at least two reasons. First, the exemption for contraband would be entirely unnecessary if the provision that it

⁷ The law defines "contraband" as "goods that may not be lawfully imported, exported or possessed." NMSA 1978, § 31-27-3(C) (2015). Automobiles do not fall within this definition.

follows was read (as Albuquerque urges) to exempt *all* laws that fail to “specifically apply” the Forfeiture Act. After all, laws concerning contraband would then be automatically exempt so long as they failed to mention the Forfeiture Act. And, second, the law’s exemption for contraband shows that the Legislature knew very well how to craft an exemption from state forfeiture law—and yet included *no* such exemption for municipal forfeiture ordinances.⁸

History confirms what context makes clear, as the Forfeiture Reform Law *repealed* language that did exempt municipal forfeiture ordinances from state forfeiture law. The law previously gave municipalities scope to enact forfeiture ordinances (like the ordinance at issue here) inconsistent with state law: The law stated that it applied to forfeitures “pursuant to laws that specifically apply the Forfeiture Act,” as well as to forfeitures “pursuant to *other laws*; but *only to the extent* that the procedures in the Forfeiture Act for seizing, forfeiting or disposing of property *are consistent with* any procedures specified in those laws.” NMSA 1978, § 31-27-2(B) (2002, before 2015 amendment) (emphasis added). In the Forfeiture Reform Act, however, the Legislature repealed the provision exempting “other laws” and replaced it with the narrow exemption for contraband discussed above. *See* NMSA 1978, § 31-27-2(B) (2015). In other words, the exemption claimed by Albuquerque formerly existed but was specifically eliminated. Albuquerque would have this Court read that exemption back into the law, but this Court should decline to engage in such a dramatic re-writing of the statute.

2. Legislative History.

Albuquerque also cites in support of its claimed exemption “the testimony of the bill’s sponsor . . . on the House floor,” although Albuquerque does not otherwise explain what that

⁸ Other state laws, by contrast, do include provisions expressly saving municipal ordinances from preemption. *See, e.g., ACLU v. City of Albuquerque*, 2006-NMCA-078, ¶ 15, 139 N.M. 761.

testimony consisted of. Answer ¶ 51. Statements by legislators cannot justify departure from the text of the statute. As the New Mexico Supreme Court has explained, “[i]t is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself,” particularly as “we have no state-sponsored system of recording the legislative history of particular enactments.” *Regents of the Univ. of New Mexico v. New Mexico Fed’n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401; *see also id.* ¶ 32 (“The statements of legislators . . . cannot be considered competent evidence in establishing what the Legislature intended.”). The best evidence of legislative intent is the law itself. In this case, no legislative history can change the fact that Albuquerque’s vehicle forfeiture ordinance conflicts on its face with the Forfeiture Reform Law—which contains no statutory exemption for municipal ordinances—and is therefore preempted.

CONCLUSION

Plaintiffs’ Motion for Judgment on the Pleadings should be granted and Albuquerque’s continued enforcement of its vehicle forfeiture ordinance should be enjoined.

Dated: January 20, 2016

Respectfully submitted,

/s/ Brad Cates

/s/ Robert Everett Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2016, a true and correct copy of the foregoing **MOTION FOR JUDGMENT ON THE PLEADINGS** was filed and electronically delivered through the Odyssey File and Serve electronic filing system to the Managing Assistant City Attorney for the City of Albuquerque, Eric J. Locher at elocher@cabq.gov.

/s/ Robert Everett Johnson