IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO
ALBUQUERQUE

WILFREDO ESPINOZA,

Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellee.

No. 35,908
Bernalillo County
D-202-CV-2016-04156

On Appeal From The Second Judicial District Court,
The Honorable Valerie Huling, District Judge

BRIEF FOR *AMICI CURIAE* ARLENE HARJO AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases **Page(s)**

Other Cases

Statutes

Ordinances

Rules

Court Filings

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Arlene Harjo is a resident of Albuquerque whose car was seized for civil forfeiture by the City because *her son* allegedly broke the law. Nobody accused Arlene of a crime. But the City nevertheless held Arlene's car in an impound lot for eight months, forcing her to appear in administrative and judicial forfeiture proceedings to fight to get her car back. The City offered to return the car if Arlene would pay $4,000, but Arlene refused and instead joined with the Institute for Justice to mount a legal challenge to the City's forfeiture program.[2] Arlene recovered her car when—one week after Arlene filed a motion asking the court to shut down the City's program—city officials belatedly realized the car was outside the city limits of Albuquerque when it was seized. Arlene remains determined to fight to ensure this does not happen to other innocent people, and her challenge to the City's forfeiture program remains pending in trial court.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing

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[1] Pursuant to Rule 12-320(C) NMRA, *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (N.M. Dist. Ct.) (forfeiture action); *Harjo v. City of Albuquerque*, No. 16-cv-1113 (D.N.M.) (challenge to program removed by City to federal court).

greater protection for individual liberty. IJ litigates nationwide to protect property rights, both because property rights are a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. Here in New Mexico, IJ currently represents Arlene Harjo in her fight against the City's civil forfeiture program, and IJ also previously filed a lawsuit on behalf of two State Senators seeking to shut down the City's illegal program.[3] In addition to fighting civil forfeiture in the courts, IJ advocates for legislative reform of civil forfeiture laws, and IJ frequently points to New Mexico's abolition of civil forfeiture as a model that other States should follow.[4] Following New Mexico's lead, nine other States have reformed their forfeiture laws, and reform legislation is currently pending in an additional fifteen States.[5] Precisely because New Mexico's reforms have set the standard for civil forfeiture reform nationwide, IJ believes it is vitally important to see those reforms fully implemented.

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[3] *See Torraco v. City of Albuquerque*, No. D-202-CV-2015-08736 (representing Senator Daniel Ivey-Soto and then-Senator Lisa Torraco).

[4] *See, e.g.,* Dick M. Carpenter II, Ph.D., *et al.*, Institute for Justice, *Policing for Profit* 23 (2d ed. 2015), *available at* http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf ("New Mexico's reforms set a clear example for other states to follow in protecting people from unjust forfeitures."); Lee McGrath & Nick Sibilla, *Pushback Against Government Raids on Personal Property*, Wall St. J., June 3, 2016, http://on.wsj.com/1O8cqCq ("In New Mexico and Nebraska, state civil-forfeiture has been abolished entirely.").

[5] A map showing pending and enacted forfeiture reform legislation, assembled by the Institute for Justice, can be found online at www.endforfeiture.com.

All parties to this case received timely notice of *Amici*'s intent to file this brief pursuant to Rule 12-320(D)(1) NMRA. Counsel for *Amici* formally notified both parties on January 25, 2017, which was more than 14 days prior to the February 9, 2017 filing deadline.

INTRODUCTION

This case is about more than Wilfredo Espinoza's car. This case concerns a massive civil forfeiture program that seizes over one thousand cars and grosses over $1 million annually. In 2014, the program seized 1,272 cars and earned more than $1.2 million.[6] Between 2010 and 2014, the program seized over 8,300 cars—approximately one car for every 67 residents of Albuquerque.[7]

About half these cars are taken from innocent people. We know this because the City's Chief Hearing Officer—the administrative law judge charged with hearing civil forfeiture cases—has publicly admitted that "[h]alf the vehicles [seized] are not owned by the drunks we take them from."[8] The City takes cars

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[6] Albuquerque Police Dep't, *Annual Report* 34 (2014), *available at* http://documents.cabq.gov/police/albuquerque-police-annual-report-2014.pdf.

[7] Ryan Boetel, *City's Vehicle Seizure Law: You Don't Have To Be Driving To Lose Your Car*, Albuquerque Journal, Apr. 26, 2015, https://www.abqjournal.com/575256/you-dont-have-to-be-driving-to-lose-your-car.html (compiling data from Albuquerque Police Department public reports); *see also* U.S. Dep't of Census, *Quick Facts: Albuquerque City, New Mexico*, http://www.census.gov/quickfacts/table/RHI105210/3502000/accessible (providing data on city's population).

[8] Boetel, *supra* note 7.

from people whose family member or friend—or even a total stranger—borrowed their car and allegedly broke the law.

Even worse, city officials have a direct financial incentive to take cars from innocent people, as forfeiture proceeds are used to fund the forfeiture program's budget and to pay the salaries of the city attorneys who file forfeiture cases.[9] The City even goes so far as to include "performance measures" planning for a certain number of vehicle forfeitures—and revenues from forfeitures—in its annual budget.[10] This kind of financial incentive warps law enforcement priorities, pushing police and prosecutors to go after fat financial targets rather than real criminals.

All of this is now illegal in New Mexico. In 2015, the State Legislature unanimously enacted, and the Governor signed, historic legislation—House Bill 560, which is referred to hereinafter as the Reform Law—abolishing civil

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[9] *See, e.g.,* City of Albuquerque's Answer to Claimant Arlene Harjo's Amended Answer, Affirmative Defenses, and Counterclaims ¶ 81, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Nov. 30, 2016) ("[T]he City admits that a portion of city attorneys' salary is paid through proceeds from the program.").

[10] *Id.* ¶ 16 ("[T]he City admits that it plans for vehicle forfeitures in its budget."); *see also, e.g.,* City of Albuquerque, *FY/16 Approved Budget* 181 (July 1, 2015), *available at* http://documents.cabq.gov/budget/fy-16-approved-budget.pdf.

forfeiture. H.B. 560, 52nd Leg., 1st Sess. (N.M. 2015).[11] The Reform Law says at its outset that it is intended to "ensure that *only criminal forfeiture* is allowed in this state." *Id.* § 2 (codified at NMSA 1978, § 31-27-2(A)(6) (2015)) (emphasis added). In other words, a person's property is only "subject to forfeiture if . . . the person is convicted by a criminal court." *Id.* § 4 (codified at § 31-27-4(A)). And, just as significant, forfeiture proceeds are to be deposited in the State's general fund, not retained by the seizing agency. *Id.* § 8 (codified at § 31-27-7(B)). The City's civil forfeiture program plainly violates this law.

Under the Reform Law, this should be a simple case. New Mexico has outlawed civil forfeiture, and yet the City continues to take property using civil forfeiture. This conflict requires preemption. *See Protection and Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 48, 145 N.M. 156 (where an "ordinance is inconsistent with a general State statute then the State statute controls"); *see also ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶¶ 10-11, 128 N.M. 315; *O'Connell v. City of Stockton*, 162 P.3d 583, 589 (Cal. 2007).

The City has nevertheless managed to keep its program alive in the trial courts, but it has done so based on a fundamental misinterpretation of state law. The City has relied on Section 2(B) of the Forfeiture Act, which specifies where

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[11] The full text of the statute is available online at https://nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf.

the Forfeiture Act—the main statute amended by the Reform Law—"applies." H.B. 560 § 2 (codified at NMSA 1978, § 31-27-2(B)(1) (2015)).[12] But this Court has already interpreted the relevant language in Section 2(B), which predates the Reform Law, in a manner that is flatly contrary to the City's reading. *See Albin v. Bakas*, 2007-NMCA-076 ¶¶ 26-28, 141 N.M. 742. As this brief explores in detail (at pages 17-22), *Albin* held that Section 2(B) governs the interrelationship between the Forfeiture Act and various provisions of *state* law but says nothing at all about the Forfeiture Act's relationship to *other* sources of legal authority, such as municipal ordinances. In other words, *Albin* establishes that Section 2(B) is wholly irrelevant to the municipal preemption issue at the heart of this case.

This brief clears away the underbrush that has thus far obscured this simple conclusion, while also seeking to place Appellant Espinoza's case in its broader context. It does so in two parts.

Part I provides an overview of the vehicle forfeiture program at issue in this litigation, in order to show that the City's program involves precisely the abuses that drove New Mexico to abolish civil forfeiture.

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[12] For the City's arguments based on Section 2(B) in the trial court in this case, see the City's Response to Plaintiff's Verified Petition for Writ of Mandamus and Prohibition & Plaintiff's Motion for Judgment on the Pleadings at 2-3, *Espinoza v. City of Albuquerque*, No. D-202-CV-2016-04156 (Sept. 7, 2016).

Part II, meanwhile, shows that the City's defense of its program is based on a fundamental misreading of state law. The City's interpretation of Section 2(B) is contrary to *Albin*, 2007-NMCA-076 ¶¶ 26-28. The City's interpretation would also undermine the Reform Law's expressly-stated purpose, as well as its overall structure, by authorizing unlimited municipal civil forfeiture. Finally, the City's interpretation must be rejected under the presumption against forfeiture, which commands that state law be read strictly against forfeiture. If there is any doubt about the proper interpretation of Section 2(B) or any other provision of state law, that doubt must be resolved against forfeiture and in favor of preemption.

Two years have passed since New Mexico abolished civil forfeiture. The City's illegal civil forfeiture program should finally be brought to an end.

ARGUMENT

I. Albuquerque's Program Involves Precisely The Abuses That Drove New Mexico To Abolish Civil Forfeiture.

When New Mexico abolished civil forfeiture in 2015, the State Legislature acted against the backdrop of public outrage directed at *municipal* civil forfeiture programs. The issue of civil forfeiture came to the public's attention when video of city attorneys speaking at a conference in Santa Fe surfaced on the internet and

was reported in the *New York Times*.[13] The video revealed the profit incentive that underlies civil forfeiture. A Las Cruces city attorney, for instance, was captured referring to civil forfeiture as a "gold mine."[14] He recounted how the City had seized "a 2008 Mercedes, brand new, just so beautiful."[15] And he said: "We thought, damn. We have a 2008 Mercedes Benz. This is going to go to auction. This is going to be great. We put all our junk out there and this will be the big seller."[16] Reports about this video—and the discussion of municipal forfeiture programs that it revealed—led to public calls for reform.[17]

Against this backdrop of public outrage directed at municipal forfeiture programs, it is hardly surprising that the City's forfeiture program involves precisely the abuses that the State targeted in the Reform Law. Most notably, the

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[13] Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. Times, Nov. 9, 2014, http://nyti.ms/2jsk8K9.

[14] Video: Santa Fe Vehicle Forfeiture Conference, YouTube, at 0:58:50 (Sept. 10, 2014), https://www.youtube.com/watch?v=HHrgsda5g3c.

[15] *Id.* at 1:03:05.

[16] *Id.* at 1:04:00.

[17] *See, e.g.*, Editorial, *Property Forfeiture Should Apply to Those Found Guilty*, Albuquerque Journal, Mar. 31, 2015, http://bit.ly/1NSLFf5; Hal Stratton, Op-Ed, *Legislature Tackles 'Policing for Profit,'* Albuquerque Journal, Mar. 29, 2015, http://bit.ly/1mLqogU; Rob Nikolewski, *A 'Gold Mine' or a Civil Liberties Outrage? Civil Forfeiture Remarks Go Viral*, N.M. Watchdog, Nov. 13, 2014, http://bit.ly/1uqfm0Q; James Staley, *Critics Hammer Las Cruces City Attorney for Forfeiture Comments*, Albuquerque Journal, Nov. 12, 2014, http://bit.ly/1TmR0z8.

City takes property from innocent people and allows police and prosecutors to benefit financially from seizing and forfeiting property.

A. Albuquerque Takes Property From Innocent People.

Under the Reform Law, government can forfeit property only if the owner is convicted of a crime. *See* H.B. 560 § 4 (codified at NMSA 1978, § 31-27-4(A) (2015)). The City's forfeiture ordinance, on the other hand, authorizes forfeiture *whenever* a car is used in a qualifying DWI offense. *See* Albuquerque, N.M., Rev. Ordinances ch. 7, art. VI, § 7-6-2 (1974, amended 2014) (hereinafter, "Albuquerque Code"). The City routinely seizes and forfeits property owned by people who have not been accused—much less convicted—of a crime.

Arlene Harjo's case provides an instructive example.[18] Arlene was not accused of a crime, but the City tried to forfeit her nearly-brand-new Nissan Versa because *her son* borrowed the car and allegedly drove drunk.[19] While Arlene's son

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[18] For a full recitation of the facts of Arlene's case, see Amended Answer, Affirmative Defenses, and Counterclaims ¶¶ 51-71, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Nov. 15, 2016). The facts of Arlene's case have also been widely reported in the press. *See, e.g.*, Ryan Boetel, *Suit Seeks to Halt Albuquerque Car Seizure Program*, Albuquerque Journal, Aug. 31, 2016, http://bit.ly/2c6rH9U; Ryan Boetel, *Woman Regains Car, But Still Plans to Sue*, Albuquerque Journal, Dec. 21, 2016, http://bit.ly/2jM5XhR; Editorial, *City Needs to Finally Repair Its Vehicle Seizure Flaws*, Albuquerque Journal, Dec. 27, 2016, http://bit.ly/2kaGKB8.

[19] *See* Complaint ¶¶ 5-6, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (June 10, 2016).

had prior drunk driving arrests, the most recent had occurred seven years before. After seven years, Arlene believed her son had reformed. But, in fact, Arlene's son lied to her: He asked to borrow the car for a quick trip to the gym, and then he took the car for a long drive to see his girlfriend. Arlene never would have let her son take the car if he had told the truth. She certainly would not have allowed him to take the car if she had believed he was going to drink and drive.

Although Arlene did nothing wrong, the City dragged her through *eight months* of forfeiture proceedings. Initially, city attorneys tried to strike a deal, offering to return Arlene's car if she agreed to pay $4,000. When she refused, the City held an administrative forfeiture hearing at which the City's only witness was her son's arresting officer. The City's Chief Hearing Officer upheld the forfeiture, and the case moved to the Second Judicial District Court. There, Arlene had to intervene as a claimant—filing a *pro se* answer to the City's forfeiture complaint—just to avoid the automatic forfeiture of her car. Meanwhile, Arlene's car sat in the City's impound lot throughout all these proceedings, even as Arlene continued to make monthly loan payments on a car she could not drive.

Finally, after eight months of proceedings, the City disclosed that Arlene's car was located outside city limits at the time it was seized and therefore outside

the jurisdiction of the City's forfeiture program.[20] The City made this disclosure only after the Institute for Justice took Arlene's case—and just *days* after the Institute for Justice served the City with a motion asking the trial court to enforce the Reform Law and shut the program down.[21] Of course, the City was not nearly so scrupulous about the location of the seizure when it asked Arlene to settle for $4,000 or when it filed its initial forfeiture complaint.[22]

Arlene's case is not unique. The City's Chief Hearing Officer has said that in about *half* of all cases the seized car is owned by someone other than the driver.[23] And, indeed, the press has reported numerous cases in which cars were seized from innocent people:

- Johnny and Cynthia Martinez lent their car to their daughter, who in turn took it to a mechanic, and the City seized the car because the mechanic took

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[20] *See* City's Response to Claimant Arlene Harjo's Motion for Partial Judgment on the Pleadings at 2, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Jan. 3, 2017).

[21] *See* Claimant Arlene Harjo's Motion for Partial Judgment on the Pleadings, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Dec. 15, 2016).

[22] Notably, the City's forfeiture complaint alleged—falsely—that the seizure occurred "in Albuquerque." Complaint ¶ 4, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (June 10, 2016).

[23] Boetel, *supra* note 7.

the car out for a test drive on a suspended license.[24] The City is currently pursuing forfeiture of Johnny and Cynthia's car in trial court.[25]

- Claudeen Crank left her car with a mechanic, and the City seized the car after a complete stranger took it for a drunken joyride. Because the cost to fight the forfeiture exceeded the car's value, Claudeen had no real choice other than to sign ownership over to the City.[26]
- Marcial Gonzales had his car seized because he allowed a friend to drive and—unbeknownst to Marcial—the friend's license required an interlock device. The City ultimately returned Marcial's car, but only after Marcial agreed to pay $850.[27]
- Jose Chavez, Jr. had his car seized because he loaned it to his friend's aunt, not knowing that her license had been revoked. Unable to afford to fight in court, and unable to afford the $1,200 settlement proposed by the City, Jose signed an agreement handing the car over to the City.[28]

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[24] Martin Kaste, *New Mexico Ended Civil Asset Forfeiture. Why Then Is It Still Happening?*, NPR, June 7, 2016, http://n.pr/2itBZSi.

[25] *City of Albuquerque v. One (1) 2006 Pontiac 4DR Silver*, No. D-202-CV-2016-00644 (N.M. Dist. Ct.).

[26] Boetel, *supra* note 7.

[27] *Id.*

[28] *Id.*

These are exactly the kinds of people—never accused, much less convicted, of a crime—who are supposed to be protected by the Reform Law. Yet the City routinely seizes and forfeits cars in precisely these kinds of cases.

B. City Officials Have An Improper Financial Incentive To Take Property.

In addition to requiring a conviction, the Reform Law provides that seizing agencies can no longer retain forfeiture proceeds—which must, instead, be deposited in the State's general fund. *See* H.B. 560 § 8 (codified at NMSA 1978, § 31-27-7(B) (2015)). The City disregards this reform as well, instead using forfeiture proceeds to fund its forfeiture program. *See* Albuquerque Code § 7-6-5(E) (2014). This gives rise to precisely the financial incentive—to pursue fat financial targets, rather than real criminals—that the Reform Law was enacted to prohibit.

The city attorneys who file forfeiture cases have a direct financial incentive to take property from innocent people, as forfeiture proceeds are used to pay their salaries.[29] A significant chunk of forfeiture revenues go to pay salaries: The City's 2016 budget allocated $512,000 in forfeiture revenues to pay the salaries of "two

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[29] *See* City of Albuquerque's Answer to Claimant Arlene Harjo's Amended Answer, Affirmative Defenses, and Counterclaims ¶ 81, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Nov. 30, 2016) ("[T]he City admits that a portion of city attorneys' salary is paid through proceeds from the program.").

paralegals, two attorneys, two DWI seizure assistants and one DWI seizure coordinator."[30] All these payments are problematic, but payments to city attorneys are particularly troubling, as city attorneys exercise discretion to pursue or settle forfeiture cases—meaning city attorneys must exercise that discretion knowing their livelihood depends on generating forfeiture revenue.

The City's forfeiture program is financially dependent upon maintaining a high level of vehicle seizures, settlements, and forfeitures. In Arlene Harjo's case, the City has conceded that revenues from auctioning forfeited vehicles, along with payments made by owners of seized vehicles to get their vehicles back, make up close to or even more than 100% of the forfeiture program's budget.[31] This creates pressure to take property from innocent people, as everyone involved in the City's program has an incentive to ensure its financial viability.

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[30] *FY/16 Approved Budget*, *supra* note 10, at 53.

[31] City of Albuquerque's Answer to Claimant Arlene Harjo's Amended Answer, Affirmative Defenses, and Counterclaims ¶ 15, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Nov. 30, 2016) (admitting that "revenue generated . . . defrays the costs associated with operating the Program" and failing to deny allegation that "revenues from auctions of forfeited vehicles and settlement agreements with owners of seized vehicles make up close to or even more than 100% of the forfeiture program's budget").

All of this is made explicit in the City's annual budget, which sets annual targets for forfeiture revenues.[32] The City's 2016 budget, for instance, includes as "performance measures" for the upcoming year targets to conduct 1,200 vehicle seizure hearings, bring 625 vehicles to auction, and release 350 vehicles pursuant to settlement agreements under which owners agree to pay hundreds or even thousands of dollars.[33] The City budgeted that it would earn $615,000 in 2016 auctioning forfeited vehicles, while other program revenues would be generated through settlement agreements with property owners.[34] The result is yet another set of perverse incentives: While the City's vehicle forfeiture program is ostensibly devoted to combatting drunk driving, the program would actually *fail to meet* performance benchmarks set by the City if revenues were to fall because fewer people were drinking and driving.

Social scientists have documented the distorting effect of these kinds of financial incentives. One recent report concluded that "[c]ivil forfeiture encourages choices by law enforcement that leave the public worse off," as it "puts people in a

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[32] *Id.* ¶ 16 ("[T]he City admits that it plans for vehicle forfeitures in its budget.").

[33] *FY/16 Approved Budget*, *supra* note 10, at 181.

[34] *Id.*

position to choose between benefitting themselves or the overall public."[35] Ultimately, though, this Court need not decide whether such a financial incentive is good or bad policy. The Legislature made that choice when it enacted the Reform Law. Now the time has come for Albuquerque to follow the law.

II. Albuquerque Fundamentally Misinterprets New Mexico's Landmark Forfeiture Reform Law.

Although New Mexico abolished civil forfeiture in 2015, the City continues to take property using civil forfeiture at the dawn of 2017. The City has thus far accomplished this feat by advancing an interpretation of the Reform Law under which it operates as an "opt-in" regime—meaning municipalities can choose whether or not to incorporate the Reform Law into their ordinances.[36] The City contends that, so long as it does not opt into the reforms, it can continue taking property without a conviction and using the proceeds to fund its budget.

This "opt-in" interpretation of the Reform Law should be rejected for at least four reasons. First, the City's interpretation is contrary to this Court's decision in *Albin v. Bakas*, 2007-NMCA-076, ¶ 26-28, 141 N.M. 742. Second, the City's

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[35] Bart J. Wilson & Michael Preciado, Institute for Justice, *Bad Apples or Bad Laws? Testing the Incentives of Civil Forfeiture* 3 (Sept. 2014), *available at* http://ij.org/wp-content/uploads/2015/03/bad-apples-bad-laws.pdf.

[36] *See, e.g.,* Defendant's Response to Plaintiff's Motion for Judgment on the Pleadings at 12, *Torraco v. City of Albuquerque*, No. D-202-CV-2015-08736 (Feb. 5, 2016).

interpretation would undermine the expressly-stated purpose of the Reform Law. Third, the City's interpretation is contrary to the structure of the Reform Law, which made comprehensive changes to state law to abolish civil forfeiture. Fourth, and finally, the City's interpretation must be rejected under the presumption against forfeiture, which directs courts to interpret state law in the manner that will result in the least forfeiture. In short, the City's interpretation should be rejected because it would transform a law that abolished civil forfeiture across the State into an open-ended invitation for unlimited civil forfeiture at the municipal level.

A. The City's Interpretation Is Foreclosed By *Albin v. Bakas*.

The City's interpretation of the Reform Law as an "opt-in" regime rests on Section 2(B) of the Forfeiture Act, which states that the Forfeiture Act—the primary statute amended by the Reform Law—"applies" to "seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the Forfeiture Act." H.B. 560 § 2 (codified at NMSA 1978, § 31-27-2(B)(1) (2015)). The City claims its ordinance is not preempted because it does not "specifically apply" the Forfeiture Act and therefore falls outside the scope of Section 2(B).[37]

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[37] *See, e.g.,* Defendant's Response to Plaintiff's Motion for Judgment on the Pleadings at 4, *Torraco v. City of Albuquerque*, No. D-202-CV-2015-08736 (Feb. 5, 2016).

But this fundamentally misreads Section 2(B). As interpreted by this Court in *Albin*, 2007-NMCA-076, ¶ 26-28, Section 2(B) governs whether the Forfeiture Act applies to other state laws but says nothing whatsoever about whether or how the Forfeiture Act "applies" to *non-state-law* authorities like municipal ordinances. Section 2(B) therefore does not address, and is wholly irrelevant to, the preemption question at issue in this case.

Like this case, *Albin* involved an attempt to use Section 2(B) to circumvent the Forfeiture Act's protections for property owners. In *Albin*, state law enforcement officials claimed that Section 2(B) allowed them to ignore the Forfeiture Act's procedures when they seized property in order to transfer it to the federal government for forfeiture under federal law. 2007-NMCA-076, ¶ 23. They claimed their actions to enforce federal forfeiture laws were not subject to the Forfeiture Act because federal forfeiture statutes are not among the "laws" to which the Forfeiture Act "applies" under Section 2(B). *Id.* That is precisely the same argument that the City is making here, except that, in this case, the City is instead attempting to circumvent the Forfeiture Act using a municipal ordinance.

If anything, law enforcement's claim that Section 2(B) allowed them to circumvent the Forfeiture Act had *more* force at the time of the decision in *Albin*. Then, Section 2(B) included the same language about "laws" that "specifically apply" the Forfeiture Act that the City relies on now, but it *also* included language

stating that the Forfeiture Act applied to "other laws" only to the extent they were "consistent" with the Forfeiture Act. 2007-NMCA-076, ¶ 24 (quoting statute). This additional language contemplated that "other laws" that did *not* "specifically apply" the Forfeiture Act might diverge from the Forfeiture Act's procedures, and it provided that the Forfeiture Act would take a back seat to those "other laws." *Id.* This additional language allowed law enforcement to argue that federal forfeiture statutes were among the inconsistent "other laws" carved out by Section 2(B). *Id.* ¶ 23. Today, the City can no longer rely on this carve-out for inconsistent "other laws," as it was repealed by the Reform Law.[38]

Albin rejected law enforcement's attempt to circumvent the Forfeiture Act for reasons that are directly controlling here. The Court held that the term "laws" in Section 2(B) refers to *state statutes* and that Section 2(B) therefore says nothing whatsoever about how the Forfeiture Act "applies" to *non-state-law* forfeiture authorities. 2007-NMCA-076, ¶ 28; *see also id.* ¶¶ 25-27. The Court began its discussion by parsing the very language cited by the City here:

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[38] The Reform Law replaced this reference to "other laws" with a far narrower exception for forfeitures of contraband. *See* H.B. 560 § 2 (codified at NMSA 1978, § 31-27-2(B)(2) (2015)). That change broadened the scope of the Forfeiture Act by eliminating any express authorization for inconsistent "other laws." Even more importantly, that change left in place the critical terms "applies" and "laws," which are the terms the decision in *Albin* authoritatively interpreted.

> First, [the Forfeiture Act] applies to "seizures, forfeitures and dispositions," Section 31–27–2(B)(1), of "property described and declared to be subject to forfeiture *by a state law,*" Section 31–27–3(G), (which is to say, "property subject to forfeiture") under laws that "specifically apply the Forfeiture Act." Section 31–27–2(B)(1). A specific example, once again, is the Controlled Substances Act, which states, "The provisions of the Forfeiture Act . . . apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal under the Controlled Substances Act." Section 30–31–35.

2007-NMCA-076, ¶ 26 (emphasis in original). In other words, the Court relied on the Forfeiture Act's definition of "property subject to forfeiture" to interpret the word "laws" in Section 2(B) to refer to *state laws* such as the Controlled Substances Act. Then, in the next paragraph, the Court gave examples of "other laws," which it interpreted to mean "*statutes* which do not 'specifically apply the Forfeiture Act.'" *Id.* ¶ 27 (emphasis added). The Court stated:

> An example is NMSA 1978, § 66–3–507 (1978), which provides that a motor vehicle with an altered vehicle identification number may be declared contraband and subject to forfeiture by the law enforcement agency confiscating it, but it does not specify that the procedures of the Forfeiture Act apply. . . . Other examples can be found at NMSA 1978, § 25–2–6 (1982) (providing for the seizure and forfeiture of adulterated or misbranded food, but not specifying that the procedures of the Forfeiture Act apply); NMSA 1978, § 26–1–6 (1972) (providing for the seizure and forfeiture of an adulterated, misbranded or counterfeit drug, device, or cosmetic, but not specifying that the procedures of the Forfeiture Act apply); and NMSA 1978, § 77–18–2 (1999) (providing for the seizure and forfeiture or destruction of cruelly treated livestock, but not specifying that the procedures of the Forfeiture Act apply).

2007-NMCA-076, ¶ 27. In other words, surveying the universe of "laws" that "do not 'specifically apply the Forfeiture Act,'" the Court again interpreted the term

"laws" in Section 2(B) as referring to *state laws*. Finally, then, the Court asked whether the word "laws" in Section 2(B) might also encompass *non-state-law* authorities, and the Court concluded that it did not:

> This brings us to the final question: Does the phrase "other laws" in the Forfeiture Act at Section 31–27–2(B)(2), also refer to federal forfeiture proceedings as Defendants contend? We conclude it does not. . . . The definition of "property subject to forfeiture" with its specific reference to *state law*, the structure of the statute, and its purposes lead us to conclude that the Legislature did not intend to include an adoptive seizure by the United States under federal forfeiture statutes in the phrase "other laws" in Section 31–27–2(B)(2).

2007-NMCA-076, ¶ 28 (emphasis in original). Put differently, because the word "laws" referred to *state laws*, the Court held that Section 2(B) did not address the Forfeiture Act's relationship to federal forfeiture statutes. *Id.* And, having concluded that Section 2(B) was silent on the question, the Court went on to hold that law enforcement *could not* be allowed to circumvent the Forfeiture Act's protections for property owners. *Id.* ¶ 29. That holding is controlling here: Because "laws" in Section 2(B) refers to *state laws*, Section 2(B) has nothing whatsoever to say about the relationship between the Forfeiture Act and the City's municipal ordinance and is therefore irrelevant to the preemption question at issue in this case.[39]

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[39] Notably, the analysis in *Albin* hinged on the use of the words "state law" in the Forfeiture Act's definition of "property subject to forfeiture," which is a feature

Because Section 2(B) has nothing to say about the relationship between the Forfeiture Act and the City's forfeiture ordinance, this Court must look beyond Section 2(B) to determine the Forfeiture Act's preemptive effect. In *Albin*, this Court looked to the Forfeiture Act's "purpose" and "structure" to determine its relationship to federal law. 2007-NMCA-076, ¶ 28. Other cases—discussed at length below—suggest that same concern with "purpose" and "structure" should guide the municipal preemption analysis. *See, e.g.*, *ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶ 11, 128 N.M. 315; *Protection and Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 71, 145 N.M. 156. Turning away from Section 2(B) to the Forfeiture Act's broader purpose and structure, there can be little question that the City's civil forfeiture ordinance is preempted.

B. The City's Interpretation Directly Conflicts With The Reform Law's Expressly-Stated Purpose.

Albin directs this Court to look to the purpose and structure of the Reform Law, and in this case the Reform Law's purpose is clear: The Reform Law explicitly says that it is intended to "ensure that *only criminal forfeiture* is allowed *in this state*." H.B. 560 § 2 (codified at NMSA 1978, § 31-27-2(A)(6) (2015))

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of the Forfeiture Act that was left undisturbed by the Reform Law. *See* H.B. 560 § 3 (codified at NMSA 1978 § 31-27-3(L) (2015)) (defining "property subject to forfeiture" as "property or an instrumentality described and declared to be subject to forfeiture by the Forfeiture Act or a *state law* outside of the forfeiture act." (emphasis added)).

(emphases added). In other words, the purpose of the Reform Law is to abolish civil forfeiture across New Mexico. The City's interpretation of the Reform Law must be rejected because it would directly conflict with that clearly-articulated purpose. It is inconceivable that the Reform Law—which was enacted to abolish civil forfeiture statewide—would permit unfettered civil forfeiture at the municipal level.

The New Mexico Supreme Court relied on an equally explicit statement of purpose to find an ordinance preempted in *ACLU v. City of Albuquerque*, 1999-NMSC-044, 128 N.M. 315. The question in *ACLU* was whether the protections afforded to juveniles by the State's Delinquency Act preempted Albuquerque's curfew ordinance. *Id.* ¶¶ 10, 12. Just as the City does with Section 2(B) here, the City argued that its ordinance fell outside the express terms of the state statute. The Delinquency Act's scope encompassed "delinquent acts," as defined by the Act, and the City argued that a violation of its curfew ordinance did not meet the Act's definition of that term. *Id.* ¶ 12. The Court "agree[d] that a violation of the City's Curfew is not a 'delinquent act,'" *id.*, but held that was irrelevant for essentially the same reason that Section 2(B) is irrelevant here: The definition of a "delinquent act" told courts how to decide questions arising *within* the four corners of the State's statutory scheme but did not tell courts whether the State's statutory scheme preempted a municipal ordinance. *Id.* To answer that preemption question,

the Court looked to the Delinquency Act's express statement of purpose. The Delinquency Act expressly said that its purpose was "'to remove from children . . . the adult consequences of criminal behavior.'" *Id.* ¶ 13 (quoting NMSA 1978, § 32A-2-2(A) (1993, amended 2007)). Because the City's ordinance treated curfew violations by juveniles as criminal offenses, it "circumvent[ed] and thereby frustrat[ed]" the Delinquency Act's expressly-stated purpose and was preempted. *Id.*

ACLU and this case are indistinguishable. As in this case, the City in *ACLU* advanced a cramped interpretation of state law in order to defeat preemption. 1999-NMSC-044, ¶ 12. And, as in this case, the City's cramped interpretation would have fatally undermined the state law's explicitly-articulated purpose, as municipalities would have been able to enact ordinances that would achieve exactly the result state law was intended to prevent. *Id.* ¶ 13. The Supreme Court rejected the City's cramped interpretation of state law in *ACLU* and instead held that preemption was required to achieve state law's expressly-stated purpose. *Id.* ¶ 13. The result here should be the same. The City's civil forfeiture ordinance cannot be squared with the Reform Law's expressly-stated purpose to abolish civil forfeiture across the State and is accordingly preempted.

C. The City's Interpretation Is Contrary To The Reform Law's Basic Structure.

The overall structure of the Reform Law confirms that the abolition of civil forfeiture was not intended to operate as an "opt in" reform at the municipal level. The Reform Law made comprehensive changes to state law to abolish civil forfeiture, and all of those changes would be effectively meaningless if state law imposed no limitations on the ability of cities to reauthorize civil forfeiture through the back door. As the City has done here, municipalities could reauthorize exactly the kinds of abuses that the legislature acted to abolish. Preemption is thus required by the basic rule of statutory interpretation that courts should "presume that the legislature . . . does not intend to enact a nullity." *Inc. Cty. of Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 4, 108 N.M. 633.

The Reform Law did not merely *say* that it was intended to abolish civil forfeiture; it also overhauled state forfeiture laws to achieve that result. The Reform Law amended the Forfeiture Act to provide that property can be forfeited *only* if the owner "is convicted by a criminal court." H.B. 560 § 4 (codified at NMSA 1978, § 31-27-4(A) (2015)). The Reform Law then systematically amended forfeiture provisions in other state statutes to make clear that forfeitures under those statutes must proceed under the *criminal* forfeiture procedures now spelled out in the Forfeiture Act. *Id.* §§ 14-19 (codified throughout NMSA). The Reform Law authorized only one limited exception to this scheme, providing that

contraband (*e.g.*, illegal drugs) can be seized and disposed of without a conviction. *Id.* § 2 (codified at § 31-27-2(B)(2)). And, finally, the Reform Law prohibited law enforcement from circumventing the abolition of civil forfeiture by transferring property to the federal government. *Id.* § 13 (codified at § 31-27-11). With carefully limited exceptions, this scheme ensures that law enforcement can forfeit property based on its use in an alleged criminal offense *only* if law enforcement convicts the property's owner of a crime. In other words, the Reform Law acted comprehensively to abolish civil forfeiture.

The City's interpretation would effectively gut the Reform Law. While this case involves forfeiture of a car for an alleged drunk driving offense, the City's interpretation of the Reform Law would allow the City to authorize civil forfeiture of *any* property based on *any* alleged offense.[40] This is not speculation: Even today the City's civil forfeiture ordinances go beyond drunk driving and authorize civil forfeiture for any state-law felony offense involving use of a firearm. Albuquerque Code § 7-9-3(A)(1) (2008); *see also id.* § 7-14-2 (2013) (allowing civil forfeiture for prostitution offenses). The City's interpretation would free it to enact even

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[40] *See* City of Albuquerque's Answer to Claimant Arlene Harjo's Amended Answer, Affirmative Defenses, And Counterclaims at 13 ¶ 1, *City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (Nov. 30, 2016) ("[T]he City is *statutorily exempt* from the Forfeiture Act." (emphasis added)).

more sweeping ordinances that would effectively undo the State's abolition of civil forfeiture.

Indeed, these conflicts are all the more stark given that Albuquerque's ordinance authorizes forfeiture for alleged violations of *state* criminal law and is enforced through forfeiture actions filed in *state* courts. *See, e.g.*, Albuquerque Code § 7-6-2(A) (2014) (authorizing forfeiture based on violation of state DWI statute). Albuquerque's ordinance operates in an area permeated by state law, yet it entirely ignores state forfeiture legislation. If state courts are going to impose forfeiture as a remedy for alleged violations of state criminal law, the state courts should do so only in accordance with the comprehensive state forfeiture procedures set forth in the Reform Law.

Courts consistently find that the kind of statewide comprehensive scheme enacted by the Reform Law—enacted to protect individual rights from interference by the government—preempts municipal ordinances that would circumvent that scheme. Three cases illustrate the point:

- ***ACLU v. City of Albuquerque*, 1999-NMSC-044, 128 N.M. 315:** In addition to the Legislature's express statement of intent, the New Mexico Supreme Court in *ACLU* looked to the structure of the State's Delinquency Act and held that it was "clearly intended to protect and preserve the legal rights of children." *Id.* ¶ 11. Having acted "comprehensively" and

"exhaustively" to protect children from criminal sanctions, the Legislature could not possibly have intended to allow municipalities to impose such sanctions via ordinance. *Id.* ¶¶ 13, 15.

- ***Protection and Advocacy System v. City of Albuquerque*, 2008-NMCA-149, 145 N.M. 156:** Here, the Court of Appeals found that state laws that created a comprehensive scheme governing compulsory treatment of the mentally ill preempted an Albuquerque ordinance that would allow compulsory treatment in *additional* circumstances. *Id.* ¶ 58-59, 70-71. The Court of Appeals emphasized that the state law protected individual rights: "[T]he Legislature has evinced an intent . . . to provide the specific protections . . . before treating an individual with mental illness." *Id.* ¶ 71. Preemption was required because allowing "each municipality to create different schemes" would "frustrate the purpose of the Legislature in creating the detailed scheme." *Id.*
- ***O'Connell v. City of Stockton*, 162 P.3d 583 (Cal. 2007):** Finally, in *O'Connell*, the California Supreme Court found that state forfeiture law preempted a city's vehicle forfeiture ordinance.[41] California law permitted

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[41] The home rule provision in the New Mexico Constitution is patterned on the home rule provision of the California Constitution, and the New Mexico Supreme

forfeiture for certain drug crimes only upon proof "beyond a reasonable doubt." *Id.* at 589. But the City of Stockton's ordinance—just like Albuquerque's ordinance here—"allow[ed] the harsh penalty of vehicle forfeiture upon proof merely by a preponderance of evidence." *Id.* The California Supreme Court observed that state forfeiture law limited the availability of forfeiture in order to protect the individual rights of property owners and held that Stockton's ordinance was preempted because it would undermine that protection. *Id.*

These three cases all demand rejection of the expansive authority claimed by the City. In all three cases, state law protected individuals by limiting the government's ability to infringe individual rights. In all three cases, municipalities claimed authority to disregard those limits. And, in all three cases, the courts disagreed: Where a state law exists to protect individual rights, that state law preempts municipal ordinances that would circumvent those protections. *See also In re Mahdjid B.*, 2015-NMSC-003, ¶ 32, 342 P.3d 698 (rejecting interpretation that would "undermine the spirit" of law enacted to protect individual rights). Because Albuquerque's vehicle forfeiture ordinance would effectively gut the Reform Law, preemption is required.

Court has looked to California precedent when deciding preemption issues. *See Apodaca v. Wilson*, 1974-NMSC-071, ¶ 12, 86 N.M. 516.

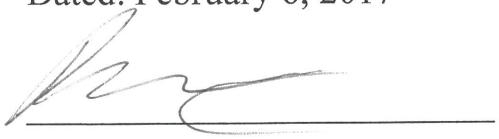
D. The City's Interpretation Must Be Rejected Under The Presumption Against Forfeiture.

Finally, to the extent that there can be any question as to the proper interpretation of the Reform Law, *Albin* teaches that the issue must be resolved against forfeiture and—accordingly—in favor of preemption. As discussed above, at pages 17-22, *Albin* asked if law enforcement could circumvent the Forfeiture Act by pursuing forfeiture under federal law. The Court held that circumvention was not allowed and, in doing so, repeatedly invoked the presumption against forfeiture, under which courts "construe the statute strictly against forfeiture." 2007-NMCA-076, ¶¶ 24, 28; *see also State v. Ozarek*, 1978-NMSC-001, ¶ 4, 91 N.M. 275. The Court, in light of this presumption, interpreted state law in the way that would result in the fewest forfeitures—which meant interpreting the Forfeiture Act to stop law enforcement from circumventing state law. The same reasoning applies here: If there is any doubt about the proper interpretation of the Reform Law, that doubt must be resolved against forfeiture and in favor of preemption.

CONCLUSION

The Reform Law abolished civil forfeiture across New Mexico. The City's civil forfeiture program must therefore be brought to an end. The decision below, upholding the City's program, should be reversed.

Dated: February 6, 2017



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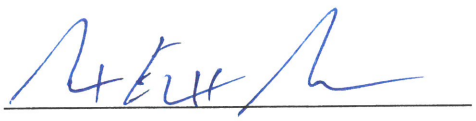

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