Filed 4/22/05

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(San Joaquin)**

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| KENDRA O'CONNELL,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>THE CITY OF STOCKTON et al.,<br><br>Defendants and Respondents. | C044400<br><br>(Super. Ct. No. CV019275) |

APPEAL from a judgment of the Superior Court of San Joaquin County, Elizabeth Humphreys, J. Reversed with directions.

Mark T. Clausen for Plaintiff and Appellant.

Meyers, Nave, Riback, Silver & Wilson, Joseph M. Quinn; and Lori S. Whittaker, Deputy City Attorney, for the City of Stockton and Jayne W. Williams, Defendants and Respondents.

In California, a motor vehicle is practically a necessity of life. Millions of our citizens depend on their cars, trucks or motorcycles to transport them to and from employment, school, medical facilities and childcare centers. In this case, we resolve a facial constitutional challenge to a municipal ordinance permitting the City of Stockton to seize and hold for forfeiture any motor vehicle used to solicit an act of prostitution or to attempt to consummate a drug transaction.

The vehicle may be seized upon a peace officer's probable cause determination that the ordinance has been violated. As worded, the ordinance does not provide for any judicial determination of probable cause on the validity of the seizure until the forfeiture trial, which in practical effect, will not occur for a minimum of several weeks.

The trial court sustained, with leave to amend, a demurrer to plaintiff's first amended complaint as a city taxpayer, seeking to enjoin enforcement of the ordinance. Plaintiff did not amend her complaint following the court's order and judgment was entered on May 28, 2003. This appeal followed.

While rejecting other constitutional challenges, we shall conclude that the ordinance fails to pass muster under procedural due process guarantees of the federal and state Constitutions because it contains no provision for a reasonably prompt postseizure probable cause hearing on the validity of the City of Stockton's right to detain the vehicle.

At our request, the parties have filed supplemental briefing on the question whether state statutes governing drug-asset related forfeiture of vehicles and pertinent sections of the Vehicle Code preempt Stockton's municipal ordinance as to the forfeiture of vehicles used to acquire or attempt to acquire any controlled substance, and those used to solicit an act of prostitution.

After reviewing the supplemental briefing and other materials submitted by the parties,[1] we conclude, disagreeing with *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580 (*Horton*), that both aspects of the ordinance are preempted by state law. We, therefore, shall reverse the judgment and remand to the trial court with directions.

## PROCEDURAL BACKGROUND

Plaintiff Kendra O'Connell filed this taxpayer action (Code Civ. Proc., § 526a) for declaratory and injunctive relief against the City of Stockton and its City Attorney (collectively, the City), seeking to enjoin enforcement of chapter 5, part XXV--Seizure and Forfeiture of Nuisance Vehicles (hereafter Part XXV), section 5-1000 et seq., of the Stockton Municipal Code[2] dealing with seizure and forfeiture of motor vehicles. Plaintiff's first amended complaint alleges that the ordinance, on its face, is unconstitutional on a number of grounds, including (1) substantive due process (first cause of

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[1] Each party has requested judicial notice of statutes, legislative materials, and other authorities in connection with the preemption issue. (Plaintiff's Second Supplemental Request for Judicial Notice [exhibits A through H], plaintiff's Third Supplemental Request for Judicial Notice [Mar. 17, 1998 letter from Legislative Counsel--preemption issue], and the City's Request for Judicial Notice [exhibits A through Q].) We now grant these unopposed requests, without making any determination of relevancy or materiality. (See *Horton*, *supra*, 82 Cal.App.4th at p. 584, fn. 2.) We shall refer to those submitted materials that we find are pertinent to our decision.

[2] Undesignated code sections are to the Stockton Municipal Code (identified by the prefix "5-").

action), (2) procedural due process (second cause of action), (3) violation of the excessive fines prohibition (third and fifth causes of action), (4) vagueness and (5) violation of the separation of powers doctrine (sixth cause of action). Plaintiff also seeks declaratory relief based on her contention that Part XXV is preempted by state law (eighth cause of action).[3]

The trial court sustained the City's demurrer with 15 days' leave to amend, finding that Part XXV was constitutional on its face and that the action was barred by the statute of limitations. Plaintiff acknowledges she did not avail herself of the opportunity to amend her complaint. She timely appealed from the judgment.

## DISCUSSION

### I. Statute of Limitations

Before reaching the substantive constitutional questions, we must first address the City's argument that this action is barred by the statute of limitations.

The City asserts, without a citation to the record or request for judicial notice, that Part XXV was adopted by the City Council on June 12, 2001, and made effective July 12, 2001. Relying on Code of Civil Procedure section 340, subdivision (b),

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[3] The first amended complaint contained additional causes of action based on other alleged infirmities with the ordinance (fourth and seventh causes of action). These challenges have not been briefed and therefore are not before us on this appeal.

which imposes a one-year time limit for bringing "[a]n action upon a statute for a forfeiture or penalty to the people of this state," the City concludes that the last day to bring a facial constitutional attack on the ordinance was June 11, 2002, more than five months before plaintiff's action was filed. We disagree.

Code of Civil Procedure section 340, subdivision (b) pertains to an action by a party to recover damages based on a forfeiture of a penalty provision imposed by statute. (E.g., *Douglas v. Klopper* (1930) 107 Cal.App.Supp. 765, 767 [treble damages for usury], disapproved on other grounds in *Taylor v. Budd* (1933) 217 Cal. 262, 267.) Where no action for a forfeiture is required to be brought, section 340 is inapplicable. (*People v. Grant* (1942) 52 Cal.App.2d 794, 799.)

This is a *taxpayer action* under Code of Civil Procedure section 526a, seeking to enjoin the expenditure of public funds resulting from the enforcement of an unconstitutional law. Plaintiff's interest as a taxpayer is sufficient to confer standing to maintain this action and bring it to final judgment, permanently enjoining unlawful expenditures. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-270.)

Moreover, the complaint alleges a "presently existing actual controversy" between plaintiff and the City over the validity of Part XXV, which she seeks to resolve by declaratory judgment. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 821.) The continued illegal expenditure

of public funds is an ongoing wrong. (*Id.* at pp. 822-824.) Plaintiff's action is not untimely.

Acceptance of the City's argument would mean that a statute, facially unconstitutional when enacted, would acquire immunity from judicial review by the mere passage of time. Such an interpretation of Code of Civil Procedure section 340, subdivision (b) would clearly run afoul of the separation of powers doctrine, for a legislative body may not circumscribe the inherent power of the courts to review a statute's constitutional validity. (See *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176-180 [2 L.Ed. 60, 73-74]; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 56, pp. 97-98.)

**II. Viability of an "As-Applied" Constitutional Challenge**

Although the lion's share of plaintiff's arguments pertain to the facial constitutional validity of Part XXV, the first amended complaint contains sporadic references to extrinsic facts relating to the enforcement of the ordinance, and plaintiff suggests at various points in the briefing that she has asserted, or could if granted leave to amend assert, a successful as-applied constitutional attack on Part XXV. On this point, we agree with the City that the only challenge cognizable here is to the ordinance on its face.

Unlike plaintiff's original complaint, which contained an "as-applied" claim for relief, each cause of action of the first amended complaint asserts that Part XXV is *facially* invalid on various constitutional grounds. The amended complaint, despite

occasional references to enforcement, proffers only a facial attack on the ordinance. Having so limited her complaint in the trial court, plaintiff may not expand her theories of relief on appeal. (See *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 616-617.)[4]

In any event, plaintiff has failed to perfect an as-applied challenge to Part XXV. As stated in *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 (*Tobe*), a constitutional challenge to a statute as applied "may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred." (*Id.* at p. 1083.) Plaintiff brought this lawsuit solely as a taxpayer action. She has not described any specific application of the statute resulting in injury to her or others. Consequently, we consider only the text of the ordinance itself, not its application to the facts of any particular case. (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39 (*Zuckerman*); *Tobe, supra*, at p. 1084.)

## III. Overview of Part XXV

Part XXV of the City's municipal code is captioned "Seizure and Forfeiture of Nuisance Vehicles." The ordinance provides that any vehicle used to solicit an act of prostitution, or to

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[4] We decline plaintiff's request to consider as an "undisputed fact," one that does not appear in her amended complaint--that Part XXV is enforced only in conjunction with "reverse sting" operations.

acquire or attempt to acquire a controlled substance, "is declared a nuisance, . . . and abated as provided in this chapter." (§ 5-1000.) Upon proof that the vehicle was so used, the court "shall declare the property a nuisance" and order that it be sold and the proceeds distributed as provided in section 5-1008. (§ 5-1001.)

Vehicles subject to forfeiture may be seized (1) upon process issued by the court, (2) where the seizure is incident to an arrest or search under a search warrant, or (3) wherever "[t]here is probable cause to believe that the property was used in violation of this chapter." (§ 5-1003.) Whenever a peace officer seizes a vehicle he or she shall deliver a receipt to the person from whom it was seized. (§ 5-1004.)

Either the city attorney or the district attorney shall file a petition for forfeiture with the court upon a determination that the circumstances so warrant. (§ 5-1006, subd. (a).) The petition "shall be filed as soon as practicable, but in any case within one year" of the seizure. (§ 5-1006, subd. (b).) The city attorney or district attorney shall cause notice of seizure and of intended forfeiture proceedings to be served on all persons who have an interest in the seized vehicle, but there are no time limits on giving such notice. Persons who receive the notice must also be given a claim form which may be filed with the court. (§ 5-1006, subd. (c).)

Any person who claims an interest in the vehicle must file a claim within 10 days of the date of the notice of seizure. If a verified claim is filed, the forfeiture action shall be set for a court hearing not less than 30 days later. (§ 5-1007, subds. (a), (b).)

Section 5-1008 provides that when seized vehicles are ordered forfeited they shall be sold, or the City may accept a cash settlement in lieu of forfeiture. The proceeds shall be used first to pay off bona fide or innocent purchasers, lienholders, vendors and the like, then to recover expenses incurred in connection with the vehicle's seizure. (§ 5-1008, subds. (a) & (b).) Any remaining funds shall be distributed 50 percent to the participating law enforcement agency and 50 percent to the city attorney or district attorney. (§ 5-1008, subd. (c).)

## IV. Substantive Due Process

Plaintiff's first challenge to Part XXV stems from section 5-1008, subdivision (c), which allocates half the net proceeds of the forfeiture to Stockton's District Attorney or City Attorney and half to the police department or other participating law enforcement agency. She argues that the pecuniary interest in the proceeds of forfeiture held by these agencies constitutes a built-in conflict of interest which transgresses state and federal due process guarantees. Specifically, the scheme provides too great a monetary incentive

to seize and forfeit vehicles, which impermissibly skews impartial enforcement and exercise of prosecutorial discretion.

In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238 [64 L.Ed.2d 182] (*Marshall*) the United States Supreme Court considered a due process challenge to a provision of the federal Fair Labor Standards Act (the Act) (29 U.S.C. § 212), which directed that sums collected as civil penalties for violation of child labor laws go toward reimbursing the United States Department of Labor's Employment Standards Administration (ESA) for the costs of determining violations and assessing penalties. (*Marshall*, at p. 239 [64 L.Ed.2d at p. 186].) The challenger asserted that the ESA's pecuniary interest in the penalty proceeds "created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties." (*Id.* at p. 241 [64 L.Ed.2d at p. 187].)

While recognizing that the appearance of neutrality is an essential aspect of due process in both civil and criminal proceedings (*Marshall*, *supra*, 446 U.S. at p. 242 [64 L.Ed.2d at p. 188]), the high court held that the pecuniary interest of the administrator "whose functions resemble those of a prosecutor more closely than those of a judge," was too remote and insubstantial to violate constitutional restraints. (*Id.* at p. 243 [64 L.Ed.2d at p. 189].) The high court noted that the amount of funds earned in this manner amounted to less than 1 percent of the ESA's budget and that "[n]o governmental

official stands to profit economically from vigorous enforcement of the child labor provisions of the Act." (*Id.* at p. 250 [64 L.Ed.2d at p. 193].)

*Marshall* dictates rejection of plaintiff's argument on this point. (*Marshall*, *supra*, 446 U.S. 238 [64 L.Ed.2d 182].) Like the ESA in *Marshall*, the functions of the city attorney and police department are prosecutorial rather than adjudicatory in nature. (*Id.* at p. 247 [64 L.Ed.2d at p. 191].) It is undisputed that no individual employee of the City is enriched by the proceeds of vehicle forfeiture. The excess funds, if any, simply go into the budget of the participating agencies. Because this case arises as a facial challenge, we are not at liberty to speculate whether the City's interest in the net proceeds of forfeited vehicles is so significant as to raise the specter of bias or is merely "remote" as it was in *Marshall*. (*Id*. at pp. 250-251 [64 L.Ed.2d at pp. 193-194].)

Plaintiff places heavy reliance on dictum from the California Supreme Court in *People v. Eubanks* (1996) 14 Cal.4th 580 to the effect that institutional interests, as well as personal ones, may impermissibly skew a prosecutor's exercise of discretion in the charging and plea bargaining of cases. (*Id.* at p. 596.) *Eubanks*, however, concerned the issue of whether a prosecutor who accepts financial assistance from the victim of a crime suffers from a conflict of interest that would render it unlikely that the defendant would receive fair treatment during the criminal proceedings, thus requiring recusal under Penal

Code section 1424. (*Eubanks*, at pp. 583-584.) The opinion expressly did "not reach any constitutional question" (*id.* at p. 596, fn. 8) and thus its applicability to the present case is doubtful.

But even accepting that the institutional pecuniary interests may be as significant as personal ones for purposes of due process scrutiny, plaintiff's contention still fails because of the impossibility of *quantifying* that interest on a facial constitutional challenge.

It may be that neither the city attorney nor the police department has any incentive to enforce the forfeiture law because, in practice, the expenses of storage, towing and prosecution always exceed the value of the vehicles. Or perhaps vehicle forfeiture is an extremely lucrative business for the City. We simply do not know. We are limited to the text of the ordinance itself, which provides no clue as to whether the prosecuting agencies have such a strong pecuniary interest in the execution of Part XXV that it substantially affects their ability to impartially exercise their discretionary enforcement functions.

No constitutional infirmity appears on this ground. Thus, the demurrer to the first cause of action was properly sustained.

## V. Excessive Fines Violation

Plaintiff's third and fifth causes of action allege that Part XXV on its face violates the excessive fines clause

contained in the Eighth Amendment to the United States Constitution.

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.) "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" (*Austin v. United States* (1993) 509 U.S. 602, 609-610 [125 L.Ed.2d 488, 497], quoting *Browning-Ferris v. Kelco Disposal* (1989) 492 U.S. 257, 265 [106 L.Ed.2d 219, 232].) A civil forfeiture levied in connection with the commission of a criminal offense, even though in rem in character, constitutes a form of punishment and therefore falls within the prohibition on excessive fines. (*Austin*, *supra*, 509 U.S. at pp. 619-622 [125 L.Ed.2d at pp. 503-506].)

"'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.'" (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321-1322, quoting *United States v. Bajakajian* (1998) 524 U.S. 321, 334 [141 L.Ed.2d 314, 329].) "*Bajakajian* adopted a *gross disproportionality* standard articulated in cruel and unusual punishments clause precedent to hold that a reviewing court 'must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is

grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.'" (*Sainez*, *supra*, at p. 1322, quoting *Bajakajian, supra*, at pp. 336-337 [141 L.Ed.2d at p. 331].)

Pointing out that solicitation of prostitution is a relatively minor crime, usually punishable by a small fine and a short period of probation, plaintiff maintains that the compelled forfeiture of an automobile, which is often a person's most valuable asset, is grossly disproportionate to the predicate offense.

Again plaintiff's argument is fatally flawed by the fact that her challenge is limited to the text of the ordinance. Depending on the circumstances, specific applications of Part XXV could yield vastly disparate results. The forfeited vehicle could be an old jalopy or a luxury car worth tens of thousands of dollars. The crime could be anything from a straightforward "trick" to the sale of several pounds of heroin or cocaine. Untethered to any particular application, plaintiff's excessive fines claim must fail because she cannot demonstrate that the punishment of forfeiture is grossly disproportionate to the underlying crime, either as a general rule or in the "'vast majority'" of cases. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.)

The trial court properly sustained the demurrer to plaintiff's third and fifth causes of action.

## VI. Procedural Due Process

We next turn to plaintiff's second cause of action, which asserts that Part XXV is invalid for failing to provide a reasonably prompt hearing on the probable merit of the government's right to detain the vehicle.

### *A. General Principles*

"The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1072 (*Ryan*); *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [32 L.Ed.2d 556, 570] (*Fuentes*).)

Procedural due process is guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution (*United States v. Good Real Property* (1993) 510 U.S. 43, 49-52 [126 L.Ed.2d 490, 500-502] (*Good Real Property*)) and article I, section 7 of the California Constitution (*Menefee & Son v. Department of Food & Agriculture* (1988) 199 Cal.App.3d 774, 780-781 (*Menefee*)); and these guarantees apply to civil forfeiture proceedings.

"[A]t a minimum, whenever property is taken due process requires some form of notice and a hearing." (*Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 783 (*Tyler*).) "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession

of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property . . . .'" (*Good Real Property, supra,* 510 U.S. at p. 53 [126 L.Ed.2d at p. 503], quoting *Fuentes, supra,* 407 U.S. at pp. 80-81 [32 L.Ed.2d at p. 570].)

Beginning with *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349] (*Sniadach*), the concept that due process mandates the right to notice and hearing prior to the taking of property has been held applicable even to temporary deprivations of property. (*Fuentes, supra,* 407 U.S. at p. 85 [32 L.Ed.2d at p. 572] [temporary, nonfinal taking of property is nonetheless a "deprivation" within the meaning of the Fourteenth Amendment]; *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 455; *Carrera v. Bertaini* (1976) 63 Cal.App.3d 721, 727.)

"Although due process generally requires that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest [citation], the United States Supreme Court has '"rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property."'" (*Bostean v. Los Angeles Unified School Dist*. (1998) 63 Cal.App.4th 95, 112, quoting *Gilbert v. Homar* (1997) 520 U.S. 924, 930 [138 L.Ed.2d 120, 127], first italics added.)

Given the mobility of motor vehicles and the need for prompt action to prevent their removal, we recognize that the

City need not provide a hearing *before* it seizes a vehicle pursuant to Part XXV (see *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 678-680 [40 L.Ed.2d 452, 465-466], and plaintiff does not argue to the contrary.

However, even where summary action is justified, due process still requires a reasonably prompt hearing to test the probable merit of the government's case. (*Krimstock v. Kelly* (2d Cir. 2002) 306 F.3d 40, 69-70, cert. den. (2003) 539 U.S. 969 [156 L.Ed.2d 675] (*Krimstock*); *Tyler*, *supra*, 34 Cal.App.4th at p. 784.) As the court stated in *Stypmann v. City and County of San Francisco* (9th Cir. 1977) 557 F.2d 1338, 1344 (*Stypmann*): "Seizure of property without prior hearing has been sustained only where the owner is afforded [a] *prompt post-seizure hearing* at which the person seizing the property must at least make a showing of probable cause." (Italics added.)

***B. Due Process Barriers Under the City's Forfeiture Ordinance***

Part XXV runs into serious constitutional difficulties when measured against the foregoing principles. The only public duty triggered by the City's seizure of a vehicle is the issuance of a receipt by the peace officer conducting the seizure. (§ 5-1004.) The ordinance then requires the city attorney or district attorney to conduct an investigation and commence forfeiture proceedings if warranted, but within an extraordinary time frame: "as soon as practicable *but in any case within one year*" of the seizure. (§ 5-1006, subds. (a) & (b), italics added.) Worse still, while the prosecuting agency must give all

persons with an interest in the vehicle notice of the seizure and intended forfeiture (§ 5-1006, subd. (c)), there are *no time limits* on how soon after the seizure such notice must be given. Claimants may be forced to wait weeks or even months before *any* hearing is held on the merits of the government's case, prima facie or otherwise.

Even if the City institutes forfeiture proceedings with some diligence, the procedure suffers from significant delay. Interested parties have 10 days to file a notice of claim *after* being served with notice of seizure. (§ 5-1007, subd. (a).) If a verified claim is filed, the court clerk is directed to set the forfeiture proceeding for a hearing "not *less than* thirty (30) days" thereafter. (§ 5-1007, subd. (b), italics added.)[5] These time frames do not even account for time needed to conduct discovery, requests for postponements, and the predictable congestion of the trial court's calendar, all of which make substantial additional delay a likely conclusion.

In other words, even with prosecutorial and judicial agencies firing on all cylinders, owners of seized vehicles face a minimum six- to seven-week wait for a hearing. When we factor

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[5] The City's representation that "the maximum delay, on the face of the ordinance . . . is 30 days" appears to be based on a misreading of section 5-1007. The section imposes a *minimum*, not a maximum time frame for setting the case for hearing, and even that period does not begin to run until a claim is filed. The claim form is received only when the City causes the notice of seizure and intended forfeiture proceedings to be personally served or sent by registered mail to those persons with an interest in the seized vehicle. (§ 5-1006, subd. (c).)

in knowledge of how the court system operates in the real world, delays of two, three or four months are realistic in the vast majority of cases.

### *C.* Application of the *Mathews* Test

Despite Part XXV's obvious difficulties in affording prompt postseizure review, we must nevertheless pay heed to the admonition of the United States Supreme Court in *Mathews v. Eldridge* (1976) 424 U.S. 319 [47 L.Ed.2d 18] (*Mathews*) that "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [Citation.] '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.] Accordingly, resolution of the issue whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected." (*Id*. at p. 334 [47 L.Ed.2d at p. 33]; accord, *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561.)

Under *Mathews,* the constitutional sufficiency of a governmental scheme that affects property interests should be resolved by considering three factors: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the

fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews*, *supra*, 424 U.S. at p. 335 [47 L.Ed.2d at p. 33].) *Mathews* requires the court to "strik[e] the appropriate due process balance" among these factors. (*Mathews*, at p. 347 [47 L.Ed.2d at p. 40].)[6]

The *Mathews* balancing test has been used routinely to determine the adequacy of due process procedures in a wide variety of situations (*Campo v. New York City Employees' Ret. System* (2d Cir. 1987) 843 F.2d 96, 100, fn. 3; *Zuckerman, supra,* 29 Cal.4th at p. 43) including the adequacy of a prejudgment process in forfeiture proceedings. (*Krimstock, supra,* 306 F.3d at p. 60; *County of Nassau v. Canavan* (2003) 1 N.Y.3d 134, 142 (*Canavan*).)

Here, the first of these factors--the importance of the private interest affected--weighs heavily in favor of the party suffering the seizure. Few deprivations of property can create more havoc to the average person's life than the loss of a motor vehicle. It is universally recognized that "'automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life.'" (*Krimstock, supra,* 306 F.3d at p. 61, quoting *Coleman v. Watt* (8th Cir. 1994) 40 F.3d 255, 260-261.)

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[6] Procedural due process challenges based on the California Constitution are also analyzed using the *Mathews* paradigm. (Cf. *Ryan, supra,* 94 Cal.App.4th at pp. 1071-1072.)

The uninterrupted use of a motor vehicle is especially important in California, where distances between home and work are often great and public transportation is not always easily accessible.

The second factor is the risk of an erroneous deprivation. Here, the balance tips toward the City, but barely. Favoring the City's position is the fact that the seizure occurs not upon the mere application of a private party (see, e.g., *Fuentes*, *supra*, 407 U.S. at pp. 69-70 [32 L.Ed.2d at p. 564] & *Sniadach, supra,* 395 U.S. at pp. 337-338 [23 L.Ed.2d at pp. 351-352]), but incident to an arrest, search, or probable cause determination by a peace officer.

Other factors, however, cut the other way: Because the City has a direct pecuniary interest in the outcome of proceedings, there is a danger of overzealous enforcement, making the need for prompt postseizure review by a neutral party especially vital. (See *Good Real Property*, *supra*, 510 U.S. at pp. 55-56 [126 L.Ed.2d at pp. 504-505].) Also, the ordinance provides no recompense for erroneous deprivations; in view of the congested calendar of the civil courts, this poses an extreme hardship for ultimately successful claimants. (*Ibid*; *Krimstock, supra,* 306 F.3d at p. 63.)

The final factor is the government's interest in retaining vehicles postseizure and prior to judgment (*Canavan*, *supra*, 1 N.Y.3d at p. 144) as well as the burden alternative safeguards would impose. This factor weighs strongly against the validity of the ordinance.

First, the City's ordinance contains no provision whereby the owner may post a bond in order to retain the vehicle pending final adjudication. Although Part XXV allows *the City* to settle any contested claim forthwith by accepting payment in lieu of forfeiture (§ 5-1008), an owner whose vehicle is seized cannot retrieve it pendente lite under any circumstances. The vehicle simply sits in storage until judgment. Given the fact that the forfeiture trial will not occur for weeks or even months, this is intolerable. A requirement that the owner post a bond for a temporary restraining order against sale or disposal of the vehicle would serve the government's interest equally well, without jeopardizing due process through lengthy delay.

Second, the government's interest in holding the vehicle to prevent crime is negligible. The seizure does nothing to stop offenders from using another vehicle to resume their criminal activities. And the fact that the ordinance permits the City to settle the case by accepting a cash payment from the owner (thereby placing the vehicle right back on city streets) renders disingenuous the City's declaration that the vehicles are "nuisances" that must be "abated." (§ 5-1000.)

Application of the *Mathews* factors convinces us that Part XXV fails to meet minimum due process standards because it contains no provision for a prompt postseizure hearing, to test whether the City has probable cause to hold the vehicle. (*Mathews*, *supra*, 424 U.S. at p. 335 [47 L.Ed.2d at p. 33].) Our conclusion is especially informed by the fact that, as

structured, the ordinance fails to offer any assurance that the forfeiture trial will take place within a reasonably prompt period of time. (*Krimstock, supra,* 306 F.3d at pp. 44, 48-49 [forfeiture law that authorized vehicle seizure until judgment with no provision for earlier probable cause hearing held unconstitutional]; *Coleman v. Watt, supra,* 40 F.3d at pp. 257-261 [impoundment of vehicle for *eight weeks* without hearing violated owner's due process rights]; *Stypmann, supra,* 557 F.2d at pp. 1343-1344 [seizure and five-day impoundment of vehicle with no probable cause hearing "clearly excessive"]; *Canavan*, *supra*, 1 N.Y.3d at pp. 143-144 [vehicle forfeiture ordinance that failed to afford "prompt post-seizure retention hearing before a neutral magistrate" violates due process].)[7]

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[7] Citing *Tobe, supra,* 9 Cal.4th 1069, the City points out that we may not declare a statute facially unconstitutional based on hypothetical applications. Rather, plaintiff "'"must demonstrate that the act's provisions inevitably pose a present *total* and *fatal* conflict with applicable constitutional prohibitions."'" (*Id*. at p. 1084, italics added.)

*Tobe*, however, was not a procedural due process case. In *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327 (*California Teachers*), which like this case involved a procedural due process challenge, the court explained: "Even when considering a facial challenge to a procedural scheme, a court must determine whether the procedures 'provide sufficient protection against erroneous and unnecessary deprivations of liberty' and property. [Citation.] The balancing analysis set forth in cases such as [*Mathews*], *supra,* 424 U.S. 319 [47 L.Ed.2d 18], requires an examination of procedures to determine whether they assure a *minimum overall standard of fairness* in the particular context. '[P]rocedural due process rules are shaped by the *risk of error inherent in the* [*truthfinding process as applied to the*] *generality of cases, not the rare exceptions*.' (*Id.* at p. 344 [47 L.Ed.2d at p. 39]. In considering facial challenges to procedural schemes,

The authorities cited by the City to support the constitutional validity of Part XXV are not persuasive. In *United States v. Banco Cafetero Panama* (2d Cir. 1986) 797 F.2d 1154, which involved the government's attempt to forfeit $3 million in bank accounts which were traceable to narcotics transactions (*id*. at p. 1156), the court merely held that the banks did not have the right to an *immediate* postseizure probable cause hearing in advance of the forfeiture trial. The court noted that the forfeiture trial itself should be conducted within a reasonable time. (*Id*. at pp. 1162-1163.) Moreover, 16 years later the same court that decided *Banco* invalidated a New York City ordinance, which, like Part XXV, failed to provide the vehicle owner with a reasonably prompt pendente lite hearing on the legitimacy of the detention. (*Krimstock, supra,* 306 F.3d at p. 44.)

*United States v. One 1971 BMW 4-Door Sedan* (9th Cir. 1981) 652 F.2d 817 (*One BMW*), which held that a 72-hour probable cause hearing was not required (*id*. at pp. 820-821) and that a two-

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the United States Supreme Court balances the competing interests to ascertain whether the procedures meet due process requirements--not simply whether there are instances falling within the scheme in which a particular result would be constitutionally permissible." (*California Teachers*, at p. 347, italics added.)

Thus, in analyzing Part XXV for due process sufficiency, we must consider how it operates in most cases. We may not "ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result." (*California Teachers, supra,* 20 Cal.4th at p. 347.)

and-one-half-month delay in instituting forfeiture proceedings was not unreasonable (*id*. at pp. 821-822), is not only clearly distinguishable[8] but appears out of sync with United States Supreme Court authority decided both before (see *Commissioner v. Shapiro* (1976) 424 U.S. 614, 629 & fn. 11 [47 L.Ed.2d 278, 291] (*Shapiro*)) and since (*Good Real Property*, *supra*, 510 U.S. at p. 46 [126 L.Ed.2d at p. 498]).

*Gonzales v. Rivkind* (11th Cir. 1988) 858 F.2d 657 held that owners of vehicles that were seized at the border for transporting illegal aliens were not automatically entitled to a judicial probable cause hearing within 72 hours after claimant's request for such a hearing, the court declaring that the forfeiture proceeding itself "*if timely*, affords a claimant of seized property all process to which he is constitutionally due." (*Id.* at p. 661, italics added.) Here, Part XXV contains *no* provision for a probable cause hearing and the forfeiture procedure itself is so encumbered with intrinsic delay as to deprive claimants of any hope of a prompt adjudication of their case.

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[8] In *One BMW,* a narcotics vehicle forfeiture case, almost all of the delay was attributable to the period necessary to obtain the results of a laboratory test and the owner was in jail during this time awaiting trial on narcotics charges. Moreover, the federal statute at issue contained a provision whereby any interested party could promptly petition for remission of the forfeiture (*One BMW, supra,* 652 F.2d at p. 820), a feature not present in the Stockton ordinance.

*United States v. $8,850* (1983) 461 U.S. 555 [76 L.Ed.2d 143] and *United States v. Von Neumann* (1986) 474 U.S. 242 [88 L.Ed.2d 587], each of which involved customs forfeitures of property coming into this country from abroad, are not apposite. As the court noted in *Krimstock, supra,* 306 F.3d at p. 68, both of these decisions applied the "speedy trial" test set forth in *Barker v. Wingo* (1972) 407 U.S. 514 [33 L.Ed.2d 101] (*Barker*) to determine whether specific delays in the progress of forfeiture proceedings deprived the petitioners of due process: "The application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings and the government's custody of the property or persons *pendente lite*, leaving only the issue of delay in the proceedings. . . . The Constitution, however, distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." (*Krimstock, supra,* 306 F.3d at p. 68.)[9]

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[9] We also question whether the *Barker* test, which was developed to assess violations of a defendant's *Sixth* Amendment right to a speedy trial, can ever be an appropriate gauge for measuring the right to a timely probable cause hearing following the government's seizure of property. (*Barker*, *supra*, 407 U.S. 514 [33 L.Ed.2d 101].) The Supreme Court has since made clear that seizures of property in connection with civil forfeiture proceedings implicate both the *Fourth* Amendment right to be free from unreasonable seizure and the *Fifth* Amendment right to notice and hearing in a timely manner. (*Good Real Property, supra,* 510 U.S. at pp. 49-50 [126 L.Ed.2d at pp. 500-501].) Recent state and federal cases involving civil forfeiture, including *Good Real Property*, apply the *Mathews* analysis, and we believe *Mathews* provides the appropriate yardstick in this area. (*Mathews*, *supra*, 424 U.S. 319 [47 L.Ed.2d 18].)

Notwithstanding Part XXV's failure to provide a probable cause hearing, the City insists that due process is still satisfied because "there is nothing in the statutory scheme that would prohibit a vehicle owner from seeking *immediate* equitable relief by means of a temporary restraining order and an order to show cause." It points out that Part XXV expressly makes the Code of Civil Procedure applicable to forfeiture proceedings. (See § 5-1007, subd. (b)(3).) We are not persuaded.

First, the City does not explain how a claimant can apply for a temporary restraining order (TRO) or order to show cause in a civil case that does not yet exist, for until the City decides to file a forfeiture action there is no subject matter jurisdiction in the trial court.

Second, placing the burden on the claimant to pry open the courthouse doors to test the government's case does not comport with due process. To pass constitutional scrutiny a statutory scheme must "provide a prompt and effective means for claimants to challenge the legitimacy of the City's retention of their vehicles *pendente lite*." (*Krimstock, supra,* 306 F.3d at p. 60.) Putting aside the time and expense required to retain counsel and file a lawsuit, requiring the owner to seek a TRO would place the burden on him or her to prove both irreparable injury and a likelihood of prevailing on the merits (Code Civ. Proc., § 526, subd. (a)(1) & (3)). This is the opposite of what due process mandates--that *government* bear the initial burden of

proving probable cause for continued retention of property it has taken.

In sum, any procedural scheme that permits the City to seize a vehicle off the street without a prior hearing must contain its own provisions for prompt postseizure review. "[W]e are neither inclined nor permitted to accord the administrative forfeiture statute what Justice Holmes, in a different context, called 'a little play in its joints.'" (*Nasir v. Sacramento County Off. of the Dist. Atty*. (1992) 11 Cal.App.4th 976, 987, quoting *Bain Peanut Co. v. Pinson* (1931) 282 U.S. 499, 501 [75 L.Ed. 482, 491].) Thus, "[t]he fact that an owner may institute a judicial proceeding for the return of the property is simply no substitute for the requirement that an owner be accorded a fair hearing on the merits of the seizure." (*Menefee, supra,* 199 Cal.App.3d at p. 782.)

### *D. Conclusion*

"[A]t least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation *or prompt post-deprivation* hearing at which some showing of the probable validity of the deprivation must be made." (*Shapiro*, *supra*, 424 U.S. at p. 629 [47 L.Ed.2d at p. 291], italics added.)

Part XXV violates procedural due process because it fails to provide a prompt postseizure probable cause hearing on the

City's right to continued retention of the seized vehicles, especially in light of the fact that the ordinance permits the forfeiture proceedings to proceed at a languid pace, requiring many weeks or even months to be brought to resolution.

Because the ordinance is unconstitutional on its face, the trial court erred in failing to overrule the demurrer to the second cause of action. In light of our reversal on this ground and our determination that the ordinance is preempted by state law (see part VII, *post*), we do not reach plaintiff's claims in her sixth cause of action that the ordinance is void for vagueness and violates the separation of powers doctrine.

## VII. Preemption

### *A. General Principles*

Local legislation that conflicts with the provisions of general laws is unconstitutional as it is in violation of article XI, section 7 of the California Constitution. "The fact that the state has legislated on the same subject does not necessarily exclude the municipal power. The municipality may make additional regulations, different from those established by the state and not inconsistent with the purpose of the general law. It is only where the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field, so that any local regulations will necessarily be inconsistent with state law, that municipal power is lost." (8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 794, p. 322.)

In *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, the California Supreme Court explained: "'A conflict exists if the local legislation "'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'"'" (*Id*. at p. 897.) Local legislation is duplicative of general law when it is coextensive therewith; it is contradictory to general law when it is inimical thereto; it enters an area that is *fully occupied* by general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has done so impliedly measured against certain indicia of legislative intent. (*Id*. at pp. 898-899.)

### *B. Overview of State Civil Forfeiture Provisions--Controlled Substances*

The California Uniform Controlled Substances Act (the UCSA) (Health & Saf. Code, § 11000 et seq.) is a comprehensive regulation of controlled substances that includes their definition (chapter 2), and lawful (chapters 4 and 5) and unlawful uses (chapter 7). The UCSA also contains stringent substantive and procedural conditions for the civil forfeiture of a vehicle used in the commission of a specified controlled substance offense. (*Id.*, §§ 11469-11495.) It delegates authority to a local agency to forfeit a vehicle only if these conditions are met. (*Id.*, §§ 11469, 11488.4.) The forfeiture portion of the UCSA is introduced by a statement of purpose that the principal objective of forfeiture is law enforcement and that local prosecutors are directed "[w]henever appropriate [to]

seek criminal sanctions as to the underlying criminal acts which give rise to the forfeiture action." (*Id.*, § 11469, subds. (a), (c).) A criminal sanction is "appropriate" (i.e., required) when real or personal property is sought to be forfeited. (*Id.*, § 11470, subds. (g) & (h).)

The commission of a controlled substance offense is the primary condition justifying forfeiture. The interest of the registered owner of a vehicle may be forfeited only where it is used as an "instrument to facilitate" the crimes of "manufacture of, or possession for sale or sale" of identified controlled substances (in specified amounts).[10] (Health & Saf. Code, § 11470, subd. (e).) The registered owner's interest vests in the state only upon "commission of the [criminal] act giving rise to forfeiture" and then only "if the state or local governmental entity proves a violation of" the specified offense. (*Id.*, § 11470, subd. (h).) A judgment of forfeiture requires a conviction in the "underlying or related criminal action." (*Id.*, § 11488.4, subd. (*i*)(3).) A contested issue of forfeiture must be tried in conjunction with the trial of the offense (*id.*, § 11488.4, subd. (*i*)(5)), and the prosecution bears the burden of proof beyond a reasonable doubt that the vehicle was used, or intended to be used, to facilitate a violation of one of the enumerated underlying offenses (*id.*, § 11488.4, subd.

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[10] The mere possession of a controlled substance is not within the offenses for which the forfeiture of a vehicle may be sought. (See Health & Saf. Code, § 11470, subd. (e).)

(*i*)(1)).[11] Further, the interests of encumbrancers, bona fide purchasers and certain community property interests are protected against forfeiture. (*Id.*, § 11470, subds. (e) & (h).) The UCSA is implemented by extensive procedures for compliance with its substantive provisions. (See, e.g., *id.*, § 11488.4.)

### *C. Implied Preemption*

Because the UCSA does not expressly prohibit a local entity from enacting supplemental legislation regarding forfeiture of vehicles in the area of controlled substances, the question is whether preemption may be implied from the UCSA. There are three tests of preemption by implication: "'"(1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality."'" (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751.)

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[11] A separate contested hearing regarding the role of the vehicle as an "instrument to facilitate" a covered offense may occur when there is no contest to the underlying offense. (Health & Saf. Code, § 11484.4, subd. (*i*)(5).)

"'Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme.'" (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252 (*American Financial*), quoting *Tolman v. Underhill* (1952) 39 Cal.2d 708, 712.)

Here, the state, through the UCSA, has legislatively occupied an area of statewide importance: the civil forfeiture of vehicles when used in connection with the drug trade. The Legislature has also made the UCSA binding on local governmental agencies, such as the City. (See Health & Saf. Code, §§ 11469, 11488.4.) It has delegated to local authorities the power to forfeit a vehicle *only* as permitted by its express provisions. These provisions include the requirement of a criminal conviction, proof beyond a reasonable doubt of the conditions justifying forfeiture, and the protection of innocent parties who hold an interest in the vehicle.

The state has therefore enacted specific and detailed legislation, binding on local authorities, in the area of forfeiture of vehicles used in transactions involving a controlled substance. The City's Part XXV intrudes into this area in significant and contradictory ways: The ordinance subjects a vehicle to forfeiture as a nuisance if it is used to "acquire or attempt to acquire any controlled substance."

(§§ 5-1000, 5-1001.)[12] To acquire or attempt to acquire a controlled substance means to purchase or attempt to purchase a controlled substance.[13] However, a mere purchaser of a controlled substance is not liable as a principal in the sale of a controlled substance and cannot be prosecuted for the same offense as the seller: "[O]ne who merely purchases drugs is not guilty of furnishing as an aider and abettor of the seller . . . ." (*People v. Edwards* (1985) 39 Cal.3d 107, 114, fn. 5, citing *People v. Label* (1974) 43 Cal.App.3d 766, 770; see also *People v. Hernandez* (1968) 263 Cal.App.2d 242, 247; *People v. Lamb* (1955) 134 Cal.App.2d 582, 585-586.) Thus, Part XXV authorizes forfeiture under certain conditions which would not even constitute the commission of a criminal offense.

Like the UCSA, Part XXV applies to vehicles that are used to consummate transactions involving a controlled substance. Since it does not distinguish between the kinds or amounts of the controlled substance sought to be "acquired," Part XXV includes all of the substances covered by the UCSA. It does not

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[12] Part XXV applies to "[a]ny person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any vehicle" and the vehicle is used for the "purposes or acts set forth in this section . . . ." (§ 5-1000.)

[13] If "to acquire" means "to possess," Part XXV also authorizes the forfeiture of a vehicle that is used in the commission of the offense of possession of a controlled substance (Health & Saf. Code, § 11377), which does not qualify for forfeiture under the UCSA. The UCSA makes possession for sale (*id.*, § 11378), but not mere possession, a qualifying offense for forfeiture (*id.*, § 11470, subd. (e)).

require proof beyond a reasonable doubt of the grounds for forfeiture[14] and contains no protections against forfeiture for innocent parties who hold community property, bona fide purchaser or encumbrancer interests.[15] Thus, the City's ordinance authorizes vehicular forfeiture under a panoply of circumstances that would be impermissible if forfeiture were sought under the UCSA.

The Legislature's express delegation of the power of forfeiture to local agencies, its scrupulous attention to conditions necessary for forfeiture, and its protection of due process rights of those impacted by forfeiture, manifests a clear intent to occupy the area of forfeiture of vehicles when used as instrumentalities of the drug trade. There is no room, under this scheme, for local legislation in the same field which, as Part XXV does, expands the conditions triggering forfeiture of vehicles used in drug transactions, loosens the requisite standard of proof, omits due process protections for

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[14] Part XXV provides that "the City of Stockton shall have the burden of proving by a preponderance of the evidence that the vehicle was used as set forth in Section 5-1000." (§ 5-1006, subd. (f).)

[15] The only remedy provided to an innocent party is the receipt of proceeds from the sale of a forfeited vehicle. Part XXV provides that upon the sale of a forfeited vehicle the proceeds of the sale shall be paid to an innocent purchaser or encumbrancer. (§ 5-1008, subd. (a).) The interest of the innocent person nonetheless may be forfeited.

innocent parties, and divides up the net proceeds among local law enforcement agencies.[16]

The City's position nevertheless finds support in *Horton, supra,* 82 Cal.App.4th 580, which addressed a claim of preemption as to an Oakland ordinance[17] that the parties agree replicates Part XXV of the City's ordinance in all material respects. The Oakland ordinance authorized the seizure, forfeiture, and sale of vehicles used to acquire or attempt to acquire controlled substances. (*Id*. at p. 584.) The taxpayer litigants claimed the ordinance was preempted by Health and Safety Code section 11469 et seq. (*Horton*, at p. 586.) The Court of Appeal, First Appellate District, Division Three, rejected that claim on the view that the "state statutory scheme is silent with regard to vehicles used by drug *buyers*," and therefore the ordinance "covers an area untouched by statewide legislation." (*Ibid.*)

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[16] Health and Safety Code section 11469, subdivision (a) provides: "Law enforcement is the principal objective of forfeiture. *Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens*." (Italics added.)

[17] Oakland Municipal Code, former chapter 3, article 23, Ordinance No. 11987 (1997), section 3-23.01 is now title 9, chapter 9.56, section 9.56.010 (hereafter the Oakland ordinance). (*Horton*, *supra*, 82 Cal.App.4th at p. 584.) Although *Horton* does recite the text of the Oakland ordinance, we have taken judicial notice of it at plaintiff's request. (See fn. 1, *ante*.)

*Horton*'s reasoning cannot be reconciled with the broad scope and detailed parameters set forth in the UCSA regarding forfeiture of vehicles used in the drug trade. The Legislature has scrupulously set forth the conditions for forfeiture of vehicles used as instrumentalities for controlled substances while omitting others. This occupation of the field preempts local regulation, even on subjects not specifically addressed by the state statutes. The state's decision to authorize vehicle forfeiture in some aspects of the drug trade but not others "is not an invitation for municipal regulation." (*American Financial*, *supra*, 34 Cal.4th at p. 1259.) For example, the Legislature may well have concluded vehicle forfeiture as too severe a sanction to impose on drug buyers, who are generally viewed with greater sympathy and leniency than drug sellers and manufacturers. *Expressio unius est exclusio alterius*--"the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp*. (1976) 65 Cal.App.3d 397, 403.) To paraphrase *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, the "absence of any specific statewide legislation" with regard to drug buyers, "does not create a statutory loophole inviting local legislation, because of the pervasive statutory scheme already in place . . . ." (*Id*. at p. 601.)

Our view is supported, not only by Legislative Counsel's opinion that the Oakland ordinance "is in conflict with and

preempted by state law,"[18] but by the California Supreme Court's recent decision in *American Financial.* There, the City of Oakland enacted a local ordinance regulating predatory lending practices within the city limits. (*American Financial*, *supra*, 34 Cal.4th at pp. 1248-1250.) The Legislature also enacted a set of statutes designed to combat similar abuses (Fin. Code, §§ 4970-4979.8 [also known as Division 1.6]). (*American Financial,* at p. 1244 & fn. 2.)

Both sets of regulations regulated lending practices in the "'subprime'" home loan market (*American Financial*, *supra*, 34 Cal.4th at p. 1246, fn. 5), but Oakland's ordinance contained numerous prohibitions and limitations that were different from those in Division 1.6. Like Part XXV here and the Oakland ordinance in *Horton*, the local ordinance in *American Financial* imposed more extensive and stringent penalties for predatory practices than those set forth in Division 1.6. Although Division 1.6 contained no express preemption language, the California Supreme Court found preemption in view of the "clear indications of the Legislature's implicit intent to fully occupy the field of regulation of predatory lending tactics in home mortgages." (*American Financial*, at p. 1252.)

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[18] Letter exhibit to plaintiff's Third Supplemental Request for Judicial Notice (Legislative Counsel of California's letter to Sen. John Vasconcellos, Mar. 17, 1998, p. 16); see footnote 1, *ante*.

Without addressing the comprehensive nature of the state forfeiture statutes, the City argues there is no preemption by redefining the subject matter. According to the City, while the UCSA forfeiture statutes regulate "tools used and profits realized by drug *dealers*," its ordinance merely regulates "the field of nuisance as it relates to drive-up drug buyers." Citing general public nuisance statutes (Civ. Code, §§ 3479, 3480),[19] as well as Government Code section 38771,[20] the City insists it is authorized to identify a local problem as a nuisance and regulate it, regardless of the state's extensive regulation in the same area.

We disagree. Civil Code sections 3479 and 3480 define a nuisance for both private and public actions. (See also Civ. Code, § 3481.) While a private nuisance may be "enjoined or abated" (Code Civ. Proc., § 731), a public nuisance may be

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[19] Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

[20] Government Code section 38771 provides: "By ordinance the city legislative body may declare what constitutes a nuisance."

abated by any authorized public body or officer (Civ. Code, § 3494) and only by a "civil action" brought in the name of the People of the State by the district attorney or the city attorney of any city.[21] (Code Civ. Proc., § 731.) Such an abatement is normally accomplished by the equitable remedy of injunction, an in personam action. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1102-1103; *In re Englebrecht* (1998) 67 Cal.App.4th 486, 492; *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 114 Cal.App.3d 923, 932-933 [injunction against the display of obscene films is in personam].)

Part XXV is not authorized by Civil Code sections 3479 and 3480 for at least two reasons: First, the forfeiture relief provided in the ordinance appears to be in rem and not in personam. Second, Part XXV does not require the commission of the crime of illegal sale of a controlled substance, the ground specified in Civil Code section 3479. If it did so provide, it would be in direct conflict with the procedure in Health and Safety Code section 11470 et seq., which is in rem.[22]

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[21] Civil Code section 3491 specifies the remedies against a public nuisance as "1. Indictment or information; 2. A civil action; or, 3. Abatement." An abatement without a civil action runs contrary to the equitable authority granted district attorneys or city attorneys in Code of Civil Procedure section 731.

[22] "The forfeiture prescribed by the Health and Safety Code [section 11470 et seq.] is in rem." (*Baca v. Minier* (1991) 229 Cal.App.3d 1253, 1262, citing *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286 ["A statutory or legislative forfeiture is *in rem* against the property itself. A common-law

Further, just as a statute giving cities general authority to legislate on a given subject (e.g., Gov. Code, § 38771) "would not validate a city ordinance if it in fact conflicted with a state statute" (*City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 101), the result should be no different where a city's ordinance runs afoul of the doctrine of implied preemption. The City's general authority to regulate nuisances cannot be used as a tool to override the Legislature in an area in which it has already manifested an intent to occupy.

The thrust of the reasoning advanced by the City, and validated in *Horton, supra,* 82 Cal.App.4th 580, is that cities are free to supplement the UCSA simply by omitting the conditions that are essential to vehicular forfeiture therein and creating their own conditions for vehicle forfeiture. Taken to its logical conclusion, such a view would find preemption only where state statutes and municipal regulations precisely overlap. This would virtually wipe out the doctrine of implied preemption, a result that has been criticized by our Supreme Court in *American Financial* as a "notable departure from our implied preemption precedents." (*American Financial, supra,* 34 Cal.4th at p. 1261.)

The UCSA's provisions permitting forfeiture of vehicles as instrumentalities of the drug trade represent "'legislative

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or judicial forfeiture is *in personam* against a defendant [citation]. The forfeiture prescribed by the Health and Safety Code is *in rem*"].)

estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution.'" (*American Financial*, *supra,* 34 Cal.4th at p. 1259, quoting *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d. 1, 24.) The City is not free to ignore them and impose its own solutions.

We are unpersuaded by the City's argument that the fact the Legislature once passed an express preemption amendment, only to be blocked by the Governor's veto, shows that no implied preemption was intended.[23] If anything, the bill's passage supports our conclusion that the lawmakers never intended to allow local regulation in this area. The Governor's views on preemption are certainly not binding on other branches of government, and our Supreme Court has made clear that such statements carry no weight in construing the intent of the Legislature as a whole. (*American Financial*, *supra*, 34 Cal.4th

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[23] As noted in *Horton*: "In September 1999, the Legislature passed Assembly Bill No. 662 (1999-2000 Reg. Sess.), amending [Health and Safety Code] section 11469 et seq. to include forfeitures under the criminal profiteering statute. The bill also declared the Legislature's intent that forfeiture law be exclusive of any local ordinance or regulation, declaring the subject a matter of statewide concern." (*Horton, supra,* 82 Cal.App.4th at p. 588.) Assembly Bill No. 662 stated that "'[t]he provisions of this section are a clarification and declaration of existing law.'" (*Ibid.*) The bill was vetoed by Governor Davis, expressing the view that "'[i]t is not appropriate for the State to take away the tools from Oakland, Sacramento, and other cities considering the adoption of similar ordinances without a more careful analysis of the amount of discretion which should be left to cities to craft their own remedies in response to local conditions.'" (*Ibid.*)

at p. 1261 [“we are reluctant to reward the opponents of preemption when nothing in the statutory language or history suggests they persuaded the Legislature to consider relinquishing its historical control of this particular regulatory field and to tolerate municipal, and possibly conflicting, regulation”].)

### *D. Home Rule Doctrine*

The City also defends the claim of preemption by invoking its status as a charter city and the *home rule* doctrine. (Cal. Const., art. XI, § 5.) Under the home rule doctrine, California’s Constitution reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a “‘municipal affair’” rather than one of “‘statewide concern.’” (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399.) To determine whether the doctrine applies, a court first determines whether there is a genuine conflict between a state statute and a municipal ordinance. If there is, the court proceeds with the second half of the inquiry; i.e., “does the local legislation impact a municipal or statewide concern?” (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813.)

As noted, there is a very real conflict between Part XXV and the vehicle forfeiture provisions of the UCSA. We thus look to whether the subject regulated is one of statewide rather than municipal concern. “[I]f the subject matter is one of general or statewide concern, the Legislature has paramount authority;

and if the Legislature has enacted general legislation covering that matter, in whole or in part, there must be a presumption that the matter has been preempted." (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106-107.)

The prohibition, dispensation and regulation of controlled substances are uniquely within the province of state statutes. (E.g., Bus. & Prof. Code, §§ 2237 et seq., 4006; Health & Saf. Code, § 11000 et seq.) Further, through the UCSA the Legislature has injected itself into the specific subject matter covered by Part XXV of the ordinance.

Finally, we reject the City's suggestion that Part XXV addresses only the problem of "illegal curbside commercial activity," a matter of local concern. We find no indication that such "public nuisances," if they can be called that, are unique to any municipality. The problems caused by the use of vehicles to consummate drug deals exist in every urban part of the state.

Part XXV is not saved by the home rule doctrine. The drug-related vehicle forfeitures authorized by Part XXV are impliedly preempted by the state's comprehensive scheme regulating the same subject, as set forth in the UCSA.

### *VIII. Solicitation of Prostitution*

We turn to that aspect of Part XXV which authorizes the City to institute forfeiture proceedings against a vehicle if it is used "to solicit an act of prostitution . . . ." (§ 5-1000.)

Our starting point is Vehicle Code section 21, which reads: "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, *and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein*." (Italics added.)

"[I]n view of the intent of the Legislature as expressed in section 21 of the Vehicle Code, . . . the delegation of authority to local authorities will be strictly construed[]--such authority must be 'expressly (not impliedly) declared by the Legislature.'" (*People v. Moore* (1964) 229 Cal.App.2d 221, 228.)

Our analysis thus differs significantly from the implied preemption paradigm applied in the previous section. By virtue of Vehicle Code section 21, if the Vehicle Code covers the subject, preemption of local regulation is *presumed* unless the Legislature declares otherwise. (*Barajas v. City of Anaheim, supra,* 15 Cal.App.4th at p. 1818; *County of Los Angeles v. City of Alhambra* (1980) 27 Cal.3d 184, 189.)

The Vehicle Code does address the subject of seizure of vehicles by local entities as nuisances when used in connection with prostitution. Vehicle Code section 22659.5 delegates authority to a city or county to adopt a five-year pilot program[24] "that implements procedures for declaring any motor

[24] The original legislation specified certain named cities and counties as eligible for participation in the pilot program and

vehicle a public nuisance when the vehicle is used in the commission of an act in violation of [Penal Code sections prohibiting pimping, pandering, or solicitation of prostitution].” (Veh. Code, § 22659.5, subd. (a).) The defendant must be convicted of the specified offense or plead to a lesser included offense. (*Ibid*.) The remedies provided are limited to those stated in Vehicle Code section 22651--temporary impoundment not to exceed 48 hours and ordering the defendant to not use the vehicle again in the commission of the offense. (§ 22659.5, subds. (b) & (c).)

The subject matters of Part XXV and Vehicle Code section 22659.5 both apply to local seizure of a vehicle when used as an instrumentality of prostitution, except that Part XXV establishes its own procedures for permanent forfeiture (rather than temporary impoundment) and does *not* require that the vehicle be used for commission of an act punishable by the Penal Code.

Part XXV runs afoul of the preemptive effect of Vehicle Code section 21, by authorizing the seizure and forfeiture of vehicles used in connection with the prostitution trade. Rather than participate in the five-year pilot program established by the Legislature, the City has simply launched its own permanent

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included a sunset clause. In 1998, the Legislature amended the statute to delete the sunset provision and extended the pilot program to all cities and counties. (Historical and Statutory Notes, 67 West’s Annot. Veh. Code (2000 ed.) foll. § 22659.5, p. 269.)

program, complete with its own rules and remedies, to combat the public nuisance caused by vehicles used to solicit prostitution on city streets.

The City argues that there is no preemption because Vehicle Code section 22659.5 does not expressly *prohibit* local legislation that is not within its precise provisions. However, the fact that section 22659.5 is cast as a delegation of authority to local governments clearly implies that authority over the subject matter is limited to that authorized.

The City also relies on *Horton*'s rationale that Vehicle Code section 22659.5 does not cover the subject matter of the (identical) Oakland ordinance because the purpose of section 22659.5 is "traffic control," while the purpose of the Oakland ordinance is "more broadly [aimed] at nuisance and blight abatement, traditionally an area of local regulation." (*Horton, supra,* 82 Cal.App.4th at p. 590.) We reject this argument as an exercise in semantic mumbo jumbo.

The purpose of Vehicle Code section 22659.5 is not traffic control. The purpose of the pilot program is to determine whether seizing and declaring as public nuisances motor vehicles used in the commission of acts of prostitution would effect a substantial reduction of prostitution in neighborhoods.[25] Part

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**25** As enacted in 1993, the statute codified as Vehicle Code section 22659.5 set forth the following declaration of intent: "The Legislature hereby finds and declares that under the Red Light Abatement Law every building or place used for, among other unlawful purposes, prostitution, is a nuisance which shall

XXV, in effect, answers that question in the affirmative, and goes on to impose sanctions far more severe than those authorized by the pilot program.

By authorizing a forfeiture whenever the vehicle is used for "any of the . . . *acts*" (§ 5-1000, italics added) specified in Part XXV, section 5-1000, including solicitation of prostitution, Part XXV regulates an act "covered by" (Veh. Code, § 21) Vehicle Code section 22659.5. Thus, "[b]oth [sets of laws] regulate [seizure and forfeiture of vehicles used as instrumentalities of prostitution], and do so in parallel fashion." (*American Financial, supra,* 34 Cal.4th at p. 1256.)

*Horton* distinguishes Vehicle Code section 22659.5 on the ground it authorizes "an optional and limited pilot program [that] is not to be construed to cover the matter addressed by Oakland's independent ordinance." (*Horton, supra,* 82 Cal.App.4th at p. 591.) The distinction is premised on the incorrect view that a limited delegation of authority does not

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be enjoined, abated, and prevented, and for which damages may be recovered. It is recognized that in many instances vehicles are used in the commission of acts of prostitution and that if these vehicles were subject to the same procedures, currently applicable to buildings and places, the commission of prostitution in vehicles would be vastly curtailed. The Legislature, therefore, intends to enact a five-year pilot program, in order to ascertain whether declaring motor vehicles a public nuisance when used in the commission of acts of prostitution would have a substantial effect upon the reduction of prostitution in neighborhoods, thereby serving the local business owners and citizens of our urban communities." (Stats. 1993, ch. 485, § 1, pp. 2597-2598.)

conflict with an authority greater than that delegated. As stated in *City* of *Lafayette v. County of Contra Costa* (1979) 91 Cal.App.3d 749, 755, "the City does *not* have . . . 'very wide discretion' under the police power in legislating in the field covered by the Vehicle Code. Instead it has *no police power in that area at all*, 'unless expressly authorized' by the Legislature." The only express authorization allowed by the Legislature is participation in the pilot program.[26]

The civil forfeiture of vehicles used to solicit acts of prostitution as authorized by Part XXV is preempted by state law. We conclude the trial court erred in sustaining the demurrer to plaintiff's eighth cause of action.

**DISPOSITION**

The judgment is reversed. The cause is remanded to the trial court with directions to overrule defendant's demurrer to the second and eighth causes of action of plaintiff's first amended complaint and to enter judgment for the plaintiff declaring the City of Stockton's ordinance (Part XXV) invalid for the reasons set forth above. Plaintiff is awarded her costs

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[26] Horton relies on *Xiloj-Itzep v. City of Agoura Hills* (1994) 24 Cal.App.4th 620, 644-645, which it characterizes as involving an "ordinance prohibiting solicitation of commerce on city streets [which] does not regulate vehicular traffic in violation of [Vehicle Code section] 21." (*Horton*, *supra*, 82 Cal.App.4th at p. 591.) However, the ordinance in *Xiloj-Itzep* regulated the solicitation of commerce on city streets and sidewalks, a subject not "covered by" the Vehicle Code (§§ 21, 22520.5), which only prohibits "vending" on or near freeway ramps. (*Xiloj-Itzep*, *supra*, 24 Cal.App.4th at pp. 642-644.)

on appeal. (Cal. Rules of Court, rule 27(a).) ***(CERTIFIED FOR PUBLICATION.)***

BUTZ, J.

We concur:

BLEASE, Acting P. J.

MORRISON, J.