No. S135160

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KENDRA O'CONNELL,
Plaintiff/Appellant,

v.

THE CITY OF STOCKTON, et al.,
Defendants/Respondents.

AMICUS BRIEF
IN SUPPORT OF APPELLANT

On Review after Decision by Court of Appeal,
Third Appellate District Case No. C044400
San Joaquin Superior Court No. CV019275
Hon. Elizabeth J. Humphreys

Meredith N. Landy (State Bar No. 136489)
Dale M. Edmondson (State Bar No. 189793)
Joshua D. Baker (State Bar No. 214389)
Michel Amaral (State Bar No. 233451)
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, California 94025
Telephone: (650) 473-2600
Facsimile: (650) 473-2601

Attorneys for Amici Curiae
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

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INTRODUCTION

The American Civil Liberties Union of Northern California, the American Civil Liberties Union of Southern California, the American Civil Liberties Union of San Diego & Imperial Counties, and the California Attorneys for Criminal Justice submit this brief in support of a challenge to Stockton Municipal Code, Chapter 5, Part XXV, sections 5-1000 et seq. (the "Ordinance"), enacted by the City of Stockton (the "City"). The Ordinance permits authorities to seize and hold for forfeiture any motor vehicle based on the suspicion that it was used to solicit an act of prostitution or to attempt to consummate a drug transaction. The Ordinance prevents vehicle owners from securing even a hearing, much less the return of their vehicles, for months following vehicle seizures. By authorizing the seizure and retention of vehicles for such extended periods prior to any determination of guilt, the Ordinance violates the procedural due process guarantees of the United States Constitution and the Constitution of the State of California.

Motor vehicles are a necessity of life in California. They provide transportation to and from employment, school, medical facilities, and childcare centers for millions of people. Indeed, given the lack of comprehensive mass transit options in much of the state, motor vehicles provide the only option for many people to function in daily life, and to care for themselves and their families. In light of the critical importance that vehicles carry, vehicle deprivation imposes tremendous burdens on

the average person. Moreover, those burdens increase exponentially with the length of any deprivation. Such burdens cannot be imposed lightly, or without stringent safeguards to prevent erroneous deprivation of rights.

The Ordinance at issue here does precisely that. It enables city authorities to deprive citizens of their vehicles for months at a time without even a preliminary showing of guilt as to the underlying offense. It further affords no means for innocent owners to obtain relief unless they first endure months without their vehicles. Vehicle owners can avoid this potentially devastating deprivation in only one way — by paying a monetary settlement. If owners elect this option, however, they lose any opportunity to demonstrate their innocence or to otherwise object to the seizure and/or retention of their vehicles. This situation places vehicle owners in the unfair position of having to either face months without any means of transport, which could possibly jeopardize their livelihoods or ability to meet other obligations, or to pay a settlement without any showing that they are at all culpable. Due to the pressures associated with the loss of one's vehicle, literally *every* person whose vehicle has been seized has settled. As a result, despite the fact that not one person has been found liable after trial for forfeiture under the Ordinance, the City has nevertheless generated more than a quarter of a million dollars in settlement revenue under the Ordinance.

The City has provided no compelling rationale that might conceivably support such a manifestly unjust situation. It has not shown that citizens must be placed in this dilemma in order to prevent greater harm. To the contrary, by settling with forfeiture victims in every case, the City has demonstrated that it has no compelling need to keep seized vehicles off the streets. It has further advanced no arguments, let alone made a sufficient showing, that prompt post-seizure procedural safeguards would undermine any legitimate interests the Ordinance may have been crafted to advance. These safeguards take on heightened significance in light of the fact that the unusual burdens that are placed on vehicle owners are part of a forfeiture process that results directly in revenue for the prosecuting authorities.

It is manifestly unfair, unnecessary, and unconstitutional to deprive owners of their vehicles for extended periods without providing for any timely relief or review. Courts have held that in order to pass constitutional muster, vehicle forfeiture ordinances like the one here must, at a minimum, provide vehicle owners with a prompt post-seizure hearing at which the government must prove probable cause for the vehicle seizure and demonstrate a compelling need for continued vehicle retention. (*Krimstock v. Kelly* (2d Cir. 2002) 306 F.3d 40, 69 (hereafter *Krimstock*).) The lack of any such hearing, among other things, led the California Court of Appeal to strike down the Ordinance as facially unconstitutional because

it violates the procedural due process guarantees of our federal and state Constitutions. (*O'Connell v. City of Stockton* (2005) 27 Cal.Rptr.3d 696 (hereafter *O'Connell*).) This Court should do the same.

STATEMENT OF FACTS

In 2001, the City enacted the Ordinance at issue in this action. The Ordinance, among other things, allows the City to seize and hold for forfeiture, without a warrant or court order, any motor vehicle based on the suspicion that it was used to solicit an act of prostitution or to attempt to consummate a drug transaction. (§ 5-1003.) The Ordinance creates broad procedural timelines that benefit the City and harm vehicle owners. The City has up to one year after a vehicle is seized to file a forfeiture petition and notify the owner of its action (§ 5-1006, subd. (b)), prior to which time the City retains possession of the vehicle. Although a vehicle owner may contest the seizure after receiving notice of the action, the Ordinance does not prescribe a deadline for when the City must provide such notice. (§ 5-1006, subd. (c).) Moreover, although the Ordinance, in theory, prescribes a waiting period of ***at least*** thirty days between seizure and judicial review (§ 5-1007, subds. (a-b)), actual waiting periods inevitably span several months because of the broad temporal discretion the City enjoys in complying with its own procedural requirements. For a vehicle owner to obtain judicial review within thirty-one days of seizure, as posited by the City, the City would have to file a forfeiture action immediately upon

seizure, and there would have to be no postponements attributable to discovery requirements or court congestion. When these and other ordinary features of any proceeding are considered, substantial delays become all but inevitable. The Court of Appeal concluded that "delays of two, three or four months are realistic in the vast majority of cases."[1] (*O'Connell, supra,* 27 Cal.Rptr.3d at p. 709.) Under less favorable circumstances, judicial review could be delayed for more than one year.[2]

A vehicle owner can avoid this burdensome delay and regain possession of a seized vehicle immediately only by paying a monetary

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[1] Consideration of the multi-month delays caused by the Ordinance is entirely appropriate with respect to a facial challenge. (See, e.g., *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 347 [In evaluating facial challenges based on procedural due process, a court must not "simply [consider] whether there are instances falling within the scheme in which a particular result would be constitutionally permissible" and "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." Instead, a court must consider the implications that result from enforcement "in the generality of cases."].)

[2] Under the Ordinance, the City must file a forfeiture action, if at all, within one year of when a vehicle is seized. (§ 5-1006, subd. (b).) Although vehicle owners may file a claim for review upon receiving notice (§ 5-1007, subds. (a-b)), the Ordinance does not set a deadline for the City to provide such notice. (§ 5-1006, subd. (c).) Therefore, the City could file a forfeiture action and provide notice just short of one year following the seizure of a vehicle. Under this scenario, because the Ordinance prevents vehicle owners from obtaining judicial review for at least one month after filing a claim (§ 5-1007, subds. (a-b)), a vehicle owner would not receive judicial review for at least thirteen months after the seizure of her vehicle, which estimate still does not account for further procedural delays attributable to discovery and court congestion.

settlement, the proceeds of which are split between the Stockton Police Department (the "SPD") and the City Attorney's Office. (§ 5-1008, subd. (c).) Accepting payment in exchange for the dismissal of a forfeiture action appears to be the optimal and desired result from the City's perspective. The City has seized over 250 vehicles to date, generating more than $273,000 in revenue for the SPD and the City Attorney's Office, but it has never taken a case to trial to enforce any forfeiture. Instead, the City has accepted monetary settlements in one hundred percent of non-default cases. This arrangement effectively forecloses judicial review by pitting an owner's compelling need for the immediate use of her vehicle against her right to be heard.

In 2002, Kendra O'Connell filed a taxpayer action for declaratory and injunctive relief against the City of Stockton and its City Attorney, seeking to enjoin enforcement of the Ordinance. The California Court of Appeal struck down the Ordinance, holding, among other things, that its failure to provide a prompt post-seizure hearing, at which a vehicle owner may test the probable cause for vehicle seizure and the City's need for continued vehicle retention, violates the procedural due process requirements guaranteed by our federal and state Constitutions. (*O'Connell, supra,* 27 Cal.Rptr.3d at p. 696.) Although the Ordinance is rife with

constitutional infirmities,[3] this brief focuses on the ways in which the Ordinance violates the procedural due process requirements of the United States Constitution and the Constitution of the State of California.

ISSUE PRESENTED

Whether Stockton Municipal Code, Chapter 5, Part XXV, sections 5-1000 et seq., which allow seizure and extended retention of motor vehicles without providing any avenue for prompt post-seizure review or relief, violate the procedural due process requirements of the United States Constitution and the Constitution of the State of California.

ARGUMENT

I. THE COURT OF APPEAL PROPERLY HELD THAT THE ORDINANCE VIOLATES PROCEDURAL DUE PROCESS UNDER THE *MATTHEWS* TEST.

Procedural due process is guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution (*United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 49-52), and article I, section 7 of the California Constitution (*People v. Ramirez* (1979) 25 Cal.3d 260, 263-264). At a minimum, procedural due process requires

[3] Amici note that the Ordinance suffers from additional defects in a number of respects, including potential substantive due process and preemption issues, as discussed by Appellant. In addition, by permitting seizure and open-ended retention of vehicles worth thousands of dollars, ostensibly to await hearings on offenses that carry minimal penalties, the Ordinance violates constitutional limits on excessive fines. Given the manifest invalidity of the Ordinance on procedural due process grounds, however, amici confine their discussion to that issue.

some form of notice and a hearing whenever property is taken. (*Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 783.) In most cases, notice and a hearing are required prior to the deprivation of a property interest. (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 112.) In fact, 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. (*Stypmann v. City and County of San Francisco* (9th Cir. 1977) 557 F.2d 1338, 1344 (hereafter *Stypmann*).) These standards apply even when the deprivation of property is temporary. (*Carrera v. Bertaini* (1976) 63 Cal.App.3d 721, 727.)

In *Matthews v. Eldridge* (1976) 424 U.S. 319, the United States Supreme Court articulated a three-factor balancing test for deciding what specific procedures are required to justify a deprivation of life, liberty, or property (the "*Matthews* Test"). This test is the definitive mechanism for evaluating procedural due process questions of the kind presented here. The *Matthews* Test requires a balancing of the following factors:

> (1) the private interest that will be affected by the official action;
>
> (2) 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

> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Id.* at p. 335.)

The *Matthews* Test is used to determine the adequacy of due process procedures in a wide variety of situations, including the adequacy of prejudgment processes in forfeiture actions. (*Krimstock, supra*, 306 F.3d at p. 60.) In particular, the court in *Krimstock* held that vehicle forfeiture ordinances are deficient if they do not, at a minimum, provide owners with a prompt post-seizure hearing, at which the government must show both probable cause for the initial seizure and a need for continued retention of the vehicle pending final judgment (a "*Krimstock* Hearing"). (*Krimstock, supra,* 306 F.3d at p. 69 [noting that where government fails to provide either "[proof of] probable cause for the seizure or [evidence] supporting the [government's need for] continued deprivation, an owner's vehicle [must] be released"].) Accordingly, while a *Krimstock* Hearing may not cure a measure of all its constitutional defects, the absence of such a hearing is independently fatal to the validity of a forfeiture scheme under *Matthews*.

The Ordinance at issue here runs afoul of the *Matthews* Test because, among other things, it lacks any form of a *Krimstock* Hearing. It thus affords vehicle owners no mechanism for early review of the City's

alleged probable cause for seizure, or its basis for open-ended pre-judgment retention of a vehicle — much less a mechanism that ensures that the City properly bears the burden of justifying its actions. (See, e.g., *Stypmann*, *supra*, 557 F.2d at p. 1344 [burden of proving probable cause and compelling need for continued deprivation rests squarely on the government].) This deficiency looms particularly large given the lack of any other meaningful safeguards that have been applied in other contexts to reduce the risks of erroneous deprivation and the burdens on private interests. A balancing of the relevant factors under *Matthews* is therefore fatal to the Ordinance.

A. Owners Have a Strong Interest in Retaining Possession of Their Motor Vehicles.

Forfeiture has long been regarded as "the most draconian" and "harshest of all our laws respecting the private ownership of [ ] property." (*Nasir v. Sacramento County Office of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 985.) Indeed, California courts have traditionally disfavored forfeiture because of its harmful effects on property owners. (*Id.* at p. 986.) Forfeiture is particularly burdensome where, as here, it targets the principal if not sole means of transportation for many citizens. Motor vehicles occupy "a central place in the lives of most Americans." (*Coleman v. Watt* (8th Cir. 1994) 40 F.3d 255, 260-61; accord *Stypmann, supra,* 557 F.2d at pp. 1342-43 [finding that owner has "substantial"

interest in the "uninterrupted use of an automobile," upon which his or her "ability to make a living" may depend]; *Krimstock, supra,* 306 F.3d at p. 61; *Bennis v. Michigan* (1996) 516 U.S. 442, 473 (dis. opn. of Kennedy, J.).) Millions of people depend on motor vehicles to transport them to and from employment, school, medical facilities, and childcare centers. (*O'Connell, supra,* 27 Cal.Rptr.3d at p. 696.) The uninterrupted use of a motor vehicle is especially important in California, where distances between destinations are often great and public transportation is not always easily accessible. (*Id.* at pp. 709-10.) Motor vehicles have thus been identified as a "necessity of life" in California. (*Id.* at p. 696.) An owner's interest in uninterrupted possession is therefore undeniably strong.

Importantly, the burdens of vehicle seizure and retention impair not only the rights of those accused of using vehicles for illicit activities, but also the rights of innocent owners and their families. While the specific harms of seizure necessarily vary by case, the Ordinance sets in place a system wherein an entire family could lose its only vehicle based on the alleged actions of a single member of that family, or even a non-family member who borrowed the car. This scenario effects a grave intrusion upon the private interests of innocent owners. The United States Supreme Court has expressed special concern about the inequities inherent in such situations. (*United States v. James Daniel Good Real Property, supra,* 510 U.S. 43, 55.) The Court has specifically observed that, "Improperly

used, forfeiture could become . . . a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals . . . ." (*Bennis v. Michigan, supra,* 516 U.S. 442, 456.) That hypothetical harm envisioned by the Court has become a reality in Stockton, where vehicles are seized without judicial oversight, to the detriment of innocent owners and potentially culpable parties alike.

Courts have recognized that the harm to a vehicle owner's interest in the uninterrupted use of her vehicle only increases with the length of any deprivation. (*Krimstock, supra*, 306 F.3d at pp. 61-62.) Even if the minimum delay of ***at least*** one month between seizure and judicial review, as envisioned by the Ordinance, were at all realistic — and it is not — it would effect an unacceptable intrusion upon the rights of private citizens. (*Lee v. Thornton* (2d Cir. 1976) 538 F.2d 27, 33 [requiring hearing within 72 hours of vehicle seizure under certain circumstances].) As noted above, however, the practical realities surrounding enforcement of the Ordinance result in delays of at least several months for the overwhelming majority of persons whose vehicles are seized. (*Ante*, at pp. 4-5; see also *O'Connell, supra*, 27 Cal.Rptr.3d at p. 709.) This unacceptable delay between seizure and judicial review only exacerbates the harms of vehicle deprivation. Thus, even to the extent that the particular harms of vehicle

deprivation may vary by case, enforcing the Ordinance increases those harms in every instance by extending the duration of the vehicle retention.

In light of the key role that vehicles play in the lives of Californians, as well as the degree of burden inherent in a protracted deprivation of this primary mode of transportation, the private interest that the Ordinance impacts is profound, as is the degree of intrusion upon that interest. The first factor of the *Matthews* Test thus weighs heavily against the Ordinance. (*O'Connell, supra,* 27 Cal.Rptr.3d at pp. 709-10.)

B. The Risk of Erroneous Deprivation Is High Given the Lack of Any Meaningful Safeguards and the City's Pecuniary Interest in Seizure.

The Ordinance contains none of the procedural safeguards that have been applied elsewhere to mitigate the risk of erroneous deprivation. In the absence of such safeguards, the Ordinance presents an unacceptably high risk of erroneous deprivation of rights — a fact which weighs heavily against the Ordinance under *Matthews.*

The Ordinance omits the basic protections embodied in a *Krimstock* Hearing that mitigate error and other unnecessary burdens. Such a hearing is expressly calculated to enable owners to test both probable cause and the need for ongoing vehicle retention at an early stage. The lack of such a hearing results in an unacceptably high risk that parties will be erroneously deprived of their rights and property in the first instance,

and that their burdens will be unduly and unnecessarily increased by unjust vehicle retention prior to judgment.

More broadly, the Ordinance ignores all of the procedural safeguards that have been used to protect the individual rights of persons facing deprivations of liberty and property. Federal and state courts alike have consistently noted that civil forfeiture is a "'harsh and oppressive procedure' which is not favored by the courts." (*United States v. $31,990.00 in U.S. Currency* (2d Cir. 1993) 982 F.2d 851, 856; see also *People v. Ten $500 Barclay's Bank Visa Traveler's Checks* (1993) 16 Cal.App.4th 475, 479; accord *People v. One 1937 Lincoln Zephyr Sedan* (1945) 26 Cal.2d 736, 738; *People v. $28,500 U.S. Currency* (1996) 51 Cal.App.4th 447, 463; *Baca v. Minier* (1991) 229 Cal.App.3d 1253, 1265; *Nasir v. Sacramento County Dist. Atty., supra*, 11 Cal.App.4th at p. 985 [forfeiture laws have been referred to as "the harshest of all our laws respecting the private ownership of personal property"].)

In recognition of the punitive character of forfeiture, the courts have not allowed the "civil" form of the statutes to obscure the reality that forfeiture is a "quasi-criminal" sanction. (See *United States v. $191,910.00 in U.S. Currency* (9th Cir. 1994) 16 F.3d 1051, 1063, 1068-69 ["We are particularly wary of civil forfeiture statutes, for they impose 'quasi-criminal' penalties without affording property owners all of the procedural protections afforded criminal defendants. [Citation.] The

relative ease of obtaining forfeitures may tempt the government to seek criminal law enforcement objectives through these nominally 'civil' proceedings"]; *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania* (1965) 380 U.S. 693, 700 ["[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize the commission of an offense against the law."].)

The Ordinance, while imposing on persons accused of relatively minor criminal offenses the extremely harsh and quasi-criminal sanction of forfeiture, systematically avoids the basic protections provided by the criminal justice system. It affords no right to a jury trial, no right to counsel, and none of the additional protections guaranteed to accused parties as a matter of course. In the absence of such safeguards, the risk of error and fundamental unfairness is unacceptably high.

The Ordinance also lacks other safeguards that are mandated in state and federal forfeiture schemes to reduce the risk of erroneous deprivation and abuse. (See Health & Saf. Code, § 11469, subd. (e) [requiring training for law enforcement officers authorized to seize vehicle]; 18 U.S.C. § 983(b)(1)(A) [providing counsel for interested parties who cannot afford legal representation].) For example, several forfeiture laws require some finding of culpability before vehicles may be seized. (See, e.g., Veh. Code, § 22659.5, subd. (a) [vehicle may be impounded as a nuisance under this section only after conviction or plea of guilty or nolo contendere]; Health &

Saf. Code, § 11488.4, subd. (i)(1) [when forfeiture sought, government must establish beyond reasonable doubt that property was used in prohibited manner]; Health & Saf. Code § 11488.4, subd. (i)(3) [defendant must be convicted of underlying criminal action beyond reasonable doubt before vehicle can be forfeited].) State and federal forfeiture schemes also provide exemptions for innocent owners to reduce the risk that vehicles will be seized from interested parties who do not participate in illicit activities. (See, e.g., Health & Saf. Code, § 11488.5, subd. (e) [providing innocent owner defense]; Health & Saf. Code, § 11470, subd. (e) [providing exemption for non-defendants with community property interest]; 18 U.S.C. § 983(d) [providing innocent owner defense for interested parties].) All of these procedures exist specifically to enhance fairness and reduce the risk of error. In the absence of these procedures, the City's omission of a *Krimstock* Hearing takes on even greater significance, and constitutes a violation of procedural due process principles under *Matthews*.

Instead of providing any of the protections that policymakers have deemed necessary in forfeiture actions of this kind, the Ordinance creates a system that actively discourages vehicle owners from testing the merits of the City's claims. Both the presumption of innocence and the requirement of a conviction before punishment are tossed aside. Once a vehicle is seized, the owner has the burden of fighting the system to regain her property at her own expense, with no burden placed on the City to come

forward with any supporting evidence (much less proof beyond a reasonable doubt) unless and until the owner navigates the protracted and expensive course of civil litigation. This burden falls particularly harshly on the socio-economically disadvantaged, who are most likely to suffer major adverse consequences from not having access to what may be a family's only car. The Ordinance dictates that vehicle owners must not only bear this burden, but also face months without transportation before they can avail themselves of even an initial hearing. If vehicle owners, including those not involved in any way in criminal activity, cannot bear this burden (because they cannot function without transportation or otherwise), they have no choice but to pay off the City in settlement. In so doing, they sacrifice any opportunity to challenge potentially erroneous charges, the validity of the seizure and attendant retention of their vehicles, and the legitimacy of the statutory scheme itself. This situation affords little if any prospect for vehicle owners, particularly those of limited means, to challenge seizures on the merits. The Ordinance thus effectively disregards the axiom that the accused are presumed innocent until proven guilty. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 483.)

To make matters worse, the settlement pressures applied by the Ordinance shield forfeiture charges from review. The pressures for settlement are so extreme that to date, every single vehicle seizure under the Ordinance — more than 250 in total — that did not result in a default has

been settled. With every non-defaulting owner electing to pay quick settlements rather than endure months of deprivation before a hearing, the City's decisions to bring charges are completely insulated from judicial review. Accordingly, the Ordinance not only creates a significant risk of error, but presents substantial obstacles to any attempt to redress errors that inevitably occur.

The foregoing flaws are further aggravated by the conflict of interest that infects the Ordinance. The Ordinance provides that the proceeds of monetary settlements and forfeiture sales are split between the SPD and the City Attorney's Office. The direct pecuniary interest of these two agencies in the outcome of proceedings aggravates the risk of overzealous and arbitrary enforcement, making the need for prompt post-seizure review by a neutral party especially vital. (*United States v. James Daniel Good Real Property, supra,* 510 U.S. 43, 55-56; see also *Jones v. U.S. Drug Enforcement Admin.* (M.D. Tenn. 1993) 819 F.Supp. 698, 724 [fact that local law enforcement agencies have a direct financial interest in the forfeiture creates dangerous potential for abuse and requires heightened scrutiny by the courts].) In the absence of prompt neutral review following seizure, the Ordinance is problematic in both its undue risk of error and in the significant appearance of impropriety it creates.

By omitting the critical safeguards of the criminal justice system and other forfeiture mechanisms, the Ordinance disregards measures

that courts and legislatures across jurisdictions have found critical to a fair and accurate process. The absence of these safeguards only magnifies the due process violation that results from the lack of a *Krimstock* Hearing, which would mitigate the chances of error and the harms of vehicle retention. When coupled with the conflict of interest created by the Ordinance and the appearance of impropriety created by that conflict, this factor of the *Matthews* Test also weighs heavily against the Ordinance.

C. The Value of Additional, Readily Available Safeguards Would Be Considerable.

Procedural safeguards, which are absent from the Ordinance, have been employed in similar contexts to reduce the risk of error, the potential for abuse, and the unnecessary harms of forfeiture. The City does not and cannot explain why such protections, while appropriate in other contexts, would be impractical or otherwise improper here. This inexplicable absence of readily available and potentially highly valuable protections further highlights the facial deficiency of the Ordinance.

The failure of the Ordinance to provide a *Krimstock* Hearing is fatal to its constitutionality. Such a hearing, the availability of which would be made known to vehicle owners soon after seizure, would at least afford a prompt post-seizure opportunity to test the probable cause for the initial warrantless seizure and the City's need for vehicle retention. Moreover, as noted, while the nature of the harm associated with vehicle

forfeiture varies by case, increasing the length of deprivation between seizure and judicial review necessarily increases the degree of harm in every case. (*Krimstock, supra,* 306 F.3d at pp. 61-62.) Accordingly, implementing a *Krimstock*-style procedure would significantly reduce the potential for unfair and arbitrary deprivations of motor vehicles by decreasing the length of time between seizure and at least preliminary judicial review.

The Ordinance lacks not only a provision for a *Krimstock* Hearing, but many other procedures that state and federal laws employ to reduce the potential for unfairness in similar contexts. For example, both state and federal laws prescribe procedural timelines that protect vehicle owners from extended delays between vehicle seizure and judicial review. (See Veh. Code, § 22659.5, subd. (b) [prohibiting impoundment of vehicle used for nuisance activity for more than 48 hours]; see also Health & Saf. Code, § 11488.5, subd. (a)(1) [providing owners with 30-day window after notice to challenge seizure of property]; 18 U.S.C. § 983(a)(3)(A) [requiring government to file forfeiture complaint, if at all, within 90 days of filing of claim by interested party].) State and federal forfeiture schemes also provide certain exemptions to protect vehicle owners when seizure would be fundamentally unfair. (*Ante*, § I.B; see also Health & Saf. Code, § 11488.4, subd. (h) [allowing defendant to seek return of the property prior to forfeiture based on lack of probable cause]; 18 U.S.C. § 983(f)

[mandating immediate release of seized property, under certain circumstances, upon showing of prospective hardship]; 18 U.S.C. § 983(g) [allowing court to reduce or eliminate forfeiture upon showing of excessiveness].) Despite the value that state and federal legislatures have found in such measures, the City has not explained why comparable safeguards are deliberately omitted from the Ordinance. That law enforcement would welcome a revenue generating tool, which allows for the circumvention of traditional due process protections, does not represent a sufficient reason for this statutory scheme to receive the imprimatur of this Court.

In the absence of these and other available safeguards, the lack of a *Krimstock* Hearing constitutes a due process violation. The City's direct pecuniary interest in the outcome of proceedings only makes this constitutional defect more glaring. (*United States v. James Daniel Good Real Property*, *supra,* 510 U.S. at pp. 55-56 [procedural safeguards are particularly important where the government has a direct pecuniary interest in the outcome of the proceedings].) Since the abuses that flow from enforcement of the Ordinance would be mitigated to a significant degree by a *Krimstock* Hearing, the *Matthews* Test again weighs strongly against the Ordinance.

D. The City's Interest in Retaining Motor Vehicles Is Weak, and the Burden of Providing a *Krimstock* Hearing Is Minimal.

Given the compelling interests of vehicle owners, the deep intrusion upon their interests caused by the Ordinance, the high risk of erroneous deprivation, and the ready availability of mitigating procedures, the City requires a very strong interest to support the mechanism it has created. Yet the City has made no showing or even argument that any purportedly legitimate interest can be achieved only through the draconian mechanism currently in place. The Ordinance thus cannot stand.

One argument that has been advanced in support of vehicle forfeiture is the legitimate government interest in crime prevention. (*Bennis v. Michigan*, *supra*, 516 U.S. at p. 452.) Seizing and forfeiting vehicles, so the argument goes, reduces the risk that those vehicles will be used in further crimes. (*Ibid.*) However, the Ordinance permits the City to accept a monetary settlement in exchange for the immediate return of a vehicle. (§ 5-1008.) Since the City has elected to do this for every vehicle seized to date, the Ordinance does not in fact reduce the risk that seized vehicles will be used in further crimes. These ubiquitous settlements are a tacit admission by the City that any proffered rationale of crime prevention is "disingenuous." (*O'Connell, supra,* 27 Cal.Rptr.3d at p. 710.) Further, if the offender is not the owner of the vehicle, the risk of recidivism caused

by the release of the vehicle is negligible. All of these considerations undercut the argument that vehicles are retained to prevent crime.

Equally unpersuasive is any argument that providing a *Krimstock* Hearing would be unduly burdensome from an administrative standpoint. A *Krimstock* Hearing requires only that the City prove probable cause for the initial warrantless seizure and its need for the continued retention of a vehicle. (*Krimstock, supra,* 306 F.3d at p. 69.) The City should know this information no later than the time of vehicle seizure, particularly given its reliance on sting operations to enforce the Ordinance. A requirement for a prompt post-seizure hearing to test the grounds for probable cause and vehicle retention hardly constitutes the kind of overbearing administrative burden to the City that might justify its absence. Indeed, the feasibility of such hearings is evident in their use in other similar contexts. (See Health & Saf. Code, § 11488.4, subd. (h) [allowing defendant to seek return of the property prior to forfeiture based on lack of probable cause]; see also 19 U.S.C. § 1615 [requiring probable cause showing prior to institution of forfeiture proceedings]; see *United States v. $191,910.00 in U.S. Currency* (9th Cir. 1994) 16 F.3d 1051, 1067 [probable cause hearing requirement in other contexts indicates that requiring such prior to forfeiture proceeding is not unduly burdensome].) The City has made no showing that such a procedural safeguard would involve an unacceptable or disproportionate burden. Because the City has not shown and cannot

show that it can advance vital interests only by retaining vehicles for months without providing a *Krimstock* Hearing, the final factor of the *Matthews* Test also cuts sharply against the Ordinance.

E. A Balancing of the Relevant Factors Under the *Matthews* Test Demonstrates That the Ordinance Violates Due Process.

When the foregoing factors are weighed against each other, the Ordinance falls far short of constitutional standards of due process. The private rights affected by the Ordinance are compelling, as vehicle owners face severe impairment of their interests from the extended deprivation caused by the Ordinance. The risk that such deprivation will occur in error is significant, given the City's direct conflict of interest and the lack of any meaningful procedural safeguards provided by the Ordinance. The Ordinance imposes significant burdens on public due process rights that do not further any legitimate interest and serve only to apply undue settlement pressure upon accused parties and innocent owners alike. The City has not proffered any valid interest that might either outweigh the private interests impacted or justify the risk of erroneous deprivation. Given the high potential value of additional procedural safeguards and the relative lack of burdens on the City associated with such safeguards, the Ordinance does not pass constitutional muster under any prong of the *Matthews* Test, much less under its totality. This Court therefore should affirm the decision below.

II. THE CITY'S REPLY OFFERS NO JUSTIFICATION FOR THE ORDINANCE THAT SATISFIES THE DUE PROCESS STANDARDS OF *MATTHEWS*.

The City's Reply Brief (hereafter "Reply") sidesteps the appropriate inquiry under *Matthews*. Other than scattershot assertions that it has an interest in crime prevention (see Reply at p. 1-2) and an anemic suggestion that a different standard "may" be the correct test[4] (a patently invalid claim given the overwhelming acceptance of the *Matthews* Test as the definitive standard), the City offers no systematic response to the deep problems that infect the Ordinance, which are highlighted in the foregoing discussion and application of the *Matthews* Test. Instead, the City attempts to gloss over those problems by arguing, without support, that owners have other avenues they can pursue to obtain the relief the Ordinance does not provide. (See Reply at p. 2 [suggesting that aggrieved parties can theoretically obtain relief "through an application for a temporary restraining order or a motion for a preliminary injunction"]; see also *id.* at p. 1 [summarily asserting that a claimant could seek a probable cause hearing quickly, without explaining how or upon what authority such hearing could be

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[4] The City's reliance on the test applied in *Barker v. Wingo* (1972) 407 U.S. 514 is misplaced because that case involved only the legality of the length of delay between property seizure and final judgment on the merits. In contrast, at issue here is the necessity for a prompt post-seizure procedural protection to which vehicle owners are entitled before final adjudication, which courts have consistently analyzed under *Matthews*. Therefore, the City's analysis of *Barker* and its progeny are inapposite.

sought].) This argument thus suggests that in lieu of a clearly defined set of protections consistent with a *Krimstock* Hearing or otherwise, vehicle owners' rights can be adequately protected by nebulous, case-by-case efforts to cobble together some form of separate relief. This argument ignores both the legal framework of the Ordinance and the realistic implications of its enforcement.

The "separate action" that the City suggests a vehicle owner could initiate for relief is problematic in myriad respects. Most strikingly, it places significant burdens on vehicle owners, denying them the benefits of the rights to which they are entitled. Whereas in a criminal proceeding an accused individual is presumed innocent and guaranteed effective representation by counsel, a separate civil action would involve no such presumption nor any right to an appointed attorney for indigent defendants. To the contrary, the vehicle owner would bear all responsibility for engaging counsel, paying associated fees, and affirmatively proving a right to vehicle release. Moreover, the costs associated with a separate action would in all likelihood far exceed the settlement amounts already in play under the Ordinance. The City's proposed "separate action" option thus does not meaningfully ameliorate the plight of vehicle owners subject to the Ordinance.

The City also attempts to minimize this denial of due process by suggesting that vehicle owners may seek relief through some form of

unspecified motion practice in a forfeiture proceeding itself. (Reply at p. 2.) This suggestion again offers no meaningful and practical alternative to paying a financial settlement or losing the use of a vehicle for months. By its terms, the Ordinance permits immediate seizure of vehicles, which results in immediate deprivation for both the accused party and any innocent co-owner. This deprivation continues until the City initiates a forfeiture action, which could be delayed for up to one year. Even when the City chooses, in its sole discretion, to file a forfeiture action, it is far from clear how motion practice for vehicle relief would be handled. The City provides no indication as to what procedures would be used, or as to how long they would take. And even if motion practice would theoretically be available, it would occur at an unknown cost, invoke unknown standards, and in all likelihood, place the burden on the owner to justify vehicle release.[5]

In light of these issues, courts have declined to allow authorities to require vehicle owners to rely on separate legal actions to protect

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[5] For instance, the City suggests that a vehicle owner might demur to a forfeiture complaint. (Reply at p. 2.) Yet demurrers not only require weeks of notice, but accept all allegations as true and grant the opposing party the benefit of all reasonable inferences. As a result, this approach would not only relieve the City of its duty to justify vehicle retention (shifting all burdens to the vehicle owner), but would also enable it to frustrate efforts for relief based merely on summary allegations, with or without factual support. This scheme thus does nothing to ameliorate the burden on vehicle owners, or to reduce the undue settlement pressure that the current scheme applies.

constitutional rights. The *Krimstock* court, in addressing a vehicle forfeiture ordinance like the one here, specifically rejected the argument that separate legal actions provide sufficient procedural due process protections. (*Krimstock, supra*, 306 F.3d at pp. 59-60.)[6] The *Krimstock* court explicitly stated that forcing vehicle owners to rely on temporary restraining orders and other alternative procedural devices, without providing a prompt post-seizure hearing following vehicle forfeiture, does "not provide [an] effective means for claimants to challenge the legitimacy of the City's retention of their vehicles pendente lite." (*Id.* at p. 60, citing *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [finding unconstitutional a Pennsylvania statute that "allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one"].)

An unconstitutional statute cannot be rehabilitated by requiring aggrieved parties to expend considerable time and resources to cobble together a separate legal avenue to approximate the relief to which due process entitles them. If the City wishes to create a forfeiture mechanism, that mechanism itself must respect the due process rights of accused parties. The burdens of justifying vehicle retention properly rest with the City, not the vehicle owners. The City's attempt to repair the Ordinance by reference

[6] The City's attempt to summarily dismiss the Second Circuit's holding in *Krimstock* as an "outlier[ ]" is specious and insulting, given the fact that *Krimstock* is the decision that is perhaps most squarely in line with the facts at issue. (Reply at p. 5.)

to other theoretical options for relief that entail undue burdens on vehicle owners thus falls far short of the mark in terms of due process standards.

CONCLUSION

The Ordinance constitutes a facially invalid attempt to force vehicle owners to choose between enduring an unduly burdensome deprivation of transport and making a settlement payment without any opportunity for judicial review. The City's attempt to leverage this unconstitutional dilemma into settlement revenue should not be allowed to stand. This deeply and unnecessarily flawed procedural scheme simply cannot be reconciled with the basic notions of due process guaranteed by the federal and state Constitutions. This Court therefore should affirm the decision of the Court of Appeal.

Dated: May 5, 2006

MEREDITH N. LANDY
DALE M. EDMONDSON
JOSHUA D. BAKER
MICHEL AMARAL
O'MELVENY & MYERS LLP

By: ________________________
Michel Amaral

Attorneys for Amici Curiae
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

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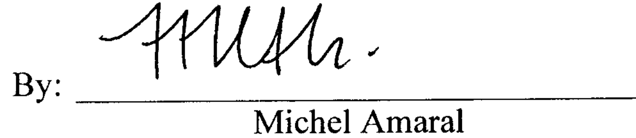
Dated: May 5, 2006

MICHEL AMARAL
O'MELVENY & MYERS LLP



By: ______________________
Michel Amaral

Attorney for Amici Curiae
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

PROOF OF SERVICE

I, the undersigned, am over the age of eighteen years and not a party to the within action. I am a resident of San Mateo County, California, where the service described below occurred. My business address is 2765 Sand Hill Road, Menlo Park, California 94025.

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AMICUS BRIEF
IN SUPPORT OF APPELLANT

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Stockton, California 95202-2777
(For The Honorable Elizabeth Humphreys)

Attorney for Appellant Kendra O'Connell:

Mark T. Clausen, Esq. *(one copy)*
The Law Office of Mark T. Clausen
150 Shrader Street
San Francisco, California 94117

Attorney for Respondents The City of Stockton and Jayne Williams, solely in her official capacity as interim Stockton City Attorney:

Richard E. Nosky, Jr., Esq. *(one copy)*
City Attorney
Lori S. Whittaker, Esq.
Deputy City Attorney
Office of the City Attorney
425 North El Dorado Street
Second Floor
Stockton, California 95202

Joseph M. Quinn, Esq. *(one copy)*
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, California 94607

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Executed on May 5, 2006, at Menlo Park, California.

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Robert Brown