No. 24-1367

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMYA SPARGER-WITHERS,
Plaintiff-Appellant,

v.

JOSHUA TAYLOR, ET AL,
Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:21-cv-02824-JRS-CSW
The Honorable Judge James R. Sweeney, II

Brief of Amici Curiae 55 Current and Former Elected Prosecutors and Law Enforcement Leaders, and Former Attorneys General, U.S. Attorneys, and U.S. Department of Justice Officials in Support of Appellant

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Circuit Rule 26.1 Disclosure Statement

The following information is provided in accordance with Circuit Rule 26.1:

- Tyler D. Helmond of Voyles Vaiana Lukemeyer Baldwin and Webb, Indianapolis, Indiana, appears as counsel for 55 current and former elected prosecutors and law enforcement leaders, and former Attorneys General, U.S. Attorneys, and U.S. Department of Justice Officials, Amici Curiae in this cause. No other attorneys are anticipated to appear on behalf of Amici Curiae in this cause. Amici Curiae are:

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- Amici Curiae are individuals and not a corporation.
- FRAP 26.1(b) and (c), organization victims and debtor information, are not applicable.

Table of Contents

Circuit Rule 26.1 Disclosure Statement i
Table of Contents vi
Table of Authorities vii
Statement of Identity, Interest, and Authority to File of Amicus Curiae 1
Argument 3
Conclusion 11
Certificate of Service 12

Table of Authorities

Cases

Bennis v. Michigan,
516 U.S. 442 (1996) (Ginsburg, J., concurring) 4

Berger v. United States,
295 U.S. 78 (1935) 8

Blyew v. United States,
80 U.S. (13 Wall.) 581 (1871)....................6

Matter of Burton,
139 N.E.3d 211 (Ind. 2020) 8

Matter of Christoff,
690 N.E.2d 1135 (Ind. 1997)....................8

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965)....................4

People v. Cameron,
929 N.W.2d 785 (Mich. 2019) 10

Kansas ex rel. *Rome v. Fountain*,
678 P.2d 146 (Kan. 1984) 6

State v. Berg,
694 P.2d 427 (Kan. 1985)....................6

Tonkin v. Michael,
349 F. Supp. 78 (D.V.I. 1972) 6

United States v. Ortega,
24 U.S. (11 Wheat.) 467, 469 (1826)....................5, 6

Young v. U.S. ex rel. *Vuitton*,
481 U.S. 787 (1987) 8

Other Authorities

ABA Standards for Criminal Justice, Prosecution Function and
Defense Function 3-1.2 (2014)....................7

Evan Deig, *Indiana Civil Forfeiture: How Should We Proceed?* 56 Ind. L. Rev. 143 (2022) 4

Fair and Just Prosecution, *Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement* (2018), available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf 9

Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Laundering, Facilitation, and Forfeiture*, 44 Duke L.J. 744 (1995) 3

Louis S. Sulli, *Seizing Family Homes From The Innocent: Can The Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111 (2017) 3

Stefan Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910 (1998) 5

Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231 (2008) 9

Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78 (2013) 9

2 William Blackstone, *Commentaries* 5

Statement of Identity, Interest, and Authority to File of Amicus Curiae[1]

Amici Curiae, a bipartisan group of 55 current and former elected prosecutors and law enforcement leaders, and former Attorneys General, U.S. Attorneys and U.S. Department of Justice Officials, file this brief in support of Plaintiffs' challenge to Indiana's civil asset forfeiture law permitting the appointment of private prosecutors to work on a contingency-fee basis. That arrangement allows private parties to take advantage of the lowered burden of proof that exists in civil asset forfeiture proceedings to pursue their personal financial interests and benefit themselves. This delegation is at odds with the role of elected prosecutors who are accountable to the public for their actions, and creates an appearance of impropriety that erodes public trust integral to keeping communities safe.

As current and former prosecutors and law enforcement leaders, amici have serious concerns about a system that inserts a private person's financial profit motivations into a quasi-criminal process. Civil asset forfeiture is different from the traditional civil legal system. It is not designed to resolve a private dispute between parties. Instead, it is a form of financial punishment used to address wrongs against the public and deter criminal behavior. But Indiana's law—unique

[1] Pursuant to Federal Rule of Appellate Procedure 29, amici hereby certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amici and its counsel contributed money intended to fund preparation or submission of the brief. All parties have consented to the filing of this amicus brief.

to that state—allows a private prosecutor to proceed not with justice in mind, but rather with the opportunity for financial gain. Such a structure offends the critical starting point of a justice system that seeks to rise above bias and improper motives and thereby earn the trust and faith of the community.

If we permit the state to inject personal and private financial motivations into our criminal legal system, we threaten both the integrity of this system as well as public safety. When people observe that a private prosecutor is allowed to take away a person's home, car, or other means of support, and that the attorney benefits monetarily from the resulting forfeitures, the community will lose faith in the legal system. And when people lack faith in the justice system, they are less likely to call the police, serve as witnesses, or cooperate in what are often intimidating and trying legal proceedings.

For all these reasons, amici have deep concerns about the very troubling implications of this law and offer our views here respectfully as friends of the Court. A full list of amici is set forth in the Disclosure Statement.

Argument

I. Indiana Has Impermissibly Delegated a Quasi-Criminal Function to a Private Parties Acting in Their Own Self-Interest

A. Civil Forfeiture Laws Require Oversight to Avoid Abuse

Civil asset forfeiture is an area rife with the potential for abuse. Unlike criminal law proceedings, the government has a severely reduced burden of proof needed to seize property. *See* Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Laundering, Facilitation, and Forfeiture*, 44 Duke L.J. 744, 755-64 (1995). Those who face the loss of property are not entitled to counsel, and many proceedings result in default judgments because the person is unable to appear in court to advocate on their own behalf or terrified of appearing alone. *See* Louis S. Sulli, *Seizing Family Homes From The Innocent: Can The Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1126 (2017).

The wide range of assets that can be subject to forfeiture is also an area of growing concern over the years: at times these can be valuable assets with a remote, almost non-existent connection to the criminal conduct and impact family members or loved ones who rely on those assets to function on a daily basis. Indiana's forfeiture regime is particularly expansive in its scope. For example, Indiana does not require the related criminal activity to result in a conviction, and its forfeiture statute encompasses a wide range of property types, including vehicles, currency, real property, and several types of personal property. To

illustrate how expansively the law reaches, currency can be forfeited if it is merely "found near or on a person who is committing, attempting to commit, or conspiring to commit" enumerated drug offenses. Evan Deig, *Indiana Civil Forfeiture: How Should We Proceed?* 56 Ind. L. Rev. 143, 148-49 (2022).

Thus, the implications of improper motives that might drive forfeiture actions are particularly acute.

B. Independent and Accountable Prosecutors Should Be the Ones Charged with Pursuing Civil Forfeiture

Proponents of the civil forfeiture system have defended it by pointing out that core constitutional protections apply in its exercise, protecting individuals from the grossest abuses. Those protections include the presence of an independent prosecutor who represents the state and a judge who has the ability to police unfair actions. *See Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring) ("[The s]tate's Supreme Court stands ready to police exorbitant applications of the statute.").

Replacing a public prosecutor with a private actor motivated by personal gain is particularly troubling and exacerbates these concerns. Civil asset forfeiture, although brought in rem against property and not against a person, nonetheless serves criminal law objectives. Unlike in traditional civil property proceedings, "a forfeiture proceeding is quasi-criminal in character." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). "Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* A prosecutor may seek, for example, to forfeit a car that was used to transport drugs or a house used

to possess or sell them. The prosecutor is not doing so to remedy a nuisance claim and make another individual whole. To the contrary, the prosecutor is bringing the forfeiture action to punish a defendant—or oftentimes just a suspect—for a suspected criminal offense and "to serve the criminal law objectives of deterrence and retribution." Stefan Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1924 (1998). Thus, forfeiture actions fall squarely on the side of a public wrong proceeding, and the proceedings are deserving of the attendant protections. *See* 2 William Blackstone, *Commentaries* *122 ("Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries;' the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'").

The Supreme Court has made clear that the only parties to a criminal action—unlike a civil action or even a qui tam action—are the government and the accused. That has long been the case. In *United States v. Ortega*, for example, the Court opined that the only parties to a criminal action are the United States and the individual it seeks to punish:

> It is that of a public prosecution, instituted and conducted by and in the name of the United States to vindicate the law of nations, and that of the United States . . . . It is a case, then, which affects the United States, and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern.

24 U.S. (11 Wheat.) 467, 469 (1826); *see also Blyew v. United States*, 80 U.S. (13 Wall.) 581, 591 (1871) ("Obviously the only parties to [a criminal prosecution] are the government and the persons indicted.").

The limitation on who can exercise prosecutorial power in criminal or quasi-criminal proceedings is not only deeply rooted in American history and law but also makes imminent sense. "[I]n the context of law enforcement," of which asset forfeiture undoubtedly is a function, "it is desirable to seek uniformity of prosecutorial policy" because the prosecutor's discretion should not "be controlled by any interested individual or individuals seeking redress by the use of the criminal process for alleged wrongs committed against them." *Tonkin v. Michael*, 349 F. Supp. 78, 81-82 (D.V.I. 1972). "[T]he national tradition . . . requires that the person representing the state in a criminal proceeding must be a law-trained, independent public prosecutor rather than a vengeful persecutor." *State v. Berg*, 694 P.2d 427, 430 (Kan. 1985) (citing *Kansas* ex rel. *Rome v. Fountain*, 678 P.2d 146 (Kan. 1984)). Prosecutors carrying out criminal law functions have enormous power—power which is already open to abuse. Delegating that authority to a private person motivated by financial gain impermissibly injects a private interest into the criminal or quasi-criminal process and creates the potential for abuse.

C. The Indiana Law Erodes All of These Critical Protections and Is at Odds With the Ethical Role of Prosecutors

Elected prosecutors, unlike private actors, are accountable to the community. If they abuse the forfeiture process, their community can hold them

accountable. Private actors, in contract, are subject to no such mechanism to curb abuse.

Indiana, however, outsources its forfeiture prosecutions to private parties—a troubling starting point on its own as private prosecutors are an anathema to a criminal proceeding. But what makes that decision even more concerning is that those individuals are paid on a contingency-fee basis. Put simply, the more money they confiscate, the more money they make. That profit motive means that the private prosecutors have every incentive to zealously bring the case in order to make money for themselves, and not to do justice on behalf of the public or promote the broader goal of community safety. They are, thus, motivated to pursue any civil asset forfeiture they legally can and not to exercise restraint and pursue this form of punishment only when justice requires, as prosecutors – ministers of justice – are committed to do. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-1.2 (2014). And since the Indiana civil forfeiture law already sweeps broadly in its scope, the private-prosecutors contingency-based civil forfeiture regime produces particularly troubling results.

This odd delegation of authority undermines the fairness and integrity of the criminal legal system. As explained, there is no American historical antecedent for a private party handling a criminal or quasi-criminal proceeding in pursuit of their own financial self-interest. The "[u]se of prosecutorial authority becomes improper when the sole or overriding motivation for exercising it is the

prosecutor's personal benefit or gain, and not to further the public interest of effective law application and enforcement." *Matter of Burton*, 139 N.E.3d 211, 213 (Ind. 2020) (citing *Matter of Christoff*, 690 N.E.2d 1135, 1141 (Ind. 1997)). "It is a fundamental premise of our society that the state wield [sic] its formidable criminal enforcement powers in a rigorously disinterested fashion." *Young v. U.S.* ex rel. *Vuitton*, 481 U.S. 787, 810 (1987). A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In Indiana, the private prosecutor empowered to pursue civil forfeitures is a representative only of themself. If justice requires dropping the forfeiture or reducing the requested amount, the private prosecutor stands to lose personally. A conflict of interest underlies every decision these individuals make. This is not a starting point that should be allowed to continue in our legal system. Indeed, Indiana stands alone in creating a process such as this. The Court should now strike it down.

II. The Conflict Inherent in Indiana's Asset Forfeiture System Erodes Public Trust in the Legal System, and Thus, Damages Public Safety

Allowing Indiana's private-prosecutor civil forfeiture regime to remain in place will cause irreparable harm to the ability of criminal justice leaders to seek justice and protect public safety. Prosecutors and law enforcement officials rely on community trust and faith in the integrity of our legal system to perform their jobs.

When the integrity of the rule of law—and people's belief in its even-handed application and enforcement—is undermined, it becomes more difficult to maintain community trust in the integrity of the justice system and protect public safety. *See, e.g.*, Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78, 78-79 (2013); Fair and Just Prosecution, *Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement* (2018), available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf, at 1 ("Trust between the community and the prosecutor's office is essential to maintain the office's legitimacy and credibility."). When individuals lack confidence in legal authorities and view protective government agencies and officials, the lawyers who represent them, the police, the courts, and the law as illegitimate, they are less likely to report crimes, cooperate as witnesses, or accept police and judicial system authority. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008).

Allowing private individuals who have profit-seeking motives to conduct asset forfeiture investigations will undoubtedly result in reduced faith in the legal system and, thus, less cooperation and decreased public safety. Even if the private party is actually acting in good faith, the mere appearance of impropriety is deeply

problematic here. *See People v. Cameron*, 929 N.W.2d 785, 786 (Mich. 2019) (McCormack, C.J., concurring in denial of certiorari) ("No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units . . . could create at least the appearance of impropriety."). A system that allows private parties to take away property, and retain some portion of it—while also lacking the normal attendant protections associated with the criminal system, including the high burden of proof—will appear patently unfair to most and make a mockery of our system of justice.

Public trust is the essential currency law enforcement relies on to keep our communities safe, and this law (not surprisingly absent in all other states in the nation) will needlessly diminish these critical bonds of trust. For all these reasons, this Court should strike down Indiana's asset forfeiture structure.

Conclusion

Indiana's asset forfeiture regime is an anathema to the legal system in America. It creates a vehicle to remove elected prosecutors from their critical role in the civil forfeiture process, erodes public trust, and, if allowed to stand, will continue to do tremendous damage to Indiana's criminal justice system and to the public safety of Indiana's people.

As such, we urge this Court to grant the requested relief and overturn this deeply troubling civil forfeiture law.

Respectfully Submitted,

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Certificate of Service

The undersigned certifies that on April 29, 2024, he caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Undersigned certifies that all participants in this care are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, undersigned certifies that he will cause 15 copies of the brief to be transmitted to the Court via delivery, delivery fee prepaid within five days of that date.

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