No. 24-1367

In the United States Court of Appeals for the Seventh Circuit

AMYA SPARGER-WITHERS,

Plaintiff-Appellee,

v.

JOSHUA N. TAYLOR, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:21-cv-02824
Hon. James R. Sweeney II

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFF-APPELLEE

Nicole Henning
David J. Sandefer
JONES DAY
Chicago, IL 60606
Telephone: 312-782-3939
nhenning@jonesday.com
dsandefer@jonesday.com

Counsel for Amicus Curiae *National Association of Criminal Defense Lawyers*

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1367

Short Caption: Amya Sparger-Withers v. Joshua N. Taylor, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The National Association of Criminal Defense Lawyers

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Nicole Henning Date: 4/29/2024

Attorney's Printed Name: Nicole Henning

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 110 N. Wacker Dr, Suite 4800

Chicago, IL 60606

Phone Number: 312-269-4158 Fax Number: 312-782-8585

E-Mail Address: nhenning@jonesday.com

rev. 12/19 AK

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1367

Short Caption: Amya Sparger-Withers v. Joshua N. Taylor, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The National Association of Criminal Defense Lawyers

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ David Sandefer Date: 4/29/2024

Attorney's Printed Name: David Sandefer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 110 N. Wacker Dr, Suite 4800

Chicago, IL 60606

Phone Number: 312-269-1544 Fax Number: 312-782-8585

E-Mail Address: dsandefer@jonesday.com

rev. 12/19 AK

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges with experience in both federal and state courts throughout the United States. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, including before the Seventh Circuit, to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Many of NACDL's members represent defendants involved in civil forfeiture proceedings. Therefore, NACDL has a significant interest in ensuring civil forfeiture proceedings are conducted properly and, more generally, to retain public trust in the criminal justice system.

[1] All parties to this appeal have consented to the filing of this brief. Counsel for NACDL certify that this brief was not written in whole or in part by counsel for any party, and no person or entity other than NACDL and its counsel has contributed financially to the submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Civil forfeiture allows the government to seize and retain property that was allegedly associated with criminal activity. For the property to be permanently confiscated, a prosecutor need only establish by a preponderance of the evidence that a nexus existed between the property and criminal activity.

Under Indiana law, "[a] prosecuting attorney may retain an attorney to bring a[ ] [civil forfeiture action]" and enter into a "compensation agreement" by which the private attorney may receive "compensation" for conducting the civil forfeiture action. Ind. Code § 34-24-1-8(a)–(b). All forms of compensation other than a "contingency fee agreement" are explicitly prohibited by statute. Ind. Code § 34-24-1-8(e). Indiana further dictates the substance of these contingency fee agreements by: (1) imposing a graduated fee schedule where, for example, a private attorney can recover up to thirty-three and one-third percent (33 1/3%) of the first ten thousand dollars ($10,000) of proceeds" but only "fifteen percent (15%) of the part of the proceeds . . . that is one hundred thousand dollars ($100,000) or more" and (2) permitting "a minimum fee that does not exceed one hundred dollars ($100)." *Id.* This compensation scheme is unique. In fact, as acknowledged by the District Court, Indiana is "alone among the fifty states [by] allow[ing] private attorneys to prosecute civil forfeitures on a contingency fee basis." R. 137 at 2.

Allowing prosecutorial functions to be carried out by private citizens with readily apparent financial conflicts of interest inherently encourages overreach (or, at minimum, appears to do so), which harms not only targeted citizens, but the citizenry of Indiana writ large. That is because when the justice system appears to serve only the individuals who represent the government, the public will eventually lose confidence in the criminal justice system. That, in turn, has negative consequences for Indiana's law enforcement community and, ultimately, the public. Moreover, private prosecutors financially motivated to prosecute individuals have been strongly disfavored from the earliest days of our Republic. That collective wisdom is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, and this Court should find Indiana's forfeiture bounty system to be unconstitutional.

ARGUMENT

I. The Due Process Clause Prohibits Funding Private Prosecutors Through Contingency Fees.

The District Court's Order rests on a simple (albeit flawed) premise: Because Indiana's civil forfeiture law "is in line with early American practice," it is not barred by the Constitution, regardless of whether the practice fits with "modern orthodoxy." R. 137 at 2, 18. That premise is wrong as a matter of both law and fact. In reality, it is hardly "modern" to recognize the perils of private prosecutors who possess a personal financial interest in the outcome of a prosecution. More than 200 years of legal

development and theory—much of which dates back to the founding of the United States and its criminal justice system—caution against the practice.

As the Supreme Court made clear in *Marshall v. Jerrico, Inc.*, the Due Process Clause of the United States Constitution protects defendants not only from biased judges, but also from biased prosecutors. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors."). Although the District Court acknowledged *Marshall*'s holding, it nevertheless disregarded it on the grounds that the Supreme Court in *Marshall* failed to "sharpen its definition of the outer bounds in its application of the law to the facts." R. 137 at 5. But the *Marshall* Court could not have been more clear: When a prosecutor "stands to profit economically from [ ] enforcement of the law," he or she has a financial bias that violates the Due Process Clause. *Marshall*, 446 U.S. at 250. While the compensation scheme in *Marshall* did not violate the Due Process Clause because the prosecutor's "salary . . . [wa]s fixed by law," *id.* (citation omitted), the *Marshall* Court determined that government prosecutors who have a financial bias in prosecuting actions violate the Due Process Clause. *Id.* at 249. That *Marshall* test is hardly novel; it is fully consistent with many other cases that have addressed biased prosecutors. *See, e.g.*, *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("[W]e establish a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment."). And that is true whether or not the perceived conflict

provably affected the outcome of the forfeiture proceeding. The Supreme Court has recognized that for the public to perceive that "justice" has occurred, the criminal justice system must avoid even the *appearance* that a conflict has affected the outcome. *See, e.g.*, *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). The private prosecutors authorized by Indiana law to directly profit from pursuing civil forfeiture actions simply do not meet the *Marshall* standard.

In addition to the Supreme Court's binding precedent, deeply rooted historical practices in this country lead to the same conclusions the *Marshall* court reached. When the colonies were founded, the English criminal justice model relied almost exclusively on private prosecutions; in other words, a "private person could manage his whole [criminal] prosecution just as he would manage a civil case." Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 360 (1986). As reform advocates later acknowledged, this system of private prosecution in England led to "arrangements between attorneys and police to secure prosecutions; mismanagement of prosecutions for want of effort, talent, or money; initiation of prosecutions for revenge and personal animosity; and abandonment of prosecutions after corrupt settlements between the private prosecutor and the defendant had been entered into." *Id.* at 362. These problems were endemic throughout the English criminal justice system, in part because states also benefited from the prosecutors' self-dealing. *See* Linda B. Deutschmann & Aaron Young, *Crime and Delinquency*, SOCIAL PROBLEMS 69–70 (Norman A. Dolch et al. eds., 2d ed. 2007) ("In early England, crimes were violations

of the 'King's Peace.' Fines were paid to the king, who made a profit from providing justice." (citation omitted)).

Despite the problems inherent in the English criminal justice model, the "formal machinery of law enforcement in Colonial America was largely derived from the English, pre-urban past," and private prosecutors were more common than public prosecutors in early colonial history. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AMER. CRIM. L REV. 649, 651 (1976). However, even before the American Revolution, American colonists recognized the threats associated with for-profit prosecutions and had begun to reject private prosecutions in favor of a public prosecution model. *See* Cardenas, at 369–71 (tracking development of public prosecutors in the American colonies and concluding that "[w]hatever its derivation, the American system of public prosecution was fairly well established by the time of the American Revolution [with] . . . local district attorneys [being] given a virtual monopoly over the power to prosecute"); John D. Bessler, *The Public Interest and Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516 (1994) ("In the United States, public prosecutions began to replace the system of private prosecutions long before the colonies gained their independence.").

In the latter half of the nineteenth century, the public had become particularly leery of fee arrangements that seemed to give prosecutors a direct financial interest in the result of prosecutions. This resulted in Congress acting to ensure that federal prosecutors were salaried, as opposed to being paid based on case outcomes. *See, e.g.*,

Annual Report of the Attorney General of the United States 17 (1873) (asserting federal prosecutors should be "wholly paid by salaries" instead of conviction fees); 28 Cong. Rec. 2396 (1896) (claiming that if the fee system were eliminated, "the great and constantly increasing number of frivolous and unwarranted prosecutions set on foot by greedy and avaricious officials and professional prosecutors and informers to get fees will be largely, if not entirely, wiped out"). Around the same time, states began to drastically limit the use of private prosecutors. *See* Michael E. O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 681 (2010) (referring to a rapid decline of private prosecutions "[b]y the turn of the twentieth century"). By the modern era, private prosecutions had largely become a relic of the past. *See id.* at 684. The very limited use of private prosecutors by states today is subject to various restraints intended to limit opportunities for corruption or the appearance of corruption. *See, e.g.*, *id.* at 738 ("The Model Rules of Professional Conduct have long banned the collection of contingency fees in criminal cases."); Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b)–(c) (4th ed. 2018) ("The prosecutor should avoid an appearance of impropriety in performing the prosecution function."); *see also Adams v. BellSouth Telecommuncations, Inc.*, No. 96-2473-CIV, 2001 WL 34032759, at *9 (S.D. Fla. Jan. 29, 2001), *dismissed sub nom. Adams v. BellSouth Telecommunications*, 45 F. App'x 876 (11th Cir. 2002) ("It is therefore incumbent on the legal bar to refrain from

actions . . . that engender the belief that lawyers are placing self-interest above their client's interest.").[2]

This broader context demonstrates that private prosecutions for profit are inconsistent with the Constitution's Due Process Clause and historical practices regarding prosecutor compensation. The Founders were skeptical of the English criminal justice model, *see e.g.*, *Duncan v. State of La.*, 391 U.S. 145, 152 (1968) ("Royal interference with the jury trial was deeply resented."), and the Constitution reflected a broader effort to replace the English model with a model of governance more protective of individual freedoms and more insulated from private whims. *See* Bessler, at 550 (1994); *see also Pennsylvania v. Muniz*, 496 U.S. 582, 595–96 (1990) (discussing how the privilege against self-incrimination was in part a reaction to the English Star Chamber). In particular, the Due Process Clause reflected the Founders' concerns that a highly centralized government subject to individual biases could deprive citizens of "life, liberty, and property," as experienced by the Founders during the Revolutionary period. *See, e.g.*, Hon. James F. McHugh (ret.) Book Review, *The Words That Made Us: America's Constitutional Conversation, 1760-1840, By Akil Reed Amar*, 104 MASS. L. REV. 91,

[2] An exhaustive list of state practices involving private prosecutors is discussed in Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L. Q. 85, 103–07 (1992). Although several states permit private attorneys to play a limited role in the criminal justice process, often by assisting public prosecutors, none of the states surveyed permit private attorneys to pursue criminal actions on a contingency basis. *See id.*

92 (2023). Critically, our system of criminal justice was founded, in part, on preventing conflicted prosecutors from pursuing arbitrary and unfair criminal actions at the expense of the general public. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice . . . is at the core of due process . . . ."); *Young*, 481 U.S. at 815 (Blackmun, J., concurring) ("[The Constitution], in my view, requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered."); *see also Cantrell v. Commonwealth*, 229 Va. 387, 394 (1985) ("A conflict of interest on the part of the prosecution in itself constitutes a denial of a defendant's due process rights . . . ."). Indiana's statutory scheme for compensating private prosecutors on a contingency basis is irreconcilable with the Due Process Clause and historical practice. Bessler, at 558 ("Because private prosecutors have financial incentives that public prosecutors do not, and because private prosecutors create, at the very least, an appearance of impropriety, private prosecutors violate defendants' due process rights.").

II. Indiana's Contingency Fee System Creates an Incentive to Aggressively Prosecute Civil Forfeiture Cases for Personal Gain.

As is often the case, the collective wisdom of history has proven to be an excellent guide when it comes to the negative real-world consequences of private prosecutors who personally benefit from case outcomes. Indiana has ignored the weight of the history discussed above by enacting a statutory scheme that encourages private

prosecutors to aggressively file forfeiture actions, which harms both the defendants involved in the forfeiture actions as well as the public trust.

A. Indiana's Contingency Fee System Incentivizes Attorneys to Aggressively Prosecute Civil Forfeiture Cases for Personal Gain.

Academics have long speculated "that a private prosecutor, motivated by the prospect of a fee, may decide to undertake a prosecution when, in a reasonable public prosecutor's discretion, no prosecution should be undertaken at all." O'Neill, at 717. In Indiana, that concern has been borne out in practice, to the detriment of the targeted individuals. Contingency fees frequently "color the exercise of a prosecutor's discretion" and blur the line between the pursuit of justice and exploiting the law for personal profit. Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 505 (1991).

Encouraged by contingency fees, private prosecutors in Indiana have sought forfeitures significantly disproportionate to the underlying offense, as in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), where Timbs pleaded guilty to a drug-related offense and police seized his recently purchased Land Rover. *Id.* at 686. A private prosecutor sought to have Timbs's Land Rover permanently forfeited, even though Timbs "had recently purchased the vehicle for $ 42,000, more than four times the maximum $ 10,000 monetary fine assessable against [Timbs] for his drug conviction." *Id.* The case is not an outlier. Members of the Indiana Supreme Court have expressed "keen[ ] awareness" of excessive forfeiture practices by the State of Indiana and have acknowledged that

"[e]ntire family farms [in Indiana] are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized." *State v. Timbs*, 62 N.E.3d 472, 478 (Ind. Ct. App. 2016), *vacated and remanded*, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019) (Barnes, J., dissenting).[3]

The per-action statutory fee structure also encourages private prosecutors to file high volumes of forfeiture actions—some of which target low-value items that are only tangentially related to an alleged crime. Since most defendants usually do not contest these cases involving low-value items, private prosecutors can collect a contingency fee merely for filing these actions. In Vanderburgh County, for example, one private firm aggressively pursued the forfeiture of low-value assets ranging from chrome wheels and recliners to video game systems and flat screen TVs. *See* Thomas B. Langhorne, *Prosecutor Candidates are Split on a Controversial Practice That Could Soon End in Indiana*, EVANSVILLE COURIER & PRESS (Sept. 20, 2022), accessible at https://www.courierpress.com/story/news/politics/elections/2022/09/20/prosecutor-candidates-are-split-on-a-controversial-practice-in-indiana/69494621007/. While private prosecutors are incentivized by a steady revenue stream of revenue to file such

[3] In fact, under Indiana's civil forfeiture system, property can be forfeited if it was allegedly used in a crime, regardless of whether the property belongs to the person who committed the crime. Thus, for example, if a teen drives the truck his parents own and use for their family business to sell a small amount of Adderall to a classmate, the truck could be subject to forfeiture. And to receive a percentage of the value of that truck, the prosecutor need only prove by a preponderance of the evidence that the truck was used in a crime.

cases, a less financially interested prosecutor would more likely exercise prosecutorial discretion and decline to initiate forfeiture proceedings.

This problem is exacerbated in the civil forfeiture context, where individual defendants can feel forced into settlement to avoid losing some of their most valuable assets—cars, tools critical to their businesses, etc. For example, an action filed by the private prosecutor in the present case, Joshua Taylor of RileyCate, LLC, sought forfeiture of a defendant's impounded Range Rover vehicle. To avoid forfeiting the vehicle entirely (or paying legal fees potentially in excess of the value of the vehicle), the defendant settled for $2,650. *See State of Indiana v. Thompson*, No. 30C01-2212-MI-001651 (Hancock Cir. Ct., Ind.) (Aug. 10, 2023 Order). For his part, Mr. Taylor walked away with $795. Other defendants have similarly paid large sums to ensure the return of valuable property, with part of the settlement going directly into the pocket of the private prosecutor who initiated the action. *See, e.g.*, *State of Indiana v. Alfred Barnes*, No. 47C01-2010-MI-001279 (Lawrence Cir. Ct., Ind.) (Oct. 24, 2022 Order) (ordering property to be returned to defendant including six chainsaws, several vehicles, and a folder containing "vehicle titles" after the defendant settled for $15,000, including $4,333.33 paid to the private prosecutor).

B. Allowing Indiana's Contingency Scheme to Proceed Will Harm Public Perception of the Criminal Justice System.

Circumstances like those described above, combined with the transparent financial conflicts inherent in the forfeiture proceeding, will inevitably erode the public's

faith in the justice system. Left unchecked, that would have wide-reaching impacts beyond the realm of civil asset forfeiture.

The contingency fee arrangements set by Indiana statute incentivize private prosecutors to target as many assets as possible and to aggressively pursue recovery. *See* Evan Deig, *Indiana Civil Forfeiture: How Should We Proceed*, 56 IND. L. REV. 143, 154 (2022) ("Under this scheme, private prosecutors, who often specialize in civil forfeiture prosecution, are incentivized to successfully forfeit the maximum amount of property as they will receive a share of the proceeds from the forfeiture. Private attorneys likely look to have the most value forfeited as possible." (footnotes omitted)). The resulting prosecutorial overreach and abuses*, see supra* Section II(A), have not gone unnoticed in Indiana's communities. Indeed, they have been repeatedly noted and acknowledged by the Indiana appellate courts. *See State v. Timbs*, 134 N.E.3d 12, 31 (Ind. 2019) ("[T]he way Indiana carries out civil forfeitures is . . . concerning"); *Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring) ("I have serious concerns with the way Indiana carries out civil forfeitures . . . ."); *Sargent v. State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting) (commenting on "overreach" in Indiana and likening civil forfeiture in Indiana to one of several "Weapons of Mass Destruction [deployed] against pedestrian targets").

The abuses under Indiana's civil forfeiture scheme have also been repeatedly covered in both local and national news media. *See, e.g.*, Radley Balko, *Take the Money and Run: The Crazy Perversities of Civil Asset Forfeiture*, SLATE (Feb. 4, 2010), accessible at

https://slate.com/news-and-politics/2010/02/the-crazy-perversities-of-civil-asset-forfeiture.html (discussing Indiana's civil asset forfeiture scheme and "how perverse forfeiture proceedings [in Indiana] can get"). And of course, word of abuses can quickly spread through tight-knit communities.

As a result of the public becoming increasingly aware of the abuses perpetuated by private prosecutors, some commenters have observed a continuing decline in the Indiana public's confidence in the criminal justice and judicial systems. *See, e.g.*, Scott Lemieux, *Police Abused Civil Forfeiture Laws For So Long That The Supreme Court Stepped In: But One Ruling Won't End It*, NBCNEWS (Feb. 21, 2019), accessible at https://www.nbcnews.com/think/opinion/police-abused-civil-forfeiture-laws-so-long-supreme-court-stepped-ncna974086 ("[T]he state's power to compel the transfer of property from suspected criminal to the state . . . has become rife with abuse and arbitrary exercises of state power."); David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 1.01, at 1-13 (LexisNexis 2017) (describing "Indiana's institutionalized bounty hunter system in which state DA's contract with private attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit" as a "scandal").

Eroding confidence in America's judicial systems is not an abstract concern with abstract impact. The very bedrock of our legal system relies on public trust and confidence in the judicial system. Without this confidence, the public is "less likely to seek the help of the courts—or worse yet, less likely to comply with dictates of the

court." Inst. for the Advancement of the Am. Legal Sys., PUBLIC PERSPECTIVES ON TRUST & CONFIDENCE IN THE COURTS (June 2020), at 3, accessible at https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf. In recent years, public confidence in the American legal system has been eroded by perceptions of bias and conflicts of interest—a perception that Indiana's forfeiture system only exacerbates. *See* Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), accessible at https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx (showing, between 2000 and 2023, that the percentage of Americans who believe the criminal justice system is "somewhat unfair" or "very unfair" to suspects has grown from 29% to 49%); *see also* Ind. Code of Judicial Conduct, R. 1.2 Cmt. 1 ("Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety."). If the Seventh Circuit were to affirm the District Court's decision and permit private prosecutors in Indiana to continue to financially incentivize private attorneys to maximize civil forfeitures, Indiana citizens will lose further trust in the judicial system, and the Indiana citizenry would suffer the consequences. The NACDL asks this Court to hold Indiana's private forfeiture scheme violates the Due Process Clause to prevent further loss of trust.

CONCLUSION

NACDL respectfully requests that the panel reverse the Order entered by the District Court and hold that Indiana's civil forfeiture practices violate the Due Process Clause.

Dated: April 29, 2024

Respectfully submitted,

/s/ Nicole Henning
Nicole Henning
David J. Sandefer
Jones Day
Chicago, IL 60606
Telephone: 312-782-3939
nhenning@jonesday.com
dsandefer@jonesday.com

Counsel for Amicus Curiae *National Association of Criminal Defense Lawyers*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with (1) the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Cir. R. 29 because it contains 3,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (2) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Garamond font.

Dated: April 29, 2024

/s/ Nicole Henning
Nicole Henning

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief of the National Association of Criminal Defense Lawyers with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 29, 2024

/s/ Nicole Henning
Nicole Henning