IN THE
SUPREME COURT OF INDIANA

NO. 18S-PL-00333

JEANA M. HORNER, et al., *Appellants (Plaintiffs below)*, v. TERRY R. CURRY, in his official capacity as Marion County Prosecuting Attorney, et al., *Appellees (Defendants below)*.	)	Appeal from the Marion Superior Court Trial Court Case No. 49D06-1602-PL-004804 The Honorable Thomas J. Carroll, Judge.

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Article 8 of the Indiana Constitution provides that "all forfeitures which may accrue" belong to the common school fund. Yet the Civil Forfeiture Statute directs no less than 90 percent of forfeiture revenue away from the school fund for the benefit of prosecutors, police, and private lawyers. The statute violates Article 8. When the government divests people of their property under the Civil Forfeiture Statute, that is a "forfeiture" under Article 8. And Article 8 requires that "all" such forfeitures go to the school fund. Because the Civil Forfeiture Statute directs only a small fraction to the school fund, it conflicts with Article 8's text, structure, history, and precedent.

In upholding the Civil Forfeiture Statute, the trial court labored under the misimpression that "civil forfeitures . . . were unknown" when Article 8 was ratified. Appellants' App. Vol. II p. 32. As explained in the Taxpayers' opening brief (at 17-26), that conclusion was wrong. Even the government now declines to defend it. *See* IMPD Br. 15 ("The trial court here based its holding on a rationale that no party argued below . . . .").

The government's alternative arguments are equally without merit. Each conflicts with basic principles of interpretation, and the government's main argument would even invite separation-of-powers problems (Section I, below). The government also errs in arguing that Hoosiers have no right to vindicate Article 8 in the courts (Section II, below). The Court should thus hold that the Civil Forfeiture Statute violates Article 8 and should reverse the judgment below.[1]

[1] This reply addresses both the Brief of Appellees Terry Curry et al. (cited as "Prosecutor's Br.") and the Consolidated Appellees' Brief of the Consolidated City of Indianapolis and Marion County et al. (cited as "IMPD Br.").

ARGUMENT

I. The Civil Forfeiture Statute violates Article 8 of the Indiana Constitution by diverting forfeiture revenue from the common school fund.

The government acknowledges that the Constitution's text must "be treated with particular deference." Prosecutor's Br. 13 (citation omitted). Notably absent from both government briefs, however, is any attempt to square Article 8's text with the Civil Forfeiture Statute. The government's leading argument not only contradicts Article 8; it would also destabilize the balance of power in Indiana, giving the General Assembly "full authority" to declare its own laws constitutional. *Id.* 31. The government's secondary arguments (and its amici's) lack merit also. Article 8 contains no loophole for "expense deductions." Nor does "all forfeitures" mean "criminal forfeitures." Nor can the legislature short-circuit Article 8 by channeling forfeitures through city bank accounts instead of state ones. The correct approach is the simplest one: The Constitution directs "all forfeitures which may accrue" to the school fund, the Civil Forfeiture Statute directs forfeitures elsewhere, so the statute is unconstitutional.

A. The General Assembly cannot circumvent Article 8 by using words other than "forfeiture."

The government's main defense is as circular as it is dangerous: The Civil Forfeiture Statute is constitutional because the General Assembly says so. The government acknowledges that Article 8 directs "all forfeitures" to the common school fund. Prosecutor's Br. 31. Even so, the government asserts that moneys diverted under the Civil Forfeiture Statute are not "forfeitures" as that word is used in Article 8. *Id*. That is because the General Assembly "has chosen not to characterize [the money] as 'forfeitures'"; instead, it has "statutorily defined" the money as "proceeds." *Id.* 11, 31. That label—in the government's eyes—"conclusively determine[s]" that the moneys are not forfeitures under the Constitution. *Id.* 21 (capitalization omitted); *see also* IMPD Br. 17-25.

This argument is not one the Court can accept. Neither the Marion County Prosecutor's Office (Prosecutor's Office) nor the Indianapolis Metropolitan Police Department (IMPD) seriously disputes that the moneys diverted under the Civil Forfeiture Statute are "forfeitures" within the meaning of Article 8. The most the government can say is that the General Assembly used a different label in the statute. Prosecutor's Br. 31 ("The key language here is 'proceeds'"). That is irrelevant; the General Assembly does not have "full authority" to insulate itself from the Constitution. *See id.*

1. "The words of the Constitution should be construed in a manner consistent with their ordinary sense and their common meaning should be attributed to them." *Eakin v. State ex rel. Capital Imp. Bd. of Managers*, 474 N.E.2d 62, 65 (Ind. 1985). Here, the ordinary sense and common meaning of "all forfeitures" includes the revenue the Civil Forfeiture Statute diverts to law enforcement. Under the statute, the government divests people of their property by proving that the property "was used to commit one of the enumerated offenses." *Serrano v. State*, 946 N.E.2d 1139, 1143 (Ind. 2011). If the government makes that showing, the owner loses title, and the property is divided up between different law-enforcement agencies. Ind. Code § 34-24-1-4(d). Property the government takes in this way is a "forfeiture" as that word has been understood for centuries. Appellants' Br. 17-26, 36-37.

In every context except this appeal, in fact, the Prosecutor's Office and the IMPD openly describe their income under the Civil Forfeiture Statute using the word "forfeiture." For example:

- The Prosecutor's *2012 Report to the Community* boasts of "the annual average total cash awarded through forfeiture" to the office. Appellants' Supp. App. (Reply Br.) Vol. II p. 26.

- The Prosecutor's Office's answer "admit[s] . . . that forfeiture funds represent a revenue source" for law enforcement. *Id.* Vol. II p. 34.
- The IMPD and Prosecutor's Office's longstanding "Memorandum of Understanding Regarding Forfeitures" referred to distribution of "forfeited" currency, "forfeited" vehicles, and "forfeited real or personal property." Appellants' App. Vol. II pp. 55-56.
- In its civil-forfeiture training materials, the IMPD addresses the question "What is Forfeiture?" by giving the clearly correct answer: "The loss of property because of a crime, with title being transferred to the government." *Id.* Vol. II p. 58.

The list goes on. While the Prosecutor's Office states (at Br. 31) that diverted moneys "are not forfeitures," the Civil Forfeiture Statute directs much of that money to the office's "forfeiture fund." I.C. § 34-24-1-4(d)(3)(B). The office files "Complaints for Forfeiture" that demand "delivery of . . . currency upon forfeiture." Compl. for Forfeiture, *State v. Alvardo*, No. 49D13-1808-MI-030844, 2018 WL 3910882, at *1 (Ind. Super. Ct. Marion Cty. Aug. 6, 2018). At the office's request, trial courts then enter judgments "for forfeiture," decree property "forfeited," and award 90 percent of that property to the Prosecutor's Office and the IMPD. *See, e.g.*, Default J., *State v. Campbell*, No. 49D01-1705-MI-020534, 2018 WL 3687213, at *1 (Ind. Super. Ct. Marion Cty. July 9, 2018). Daily practice thus confirms what is clear from the face of the statute: Apart from the General Assembly's choice of words, there is no difference between revenue the Civil Forfeiture Statute calls "forfeited" (and sends to the school fund) and revenue the statute calls "proceeds" (and sends elsewhere). Whether the statute strips people of property under the label "forfeitures," or "proceeds," or any other word, that property is a forfeiture under Article 8.

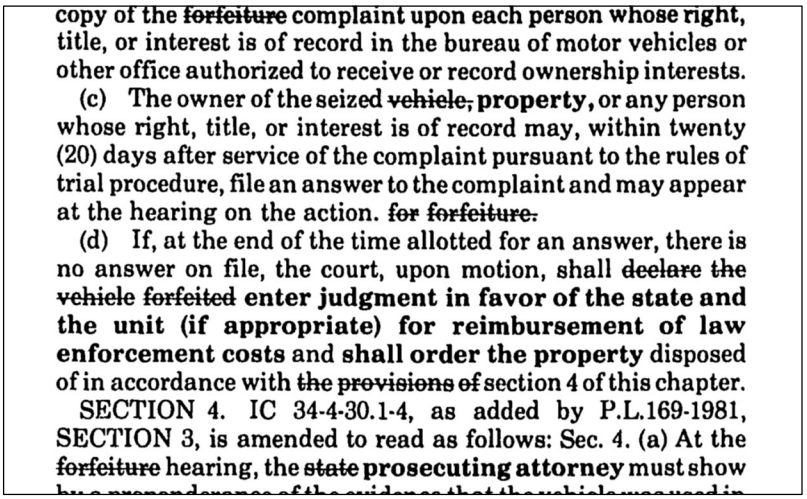
2. The government engages with none of this. Instead, it subordinates the words of the Indiana Constitution to the words of the Civil Forfeiture Statute. According to the government, it is enough that the General Assembly "has chosen not to characterize the proceeds . . . as 'forfeitures.'" Prosecutor's Br. 12. By using the label "proceeds," the government argues, the General Assembly has "conclusively determine[d]" that the diverted moneys are not forfeitures under Article 8. *Id.* 21 (capitalization omitted); IMPD Br. 16.

This argument inverts the hierarchy of state law, raising structural concerns of the highest order. The General Assembly does not have "full authority" to "conclusively determine" which of its statutes are constitutional. Prosecutor's Br. 21, 31. "It is for the courts to pass upon this question." *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619, 623 (1937). Just as "[t]he Legislature cannot enact a law and at the same time pass upon its constitutionality," *id.*, lawmakers "cannot avoid constitutional provisions by statutorily redefining constitutionally unacceptable activity," *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 434 (Neb. 1991); *see also Snyder v. King*, 958 N.E.2d 764, 772 (Ind. 2011) (rejecting, as "circular reasoning," a similar claim of legislative power under the Infamous Crimes Clause); *Cerajewski v. McVey*, 225 Ind. 67, 72 N.E.2d 650, 652 (1947) ("[W]e . . . must look through the form of the statute to the substance of what it does and we should not countenance subterfuge to evade the intent of our fundamental law."). Far from "conclusively determin[ing]" the Civil Forfeiture Statute's validity, the General Assembly's labeling choices are irrelevant.

These principles apply with special force here. Contrary to the government's view, the General Assembly does not have "leeway in determining the scope" of Article 8 (Prosecutor's Br. 29); Article 8 places the common school fund "beyond the power of the legislature." *Howard Cty. v. State ex rel. Michener*, 120 Ind. 282, 22 N.E. 255, 255 (1889). "The money due

the school fund cannot by any legislative contrivance be kept out of it." *Id.* at 255-56. "[N]or can any legislative scheme be framed" to prevent the courts from giving Article 8 full effect. *Id.* at 256.

The Civil Forfeiture Statute is just such a "legislative scheme." In fact, when the General Assembly first began diverting forfeiture revenue from the school fund, legislators actually removed the words "forfeiture" and "forfeited" from much of the statute.



copy of the ~~forfeiture~~ complaint upon each person whose right, title, or interest is of record in the bureau of motor vehicles or other office authorized to receive or record ownership interests.

(c) The owner of the seized ~~vehicle,~~ **property,** or any person whose right, title, or interest is of record may, within twenty (20) days after service of the complaint pursuant to the rules of trial procedure, file an answer to the complaint and may appear at the hearing on the action. ~~for forfeiture.~~

(d) If, at the end of the time allotted for an answer, there is no answer on file, the court, upon motion, shall ~~declare the vehicle forfeited~~ **enter judgment in favor of the state and the unit (if appropriate) for reimbursement of law enforcement costs** and **shall order the property** disposed of in accordance with ~~the provisions of~~ section 4 of this chapter.

SECTION 4. IC 34-4-30.1-4, as added by P.L.169-1981, SECTION 3, is amended to read as follows: Sec. 4. (a) At the ~~forfeiture~~ hearing, the ~~state~~ **prosecuting attorney** must show

Appellants' Supp. App. (Reply Br.) Vol. II p. 51. The reason for these deletions is obvious. As one lawmaker acknowledged last session, "what we're really trying to do with this bill, in the past, is hope that if we say it's 'reimbursement of expenses,' that the courts will let us get away with not putting it in the common school fund, which the Constitution says you ought to do in the first place." House Chamber 57:00-57:41 (Feb. 26, 2018) (Rep. Pierce), https://tinyurl.com/y9s8pvu8.

The Constitution cannot be circumvented so easily. As with the rest of the Constitution, the text of Article 8, Section 2 "must be treated with particular deference, as though every word had been hammered into place." *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484 (Ind. 2006) (citation omitted). Whatever discretion the General Assembly may

have over money that does not fall within Article 8, Section 2, it has no discretion to divert revenue that provision covers.

3. The cases the government cites prove the point. For example, in *State ex rel. Attorney General v. Meyer*, 63 Ind. 33 (1878), the Court considered whether a law giving adopted children inheritance rights conflicted with Article 8, which grants the school fund "[a]ll lands and other estate which shall escheat to the State." Ind. Const. art. 8, § 2. The Court upheld the statute—but not (as the government claims) because the General Assembly has "expansive authority" to manipulate Article 8. Prosecutor's Br. 23; IMPD Br. 17-18. Rather, Article 8 did not cover the property in the first place. Estates that descend to adopted children do not "escheat to the State," just as estates inherited by biological children do not "escheat to the State" and just as vehicles returned to innocent owners are not "forfeitures." *See* I.C. §§ 34-24-1-1(e), 4(a), 5.[2] Property the Civil Forfeiture Statute divests from its owners, by contrast, fits within the common understanding of "forfeitures." *See* pages 10-11, above; Appellants' Br. 18-26. Unlike the estate in *Meyer*, this property is covered by the plain text of Article 8 and is "beyond legislative control." *Howard Cty.*, 22 N.E. at 255.

State ex rel. Baldwin v. Board of Commissioners, 85 Ind. 489 (1882) (*Baldwin I*), is similar. There, the Court held that valuables found on corpses did not qualify as "forfeitures" under Article 8. Again, however, that conclusion does not suggest that the legislature "has the authority to determine which funds fall within the scope of Article 8, section 2." Prosecutor's Br. 26; IMPD Br. 19. Far from it; the Court in *Baldwin I* construed Article 8 and applied the plain text to the statute at issue—exactly what the Taxpayers request here. "A forfeiture," the

[2] Nor had the property in *Meyer* escheated to the state years earlier (as the government suggests), since Indiana had no system for escheats at all until 1896. *See* John S. Grimes, *Development of Descent in Indiana*, 29 Ind. L.J. 319, 339 (1954) ("[T]here was no provision by which title to this money ever finally vested in the state."); 2 Ind. Rev. Stat. 1852, pp. 281-82.

Court reasoned, "may be generally defined to be the loss of what belongs to a person in consequence of some fault, misconduct or transgression of law." 85 Ind. at 493; *see also id.* (similar). So construed, "forfeitures" did not cover valuables found on blameless corpses. As in *Meyer*, the property did not even vest in the government; the county treasurer would hold the proceeds indefinitely for the "real owner." *Id.* at 494. And while the General Assembly could *choose* to direct that property to the school fund, *see id.*, Article 8 did not *require* it to do so. By contrast, revenue under the Civil Forfeiture Statute fits perfectly with *Baldwin I*'s conception of "forfeiture." Appellants' Br. 21. In turn, Article 8 gives the General Assembly no choice but to remit that revenue to the school fund.

O'Laughlin v. Barton, which the government discusses at length, does not change the analysis. In *O'Laughlin*, the Court considered a statute providing that bail money could go to injured persons, rather than the school fund. 582 N.E.2d 817 (Ind. 1991). But the Court's majority did not mention—much less analyze—whether the statute comported with Article 8. Nor does the question appear to have been briefed. Appellants' Supp. App. (Reply Br.) Vol. II pp. 56-66.[3] For those reasons, the government's reliance on *O'Laughlin* reads far too much into "[a]n opinion which does not mention the principle for which the case is supposed to be an authority." *Rouse v. Paidrick*, 221 Ind. 517, 49 N.E.2d 528, 531 (Ind. 1943).

At the same time, *O'Laughlin* is instructive in one respect: Even though the litigants failed to timely raise the Article 8 issue, two of this Court's five Justices thought it important enough to merit a separate writing. Writing for himself and Justice Givan, Chief Justice Shepard voiced concern that the General Assembly "really just declare[d] that a forfeiture is not a forfeiture" and used "a different word" to divert money from the school fund. 582 N.E.2d at

[3] Treasurer O'Laughlin may have raised the issue in a rehearing petition, which the Court denied.

821 (Shepard, C.J., dissenting); *see also id.* ("Judicial approval of this sort of evasion will invite further dismantling of the Common School Fund."). Those words apply with full force here. Unlike in *O'Laughlin*, Article 8 is front and center here, and the Prosecutor's Office and the IMPD argue full-throatedly that "a forfeiture is not a forfeiture." *See id.*, *quoted in* IMPD Br. 20; *see also* Prosecutor's Br. 26. That position cannot be squared with Article 8, and it invites serious questions about the relationship between the legislature and the courts.

B. The General Assembly cannot divert revenue from the common school fund for "expense deductions."

The government's secondary arguments also lack merit. Even if the General Assembly does not have "full" authority to divert forfeiture revenue, the government contends, it has "specific authority" to divert revenue to reimburse other agencies' expenses. Prosecutor's Br. 26, 31; IMPD Br. 28-32. Nowhere does the government reconcile this argument with Article 8. Elsewhere in Article 8, Section 2, for example, the framers expressly allowed for "deducting the expense of selecting and draining [swamps]." Yet they included no such language in the forfeitures clause. Particularly given Indiana's history, Appellants' Br. 32-36, the framers' construction makes perfect sense. So too does this Court's conclusion that "the fund must be devoted to the support of the common schools, without the diversion from it of a penny for any other purpose whatever." *Howard Cty.*, 22 N.E. at 255.

The IMPD concedes that the Taxpayers' interpretation "might be viable" in principle, IMPD Br. 28, yet the government offers no principled alternative. Instead, the government relies on a mistaken view of one sentence in a case that has been cited one time. According to the government, *Auditor & Treasurer of Grant County v. Board of Commissioners*, 7 Ind. 315 (1855), gives the political branches free rein to make "expense deductions" from school-fund revenue. IMPD Br. 28; Prosecutor's Br. 27. But *Grant County* is not the blank check the

government suggests. Instead, it addressed an episode unique to Indiana's transition from the 1816 Constitution to the 1851 Constitution. In 1849, Grant County contracted with a builder to construct a seminary. During "the progress of the work," the seminary fund "bec[a]me exhausted." 7 Ind. at 315. To pay the builder, the county commissioners thus "advanced out of the county treasury near 1,900 dollars, anticipating the revenue to the seminary fund in that amount, for the completion of the building." *Id.* Meanwhile, the electorate ratified the 1851 Constitution, which "cut[] off the seminary revenue, provid[ed] for the sale of existing seminary buildings, &c., and appropriat[ed] the proceeds to the common school fund." *Id.* Given that sea change in the law, Grant County sought permission to recover its loan to the seminary from the proceeds of the seminary's sale. This Court affirmed that "[i]t is a sufficient compliance with the constitutional requirement, if the seminary fund, after payment of its debts, is appropriated to common schools." *Id.* at 316.[4]

On the strength of that sentence, the Prosecutor's Office and the IMPD claim a free hand to subtract "expense[s]" from school-fund revenue. IMPD 28; Prosecutor's Br. 26-31. That distorts *Grant County* beyond recognition. To start, it is not at all clear *Grant County* applies beyond Article 8's seminary clause, which raised uniquely thorny questions in the 1850s.[5] In

[4] The record suggests the *Grant County* litigation may not have been adversarial. On behalf of the board of commissioners, James Brownlee (attorney and county auditor) "confess[ed] judgment in favor of the contractor" in an earlier lawsuit over the amount owed. *History of Grant County, Indiana*, 586 (1886), https://tinyurl.com/yac2x2ls; *see also* Addend. 14a-15a. The board then sued Brownlee, in his capacity as county auditor, and petitioned the trial court to order him and the county treasurer to repay the judgment from the seminary proceeds. Addend. 4a-6a. Brownlee and the treasurer promptly "admit[ted] the matters and things set forth in said Petition," *id.* 6a-7a, and the court entered judgment for the board, *id.* 7a. (This Court's *Grant County* case file is reproduced in the attached addendum.)

[5] *See, e.g.*, 2 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana. 1850*, 1867 (H. Fowler ed. 1850) ("Certainly the rights of the creditors of seminaries, whose only lien may be upon the building itself, should be preserved and maintained.") (S. Colfax).

any event, the outstanding "debts" recovered in *Grant County* differ in meaningful ways from the forfeiture revenue diverted under the Civil Forfeiture Statute. The Court in *Grant County* understood the sums advanced by the county to be a preexisting claim on the seminary's assets—much like a bank's mortgage on a house. Indeed, the only time this Court has cited *Grant County*, it did so "[a]s to the right to sell county seminaries for private debts." *President & Trs. of the Hendricks Cty. Seminary v. Matlock*, 9 Ind. 114, 115 (1857). Revenue diverted under the Civil Forfeiture Statute is different. Unlike a mortgagee, police and prosecutors are not recovering "private debts" owed to them by property owners. They receive a cut of the money when they succeed in taking property under the statute; they receive nothing when they do not.

In this way, the Civil Forfeiture Statute bears little resemblance to the arrangement in *Grant County*. The statute is similar, however, to an arrangement this Court invalidated in 1888, in *Board of Commissioners v. State ex rel. Baldwin*, 116 Ind. 329, 19 N.E. 173 (*Baldwin II*). Applying the plain text of Article 8, the Court in *Baldwin II* held that expenses the government incurs in collecting school-fund revenue cannot be reimbursed "out of the moneys collected." *Id.* at 178; Appellants' Br. 28-29. The Prosecutor's Office recasts *Baldwin II* as involving an unspoken line between "local governments" and "the State." Prosecutor's Br. 28. But as discussed above (at 12-13), Article 8 serves as a check on state and local action alike, and *Baldwin II* speaks for itself. 19 N.E. at 179 (noting that "the attorney general" must comply too). In short, the Court in *Baldwin II* emphatically rejected what the government argues for here: the power to "appropriate, directly or indirectly, any part of the moneys collected on [a] judgment" to reimburse the expense of "procuring such judgment." *Id.* at 178; *see also* IMPD Br. 27 (acknowledging that *Baldwin II* "holds that property falling within [Article 8, Section 2's] reach

must go to the school fund"). That reasoning follows from Article 8's text, structure, and history, and it precludes the government's claim to "expense deductions."[6]

C. Article 8 is not limited to what the government calls "criminal forfeitures."

The government's third theory fares no better. If the General Assembly lacks "discretion" to divert forfeiture revenue (and it does), the Prosecutor's Office proposes that the Court rewrite Article 8 to apply "only to criminal forfeitures." Prosecutor's Br. 32 (capitalization omitted). Like the government's other interpretations, this one, too, is incorrect.

1. The Prosecutor's Office contends that the words "fines" and "forfeitures" are synonymous, and because Article 8 elsewhere addresses criminal fines, "all forfeitures" must refer only to criminal forfeitures. *Id.* 33. That is wrong. Whatever "fines" means for purposes of the federal Excessive Fines Clause (*id.*), the framers in Indiana viewed fines and forfeitures as distinct concepts for purposes of Article 8. Article 8 assigns to the school fund "fines assessed for breaches of the penal laws of the State," and, separately, "all forfeitures which may accrue." For that reason, reading "'forfeiture' as equivalent to 'fine'" (*id.*) would violate a "fundamental rule[] of constitutional construction" by stripping the forfeitures clause of independent effect. *Hendricks v. State ex rel. Nw. Ind. Crime Comm'n*, 245 Ind. 43, 196 N.E.2d 66, 70 (1964).

Unlike the government's reading, the Taxpayers' interpretation gives the fines clause and the forfeitures clause distinct meanings. Under the plain text of the fines clause—"fines assessed for breaches of the penal laws of the State"—it might make sense to conclude that criminal-court fines are covered, while civil monetary penalties are not. But the forfeitures clause contains no

[6] The government's briefs cite an 1895 Virginia decision construing the Virginia Constitution to permit diversions of fines to reimburse enforcers' "cost or expense." *See* IMPD Br. 30-31; Prosecutor's Br. 28. Whatever the merits of that interpretation as a matter of Virginia law—and one court has called it "mere dicta," "unwarranted," and "unwise," *Ex parte McMahon*, 66 P. 294, 294 (Nev. 1901) (per curiam)—it conflicts with this Court's interpretation of Article 8. *See, e.g.*, *Baldwin II*, 19 N.E. at 178.

such limitation. That can only mean the framers did not intend to treat forfeitures in civil court differently from those in criminal court. In fact, as discussed in the Taxpayers' opening brief (at 23), such a distinction would have mystified the framers.

Seemingly, the distinction mystifies the Prosecutor's Office too. The office accepts that "forfeited recognizances"—i.e., forfeited bail bonds—are "forfeitures" under Article 8. *See* Prosecutor's Br. 32-33 & n.1. Yet bail-bond forfeitures are, if anything, *less* "criminal" than forfeitures under the Civil Forfeiture Statute. They "do[] not involve the guilt or innocence, conviction or acquittal, of any person." 4 Am. Jur. Pl. & Pr. Forms, *Bail and Recognizance* § 66. Rather, bail-bond forfeitures entail "a civil action to enforce the surety's contract with the state." *Id.* They are often enforced, "like any other bond, by civil suit." *State v. Robb*, 16 Ind. 413, 414 (1861); I.C. § 27-10-2-12(h). And the underlying litigation may be civil. *Germann v. Tom's 24-Hour Towing, Inc.*, 776 N.E.2d 932, 933-34 (Ind. Ct. App. 2002). Forfeitures under the Civil Forfeiture Statute, by contrast, arise from alleged criminal violations and have "significant criminal and punitive characteristics." *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014). Thus—and as courts and attorneys general in eight other states have concluded—*in rem* forfeitures fit easily within the common understanding of "forfeitures." Appellants' Br. 23-26.

2. The Prosecutor's Office also asserts that this Court has held "that Article 8, Section 2 does not apply to *civil* actions for punitive remedies." Prosecutor's Br. 34; *see also* IMPD Br. 21-24. Again, the Prosecutor's Office conflates the forfeitures clause with the fines clause. Every decision the Prosecutor's Office cites traces back to a single ruling—*Burgh v. State ex rel. McCormick*, 108 Ind. 132, 9 N.E. 75 (1886)—which construed the fines clause but did not mention the forfeitures clause. *Id.* at 76. So even if *Burgh* offers a reasonable construction of the fines clause, it says nothing about the meaning of the forfeitures clause. *See*

Appellants' Br. 22 & n.2. Nor did any of the decisions following *Burgh* suggest that the two clauses are interchangeable.[7] Quite the opposite; when confronted with the issue, this Court has given the forfeitures clause distinct meaning and construed it to govern laws like the Civil Forfeiture Statute. *See Baldwin I*, 85 Ind. at 493-94; *cf. W. Union Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N.E. 679, 681 (Ind. 1901) (construing the two clauses separately); Appellants' Br. 20-21, 23.

Of course, all this distracts from a more basic point: Even if the forfeitures clause were to "apply only to penal action," as the Prosecutor's Office urges (Appellants' App. Vol. II p. 134), proceedings under the Civil Forfeiture Statute still would qualify. Unlike the civil violations at issue in every one of the nineteenth-century cases the government cites, the government can prevail under the Civil Forfeiture Statute only if it proves that a crime has taken place. *See* page 10, above. In this way, forfeitures under the Civil Forfeiture Statute are "manifestly penal" and would satisfy even the narrowest reading of Article 8. *See Reorganized Sch. Dist. No. 7 v. Douthit*, 799 S.W.2d 591, 594 (Mo. 1990). Article 8's text, structure, and history point to one conclusion. The framers' reference to "all forfeitures which may accrue" was deliberate, and—as this Court said in *Serrano*—the clause covers "all forfeitures," including those under the Civil Forfeiture Statute. *Serrano v. State*, 946 N.E.2d 1139, 1142 (Ind. 2011).

[7] *See State v. Ind. & I.S.R. Co.*, 133 Ind. 69, 32 N.E. 817, 820 (1892) (quoting the fines clause and the forfeitures clauses but citing only *Burgh*); *Pa. Co. v. State*, 142 Ind. 428, 41 N.E. 937, 939 (1895) (quoting both clauses and citing *Indiana & I.S.R. Co.*); *Judy v. Thompson*, 156 Ind. 533, 60 N.E. 270 (1901) (quoting both clauses and citing *Pennsylvania Co.* and *Toledo, St. L. & K.C.R. Co. v. Stevenson*, 131 Ind. 203, 30 N.E. 1082 (1892), another decision citing *Burgh*).

D. The IMPD's residual arguments lack merit.

The IMPD advances another two arguments for upholding the judgment below. Both are meritless.

First, the IMPD contends that the General Assembly's power to authorize forfeitures includes the "more limited authority" to do so in a way that violates Article 8. IMPD Br. 30. But the power to violate the Constitution is not a subset of "[t]he Legislative authority of the State." Ind. Const. art. 4, § 1. Of course the General Assembly could decide to repeal the Civil Forfeiture Statute, just as, for decades, it chose not to provide for the escheat of property. *See* page 14 n.2, above; *cf. Meyer*, 63 Ind. at 41 ("[I]t had never been, and is not now, in our opinion, the policy of this State, to enforce rigidly the recovery of escheated or forfeited estates."). But when the General Assembly chooses to establish a system for forfeiting (or escheating) property, that property must go to the school fund. Having chosen to enact the Civil Forfeiture Statute, the General Assembly cannot ignore Article 8.

Second, the IMPD claims that whatever Article 8 might mean for the Prosecutor's Office, it places no limits on diverting forfeiture revenue to Indianapolis. According to the IMPD, Article 8 covers only forfeitures that accrue "to the State." IMPD Br. 26. "Indianapolis is not the State." *Id.* So siphoning forfeiture revenue to Indianapolis "cannot offend Article 8, section 2." *Id.*

That syllogism fails. The phrase "all forfeitures which may accrue" does not distinguish between "the State" and political subdivisions that enforce the state's laws. Such a distinction would not have made sense in 1851. *Cf. Brownsburg Cmty. Sch. Corp. v. Natare Corp.*, 824 N.E.2d 336, 348 (Ind. 2005) ("Municipal and local government units . . . are creatures of the State."). It is certainly illogical here. The IMPD's share of forfeiture revenue follows from the enforcement of state statutes. Actions under the Civil Forfeiture Statute are prosecuted by a

constitutional officer "in the name of the state." I.C. § 34-24-1-3(a)(1). These actions are based on violations of Indiana's state criminal laws. *Id.* §§ 34-24-1-1, -4(a). And the IMPD's share of the revenue is premised on its role in enforcing those laws on behalf of the state. *Id.* § 34-24-1-4(d)(3). In this context, the IMPD is, "for both practical and legal purposes, the state." Jessica R. Manley, Note, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 Nw. U. L. Rev. 967, 989 (2006). Forfeiture complaints even describe IMPD officers as "officers of the Plaintiff"—the "State of Indiana." Compl. for Forfeiture, *Alvardo*, 2018 WL 3910882, at *1.

As against all this, the IMPD plucks a sentence from this Court's decision in *Western Union Telegraph Co. v. Ferguson* stating that "the school fund is to be enriched 'from all forfeitures which may accrue' to the state." 157 Ind. 37, 60 N.E. 679, 681 (1901). But far from distinguishing "the State" from its "creatures," *Natare Corp.*, 824 N.E.2d at 348, the Court in *Ferguson* drew a more sensible line: between government enforcement and private lawsuits. "[F]ixed, punitive damages" awarded to "aggrieved" private citizens, the Court held, obviously are not "forfeitures" under Article 8. 60 N.E. at 681; *see also* Appellants' Br. 21. Just as obviously, revenue diverted to enforcers of the state's criminal code fits "forfeiture" to a tee.

The courts of North Carolina—which the IMPD cites for support (Br. 16 n.6)—have made this point repeatedly. Unlike Article 8, North Carolina's constitution explicitly drew a line at penalties that "accrue to the State." N.C. 1868 Const. art. IX, § 4. (The wording later changed.) Yet the courts have found "no merit" to the sort of argument the IMPD presses here. *Shavitz v. City of High Point*, 630 S.E.2d 4, 15 (N.C. Ct. App. 2006) ("Finally, we note that there is no merit in High Point's argument that the penalties it collects do not accrue to the state."). "[T]he phrase 'accrue to the State,'" the courts hold, "should be taken in the context in which it

was developed—as opposed to being payable to a private party." *Donoho v. City of Asheville*, 569 S.E.2d 19, 23 (N.C. Ct. App. 2002); *Katzenstein v. Raleigh & Gaston R.R. Co.*, 84 N.C. 688, 693 (1881). This Court's decision in *Ferguson* reflects a similar view of Article 8.

As a practical matter, moreover, the IMPD's theory raises far more questions than answers. For example, the IMPD suggests that county prosecutors are "local government[]" for purposes of Article 8. IMPD Br. 24 & n.8. But prosecutors are constitutional officers, Ind. Const. art. 7, § 16, whose "duties are concerned with representing the State of Indiana." *Matter of Catt*, 672 N.E.2d 410, 410 (Ind. 1996) (citation omitted). The IMPD also does not explain what its theory means for places—like Marion County—that funnel forfeiture revenue to prosecutors through county bank accounts. *See* Default J., *Campbell*, 2018 WL 3687213, at *1 (directing revenue "to the MCPO portion of the City of Indianapolis - Law Enforcement Fund"). And what of the many jurisdictions that send forfeiture revenue to private law firms? *See* I.C. § 34-24-1-8. The IMPD's theory raises all these questions—and more—without offering any answers.

The precedent the IMPD cites yields more confusion still. IMPD Br. 25-26. Not one of the decisions relates to Article 8. For example, *Indiana State Toll-Bridge Commission v. Minor* involved the status of a bridge commission for purposes of venue and public-employment rules. 236 Ind. 193, 139 N.E.2d 445, 448-49 & n.3 (1957). Other cases involve different parts of the Constitution. *See, e.g.*, *Steup v. Ind. Hous. Fin. Auth.*, 273 Ind. 72, 402 N.E.2d 1215, 1218 (1980). Beyond reciting the words "fiscal issues," IMPD Br. 25, the IMPD does not even try to connect this precedent with Article 8. That only underscores how far the IMPD's argument strays from the question presented.

E. Amici's policy arguments are misplaced.

The government-aligned amici emphasize what the government is unwilling to admit: Whatever Article 8 says, law enforcement should have the money. Civil forfeiture is important, amici contend, and law enforcement puts revenue from forfeiture to good use. Br. Amici Curiae Accelerate Indiana Municipalities, Inc. et al. 14. As a policy matter, many of amici's assumptions are questionable. For example, amici overlook that public schools are cash-strapped too, and that they benefit greatly from school-fund loans. *See* Br. Amicus Curiae Indiana School Boards Ass'n 8-11 (describing school-security program). Amici disregard the many counties where forfeiture revenue goes, not just to law enforcement, but to private lawyers. Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers—who get a cut of the money*, The Indianapolis Star (Nov. 14, 2010), at A1. They also overstate civil forfeiture's public value, while ignoring the sometimes devastating costs for property owners.

Of course, the wisdom of amici's policy arguments is beside the point. *Cf. Paul Stieler Enter. v. City of Evansville*, 2 N.E.3d 1269, 1277-78 (Ind. 2014) ("We decline to condone violation of constitutional provisions to justify such policy implementation strategies."). If police and prosecutors want forfeiture revenue, they should persuade the Indiana electorate to amend the Constitution. Between 1980 and 1990, in fact, citizens in four other states—Virginia, Oregon, New Mexico, and Utah—voted to redirect forfeitures from education to law enforcement.[8] Hoosiers have seen things differently. When confronted with a proposal to loosen the common school fund, in 1986, 71 percent of Indiana voters "gave a resounding no." *'No' To*

[8] James Simon, Note, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 Wash. & Lee L. Rev. 1295, 1319-20 (2017); Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 Willamette L. Rev. 449, 461 (1990); N.M. Att'y Gen. Op. No. 87-20, 1987 WL 270320, at *1 (1987); Utah Att'y Gen. Informal Op. No. 85-61, 1985 WL 193119, at *2 (1985).

Amendments, The Indianapolis Star (Nov. 6, 1986), at 26. The people of Indiana have the last word on Article 8's content. And because the Civil Forfeiture Statute violates Article 8, this Court should reverse the trial court's judgment.

II. The Taxpayers have the right to bring this case.

The Prosecutor's Office agrees that this case "raise[s] a substantial question of Indiana constitutional law" and one "of great public importance." Prosecutor's Resp. Mot. Transfer 2, 5. Yet it devotes much of its brief to arguing that the question should remain unresolved. Because Article 8 secures a public fund, the Prosecutor's Office contends, Indiana citizens have no right to vindicate it in the courts. Prosecutor's Br. 14-21.

This last-ditch effort conflicts with a century's worth of precedent. This Court has long held that Hoosiers may enforce public rights; when "public rather than private rights are at issue," it is enough that the plaintiff "be a citizen, and as such interested in the execution of the laws." *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003) (quoting *Bd. of Comm'rs v. State*, 86 Ind. 8, 12-13 (1882)). At least twice, moreover, the Court has held that public-standing plaintiffs can sue to vindicate Article 8. In *Mitsch v. City of Hammond*, 234 Ind. 285, 125 N.E.2d 21 (1955), the Court held that taxpayer plaintiffs had the right to litigate whether an ordinance was unconstitutionally "divert[ing] from the common school fund large sums of money." *Id.* at 22. "[I]t has been the rule in Indiana for many years," the Court reasoned, "that a taxpayer has such an interest in the public funds as will enable him to maintain a suit in equity to prevent unlawful waste or appropriations thereof." *Id.* at 23. The Court proceeded similarly in 2013, acknowledging taxpayers' right to vindicate Article 8 and deciding their constitutional challenge to a state statute. *Meredith v. Pence*, 984 N.E.2d 1213, 1217 n.4, 1220-25 (2013). This case is no different. "As taxpayers challenging allegedly unconstitutional

use of public funds," Jeana Horner and her co-plaintiffs have a right to bring this case. *Id.* at 1217 n.4.

In arguing otherwise, the Prosecutor's Office breaks with these principles at a fundamental level:

First, the Prosecutor's Office contends that Article 8 "does not give private individuals personal rights in the public school system." Prosecutor's Br. 14. But the Taxpayers do not claim a "personal right[]." They seek to vindicate the *public* right to stop an "unconstitutional use of public funds." *See Meredith*, 984 N.E.2d at 1217 n.4. In this way, they are no different from the plaintiffs in *Meredith*, *Mitsch*, and other cases where the Court has upheld citizens' right to contest the misuse of public moneys.

For this reason, too, the Taxpayers' lawsuit differs from the three cases on which the Prosecutor's Office relies. Prosecutor's Br. 17-18. The defendants in each of those cases invoked Article 8, not to vindicate public rights, but to defend against private liability. *Judy v. Thompson*, 156 Ind. 533, 60 N.E. 270, 271 (1901); *Pa. Co. v. State*, 142 Ind. 428, 41 N.E. 937, 940 (1895); *$100 v. State*, 822 N.E.2d 1001, 1015 (Ind. Ct. App. 2005). The Taxpayers, by contrast, do not seek to protect their "private interest[s]." Prosecutor's Br. 17 (citation omitted). This case "involves the establishment of public rights." *Zoercher v. Agler*, 202 Ind. 214, 172 N.E. 186, 189 (1930).

Second, the Prosecutor's Office writes off the Court's public-standing precedent with the claim that "standing" is "entirely separate" from whether plaintiffs can vindicate a "right." Prosecutor's Br. 19-20. But those are two sides of the same coin; "[t]he point of the standing requirement is 'to insure that the party before the court has a substantive right to enforce the claim that is being made in the litigation.'" *O'Banion v. Ford Motor Co.*, 43 N.E.3d 635, 642

(Ind. Ct. App. 2015). And whether the Prosecutor's Office favors the label "standing" or "right," this Court has held that taxpayer plaintiffs can "challeng[e] allegedly unconstitutional use of public funds" in court. *Meredith*, 984 N.E.2d at 1217 n.4; *see also Embry v. O'Bannon*, 798 N.E.2d 157, 159-60 (Ind. 2003).

Third, the Prosecutor's Office contends that Article 8 is "enforceable by the State alone" because the state has "legal title to the [school] fund." Prosecutor's Br. 14-15 (citation omitted). Again, this argument wishes away 150 years' worth of precedent. If the state's "title" to public moneys were enough to negate the citizenry's public rights, then this Court would not have reached the merits in *Meredith*, *Mitsch*, *Embry*, *Zoercher*, or any number of other cases. Similarly, it makes no difference that the General Assembly has authorized the attorney general and other officials to "recover moneys due to the Fund." *Id.* 15. The public character of public funds is *why* the public can vindicate them. *See Harney v. Indianapolis, C. & D. R.R. Co.*, 32 Ind. 244, 247 (1869) ("We cannot regard this question as open to further discussion in this court."). It is because "[t]he common school fund is a public fund of the state" that "every taxpayer of the state has a supreme interest" in defending Article 8 against laws that would subvert it. *Mitsch*, 125 N.E.2d at 23.

If anything, this case spotlights why public standing is such a vital part of Indiana's system of constitutional adjudication. The Civil Forfeiture Statute's validity has been an open question for decades. In 1989, a retired attorney general remarked that "the 'Marion County Prosecutor's Law Enforcement Fund' is not the same receptacle as the 'State Common School Fund.'" Appellants' Supp. App. (Reply Br.) Vol. II p. 68. Members of all three branches of government have raised similar questions. *Id.* Vol. II p. 70 (gubernatorial statement); *Serrano*, 946 N.E.2d at 1142 n.3; *see also* page 13, above (quoting legislator). Even the Prosecutor's

Office admits the issue is "very much in flux." Appellants' App. Vol. II p. 121. Yet this "substantial question of Indiana constitutional law" persists. Prosecutor's Resp. Mot. Transfer 2. Across the state, police, prosecutors, and private lawyers continue to divert millions from the school fund. And in candid moments, the Attorney General's Office admits to turning a blind eye. *Compare* Prosecutor's Br. 34 ("[T]he Attorney General has every incentive to secure property for the fund if the law allows it."), *with* Appellants' Supp. App. (Reply Br.) Vol. II p. 73 ("The 92 county prosecutors are the Attorney General's clients . . . . We do not serve as the accountant for other units of government."). Public-standing litigation was built for cases like this one; if ordinary citizens cannot challenge the status quo, no one will. The Court should decide this case and hold that the Civil Forfeiture Statute violates Article 8.

CONCLUSION

The judgment of the trial court should be reversed and the case remanded for entry of judgment for the Taxpayers on their constitutional claim.

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Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.

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CERTIFICATE OF SERVICE

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