STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) ss:	CIVIL DIVISION D06, ROOM W-542
COUNTY OF MARION	)	CAUSE NO.: 49D06-1602-PL-004804

JEANA M. HORNER, *et al.*,

Plaintiffs,

vs.

TERRY R. CURRY, in his official capacity as Marion County Prosecuting Attorney, *et al.*,

Defendants.

PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

J. Lee McNeely, Atty. No. 9542-73
Cynthia A. Bedrick, Atty. No. 21547-49
Scott A. Milkey, Atty. No. 32070-49
McNeely Stephenson
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176
Phone: (317) 825-5110
Fax: (317) 825-5109
E-mail: J.L.McNeely@msth.com
Cynthia.A.Bedrick@msth.com
Scott.A.Milkey@msth.com

Samuel B. Gedge, *admitted pro hac vice*,
Temporary Admission No. 5425-95-TA
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203-1854
Phone: (703) 682-9320
Fax: (703) 682-9321
E-mail: sgedge@ij.org

Wesley Hottot, *admitted pro hac vice*,
Temporary Admission No. 5426-95-TA
Institute for Justice
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004-4309
Phone: (425) 646-9300
Fax: (425) 990-6500
E-mail: whottot@ij.org

INTRODUCTION

Having missed the deadline for filing their Answers and having then sought after-the-fact extensions, Defendants now argue that the "orderly disposition of the case" demands still further delay in the form of an interlocutory appeal. This Court should exercise its discretion to deny the Government's requests for interlocutory review, for three reasons.

First, the "substantial question" Defendants believe warrants interlocutory review—whether public-standing plaintiffs can proceed "solely" under the Declaratory Judgment Act—is not even at issue in this case. Plaintiffs seek injunctive relief as well as declaratory relief, and the Government offered no argument or authority suggesting that public-standing plaintiffs cannot seek injunctive relief. Even if Plaintiffs *had* requested "solely" declaratory relief, moreover, Indiana courts have repeatedly upheld the right of public-standing plaintiffs to seek precisely the relief Plaintiffs seek in this case. There is no "substantial question" under Appellate Rule 14(B)(1)(c)(ii) that merits interlocutory review.

Nor would interlocutory review aid the "orderly disposition of the case," the other consideration under Rule 14(B)(1)(c)(ii). Quite the opposite; further delay invites real harm by giving Defendants additional time to divert money from the school fund. That is precisely the constitutional violation Plaintiffs seek to halt.

Second, contrary to Defendants' argument, requiring the Government to mount a defense on the merits will not cause "substantial expense, damage, or injury" justifying interlocutory review under Rules 14(B)(1)(c)(i) or (c)(iii). Defendants' main concern—minimizing waste of "taxpayer dollars"—rings especially hollow, given the allegations of their ongoing, multi-million-dollar misuse of public funds at the heart of this case. And in any event, Indiana courts have held that the ordinary costs of litigation "rarely, if ever," justify interlocutory review.

Third, interlocutory review is also unwarranted because the most efficient means of resolving this case is an appeal from this Court's ruling on Plaintiffs' constitutional claim. Plaintiffs are prepared to file a dispositive motion on this claim within a reasonable period after Defendants file their Answers. A ruling in Plaintiffs' favor on the merits of their constitutional claim would resolve this case in full, giving the Government a right of direct appeal to the Supreme Court. Likewise, a ruling against Plaintiffs would be a good candidate for designation as a final judgment under Trial Rules 54 and 56. Either way, both the merits and the Government's standing concerns could be addressed together in a streamlined appeal. This approach would simplify the litigation, minimize cost, and put to rest a constitutional question that—as Judge Oakes remarked more than five years ago—"do[es] not deserve to be ignored." Order, *State ex rel. Lenkowsky v. Harvey*, No. 49D13-1007-PL-031572, 2011 WL 13102552, at *1 (Ind. Super. Ct., Marion Cty. Apr. 5, 2011).

LEGAL STANDARD

The general rule is that "appeals may only be taken from final judgments." *James v. Bd. of Comm'rs of Hendricks Cty.*, 396 N.E.2d 429, 432 (Ind. Ct. App. 1979). Under Appellate Rule 14(B), however, a non-final order such as the order denying Defendants' motions to dismiss may be appealed "only upon both certification by the trial court and acceptance by the Court of Appeals . . . ." *Daimler Chrysler Corp. v. Yaeger*, 838 N.E.2d 449, 450 (Ind. 2005). "Appeals from interlocutory orders are enumerated and strictly limited, and may not be taken in every case." *Weldon v. State*, 279 N.E.2d 554, 555 (Ind. 1972). Whether to certify an order for appeal under Rule 14(B) is entirely within this Court's discretion, and denial of certification is not subject to appellate review. *See Daimler Chrysler Corp.*, 838 N.E.2d at 450.

ARGUMENT

Defendants' motions do not meet the standard for interlocutory appeal. First, Defendants fail Rule 14(B)(1)(c)(ii) because the legal question they identify is neither substantial nor at issue in this case; not only that, interlocutory review at this stage would disrupt the orderly course of this litigation and potentially cost the common school fund millions in diverted forfeiture proceeds (Section I). Second, Defendants fail Rules 14(B)(1)(c)(i) and (c)(iii) because, even were the Court to credit Defendants' concerns about the burdens of litigating the merits, those burdens do not justify interlocutory review (Section II). Third, a more reasonable alternative to interlocutory review is available, in the form of a streamlined decision on Plaintiffs' constitutional claim and a prompt appeal from that final judgment (Section III).

I. Upholding Plaintiffs' standing does not present a substantial question of law justifying interlocutory review under Rule 14(B)(1)(c)(ii).

Defendants first ask the Court to certify an appeal under Rule 14(B)(1)(c)(ii), based on what they label a "substantial question of law": "whether plaintiffs seeking relief solely under the Uniform Declaratory Judgment Act are exempt from the act's statutory standing requirement because they assert public standing." City-County Am. Mot. ¶ 2; State Mot. ¶¶ 4-5. Far from being substantial, however, this question has been settled for decades, and it is not even at issue in this case. Nor would interlocutory review at this stage "promote a more orderly disposition of the case," the other consideration under Rule 14(B)(1)(c)(ii).

A. Plaintiffs' standing is settled law, and Defendants' "substantial question" is not at issue in this case.

As Plaintiffs explained in their briefing and at last month's hearing, this case does not present the question whether public-standing plaintiffs can proceed "solely" under the Declaratory Judgment Act. *See, e.g.*, Cons. Opp. to MTDs 11; Compl. ¶¶ 123-134, pp. 23-25. That is because Plaintiffs do not seek "solely" declaratory relief. They also seek, for example,

injunctive relief—a remedy that is entirely independent of the Declaratory Judgment Act and that public-standing plaintiffs have been securing for well over a century. *See, e.g.*, *Mitsch v. City of Hammond*, 125 N.E.2d 21, 22-23 (Ind. 1955) (per curiam); *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244, 247 (1869) ("We cannot regard this question as open to further discussion in this court.").

This Court's ruling denying the motions to dismiss can be affirmed on this basis. Even if Defendants' view of the Declaratory Judgment Act were correct—and it is not—this case still would proceed to the merits. With or without the Declaratory Judgment Act, Plaintiffs' complaint states claims that entitle them to relief: at a minimum, injunctive relief. That should be the end of the matter. For "[w]here a complaint shows that the plaintiff may be entitled to some relief, the complaint is not to be dismissed even though the complaining party may not be entitled to all the particular relief for which he asks in his demand for judgment." *Morris v. City of Evansville*, 390 N.E.2d 184, 188-89 (Ind. Ct. App. 1979). This straightforward application of Rule 12(b)(6) does not merit interlocutory review. *Cf.* City of Boonville's V. Mot. to Accept Jurisdiction over Interlocutory Appeal 4, 5, *City of Boonville v. Am. Cold Storage NA*, No. 87A01-1004-PL-167 (Ind. Ct. App. filed Apr. 19, 2010) (motion for interlocutory appeal, citing "legal issue of first impression" that "goes to [citizens'] very right to participate in local government").

Even if this case were only about declaratory relief, moreover, Defendants are wrong about the availability of declaratory relief as well. There is not one set of standing rules for plaintiffs who seek declaratory relief and a different set for everyone else. The Declaratory Judgment Act was written to create an additional remedy, not to redefine traditional standing

principles. Plaintiffs have standing to seek relief from this Court, and, in turn, they have standing to request declaratory relief.

Both statutory text and Supreme Court precedent bear this out. Defendants, for example, stake their defense on Section 2 of the Declaratory Judgment Act, which they claim "expressly limits" the "plaintiffs who may seek [declaratory] relief to those with a personal interest in the dispute." City-County MTD Reply 4. But Section 2 makes no mention of "personal" interests. And the Act could not be clearer that "[t]he enumeration in section[] 2 . . . does *not* limit or restrict the exercise of the general powers" to enter declaratory relief. Ind. Code § 34-14-1-5 (emphasis added). When a dispute is properly before the courts, declaratory relief is always available to "terminate the controversy or remove an uncertainty," *id.*; whether a plaintiff invokes private standing or public standing makes no difference.

Supreme Court precedent removes all doubt. In *Zoercher v. Agler*, 172 N.E. 186 (Ind. 1930), the Supreme Court acknowledged that "[t]he rule contended for by [the government], that the plaintiff must show that he has sustained some injury to his personal or property rights, has been applied in the case of one who brings an action to enforce his private rights," *id.* at 189. "[B]ut," the Court held, "such a rule does not serve to prevent the bringing of an action which involves the establishment of public rights." *Id.*; *see also State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 981 (Ind. 2003) ("The public standing doctrine was also applied to permit constitutional challenges in . . . *Zoercher v. Agler* . . . .").

At base, Defendants are not trying to settle a substantial question; they are trying to overturn a settled question—and one that is not even squarely at issue in this case. The Court of Appeals, like this Court, will be bound to apply *Zoercher* and all the decisions that have upheld

standing in cases just like this one. This is not the sort of issue that justifies committing party and judicial resources to interlocutory review.[1]

B. Interlocutory review would disrupt the efficient resolution of this case, costing the common school fund millions in forfeiture proceeds.

Nor would interlocutory review at this stage "promote a more orderly disposition of the case," which is the other consideration under Rule 14(B)(1)(c)(ii). This litigation is already six months old, and the orderly disposition of the case at this point would be to require Defendants to litigate the merits.

This is because there are real costs to delay. An interlocutory appeal could potentially stall this litigation for months or even years—all while Defendants continue to funnel forfeiture proceeds away from the school fund. (If this Court were to certify an interlocutory appeal and if the Court of Appeals were to accept the appeal, Plaintiffs assume the Government would move to stay further trial-court proceedings. Ind. R. App. P. 14(H).) Defendants have freely admitted that the constitutionality of their forfeiture practices is "[s]till very much in flux" and that a recent Supreme Court decision "indicated displeasure" with the current state of affairs. Compl. Ex. 1, at 48; *see also id.*, at 49 (urging prosecutors to nonetheless "stay the course"). But despite constitutional doubt, Defendants have not let the pendency of this case deter them from tapping civil forfeiture as "a revenue source." Compl. ¶ 55 (quoting Defendant Curry). Last month, for instance, the Marion County Prosecutor's Office filed an estimated 44 new forfeiture actions; June saw an estimated 40 forfeiture actions filed. And under their memoranda of understanding,

---

[1] The State Defendants also note their argument that a remedy on Plaintiffs' second, statutory claim would intrude on other courts. That argument is meritless; even the State Defendants do not claim it is a substantial question. State Mot. ¶ 6 (saying issue is "implicate[d]" and that this Court's order "appears" to be wrong). Moreover, the prospect of the appellate courts' having to address this argument now only underscores why interlocutory review is unwarranted, because the case is still several steps away from this Court's even considering a remedy on Plaintiffs' statutory claim. Cons. Opp. to MTDs 14-15.

Defendants will continue to retain 100 percent of the proceeds in all these cases. Compl. ¶¶ 61-71.

As a practical matter, therefore, a year spent appealing Defendants' meritless motions to dismiss could cost the school fund upwards of one million dollars in diverted forfeiture proceeds. (In 2011 and in 2012, for example, state civil-forfeiture awards in Indianapolis averaged more than $1,500,000 each year. Compl. ¶ 75.). That strongly counsels against interlocutory review at this stage. "The obvious purpose of the final judgment rule and the strict limitation of interlocutory appeals is to prevent the needless and costly delay in the trial of lawsuits which would result from limitless intermediate appeals." *James*, 396 N.E.2d at 432. That consideration has special force where, as here, the Government is daily persisting in the very constitutional violation that gives rise to the lawsuit.

II. Defendants' claims of "substantial harm" do not support interlocutory review under Rules 14(B)(1)(c)(i) or (c)(iii).

Defendants also assert that defending the merits will cause "substantial harm" by obliging them to "waste substantial resources" and by creating a "distraction" for the Mayor and others. State Mot. ¶¶ 7, 9; City-County Am. Mot. ¶ 3. As an initial matter, it is not at all clear why the named defendants—who are sued in their official capacities, not personally—would be distracted from their duties by Plaintiffs' constitutional challenge to a state statute. Nor does Defendants' concern for "taxpayer dollars" ring true, State Mot. ¶ 10, since this case exists only because Defendants have misspent—and continue to misspend—millions in public funds.

Even if the Government's claims could be credited, moreover, they still would not justify interlocutory review under Rules 14(B)(1)(c)(i) or (c)(iii). Under those provisions, interlocutory review may be available either when "[t]he appellant will suffer substantial expense, damage, or injury if the order is erroneous and the determination of the error is withheld until after

judgment" or when "[t]he remedy by appeal is otherwise inadequate." But conducting discovery and "briefing . . . questions of constitutional law," *id.* ¶ 7, come nowhere near these standards. Rather, Indiana courts hold that "the 'expense, damage, and injury' incurred by a [party] simply as a result of his being required to continue and try his case on the merits will rarely, if ever, be substantial enough to invoke [interlocutory] review . . . ." *James*, 396 N.E.2d at 433 (rejecting review of a denial of plaintiff's summary-judgment motion).

More than the mere existence of a merits stage is needed, as *City of Indianapolis v. Kahlo*—cited by the State Defendants—makes clear. State Mot. ¶ 8. In that case, the Court of Appeals accepted an interlocutory appeal over standing and merits rulings together, but only after the defendants asserted that the merits issue stood as "an impediment to a multi-million dollar construction project." Mot. of the Ind. Sports Corp. for Leave to Bring a Permissive Interlocutory Appeal ¶ 10, *City of Indianapolis v. Kahlo*, No. 49A05-0912-CV-722 (Ind. Ct. App. filed Dec. 21, 2009); *see also* City Pet. to Accept Jurisdiction Over Interlocutory Appeal 14, *City of Indianapolis v. Kahlo*, No. 49A05-0912-CV-722 (Ind. Ct. App. filed Dec. 21, 2009) (representing that the plaintiffs planned to "harass public servants" by "seek[ing] to depose any and all, current or former, high-ranking public official[s] who w[ere] in office" years before). Here, by contrast, an interlocutory appeal is likely to *cause* harm, by giving Defendants time to divert even more forfeiture proceeds away from the school fund.

III. It would be more efficient to decide Plaintiffs' constitutional claim and allow appeals on the merits and standing to go up together.

Interlocutory review is all the more unsuitable because a more sensible approach is available—streamlining an appealable judgment on Plaintiffs' first, constitutional claim. That would allow the appellate courts to consider Plaintiffs' constitutional claim and Defendants' standing concerns together.

Plaintiffs' first claim in this case is that parts of the Civil Forfeiture Statute violate the Indiana Constitution. Compl. ¶¶ 116-23 (Claim 1). Plaintiffs anticipate that neither side will require much discovery to ready this constitutional claim for dispositive motions. And however this Court decides that claim, the resulting decision would be subject to prompt appeal. A ruling in Plaintiffs' favor would dispose of this case in full, since Plaintiffs' second, more fact-intensive claim comes into play only if the Court rejects their constitutional claim. Alternatively, if the Court were to rule against Plaintiffs on their constitutional claim, it would be reasonable for the Court to designate that order an appealable final judgment under Trial Rules 54(B) and 56(C). Ind. T.R. 54(B) (authorizing the court to "direct the entry of a final judgment as to one or more but fewer than all of the claims" when "there is no just reason for delay"), 56(C) (similar).

Either of these scenarios would be more judicially efficient than Defendants' proposed course. By positioning the case for an appealable decision on Plaintiffs' constitutional claim, this Court could promptly resolve the parties' main dispute. In turn, an appeal—either from a final judgment or under Rules 54 and 56—would allow the appellate courts to review both the Government's standing argument and the constitutional question at the center of this case. This approach—not stop-and-go appeals—would best "secure the just, speedy and inexpensive determination" of this action. Ind. T.R. 1.

CONCLUSION

This Court correctly denied Defendants' motions to dismiss. The Court should now exercise its discretion to deny Defendants' requests to certify an interlocutory appeal from that order.

Dated: August 5, 2016.

Respectfully submitted,

J. Lee McNeely, Atty. No. 9542-73
Cynthia A. Bedrick, Atty. No. 21547-49
Scott A. Milkey, Atty. No. 32070-49
MCNEELY STEPHENSON
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176
Phone: (317) 825-5110
Fax: (317) 825-5109
E-mail: J.L.McNeely@msth.com
Cynthia.A.Bedrick@msth.com
Scott.A.Milkey@msth.com

Samuel B. Gedge, *admitted pro hac vice*,
Temporary Admission No. 5425-95-TA
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203-1854
Phone: (703) 682-9320
Fax: (703) 682-9321
E-mail: sgedge@ij.org

Wesley Hottot, *admitted pro hac vice*,
Temporary Admission No. 5426-95-TA
INSTITUTE FOR JUSTICE
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004-4309
Phone: (425) 646-9300
Fax: (425) 990-6500
E-mail: whottot@ij.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2016, a true and correct copy of the foregoing has been served upon the following via First Class U.S. Mail, postage prepaid:

Donald E. Morgan
Pamela G. Schneemann
OFFICE OF CORPORATION COUNSEL
200 E. Washington Street, Room 1601
Indianapolis, IN 46204

Kelly Jean Pautler
OFFICE OF ATTORNEY GENERAL
IGCS, 5th Floor
302 West Washington Street
Indianapolis, IN 46204

J. Lee McNeely

MCNEELY STEPHENSON
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176
(317) 825-5110
(317) 825-5109 Facsimile