IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

AMYA SPARGER-WITHERS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

JOSHUA N. TAYLOR, et al.

Defendants.

Case No. 1:21-cv-2824-JRS-MG

CLASS ACTION

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (ECF No. 46)

Anthony B. Sanders, MN Bar No. 038730
INSTITUTE FOR JUSTICE
Renaissance Square
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Telephone: 612.435.3451
Facsimile: 612.435.5875
Email: asanders@ij.org

Samuel B. Gedge*
Michael N. Greenberg*
Robert M. Belden*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: 703.682.9320
Facsimile: 703.682.9321
E-mail: sgedge@ij.org
mgreenberg@ij.org
rbelden@ij.org

*Admitted *pro hac vice*

J. Lee McNeely, IN Atty. No. 9542-73
Cynthia A. Bedrick, IN Atty. No. 21547-49
Scott A. Milkey, IN Atty. No. 32070-49
MCNEELYLAW LLP
2177 Intelliplex Drive, Suite 251
Shelbyville, IN 46176
Telephone: (317) 825-5110
Facsimile: (317) 825-5109
E-mail: LMcNeely@McNeelyLaw.com
CBedrick@McNeelyLaw.com
SMilkey@McNeelyLaw.com

TABLE OF CONTENTS

Introduction 1

Background 2

A. Legal background 2

B. Facts and procedural history 4

Argument 6

I. It is undisputed that Amya Sparger-Withers had standing on the date that matters—the day this lawsuit was filed 6

II. This case continues to present a live controversy 9

A. Joshua Taylor's act of voluntary cessation does not moot Amya Sparger-Withers's individual claim 10

1. Because Taylor dismissed the forfeiture action against Sparger-Withers without prejudice, Defendants cannot carry their burden of proving mootness 11

2. The record raises substantial questions about whether Taylor changed course to try to deprive this Court of jurisdiction 12

B. Even had Amya Sparger-Withers's individual claim been mooted, this case falls within two class-action-specific exceptions to the mootness doctrine 16

1. This case is not moot because Sparger-Withers's claim is inherently transitory 16

2. This case is not moot because Sparger-Withers's claim falls within the "picking off" exception 19

Conclusion 20

TABLE OF AUTHORITIES

Case **Page(s)**

Adarand Constructors, Inc. v. Slater,
528 U.S. 216, 221 (2000)....7

Aguilar v. U.S. Immigr. & Customs Enf't Chicago Field Off.,
346 F. Supp. 3d 1174 (N.D. Ill. 2018)....17

Carter v. City of Chicago,
520 F. Supp. 3d 1024 (N.D. Ill. 2021)....8, 10

Church of Our Lord & Savior Jesus Christ v. City of Markham,
913 F.3d 670 (7th Cir. 2019)....9

Ciarpaglini v. Norwood,
817 F.3d 541 (7th Cir. 2016)....10, 11, 12

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000)....12

City of Los Angeles v. Lyons,
461 U.S. 95 (1983)....9

County of Riverside v. McLaughlin,
500 U.S. 44 (1991)....9, 16

Davis v. FEC,
554 U.S. 724 (2008)....2

Doe ex rel. Doe v. Elmbrook Sch. Dist., 658 F.3d 710 (2011), *adopted in relevant part*,
687 F.3d 840 (7th Cir. 2012) (en banc)....11, 15

DeBrown v. Trainor,
598 F.2d 1069 (7th Cir. 1979)....20

Dr. Robert L. Meinders, D.C., Ltd. v. UnitedHealthcare, Inc.,
800 F.3d 853 (7th Cir. 2015)....10

EEOC v. Flambeau, Inc.,
846 F.3d 941 (7th Cir. 2017)....12, 15

Edwards v. Ill. Bd. of Admissions to Bar,
261 F.3d 723 (7th Cir. 2001)....10, 12

Espenscheid v. DirectSat USA, LLC,
688 F.3d 872 (7th Cir. 2012) 20

Fikre v. FBI,
904 F.3d 1033 (9th Cir. 2018) 13

Freedom From Religion Found., Inc. v. Concord Cmty. Schs.,
885 F.3d 1038 (7th Cir. 2018) 2

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,
528 U.S. 167 (2000)....................7, 8

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013)....................16

Gonzalez v. State,
74 N.E.3d 1228 (Ind. Ct. App. 2017)....................15

Harrell v. Fla. Bar,
608 F.3d 1241 (11th Cir. 2010) 13

Heyer v. U.S. Bureau of Prisons,
849 F.3d 202 (4th Cir. 2017) 12

Holstein v. City of Chicago,
29 F.3d 1145 (7th Cir. 1994) 16

Horner v. Curry,
125 N.E.3d 584 (Ind. 2019) 3

In re McKinney,
948 N.E.2d 1154 (Ind. 2011) 3

Kellytoy Worldwide, Inc. v. Ty, Inc.,
No. 20-cv-748, 2020 WL 6059869 (N.D. Ill. Oct. 14, 2020) 2, 7, 8

Kikumura v. Turner,
28 F.3d 592 (7th Cir. 1994) 11

Koss v. Norwood,
305 F. Supp. 3d 897 (N.D. Ill. 2018)....................20

Lopez-Aguilar v. Marion County Sheriff's Dep't,
924 F.3d 375 (7th Cir. 2019) 8

MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.,
935 F.3d 573 (7th Cir. 2019) 20

McCormack v. Herzog,
788 F.3d 1017 (9th Cir. 2015) 12, 13

Meyer v. Walthall,
528 F. Supp. 3d 928 (S.D. Ind. 2021) 8

Mhany Mgmt., Inc. v. County of Nassau,
819 F.3d 581 (2d Cir. 2016)....................16

Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs,
708 F.3d 921 (7th Cir. 2013) 2, 6, 7, 8

Moreno v. Napolitano,
No. 11-cv-5452, 2012 WL 5995820 (N.D. Ill. Nov. 30, 2012) 8, 17

Nielsen v. Preap,
139 S. Ct. 954 (2019)....................16

Rich v. Sec'y, Fla. Dep't of Corrections,
716 F.3d 525 (11th Cir. 2013) 13

O'Shea v. Littleton,
414 U.S. 488 (1974)....................9

Olson v. Brown,
594 F.3d 577 (7th Cir. 2010) 17, 18, 19

Primax Recoveries, Inc. v. Sevilla,
324 F.3d 544 (7th Cir. 2003) 20

Rich v. Sec'y, Fla. Dep't of Corrections,
716 F.3d 525 (11th Cir. 2013) 13

Serrano v. State,
946 N.E.2d 1139 (Ind. 2011) 3

Serrano v. Customs & Border Patrol,
975 F.3d 488 (5th Cir. 2020),
cert. denied, 141 S. Ct. 2511 (2021)....................20

Sargent v. State,
27 N.E.3d 729 (Ind. 2015) 3

Sosna v. Iowa,
419 U.S. 393 (1975) 16

State v. Timbs,
134 N.E.3d 12 (Ind. 2019) 3

Susman v. Lincoln Am. Corp.,
587 F.2d 866 (7th Cir. 1978) 19

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 9, 11, 15

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 16

Washington v. Marion County Prosecutor,
No. 1:16-cv-2980-JMS-DML, 2017 WL 897311 (S.D. Ind. Mar. 7, 2017) 18

Washington v. Marion County Prosecutor,
264 F. Supp. 3d 957, 971 (S.D. Ind. 2017) 18, 19

Codes and Statutes

Ind. Code §§ 34-24-1-1 *et seq.* 2

Ind. Code § 34-24-1-8(a) 4

Ind. Code § 34-24-1-8(e) 4, 19

Ind. Code § 34-24-2-1 *et seq.* 2

Rules

Ind. Trial Rule 41(A)(2) 11

Other Authorities

13B Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.1 (3d. ed. 2008) 8

13C Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.5 (3d. ed. 2008) 8

Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 Ala. L. Rev. 531 (2021) 3

David B. Smith, *Prosecution and Defense of Forfeiture Cases* (2018) 3

INTRODUCTION

This putative class action challenges as unconstitutional Indiana's system of outsourcing civil-forfeiture prosecutions to private, contingency-fee lawyers. When this case began, named plaintiff Amya Sparger-Withers was the target of an active civil-forfeiture action in Hancock County. When this case began, that forfeiture action was being prosecuted by Joshua N. Taylor. When this case began, Taylor, a private attorney, was prosecuting that forfeiture action on a contingency-fee basis.

Sparger-Withers filed this lawsuit on November 10, 2021. In her complaint, she named Taylor and sixteen prosecutors as defendants. Also on November 10, she moved to certify a class of all current and future defendants in Taylor-prosecuted forfeiture actions. "Taylor's contingency-fee prosecutions violate each class member's due-process rights in the same way," she asserted, "by systematically impairing their right to a financially disinterested prosecutor."

Taylor reacted swiftly: A week after this lawsuit was filed (and the morning after he was served with process), he voluntarily dismissed the state-court forfeiture case against Sparger-Withers. With that action dismissed, he and his co-defendants then filed their 12(b)(1) motion here, claiming that Sparger-Withers "lacks standing to bring this case" and that this Court in turn "lacks jurisdiction to hear it." Defs.' Mem. (ECF No. 47 at 1). Meanwhile, Taylor has forged ahead with dozens of other forfeiture actions—against everyone, that is, who is not currently a named plaintiff in this lawsuit.

Even on its own terms, Defendants' 12(b)(1) motion is an easy candidate for denial. Defendants couch their motion in terms of "standing." Yet throughout, they concede (correctly) that Sparger-Withers alleges she was suffering an ongoing, concrete harm at the suit's commencement. *E.g.*, Defs.' Mem. (ECF No. 47 at 4) ("Plaintiff . . . alleges that her injury arises from Taylor's ongoing prosecution of her case under his contract with Hancock County."

(emphasis omitted)). Because "[t]he question of standing looks to the state of affairs at the suit's commencement," Defendants' concessions about the state of affairs at the suit's commencement are a straightforward basis for denying their motion. *See Kellytoy Worldwide, Inc. v. Ty, Inc.*, No. 20-cv-748, 2020 WL 6059869, at *1 (N.D. Ill. Oct. 14, 2020); *see also Davis v. FEC*, 554 U.S. 724, 734 (2008).

Defendants nonetheless contend that events *post-dating* the case's filing—Taylor's without-prejudice dismissal of Sparger-Withers's forfeiture action and the return of her money—extinguish this Court's jurisdiction. But that focus on post-filing events sounds not in standing, but a different doctrine altogether: mootness. *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 928 (7th Cir. 2013) ("[W]hen a party with standing at the inception of the litigation loses it due to intervening events, the inquiry is really one of mootness." (citation omitted)). Defendants do not mention mootness. They do not argue mootness. They do not acknowledge their "heavy" and "stringent" burden of proving mootness. *Freedom From Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1051 (7th Cir. 2018) (citation omitted). And substantively, the case isn't moot; it fits within no fewer than three exceptions to the mootness doctrine—the voluntary-cessation, inherently-transitory, and picking-off exceptions.

BACKGROUND

A. Legal background

1. Like many states, Indiana has a civil-forfeiture regime under which it can sue to confiscate property linked to certain crimes. Ind. Code §§ 34-24-1-1 *et seq*.; Ind. Code §§ 34-24-2-1 *et seq*. Often, the state need not show that the property's owner is guilty of any wrongdoing, only that his or her property has a connection to a crime. "Civil forfeiture," in the Indiana Supreme Court's words, "is a device, a legal fiction, authorizing legal action against inanimate objects for participation in alleged criminal activity, regardless of whether the property

owner is proven guilty of a crime—or even charged with a crime." *Serrano v. State*, 946 N.E.2d 1139, 1140 (Ind. 2011).

The system is both "punitive and profitable." *State v. Timbs*, 134 N.E.3d 12, 21 (Ind. 2019). It is "punitive for those whose property is confiscated; and profitable for the government, which takes ownership of the property." *Id*. It is also vulnerable to abuse. The Indiana Supreme Court, for example, has characterized "the way Indiana carries out civil forfeitures" as "concerning." *Id*. at 31; *see also id*. at 33 (commenting on "the widened use of aggressive *in rem* forfeiture practices" nationwide). Individual members of that court have likewise noted "overreach," *Sargent v. State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting); have likened civil forfeiture to a "law enforcement Weapon[] of Mass Destruction," *id*.; and have voiced "serious concerns with the way Indiana carries out civil forfeitures." *Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring in the judgment).

2. In one respect, Indiana is unique: For decades, prosecutors in Indiana have outsourced civil-forfeiture cases to private lawyers on a contingency-fee basis. These arrangements inject direct financial self-interest into the justice system. And they are notorious. A leading treatise on civil forfeiture describes them as a "scandal." David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (2018). They have even led to at least one instance of attorney discipline. In 2011, the prosecuting attorney for Delaware County had his license suspended for having abdicated "his duties as a public official" in service of "his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155-56 (Ind. 2011) (per curiam).

For all that, Indiana remains a "defiant outlier" when it comes to contingency-fee forfeitures. Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for*

Profit in All the Wrong Places, 72 Ala. L. Rev. 531, 561 (2021). In 2018, in fact, the General Assembly doubled down, codifying contingency-fee forfeitures into statutory law. As amended, Indiana's Civil Forfeiture Statute now provides explicitly that county prosecuting attorneys "may retain an attorney to bring an action under this chapter." Ind. Code § 34-24-1-8(a). Those private lawyers can be compensated *only* through contingency-fee arrangements, pocketing as much as a one-third cut from each case they win. *Id*. § 34-24-1-8(e).

3. Defendant Joshua N. Taylor is one of the most prolific contingency-fee forfeiture prosecutors in Indiana; he prosecutes civil-forfeiture actions in no fewer than sixteen counties. Under his contingency-fee agreements, Taylor stands to profit personally—up to 30 percent of all recovered proceeds—if the State wins or settles a civil-forfeiture action he prosecutes. *See id*.; *see also* Compl. Ex. 1 (ECF No. 1-1 at 2) ("Contract Between Joshua N. Taylor and the Hancock County Prosecuting Attorney"). By contrast, he does not stand to profit—and may even lose money—if the State loses the civil-forfeiture action (or if the recovery is not large enough to cover his costs of prosecuting it).

B. Facts and procedural history

1. Last February, the State of Indiana filed a civil-forfeiture action in the Superior Court of Hancock County, seeking to forfeit $6,096 police had seized from Amya Sparger-Withers days before. Ex. 9 to Greenberg Decl. Supp. Class Certification (ECF No. 6-12 at 2); Ex. 10 to Greenberg Decl. Supp. Class Certification (ECF No. 6-13 at 2). Joshua N. Taylor represented the State in that action. And under Indiana Code § 34-24-1-8(e) and his contingency-fee arrangement, Taylor stood to profit personally from prosecuting the case.

2. Sparger-Withers filed this putative class action on November 10, 2021. Compl. (ECF No. 1). On that date, the civil-forfeiture case against her remained pending. Compl. ¶ 48 (ECF No. 1 at 11). On that date, Joshua Taylor was prosecuting the civil-forfeiture case and

doing so on a contingency-fee basis. Compl. ¶¶ 49-50 (ECF No. 1 at 11). On that date, Taylor stood to profit personally from prosecuting the case. Compl. ¶ 53 (ECF No. 1 at 12).

As alleged in Sparger-Withers's complaint, those facts gave rise to a present and ongoing harm. The complaint alleged that Taylor's contingency-fee arrangements "systematically inject personal financial considerations into [his] decisionmaking as the prosecuting attorney in *State of Indiana v. Amya A. Sparger and $6,096.00 in US Currency*." Compl. ¶ 62 (ECF No. 1 at 13). The complaint alleged that Sparger-Withers "is harmed by that systematic injection of personal financial considerations into Defendant Joshua N. Taylor's decisionmaking as the prosecuting attorney in *State of Indiana v. Amya A. Sparger and $6,096.00 in US Currency*." Compl. ¶ 63 (ECF No. 1 at 13). And the complaint asked the Court to redress that harm by "declar[ing] invalid and eliminat[ing] Defendant Joshua N. Taylor's personal financial stake in the forfeiture actions he prosecutes, including *State of Indiana v. Amya A. Sparger and $6,096.00 in US Currency*." Compl. ¶ 68 (ECF No. 1 at 14); Compl. (ECF No. 1 at 19-21) (Request for Relief).

Also on November 10, Sparger-Withers moved for class certification (ECF No. 6). Joshua Taylor was personally served with process the following Monday, November 15. Aff. of Service (ECF No. 33 at 1).

3. Taylor reacted quickly; at 8:41 the next morning, he filed a two-sentence motion to voluntarily dismiss the forfeiture case against Sparger-Withers. Ex. 6 to Defs.' MTD (ECF 46-6 at 2). The State "no longer wishes to prosecute this cause," he advised. *Id.* The state court granted the motion a day later and dismissed the case. Ex. 7 to Defs.' MTD (ECF 46-7 at 2).

4. Taylor and the other defendants then jointly moved to dismiss this action under Rule 12(b)(1). Sparger-Withers's "alleged harm arose solely out of Taylor's prosecution of the civil forfeiture of her property," they observe. Defs.' Mem. (ECF No. 47 at 5). Because "th[at]

case has been dismissed and the money returned," they contend that Sparger-Withers now "lacks standing to maintain this suit." Defs.' Mem. (ECF No. 47 at 4, 5).

ARGUMENT

Defendants' motion is a straightforward candidate for denial. In Defendants' view, Amya Sparger-Withers lost Article III standing a week after this case began, when Joshua Taylor voluntarily dismissed the civil-forfeiture action against her. But that argument confuses standing with mootness. Under either doctrine, moreover, this case presents a live controversy and should proceed to the merits.

I. It is undisputed that Amya Sparger-Withers had standing on the date that matters—the day this lawsuit was filed.

A. Defendants' motion begins and ends with Article III standing. At every turn, however, the motion confirms that Amya Sparger-Withers had standing to bring this case. "Standing is evaluated at the time suit is filed." *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 928 (7th Cir. 2013). And when this suit was filed, the civil-forfeiture case against Amya Sparger-Withers was active. Compl. ¶ 48 (ECF No. 1 at 11). Joshua Taylor was actively prosecuting that case. Compl. ¶ 49 (ECF No. 1 at 11). He was acting on a contingency-fee basis. Compl. ¶¶ 50-58 (ECF No. 1 at 11-12). As alleged in the complaint, that arrangement visited a present and ongoing harm on Sparger-Withers. Compl. ¶¶ 59-64 (ECF No. 1 at 12-13). That harm was traceable to Taylor (Compl. ¶¶ 59-64 (ECF No. 1 at 12-13)) and redressable by a favorable judgment (Compl. ¶ 68 (ECF No. 1 at 14)).

Defendants contest none of this. Quite the opposite: They concede repeatedly that Sparger-Withers's complaint pleaded a cognizable harm. "Plaintiff . . . alleges," they acknowledge, "that her injury arises from Taylor's ongoing prosecution of her case under his contract with Hancock County." Defs.' Mem. (ECF No. 47 at 4) (emphasis omitted). "Plaintiff's

alleged harm," they reiterate, "arose . . . out of Taylor's prosecution of the civil forfeiture of her property." Defs.' Mem. (ECF No. 47 at 5). That should be the end of the matter. In the Seventh Circuit (and everywhere else), "[t]he question of standing looks to the state of affairs at the suit's commencement." *Kellytoy Worldwide, Inc. v. Ty, Inc.*, No. 20-cv-748, 2020 WL 6059869, at *1 (N.D. Ill. Oct. 14, 2020); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (affirming plaintiffs' standing because "it is undisputed that [the defendant's] unlawful conduct . . . was occurring at the time the complaint was filed"). And here, Defendants appear to concur that Sparger-Withers was suffering an ongoing, redressable harm when this suit began.

B. Defendants nonetheless contend that the case should be dismissed for lack of standing. Their arguments lack merit.

Foremost, Defendants assert that factual developments *post-dating* this case's filing strip Sparger-Withers of standing. Defs.' Mem. (ECF No. 47 at 4-5). A week after this case began, Defendants observe, Joshua Taylor voluntarily dismissed the civil-forfeiture action against Sparger-Withers. In Defendants' view, that post-complaint development (paired with the return of her money) extinguished her standing in this lawsuit. To repeat, however, "[t]he question of standing looks to the state of affairs at the suit's commencement"—not after. *Kellytoy Worldwide, Inc.*, 2020 WL 6059869, at *1. So Defendants' focus on more recent developments sounds not in "standing," but in a different doctrine entirely: mootness. *See Milwaukee Police Ass'n*, 708 F.3d at 928 ("[W]hen a party with standing at the inception of the litigation loses it due to intervening events, the inquiry is really one of mootness." (citation omitted)).[1]

---

[1] *See also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (per curiam) ("[T]he Tenth Circuit 'confused mootness with standing,' and as a result placed the burden of proof on the wrong party." (internal citation omitted)); *Friends of the Earth, Inc.*, 528 U.S. at 174 ("[T]he

That distinction—between standing and mootness—is a "critical" one. *See id.* While courts often shorthand mootness as "'standing set in a time frame,'" *Friends of the Earth, Inc.*, 528 U.S. at 190 (critiquing the phrase), the two doctrines differ in important ways. For example, it is the plaintiff's burden to show initial standing, but it is the defendant's to prove mootness. *Id.* Mootness also admits of many exceptions that do not apply to the initial standing analysis. *E.g.*, *id.*, at 190-91. In short, the two doctrines are "sharply different." 13C Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.5, at 240 (3d. ed. 2008); *see also* 13B Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.1 at 737 n.22 (3d. ed. 2008) ("The Court's frequent references to mootness as a time dimension of standing must not engender confusion of mootness with standing."). Whatever might be said of mootness (more on that below), Sparger-Withers alleged an ongoing, redressable harm when this case began. For standing purposes, Article III requires nothing more.

For much the same reason, the precedents on which Defendants rely have no application here; in each, the plaintiffs lacked standing because they alleged no current or imminent injury at the time their case began. In *Lopez-Aguilar v. Marion County Sheriff's Dep't*, for instance, the plaintiff sought an injunction against the local sheriff's detaining removable non-citizens. 924 F.3d 375, 393 (7th Cir. 2019), *cited at* Defs.' Mem. (ECF No. 47 at 7-8). When Antonio Lopez-Aguilar filed his suit, however, he was not currently being detained and could allege only "a

---

Court of Appeals incorrectly conflated our case law on initial standing to bring suit with our case law on postcommencement mootness." (internal citations omitted)); *Meyer v. Walthall*, 528 F. Supp. 3d 928, 949 (S.D. Ind. 2021) ("At the outset, the Court notes that the parties conflate concepts of standing and mootness."); *Carter v. City of Chicago*, 520 F. Supp. 3d 1024, 1032 (N.D. Ill. 2021) ("[The plaintiff] also argues that the City's [standing] argument really centers on mootness, and the Court again agrees with [the plaintiff]."); *Kellytoy Worldwide, Inc. v. Ty, Inc.*, No. 20-cv-748, 2020 WL 6059869, at *1 (N.D. Ill. Oct. 14, 2020) ("[I]f there is any jurisdictional problem, it is one of mootness, not standing."); *Moreno v. Napolitano*, No. 11-cv-5452, 2012 WL 5995820, at *5 (N.D. Ill. Nov. 30, 2012) (rejecting government's standing argument because it "is based on an intervening event" and instead analyzing jurisdictional question as one of mootness).

single past incident" from two years before. *Id.* The plaintiffs in *O'Shea v. Littleton* similarly alleged only "[p]ast exposure to illegal conduct" and no "continuing, present" harm "at the time the complaint was filed." 414 U.S. 488, 495, 496 (1974), *cited at* Defs.' Mem. (ECF No. 47 at 7-8). The same is true of the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), *cited at* Defs.' Mem. (ECF No. 47 at 7). In each of these cases, the "constitutionally objectionable practice [had] ceased altogether before the plaintiff filed his complaint." *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). That is why the plaintiffs lacked standing to seek forward-looking relief.

That is also why this case is different. Unlike the plaintiffs in *Lopez-Aguilar* and *O'Shea* and *Lyons*, Amya Sparger-Withers alleges that she was "suffering a direct and current injury" on the date this case began. *See id.*; *see also* Compl. ¶¶ 48-64 (ECF No. 1 at 11-13). That "injury was at that moment capable of being redressed." *See McLaughlin*, 500 U.S. at 51. Defendants (correctly) appear to concede as much. Defs.' Mem. (ECF No. 47 at 4-5). So "[t]his case is easily distinguished from *Lyons*" and the other decisions Defendants cite, and Article III's standing requirement is met. *See McLaughlin*, 500 U.S. at 51.

II. This case continues to present a live controversy.

As noted above, Defendants' argument implicates mootness more than standing. Under the mootness doctrine, too, however, this case presents a live controversy. "[A] case becomes moot 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Church of Our Lord & Savior Jesus Christ v. City of Markham*, 913 F.3d 670, 679 (7th Cir. 2019). And here, neither Sparger-Withers's individual claim nor the putative class claim is moot. As to the individual claim, Defendants "ha[ve] not carried the 'heavy burden' of making 'absolutely clear' that [they] could not revert" to their unconstitutional behavior. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). That means

Sparger-Withers has the right to proceed on behalf of both herself and the class. Even had Sparger-Withers's claim been successfully mooted, moreover, two doctrines specific to class actions—the "inherently transitory" exception and the "picking off" exception—would secure the Court's jurisdiction over the class.[2]

A. Joshua Taylor's act of voluntary cessation does not moot Amya Sparger-Withers's individual claim.

Defendants suggest that by voluntarily dismissing the forfeiture action against Amya Sparger-Withers, Joshua Taylor extinguished this Court's power to hear this case. But that is precisely the sort of "voluntary cessation" that cannot divest the federal courts of jurisdiction. To start, Taylor dismissed the forfeiture action against Sparger-Withers without prejudice, meaning the dismissal does not unambiguously prevent him from "resum[ing] [his challenged] behavior at any time." *See Edwards v. Ill. Bd. of Admissions to Bar*, 261 F.3d 723, 728 (7th Cir. 2001). The record also suggests that the dismissal was "an individually targeted effort to neutralize [this] lawsuit"—the precise mischief the voluntary-cessation doctrine exists to prevent. *Ciarpaglini v. Norwood*, 817 F.3d 541, 545 (7th Cir. 2016). For each of these reasons, Defendants cannot carry their burden of proving mootness as to Sparger-Withers's individual claim.

[2] Because mootness, like standing, implicates the Court's subject-matter jurisdiction, this brief addresses mootness as well. To be clear, however, Defendants have made no argument in favor of mootness. Nor have they tried to carry their burden of proving mootness. *Cf. Carter v. City of Chicago*, 520 F. Supp. 3d 1024, 1032-33 (N.D. Ill. 2021) (observing that "the City's [standing] argument really centers on mootness" and denying Rule 12(b)(1) motion because "[t]he City has not even attempted, at this time, to meet its 'heavy burden' of showing that [the plaintiff's] action is moot"). If at any point Defendants were to argue mootness, Sparger-Withers would be entitled to respond (if necessary, by sur-reply) to whatever arguments Defendants might make. *Dr. Robert L. Meinders, D.C., Ltd. v. UnitedHealthcare, Inc.*, 800 F.3d 853, 858 (7th Cir. 2015) ("Due process, we have cautioned, requires that a plaintiff be given an opportunity to respond to an argument or evidence raised as a basis to dismiss his or her claims.").

1. Because Taylor dismissed the forfeiture action against Sparger-Withers without prejudice, Defendants cannot carry their burden of proving mootness.

"Courts are understandably skeptical when a defendant seeks dismissal of an injunctive claim as moot on the ground that it has changed its practice while reserving the right to go back to its old ways after the lawsuit is dismissed." *Id.* at 544. For that reason, "a defendant seeking dismissal based on its voluntary change of practice or policy must clear a high bar." *Id.* at 545. It is the defendant's "'heavy burden' of making 'absolutely clear' that it could not revert" to its allegedly wrongful behavior. *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019 n.1; *see also Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 719 (2011), *adopted in relevant part*, 687 F.3d 840, 842-43 (7th Cir. 2012) (en banc). And for obvious reasons: Were the rule otherwise, "any government actor who is being sued 'could cease a challenged practice to thwart the lawsuit, and then return to old tricks once the coast is clear.'" *Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994).

These principles control here. Promptly after being served with process in this case, Taylor voluntarily dismissed the forfeiture action against Sparger-Withers. In doing so, however, he used a device that leaves the door open to violating her rights again in the future: a dismissal without prejudice. *Compare* Ind. Trial Rule 41(A)(2) ("Unless otherwise specified in the order, a dismissal under this subsection is without prejudice"), *with* Ex. 7 to Defs.' MTD (ECF No. 46-7 at 2) ("[T]he Court . . . now GRANTS Plaintiff's Motion to Dismiss.").[3] That fits this case neatly

[3] In other cases, Taylor has explicitly designated his voluntary dismissals "with prejudice." *See, e.g.*, Ex. 1 to Greenberg Decl. Opp. MTD (ECF No. 50-2 at 2) ("The Plaintiff having filed its Motion to Dismiss, and the Court being duly advised, NOW ORDERS this above entitled cause of action dismissed with prejudice."); Ex. 2 to Greenberg Decl. Opp. MTD (ECF No. 50-3 at 2) (similar); Ex. 3 to Greenberg Decl. Opp. MTD (ECF No. 50-4 at 2) (similar); Ex. 4 to Greenberg Decl. Opp. MTD (ECF No. 50-5 at 2) (similar).

within the voluntary-cessation doctrine. The Seventh Circuit has "long recognized" that "a defendant can not moot a claim simply by voluntarily ceasing behavior when it is free to resume that behavior at any time." *Edwards*, 261 F.3d at 728. And Defendants seek to execute just such a maneuver here; the whole point of a dismissal without prejudice, after all, is to try to leave the filer "free to resume [their case] at any time." *See id.* at 728; *cf. McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (denying prosecutor's bid to moot case because "[t]he discretionary decision to not re-file criminal charges against [the plaintiff] is neither 'entrenched' nor 'permanent'"). Simply, Taylor "retains the authority and capacity to repeat [the] alleged harm" against Sparger-Withers. *See Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017) (citation omitted). Sparger-Withers, in turn, retains the right to seek the security of a federal-court judgment.

2. The record raises substantial questions about whether Taylor changed course to try to deprive this Court of jurisdiction.

Even had Taylor disposed of Sparger-Withers's forfeiture case more artfully, this Court still would have the power to hear her federal claim. That is because Taylor's voluntary dismissal appears to reflect, not a "broad shift in policy," but "an individually targeted effort to neutralize [this] lawsuit." *Ciarpaglini*, 817 F.3d at 545. The federal courts' "interest in preventing litigants from attempting to manipulate . . . jurisdiction" therefore counsels strongly "against a finding of mootness" here. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

a. The bar for voluntary cessation is high in large part to stop defendants from manipulating federal jurisdiction; the doctrine "aims to eliminate the incentive for a defendant to strategically alter its conduct in order to prevent or undo a ruling adverse to its interest." *EEOC v. Flambeau, Inc.*, 846 F.3d 941, 949 (7th Cir. 2017) (citation omitted). Thus, when circumstances "raise a substantial possibility that 'the defendant has . . . changed course simply

to deprive the court of jurisdiction,'" that in itself "prevents [the courts] from finding the controversy moot." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1267 (11th Cir. 2010). Picking off a civil-rights plaintiff while leaving the challenged law or policy in place exemplifies such a tactic, and it cannot deprive the federal courts of jurisdiction. *See id.* at 1266-67 ("Short of repealing a statute, if a governmental entity decides in a clandestine or irregular manner to cease a challenged behavior, it can hardly be said that its 'termination' of the behavior is unambiguous."); *see also Fikre v. FBI*, 904 F.3d 1033, 1039-40 (9th Cir. 2018) (denying bid for mootness in challenge to No Fly List when "the FBI's decision to restore [the plaintiff's] flying privileges is an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy"); *McCormack*, 788 F.3d at 1025 ("[W]hile a statutory change 'is usually enough to render a case moot,' an executive action that is not governed by any clear or codified procedures cannot moot a claim."); *Rich v. Sec'y, Fla. Dep't of Corrections*, 716 F.3d 525, 532 (11th Cir. 2013) (concluding that the government's choice to reform a challenged statewide policy "at the prison where [the plaintiff] is incarcerated, and only at that prison," suggests "'an attempt to manipulate jurisdiction'").

b. Those teachings apply with special force here. Take Defendants' explanation for why Taylor dismissed the forfeiture action against Sparger-Withers. In her criminal case—Defendants recount—Sparger-Withers was charged both with possessing marijuana and with dealing it. Defs.' Mem. (ECF No. 47 at 2). But, according to Defendants' motion, Taylor's separate civil-forfeiture action "was predicated only on the dealing charge"—not the charge for possession. Defs.' Mem. (ECF No. 47 at 2). So with Sparger-Withers convicted of possession but acquitted of dealing, Taylor ostensibly dismissed her forfeiture action, not to stymie Article

III jurisdiction, but because she had been cleared of the crime on which the forfeiture complaint was predicated. Defs.' Mem. (ECF No. 47 at 2-3).

Respectfully, nothing about that account adds up. For one thing, the forfeiture complaint was not unambiguously "predicated only on the dealing charge." Defs.' Mem. (ECF No. 47 at 2). Rather—and consistent with years of practice—Taylor's complaint identified no predicate crime at all. Ex. 2 to Defs.' Mot. (ECF No. 46-2 at 2 ¶ 2). And routinely, Taylor uses identically worded complaints to forfeit property based, not "only on . . . dealing charge[s]," but on simple-possession crimes too. Days before dismissing his case against Sparger-Withers, for example, he filed a materially identical complaint to forfeit $296 from a defendant who was charged with drug possession alone.[4] (The money has since been forfeited, with the requisite 30% awarded to Taylor.[5]) Nor is that example an outlier.[6] From a review of Taylor's forfeiture cases in recent

---

[4] *Compare* Ex. 5 to Greenberg Decl. Opp. MTD (ECF No. 50-6 at 2) (Compl. for Forfeiture, *State of Indiana v. Autumn Burgess and $296.00 in US Currency*, 70D01-2111-MI-000322) (Rush Super. Ct. filed Nov. 5, 2021) (no predicate crime identified), *with* Ex. 6 to Greenberg Decl. Opp. MTD (ECF No. 50-7 at 2) (Information, *State of Indiana v. Autumn Burgess*, 70D01-2111-F5-000687) (Rush Super. Ct. filed Nov. 5, 2021) (charges for drug possession only).

[5] Ex. 7 to Greenberg Decl. Opp. MTD (ECF No. 50-8 at 2-3) (Default Judgment, *State of Indiana v. Autumn Burgess and $296.00 in US Currency*, 70D01-2111-MI-000322) (Rush Super. Ct. Dec. 2, 2021).

[6] *Compare* Ex. 8 to Greenberg Decl. Opp. MTD (ECF No. 50-9 at 2) (Compl. for Forfeiture, *State of Indiana v. Tracy R. Crum and $1,383.00 in US Currency*, 85C01-2105-MI-000314) (Wabash Cir. Ct. filed May 14, 2021) (no predicate crime identified), *with* Ex. 9 to Greenberg Decl. Opp. MTD (ECF No. 50-10 at 2) (Information, *State of Indiana v. Tracy R. Crum*, 85C01-2105-F4-000480) (Wabash Cir. Ct. filed May, 10, 2021) (charges for drug possession only); *compare* Ex. 10 to Greenberg Decl. Opp. MTD (ECF No. 50-11 at 2) (Compl. for Forfeiture, *State of Indiana v. Carl D. Elmore and $881.00 in U.S. Currency*, 52D01-2012-MI-000981) (Miami Super. Ct. filed Dec. 9, 2020) (no predicate crime identified), *with* Ex. 11 to Greenberg Decl. Opp. MTD (ECF No. 50-12 at 2-4) (Information, *State of Indiana v. Carl D Elmore*, 52D01-2012-F5-000384) (Miami Super Ct. filed Dec. 8, 2020) (charges for drug possession and speeding only); *compare* Ex. 12 to Greenberg Decl. Opp. MTD (ECF No. 50-13 at 2) (Compl. for Forfeiture, *State of Indiana v. Timothy R. Brewer and $1,906 In U.S. Currency*, 85C01-2009-MI-000650) (Wabash Cir. Ct. filed Sept. 30, 2020) (no predicate crime identified), *with* Ex. 13 to Greenberg Decl. Opp. MTD (ECF No. 50-14 at 2-3) (Information, *State of Indiana v. Timothy R.*

years, in fact, we have found not one case in which he has voluntarily dismissed a forfeiture action in circumstances like Sparger-Withers's. Bluntly, the one thing that appears to set her apart is that she is the named plaintiff in this litigation.

Federal jurisdiction cannot be circumvented so easily. After prosecuting the forfeiture action against Sparger-Withers for nearly a year, Taylor jettisoned it six days after she filed this case and one day after being served with process. Nothing in the record remotely supports his stated reason for that about-face. *Cf. Flambeau, Inc.*, 846 F.3d at 949-50 ("A decision supported by less evidence or less thought might more reasonably be expected to recur."). There has been no change to the challenged contingency-fee statute. Taylor continues to forge ahead with prosecutions against dozens of putative class members—everyone, that is, who isn't currently a named plaintiff in this case. And nothing makes "absolutely clear," *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2019 n.1 (citation omitted), that he cannot violate Sparger-Withers's due-process rights again in the future. *See Doe*, 658 F.3d at 719 ("The Supreme Court has made clear . . . that a likelihood that would be 'too speculative to support' a finding of initial standing can be sufficient to defeat an attempt to show mootness caused by voluntary cessation."). In short, this case spotlights why the voluntary-cessation bar is as high as it is. On

---

Brewer, 85C01-2009-F5-001056) (Wabash Cir. Ct. filed Sept. 30, 2020) (charges for drug possession only); *compare* Ex. 14 to Greenberg Decl. Opp. MTD (ECF No. 50-15 at 2) (Compl. for Forfeiture, *State of Indiana v. David E. Pauley and $1,083 in U.S. Currency*, 55D03-2006-MI-000954) (Morgan Super. Ct. filed June 29, 2020) (no predicate crime identified), *with* Ex. 15 to Greenberg Decl. Opp. MTD (ECF No. 50-16 at 2) (Information, *State of Indiana v. David E. Pauley*, 55D03-2006-F6-000955) (Morgan Super. Ct. filed June 25, 2020) (charges for drug possession only); *see also Gonzalez v. State*, 74 N.E.3d 1228, 1230, 1231 n.3 (Ind. Ct. App. 2017) (noting that the defendant had pleaded guilty to Class B possession of marijuana, quoting identical language from a Taylor-authored forfeiture complaint, and remarking that "[t]he State did not move to amend the complaint of forfeiture, make an opening statement, or otherwise specify what crime [the defendant] allegedly facilitated with his currency before the evidence concluded").

this record, there are "simply too many questions" to say that Defendants can "me[e]t [their] 'formidable burden' of showing that [they] will not permit the challenged conduct to resume." *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 605 (2d Cir. 2016).

B. Even had Amya Sparger-Withers's individual claim been mooted, this case falls within two class-action-specific exceptions to the mootness doctrine.

Even had Sparger-Withers's individual claim been mooted, the case still could proceed. As a putative class action, the case fits within two exceptions to the mootness doctrine: the "inherently transitory" exception and the "picking off" exception.

1. This case is not moot because Sparger-Withers's claim is inherently transitory.

a. Ordinary "mootness requirements are somewhat different where the plaintiff attempts to represent a class." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). Once a class is certified, for example, the mooting of the named plaintiff's individual claims does not moot the action as a whole. *Sosna v. Iowa*, 419 U.S. 393, 399, 401 (1975). Similarly "flexible" mootness rules apply at the pre-certification stage. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980). One is the "inherently transitory" exception: "[W]here a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 n.2 (2013) (quoting *McLaughlin*, 500 U.S. at 51-52). Put differently, "the fact that a class 'was not certified until after the named plaintiffs' claims had become moot does not deprive [the courts] of jurisdiction' when . . . the harms alleged are transitory enough to elude review." *Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (plurality opinion) (quoting *McLaughlin*, 500 U.S. at 52).

As synthesized by the Seventh Circuit, the inherently-transitory exception applies when two conditions are met. First, "it is uncertain that a claim will remain live for any individual who

could be named as a plaintiff long enough for a court to certify the class." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010). Second, "there will be a constant class of persons suffering the deprivation complained of in the complaint." *Id.* With those conditions met, the named plaintiff can "keep the claim alive beyond his individual claim to certify the class." *Id.* at 584. If the district court then "certifies the class, the case can proceed to the merits for the certified class of plaintiffs." *Id.*

b. Each of the two conditions listed in *Olson v. Brown* is met here.

First, "it is uncertain that any potential named plaintiff . . . would have a live claim long enough for a district court to certify a class." *See id.* at 582. As prosecutor, Taylor has discretion over whether and when to drop forfeiture actions. And as Sparger-Withers's experience spotlights, he can swiftly abandon any forfeiture case if the defendant challenges his contingency-fee arrangements. That discretion aligns Sparger-Withers's claim directly with the inherently transitory exception, since "uncertainty" about how long any named plaintiff's claim will remain live is "the essence of the exception." *Id.*

The *Olson* decision illustrates the point. Mark Olson, an inmate, commenced a putative class action about jail conditions. As here, he "filed for class certification at the same time he filed the complaint." *Id.* at 579. But before the district court could rule on that motion, the Indiana Department of Corrections transferred him to a different jail. In that way, "[t]he duration of [Olson's] claim was at the discretion of the [defendant]." *Id.* at 583. And that discretion "over the duration of [his] incarceration—and therefore his claim—created the very uncertainty that made the inherently transitory exception applicable." *Aguilar v. U.S. Immigr. & Customs Enf't Chicago Field Off.*, 346 F. Supp. 3d 1174, 1182 (N.D. Ill. 2018) (discussing *Olson*); *see also Moreno v. Napolitano*, No. 11-cv-5452, 2012 WL 5995820, at *6 (N.D. Ill. Nov. 30, 2012) ("If

the length of a claim 'cannot be determined at the outset' and is 'subject to a number of unpredictable factors,' it is 'inherently transitory.'" (quoting *Olson*, 594 F.3d at 582)).

This case is similar. As in *Olson*, the duration of Sparger-Withers's forfeiture case (like every other class member's) is in Taylor's discretion. Practically speaking, Taylor also has every incentive to exercise that discretion to try to moot out class representatives in a case like this one. The resulting uncertainty is "precisely what makes the 'inherently transitory' exception applicable in this case." *Olson*, 594 F.3d at 583.

In fact, this Court has been down this road before. In *Washington v. Marion County Prosecutor*, a property owner filed a putative class action raising a different systemwide challenge to Indiana's civil-forfeiture regime. No. 1:16-cv-2980-JMS-DML, 2017 WL 897311, at *1 (S.D. Ind. Mar. 7, 2017). As here, the plaintiff in *Washington* moved for class certification. *Id.* As here, the government voluntarily dismissed the state-court forfeiture action. *See id.*; *see also* Ex. 16 to Greenberg Decl. Opp. MTD (ECF No. 50-17 at 2-3) ("Order of Dismissal as to the 2005 Chevrolet Malibu Only"). As here, the government promptly argued that the federal court lacked jurisdiction. This Court rejected that argument root and branch. "[A]s the State retains discretion to return the seized property to its owner at any time," the Court stressed, "it could attempt to moot any named plaintiff's claim by simply returning the property after the plaintiff files a motion to certify." *Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 971 (S.D. Ind. 2017). Hence, the Court applied the inherently-transitory exception and "retain[ed] jurisdiction over th[e] dispute." *Id.*

The same result should obtain here. Indeed, this case showcases perfectly why the inherently-transitory exception is a key part of the class-action apparatus. The morning after being served with process, Taylor moved to voluntarily dismiss his forfeiture case against

Sparger-Withers. As discussed above (at 13-15), his explanation is highly implausible. Defendants swiftly moved to parlay that dismissal into a bid to thwart this class action. And all the while, Taylor has persisted in violating the rights of every member of the putative class whose name isn't Amya Sparger-Withers. The inherently-transitory exception was built for cases like this.

Second (and again as in *Washington*), "there will be a constant class of persons suffering the deprivation complained of in the Complaint." *See Washington*, 264 F. Supp. 3d at 971; *see also Olson*, 594 F.3d at 584 ("[A]ll [the named plaintiff] must show is that the claim is likely to recur with regard to the class, not that the claim is likely to recur with regard to him."). Taylor lost no time dropping Sparger-Withers's forfeiture case, but the same can't be said of his forfeiture docket more broadly. At least 98 Taylor-prosecuted forfeiture cases were active when this case was filed. *See* Br. Supp. Class Certification (ECF No. 7 at 12-13) (detailing figures). Since then, Taylor has filed over ten new forfeiture cases as well—most recently, four days ago. Ex. 17 to Greenberg Decl. Opp. MTD (ECF No. 50-18 at 2-13). All still appear to be prosecuted by Taylor on a contingency-fee basis. Ind. Code § 34-24-1-8(e). All suffer the same due-process infirmity challenged here. This case thus easily meets the second requirement of the inherently-transitory exception.

2. This case is not moot because Sparger-Withers's claim falls within the "picking off" exception.

This putative class action falls within the related "picking off" exception as well. Since at least 1978, the Seventh Circuit has held that "a case does not become moot" merely by the mooting of the named plaintiff's claim for relief if "a motion for class certification has been pursued with reasonable diligence and is then pending before the district court." *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978). The court has reaffirmed that rule

repeatedly. *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *DeBrown v. Trainor*, 598 F.2d 1069, 1072 (7th Cir. 1979) (per curiam); *see also Koss v. Norwood*, 305 F. Supp. 3d 897, 906-07 (N.D. Ill. 2018). And much like the inherently-transitory exception, the picking-off exception makes a good deal of practical sense: It guards against "a defendant['s] manufactur[ing] mootness in order to prevent a class action from going forward." *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874 (7th Cir. 2012); *Primax Recoveries, Inc.*, 324 F.3d at 547 ("Otherwise the defendant could delay the action indefinitely by paying off each class representative in succession.").

Also like the inherently-transitory exception, the picking-off exception applies straightforwardly here. Sparger-Withers moved for class certification on November 10. Taylor voluntarily dismissed the forfeiture action against her the next week (and took several weeks more to return her money). Given that sequence of events, the picking-off exception applies. *Cf. Serrano v. Customs & Border Patrol*, 975 F.3d 488, 492 n.1 (5th Cir. 2020) (per curiam) (rejecting, in context of civil forfeiture, the government's view that plaintiff's "class claims were mooted by the return of his property" because "'a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when . . . there is pending before the district court a timely filed and diligently pursued motion for class certification'"), *cert. denied*, 141 S. Ct. 2511 (2021).[7]

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

[7] Defendants' motion (though not their brief) suggests that Sparger-Withers's complaint be dismissed "with prejudice." Defs.' Mot. (ECF No. 46 at 2). But if Defendants were correct that the Court lacked jurisdiction, a with-prejudice dismissal would be error. *See MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019) ("[W]hen a suit is dismissed for want of subject-matter jurisdiction, . . . it is error to make the dismissal with prejudice." (citation omitted)).

Dated: January 24, 2022.

Respectfully submitted,

s/Samuel B. Gedge
Samuel B. Gedge*
Michael N. Greenberg*
Robert M. Belden*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: 703.682.9320
Facsimile: 703.682.9321
E-mail: sgedge@ij.org
mgreenberg@ij.org
rbelden@ij.org

*Admitted *pro hac vice*

Anthony B. Sanders, MN Bar No. 038730
INSTITUTE FOR JUSTICE
Renaissance Square
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Telephone: 612.435.3451
Facsimile: 612.435.5875
Email: asanders@ij.org

J. Lee McNeely, IN Atty. No. 9542-73
Cynthia A. Bedrick, IN Atty. No. 21547-49
Scott A. Milkey, IN Atty. No. 32070-49
MCNEELYLAW LLP
2177 Intelliplex Drive, Suite 251
Shelbyville, IN 46176
Telephone: 317.825.5110
Facsimile: 317.825.5109
E-mail: LMcNeely@McNeelyLaw.com
CBedrick@McNeelyLaw.com
SMilkey@McNeelyLaw.com