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EXHIBIT A

Motion of Amicus Curiae Institute for Justice for Leave to File Amicus Brief Regarding Public's Access to Court Records

STATE OF INDIANA	)	LAKE SUPERIOR COURT
	) SS:	CIVIL DIVISION ROOM 1
COUNTY OF LAKE	)	HAMMOND, INDIANA

STATE OF INDIANA,	)	CAUSE NO. 45D01-2208-MI-000533
	)	
Plaintiff,	)	
	)	
	)	
v.	)	
	)	
JEFFERY DIAZ, DANIEL CESPEDES-GOMEZ AND ONE (1) 2015 NISSAN SUV, VIN #5N1AR2MN6FC61688	)	
	)	
	)	
Defendants.		

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE REGARDING PUBLIC'S ACCESS TO COURT RECORDS

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STATEMENT OF AMICUS CURIAE'S INTEREST

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm that litigates around the country to protect constitutional rights. As part of that mission, IJ has become the nation's leading advocate for ending civil forfeiture.

IJ regularly represents property owners in civil-forfeiture proceedings, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *United States v. 434 Main Street*, 961 F. Supp. 2d 298 (D. Mass. 2013), and mounts successful constitutional challenges to civil-forfeiture programs, *e.g.*, *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015). IJ also regularly participates as amicus in important civil-forfeiture cases, *e.g.*, *United States v. McClellan*, 44 F.4th 200 (4th Cir. 2022), and publishes original research quantifying the problems civil forfeiture poses, *e.g.*, Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed. 2020), *available at* https://ij.org/report/policing-for-profit-3/. IJ's research has been cited by courts, including by Justice Thomas in an opinion that questioned civil forfeiture's constitutionality. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari). IJ has also represented newsgathering outlets in litigation to ensure civil-forfeiture records are available to the public. *See generally* Inst. for Justice, *Pennsylvania Forfeiture FOIA*, *available at* https://ij.org/case/pa-forfeiture-foia/.

IJ has particular expertise with Indiana's civil-forfeiture regime. IJ attorneys have been counsel in almost every civil-forfeiture-related appeal decided by the Indiana Supreme Court in recent years. *Abbott v. State*, 183 N.E.3d 1074 (Ind. 2022); *State v. Timbs*, 169 N.E.3d 361 (Ind. 2021); *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019); *Horner v. Curry*, 125 N.E.3d 584 (Ind. 2019); *see also* Appellees' Pet. to Transfer, *State v. $2,435 in United States Currency and Alucious*

Kizer, No. 22A-CR-578 (Ind., filed Nov. 3, 2022). And as particularly relevant here, IJ is now litigating a federal-court constitutional challenge to Indiana's unique system of allowing civil-forfeiture cases to be prosecuted by private attorneys who are paid with a contingency fee—that is, with a cut of what they forfeit for the State. *Sparger-Withers v. Taylor*, No. 1:21-cv-02824-JRS-MG (S.D. Ind. Sept. 14, 2022) (ECF No. 88) (denying motion to dismiss and certifying class of state-court forfeiture defendants targeted by contingency-fee prosecutor).

This case is a civil-forfeiture proceeding. It is being prosecuted for the State by a private, contingency-fee attorney. And like in several other cases filed in this Court recently, the contingency-fee prosecutor representing the State is seeking to keep the details of his civil-forfeiture activity secret. This raises grave concerns under Indiana's rules on Access to Court Records, which require litigants to make a powerful showing to overcome the presumption of openness in judicial proceedings. IJ has a strong interest in the public's access to the details of Indiana's civil-forfeiture practices—including those prosecuted by private lawyers with a personal financial stake in their cases. This amicus brief urges the Court to hold the State to the high burden it must meet before excluding the public from accessing civil-forfeiture records.

ARGUMENT

In recent months, an unusual practice has taken hold in Lake County: the State's redacting basic information from its filings in civil-forfeiture cases. Under Indiana's transparency laws, the State must satisfy a high burden to justify such redactions (Section A, below). In this case (and others like it), it appears the State has failed to meet that burden. The State's boilerplate justifications for its secrecy, along with its total failure to keep information redacted consistently across its filings, demonstrates as much (Section B.1). And transparency concerns are especially heightened given that these cases arise out of Indiana's punitive, and oft-

criticized, civil-forfeiture regime (Section B.2). Amicus urges the Court to restore the public's access to these cases' records unless the State can establish good cause for its continued secrecy.

A. State courts in Indiana have a duty to ensure that court records are not being improperly kept from public view.

Like most states in the nation, Indiana maintains "a presumption of openness" for all court records. *Commentary*, Indiana Access to Court Records Rule 6 (ACR Rule 6). That transparency serves a key purpose. Public scrutiny "promote[s] community respect for the rule of law," "provide[s] a check on the activities of judges and litigants," and "foster[s] more accurate factfinding." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). In brief, both "government and the public interest are better served when records are open for public inspection." Indiana Office of Court Services, *Public Access to Court Records Handbook Summary*, https://tinyurl.com/ykb7bbvv. In large part for these reasons, the right of public access to judicial proceedings finds footing not just in statutory law, but in the First Amendment as well. *See, e.g.*, *Grove Fresh Distribs., Inc.*, 24 F.3d at 897; *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 296 (2d Cir. 2012) ("freedom of speech and the press entail that the government [be prohibited] from limiting the stock of information from which members of the public may draw" (internal quotation marks and citations omitted)).

To safeguard these values, the Indiana Supreme Court has promulgated strict rules for limiting public access to court filings. Under ACR Rule 6, a party wishing to seal court records must present "compelling evidence to overcome th[e] presumption" of openness. *Commentary*, ACR Rule 6. Secrecy is justified by only three types of "extraordinary circumstances": (1) "[t]he public interest will be substantially served by prohibiting access"; (2) "[a]ccess or dissemination of the Court Record will create a significant risk of substantial harm to the requestor, other persons or the general public"; or (3) "[a] substantial prejudicial effect to on-going proceedings

cannot be avoided without prohibiting Public Access." ACR Rule 6(A). Restricting access is improper unless at least one of these three circumstances is proven by clear and convincing evidence. ACR Rule 6(D)(2).

On top of that, the court also must "[b]alance[] the Public Access interests served by [the ACR rules] and the grounds demonstrated by the requestor." ACR Rule 6(D)(3). And it must use "the least restrictive means and duration when prohibiting access." ACR Rule 6(D)(4). Procedurally, moreover, the courts cannot grant a request to seal without first holding a public hearing. ACR Rule 6(C)(2), (D); *see also Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 408-09 (Ind. Ct. App. 2008). Simply, the law in Indiana is clear: Transparency is the rule, and the bar for departing from it is "very high." Indiana Supreme Court Office of Court Services, *Public Access to Court Records Handbook* 52 (2020).

B. The State's pattern of sealing information about civil-forfeiture cases raises grave concerns under the Access to Court Records Rules.

In recent months, the State has sealed basic information about no fewer than three civil-forfeiture actions in this county. This practice raises serious concerns about compliance with ACR Rule 6, and it warrants the Court's attention.

1. In this case, the State's case-initiating filings redacted a remarkable amount of basic information. The State redacted the names of the defendants. *E.g.*, Compl. (caption); *see also* Pet. for Determination of Probable Cause. The State redacted the description of the property sought to be forfeited. Compl. (caption); *see also id.* ¶¶ 1, 4, 7.a. The State redacted the name of the police department holding the seized property. Compl. ¶ 6. The State redacted virtually all of the probable-cause affidavit required by Indiana Code § 34-24-1-2(b). *See* Pls.' Aff. Supp. Probable Cause Determination. The State even redacted the statutory provisions on which the lawsuit is based. Compl. ¶ 2.

There are at least two reasons to doubt whether these redactions comport with Indiana's Access to Court Rules. To start, the State's "Motion to Exclude Records from Public Access" appears to have rested largely on a boilerplate recitation of ACR 6(A)(3)—far short of the "compelling evidence" needed to justify secrecy. *Commentary*, ACR Rule 6; *see also* Mot. to Exclude Records from Public Access 1 (filed Aug. 8, 2022). The State purported to redact the relevant paragraph of its motion, but it did so unsuccessfully. *See generally* Herbert B. Dixon Jr., *Embarrassing Redaction Failures*, The Judges' Journal, Spring 2019, at 37.

More troubling, the State's steps to maintain secrecy have been stunningly haphazard. While the defendants' names were redacted in the opening filings in this case, for example, the identity of the defendants is publicly available on the Odyssey System's chronological case summary. And while the summonses on the docket redact the defendants' names and addresses, the returned-mail documentation doesn't. By September, the State itself had begun filing publicly the same information it insisted had to remain secret in August. *E.g.*, Aff. of Diligent Inquiry (filed Sept. 28, 2022).

Nor is this case an outlier. Two other times in recent months, the State has brought forfeiture actions in this county with a similar degree of ineffectual secrecy. In Case Number 45D01-2208-MI-000555, for example, the State again redacted basic information about the forfeiture action it was prosecuting. And another case—Number 45D01-2207-MI-490—is even more eyebrow-raising. There, the State redacted virtually all of the probable-cause affidavit recounting the property's seizure. Aff. Supp. of Probable Cause Determination, No. 45D01-2207-MI-490 (filed July 18, 2022). But there, too, the defendant's name remained publicly available on the chronological case summary online. Even as it demanded secrecy on the forfeiture side, the State publicly filed a detailed probable-cause affidavit on the criminal-court

side. *See* Probable Cause Aff., No. 45G01-2208-F2-63 (filed August 12, 2022). Once the property owner defaulted, moreover, the State appears to have lost all interest in confidentiality; the default-judgment paperwork it filed with this Court in early September publicized the precise information it insisted must remain sealed in late July. *E.g.*, Mot. for Default J. (filed September 6, 2022); Aff. of Non-Military Service (filed September 6, 2022); Mot. for Order of Asset Distribution (filed September 8, 2022). All of this, combined, strongly suggests that the State's bids for secrecy in Lake County forfeiture cases may merit a healthy degree of judicial skepticism. That the State itself cannot be troubled to keep its sealed information private is a signal that, perhaps, the information didn't need sealing to begin with.

2. The civil-forfeiture context of these cases only reinforces the need for rigorous transparency. Civil forfeiture has "significant criminal and punitive characteristics." *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014). At the same time, a "constellation of unique characteristics" work to the disadvantage of forfeiture defendants—from the government's burden of proof to the unavailability of appointed counsel. *Abbott v. State*, 183 N.E.3d 1074, 1087 (Ind. 2022) (Rush, C.J., concurring in part and dissenting in part). For their part, members of the Indiana Supreme Court have repeatedly voiced concerns with the state's civil-forfeiture regime.[*] Across Indiana, as in many states, law enforcement "often keeps" proceeds of forfeited property, providing it with "strong incentives to pursue forfeiture." *Leonard v. Texas*, 137 S. Ct.

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[*] *State v. Timbs*, 134 N.E.3d 12, 31 (Ind. 2019) ("[T]he way Indiana carries out civil forfeitures is . . . concerning"); *Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring in the judgment) ("I have serious concerns with the way Indiana carries out civil forfeitures . . . ."); *Sargent v. State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting) (commenting on "overreach" and likening civil forfeiture to a "law enforcement Weapon[] of Mass Destruction"); *accord Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.").

847, 848 (2017) (Thomas, J., respecting denial of certiorari). And those concerns are particularly acute in jurisdictions like Lake County, where—unlike in every other state in the nation—forfeiture prosecutions are outsourced to private, contingency-fee lawyers. David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (2018) (describing "Indiana's institutionalized bounty hunter system" as a "scandal"); *see generally Sparger-Withers v. Taylor*, No. 1:21-cv-02824-JRS-MG (S.D. Ind. Sept. 14, 2022) (ECF No. 88) (certifying statewide class in due-process challenge to contingency-fee forfeiture prosecutors).

Simply, civil forfeiture in Indiana is "punitive and profitable"—and ripe for abuse. *See State v. Timbs*, 134 N.E.3d 12, 21 (Ind. 2019). In this sphere, the courts have a special obligation to steward the public's interest in transparency. Civil forfeitures are "criminal-like penalties." *Hughley*, 15 N.E.3d at 1005. And to state the obvious, the State of Indiana cannot punish its citizens in secret. The "distrust for secret trials" has deep roots in the American and English legal traditions. *See In re Oliver*, 333 U.S. 257, 268 (1948). For civil forfeitures specifically, moreover, Indiana lawmakers have enacted a mandate for transparency. In 2018, the General Assembly amended the Civil Forfeiture Statute to require prosecutors to publicly report data about every forfeiture action they prosecute—including much of the information that was sealed in this case and others. I.C. § 34-24-1-4.5(a), (b); Indiana Public Access Counselor Adv. Op. 16-FC-254 ("[I]t is the Opinion of the Public Access Counselor that reports collected by IPAC pursuant to Indiana Code § 34-24-1-4.5 should be released."). In short, it will be the vanishingly rare case—if any—where the State can justify prosecuting civil forfeitures behind redaction tape.

CONCLUSION

Perhaps the State of Indiana has compelling reasons for its new preference for filing forfeiture cases in secret. But as detailed above, there are reasons to think it doesn't. In light of the State's spotty record in consistently keeping information in these cases private, the Court

should inquire whether the State wishes to continue to exclude the public from the records of this case (and others like it). If the State does, the Court should ensure the State has satisfied the high burden set by ACR Rule 6 before allowing the State to continue keeping the public in the dark.

Dated: November 21, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 21, 2022, I electronically filed this document using the Indiana E-filing System (IEFS). I hereby certify that a copy of this document was served on the following persons using the IEFS on November 21, 2022:

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I FURTHER CERTIFY that on November 21, 2022, a copy of the foregoing was served on the following person via U.S. Certified Mail:

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