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IN THE INDIANA SUPREME COURT
CAUSE NO. 20A-MI-01527

LAKE COUNTY BOARD OF COMMISSIONERS and LAKE COUNTY COUNCIL,	)	
Appellants (Plaintiffs below),	)	Court of Appeals Case 20A-MI-01527
v.	)	Appeal from Marion Superior Court 49D06-1906-MI-024203
STATE OF INDIANA, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF INDIANA, LAKE COUNTY PROBATION DEPARTMENT, JAN PARSONS, in her official Capacity as Director and Chief Probation Officer of felony Probation Department of the Superior Courts of Lake County Criminal Division, et al.,	)	
Appellees (Defendants below).	)	

BRIEF OF *AMICUS CURIAE*

PROBATION OFFICERS PROFESSIONAL ASSOCIATION OF INDIANA, INC.,

IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF STATEMENT OF INTEREST

The Probation Officers Professional Association of Indiana, Inc. ("POPAI") has a direct interest in the issues presented in this appeal. According to information available to its Board of Directors, there are approximately 1,510 active probation officers in the State of Indiana, and POPAI has approximately 946 active probation officers as members, including members representing 82 out of the 92 counties in Indiana.

POPAI was established in 1985 by a group of chief probation officers from throughout Indiana who were concerned about soaring caseloads, low pay, and dangerously high probation officer turnover in Indiana. POPAI's membership is composed of individuals involved in all areas of probation services: administrators, line probation officers, supervisory staff, community corrections/probation officers,

detention/probation personnel, and support staff. There is no other organization in the State of Indiana whose sole purpose is to work on behalf of probation officers.

This appeal is of critical importance to the members of POPAI because it directly impacts probation officers' representation in lawsuits that may be brought as a result of their chosen employment. With nearly two-thirds of probation officers in the State of Indiana as members, POPAI has an interest in making sure probation officers receive similar representation as other court employees in lawsuits stemming from their employment. The varying sizes and budgets of counties place probation officers at risk of inequitable legal representation based on the resources available to the counties they serve. As state employees and important members of the judicial branch, probation officers should be represented by the Attorney General like other state officials.

SUMMARY OF ARGUMENT

Probation officers are established court employees, and, as such, should be considered employees of the State of Indiana. This Court has not yet addressed this question, but the United States District Court for the Northern District of Indiana previously dismissed a lawsuit brought by a probation officer against the county, rather than the State, because the Court found the State was the proper party as the probation officer's employer. *See Scott v. Indiana*, 2014 WL 1831175 at *1 (N.D. Ind. May 7, 2014). As state employees, probation officers are entitled to representation by the Indiana Office of Attorney General. Leaving probation officers' legal representation to the county can lead to inconsistencies based on county's available

resources. Furthermore, the Court of Appeals' Opinion went beyond the legislative intent in determining that "actual expenses necessarily incurred" in probation officers' state-designated mandatory duties included legal fees. *Lake County Board of Commissioners v. State,* 170 N.E.3d 1104, 1110 (Ind. Ct. App. 2021). In finding that probation officers' legal representation fees incurred in the performance of their job duties should be paid by the county, rather than the State, the Court of Appeals made a significant departure from law or practice, and the Indiana Supreme Court should accept transfer to address this departure.

ARGUMENT

I. Probation officers are employees of the Court and, as such, are employees of the State and entitled to representation by the Indiana Attorney General like other state officials.

As a threshold matter, probation officers are unquestionably employees of the Court. Indiana Code Section 11-13-1-1(c) provides, "Probation officers shall serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of the court." The Indiana Court of Appeals has previously found that probation officers are "established court employees." *Hendricks County v. Green*, 120 N.E.3d 1118, 1124 (Ind. Ct. App. 2019), *trans. denied*[1]. "Because courts are constitutionally obligated to be open and because the operation of a probation office is a court-related function, the courts have the corresponding constitutional power to pay probation officers at a level sufficient to attract and maintain qualified

[1] The Court of Appeals accepted POPAI's filing of an *amicus curiae* brief in *Hendricks County v. Green* in which POPAI consistently asserted probation officers are employees of the Courts in which they serve.

personnel." *Matter of Madison Cty. Prob. Officers' Salaries*, 682 N.E.2d 498, 501 (Ind. 1997). Put simply, "[p]robation officers are employees of the court." *Smith v. State*, 829 N.E.2d 1021, 1025 (Ind. Ct. App. 2005).

Other opinions also have recognized, sometimes in *dicta*, that probation officers are properly considered employees of the court. *See e.g., Orange v. Morris*, 23 N.E.3d 787, 790-791 (Ind. Ct. App. 2014) ("The City Court's probation department is the largest department in the court…" and "'[T]he City Court employs two probation officers who speak Spanish…" (emphasis added)); *Kramer v. Hancock County Court*, 448 N.E.2d 1190, 1191 (Ind. 1983) (citing *State ex rel. Adams Circuit Court v. Adams County Council*, 413 N.E.2d 905 (Ind. 1980) ("The record discloses that the three employees, the reporter, bailiff, and **probation officer, were court employees** who fall within that category subject to court mandate authority.") (emphasis added). "Under Indiana law probation is a function of the state court system and probation officers are directly supervised by the courts." *Westbrook v. Indiana*, 2011 WL 4361571, at *2 (N.D. Ind. Aug. 11, 2011). "This statutory language affirms that the duties of probation officers are 'essentially and inextricably bound up with those of the court itself.'" *Id.* (quoting *Blackwell v. Cook,* 570 F. Supp. 474, 478 (N.D. Ind.1983)).

Probation officers are court employees, and court employees are state employees. "Because Probation is an arm of the court, **it like the court itself is a state entity** and therefore not a "person" under § 1983." *J.A.W. v. State*, 650 N.E.2d 1142,

1151 (Ind. Ct. App. 1995)[2] (emphasis added). Accordingly, probation officers are state employees. The United States District Court for the Northern District of Indiana explicitly recognized that probation officers are employees of the State when it dismissed a lawsuit because the probation officer sued the county as its employer, rather than the State, finding the plaintiff had filed suit against the incorrect party as its employer. *See Scott v. Indiana*, 2014 WL 1831175 at *1 (N.D. Ind. May 7, 2014).

As state employees, probation officers should be entitled to representation by the Indiana Office of Attorney General. Indiana Code Section 4-6-2-1 provides, "The attorney general … shall defend all suits brought against the state officers in their official relations…" Furthermore, Indiana Code Section 4-6-2-1.5(a) provides, "Whenever any state governmental official or employee, whether elected or appointed, is made a party to a suit, and the attorney general determines that said suit has arisen out of an act which such official or employee in good faith believed to be within the scope of the official's or employee's duties as prescribed by statute or duly adopted regulation, the attorney general shall defend such person throughout such action." "The Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities." *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 148 (Ind. 1978)*; See also Buquer v. City of Indianapolis*, 2013 WL 1332137 at * 3 (S.D.

[2] A different defendant later sought transfer concerning whether the Department of Public Welfare was subject to suit under § 1983. This Court granted transfer as to that particular issue, but affirmed the Court of Appeals' Opinion in all other respects. *J.A.W. v. State, Marion County Dept. of Public Welfare*, 687 N.E.2d 1202, 1203 n.3 (Ind. 1997).

Ind. Mar. 28, 2013). Probation officers should receive representation by the Attorney General when made party to a suit that arises out of their duties prescribed by statute.

II. Legal defenses are not the sort of "actual expenses necessarily incurred in the performance of their duties" contemplated by statute.

The Court of Appeals' Opinion concluded that "'actual expenses necessarily incurred in the performance of [probation officers'] duties,' I.C. § 11-13-1-1(c), include the legal costs of defending probation officers who are sued for acts committed while serving in their official capacities." *Lake County Board of Commissioners v. State,* 170 N.E.3d 1104, 1110 (Ind. Ct. App. 2021). The statutory provision the Opinion relies upon for "actual expenses necessarily incurred" states in full:

> (c) Probation officers shall serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of the court. The amount and time of payment of salaries of probation officers shall be fixed by the county, city, or town fiscal body in accordance with the salary schedule adopted by the county, city, or town fiscal body under IC 36-2-16.5. The salary of a probation officer shall be paid out of the county, city, or town treasury by the county auditor or city controller. **Probation officers are entitled to their actual expenses necessarily incurred in the performance of their duties.** Probation officers shall give a bond if the court so directs in a sum to be fixed by the court.

Ind. Code § 11-13-1-1(c) (emphasis added). There is no basis for concluding that legal defenses due to employment qualifies as "actual expenses necessarily incurred in the performance of their duties." Being sued is not "necessarily" incurred in the performance of probation officers' mandatory duties, which are statutorily defined and include:

> (1) conduct prehearing and presentence investigations and prepare reports as required by law;
> (2) assist the courts in making pretrial release decisions;
> (3) assist the courts, prosecuting attorneys, and other law enforcement officials in making decisions regarding the diversion of charged individuals to appropriate noncriminal alternatives;
> (4) furnish each person placed on probation under his supervision a written statement of the conditions of his probation and instruct him regarding those conditions;
> (5) supervise and assist persons on probation consistent with conditions of probation imposed by the court;
> (6) bring to the court's attention any modification in the conditions of probation considered advisable;
> (7) notify the court when a violation of a condition of probation occurs;
> (8) cooperate with public and private agencies and other persons concerned with the treatment or welfare of persons on probation, and assist them in obtaining services from those agencies and persons;
> (9) keep accurate records of cases investigated by him and of all cases assigned to him by the court and make these records available to the court upon request;
> (10) collect and disburse money from persons under his supervision according to the order of the court, and keep accurate and complete accounts of those collections and disbursements;
> (11) assist the court in transferring supervision of a person on probation to a court in another jurisdiction; and
> (12) perform other duties required by law or as directed by the court.

Ind. Code § 11-13-1-3. These state-designated mandatory duties could incur expenses such as mileage, meals, parking, tolls, training, tuition or conference fees, postage, and supplies – not legal fees.

Further, the suggestion that legal representation for probation officers is considered "actual expenses necessarily incurred in the performance of their duties" does not coalesce with the General Assembly's statutory construction surrounding legal representation and/or expenses for other state employees. When it comes to state employees, Indiana law instructs the Attorney General to represent current or former state employees (if requested by the employee) in contract claims (Ind. Code §

34-13-2-2), civil rights claims (Ind. Code § 34-13-4-2), tort claims (Ind. Code § 34-13-3-15), and in suits "aris[ing] out of an act which such official or employee in good faith believed to be within the scope of the official's or employee's duties as prescribed by statute" (Ind. Code § 4-6-2-1.5). But these statutes directing the Attorney General's legal representation of state employees are wholly separate and distinct from the numerous statutes stating that state employees are entitled to reimbursement for travel expenses "and other expenses actually incurred in connection with the member's duties …". *See e.g.,* Ind. Code § 20-19-10-7(b) (state employees on the Indiana CIVIC Education Commission); Ind. Code § 10-19-8.1-5(b) (state employees on the Governor's Security Council); Ind. Code § 16-46-6-13(b) (state employees on the Interagency State Council on Black and Minority Health); Ind. Code § 15-13-5-6(b) (state employees on the State Fair Board); Ind. Code § 25-5.1-2-7(b) (state employees on the Indiana Athletic Trainers Certification Board); Ind. Code § 14-20-15-10(b) (state employees on the Lewis and Clark Expedition Commission); Ind. Code § 14-12-2-20(b) (state employees on the Indiana Heritage Trust Program Committee); Ind. Code § 5-2-1-3 (state employees on the law enforcement training board). If the General Assembly intended legal representation to be considered "actual expenses" incurred in the performance of an employee's duties, it would not have separated the two issues as it did. The Court of Appeals' Opinion went beyond the legislative intent in determining that "actual expenses necessarily incurred" in probation officers' state-designated mandatory duties included legal fees in defending a suit that arises

out of their statutorily mandated duties. *See Lake County Board of Commissioners v. State*, 170 N.E.3d 1104, 1111 (Ind. Ct. App. 2021).

III. The Indiana Supreme Court should accept transfer because there is an undecided question of law, and the Court of Appeals' Opinion reflects a significant departure from accepted law or practice.

In its Opinion, the Court of Appeals found that the county is responsible for the legal costs of defending its probation officers in federal litigation. *Lake County Board of Commissioners v. State*, 170 N.E.3d 1104, 1111 (Ind. Ct. App. 2021). In doing so, the Court of Appeals raised an important question of law that has not been, but should be, decided by the Indiana Supreme Court. *See* Ind. App. R. 57(H)(4). The Indiana Supreme Court has not specifically addressed whether probation officers are employees of the county or of the State. Indeed, in 2018, the United States District Court for the Northern District of Indiana considered whether to exercise supplemental jurisdiction over a crossclaim brought by a probation officer and declined because it involved a "novel issue of state law." *Bostic v. Vasquez*, 2018 WL 3068855, at *4 (N.D. Ind. June 20, 2018). "The question of defense and indemnification of a probation officer in Indiana is a pure issue of Indiana state law that does not appear to have been directly answered by the courts and that the Crossclaim parties dispute as set forth in their briefs." *Id.* As such, this Court should accept transfer to address this novel issue of state law.

The Court of Appeals' Opinion also reflects a departure from accepted law or practice in the treatment of probation officers as employees of the county and not the

State. The Court of Appeals has previously found "Probation is an arm of the court." *J.A.W. v. State*, 650 N.E.2d 1142, 1150 (Ind. Ct. App. 1995). "The funding of Probation by the county is thus merely reflective of the longstanding policy of funding state courts through county revenues. Because Probation is an arm of the court, **it like the court itself is a state entity** and therefore not a "person" under § 1983." *Id.* at 1151 (emphasis added). Furthermore, in a case filed by a chief probation officer against Tippecanoe County, the United States District Court for the Northern District of Indiana granted a motion to dismiss because the probation officer filed the action against the county when it should have filed suit against the State, finding the plaintiff was not a county employee but rather employed by the State. *Scott v. Indiana*, 2014 WL 1831175 at *1 (N.D. Ind. May 7, 2014). The Northern District of Indiana came to this conclusion relying on Indiana law:

> In determining whether Plaintiff was a state or county employee, the federal court **is guided by state law**. *McMillian v. Monroe County,* 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). Under Indiana law, "[p]robation is an arm of the court, it like the court itself is a state entity." *J.A.W. v. State,* 650 N.E.2d 1142, 1150 (Ind.Ct.App.1995); *see* Ind. Code § 11–13–1–1(c) ("Probation officers shall serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of that court.").

Id. (emphasis added).

The current Opinion of the Court of Appeals creates a significant departure from law or practice in treating probation officers as county employees, rather than state employees, and the Indiana Supreme Court should accept transfer to address this departure.

CONCLUSION

On behalf of all probation officers in Indiana, Probation Officers Professional Association of Indiana, Inc., submits that probation officers are essential court employees and entitled to the same representation as other state employees. The Court of Appeals' decision should be reversed.

Respectfully submitted,

/s/ Stephanie L. Grass

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WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(E), I certify that this Brief of Amicus Curiae contains fewer than 4,200 words, excluding the items listed in Appellate Rule 44(C), as counted by Microsoft Word, which was used to prepare the Brief.

/s/ Stephanie L. Grass

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on September 24, 2021, via the Court's electronic filing system, upon the following counsel of record:

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