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IN THE
INDIANA COURT OF APPEALS

No. 22A-PL-337

KELLER J. MELLOWITZ, on behalf of himself and all others similarly situated	)	
Appellant-Plaintiff,	)	Appeal from Marion County Superior Court 1
vs.	)	Cause No. 49D01-2005-PL-15026
BALL STATE UNIVERSITY and BOARD OF TRUSTEES OF BALL STATE UNIVERSITY,	)	Hon. Matthew C. Kincaid, Special Judge
Appellees-Defendants.	)	

BRIEF OF *AMICI CURIAE* INDEPENDENT COLLEGES OF INDIANA AND UNIVERSITY OF NOTRE DAME DU LAC IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

The University of Notre Dame du Lac ("Notre Dame") is an independent Catholic university founded in 1842 by the Congregation of the Holy Cross in Notre Dame, Indiana. Notre Dame is ranked among the top national institutions of higher learning and offers numerous degree programs and 75 majors within five colleges to nearly 9,000 undergraduate and 4,000 graduate students.

Independent Colleges of Indiana, Inc. ("ICI") is a non-profit organization that develops and enhances the competitive standard of its independent, private non-profit, regionally-accredited, degree-granting member colleges and universities, striving to assure excellence and choice in higher education for all students. Notre Dame is among ICI's 29 member-universities.[1]

Both Notre Dame and the ICI ("Amici") have filed amicus briefs in other cases before the Indiana Court of Appeals or the Indiana Supreme Court addressing the impact of COVID-19 on Indiana's institutions of higher learning and, in particular, the constitutionality of PL-166. Like appellee Ball State University and its trustees ("Appellees"), Notre Dame and all ICI members were faced with the unprecedented

[1] ICI's other member-universities are: Anderson University, Bethel University, Butler University, Calumet College of St. Joseph, DePauw University, Earlham College, Franklin College, Goshen College, Grace College, Hanover College, Holy Cross College, Huntington University, Indiana Institute of Technology, Indiana Wesleyan University, Manchester University, Marian University, Martin University, Oakland City University, Rose-Hulman Institute of Technology, Saint Mary-of-the-Woods College, Saint Mary's College, Taylor University, Trine University, University of Evansville, University of Indianapolis, University of Saint Francis, Valparaiso University, and Wabash College.

dilemma of providing quality education during the once-in-a-century pandemic, COVID-19. Public health concerns required universities to rapidly commit significant resources to adapt and shift their academic curricula online to protect their students (along with faculty and staff) and continue their education. Amici, along with all of ICI's membership, share an appreciation of the consequences that could arise for colleges and universities across Indiana if class actions arising out of COVID-19, such as those at issue in this case, are permitted to proceed.

Notre Dame has unique interests in this Court addressing the constitutionality of PL-166. A Notre Dame student has filed a nearly identical putative class action seeking relief based on Notre Dame's transition to remote education in March 2020. *See Slattery v. University of Notre Dame du Lac*, 3:21-cv-505-RLM-SLC (N.D. Ind.). On February 14, 2022, Judge Robert L. Miller Jr. of the Northern District of Indiana stayed the *Slattery* case, *sua sponte*, pending authoritative input on various issues of Indiana law. *Id.*, DE 45. Judge Miller found the claims in *Slattery* to be strikingly similar to issues raised in Indiana state court cases (including this one). *Id.* at 7. Judge Miller noted that the applicability of PL-166 was an issue "of first impression under Indiana law," and so decided to "wait[] for that resolution" rather than "forging ahead with the risk of conducting unnecessary or irrelevant litigation." *Id.* at 9.

The ICI also has unique interests in these issues. Its membership remains potentially subject to claims like those asserted here for several more years, which has the potential to impose substantial financial harm on ICI institutions.

Notre Dame and ICI seek this Court's guidance on the applicability of PL-166 to ensure that the legislature's decisive action aimed at protecting Indiana's colleges and universities from potentially devastating class action litigation in the wake of a deadly pandemic is honored in state and federal courts. Together, Amici urge the Court to affirm the trial court and specifically conclude that PL-166 is a substantive statute that passes constitutional muster.

SUMMARY OF ARGUMENT

The question of "[w]hat is a substantive law and what is procedural" has historically been "a hardy perennial in legal discourse." *Jacobs v. State*, 835 N.E.2d 485, 488-89 (Ind. 2005). But yesterday, the Indiana Supreme Court in *Church v. State*, No. 22S-CR-201, --- N.E.3d --- (Ind. June 23, 2022), pruned its standard for identifying substantive laws and cut a clear path for addressing the statute at the heart of this case and the other COVID-19 tuition cases against Indiana universities. PL-166 is clearly substantive based on its text, placement in the Indiana code, and predominant purpose and effect.

Indiana's General Assembly passed PL-166 to provide Indiana postsecondary institutions with relief from potentially widespread liability for second-guessing their implementation of policies and procedures enabling continued educational operations and their compliance with state health laws during the COVID-19 pandemic. By design, PL-166 protects Indiana colleges and universities from the potentially devastating costs and damages associated with class actions by barring claimants from acting as a representative for enumerated common law claims. As such, PL-166

is an appropriate exercise of the legislature's power to modify the substantive law of the state and to provide or limit the substantive rights of Indiana citizens and institutions.

Notre Dame, unlike its fellow Indiana-based universities also facing COVID-19 tuition suits, has been sued in federal court. This is likely the result of PL-166's passage and plaintiff's attempt to avoid the application of PL-166 and circumvent the will of the General Assembly. Like Appellant Mellowitz,[2] the plaintiff in *Slattery* incorrectly casts PL-166 as a mere procedural statute that conflicts with Federal Rule of Civil Procedure 23 and cannot be applied in federal court. But that is incorrect. As Notre Dame argued in its motion to strike Slattery's class allegations,[3] and as Appellees and the Indiana Attorney General correctly contend here, PL-166 is a substantive law that does not conflict with either Trial Rule 23 or Federal Rule of Civil Procedure 23.

Although the trial court's decision here correctly concluded PL-166 is constitutional and does not conflict with Rule 23, it did not conclusively address the substantive nature of PL-166. To help aid the federal court's decision in *Slattery*, and to discourage attempts by plaintiffs to use the federal rules to subvert the General Assembly's policy decisions, Amici ask the Court to squarely address the substantive

[2] Other plaintiffs are pursuing nearly identical claims against Indiana University and Purdue University in *Trustees of Indiana University v. Spiegel*, 21A-CT-175 (Ind. Ct. App.).

[3] *See Slattery*, 3:21-cv-505-RLM-SLC, DE 30, 31 & 43.

nature of PL-166. The Court's decision here would discourage plaintiffs' forum shopping and help ensure that cases arising from the COVID-19 pandemic are decided based on the same Indiana substantive law, whether they are in federal or state court.

ARGUMENT

As soon as practicable following the devastating and life-altering emergence of the novel coronavirus in Indiana, the General Assembly acted to mitigate the economic fallout from the COVID-19 pandemic. Indeed, in its first bill introduced in the 2021 session, the General Assembly proposed numerous statutory additions to establish immunity from COVID-19 related liability. One such measure was enacting House Bill 1002, Public Law 166-2021 (effective April 2021), codified at Indiana Code Chapter 34-12-5 ("PL-166"). PL-166 states, in relevant part:

> A claimant may not bring, and a court may not certify, a class action lawsuit against a covered entity for loss or damages arising from COVID-19 in a contract, implied contract, quasi-contract, or unjust enrichment claim.

Ind. Code § 34-12-5-7.

This class action bar applies "to a claim arising from COVID-19 during a period of state disaster emergency [] to respond to COVID-19, if the state of disaster emergency was declared[] after February 29, 2020 and before April 1, 2022." Ind. Code § 34-12-5-2(a)(1-2) (cleaned up). PL-166 further defines "[a]rising from COVID-19" to include, *inter alia*, "the implementation of policies and procedures to[] prevent or minimize the spread of COVID-19" and "closing or partially closing to prevent or

minimize services due to COVID-19[.]" Ind. Code § 34-12-5-3 (cross-referencing the definition in § 34-6-2-10.4). For purposes of PL-166, "covered entity" includes an approved postsecondary education institution. *See* Ind. Code §§ 34-12-5-5, 21-7-13-6.

All ICI member-institutions, including Notre Dame, are covered entities under PL-166, as are Ball State and Indiana's other public universities. *See* Ind. Code § 21-7-13-6. All ICI member-institutions, including Notre Dame, complied with Indiana's emergency health mandates by suspending in-person education. They enacted policies and procedures, and committed significant resources, to protect their students, faculty, and staff from the COVID-19 pandemic, all while ensuring their students' continued education. *See* Ind. Code § 34-6-2-10.4(b). There is no dispute that the claims of implied contract and unjust enrichment against Ball State University, Indiana University, Purdue University, or Notre Dame are facially covered by PL-166. Indeed, PL-166 was part of several protections designed to prevent Indiana universities (and select professions or would-be defendants) from shouldering the burden of the economic fallout of the unprecedented COVID-19 pandemic. Because PL-166 is a duly passed substantive Indiana statute, the plaintiffs' arguments that PL-166 is unenforceable here (and in federal court) must fail.

A. PL-166 is a substantive statute reflecting the General Assembly's policy decision to limit postsecondary academic institutions' liability and modify the remedies for specific common law claims.

Courts have oft noted that drawing "the line between substance and procedure" is "an enduring conundrum." *Godin v. Schenks*, 629 F.3d 79, 86 (1st Cir. 2010).

Indiana courts have held that substantive laws "establish rights and responsibilities[.]" *State ex rel. Blood v. Gibson Cir. Court*, 157 N.E.2d 475, 478 (Ind. 1959). Procedural laws, however, "merely prescribe the manner in which such rights and responsibilities may be exercised and enforced," such as those that fix the "time, place and method of doing an act in court" or otherwise "regulat[e] the conduct and relationship of individuals, courts, and officers in the course of judicial litigation." *Id.*

However, yesterday the Indiana Supreme Court in *Church* refined *Blood*'s framework by adopting a "predominant purpose" standard that disavowed any "mechanical test that simply stops when its finds a process," and instead embraced "a more thoughtful test that looks at the statute's predominant objective." Slip Op. at 11. The Court joined several sister states in focusing on a statute's *purpose*. If the law "predominantly foster[s] accuracy in fact-finding," it is procedural; but a law is substantive if it "predominantly foster[s] other objectives." *Id.* at 10 (quoting *Cabinet for Health & Fam. Servs. v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010)). Under the standard in *Blood* and *Church* (or both), PL-166 is clearly "substantive."

By removing the class action vehicle for these common law claims, the legislature has altered the substantive rights of Indiana's colleges and universities and the students who attend them. Although the class action vehicle itself is procedural, its effects are not. There are substantive consequences that follow class certification: defendants are now potentially liable to absent persons who have not sued them. Likewise, class representatives are able to assert claims that are not their own, and absent persons are bound to judgments prosecuted by class representatives.

See, e.g., *Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1201 (Ind. Ct. App. 2004) ("[A] judgment in a class action has a res judicata effect on absent class members."). It is clear that the legislature "has the power to abrogate or modify common law rights and remedies." *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213 (Ind. 1981). Indeed, "one of the acknowledged functions of legislation is to change the common law to reflect change of time and circumstances." *Id.* That is precisely what the plain text of PL-166 does—it changes the rights and remedies available to students and universities and colleges as to the ability to assert certain common law actions in response to a once-in-a-century pandemic that required immediate and emergency action from Indiana's colleges and universities.

The text of PL-166 shows it is not a rule of general applicability regulating the methods of doing an act in court. PL-166 applies only to a narrowly-defined set of common law causes of action (contract, implied contract, quasi-contract, and unjust enrichment), Ind. Code § 34-12-5-1, arising from a particular factual situation (those "arising from COVID-19"), *id.* § 34-12-5-2, and to a narrow set of defendants (governmental entities and approved postsecondary institutions), *id.* § 34-12-5-5. It does not enact generally applicable rules of procedure that cover the "time, place and method" of class litigation. *Cf. Blood*, 157 N.E.2d at 478 (finding statute that set time to file for a change of judge was procedural). Instead, PL-166 reflects the substantive decision of the General Assembly to: (1) protect post-secondary institutions from potential devastating litigation; and (2) prohibit students from asserting specific common law claims on behalf of anyone other than themselves. *Cf. State ex rel.*

Hatcher v. Lake Superior Court, Room Three, 500 N.E.2d 737 (Ind. 1986) (statute at issue did not address the time, manner, or method of litigation, it abrogated the right to a change of venue in certain proceedings). This Court has before found a statute substantive, despite seemingly procedural language, because its language indicated a substantive policy goal. *Health & Hosp. Corp. of Marion Cty. v. Foreman*, 51 N.E.3d 317, 319 (Ind. Ct. App. 2016) (statute was substantive when it required prerequisites to request a change of judge in specialized enforcement actions); *Church*, Slip Op. at 10 (laws are still substantive even if "packaged in procedural wrapping"). PL-166's specificity is indicative of—and, indeed, is a result of—its substantive nature.

In addition to the substance of PL-166, its overall statutory placement and structure informs that the General Assembly enacted a substantive statute, not a procedural one. PL-166 is placed in Article 12, titled "Prohibited Causes of Action," and nestled against chapters that unquestionably regulate substantive Indiana law. *See* Ind. Code § 34-12-1 (prohibiting actions based on failure to abort); *id.* § 34-12-2 (prohibiting certain domestic relations actions); *id.* § 34-12-3 (prohibiting certain causes of action involving firearms manufacturers, trade associations, and sellers). The fact that it is placed outside the rules governing the court's procedures is telling. *See, e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 408-09 (D. Mass. 2013) (considering whether a state law "appear[s] in a generally applicable section of th[e] state's laws which merely governs procedure" or "is contained in [a] statute ... which confers substantive rights," and whether it "is informed by the state's policy decisions in relation to" that specific type of injury). PL-166's placement further

reflects the legislature's public policy objectives and that it is not just about the "orderly dispatch of judicial business." *Church*, Slip Op. at 11 (quoting *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978)).

When the General Assembly passed PL-166's class action bar, it enacted several other substantive provisions to address the COVID-19 pandemic and its ravaging effect on the economy.[4] This includes two other class action bars aimed at limiting damages arising from COVID-19 claims. *See* Ind. Code § 34-30-32-10 (barring class action suits "based on tort damages arising from COVID-19"); *id.* § 34-30-33-8 (barring class action suits "based on tort damages for harm that results from the design, manufacture, labeling, sale, distribution, or donation of a COVID-19 protective product"). From its actions, it is clear that the General Assembly had policy goals to mitigate the liability of defendants that complied with the state's health mandates. *See Church*, Slip Op. at 12 (holding the Child Deposition Statute substantive because, despite its procedural parts, it "predominantly furthers [the] public policy objectives" of protecting child victims). The plaintiffs' characterization of PL-166 as a mere procedural statute ignores the statute's patent substantive goals of creating and abrogating rights and remedies for damages arising from COVID-19.

[4] *See, e.g.*, Ind. Code § 25-1-20-1 *et seq.* (providing professional discipline exceptions for health care providers for, *inter alia*, health care services provided in response to COVID-19); *id.* § 34-13-3-3(b) (exempting from liability governmental entities and employees for an act or omission arising from COVID-19 unless it constitutes gross negligence, willful or wanton misconduct, or intentional misrepresentation); *id.* § 34-30-13.5-1(b) (exempting from civil liability health care service providers for the provision or delay of health care services in response to COVID-19).

Even the most mine-run class action suits "run the risk of potentially ruinous liability" to defendants. Fed. R. Civ. P. 23 Advisory Committee's Note on 1998 Amendment. Knowing this, Indiana's legislature intended to protect from liability its colleges and universities that complied with emergency health laws and implemented policies that allowed students to continue education during the pandemic. Because it is a substantive Indiana statute, it must be applied in a federal diversity action where Indiana substantive law controls. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Gacek v. Am. Airlines, Inc.*, 614 F.3d 298, 301-02 (7th Cir. 2010). That is precisely what Notre Dame has argued in the *Slattery* case currently pending in the Northern District of Indiana. This Court's affirmative recognition of the substantive nature of PL-166 would prevent plaintiffs from potentially abusing the principles of federalism by running to federal court to frustrate the legislature's goals of protecting Indiana's colleges and universities.

B. PL-166 does not conflict with either the Indiana Trial Rules or Federal Rules of Civil Procedure.

The trial court correctly concluded that no conflict exists between PL-166 and Trial Rule 23. PL-166's commands are fully compatible with the procedural rules of Rule 23. There is no separation of powers issue here because a statute is only rendered "a nullity ... when [it] is in conflict with the rules of procedure as established by the Indiana Supreme Court." *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993). The Court should affirm the trial court's finding as it will assist the pending parallel analysis in the *Slattery* matter against Notre Dame.

The text and practical functions of PL-166 and Rule 23 show there is no conflict between the two. A statute and trial rule conflict when they are "incompatible to the extent that both could not apply in a given situation." *State v. Bridenhager*, 279 N.E.2d 794, 796 (Ind. 1972). Rule 23 is a procedural rule that details the elements a plaintiff must satisfy to establish a class and the procedures for conducting a class action suit—it does not guarantee that every claim is eligible for class certification or that all plaintiffs are entitled to be a class representative.

PL-166, however, is a substantive provision that *removes* the class vehicle for certain claims arising out of COVID-19. It does not purport to change any element of Rule 23, it does not change the burden of proof for establishing a class, and it does not touch on the other aspects of "time, place and method" of establishing or conducting a class action. *Blood*, 157 N.E.2d at 478. There is no procedural aspect of Rule 23 with which PL-166 explicitly or implicitly conflicts. Because there is no conflict, Plaintiff's separation of powers argument must fail.

In addition, PL-166's substantive provisions are fully compatible with the existing procedures of Rule 23. Indiana's Trial Rule 23 is based on Federal Rule of Civil Procedure 23, *see Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 848 (Ind. 1997), and Trial Rule 23(D)(4) is a near mirror-image of Federal Rule of Civil Procedure 23(d)(1)(D). PL-166 is fully compatible with Rule 23(D)(4) as that rule permits the court to issue orders "that the pleadings be amended

to eliminate therefrom allegations as to representation of absent persons."[5] The rules thus have a built-in vehicle to address when a proposed class action can be maintained as such, whether that is because a plaintiff fails to satisfy Rule 23's elements or a statute (such as PL-166) has forbidden a plaintiff from asserting the rights of others in a class action.[6] The trial court appropriately used Rule 23(D)(4) and instructed Mellowitz to amend his pleading to excise the disallowed class allegations.

In Notre Dame's motion to strike class allegations, brought pursuant to Federal Rule 23(d)(1)(D), it similarly argued that PL-166 presents no conflict with Federal Rule 23. Because no conflict exists, the federal court must engage in a traditional *Erie* inquiry to decide whether it is applied in the federal proceeding. That is, the federal court asks two questions:

> Is the [Indiana] rule so likely to dictate outcomes that it will cause a lot of forum shopping ... unless it is made applicable to diversity cases and so ceases to be a factor in the choice between state and federal court? Is it so entwined with procedures prescribed by the federal rules that it is likely to impair the integrity of federal procedure if it is applied in diversity cases?

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[5] *Cf.* Fed. R. Civ. P. 23(d)(1)(D) ("[The court may issue orders that] require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly[.]").

[6] In *Church*, the Court, while declining to decide whether the statute and rule conflict, Slip Op. at 13, similarly noted that "Trial Rule 26(C) already allows a trial court to prohibit a deposition when justice requires it to protect an alleged victim from 'embarrassment, oppression, or undue burden.'" *Id.* at 5.

S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310-11 (7th Cir. 1995).

Of course, the plaintiff in *Slattery* has already engaged in blatant forum shopping. He has attempted to turn what, individually, would be less than a $30,000 complaint into one valued at potentially over one hundred million dollars by merely moving *across the street* from St. Joseph County Superior Court to the Northern District of Indiana.[7] Further, applying PL-166 in federal court would do no harm to the federal rules for the same reasons PL-166 can be harmoniously applied alongside the Indiana Trial Rules. Federal Rule 23(d)(1)(D) permits the court to issue an order that the "action should be stripped of its character as a class action." Fed. R. Civ. P. 23 Advisory Committee's Note to 1966 Amendment. An appropriate use of this rule is to strip an action of class allegations where a substantive statute prohibits the use of Rule 23's class procedures. *See, e.g.*, *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *5 (D.N.J. Dec. 19, 2007) (striking class claims where a statute permitted plaintiff to litigate her claims only as an opt-in action as opposed to a Rule 23 opt-out class).

[7] As an example, similar suits resolving even just a *portion* of the plaintiff's claims have resulted in massive payments by universities. *See, e.g.*, *Columbia U. Settles COVID-19 Tuition Refund Suit For $12.5M*, Law360, Nov. 24, 2021, https://www.law360.com/articles/1443432/columbia-u-settles-covid-19-tuition-refund-suit-for-12-5m (last visited June 24, 2022).

A decision from this Court recognizing that Trial Rule 23 and PL-166 can harmoniously co-exist and concurrently apply will assist the federal court in *Slattery* when examining its mirror-image procedural rules.

C. PL-166 is a constitutional and enforceable provision.

After the Court appropriately finds PL-166 to be a substantive Indiana statute, it should dismiss the Mellowitz's deficient arguments that the statute is unconstitutional. A party bears "a heavy burden of proof" when arguing a statute is unconstitutional on its face. *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013). A challenged statute is "clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Id.* (quoting *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999)). As more fully explained in Appellee's brief, Mellowitz has fallen far short of meeting his heavy burden.[8]

As the trial court correctly held, Mellowitz's takings arguments fail because the ability to assert another person's claims using Rule 23's class action device is not a vested right that can be taken, particularly before class certification. He may have a vested interest in his accrued causes of action. *See Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003) ("If the law recognizes a wrong, an injured person has the right to be compensated for an injury."). But PL-166 has done nothing to take or alter Mellowitz's ability to pursue his *own* implied contract or unjust enrichment claims—

[8] As discussed previously, because PL-166 is a substantive statute that can be applied harmoniously with Trial Rule 23, Mellowitz's separation of powers claim is a nonstarter. *See, e.g.*, *Chasteen*, 625 N.E.2d 502.

it has only removed his ability to pursue *other* people's rights as a class representative for absent parties, *i.e.*, parties who also remain entitled to prosecute their own, individual cases seeking to be compensated for an alleged injury.

The trial court also correctly denied Mellowitz's contractual impairment argument as he cannot establish how his implied contractual relationship with Ball State has been impaired by PL-166. *Clem v. Christole, Inc.*, 582 N.E.2d 780, 783 (Ind. 1991). He has certainly not identified how PL-166 imposes a "substantial impairment" of his contractual rights. *Id.* He is still capable of pursuing his claims of implied contract—his ability to pursue any perceived breach of contract has not been altered by PL-166.

Mellowitz has fallen short of meeting his burden to challenge PL-166's constitutionality under either the Indiana or United States Constitutions. PL-166 is a duly-passed substantive law that requires Mellowitz (and his similarly situated plaintiffs in other state and federal litigation) to pursue damages, if any exist, on an individual basis only.

CONCLUSION

The Court should affirm the trial court's decision granting Appellees' motion for relief under Trial Rule 23(D)(4). Specifically, this Court should conclude that Public Law 166 is a substantive statute that does not violate the Indiana or United States Constitutions.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that this BRIEF OF *AMICI CURIAE* INDEPENDENT COLLEGES OF INDIANA AND UNIVERSITY OF NOTRE DAME complies with the type-volume requirements of Ind. App. R. 44(E) because it contains no more than 4,200 words (4,171) based on word processing software, excluding the parts of the brief exempted by App. R. 44(C). This brief complies with the typeface requirements and type style requirements of App. R. 43(D) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font.

/s/Brian E. Casey

CERTIFICATE OF FILING AND SERVICE

Pursuant to Indiana Appellate Rules 9(A)(2) & 24(A)(1), I certify that on June 24, 2022 the foregoing *Brief of Amici Curiae Independent Colleges of Indiana and University of Notre Dame du Lac in Support of Appellees* was filed electronically with the Clerk of the Indiana Court of Appeals via the Indiana Electronic Filing System (IEFS), and was served electronically on the following counsel of record through the Court's electronic filing system on June 24, 2022:

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