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IN THE INDIANA SUPREME COURT CASE NO. _____

COURT OF APPEALS CASE NO. 22A-PL-337

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

BRIEF OF *AMICUS CURIAE* INDIANA LEGAL FOUNDATION

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STATEMENT OF INTEREST

The Indiana Legal Foundation, Inc. is a non-profit charitable and educational organization that operates under the laws of Indiana. It acts as the legal watchdog for Indiana businesses and was established to give a legal voice to that community and focus on those cases in which a broad-based policy matter is at issue.

Its members/supporters include representative associations—such as the Indiana Chamber of Commerce, Indiana Manufacturers Association, Indiana Credit Union League, Indiana Association of Realtors, Indiana Energy Association, Insurance Institute of Indiana, and Indiana Retail Council—and a diverse range of Hoosier businesses including AEP / Indiana Michigan Power, Anthem Inc., Best Way Express, Inc., Cook Group, Inc., Duke Energy, Emmis Communications, Ford Meter Box Co., Inc., Hiler Indus./Accurate Castings, Honda Develop. & Mfg., Indiana Farm Bureau Ins. Co., Indiana University Health, Kimball Electronics, Kimball International, NIPSCO, Old National Bancorp, One America Financial Partners, REI Investments Inc., Subaru of Indiana Automotive. https://www.indianalegalfoundation.org

The Foundation seeks to appear as *amicus curiae* here because this case is of great concern to Indiana businesses which are directly affected by the General Assembly's actions in adopting protection against class actions in Covid-19 related litigation.

INTRODUCTION

It is not hyperbolic to state that Covid-19 has wreaked havoc on virtually every entity in this State. As Chief Justice Rush noted in her 2021 State of the Judiciary Address, "The pandemic has forced all of us to face challenges we never would have expected" and "brought our normal lives to a halt." https://www.in.gov/courts/supreme/state-of-judiciary/2021/

Indiana's businesses—small and large—were hit hard as the State and its citizens dealt with the sheer uncertainty, panic, and devastation associated with the early days of the global crisis. When the General Assembly was able to reconvene at the Statehouse in 2021, a top priority was passing legislation that would help protect Hoosier businesses from suffering even further financial devastation.

One method of doing so was to continue to allow plaintiffs to bring litigation based on allegedly wrongful conduct occurring during the Covid-19 pandemic, but to limit such litigation to causes of action brought in a plaintiff's individual capacity and not as class actions.

The Court of Appeals, however, invalidated this legislative act based on the Indiana Constitution's Separation of Power clause. Applying a preemption-like rationale, the Opinion concluded the class action limitation statute was a nullity because it was simply a matter of procedure and, therefore, was trumped by the court rule on class actions.

Amicus Indiana Legal Foundation supports the grant of transfer sought because the legislation in question in not simply a matter of procedure; the legislation represents the substantive policy determination by the Legislature that Hoosier

businesses, governmental entities, and public and private Universities could not begin the recovery this state needed if they also faced the threat of class action litigation for decisions made during a world-wide pandemic that stemmed from global circumstances never before faced by anyone.

In responding to the many concerns raised by these entities, the Indiana General Assembly acted in a manner that still allowed individual plaintiffs full recovery for wrongs against them, but just not the type of class action recovery that could bankrupt Indiana's already struggling businesses still reeling from Covid-19.

This type of substantive policy determination is precisely the type of determination that is granted to the elected representatives of our General Assembly and should not have been struck down by the Court of Appeals. Respectfully, the Panel's conclusion that determining this State's class action policy lies only with the judiciary is a conclusion that itself raises separation of powers concerns. *See Rassi v. Trunkline Gas Co.*, 240 N.E.2d 49, 53 (Ind. 1968) ("To allow the courts to substitute their judgment for that rendered by the representatives of the people, in instances where the legislature has not acted arbitrarily, would violate the doctrine of separation of powers.").

BACKGROUND

The World Health Organization declared the Covid-19 novel virus outbreak a public health emergency on January 30, 2020 and a global pandemic on March 11, 2020. *See* www.who.int/emergencies/diseases/novel-coronavirus-2019 Federal, State, and local governments responded by implementing restrictions on businesses with shutdowns, capacity limits, payroll mandates and accommodations, social distancing

requirements, and mask policies. Almost overnight Indiana's businesses faced economic chaos and uncertainty.

"The magnitude and speed of collapse in activity that has followed is unlike anything experienced in our lifetimes," and the disruption caused by the pandemic was devastating, triggering severe social and economic disruption around the world, and leading to "the worst recession since the Great Depression." https://www.imf.org/en/Articles/2020/04/14/blog-weo-the-great-lockdown-worst-economic-downturn-since-the-great-depression. Many Hoosier businesses **still** have not fully recovered.

In response to this crisis, the General Assembly in early 2021 passed significant Covid-19 legislation protecting a myriad of Indiana businesses, governmental entities, and public and private Universities. In February 2021, Public Law 1-2021 was enacted to provide certain types of Covid-19 economic relief in the form of limitations on civil liability for torts. *See* Pub. L. No. 1-2021 (S.E.A. No.1).

Chapter 32 provides for immunity "from civil tort liability for damages arising from Covid–19: (1) on the premises owned or operated by the person; (2) on any premises on which the person or an employee or agent of the person provided property or services to another person; or (3) during an activity managed, organized, or sponsored by the person." IND.CODE §34–30–32–6. But "this chapter does **not** grant immunity from civil tort liability to a person whose actions or omissions constitute gross negligence or willful or wanton misconduct (including fraud and intentionally tortious acts) as proven by clear and convincing evidence." IND.CODE §34–30–32–7.

Chapter 33 provides that "a manufacturer or supplier is immune from civil tort liability for harm that results from the design, manufacture, labeling, sale,

distribution, or donation of a COVID–19 protective product." IND.CODE §34–30–33–4. As with Chapter 32, "the immunity from civil tort liability provided in section 4 of this chapter does not apply to an act or omission that constitutes gross negligence or willful or wanton misconduct (including fraud and intentionally tortious acts) as proven by clear and convincing evidence." IND.CODE §34–30–33–5.

Both of these Chapters also limit the ability to bring class actions in these contexts. Section 10 of Chapter 32 provides that "a person may not bring a class action lawsuit based on tort damages arising from COVID–19." IND.CODE §34–30–32–10. And Section 8 of Chapter 33 similarly provides that "a person may not bring a class action lawsuit based on tort damages for harm that results from the design, manufacture, labeling, sale, distribution, or donation of a COVID–19 protective product." IND.CODE §34–30–33–8.

A few months later, in April 2021, Public Law 166-2021 was enacted to extend the limitation on class actions to claims based in contract, implied contract, quasi-contract, or unjust enrichment. *See* Pub. L. No. 166-2021 (H.E.A. No.1002). Section 7 of Chapter 5 provides that "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. "As used in this chapter, 'covered entity' means: (1) a governmental entity (as defined by IC 34-6-2-49), including a political subdivision (as defined in IC 34-6-2-110); and (2) an approved postsecondary educational institution

(as defined by IC 21-7-13-6[1]).” IND.CODE §34-12-5-5.

After Ball State University conducted classes remotely as a result of the COVID-19 pandemic and did not agree to a student's demand that tuition and fees be refunded, the student filed a class-action complaint against the University asserting claims for breach of contract and unjust enrichment. The University sought relief under Covid-19 legislation that barred these types of class actions, and the trial court granted that relief.

On appeal, the Court of Appeals began by noting “It is a fundamental rule of Indiana law that when a procedural statute conflicts with a procedural rule adopted by the supreme court, the latter shall take precedence.” *Slip Op*. at 6. “Thus, when a procedural statute conflicts with the Indiana Rules of Trial Procedure, the trial rules govern, and phrases in statutes that are contrary to the trial rules are considered a nullity.” *Id.*

The Panel then concluded that “Trial Rule 23 is a purely procedural rule, and the right to bring a class action is a purely procedural right,” and “Section 7 is a purely procedural statute, in that it does not affect a plaintiff's existing substantive right to sue a postsecondary educational institution for breach of contract or unjust enrichment.” *Id.* at 13. Consequently, the class action statute is “a nullity.” *Id.*

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[1] “Approved postsecondary educational institution” includes virtually every public and private educational institution operating in this state that provides two-year or longer program. *See* IND.CODE §21-7-13-6.

ARGUMENT

I. Indiana businesses rely on the ability of the General Assembly to make public policy decisions that benefit this state, and the Opinion improperly calls that ability into question.

I.A. *Church v. State* provides the blueprint for the analysis here.

This Court in *Church v. State*, 189 N.E.3d 580 (Ind. 2022), recognized that enactment of "a purely procedural statute in conflict with one of [this Court's] rules" would be struck down because it violations the separation of powers clause found in Article 3, Section 1 of the Indiana Constitution,[2] but a statute that is "substantive and not procedural" raises no such "constitutional consequences." *Id.* at 591-92.

The constitutional question is, therefore, whether a given statute is "purely procedural" versus "substantive." This Court provided a basic overview that "laws are substantive when they establish rights and responsibilities, and laws are procedural when they merely prescribe the manner in which such rights and responsibilities may be exercised and enforced." *Id.* at 588.

This Court then rejected "a mechanical test that simply stops when it finds a process" or procedure involved and instead "adopt[ed] a more thoughtful test that looks at the statute's predominant objective." *Id.* at 590. That test is:

> If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive.

Id.

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[2] "[N]o person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." IND. CONST. art. 3, § 1.

At issue in *Church* was a statute that limited the depositions of child victims of sex offenses if they are under the age of sixteen. The Court of Appeals invalidated the statute because it was procedural and "impermissibly conflict[ed] with the Indiana Trial Rules governing the conduct of depositions." *Id.* at 585 (citing *Church v. State*, 173 N.E.3d 302, 303 (Ind.Ct.App. 2021), *vacated*).

On transfer, this Court disagreed and held the above test established that "[t]he statute here is substantive because it predominantly furthers public policy objectives," which were "substantive protections for child victims of sex crimes that guard against needless trauma inflicted through compelled discovery depositions." *Id.* at 590-591.

As discussed in the next section, this framework in *Church* should have led the Panel below to conclude that the Covid-19 class action statute was the product of legislative policy. But the Panel reached the opposite conclusion, which greatly concerns members of *amicus curiae* Indiana Legal Foundation because the reasoning of the Opinion means that the other Covid-19 class action statutes are similarly a nullity.

I.B. The Opinion conflicts with *Church*.

Church held that simply because a statute addresses a matter also addressed in a court rule does not automatically cause constitutional concern. Instead, a court must look beyond process and procedure and determine whether the statute at issue also "establish[es] rights and responsibilities" or "furthers public policy objectives." *Church*, 189 N.E.3d at 588, 592.

The Opinion acknowledges *Church*, but then applies a preemption-like analysis that *Church* rejected. This Court in *Church* recognized that the substantive right to

depositions is granted by the Indiana Rules of Trial Procedure and the challenged statute at issue in *Church* placed limitations on the ability to depose child victims. Consequently, this Court held that the deposition statute "limits this substantive right" which reflects "clear legislative policy" and "is not a statute that merely controls the judicial dispatch of litigation." *Id.* at 591.

The parameters of the *Church* test are further understood by reviewing the statutes and rules that formed the bases of the cases upon which this Court relied in *Church*. *See State ex rel. Ind. & Mich. Elec. Co. v. Sullivan Cir. Ct.*, 456 N.E.2d 1019, 1021 (Ind. 1983) (upholding statute that kept parties from seeking stays of condemnation orders pending appeal, even though this Court's rules allowed parties to obtain stays); *Cabinet for Health & Fam. Servs. v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010) (upholding a statute limiting disclosure of prescription records even though trial rules allowed disclosure).

In another case relied upon by this Court, a rape shield statute changed the procedural rules governing the admissibility of evidence but that statute was still upheld because it reflected a "major public policy decision by the general assembly regarding sexual assault cases" that victims of sexual assaults "should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders." *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978).

Likewise, a statute that acted "as a rule of evidence" and provided for stricter requirements for the qualification of expert witnesses than did the rules of evidence was also permitted because it involved "clear legislative policy reflecting considerations other than judicial dispatch of litigation." *McDougall v. Schanz*, 597

N.W.2d 148, 156 (Mich. 1999).

If the Opinion's reasoning is correct, neither the statute in *Church* nor the statutes in the cases *Church* relied upon would have been upheld. Yet in all of these cases the statutes were upheld as involving matters of substantive rights and policy determinations and therefore the proper exercise of legislative power. The Opinion's contrary conclusion places it squarely in conflict with *Church*.

I.C. The Opinion incorrectly invalidates the Legislature's substantive class action legislative policy decision.

The conclusion in *Church* should be the conclusion regarding the Covid-19 class action statutes here. Like the right to depositions, the substantive right to class actions is now found in the Indiana Trial Rules and the Covid-19 class action statutes "limit this substantive right" which reflects "clear legislative policy." *Church*, 189 N.E.3d at 591.

Reflecting on the history of class actions—which first originated in the law of equity, then was found in statute, and now is found in Trial Rule 23—this Court in *Budden v. Board of School Com'rs of City of Indianapolis*, 698 N.E.2d 1157 (Ind.1998), expressly concluded that the General Assembly's enactment of additional class action requirements in the Tort Claims Act was a proper matter of "legislative policy." *Id.* at 1163. Noting the substantive nature of a class action, this Court declared that "Rule 23 represents both judicial and legislative policy" and "because Rule 23 enjoys this dual heritage, this case does not involve a clash between a procedural statute and a Rule of this Court." *Id.*

Consistent with this Court's conclusion that the class action statute in *Budden*

reflected "legislative policy," the Court of Appeals has twice addressed this issue and also found the class action statutes at issue reflected legislative policy determinations. *See Owner-Operator Independent Drivers Association v. State, Dept. of Revenue*, 725 N.E.2d 891, 894 (Ind.Ct.App.2000) ("[W]e understand Appellants' concern that I.C. 6–6–4.1–7.1 seems to deter class action suits for tax refunds by making every member of the class comply with the administrative requirements in I.C. 6–6–4.1–7. However, we are bound by the Legislature's decision to require every member of the class to file a claim with the Department of Revenue before a class action suit may be maintained"); *Zayas v. Gregg Appliances, Inc.*, 676 N.E.2d 365, 367–68 (Ind.Ct.App. 1997) ("Requiring the plaintiff to file for a refund with the IDR is an obstacle to the class action … We are inclined to agree with Zayas that the requirement of filing with the IDR may deter many class-action suits for tax refunds. However, our legislature has clearly shown that it approves of this practice").

Here, the General Assembly heard and responded to the pleas from Indiana businesses, governmental entities, and public and private Universities decimated by the pandemic. These entities were calling for the Legislature to protect them from class action litigation related to the Covid-19 crisis. As Ball State's Transfer Brief explains, businesses have good reason to fear the effects of class action litigation in general—and even more so when the post-Covid-19 economic condition of these businesses is so fragile.

The General Assembly's decision to limit class action relief related to Covid-19 litigation reflects public policy objectives intended to allow Indiana businesses, governmental entities, and public and private Universities a better opportunity to

recover from the economic devastation caused by the pandemic. Transfer is needed because—contrary to the Opinion's conclusions—these policy objectives do not violate the Indiana Constitution.

II. The Opinion calls into question many other existing statutes addressing class action relief, as well as the possibility of future legislative tort reform.

The reasoning of the Opinion—that "Trial Rule 23 is a purely procedural rule, and the right to bring a class action is a purely procedural right," *Slip Op.*, at 13—also calls into question significant legislative class action bars and limitations that already exist outside the Covid-19 Legislation at issue here.

Before the pandemic, Indiana already had many statutes limiting or banning class actions in certain circumstances. In the context of tax refunds, the Indiana Code provides "A class action may not be brought against a marketplace facilitator on behalf of purchasers arising from or in any way related to an overpayment of gross retail tax or use tax collected by the marketplace facilitator, regardless of whether such action is characterized as a tax refund claim." IND.CODE §6-8.1-9-7(b).

Likewise in the tax context, the Legislature has provided that "a class action suit against an assessing official, a county auditor, or the department of local government finance may not be maintained in any court, including the Indiana tax court, on behalf of a person who has not complied with the requirements of this chapter or IC 6-1.1-26 [requiring certain administrative procedural requirements] before the certification of the class." IND.CODE §6-1.1-15-15; *see also* IND.CODE §6-6-1.1-910 (providing class action limitations for actions involving gasoline tax refunds); IND.CODE §6-6-2.5-69 (providing class action limitations for actions involving special

fuel tax refunds); IND.CODE §6-6-4.1-7.1 (providing class action limitations for actions involving motor carrier fuel tax refunds).

In litigation involving refunds from the Bureau of Motor Vehicles, the Code provides that "A class action for refunds under this chapter may not be maintained in any court on behalf of any person who has not complied with the requirement of section 1 of this chapter before the class is certified." IND.CODE §9-33-3-3.

The General Assembly has also limited the amount of damages that can be recovered in a class action involving violations of the Uniform Consumer Credit Code disclosure requirements, providing that "the total recovery under this subdivision in any class action or series of class actions arising out of the same failure to comply by the same creditor may not be more than the lesser of: (i) five hundred thousand dollars ($500,000); or (ii) one percent (1%) of the net worth of the creditor." IND.CODE §24-4.5-5-203; *see also* IND.CODE §24-5-16.5-12(c) ("The total recovery of damages, penalties, and fees in a class action civil suit brought under this section may not exceed one hundred thousand dollars ($100,000).").

These class action statutes have already withstood judicial scrutiny,[3] yet if the Opinion's conclusion that statutes regulating class actions are "purely procedural" is not vacated, then the long-standing class action statutes enacted by the General

[3] *Hecht v. State*, 853 N.E.2d 1007, 1013 (Ind.Ct.App. 2006) (mandating plaintiff comply with additional class action requirements in I.C. §6-8.1-9-7); *Smith v. State Lottery Comm'n of Ind.*, 701 N.E.2d 926, 929 (Ind.Ct.App. 1998) ("class action could not be brought on behalf of persons who had not first filed a claim with the Indiana Department of Revenue for a tax refund"); *Owner-Operator Independent Drivers Association v. State, Dept. of Revenue*, 725 N.E.2d 891, 893 (Ind.Ct.App. 2000) ("Under I.C. 6–6–4.1–7.1, all members of a class action may not maintain suit in any court until each member has complied with the administrative requirements").

Assembly must also be nullities. *Amicus* Indiana Legal Foundation does not believe this is what this Court intended in *Church*.

Even more concerning, the Opinion's reasoning also would prohibit the General Assembly from undertaking future tort reform involving class action limitations. Class action legislation has become a nationwide priority. *See* https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-7th-edition-2009/tort-class-action-reform ("In the last 20 years, class actions have morphed from a rarely used procedural device, designed to litigate a large number of unusually similar claims, into a commonly used device for coercing a settlement from companies that often have done nothing wrong."); https://instituteforlegalreform.com/history-of-tort-reform/ (U.S. Chamber of Commerce, Institute for Legal Reform, tracing history of class action reforms and concerns).

It is similarly a priority in Indiana for the businesses that are part of the Indiana Legal Foundation. These businesses are concerned that, if not vacated, the Opinion will bar any future class action limitations that would be part of any attempted reforms enacted by the General Assembly.

Respectfully, *amicus curiae* posits that class action reforms involve substantive policy determinations and are the quintessential types of decisions that should be made by the elected representatives of our General Assembly—not the courts. Otherwise, as this Court has recognized, "To allow the courts to substitute their judgment for that rendered by the representatives of the people, in instances where the legislature has not acted arbitrarily, would violate the doctrine of separation of powers." *Rassi v. Trunkline Gas Co.*, 240 N.E.2d 49, 53 (Ind. 1968).

CONCLUSION

Amicus curiae Indiana Legal Foundation requests that this Court grant transfer and affirm the trial court's conclusion that the class action Covid-19 statutes are valid exercises of legislative power and do not violate the Indiana Constitution.

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VERIFIED STATEMENT OF WORD COUNT

The undersigned counsel, pursuant to Appellate Rule 44(E), hereby verifies that the foregoing contains fewer than 4,200 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief (MS Word).

By: /s/ *Maggie L. Smith*
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CERTIFICATE OF SERVICE

Undersigned counsel certifies that, on November 21, 2022, the foregoing was electronically filed using the Court's IEFS system and service was made on the following through E-service using the IEFS:

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