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In the Indiana Supreme Court

Court of Appeals Case No. 22A-PL-00337

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. and STATE OF INDIANA, Appellee-Intervenor.	)	Appeal from the Marion Superior Court 1 Trial Court Case No. 49D01-2005-PL-15026 Hon. Matthew C. Kincaid, Special Judge

APPELLEES BALL STATE UNIVERSITY AND BOARD OF TRUSTEES OF BALL STATE UNIVERSITY'S PETITION TO TRANSFER

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QUESTIONS PRESENTED

In the midst of the COVID-19 pandemic, the General Assembly took up the pressing matter of providing pandemic-related relief at its first opportunity. In early 2021, it passed laws enacting multiple class-action bars related to litigation arising out of COVID-19, including Ind. Code § 34-12-5-7 ("Section 7"), which bars certain class actions against post-secondary educational institutions and governmental entities arising out of actions taken to respond to the pandemic. Section 7 thus serves the important public policy objective of limiting liability faced by higher education and governmental entities because of public health measures taken during a global crisis. Four of Indiana's largest schools, including Ball State University, are defending against putative class actions prohibited by Section 7.

In *Church v. State*, 189 N.E.3d 580, 590 (Ind. 2022), this Court held that if a statute "predominantly furthers judicial administration objectives, the statute is procedural," and may be defective if it conflicts with this Court's rules. "But if the statute predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive," and thus a proper exercise of the General Assembly's lawmaking authority. *See id.* (cleaned up). Departing from *Church*, the Court of Appeals held that Section 7 is procedural and therefore invalid.

Should this Court grant transfer to consider (1) whether Section 7 is substantive? Or (2) even if procedural, whether it can be harmonized with Indiana Trial Rule 23 or warrants an exception? And (3) whether the law violates the Takings or Contracts Impairment Clauses?

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BACKGROUND

Two and a half years ago, everyday life changed for all Hoosiers in response to COVID-19. Work of many types became remote rather than in-person. And by government mandate, so did most types of education. A March 2020 Executive Order issued by Governor Holcomb made it unlawful for all universities in Indiana, including Ball State, to offer in-person classes.[1] Ball State's Spring 2020 semester was approximately half-finished when these events made virtual instruction the only legally viable option to complete the semester. Over 22,000 Ball State students continued their instruction online and graduated on time or made uninterrupted progress toward their degrees.

In May 2020, Plaintiff Keller Mellowitz sued Ball State seeking to represent a class of fellow students who were educated remotely. Appellant's App. Vol. 2, p. 22. Mellowitz claims breach of contract and, in the alternative, unjust enrichment, seeking a refund of tuition and fees paid for the Spring 2020 semester. At least four Indiana universities—Ball State, Indiana University, Purdue University, and the University of Notre Dame—face similar lawsuits, which follow a national trend.

In the 121st Legislative Session, Indiana's General Assembly passed multiple laws designed to mitigate the risks associated with pandemic-related litigation. One law, Public Law 166-2021, became effective in April 2021. It provides that "[a] claimant may not bring, and a court may not certify, a class action

[1] Executive Order 20-08, *Directive for Hoosiers to Stay at Home*, ¶¶14(*l*), 5 https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf (last visited Nov. 21, 2022).

lawsuit against a covered entity [including a post-secondary educational institution] 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 (class action prohibited), 34-12-5-5 (applicable definitions).[2]

After Section 7's enactment, Ball State filed a motion under Indiana Trial Rule 23(D)(4), which allows a court to require pleadings to be amended to "eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly[.]" Mellowitz opposed the motion arguing that Section 7 was unconstitutional; he did not challenge the applicability of the law to his claims. Appellant's App. Vol. 2, pp. 52-74. The Attorney General intervened to defend the law's constitutionality. Appellant's App. Vol. 2, pp. 106-31. After briefing and argument, Special Judge Matthew C. Kincaid held Section 7 constitutional and agreed with Ball State and the Attorney General that the litigation could not proceed as a class action. He then certified the decision for interlocutory appeal. Appellant's App. Vol. 2, pp. 19-21.

After the Court of Appeals accepted the appeal, Ball State and Mellowitz filed a Joint Verified Motion for Transfer Pursuant to Indiana Appellate Rule 56(A), agreeing on the importance of the legal issue and the appropriateness of this Court's review. April 1, 2022 Joint Verified Motion for Transfer Pursuant to

[2] For clarity, this petition adopts the convention in the Court of Appeals' opinion referring to the law as "Section 7," the codification of the class action bar; Ball State's underlying briefing referred to Section 13 or Public Law 166.

Indiana Appellate Rule 56(A). After this Court denied that motion, the appeal proceeded before the Court of Appeals.

One day before Ball State's appellate brief was due, this Court decided *Church v. State*, "adopt[ing] a more thoughtful test that looks at the statute's predominant objective" to determine whether a law is procedural (meaning the law predominantly addresses judicial-administration objectives), or substantive (meaning the law predominantly furthers policy objectives). 189 N.E.3d at 590. In the present appeal, although no one contends that Section 7 furthers judicial-administration objectives, the Court of Appeals reversed and remanded on the ground that the statute is procedural, that it conflicts with Trial Rule 23, and that it is therefore a "nullity." Slip Op. at 15. The Court of Appeals did not consider Mellowitz's other arguments regarding the constitutionality of Section 7.

REASONS FOR GRANTING TRANSFER

This appeal concerns the power of the General Assembly to protect certain public and private defendants from class-action liability arising out of the COVID-19 pandemic. The Court of Appeals concluded the General Assembly lacked the authority to pass the class-action bar in Section 7 because it conflicts with Indiana Trial Rule 23. Ball State now seeks transfer so that this Court may decide for itself whether Section 7 is a valid exercise of the General Assembly's "Legislative authority," as entrusted to it by Article 4, Section 1, of the Indiana Constitution.

Transfer is appropriate for two overriding reasons. First, the Court of Appeals' published decision conflicts with *Church*. The appellate court recited the

Church standard but did not correctly apply it. Second, this case presents an important question of law. The Court of Appeals invalidated a duly enacted law without acknowledging the constitutional ramification of doing so. The decision not only has serious implications for our system of government, it directly affects four of our largest educational institutions and potentially affects public fiscal interests.

1. The Court of Appeals' decision conflicts with this Court's precedents on the distinction between substance and procedure, including its recent guidance in *Church*.

Both the parties and the panel acknowledge that *Church* articulates the standard for determining the enforceability of Section 7. Slip Op. at 8; Appellant's Reply Br. at 13. The question is how to apply that standard here and, by implication, in other cases involving class-action bars.

a. The Court of Appeals recited the standard from *Church* but then failed to apply it.

The Court of Appeals acknowledged the *Church* test at the outset of its opinion: "The test is this: '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.'" Slip Op. at 8 (quoting *Church*, 189 N.E.3d at 590 (cleaned up)). Nonetheless, after reciting this test, the Court of Appeals did not apply it. Instead, the court invoked alternative standards, reasoning that the law "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," Slip Op. at 13, and opining that it "does not 'establish rights and responsibilities,'" *id.* at 14 (internal citation omitted). Neither statement adheres to the *Church* standard.

Indeed, the decision acknowledged that Section 7 does *not* further judicial-administration objectives—the only basis under *Church* to declare the law procedural. "Instead of furthering judicial administrative objectives," the court wrote, "it frustrates them by encouraging a multiplicity of lawsuits from similarly situated plaintiffs." *Id.* at 13-14. But that characterization only underscores the substantive public policy objective animating the statute—to require plaintiffs to proceed individually, which, as will be discussed shortly, may discourage pandemic-driven lawsuits. Upon concluding that the statute does *not* further judicial-administrative objectives, the court should have declared Section 7 substantive, and thus a presumptively proper exercise of the General Assembly's law-making authority.

That is precisely how this Court resolved *Church*. While the Child Deposition Statute regulates the manner and means of taking a child's deposition in certain circumstances, and thereby imposes different requirements than those set forth in Indiana Trial Rule 30, this Court concluded that the statute reflects "a careful legislative balancing of policy considerations" as to whether the child victim or the accused has superior rights regarding a deposition. *Church*, 189 N.E.3d at 591 (citation and quotation omitted). Therefore, even though the statute has procedural aspects to it, the Court concluded it "is not a statute that merely controls the judicial dispatch of litigation." *Id.* (cleaned up). The Court of

Appeals made no effort to distinguish *Church*, and therefore never acknowledged the distinct parallel between the cases: both involve statutes that place limits on procedural devices otherwise controlled by the Trial Rules—in *Church*, depositions, and here, class actions.

b. Section 7 provides protection from class-action liability and is therefore substantive, not procedural.

The purpose of Section 7 is to limit universities' and the state government's financial liability in the face of existing and potential class-action litigation arising from efforts to slow the spread of COVID-19. The Court of Appeals held this purpose to be procedural, and not substantive because, in its view, Section 7 "does not reduce the institutions' potential legal liability in the slightest." Slip Op. at 15. Only if the legislature took the extreme step of eliminating individual causes of action might the statute be substantive, the court implied. *See id.* at 14-15 (noting the law "does not abrogate the existing substantive right to sue those institutions for breach of contract or unjust enrichment").

The Court of Appeals' assessment of the statute's effect is incorrect. First, the mere availability of class actions incentivizes plaintiffs to sue when they might otherwise not choose to bear the cost of an individual lawsuit. *See* Slip Op. at 13 (acknowledging limitation of uneconomic litigation); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (referencing the likelihood of "substantial economies in litigation" in class actions with more claimants). Second, class actions often require greater investment than one-off cases in the discovery and general litigation process because the stakes are higher. *See*

Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991) ("Class lawsuits can be frightfully expensive . . . ."), *overruled on other grounds by Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015). Third, it has long been understood and recognized, no less than by the United States Supreme Court, that class actions exert overwhelming pressure on defendants to settle even marginal cases. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 475-77 (2013) (discussing Congress's efforts to limit securities class actions and why); *AT & T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011) (class actions can entail a "risk of 'in terrorem' settlements"); *see also Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (noting "pervasive" risk of cost of pretrial discovery in a putative class action and that the risk of an adverse ruling in even a "near-frivolous" putative class action can prompt defendants to settle because "[a] small probability of a large dollar loss can be a large dollar figure"), *vacated on irrelevant grounds*, 564 U.S. 1032 (2011); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (noting judicial concern over such "blackmail settlements" is "legitimate" and that the pressure on defendants to settle class actions is "a reality," and citing law review articles).

Section 7's class-action bar therefore represents one rational way for the legislature to protect Indiana's higher educational institutions and governmental entities from potentially enormous costs, burdens, and uncapped liability associated with pandemic-related lawsuits, while still allowing students who believe the change in their mode of instruction warrants a lawsuit to pursue one. *See* Appellant's App. Vol. 2, p. 128 (State of Indiana's Brief on the Constitutionality

of Public Law 166) (characterizing the General Assembly's objective as "protect[ing] Indiana colleges and universities from widespread legal liability arising out of their efforts to combat and mitigate the spread of COVID-19"). As such, Section 7 embodies a policy-based decision that limited governmental and educational resources should not be spent defending against class actions arising out of the unavoidable circumstances created by COVID-19.

The General Assembly undisputedly has the power to abrogate or modify common law rights or remedies. *See McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*, 729 N.E.2d 972, 977 (Ind. 2000); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213 (Ind. 1981). The legislature need not eliminate claims entirely to further its predominantly substantive aim of reducing pandemic-related liability. Decreeing that a type of litigation should not proceed as a class action—even though it may implicate Trial Rule 23—"does not alter the statute's true nature as a substantive right for this class of [defendants], and as a limitation on the substantive rights of [plaintiffs]." *Church*, 189 N.E.3d at 591.

Accordingly, this Court should grant transfer and hold that, under *Church* (and the precedent undergirding *Church*),[3] Section 7 is principally substantive, not procedural.

[3] *Church* rested on earlier cases emphasizing whether the statute created substantive rights. *See, e.g.*, *Church*, 188 N.E.3d at 588 (citing, *inter alia*, *State ex rel. Zellers v. St. Joseph Cir. Ct.*, 247 Ind. 394, 401, 216 N.E.2d 548, 553 (1966) (rules "cannot abrogate or modify substantive law"); *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959) (a "substantive law . . . supersedes [our Trial Rules]")).

c. Even if deemed procedural, Section 7 can and should be read in harmony with Trial Rule 23 to avoid conflict, or an exception should be acknowledged.

The Court should not treat Section 7 as procedural, but even if it does, it next must ask whether the statute actually conflicts with Trial Rule 23. The Court of Appeals believed that "the conflict between the rule and the statute at issue could not be more stark: Trial Rule 23 says that a claimant 'may' bring a class action, and [I.C. § 34-12-5-7] says that a claimant 'may not' do so." Slip Op. at 15. In concluding this, the court rejected the argument that Trial Rule 23(D)(4) provides a mechanism for harmonization insomuch as it allows a court to require that pleadings be amended to eliminate class actions—the conclusion the trial court reached. *Id.* This issue deserves further consideration.

The statute and the rule can—and therefore must—be harmonized. *Cf. Marion Cnty. Sheriff's Merit Bd. v. Peoples Broad. Corp.*, 547 N.E.2d 235, 237 (Ind. 1989) ("When two statutes apply to the same subject they must be construed in harmony if possible."). Here, as the Attorney General noted, Section 7 changes none of the procedures in Indiana Trial Rule 23; rather, it carves out a narrow category of claims against specific defendants and prohibits those claims from being brought or certified as class actions. Intervenor's Appellee's Brief, at 16. It does not affect matters such as the method and time for seeking class certification. *Cf. State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 400, 157 N.E.2d 475, 478 (1959) (construing conflict with rule when statute addressed method and time for seeking change of judge). Section 7's carve-out as to the availability of Trial Rule 23 in very specific circumstances creates no conflict

(particularly considering Trial Rule 23(D)(4)'s express permission for the court to direct the removal of class-based allegations).[4]

But even if Section 7 and Trial Rule 23 were in conflict, "this Court may, in its discretion, decide to treat the otherwise incompatible statute as an exception to the rules of court." *Church*, 189 N.E.3d at 603 (Goff, J., concurring) (citing *Humbert v. Smith*, 664 N.E.2d 356, 356-57 (Ind. 1996)). In *Humbert*, because of the overriding interest in expeditiously resolving matters involving support of children, this Court recognized an exception to the rules of evidence otherwise governing the foundation for admission of blood tests in paternity cases. *Id.* at 357; *see also Church*, 189 N.E.3d at 603 (Goff, J., concurring) (concluding an exception would be reasonable).

While the Court need not reach this issue if it agrees that the law is "substantive," or not in conflict with Trial Rule 23, it would certainly be appropriate to recognize an exception to the Trial Rules here. Substantive or not, the General Assembly clearly was concerned about the effect that pandemic-related class-action lawsuits would have on higher education and governmental entities in

[4] *See also Morrison v. Vasquez*, 124 N.E.3d 1217, 1221 (Ind. 2019) (no conflict between Ind. Code § 23-0.5-4-12, which requires Indiana corporations to designate and maintain a registered agent in the state, and Indiana Trial Rule 75(A)(4), which specifies a preferred venue for domestic corporate organizations is the county where its principal office is located); *Health and Hosp. Corp. of Marion Cnty. v. Foreman*, 51 N.E.3d 317, 319 (Ind. Ct. App. 2016) (no conflict between Ind. Code § 16-22-8-31(e), which governs the process for change of venue from a judge in proceedings involving the particular plaintiff and Trial Rule 76(C), which generally governs the process for taking a change of judge); *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993) (no conflict between Security Box Statute, Ind. Code § 32-7-5-1, *et seq.,* and any provision of the Trial Rules).

this State. This Court should recognize and give effect to that concern regardless of where Section 7 falls on the substantive-procedural continuum.

2. The constitutionality of Section 7 is an important question of law.

No duly enacted law should be declared a "nullity" without review by this Court, particularly a law designed to shield governmental and educational institutions from pandemic-related liability. Laws come before this Court "clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999). The Court of Appeals' nullification of a law recently and urgently passed as part of COVID-19 relief legislation—without acknowledging that presumption of constitutionality—is a decision that this Court should review. Whether this lawsuit proceeds as a class action (over the will of the legislature) is important, both as a matter of precedent and policy, considering that the lawsuit stems from prudent and necessary decisions to protect public health and safety and to follow Executive Order 20-08.

a. This Court should resolve the constitutionality of a recently enacted state law.

The Court of Appeals declared Section 7 a "nullity" without discussing the separation-of-powers principles in play and without acknowledging that it was effectively holding the statute to be unconstitutional. As *Church* itself makes clear, the underpinning of the Court of Appeals' conclusion that the statute is a "nullity" is effectively a judgment that it violates the Indiana Constitution: "Because the statute here is substantive and not procedural," the Court wrote, "we

need not explore the *constitutional* consequences that might arise if the General Assembly enacted a purely procedural statute in conflict with one of our rules." *Church*, 189 N.E.3d at 591-92 (emphasis added).[5] Despite concluding that the General Assembly enacted a procedural statute in conflict with a Trial Rule, the Court of Appeals did not analyze the constitutional consequences.

This was doubly a mistake. By stopping at the conclusion that the statute conflicted with Trial Rule 23, and by failing to engage in any meaningful constitutional analysis, the Court of Appeals failed to acknowledge the strong "presumption of constitutionality" enjoyed by a duly enacted statute. *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014) (citation omitted). Nor did it resolve all doubts against the challenging party. *See KS&E Sports v. Runnels*, 72 N.E.3d 892, 905–06 (Ind. 2017). Those principles should be given full consideration before invalidating an act that reflects the will of elected officials.

Indeed, "[i]t is the duty and jurisdiction of this Court to determine the constitutionality of the laws of this State." *State v. Palmer*, 386 N.E.2d 946, 496 (Ind. 1979); *see also* Appellate Rule 4(A)(1)(b) ("The Supreme Court shall have mandatory and exclusive jurisdiction over . . . [a]ppeals of Final Judgments declaring a state or federal statute unconstitutional in whole or part."). Even Mellowitz agreed earlier in this appeal that the validity of Section 7 was a question this Court should resolve because of its extreme public importance. *See* Ind.

[5] The underlying briefing in the trial court and the Court of Appeals explicitly addressed the constitutionality of Section 7, which prompted the intervention of the Attorney General in support of the constitutionality of the law. *See* Ind. Code § 34-33.1-1-1(a).

Appellate Rule 56(A) Motion. Now is plainly the time for the Court to take up this important task lest the issue become unreviewable and to avoid this case and others proceeding as class actions against the will of the legislature.

b. The resolution of this issue has significant consequences for Ball State and others, as well as for the development of the law.

Having this case proceed as a putative class action rather than a single-plaintiff case has significant consequences for public fiscal interests. Ball State is a public university, and both the defense costs and the potential liability from a class action are, as discussed, substantially greater than liability from individual actions. The dispute over whether Mellowitz's case actually satisfies Trial Rule 23 will require significant efforts by the parties and the consumption of substantial judicial resources. Section 7 was designed to shield universities from such expenses. Thus, the Court of Appeals' conclusion that the law is unenforceable portends potentially significant financial consequences. *See also* University Amicus.

Moreover, the logic of the Court of Appeals ruling—that Section 7 cannot stand because it conflicts with Rule 23—surely dooms other class-action bars, including those passed by the legislature in Public Law 1-2021, the priority COVID-19 relief legislation passed by the General Assembly in 2021.[6] The Court of Appeals' opinion dismissed this concern in a footnote. *See* Slip Op. at 15, n.6

[6] Public Law 1, enrolled earlier in the session, prohibits class actions based on tort damages for exposure or treatment arising from COVID-19. Ind. Code § 34-30-32-10. And it prohibits class actions against manufacturers and suppliers for damages arising from a COVID-19 protective product. Ind Code § 34-30-33-8.

("Those bars are not before us in this appeal, and we express no opinion on them."). But the conclusion that these other class action bars would also be a "nullity" is inescapable given the Court's rationale for invalidating Section 7. The court's decision therefore has broad and significant implications beyond this case and even beyond other university-refund litigation in Indiana; it jeopardizes multiple class-action limitations previously passed by the General Assembly.[7]

The decision also seriously calls into question the ability of the legislature to ever pass a valid class-action bar (or other class-action limitations). The logic of the Court of Appeals' decision compels the conclusion that the mere existence of Trial Rule 23 bars the General Assembly from ever seeking to limit the availability of class actions to serve public policy objectives. That *creates* a separation-of-powers problem that puts Indiana in a class of its own. *See* Appellees' Brief at 29 and Appendix A (reflecting states that have passed various forms of class-action bars). It surely cannot be the case that Indiana's legislature is powerless to limit the availability of class actions for common law *or* statutory claims due to the mere existence of Trial Rule 23. *See also generally* Indiana Legal Foundation Amicus Brief.

[7] *See* Ind. Code. § 6-1.1-15-15 (class actions for property taxes); Ind. Code § 6-6-1.1-910 (class action for tax refund for the gas tax); Ind. Code § 6-6-2.5-69 (class actions for tax refunds for special fuel tax); Ind. Code § 6-6-4.1-7.1 (class actions for tax refunds for motor carrier fuel tax); Ind. Code § 6-8.1-9-7 (class actions for tax refunds); Ind. Code § 9-33-3-3 (class actions for certain motor vehicle fee refunds).

3. Mellowitz's other constitutional challenges would fail upon scrutiny by this Court.

In the underlying appeal, Mellowitz made two alternative constitutional arguments as to why Section 7 should not be enforced, specifically arguments under the Takings and Contracts Impairment Clauses. The Court of Appeals did not consider those arguments, but they were adequately addressed in briefing below and would be before this Court on transfer. *See Sharp v. State*, 42 N.E.3d 512, 516 (Ind. 2015). For the reasons stated in the Appellees' Briefs, those arguments fail.

CONCLUSION

Ball State respectfully asks the Court to grant transfer and vacate the decision of the Court of Appeals.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44, I verify that this brief contains no more than 4,200 words, including footnotes but not including those portions excluded by Indiana Appellate Rule 44(C), according to the word count of the Microsoft Word, the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, the foregoing was electronically filed and served using the Indiana E-Filing System (IEFS) on the following:

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