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IN THE
INDIANA SUPREME COURT

No. 22A-PL-337

KELLER J. MELLOWTIZ,
Appellant-Plaintiff,

v.

BALL STATE UNIVERSITY AND BOARD OF TRUSTEES OF BALL STATE UNIVERSITY,
Appellees-Defendants,

and

STATE OF INDIANA,
Appellee-Intervenor.

Interlocutory Appeal from the Marion Superior Court,

No. 49D01-2005-PL-15026,

The Honorable Matthew C. Kincaid, Special Judge.

PETITION TO TRANSFER APPELLEE-INTERVENER STATE OF INDIANA

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QUESTION PRESENTED ON TRANSFER

Whether the General Assembly may prohibit pandemic-based class-action contract claims against post-secondary educational institutions.

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INTRODUCTION

In March 2020, the COVID-19 global pandemic made its way to Indiana, and Governor Holcomb issued an executive order prohibiting all nonessential business in the state. Among other impacts, his order forced post-secondary educational institutions to cease in-person instruction—but permitted them to continue and expand remote education. Foreseeing the potential liability that such institutions might face from complying with the executive order, the General Assembly enacted Public Law 166-2021, section 13, codified as Indiana Code section 34-12-5-7, to reduce their exposure. Section 7 prohibits class action lawsuits against post-secondary educational institutions and governmental entities for contract, implied contract, quasi-contract, and unjust enrichment claims arising from COVID-19.[1] Section 7 was part of a larger bill that prohibited class actions in other situations related to COVID-19 and provided protections for healthcare workers and governmental employees who were also at risk for legal liability due to their actions or omissions in the face of COVID-19.

In this putative class action by a student seeking to be reimbursed for tuition and fees after Ball State complied with the Governor's executive order, the Court of Appeals invalidated Section 7 on the grounds that it is a procedural statute that conflicts with Indiana Trial Rule 23. *Mellowitz v. Ball State University*, ___ N.E.3d ___, No. 22A-PL-337, slip op. (Ind. Ct. App. Oct. 5, 2022).

This Court should grant transfer because the Court of Appeals invalidated a state statute, *cf*. Ind. Appellate Rule 57(H)(4), and because Section 7 is a substantive

[1] The statute was codified at Indiana Code section 34-12-5-7 (Section 7), but it is in Section 13 of Public Law 161-2021. We use Section 7 throughout this petition.

statute that "furthers public policy objectives involving matters other than the orderly dispatch of judicial business." *Church v. State*, 189 N.E.3d 580, 590 (Ind. 2022). By precluding a set of class actions, Section 7 advances valid public policy goals by reducing, as a practical matter, the liability exposure of post-secondary educational institutions who complied with the Governor's Executive Orders related to COVID-19. At the very least, Section 7 eliminates the "bet the company" pressure that class actions sometimes enable and permits protected entities to litigate each affected claim on its merits without having to worry about an existential liability threat occasioned merely by the size of a plaintiff class.

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

After the COVID-19 pandemic had spread to many Indiana counties, on March 23, 2020, Governor Holcomb issued Executive Order No. 20-08. *See* Ind. Reg. LSA Doc. No. 20-194 (Mar. 23, 2020) (E.O. 20-08), available at www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf (last viewed Nov. 21, 2022). The Order mandated that all individuals living in Indiana were to stay at home unless otherwise authorized. *Id*. at 2. Educational institutions were allowed to continue operating only "for purposes of facilitating distance learning, performing critical research, or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible." *Id*. at 6. Ball State and other post-secondary institutions complied and closed their campuses to in-person learning and continued instruction online.

On behalf of himself and a putative class of similarly situated students, Mellowitz filed a complaint against Ball State University and its Board of Trustees for

breach of contract owing to Ball State's discontinuation of in-person education during spring of 2020 (App. 22–30). Mellowitz alleged that he and the proposed class were entitled to reimbursement for tuition and fees paid for in-person learning, technology fees, student recreation fees, student health fees, and student transportation fees (*id.* at 22–23). Mellowitz has not yet sought class certification (*id*. at 4–18).

Aware of not only this lawsuit but also the threat of other similar lawsuits, the General Assembly passed Public Law 166-2021, part of which was codified as Indiana Code section 34-12-5-7. Section 7, which became effective in April 2021 and was made retroactive to March 1, 2020, 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.

Ball State moved for Mellowitz to amend his complaint to remove the class allegations in accord with Section 7 (*id*. at 31–50). Mellowitz objected, arguing that Section 7 was an unconstitutional procedural statute that conflicted with Trial Rule 23, effected an impermissible taking, and unconstitutionally impaired contractual obligations (*id*. at 52–74). The State intervened to defend Section 7's constitutionality (*id*. at 14).

The trial court granted Ball State's motion and ordered Mellowitz to amend his complaint to remove the class allegations. It concluded that Section 7 did not violate the "separation of powers" or "encroach[ ] upon the rule-making authority" of the judiciary and that Section 7 could be applied harmoniously with Trial Rule 23 (*id*. at

19–21). The trial court also concluded that Section 7 was not an unconstitutional taking and did not impair Mellowitz's contract rights (*id.* at 20). The trial court certified its order, (*id.* at 170–71), and the Court of Appeals accepted jurisdiction, (online docket).

The Court of Appeals reversed in a published decision, deeming Section 7 a "nullity" as a procedural statute that prohibits a person from bringing a class action that Trial Rule 23 permits. *Mellowtiz,* slip op. at 15. It said that Section 7 is not a substantive law because it does not establish or abrogate an individual's right to bring a breach-of-contract or unjust-enrichment claim, but instead "merely prescribes the manner" in which a plaintiff can bring the claim. *Id.* at 13–14 (cleaned up). In addition, the Court held that Section 7 is not substantive because "it does not reduce the institutions' potential legal liability in the slightest." *Id.* at 14–15.

ARGUMENT

I. Transfer is Warranted Because the Court of Appeals Invalidated a State Statute

The Court should grant transfer because the Court of Appeals invalidated Section 7—and the General Assembly's legislative authority to enact such a statute—by holding that it was a procedural statute in conflict with the Indiana Trial Rules. *Mellowtiz*, slip op. at 13–15. The invalidation of a state statute is an important question of law that should be decided by this Court. Ind. Appellate Rule 57(H)(4).

This Court exercises mandatory jurisdiction over appeals of *trial court* judgments that declare state statutes unconstitutional. Ind. Appellate Rule 4(A)(1)(b); *see, e.g., State v. Timbs*, 169 N.E.3d 361, 367 (Ind. 2021); *Girl Scouts of S. Ill. V. Vincennes*

Ind. Girls, Inc., 988 N.E.2d 250, 253 (Ind. 2013); *State v. Hernandez*, 910 N.E.2d 213, 215 (Ind. 2009). The Court should likewise exercise jurisdiction to review a decision of the Court of Appeals that declares a particular state statute to be a nullity or otherwise invalid. The need for this Court to be the final word among Indiana courts over the invalidity of a state statute is no less when the Court of Appeals issues a declaration of invalidity than when a trial court does so or when the basis for the invalidation is an asserted conflict with this Court's rules.

Further, the Court of Appeals' analysis implicitly calls into question the validity of other statutes that place limitations or prohibitions on class-action lawsuits. In addition to the prohibition on class actions in Section 7, the General Assembly also passed Public Law 1-2021, which barred class actions for COVID-19-based tort claims, I.C. § 34-30-32-10, and for product-liability claims targeting "a COVID-19 protective product," I.C. § 34-30-33-8.

The decision below, moreover, could undermine statutes that prohibit class actions in other contexts. *See* I.C. § 9-33-3-3 (placing a prohibition on maintaining a class action seeking refund of fees from the BMV); I.C. § 6-8.1-9-7(a) (prohibiting the maintenance of a class action for a refund of a tax on behalf of a person who has not filed a timely claim with the Department); I.C. § 6-8.1-9-7(b) (prohibiting a class action "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"); I.C. § 6-6-1.1-910 (placing restrictions on maintaining a class action

for a refund of gasoline tax); I.C. § 6-6-4.1-7.1 (placing restrictions on maintaining a class action for refund of motor carrier fuel tax).

Such potential for widespread impact favors transfer.

II. Transfer is Warranted Because Section 7 Principally Advances Important Public Policy Judgments

The judiciary has the authority to promulgate rules related to the procedures of courts. I.C. §§ 34-8-1-3, 34-8-2-1. But the Indiana Constitution vests the General Assembly with the authority to pass substantive laws related to what it believes is in the overall wellbeing of society. To reconcile these two principles, courts must ask whether a statute affecting lawsuits otherwise permitted by the Trial Rules are justified by substantive public policy judgments rather than concern for judicial administration. "If the statute predominately furthers judicial administrative objectives, the statute is procedural. But if the statute predominately furthers public policy objectives involving matters other than the orderly dispatch of judicial business it is substantive." *Church*, 189 N.E.3d at 590.

Statutes upheld as substantive in *Church* and other cases illustrate this distinction. In *Church*, this Court upheld a statute limiting child depositions to protect child victims of sex crimes, which, while it affected criminal defendants' procedural tools embodied in the Trial Rules, principally advanced a "public policy objective," that is, creation of "a substantive right for this class of victims." *Id.* 189 N.E.3d at 590–91. Such a policy to "secure these rights" means that a statute does not "merely control[] the judicial dispatch of litigation," and is instead substantive. *Id.*

The Court's earlier precedents reflect a similar assessment of other statutes affecting litigation. In *State ex rel. Indiana & Michigan Elec. Co. v. Sullivan Circuit Court*, 456 N.E.2d 1019, 1021 (Ind. 1983), this Court said that a statute prohibiting stays of condemnation orders was substantive and within the legislature's province. In *Hatcher v. Lake Superior Court*, 500 N.E.2d 737, 739–40 (Ind. 1986), it held that the legislature had the authority to grant the right to change of venue, though the rules governing exercise of that right were procedural. And more recently in *State v. Doe*, 987 N.E.2d 1066, 1072–73 (Ind. 2013), this Court held that the General Assembly may limit punitive damages as a "public policy judgment that punitive damages in civil cases should not exceed a certain amount." *Id.*

Section 7 is likewise substantive—and within the General Assembly's province to legislate—because its objective is not to govern the day-to-day operations of the judiciary but to reduce the deleterious effects of class actions on defendants. The General Assembly was likely concerned that educational institutions could face immense settlement pressures that class actions often bring. Particularly given the other substantial financial impacts of COVID-19, it could have been concerned that such pressures might unfairly prompt educational institutions to settle class-action cases regardless of the merits of the claims. Such a policy judgment relates to the overall wellbeing the State, not the day-to-day operations of Indiana's courts. *See Church*, 189 N.E.3d at 588–89.

Other provisions of Public Law 166-2021 confirm that the legislature was concerned about limiting substantive liability for people and institutions caught up in

the chaos of the pandemic response. It also provides immunity from professional discipline to healthcare workers for services provided in response to COVID-19, delays or withdrawal of healthcare due to COVID-19, compliance with executive orders declared in response to COVID-19, and an injury, death, or loss due to being unable to treat an individual due to COVID-19. I.C. § 25-1-20-3. It provides protection from civil liability to individuals and employees providing medical services "for an act or omission relating to the provision or delay of health care services or emergency medical services arising from a state disaster emergency declared under IC 10-14-3-12 to respond to COVID-19." I.C. §§ 34-30-13.5-1, 34-30-13.5-3. It provides immunity to governmental entities or employees for acts or omissions within the scope of the employee's employment that arose from COVID-19. I.C. § 34-13-3-3(b). And it declared that orders issued by the federal, state, and local government in response to COVID-19 did not create a new cause of action with respect to the matter contained in the order. I.C. §§ 25-1-20-5, 34-7-8-2.

The Court of Appeals, however, gave little credence to the General Assembly's policy reasons for Section 7. Instead, it focused on the rationales for permitting class actions, *i.e.,* to promote "efficiency of economy of litigation." *Mellowitz*, slip op. at 12 (cleaned up). *Church*, however, requires courts to consider the policy reasons *behind the statute being challenged*, not the judiciary's reasons for creating a procedural rule. 189 N.E.3d at 590–91 (considering the policy reasons behind the child deposition statute, not the judiciary's reasons for the Trial Rule on depositions).

Here, the Court of Appeals did the opposite and even substituted its own policy judgment for that of the General Assembly. In asserting that Section 7 "does not reduce the institutions' potential legal liability in the slightest," *Mellowtiz,* slip op. at 14–15, the Court ignored the negative implications of the very "efficiency of economy of litigation" that it deemed beneficial. Such efficiency may benefit some plaintiffs, but it also drives up potential exposure to where defendants may be forced either to settle or else "bet the company." *See, e.g., Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (observing that large class actions placed the defendants under "intense pressure to settle" to avoid "$25 billion in potential liability (conceivably more), and with it bankruptcy"—effectively, a "blackmail settlement."). Whether defendants should be put in such a position plainly carries grave public policy implications, which is why the General Assembly frequently limits the availability of class actions as a means of imposing controls over the civil justice system. *See supra* at 9-10.

More broadly, class action reform is a species of tort reform, including limits on punitive damages and other policies previously upheld by this Court. Both the U.S. Chamber National Litigation Center and the American Tort Reform Association advocate for various types of class action reform. *See* Class Actions, U.S. Chamber of Commerce Litigation Center, available at https://www.chamberlitigation.com/class-actions (last viewed Nov. 21, 2022); Class Action Reform, American Tort Reform association, available at https://www.atra.org/issue/class-action-reform/ (last viewed Nov. 21, 2022). And Congress legislated on this subject with the Class Action Fairness

Act of 2005, which expanded the availability of federal courts as a forum for class actions removed from state courts. 28 U.S.C. §§ 1332(d), 1453, 1711–1715. Such frequent attention by public advocates and legislatures alike confirms that important questions of public policy lie at the heart of statutes limiting the availability of class actions.

In summary, the General Assembly chose to allocate the societal costs of COVID-19 in part by prohibiting class-action lawsuits against post-secondary educational institutions for breach of contract or unjust enrichment arising from COVID-19. By foreclosing class-action suits, the General Assembly sought to reduce the pressure on institutions to settle rather than face existential liability threats arising from their compliance with the Governor's COVID-19 executive orders. Section 7 is therefore a substantive law within the province of the General Assembly. Transfer is warranted to reinstate it.

CONCLUSION

This Court should grant transfer, hold that Section 7 is a valid exercise of legislative authority, and affirm the trial court's order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief of appellee-intervenor contains no more than 4,200 words, not including those portions excluded by Indiana Appellate Rule 44(C).

/s/ Thomas M. Fisher
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CERTIFICATE OF SERVICE

I certify that on November 21, 2022, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on November 21, 2022, the foregoing was served upon the following via IEFS:

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