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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.

REPLY IN SUPPORT OF PETITION TO TRANSFER APPELLEE-INTERVENOR STATE OF INDIANA

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Transfer is Warranted Because the Court of Appeals Invalidated a State Statute Protecting Educational Institutions from Class Action Claims, Which the General Assembly has the Authority to Pass

Under this Court's test in *Church v. State*, laws are substantive when the General Assembly's objective in passing them is not related to the day-to-day operations of the judiciary. 189 N.E.3d 580, 590 (Ind. 2022). Section 7 fits that mold because the General Assembly passed it to mitigate the burden of COVID-19 on post-secondary educational institutions. The Court should grant transfer to review this important issue.

A. This Court Should Grant Transfer Because the Court of Appeals Invalidated a State Statute

This Court should transfer jurisdiction over this case because the Court of Appeals declared a state statute invalid, which is comparable to where a trial court declares a statute unconstitutional. *See* Ind. Appellate Rule 4(A)(1)(b). The point is that invalidation of a statute is a serious matter that the state's highest court should review, no matter the tribunal that invalidated it. And even if the threat of lower-court conflict were relevant, court of appeals rulings, just like trial court judgments, are susceptible of conflict given the lack of horizontal *stare decisis*. *See In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009).

Further, whether the roots of the *Church* test are statutory or constitutional remains unclear. If statutory, then a statute governing a specific court procedure should modify the more general statute deferring to court rules, under either the

specific-controls-general canon or the later-in-time canon. But the damage to a legislative enactment is the same regardless, as is the rationale for transfer.

In addition, as shown in the State's petition, the Court's decision could have consequences for other statutes prohibiting or placing restrictions on class actions (*contra* Resp. Pet. 19–20).

B. Mellowitz—Like the Court of Appeals—Incorrectly Focuses on Whether Class Actions are Procedural Instead of Whether Section 7 Advances Substantive Public Policy Goals

Section 7 is substantive because it furthers valid public policy goals by reducing the liability exposure of post-secondary educational institutions who complied with the Governor's executive orders related to COVID-19. It is a substantive statute even if the Court disagrees with the way the General Assembly chose to allocate the societal costs of COVID-19. *See State v. Doe*, 987 N.E.2d 1066, 1070 (Ind. 2013) (recognizing courts should "refrain from evaluating [a statute's] wisdom or suitability").

Mellowitz's reliance on a 65-year-old law review article proposing the "orderly dispatch of judicial business" test (*see* Resp. Pet. 14–16) represents a departure from, not an application of, *Church*. Regardless, even under that test, where rules involve the "orderly dispatch of judicial business," other policy considerations may still justify overriding statutes. *See* Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich.L.Rev. 623, 651 (1957) (discussing that while rules of evidence traditionally involve the orderly dispatch of judicial business, "there are rules of evidence which involve other policy considerations and should be enacted by the legislature").

Nor are the decisions by the Alaska and Rhode Island Supreme Courts persuasive (*see* Resp. Pet. 16). In neither case did anyone cite policy reasons outside the orderly dispatch of judicial business that would have made the statute at issue substantive. *See Johnston Businessmen's Assoc. v. Russillo*, 274 A.2d 433, 436 (R.I. 1971), *superseded by statute as stated in Barone v. State*, 93 A.3d 938, 942 (R.I. 2014); *Nolan v. Sea Airmotive*, Inc. 627 P.2d 1035, 1040–47.

Further, the cases cited by the State to demonstrate the General Assembly's authority to pass substantive laws regarding nominally procedural areas—condemnation orders, change of venue, and punitive damages—are not distinguishable on Mellowitz's *ipse dixit*. (*contra* Resp. Pet. 18–19).

Section 7 is substantive because its objective is to protect post-secondary educational institutions from the deleterious effects of class actions related to COVID-19, and thus, is within the General Assembly's legislative authority.

C. This Court Should Not Presume that a Statute Governing the Same Topic as a Trial Rule is Presumptively Procedural

This Court should not apply a presumption that any statute conflicting with a trial rule is procedural (*contra* Resp. Pet. 22; Appellant's Reply Br. 24–25 n.12). The Court's test in *Church* strikes the right balance between protecting the General Assembly's authority to pass substantive laws and the judiciary's authority given to adopt procedural rules. Presuming that a statute conflicting with a trial rule is presumptively procedural would—particularly where the legislature has no way to rebut that presumption—unjustifiably tip that balance in favor of judicial power. *Cf. Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013) (cautioning courts not to invade the

authority of the General Assembly and "violate the very constitution which they thereby seek to preserve and maintain" (cleaned up)).

D. Section 7 is Not an Unconstitutional Taking and Does Not Impair Contractual Obligations

Section 7 cannot plausibly constitute a taking of private property. In short, Mellowitz has no property interest in bringing a class action asserting the rights of others—even less so because when the trial court ordered him to remove the class allegations, Mellowtiz had not yet even moved for class certification.

Nor does Section 7 plausibly impair Mellowitz's contract with Ball State, which said nothing about suing Ball State for breach on behalf a representative class. *See Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018) (determining whether a law impairs contractual obligations turns on "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights").

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 1,000 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 December 19, 2022, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on December 19, 2022, the foregoing was served upon the following via IEFS:

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