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In the Indiana Supreme Court

No. 22A-PL-337

KELLER J. MELLOWITZ, on behalf of himself and all others similarly situated Appellant (Plaintiff Below), v. BALL STATE UNIVERSITY And BOARD OF TRUSTEES OF BALL STATE UNIVERSITY, Appellees (Defendants Below).	On Petition to Transfer from the Indiana Court of Appeals, No. 22A-PL-337 Interlocutory Appeal from the Marion Superior Court No. 1 No. 49D01-2005-PL-15026 The Honorable Matthew C. Kincaid, Special Judge

APPELLANT'S RESPONSE BRIEF IN OPPOSITION TO PETITIONS TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

Procedural laws in conflict with the rules of this Court are unenforceable. In *Church v. State*, 189 N.E.3d 580 (Ind. 2022), the Court adopted a test for determining whether a law is procedural: "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*. at 590 (cleaned up).

The origin of that test is a paper "prepared for the guidance of a Committee on Michigan Procedural Revision ... to recommend revision of Michigan procedural statutes and rules." Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 623 n.† (1957). That paper states, "class actions[ ] are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters." *Id*. at 648. The Supreme Court of the United States and two other state supreme courts have deemed statutes interfering with class-action procedures unenforceable.

Did the Court of Appeals err in reaching the same conclusion with Indiana Code § 34-12-5-7 ("Section 7"), which retroactively instructs courts that they may not use the class-action mechanisms of Trial Rule 23 to efficiently adjudicate certain claims of students against postsecondary institutions?

If Section 7 is substantive, does its retroactive application to this action, filed a year before Section 7's enactment, constitute a taking of vested rights or otherwise interfere with rights of contract by removing the only effective remedy for redress?

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INTRODUCTION

For the Spring 2020 semester, Ball State students paid fees to access services such as student-services fees, university-technology fees, recreation fees, health fees, and transportation fees, as well as tuition for in-person classes. [Appellant's App. Vol. II pp.22-25]. During that semester, due to COVID-19 measures, Ball State ceased providing those services and in-person classes. [*Id.*].

Under contract law, unless reallocated by a *force majeure* provision, the risk of non-performance due to impossibility rested with the performing party, Ball State. *Trs. of Ind. Univ. v. Spiegel*, 186 N.E.3d 1151, 1161 (Ind. Ct. App. 2022), *trans. denied*; MURRAY ON CONTRACTS § 116[C] (5th ed. 2011).

One year after this case commenced, Indiana Code § 34-12-5-7 ("Section 7") was enacted to retroactively prohibit class-action adjudication of these claims. In prohibiting courts from using the efficient procedures of Trial Rule 23, "Section 7 is a purely procedural statute," that "[i]nstead of furthering judicial administrative objectives, ... frustrates them by encouraging a multiplicity of lawsuits from similarly situated plaintiffs." *Mellowitz v. Ball State Univ.*, 196 N.E.3d 1256, 1262-63 (Ind. Ct. App. 2022). Pursuant to *Church v. State*, 189 N.E.3d 580 (Ind. 2022), Section 7 is a procedural law in conflict with Rule 23, and unenforceable.

Even were it substantive, in retroactively removing the only effective remedy of accrued rights of action and vested contracts, Section 7 unconstitutionally violates the state and federal takings and contracts clauses. Indeed, as the university amici contend, Section 7 amounts to "immunity." [Br. p.14].

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Deprived of the benefits of their bargains, Mellowitz, on behalf of similarly situated students, filed his Class Action Complaint on May 1, 2020, alleging breaches of contracts and unjust enrichment. [Appellant's App. Vol. II pp.22-30]. 363 days later, Section 7 was enacted, retroactively prohibiting certification of class actions against postsecondary institutions for claims sounding in breach of contract and unjust enrichment if the claims accrued between February 29, 2020 and April 1, 2022 and arose from COVID-19. I.C. § 34-12-5-7.

Ball State moved to strike Mellowitz's class allegations. [Appellant's App. Vol. II pp.31-51]. Mellowitz contended that Section 7 is a procedural law in conflict with Trial Rule 23 and, if substantive, violated the takings provisions and contract clauses of the state and federal constitutions. [*Id.* at pp.52-74]. The State intervened in support of Section 7. [*Id.* at pp.106-31]. The trial court, upholding Section 7, ordered Mellowitz to refile his complaint, omitting his class allegations. [*Id.* at pp.19-21]. That order was stayed pending appeal. [*Id.* at pp.170-71].

On review, the Court of Appeals unanimously held "that Section 7 is a procedural statute that impermissibly conflicts with Indiana Trial Rule 23 ... and thus Section 7 is a nullity." *Mellowitz*, 196 N.E.3d at 1257-58. Ball State and the State now seek transfer.

ARGUMENT

I. Transfer is Not Warranted.

In June, the Court addressed the question of whether a legislative enactment impermissibly conflicted with a procedural rule. *Church v. State*, 189 N.E.3d 580 (Ind. 2022). In deciding this appeal, the Court of Appeals adhered to *Church* and correctly applied its test to deem Section 7 an impermissible procedural law in conflict with Trial Rule 23. *Mellowitz*, 196 N.E.3d 1256. With the ink of *Church* recently dried, both Ball State and the State ask the Court to take up the question again.

There being no need to revisit this area of law, Ball State and the State instead ask the Court to engage in error-correcting, contending that the Court of Appeals has misapplied *Church*. *See Clark v. Wiegand*, 617 N.E.2d 916, 921 (Ind. 1993) (Shepard, C.J., dissenting) ("No new law here, just an exercise in error-correcting by the court of last resort[.]"). As shown below, the Court of Appeals correctly applied *Church*, and transfer is unwarranted under Appellate Rule 57(H)(2).

Both Ball State and the State further contend that review is necessary to address an important question of law merely because the Court of Appeals deemed a statute invalid. Notably, the Court of Appeals did not indicate that it struck down Section 7 on constitutional grounds. Although invited to do so, *see* [Appellant's Br. pp.26-32], the court could just have likely done so under Indiana Code §§ 34-8-1-3 & 34-8-2-1, consistent with judicial restraint. *Church*, 189 N.E.3d at 586; *Founds. of E. Chi., Inc. v. City of E. Chi.*, 927 N.E.2d 900, 905 (Ind. 2010); *see, e.g.*, *Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157, 1163-64 (Ind. 1998).

Even if the Court of Appeals struck down Section 7 as unconstitutional, Appellate Rule 4(A)(1)(b) does not apply. Recognizing that fact, the State seeks to merge Rules 4(A)(1)(b) and 57(H)(4) to invoke the Court's jurisdiction. Doing so, the State fails to recognize why Rule 4(A)(1)(b) is written as it is.

Speaking of the rule's predecessor, this Court explained:

> It is the duty and jurisdiction of this Court to determine the constitutionality of the laws of this State. For the law to be universally administered, it is necessary for this authority to rest in but one place. This is the purpose, of course, of Appellate Rule 4(A)(8). **Obviously, if this were not so, constitutional interpretation could vary from one judicial circuit to another throughout the State.**

State v. Palmer, 270 Ind. 493, 496, 386 N.E.2d 946, 949 (1979) (emphasis added).

Although *Palmer* suggests that only this Court should decide constitutionality, that is not how the Court drafted Rule 4. Instead, as *Palmer* teaches, the danger circumscribed by Rule 4 is potential for rudderless, varied interpretations across judicial circuits. That danger arises only at the trial-court level, not the appellate level. "[T]he decision of one trial court is not binding upon another trial court[,]" *Ind. Dep't of Nat. Res. v. United Minerals, Inc.*, 686 N.E.2d 851, 857 (Ind. Ct. App. 1997), *trans. denied*, but "the decisions of all five appellate districts are law governing all of Indiana, not just the district from which the decision was issued." *Diesel Constr. Co. v. Cotten*, 634 N.E.2d 1351, 1354 (Ind. Ct. App. 1994). Unless contrary to an opinion of this Court, our trial courts are bound to follow the Court of Appeals' decisions. *Matter of M.W.*, 130 N.E.3d 114, 116 (Ind. Ct. App. 2019).

Should it be necessary for the Court to extend its precedent in this area, Mellowitz requests the court adopt the well-reasoned opinion of the Court of Appeals.

II. Under *Church*, Trial Rule 23 is a Purely Procedural Rule, and the Right to Bring a Class Action is a Purely Procedural Right.

A. Class Actions are Purely Procedural Arising from Rule 23.

A class action is a species of traditional joinder that enables courts "to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). Class actions exist to safeguard judicial resources. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982). They also ensure avoidance of "inconsistent or varying adjudications[.]" T.R. 23(B)(1)(a).

As this Court has recognized, "One of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met." *Budden*, 698 N.E.2d at 1162. Unlike the statutory right to criminal depositions, the right to class-action adjudication is a purely procedural right arising entirely from Rule 23. As a right provided by the legislature, the statutory right to criminal depositions in *Church* can be curtailed by the legislature; as a procedural right arising from Rule 23, the right to class actions cannot. *Church*, 189 N.E.3d at 589 (legislature may limit "a right previously conferred" by statute); [Appellant's Br. pp.34-37]; [Appellant's Reply pp.17-18].

B. *Church* Shows Statutes Prohibiting Class Actions are Procedural

"[T]he power to make rules of procedure in Indiana is neither exclusively legislative nor judicial." *State ex rel. Blood v. Gibson Circuit Court*, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959). Though shared with the legislature, "the power to make

procedural rules 'is not a power equally shared.'" *Mellowitz*, 196 N.E.3d at 1259 (quoting Appellant's Br. at 27). The split of power permits the legislature to enact procedural statutes, but only to the extent they do not conflict with rules of this Court. *State v. Bridenhager*, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

Our Constitution and the legislature entrust this Court with "the inherent power to establish rules governing the course of litigation in the trial courts." *Owen Cnty. v. Ind. Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1287-88 (Ind. Ct. App. 2007); *see also Epstein v. State*, 190 Ind. 693, 696, 128 N.E. 353, 353 (1920); I.C. §§ 34-8-1-3 & -2-1. Thus, "[o]n matters of procedure, to the extent a statute is at odds with" a Court rule, "the rule governs." *Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018).

In *Church*, the Court upheld a substantive statute protecting child sex-crime victims by constraining the statutory right to criminal depositions. Looking to a pronouncement from the Colorado Supreme Court, *Church* adopted a test defining the boundaries between procedural laws subject to Court rules and substantive laws subject to legislative oversight:

> 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.

189 N.E.3d at 590 (quoting *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978)).

The test adopted in *Church*, taken from *McKenna*, did not originate with *McKenna*. Instead, *McKenna* adopted its test from a paper "prepared for the guidance of a Committee on Michigan Procedural Revision jointly created by the Michigan Legislature, the Supreme Court of Michigan, and the Michigan State Bar

to recommend revision of Michigan procedural statutes and rules." Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 623 n.† (1957).[1]

That widely cited paper, *see*, *e.g.*, *Kiven v. Mercedes-Benz of N. Am., Inc.*, 491 N.E.2d 1167, 1168 (Ill. 1986); *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1042, 1045 (Alaska 1981); *State v. Leonardis*, 375 A.2d 607, 611 (N.J. 1977), addresses the question of whether class actions are procedural matters for courts or substantive matters for legislatures, concluding as the Court of Appeals did below that they are procedural matters for courts:

> *Joinder of Causes*. Nothing could be more a part of practice than a determination as to what causes should be joined in a single action. ...
>
> *Parties*. The same thing that was said about the joinder of causes can be said about parties. Who are required or permitted to be plaintiffs or defendants, are matters involving the orderly dispatch of judicial business. Intervention, substitution, interpleader, third-party practice, class actions, all are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters.

Joiner & Miller, supra, at 648 (footnotes omitted; emphases added).

Demonstrating a similar understanding, the Supreme Court of the United States found a New York statute prohibiting class actions for claims seeking statutory

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[1] Although *Church* quoted directly from *McKenna*, *Church* also cited *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999), and *Cabinet for Health & Family Servs. v. Chauvin*, 316 S.W.3d 279 (Ky. 2010). *McDougall*, like *McKenna*, takes its standard directly from Joiner & Miller, 597 N.W.2d at 156, and *Chauvin* draws its standard from a law journal article that extensively relies on Joiner & Miller to state its test as based on "the best scholars[.]" *Chauvin*, 316 S.W.3d at 285 (quoting Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 KY. L.J. 525, 580 (2000)). For criticisms of the standard, see *McDougall*, 597 N.W.2d at 159-76 (Cavanagh, J., dissenting); *Schoenvogel v. Venator Group Retail Inc.*, 895 So.2d 225, 251 (Ala. 2004).

penalties was a procedural law inapplicable in federal court. *Shady Grove*, 559 U.S. at 396-436; *see id*. at 408-09 (Scalia, J., plurality) ("[T]he *consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit, but the law itself alters only procedure." (emphasis in original)).

The Rhode Island Supreme Court also found a statute prohibiting class actions conflicted with Rule 23 and was unenforceable. *Johnston Businessmen's Assoc. v. Russillo*, 274 A.2d 433, 436 (1971). The Alaska Supreme Court similarly deemed a statute conflicting with Rule 23 to be unenforceable. *Nolan*, 627 P.2d at 1040-47.

The Court of Appeals correctly determined Section 7, in mandating judicial inefficiency by prohibiting class-action adjudication, predominantly addressed the orderly dispatch of judicial business.

C. Ball State's Interpretation is Inconsistent with *Church*.

Ball State's interpretation of the substantive-procedural test is inconsistent with *Church*, which provides:

> 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.

189 N.E.3d 590 (citation omitted). Ball State argues that only a statute that "furthers" judicial administration objectives is procedural. [Pet. p.11]. That is, if a statute predominately hinders, frustrates, or impedes judicial administration objectives, it is not procedural but substantive. Accordingly, Ball State contends, the Court of Appeals misapplied *Church* because it found Section 7 "frustrates" judicial administrative objectives.

Aside from the fact that the Indiana Constitution cannot countenance upholding legislative acts that frustrate judicial administration while simultaneously requiring striking down statutes that would further judicial administration,[2] that interpretation is not consistent with *Church*'s pronouncement of the test. To be substantive, a statute must "further public policy objectives[.]" By Ball State's logic, if the statute is deemed to frustrate public policy, then the statute must be procedural. Moreover, Ball State's interpretation ignores that to be substantive, a statute must "involv[e] matters other than the orderly dispatch of judicial business[.]" The Court of Appeals correctly found Section 7 involves the orderly dispatch of judicial business.

D. Section 7 Conflicts with Rule 23.

Ball State further argus that Section 7 does not conflict with Rule 23 and otherwise asks the Court to create a judicially mandated exception. The Court of Appeals correctly found "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 Section 7 says that a claimant 'may not' do so." *Mellowitz*, 196 N.E.3d at 1263; *see also Bridenhager*, 257 Ind. at 704, 279 N.E.2d at 796-97.

It would also be inappropriate to deem the statute an exception to Rule 23. Justice Goff's invitation to do so in *Church* was laudable in that context of upholding protections for child victims, constraining a rare statutory right to criminal

[2] "[O]ne department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution." *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000) (cleaned up).

depositions. Doing so here, however, would be antithetical to this Court's prior guidance:

> One of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met. As a practical matter, this is often essential to the assertion of any claim at all. The cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney, and financing such an enterprise on a pay as you go basis is often beyond the means of the aggrieved parties .... The class action device has a long and useful history in this State.

Budden, 698 N.E.2d at 1162 (footnote omitted).

Here, Justice Slaughter's guidance in *Morrison v. Vasquez* is well taken: "the better way to effectuate that policy change is by formally amending our trial rules and not reinterpreting them by judicial fiat with retroactive application." 124 N.E.3d 1217, 1222 (Ind. 2019) (Slaughter, J., dissenting).

E. Other Cases Cited by the State are of No Guidance.

Aside from *Church*, the State cites three other decisions from this Court, none of which are helpful. *State ex rel. Indiana & Michigan Electric Co. v. Sullivan Circuit Court* does not illustrate the substantive-procedural dichotomy because there was no conflict between the statute and procedural rules. 456 N.E.2d 1019, 1021 (Ind. 1983); *see also* [Appellant's App. Vol. II pp.149-50]. *State v. Doe* also found no conflict between the statute and procedural rules; the Court specifically rejected Doe's argument that the punitive-damages cap and allocation provision constituted a "legislative remittitur" that could have conflicted with Trial Rule 59(J)(5). 987 N.E.2d 1066, 1072 (Ind. 2013).

Citation to *Hatcher v. Lake Superior Court*, 500 N.E.2d 737 (Ind. 1986), is

also unhelpful. *Hatcher* was a change-of-venue case. This Court and the legislature have long agreed that "the right to a change of venue from the county or judge is a substantive right which can be conferred only by the legislature." *State ex rel. Wade v. Cass Cir. Ct.*, 447 N.E.2d 1082, 1083 (Ind. 1983); *see also Hatcher*, 500 N.E.2d at 739; *Blood*, 239 Ind. at 400, 157 N.E.2d at 478; I.C. § 34-8-2-1. As a statutory right, it is a right curtailable by the legislature. *Church*, 189 N.E.3d at 589. Notably, the Court recently found preferred venue is procedural. *Morrison*, 124 N.E.3d at 1222.

III. This Case Does Not Impact a Multitude of Other Statutes.

Petitioners and amici warn that , if transfer is not granted, numerous other class-action prohibitions are in jeopardy. Aside from the prohibitions passed in the same session as Section 7, all but one cited statute is not impacted by this case. Indiana Code Sections 6-1.1-15-15, 6-6-1.1-910, 6-6-4.1-7.1, 6-6-2.5-69, 6-8.1-9-7(a), and 9-33-3-3 each require pre-suit exhaustion of administrative remedies. That is consistent with existing caselaw because a claim does not become ripe until such remedies are exhausted unless otherwise deemed futile. *Spencer v. State*, 520 N.E.2d 106, 109-10 (Ind. Ct. App. 1988), *trans. denied*; *Rene v. Reed*, 726 N.E.2d 808, 819 (Ind. Ct. App. 2000), *trans. denied*. Those are not class-action prohibitions.

The only exception is I.C. § 6-8.1-9-7(b), enacted in 2019. Due to its recency, the enforceability of that statute has not yet been tested and is not before the Court. But it, along with the statutes enacted in the same session as Section 7 "do not become constitutional through age or repetition." *Bayh v. Sonnenburg*, 573 N.E.2d 398, 415 (Ind. 1991). Nor is incremental encroachment into Rule 23 permissible. To

hold otherwise would allow incremental desiccation of the "privilege[of] our system of justice confer[red] on every citizen [in] the ability to assert claims in the form of a class action if the requirements of Rule 23 are met." *Budden*, 698 N.E.2d at 1162. If the legislature lacks the power to enact a blanket prohibition on class actions, then piecemeal chipping away at the class-action right either affords the legislature the power to do by a thousand cuts what it may not do by one or foist upon future courts the impossible task of solving sorites paradox.[3]

Further, both Ball State and the State decry the "'[b]et the company' pressure" of class actions, [State Pet. p.7], yet neither acknowledge Ball State received $77,580,157 in federal pandemic relief or otherwise attempt to substantiate that the present case threatens the demise of this 104-year-old institution. https://covid-relief-data.ed.gov/profile/entity/065540726. Instead, Ball State and the State would prefer to shift the entire COVID financial burden onto its students in a nation bearing $1.75T in student-loan debt. Alicia Hahn & Jordan Tarver, *2022 Student Loan Debt Statistics: Average Student Loan Debt*, Forbes.com (June 9, 2022), https://web.archive.org/web/20220705183920/https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/.

IV. Even if Substantive, Section 7 is Unconstitutional.

Not addressed by the State or amici is that the analysis does not end if Section

[3] If a single grain of wheat is removed from a heap, it is still a heap. But continuous removal of every grain at some indeterminate point is sufficient to render it no longer a heap. *See* Dominic Hyde, *Sorites Paradox*, in Stanford Encyclopedia of Philosophy (Dec. 6, 2011), https://web.archive.org/web/20220711153855/https://meinong.stanford.edu/entries/sorites-paradox/.

7 is deemed substantive. By applying retroactively, Section 7 removes the only effective remedy for redress for Mellowitz and his fellow students. As this Court observed in *Budden*: "As a practical matter, [a class action] is often essential to the assertion of any claim at all. The cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney, and financing such an enterprise on a pay as you go basis is often beyond the means of the aggrieved parties[.]" 698 N.E.2d at 1162; *accord Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (often the alternative to class actions is not a multitude but zero suits).

The State admits Section 7 was targeted at this case. [State Pet. p.8]. And Ball State admits Section 7's purpose is that students "might otherwise not choose to bear the cost of an individual lawsuit." [Ball State Pet. p.12].

There is no scenario in which defending thousands of individual actions is more cost effective than defending a single class action. *Gunderson v. F.A. Richard & Assocs.*, 977 So.2d 1128, 1140 (La. Ct. App. 2008). The only way Section 7 can serve its purpose is if it erects such substantial barriers to redress that it increases "[t]he cost and difficulty of pursuing only an individual claim[,]" making "it uneconomic from the point of view of any capable attorney, and financing such an enterprise ... beyond the means of the aggrieved parties[.]" *Budden*, 698 N.E.2d at 1162. Section 7's purpose proves it functionally eliminates the remedy. Indeed, the university amici argue Section 7 is "immunity." [University Amici at 14].

If allowed to achieve its goal, Section 7 is the functional equivalent of

retroactive immunity, which is blatantly unconstitutional. *Ferretti v. Nova Se. Univ., Inc.*, 586 F. Supp. 3d 1260 (S.D. Fla. 2022).

In removing the only effective remedy for redress, Section 7 effects a retroactive taking of an accrued right of action for Mellowitz and his fellow students. Mellowitz triggered the right to pursue class adjudication by filing his Class Action Complaint. *Am. Cyanamid Co. v. Stephen*, 623 N.E.2d 1065, 1070 (Ind. Ct. App. 1993) (obligation to rule on class certification triggered by filing complaint, not by filing certification motion). Section 7 constitutes an unconstitutional taking. *See* [Appellant's Br. pp.48-51]; [Appellant's Reply pp.27-33].

Similarly, by removing the only effective remedy, imputed as a matter of law into the contracts between Ball State and its students, Section 7 constitutes a substantial impairment of those contracts. Because Section 7 was not enacted under the State's *necessary* police powers, but rather to vitiate governmental liabilities, it violates the state and federal contract clauses. *See* [Appellant's Br. pp.52-61]; [Appellant's Reply pp.33-35].

V. If the Court Grants Transfer, it Should Adopt the Presumption of Validity for Rules Applied by the Supreme Court of the United States.

If the Court grants transfer, it should adopt the presumption of validity for procedure rules utilized by the Supreme Court of the United States, *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 6 (1987), such that the analysis of whether a statute is procedural should first examine whether the statute conflicts with a procedural rule. *See* [Appellant's Reply pp.24-25 n.12].

CONCLUSION

Because the Court of Appeals correctly applied *Church* to deem Section 7 a procedural law in conflict with Trial Rule 23 and this Court has so recently addressed the law in this area, transfer should be denied.

Respectfully submitted,

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WORD COUNT CERTIFICATE

In accordance with Ind. Appellate Rule 44(F), I verify that this brief contains no more than 4,200 words in accordance with Ind. Appellate Rule 44(E). I further verify that this brief contains 4,198 words as measured by Microsoft Word and by manual count of text not subject to Microsoft Word's analysis.

/s/ *Colin E. Flora*
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CERTIFICATE OF SERVICE

I certify that on December 9, 2022, a copy of the foregoing was filed electronically with Efile.INCourts.Gov. On the same date the foregoing was served on the following parties by operation of the Court's electronic filing system pursuant to Ind. Appellate Rule 68:

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