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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 REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

This Court should grant transfer to determine whether an important statute enacted in response to COVID-19 is enforceable. Earlier this year, Mellowitz jointly moved with Ball State in asking this Court to accept early transfer under Ind. Appellate Rule 56(A). Joint Verified Motion for Transfer, p. 3 (agreeing that "question presented is of substantial importance"). The substantial importance of the question is unaltered.

I. Whether the legislature has authority to bar class actions in this and other contexts is an important question of law of great public consequence.

The Supreme Court has mandatory jurisdiction over final judgments declaring statutes unconstitutional. App. R. 4(A)(1)(b). The guiding principle behind this rule is that the highest court in the State should be the final word in the State on whether a statute enacted by the people's representatives has the force of law. Mellowitz contends that principle does not apply here both because the Court of Appeals did not *say* Ind. Code § 34-12-5-7 ("Section 7") is "unconstitutional" and because Rule 4(A)(1)(b) does not technically apply where the *Court of Appeals* has struck down the statute. Both arguments put form over substance.

This Court's recent decision in *Church v. State* suggests that determining whether a statute is a "nullity" because it encroaches on the authority of this Court to govern procedure has "constitutional consequences." 189 N.E.3d 580, 591-92 (Ind. 2022). That is unquestionably right. These sorts of decisions implicate separation of powers, a basic constitutional value. And

while Rule 4(A)(1)(b)'s text is limited to trial court judgments, the *principle* underlying the rule—that this Court should review decisions rendering a statute unconstitutional—is squarely at issue. A Court of Appeals decision that finds a statute unenforceable invariably presents "an important question of law" and is, as here, "a case of great public importance that has not been, but should be, decided by the Supreme Court." Ind. App. R. 57(H)(4).

Whether the legislature had the authority to bar class actions arising out of efforts to mitigate the public health crisis posed by COVID-19 is a question of vital importance to every major university in this State. It affects tens of thousands of putative plaintiffs, and millions of private and public dollars are at stake. That alone justifies transfer. And whether the legislature has authority to restrict class actions more generally is an equally important question implicated by the panel decision. Several other state statutes surely also fall under the panel's rationale if Section 7 is unenforceable. Mellowitz denies broader consequences, but even he acknowledges that other class-action bars are now in jeopardy. *See* Resp. p. 18-19.

Mellowitz contends that two sources weigh against this Court accepting review: a 1957 paper prepared for a committee on Michigan procedural revisions and a plurality decision of the U.S. Supreme Court that turns largely on the application of the federal Rules Enabling Act. Neither remotely speaks to whether Indiana's legislature may pass a law restricting class actions on policy grounds. The Michigan paper simply references class actions in a list of rules that relate to "who are required or permitted to be

[parties]." Charles W. Joiner & Oscar J. Miller, *Rules of Practice & Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 648 (1957). And *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), decided without a majority rationale, concerns only whether a general New York class-action bar could be enforced in federal court. That is obviously not the issue here. In any event, since *Shady Grove*, many federal courts have enforced specific state class-action bars like the one at issue here. *See, e.g.*, *Delgado v. Ocwen Loan Servicing, LLC*, No. 13-CV-4427 (NGG)(ST), 2017 WL 5201079, at *9-10 (E.D.N.Y. Nov. 9, 2017) (analyzing and distinguishing *Shady Grove* and collecting similar cases enforcing specific class-action bars).

II. This Court's decision in *Church* requires a different analysis than that used by the Court of Appeals.

Mellowitz's defense of the panel's reasoning does not withstand scrutiny. The panel decision largely turns on the fact that class actions are governed by the Trial Rules. But so are depositions, and still this Court decided in *Church* that the legislature could limit their availability in certain criminal matters.

The decision below gives no credence to the policy reasons that clearly motivated the legislature to limit class-action exposure for universities and others for their actions during the pandemic—actions they were required to take by law. To say in these circumstances that, because Section 7 implicates a matter governed by the Trial Rules, the legislature was simply

attempting to "further[] judicial administration objectives," *Church*, 189 N.E.3d at 590, is effectively to say that the legislature can never limit class actions. Surely that cannot be correct. Congress has limited class actions. Other state legislatures have limited class actions. Our own legislature has previously limited class actions. And that is for the simple reason that, as courts and scholars alike have long understood, class-action litigation implicates important public policy concerns "other than the orderly dispatch of judicial business." *Id.* (citation omitted). The availability of class actions affects the cost and volume of litigation. It affects the amount of potential damage awards. And it affects whether plaintiffs sue or not and whether and when defendants settle or not. To suggest otherwise is to ignore the realities of modern mass litigation.

One final point. Given the presumption of constitutionality that attaches to statutes, there should be a more robust effort to avoid conflict between Section 7 and Rule 23. The panel waived off that possibility in little more than a sentence, but that fails to give the legislature's work its due. Trial Rule 23(D)(4) gives trial courts the authority to require that pleadings be amended to eliminate class-action allegations. It does not take much creativity to see that, even if Section 7 is procedural, there is a defensible way to allow Section 7 to stand with the rule.

CONCLUSION

The Court should grant transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44, I verify that this brief contains no more than 1000 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

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