

IN THE
INDIANA SUPREME COURT

No. 22A-PL-337

KELLER J. MELLOWITZ,)	
on behalf of himself and all)	
others similarly situated)	
)	
Appellant-Plaintiff,)	Appeal from Marion County
)	Superior Court 1
vs.)	Cause No. 49D01-2005-PL-15026
)	
BALL STATE UNIVERSITY)	Hon. Matthew C. Kincaid,
and BOARD OF TRUSTEES OF)	Special Judge
BALL STATE UNIVERSITY,)	
)	
Appellees-Defendants.)	
)	

**BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY,
UNIVERSITY OF NOTRE DAME DU LAC, AND INDEPENDENT COLLEGES OF
INDIANA**

Brian E. Casey (23263-71)
Sarah E. Brown (35715-53)
Barnes & Thornburg LLP
201 S. Main Street, Suite 400
South Bend, IN 46601
(574) 233-1171
brian.casey@btlaw.com
sarah.brown@btlaw.com

Counsel for Amici

TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES 3

STATEMENT OF INTEREST 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

 A. Transfer is necessary because the appellate court failed to follow this Court’s analysis in *Church*. 13

 B. Transfer is necessary because the appellate court usurped the General Assembly’s core legislative functions and violated separation of powers by declaring PL-166 to be an unconstitutional “nullity.” 16

 1. The Opinion neither acknowledges nor employs the appropriate standard by which validly-enacted statutes are reviewed for constitutionality. 17

 2. This deference to the General Assembly arises from the constitutionally-mandated separation of powers requirement. 18

 3. PL-166 is the result of the Legislature’s exercise of several of its core functions..... 19

CONCLUSION..... 23

WORD COUNT CERTIFICATE 25

CERTIFICATE OF FILING AND SERVICE 26

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Berry v. Crawford</i> , 990 N.E.2d 410 (Ind. 2013)	18
<i>Blood v. Gibson Circuit Court</i> , 157 N.E.2d 475 (1959)	13
<i>Bonney v. Indiana Fin. Auth.</i> , 849 N.E.2d 473 (Ind. 2006)	19
<i>Calvin v. State</i> , 87 N.E.3d 474 (Ind. 2017)	18
<i>Church v. State</i> , 189 N.E.3d 580 (Ind. 2022)	passim
<i>Dague v. Piper Aircraft Corp.</i> , 418 N.E.2d 207 (Ind. 1981)	20
<i>Fruit v. Metropolitan School Dist. of Winchester-White River Tp.</i> , 172 N.E.2d 864 (Ind. 1961)	19
<i>Havel v. Villa St. Joseph</i> , 963 N.E.2d 1270 (Ohio 2012)	14
<i>Holcomb v. Bray</i> , 187 N.E.3d 1268 (Ind. 2022)	17
<i>Jacobs v. State</i> , 835 N.E.2d 485 (Ind. 2005)	9
<i>Meredith v. Pence</i> , 984 N.E.2d 1213 (Ind. 2013)	17
<i>Rassi v. Trunkline Gas Co.</i> , 240 N.E.2d 49 (Ind. 1968)	23
<i>Short v. Texaco, Inc.</i> , 406 N.E.2d 625 (Ind. 1980)	17, 19

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

Slattery v. University of Notre Dame du Lac,
3:21-cv-505-RLM-SLC (N.D. Ind.) 8

South Bend Public Transp. Corp. v. City of South Bend,
428 N.E.2d 217 (Ind. 1981) 19

State ex rel. Commons v. Pera,
987 N.E.2d 1074 (Ind. 2013) 18

State ex rel. Ind. & Mich. Elec. Co. v. Sullivan Cir. Ct.,
456 N.E.2d 1019 (Ind. 1983) 15

State ex rel. Loyd v. Lovelady,
1840 N.E.2d 1062 (Ohio 2006) 16

State ex rel. Root v. Circuit Court of Allen Cty,
289 N.E.2d 503 (Ind. 1972) 20

State v. Doe,
987 N.E.2d 1066 (Ind. 2013) 17

State v. Moss-Dwyer,
686 N.E.2d 109 (Ind. 1997) 17

State v. Rendleman,
603 N.E.2d (Ind. 1992) 17

Trustees of Indiana University v. Spiegel,
186 N.E.3d 1151 (Ind. Ct. App. 2022)..... 8

Union Ins. Co. v. State ex rel. Indiana Dept. of Ins.,
401 N.E.2d 1372 (Ind. Ct. App. 1980)..... 20

Whistle Stop Inn, Inc. v. City of Indianapolis,
51 N.E.3d 195 (Ind. 2016) 17

Young v. State ex rel. School City of Gary,
103 N.E.2d 431 (Ind. 1952) 19

Statutes

Ind. Const., Art. 3, §1..... 18

Ind. Const., Art. 4, § 1..... 18

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

Ind. Const., Art. 4, §16..... 19

I.C. § 21-7-13-6..... 7, 11, 12

I.C. § 25-1-20-1..... 11, 21

I.C. § 34-6-2-10.4..... 12

I.C. § 34-12-5-2..... 11, 12

I.C. § 34-12-5-3..... 12, 14

I.C. § 34-12-5-5..... 11

I.C. § 34-12-5-7..... 12

I.C. § 34-13-3-3..... 11, 21

I.C. § 34-30-13.5-1..... 11, 21

I.C. § 34-30-32-10..... 21

I.C. § 34-30-33-8..... 21

Rules

App. R. 57..... 13

Other Authorities

Black’s Law Dictionary (11th ed. 2019)..... 15

DataUSA
<https://datausa.io/>..... 21

House Bill 1002..... 11

Public Law 166-2021 passim

U.S. Dept. of Education, National Center for Education Statistics, Students in Postsecondary Institutions (Indiana)
<https://nces.ed.gov/ipeds/TrendGenerator/app/answer/2/2?f=6%3D18> 10

U.S. Dept. of Education, NCES, Employees and Instructional Staff (Indiana),
<https://nces.ed.gov/ipeds/TrendGenerator/app/answer/5/30?f=6%3D18> 21

STATEMENT OF INTEREST

Amici curiae represent many of the higher education institutions, both public and private and both small and large, in the State of Indiana.

Purdue University is a public land-grant research university founded in 1869 in West Lafayette. Purdue enrolls the largest student body of any individual university campus in Indiana. It is ranked among the best public universities in the country and nationally known for its engineering and research programs. It offers over 200 majors for undergraduates, over 70 masters and doctorate programs, and numerous professional degrees to over 37,000 undergraduates and over 12,000 postgraduates.

Indiana University Bloomington is a public research university in Bloomington, founded in 1820. It is the flagship and largest campus of Indiana University, with over 34,000 undergraduates and 11,000 postgraduates. IU is ranked among the best public universities in the country numerous undergraduate and graduate programs.

The University of Notre Dame du Lac is an independent Catholic university founded in 1842 by the Congregation of the Holy Cross in Notre Dame, Indiana. Notre Dame is ranked among the top universities in the nation and offers numerous degree programs and 75 majors within six colleges to nearly 9,000 undergraduate and 4,000 graduate students.

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

Independent Colleges of Indiana, Inc. (“ICI”) is a non-profit membership organization that provides legislative advocacy, shared services, and strategic support for all 29 independent, private non-profit, regionally-accredited, degree-granting colleges and universities in the State, striving to assure excellence and choice in higher education.¹

All the amici have filed briefs, as parties or amici, in other cases before Indiana state and federal courts addressing COVID-19’s impact on Indiana’s colleges and universities and, especially, the constitutionality of PL-166. Like Ball State University and its trustees (“Appellees”), amici and all ICI members were faced with the unprecedented dilemma of providing quality education during the once-in-a-century COVID-19 pandemic. Public health concerns required universities to rapidly commit significant resources to adapt and shift their academic curricula online to protect their students (and faculty and staff) and continue their education. Amici, and all of ICI’s membership, recognize the consequences that could arise for colleges and

¹ ICI’s member-universities are: Anderson University, Bethel University, Butler University, Calumet College of St. Joseph, DePauw University, Earlham College, Franklin College, Goshen College, Grace College, Hanover College, Holy Cross College, Huntington University, Indiana Institute of Technology, Indiana Wesleyan University, Manchester University, Marian University, Martin University, Oakland City University, Rose-Hulman Institute of Technology, Saint Mary-of-the-Woods College, Saint Mary’s College, Taylor University, Trine University, University of Evansville, University of Indianapolis, University of Notre Dame, University of Saint Francis, Valparaiso University, and Wabash College. *See* I.C. §21-7-13-6(a)(1)(C) (identifying same).

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

universities across Indiana if class actions arising out of COVID-19, like the one here, are permitted to proceed.

IU, Purdue, and Notre Dame each have unique interests in this Court addressing the constitutionality of PL-166. They are each defendants in nearly identical putative class actions seeking relief based on their transitions to remote education in March 2020. *See Trustees of Indiana University v. Spiegel*, 186 N.E.3d 1151 (Ind. Ct. App. 2022) (consolidated Purdue and IU appeals); *Slattery v. University of Notre Dame du Lac*, 3:21-cv-505-RLM-SLC (N.D. Ind.). IU and Purdue addressed the constitutionality of PL-166 in their appeal, but the appellate court declined to resolve the issue because PL-166 was enacted after the orders being appealed were decided. *Spiegel*, 186 N.E.3d at 1163. In fact, the appellate court cited this case as another means to address PL-166's constitutionality. *Id.* In the federal court putative class action against Notre Dame, the district court stayed proceedings pending resolution in state court of various state law issues, including PL-166's constitutionality.

The ICI also has unique interests in these issues. Its membership remains potentially subject to claims like those here for several more years, which could potentially impose substantial financial harm on ICI schools, particularly since many of its members are smaller institutions.

Amici seek this Court's guidance on the applicability of PL-166 to ensure that the Legislature's decisive action to protect Indiana's colleges and universities from

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

potentially devastating class action litigation in the wake of a deadly pandemic is honored in state and federal courts. Together, amici urge the Court to grant the petition to transfer, reverse the appellate court’s decision, and specifically conclude that PL-166 is a substantive statute that passes constitutional muster.

SUMMARY OF ARGUMENT

On June 23, 2022, this Court decided *Church v. State*, 189 N.E.3d 580 (Ind. 2022), which provided much-needed clarity concerning “[w]hat is a substantive law and what is procedural” – a question that has bedeviled Indiana courts for years. *Jacobs v. State*, 835 N.E.2d 485, 488-89 (Ind. 2005). *Church* made clear that “laws are substantive when they establish rights and responsibilities,” and, “even if statutes establishing substantive rights are ‘packaged in procedural wrapping,’” their “true nature” remains substantive. *Church*, 189 N.E.3d at 588, 589. A statute is “substantive” when it “predominantly furthers public policy objectives of the General Assembly.” *Id.* at 584. The Court underscored that it had “repeatedly upheld statutes over competing Trial Rules when the statutes expressed public policy objectives.” *Id.* at 590.

Nonetheless, two months later, the Indiana Court of Appeals failed to employ *Church’s* analytical framework when deciding this case and concluding that PL-166 – the General Assembly’s considered statutory response to help protect Indiana’s higher education institutions, other necessary industries, and the public fisc from potentially crippling liability for complying with Governor Holcomb’s Executive

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

Orders during the COVID-19 pandemic – was a “procedural statute” that infringed on the judiciary’s prerogatives and therefore was an unconstitutional “nullity.” *Mellowitz v. Ball State Univ.*, slip op., ¶1 (“Opinion”).

Appellees’ petition to transfer should be granted for two separate and independent reasons. First, the Opinion contradicts and undermines this Court’s analysis in *Church* by concluding that PL-166 is procedural rather than substantive. Second, the Court of Appeals has infringed on core legislative functions and usurped the Legislature’s constitutional authority to protect the public fisc and decide how to spend State funds; modify state substantive law and provide or limit the substantive rights of Indiana citizens and institutions; and regulate economic activity and education. The Opinion has undermined the Legislature’s efforts to shield Indiana’s postsecondary institutions, both public and private and large and small, from potentially ruinous financial consequences for simultaneously complying with the Governor’s orders and making herculean efforts to enable approximately 578,800² Indiana college and university students to continue to progress towards their degrees or graduate on time.

Amici therefore ask this Court to grant Appellees’ petition to transfer, reverse the Opinion, and determine that PL-166 is both substantive and constitutional.

² See U.S. Dept. of Education, National Center for Education Statistics (“NCES”), Students in Postsecondary Institutions (Indiana), available at <https://nces.ed.gov/ipeds/TrendGenerator/app/answer/2/2?f=6%3D18>.

ARGUMENT

As soon as practicable following the devastating and life-altering emergence of the novel coronavirus in Indiana, the General Assembly acted to mitigate the economic fallout from the COVID-19 pandemic. Indeed, in its first bill introduced in the 2021 session, the General Assembly proposed numerous statutory additions to establish immunity from COVID-19 related liability. One such measure was enacting House Bill 1002, Public Law 166-2021 (effective April 2021), codified at Indiana Code Chapter 34-12-5 (“PL-166”).

PL-166 made clear that its focus was protecting defendants from liability associated with “claim[s] arising under COVID-19,” by expressly providing that it did not “create a cause of action,” “eliminate a required element of any existing cause of action,” or otherwise “amend, repeal, alter, or affect any immunity, defense, limitation of liability, or procedure available or required under law or contract.” I.C. § 34-12-5-2(b). PL-166 limited the scope of professional discipline that could be imposed on health care providers responding to COVID-19. I.C. §25-1-20-1 *et seq.* It provided immunity for government entities and employees for medical malpractice for responding to COVID-19. I.C. §§ 34-13-3-3(b), 34-30-13.5-1. The General Assembly enacted substantial liability protections for various “covered entit[ies],” which it defined as “governmental entit[ies],” and “approved postsecondary educational institution[s].” *See* I.C. §§ 34-12-5-5, 21-7-13-6.

As relevant here, PL-166 also states that:

BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

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.

I.C. § 34-12-5-7.

This class action bar applies “to a claim arising from COVID-19 during a period of state disaster emergency [] to respond to COVID-19, if the state of disaster emergency was declared[] after February 29, 2020 and before April 1, 2022.” I.C. § 34-12-5-2(a)(1-2) (cleaned up). PL-166 further defines “[a]rising from COVID-19” to include, *inter alia*, “the implementation of policies and procedures to [] prevent or minimize the spread of COVID-19” and “closing or partially closing to prevent or minimize services due to COVID-19[.]” I.C. § 34-12-5-3 (cross-referencing § 34-6-2-10.4).

All amici here are covered entities under PL-166. I.C. § 21-7-13-6. All amici complied with Indiana’s emergency health mandates by suspending in-person education. They enacted policies and procedures, and committed significant resources, to protect their students, faculty, and staff from the COVID-19 pandemic, all while ensuring their students’ continued education. I.C. § 34-6-2-10.4(b). The implied contract and unjust enrichment claims against Ball State University, Indiana University, Purdue University, or Notre Dame are clearly covered by PL-166. Indeed, PL-166 was part of several protections designed to prevent Indiana universities (and select professions and public institutions) from shouldering the burden of the economic fallout from the pandemic.

BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

PL-166 is a duly-enacted, substantive Indiana statute. Appellees’ petition to transfer should be granted.

A. Transfer is necessary because the appellate court failed to follow this Court’s analysis in *Church*.

This Court should grant transfer because the Opinion conflicts with this Court’s recently issued decision in *Church*. See App. R. 57. That decision was intended to assist Indiana courts in what has historically been an arduous task: *i.e.*, identifying whether a statute is “procedural” or “substantive.” The Court, looking to several sister states’ precedents, found that a mechanical test was inadequate to determine a statute’s nature. *Church*, 189 N.E.3d at 590. Instead, the Court held that “[e]ven though the statute has procedural elements,” it is substantive when it “predominantly furthers public policy objectives of the General Assembly, as opposed to judicial administration objectives characteristic of a procedural statute.” *Id.* at 584.

The appellate court, although correctly acknowledging *Church*’s new standard, Opinion, ¶¶8–9, failed to consider the significant public policy objectives that form the predominant purpose of PL-166. Before this important statute is rendered a “nullity,” *id.*, ¶16, this Court should grant transfer and conduct a full *Church* analysis and consider the important, substantive policy objectives of PL-166.

PL-166 is substantive because it has established rights for covered entities, including Indiana’s higher education institutions. Under long-understood Indiana law, “laws are substantive when they establish rights and responsibilities[.]” *Blood v. Gibson Circuit Court*, 157 N.E.2d 475, 478 (1959). A right is “[a] power, privilege, or

BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

immunity secured to a person by law.” Black’s Law Dictionary (11th ed. 2019) (emphasis added). A statute can also confer a right “when it contains mandatory language and restricts judicial or agency discretion.” *Havel v. Villa St. Joseph*, 963 N.E.2d 1270, 1277 (Ohio 2012) (finding substantive Ohio’s statute mandating bifurcation in tort actions seeking punitive damages, *inter alia*, because, “[b]y eliminating judicial discretion, [the statute] creates a concomitant right to bifurcation”). PL-166 fits squarely in the common understanding of a substantive law. It created a substantive right—an immunity—that protects covered entities, including Indiana’s higher education institutions, by exempting them from certain class claims for their “implementation of policies and procedures to[] prevent or minimize the spread of COVID-19” and “closing or partially closing to prevent or minimize services due to COVID-19[.]” I.C. § 34-12-5-3. The Legislature granted this immunity to higher education institutions to further multiple important policy objectives that are well within its prerogative (*see infra* Section B).

PL-166’s substantive nature is directly analogous to the substantive statute upheld in *Church*. There, this Court recognized “the General Assembly’s power to narrow the scope of its substantive grant of deposition rights for criminal defendants in the service of protecting children. Or, stated differently, its power to extend a substantive right to children by limiting a right previously conferred without exception to defendants by statute.” *Church*, 189 N.E.3d at 589. Here, the General Assembly, via PL-166, likewise “narrow[ed] the scope of [plaintiffs’] rights” to assert

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

claims on behalf of others and “extend[ed] a substantive right to [higher education institutions] by limiting a right previously conferred without exception” to plaintiff-students to bring aggregate claims. *Id.*

Church explained that the proper analysis required examining a statute’s “predominant purpose”: procedural laws “predominantly foster accuracy in fact-finding,” whereas substantive laws “predominantly foster other objectives.” *Church*, 189 N.E.3d at 589 (quotation omitted). Plainly PL-166 does not address the accuracy of judicial fact-finding or alter Trial Rule 23’s procedure at all. In fact, the Opinion declared that PL-166 “frustrates” judicial administrative objectives. Opinion, ¶14. Under *Church*, this fact weighs in *favor* of PL-166’s substantive nature, not against it. *Church*, 189 N.E.3d at 589. But the appellate court found this fact indicative of the statute’s “procedural nature.” Opinion, ¶14. However, even when it might appear “attractive” to apply court rules over a substantive statute, *e.g.*, for judicial efficiency, it is “intolerable” for a court to frustrate a conferred statutory right. *Church*, 189 N.E.3d at 590; *State ex rel. Ind. & Mich. Elec. Co. v. Sullivan Cir. Ct.*, 456 N.E.2d 1019, 1021 (Ind. 1983).

The Opinion failed to recognize the multiple overriding policy objectives of PL-166 (further explained below) and instead focused on seemingly procedural language in the statute and its effect on judicial efficiency. But this Court was clear that, even if a statute is “packaged in procedural wrapping,” that does not alter its true nature.

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

Church, 189 N.E.3d at 589 (quoting *State ex rel. Loyd v. Lovelady*, 1840 N.E.2d 1062, 1064 (Ohio 2006)).

Because PL-166 is a substantive law designed to target policy objectives, this Court need not decide whether it conflicts with this Court’s procedural rules (it does not). *See id.* at 591–92. The Court should grant transfer, conduct the “thoughtful analysis” of procedure versus substance *Church* requires, and conclude that PL-166 is a constitutionally-enacted, substantive statute.

B. Transfer is necessary because the appellate court usurped the General Assembly’s core legislative functions and violated separation of powers by declaring PL-166 to be an unconstitutional “nullity.”

Transfer is also necessary because the appellate court usurped several of the General Assembly’s core legislative functions by concluding that PL-166 is an unconstitutional “nullity.” Opinion, ¶1. In doing so, the Opinion never acknowledges the standard, explained by many of this Court’s decisions, that duly enacted statutes are presumptively valid; and it negates multiple responsibilities that this Court has held that the Constitution grants exclusively to the General Assembly, including the obligation to direct and protect how State funds are spent and to regulate economic activity. At a minimum, any decision about the constitutionality of legislation validly enacted by the General Assembly should be made by this Court. Once transfer is granted, this Court should conclude that PL-166 is substantive and passes constitutional muster.

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

- 1. The Opinion neither acknowledges nor employs the appropriate standard by which validly-enacted statutes are reviewed for constitutionality.**

Any inquiry into the constitutionality of a statute duly-enacted by the General Assembly begins with the presumption that the Legislature acted constitutionally. *Holcomb v. Bray*, 187 N.E.3d 1268, 1277 (Ind. 2022) (“all laws come ‘before us clothed with the presumption of constitutionality unless clearly overcome by a contrary showing.’”) (citations omitted). Any litigant challenging a statute’s constitutionality has a “high burden” to prove that the statute is unconstitutional. *Id.*; *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013) (“heavy burden of proof”); *State v. Moss-Dwyer*, 686 N.E.2d 109, 111-12 (Ind. 1997) (review is “highly restrained” and “very deferential”). Courts “resolve any doubts about the law’s constitutionality in the Legislature’s favor.” *Holcomb*, 187 N.E.3d at 1277 (citation omitted). In essence, “the claimant assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied.” *Meredith*, 984 N.E.2d at 1218 (citation omitted); *Short v. Texaco, Inc.*, 406 N.E.2d 625, 628 (Ind. 1980) (“They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law.”).

This Court has reaffirmed this fundamental principle countless times, including in *Church*. *Church*, 189 N.E.3d at 586; *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016); *State v. Doe*, 987 N.E.2d 1066, 1070

(Ind. 2013); *State v. Rendleman*, 603 N.E.2d 133, 1334 (Ind. 1992); *see also supra*.

The Opinion, however, conflicts with this precedent because it neither acknowledges nor employs this basic principle.

2. This deference to the General Assembly arises from the constitutionally-mandated separation of powers requirement.

The judicial deference inherent in this standard of review emanates from the Indiana Constitution itself. Article 3, Section 1 divides the Government’s powers into three separate departments, Legislative, Executive, and Judicial. Ind. Const., Art. 3, §1. This provision recognizes “that each branch of the government has specific duties and powers that may not be usurped or infringed upon by the other branches of government.” *State ex rel. Commons v. Pera*, 987 N.E.2d 1074, 1079 (Ind. 2013) (quotation omitted). “The separation of powers doctrine prevents the courts from reviewing political, social, and economic actions within the exclusive province of coordinate branches of government.” *Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013).

“[T]he power to legislate ‘is vested exclusively in the Legislature under Article 4, Section 1 of the Indiana Constitution.’” *Calvin v. State*, 87 N.E.3d 474, 478 (Ind. 2017) (citation omitted); *Church*, 189 N.E.3d at 588. This Court has warned that “[c]ourts should be very careful not to invade the authority of the legislature.” *Berry*, 990 N.E.2d at 415. Hence, the judicial reluctance to invalidate a statute duly-enacted by the Legislature comes directly from the foundational animating principle of separation of powers.

3. PL-166 is the result of the Legislature’s exercise of several of its core functions.

The Constitution gives “all powers” “necessary for ... a free and independent State” to the Legislature. Ind. Const. Art. 4, §16. Thus, the Legislature maintains “the right to enact ‘all laws and regulations respecting the peace, the safety, the health, the happiness, and general well-being’ of the citizenry.” *Church*, 189 N.E.3d at 588-89 (citation omitted); *Short*, 406 N.E.2d at 629. It obviously has the power to determine how state funds are appropriated and for what purpose. *Bonney v. Indiana Fin. Auth.*, 849 N.E.2d 473, 482 (Ind. 2006) (“appropriation of funds is a central legislative function unusually unsuitable to judicial review as a matter of separation of powers.”); *South Bend Public Transp. Corp. v. City of South Bend*, 428 N.E.2d 217 (Ind. 1981).

It maintains the power to regulate economic activity. *Short*, 406 N.E.2d at 528 (“The Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well. ... In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court.”). It has the power to “determine how the educational system of the state shall be administered and carried out And with that determination the judiciary may not interfere.” *Fruit v. Metropolitan School Dist. of Winchester-White River Tp.*, 172 N.E.2d 864, 866 (Ind. 1961); *Young v. State ex rel. School City of Gary*, 103 N.E.2d 431, 432 (Ind. 1952).

BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

The Legislature also has the power to create, define, and limit substantive rights. It “clearly has the power to abrogate or modify common law rights and remedies.” *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213 (Ind. 1981); *Union Ins. Co. v. State ex rel. Indiana Dept. of Ins.*, 401 N.E.2d 1372, 1375 (Ind. Ct. App. 1980) (“It is within the power of the Indiana General Assembly to modify common law rules and remedies.”).

The Legislature similarly has the power to change the rules and rights for courts sitting in equity.³ *State ex rel. Root v. Circuit Court of Allen Cty.*, 289 N.E.2d 503, 506 (Ind. 1972) (“Under the system of separation of powers in this state the Legislature may constitutionally prevent a court from exercising its equity jurisdiction ...”).

Each of these exclusive legislative functions contributed to, and animated, the Legislature’s response to COVID-19. With PL-166, the Legislature sought to protect essential industries and occupations from potentially catastrophic liability for continuing to perform vital functions while complying with Governor Holcomb’s

³ The Opinion made much of the view that class actions have their roots in equity. Opinion, ¶10. However, that is a distinction without a difference because the Legislature can define and limit rights in equity also. In fact, “where substantial justice can be accomplished by following the law, and where the parties’ actions are clearly governed by the rules of law, equity follows the law.” *Root*, 289 N.E.2d at 506. Therefore the equity/law distinction is of no moment because the General Assembly maintains the authority to abrogate or limit rights under either regime.

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

emergency orders and to otherwise provide for the general health and welfare of both Hoosiers and Indiana businesses.⁴

In particular, through PL-166’s prohibition of class actions against higher education institutions, the Legislature recognized the crucial role Indiana’s colleges and universities play in educating its citizens, and serving as engines of economic activity in many communities. Throughout Indiana, postsecondary institutions not only play an important role in preparing half a million Hoosier students for employment, but they also are an important source of jobs and income for Indiana’s workforce. Postsecondary education institutions employ over 86,000 people in Indiana.⁵

Despite being important employers in their regions, many ICI members are still small and would likely suffer particularly devastating consequences if a class action ever proceeded to judgment against them. For some ICI members, the potential class action judgment could exceed the institution’s total endowment.⁶ Even

⁴ The Legislature protected essential industries from liability in other ways. It enacted two other class action bars to shield other economic actors from tort liability. *See* I.C. § 34-30-32-10; *id.* § 34-30-33-8. It enacted several protections for health care providers responding to the pandemic. *Id.* § 25-1-20-1 *et seq.*; *id.* § 34-30-13.5-1(b). And it exempted government entities and employees from certain kinds of COVID-19-related liability. *Id.*, § 34-13-3-3(b).

⁵ U.S. Dept. of Education, NCES, Employees and Instructional Staff (Indiana), available at <https://nces.ed.gov/ipeds/TrendGenerator/app/answer/5/30?f=6%3D18>.

⁶ For information regarding each school’s student population, tuition, and endowments, *see* DataUSA, available at <https://datausa.io/> (last accessed on November 19, 2022).

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

schools with larger endowments would face substantial funding challenges (since an endowment is not an undifferentiated pool of funds, but a collection of separate, often restricted funds). For several amici, if a certified class prevailed at trial, a class-wide damages judgment could conceivably exceed \$100 million. Such judgments would needlessly drain State funds from public institutions. For smaller institutions, they could pose significant resource challenges that could impact services or programs and effectively damage future classes of students to ostensibly benefit students in each school's putative class.

The Legislature's decision to provide immunity to these institutions and limit the ability of a single student to initiate a potentially catastrophic class action against her school therefore sits at the intersection of multiple important legislative policy objectives and responsibilities, including the obligations to protect the public fisc (for public institutions like Indiana University, Purdue University, and Ball State), protect private higher education institutions (particularly smaller ones) from ruinous class action litigation, to regulate higher education in a rapidly-changing environment, to help maintain economic activity, and to otherwise protect the physical health and safety of Hoosier students and employees.

That the Legislature chose to address these policy goals by providing a substantive right, *i.e.*, an immunity, to postsecondary institutions from a particular kind of class-wide, aggregate litigation, and eliminating the substantive right of putative plaintiffs to assert claims on behalf of others is both within the Legislature's

BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

prerogative and perfectly consonant with the Legislature’s ability to create, define, and limit substantive rights either at common law or in equity. PL-166 therefore was simply one “careful legislative balancing of policy considerations,” *Church*, 189 N.E.3d at 591, that is substantive, not procedural, law, even if it is “packaged in procedural wrapping.” *Id.* at 589.

The Opinion, unfortunately, considered none of these important legislative policy objectives or the exclusive role the Legislature plays in addressing these weighty issues when analyzing the statute. *Cf. Rassi v. Trunkline Gas Co.*, 240 N.E.2d 49, 53 (Ind. 1968) (“To allow the courts to substitute their judgment for that rendered by the representatives of the people, in instances where the legislature has not acted arbitrarily, would violate the doctrine of separation of powers.”). Transfer is necessary to preserve the constitutionally-mandated separation of powers and ensure that the judiciary does not intrude on the General Assembly’s exclusive legislative functions.

CONCLUSION

Appellees’ petition to transfer should be granted. The Opinion undermines this Court’s analysis in *Church*, contravenes numerous considered public policy objectives of the General Assembly, and threatens to impose substantial, even ruinous, financial hardship on Indiana’s higher educational institutions. The Court should conclude that PL-166 is a substantive statute that does not violate any constitutional provisions.

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF
NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF
APPELLEES

Respectfully submitted,

/s/Brian E. Casey _____

Brian E. Casey (23263-71)
Sarah E. Brown (35715-53)
Barnes & Thornburg LLP
201 S. Main Street, Suite 400
South Bend, IN 46601

Counsel for Amici

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

WORD COUNT CERTIFICATE

I certify that this BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC, AND INDEPENDENT COLLEGES OF INDIANA complies with the type-volume requirements of Ind. App. R. 44(E) because it contains no more than 4,200 words (4,200) based on word processing software, excluding the parts of the brief exempted by App. R. 44(C). This brief complies with the typeface requirements and type style requirements of App. R. 43(D) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font.

/s/Brian E. Casey _____

BRIEF OF *AMICI CURIAE* INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC AND INDEPENDENT COLLEGES OF INDIANA IN SUPPORT OF APPELLEES

CERTIFICATE OF FILING AND SERVICE

Pursuant to Indiana Appellate Rules 9(A)(2) & 24(A)(1), I certify that the foregoing BRIEF OF AMICI CURIAE INDIANA UNIVERSITY, PURDUE UNIVERSITY, UNIVERSITY OF NOTRE DAME DU LAC, AND INDEPENDENT COLLEGES OF INDIANA was filed electronically with the Clerk of the Indiana Supreme Court via the Indiana Electronic Filing System (IEFS), and was served electronically on the following counsel of record through the Court's electronic filing system on November 21, 2022:

Jane Dall Wilson
Paul A. Wolfla
Amanda L. Shelby
Jason M. Rauch
Faegre Drinker Biddle & Reath LLP
300 N. Meridian Street, Suite 2500
Indianapolis, IN 46204-1750
jane.wilson@faegredrinker.com
paul.wolfla@faegredrinker.com
amanda.shelby@faegredrinker.com
jason.rauch@faegredrinker.com

Jodie Ferise
Independent Colleges of Indiana
30 S. Meridian St., Ste. 800
Indianapolis, IN 46204
jferise@icindiana.org

Thomas M. Fisher
James A. Barta
Aaron T. Craft
Abigail R. Recker
Benjamin Jones
Office of the Attorney General
Indiana Government Center South, 5th
Fl.
302 West Washington Street
Indianapolis, IN 46204-2770
aaron.craft@atg.in.gov
abigail.recker@atg.in.gov
benjamin.jones@atg.in.gov

Eric S. Pavlack
Colin E. Flora
Pavlack Law, LLC
50 E. 91st St., Ste. 305
Indianapolis, IN 46240
eric@pavlacklawfirm.com
colin@pavlacklawfirm.com

/s/*Brian E. Casey*