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## REPLY IN SUPPORT OF PETITION TO TRANSFER

### I. A Conflict Over Standing Justifies Transfer

Plaintiffs argue that the decision below does not implicate *Fort Wayne Education Association v. Indiana Department of Education*, 692 N.E.2d 902 (Ind. Ct. App. 1998), because that decision dealt with the direct injury requirement for standing rather than redressability, which, they state, “is clearly the thrust of Defendants’ argument.” Resp. to Pet. 3. On the contrary, Defendants have consistently argued that Plaintiffs lack standing because they have not alleged a cognizable direct injury. See Br. of Defs./Appellees 12-13; Pet. to Transfer 6-8. One basis for inferring lack of cognizable injury is the observation that any benefit to the plaintiffs of a favorable decision would be entirely speculative.

To review: In *Fort Wayne*, the Court of Appeals held that parents of public school students *may not* challenge a public school’s funding arrangements based only on speculation that a favorable decision might result in more money for their children’s programs. See *Fort Wayne*, 692 N.E.2d at 904. Here, in contrast, the Court of Appeals ruled that plaintiff public school students and their parents *may* challenge public school funding arrangements based only on speculation that a favorable decision might yield more money for their children’s programs. See *Bonner ex rel. Bonner v. Daniels*, 885 N.E.2d 673, 685 (Ind. Ct. App. 2008). These decisions are plainly irreconcilable.

### II. The Meaning of the General and Uniform Clause Presents an Important Question Demanding This Court’s Immediate Attention

Plaintiffs resist transfer because they first want “an opportunity to prove . . . that the State is currently failing to provide all its children with the education

required by the Indiana Constitution.” Resp. to Pet. 9. Neither Plaintiffs nor the Court of Appeals, however, has said *what* constitutes an “education required by the Indiana Constitution.” This failure not only poses practical problems, but also fundamentally belies any constitutional basis for this case. Before trial, critically important questions as to whether one is even warranted and, if so, what it would look like, must be answered.

1. As described in the Petition, the decision below conflicts with this Court’s holdings that the General and Uniform Clause relates to legislative power and responsibility and is not a source of judicially enforceable individual rights. *See* Pet. to Transfer 11-13. In response, Plaintiffs cite *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481 (Ind. 2006), to show that Article VIII, § 1 “is subject to judicial enforcement.” Resp. to Pet. 7-8. But *Nagy* interpreted the *Free Tuition* Clause of § 1, not the *General and Uniform* Clause. Plaintiffs make no argument that the Indiana school funding formula somehow violates the Free Tuition Clause—or any clause of Section 1 other than the General and Uniform Clause—and they cite no cases that apply the General and Uniform Clause to confer judicially enforceable rights on individuals.

Seeking to obscure this all-important distinction, Plaintiffs chide the State for asserting, in the face of *Nagy*, that “‘none’ of this Court’s decisions establish that the [Education Clause] imposes judicially enforceable duties on the General Assembly or creates judicially enforceable rights for students.” Resp. to Pet. 8 (citation omitted). As the strategic use of brackets in that quotation suggests, the State has never made such a statement. What the State has actually asserted is

that no case has applied the *General and Uniform Clause* to confer judicially enforceable individual rights. Pet. to Transfer 11. The State’s doctrinal observation is accurate, and the precedents that do exist directly foreclose Plaintiffs’ claims in this case.

2. The decision below also conflicts with the Court’s prior holding that the General Assembly’s decisions concerning governmental appropriations are not judicially reviewable. *See Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473, 482 (Ind. 2006). There, the plaintiffs sought to invalidate appropriations for highway construction. *Id.* at 477. Here, the plaintiffs seek to invalidate appropriations for education. There is no meaningful distinction, and Plaintiffs do not even try to refute the conflict.

3. Conflicts aside, whether the General and Uniform Clause confers a judicially enforceable individual right to a minimally adequate education presents “an important question of law . . . that has not been, but should be, decided by the Supreme Court.” Ind. Appellate Rule 57(H)(4). Judge Friedlander’s dissent adds doubt about the decision below that further justifies transfer. While offering vague defenses of judicial review generally, Plaintiffs offer no direct response to this rationale for granting transfer.

4. Finally, Plaintiffs do not deny that the Court of Appeals provided no legal standard for trying this case. They argue instead that lack of standards “has not proved to be an obstacle for the vast majority of other state supreme courts” that have entertained constitutional challenges to school funding systems. Resp. to Pet. 9. Decades of intractable education funding litigation in many states

demonstrate otherwise. See Br. of Defs./Appellees 37-43<sup>1</sup>; see also Chris Atkins, *Appropriation by Litigation: Estimating the Costs of Judicial Mandates for State and Local Education Spending*, Tax Foundation Background Paper, July 2007, at 7, available at <http://www.taxfoundation.org/files/bp55.pdf> (observing that a “trend [of] compliance with court mandates followed by more lawsuits and mandates [] is typical in most states under court order to improve school finance systems.”).

Regardless, the point remains that the General and Uniform Clause contains no text by which a trial court can develop a principled, workable, and valid legal standard for evaluating the quality of Indiana’s educational system. The Court should take this case now to prevent a waste of resources in the trial court.

### CONCLUSION

The Court should grant the Petition to Transfer.

Respectfully submitted,

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<sup>1</sup> In the Petition to Transfer, *Lobato v. Colorado* was cited incorrectly. The correct citation is 2008 WL 194019 (Colo. App.).

## **WORD COUNT CERTIFICATE**

As required by Indiana Appellate Rule 44, I verify that this Reply in Support of Petition to Transfer contains no more than 1,000 words.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2008, a copy of the foregoing was served via First Class United States mail, postage pre-paid to the following:

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