
IN THE
Supreme Court of the State of Indiana

No. 71S00-0606-CV-00204

Court of Appeals Cause No. 71A03-0606-CV-239

STEVE BONNEY, JOHN GIBSON,)	
ANITA GIBSON, TOM PIETRZAK,)	
RANDY NACE, CLARINDA NACE,)	
JUNE NACE, and THE CITIZENS ACTION)	
COALITION OF INDIANA, INC.,)	Appeal from the
an Indiana not for profit corporation,)	St. Joseph Superior Court
)	
Plaintiffs/Appellants,)	No. 71D07-0604-PL-00144
)	
v.)	The Honorable
)	Michael P. Scopelitis, Judge
INDIANA FINANCE AUTHORITY,)	
STATEWIDE MOBILITY PARTNERS, LLC,)	
ITR CONCESSION COMPANY, LLC,)	
THE INDIANA DEPARTMENT OF)	
TRANSPORTATION, MITCHELL E.)	
DANIELS, Governor of Indiana, and)	
TIM BERRY, Treasurer of Indiana,)	
)	
Defendants/Appellees.)	

BRIEF OF DEFENDANTS/APPELLEES

**THE INDIANA DEPARTMENT OF TRANSPORTATION, MITCHELL E. DANIELS,
GOVERNOR OF INDIANA, AND TIM BERRY, TREASURER OF INDIANA**

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STATEMENT OF SUPREME COURT JURISDICTION

This is an appeal from the May 26, 2006, Order of the St. Joseph Superior Court, declaring this case to be a Public Lawsuit pursuant to Indiana Code § 34-13-5-1 *et seq.* and ordering the Plaintiffs to post a bond *pendente lite* of \$1.9 billion within ten days on pain of dismissal of the lawsuit. *See Bonney v. Ind. Fin. Auth.*, No. 71D07-0604-PL00144, Slip Op. at 82 (St. Joseph Superior Ct. May 26, 2006). The trial court's May 26 Order is an immediately appealable interlocutory order. *See Ind. Code § 34-13-5-7(d)*. On June 5, 2006, Appellants filed in the trial court a Notice of Appeal to the Indiana Court of Appeals. App. at 1104-06.

That same day, however, Appellees filed a verified motion pursuant to Rule 56(A) of the Indiana Rules of Appellate Procedure to transfer jurisdiction over the appeal to this Court. Pursuant to Rule 56(A), the Supreme Court may accept jurisdiction of an appeal upon a showing that the appeal "involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination." The Court immediately granted Appellees' motion and "assumed jurisdiction over this appeal on an emergency basis." *See Bonney v. Ind. Fin. Auth.*, No. 71S00-0606-CV-00204, Order at 1 (Ind. June 5, 2006).

STATEMENT OF ISSUES

1. Whether a lawsuit against the Indiana Finance Authority seeking to enjoin the Lease of the Indiana Toll Road to a private consortium to finance statewide infrastructure projects constitutes a "Public Lawsuit" within the meaning of Indiana Code § 34-13-5-1 *et seq.*
2. Whether the "local and special laws" restriction of Article 4, section 23 of the Indiana Constitution permits the General Assembly to distribute

proceeds from the Indiana Toll Road Lease to counties that may conceivably incur greater burdens as a result of the Lease.

3. Whether the “Public Debt” retirement provision of Article 10, section 2 of the Indiana Constitution requires the General Assembly to reserve proceeds from the Indiana Toll Road Lease for contingent future obligations of the Indiana Finance Authority and Teachers’ Retirement Fund or to pay existing municipal debts.
4. Whether Article 10, section 1 of the Indiana Constitution, which generally requires uniform and equal ad valorem property assessment and taxation, requires the General Assembly to impose property taxes on lessees of real property.

STATEMENT OF THE CASE

The State Defendants are satisfied with the Statement of the Case presented by the Indiana Finance Authority (“IFA”).

STATEMENT OF FACTS

This suit challenges provisions of House Enrolled Act 1008, known as the “Major Moves” legislation, which authorizes the IFA to lease the Indiana East-West Toll Road for an up-front payment of \$3.8 billion. *See* House Enrolled Act 1008, § 39; App. at 1137. The parties to the Toll Road Lease are IFA and ITR Partners Concession Company, Limited. App. at 90, 1117. The proceeds of the Toll Road Lease will be distributed across Indiana to upgrade the State’s transportation infrastructure. *See* House Enrolled Act 1008, §§ 5, 7. Some projects to be financed by the Toll Road Lease include the final segment of the Hoosier Heartland Highway, two new Ohio River Bridges near Louisville, upgrading sections of U.S. 31 between Indianapolis and South Bend, modernizing the Indiana Toll Road Corridor, and

accelerating construction of I-69 between Evansville and Indianapolis as a toll road, in addition to more than 200 other transportation projects. See http://www.in.gov/gov/issues/MM_Introduction.pdf, at 4 (last visited June 11, 2006); http://www.in.gov/gov/issues/MM_New_Projects.pdf (last visited June 11, 2006) (detailing INDOT's 10-year plan for new projects); http://www.in.gov/gov/issues/MM_Preservation_Projects.pdf (last visited June 11, 2006) (detailing INDOT's 10-year plan for road preservation).

1. The story of why the Toll Road Lease and the Major Moves legislation are constitutional begins with the tale of the disastrous nineteenth-century infrastructure-financing schemes that precipitated our current State Constitution—and the ways Indiana citizens have financed public projects since that time.

Throughout the 1820s and 1830s, particularly with the Internal Improvements Act of 1836, Indiana (and many other States) embarked upon an aggressive program to build canals, highways, bridges, and other infrastructure. See Donald F. Carmony, *Historical Background of the Restrictions against State Debt in the Indiana Constitution of 1851*, 47 Ind. Mag. of Hist. 129, 135 (June 1951). The State financed these projects by issuing bonds on the theory that the resulting increase in State wealth and the tolls collected from the new canals and roads would allow the State pay off the bonds without raising taxes. See Donald F. Carmony, *Indiana 1816-1850: The Pioneer Era* 194 (1998) [hereinafter Carmony]. In addition to issuing bonds, the State began to invest in the various construction companies by purchasing equity shares in those companies and amplifying their

risk by stepping into both the shoes of lender and owner. *See N. Ind. Bank & Trust v. State Bd. of Fin.*, 457 N.E.2d 527, 529-30 (Ind. 1983).

Unfortunately, economic depression followed. *See id.* at 530. This, combined with cost overruns, lack of cash flow, and inadequate planning led to the failure of many of the corporations that were charged with building the projects in which the State had invested. Many projects were never completed, and with them died any hope of paying off the enormous debt with resulting revenue. *See generally* Carmony, at 202-78. Consequently, the State was unable to make payments and began defaulting on interest payments. *See id.* at 288.

In an effort to obtain more favorable credit terms, in 1846, the General Assembly approved the “Butler Bills” (named for the agent representing bondholders in negotiations with the State), which converted many of the outstanding bonds to “State Stock Certificates.” *See* Carmony, at 302-10. In essence, the bills gave the bondholders the option to redeem their investment from the State over time, with half of the revenue coming from the general fund and the other half limited to only revenues generated by the roads and canals. *See id.* at 308.

Indiana benefited because the amount of the State’s liability on its bonds was reduced, and the holders benefited by being guaranteed at least partial payment. However, because the State itself was still liable to pay portions of that debt, many generations of Indiana citizens would eventually be saddled with the debt. *See* 2 *Report of the Debates and Proceedings of the Convention for the Revision of the*

Constitution of the State of Indiana, 1850 1773-78 (Indiana Historical Collections reprint 1935) [hereinafter *Debates*] (Delegate Hall explaining in detail that his estimation for the retirement of all debt would be in 1866); *cf.* 1915 Auditor's Report, *Addendum*, at 62 (noting that the last of the instruments used to refinance debt was finally extinguished). This series of events was perhaps the single biggest reason for the Constitutional Convention of 1850 and resulting Indiana Constitution of 1851.

Unsurprisingly, several constitutional provisions owe their origins to the failure of the infrastructure-improvement projects of the early nineteenth century. Prominent examples include: Article 10, section 5, which permits the State to contract debt only in exigent circumstances; Article 10, section 6, which prohibits counties from subscribing stock and from borrowing excessively and also prohibits the State from assuming county debts; and Article 11, section 12, which prohibits the State from becoming a stockholder in any bank or corporation or lending its credit.

Also among the debt-management provisions of the 1851 Constitution is Article 10, section 2, which mandates that the proceeds "derived from the sale of any of the public works belonging to the State, and from the net annual income thereof . . . shall be annually applied . . . to the payment of the principal of the Public Debt." This clause was designed not only to provide some means to pay down the debt that existed in 1850, but more precisely to ensure that any proceeds that might one day be derived from the defunct public-works projects would be used to

pay down the debt those projects created. *See* 1 Debates, at 228 (Delegate Maguire stating that it would only be proper to retire the debt if the internal improvements were ever sold, since it was the improvements that caused the debt).

The new Constitution achieved its goals of retiring the crushing debt that existed in 1851 and of imposing fiscal discipline on the State. By 1873, the General Assembly was able to call the State Stock Certificates for redemption and stop the accrual of interest, after which holders either redeemed their certificates or their interest lapsed. *See Carr v. State*, 127 Ind. 204, 26 N.E. 778, 781 (1891); *see also* Ind. Const. art. 10, § 7 (constitutional amendment relieving the State from any liability on certificates issued under the Butler Bills).

Additionally, the bonds that had not been converted into stock certificates were retired in 1882. *See* Acts of 1883, at 235. Finally, on April 1, 1915, the last of the temporary loans used to refinance the remaining debt at lower interest rates was retired. *See* 1914 Auditor's Report, *Public Debt Statement*, at 60; 1915 Auditor's Report, *Public Debt Statement*, at 62. On February 7, 1916, the Auditor issued an addendum to the 1915 Report stating that Indiana had no outstanding debt. *See* 1915 Auditor's Report, *Addendum*, at 62.

Because of the fiscal-discipline restrictions of the 1851 Constitution, the General Assembly has financed public-construction projects through means other than State-issued bonds. For at least a half century, the legislature has empowered political instrumentalities, known as "bodies corporate and politic," to issue bonds and manage debt. *See Ennis v. State Highway Comm'n*, 231 Ind. 311, 108 N.E.2d

687, 693-95 (1952). One of the most prominent such bodies was the Indiana Toll Road Commission, a precursor to the IFA. *See id.* Such bodies are permitted to issue bonds, even though the State as such is not, because they insulate the State's general fund from direct obligation to the bondholders. *See id.* at 699. Hence, the debt of such bodies is not deemed State debt, which again is prohibited by the 1851 Constitution. *See id.*

On May 15, 2005, each debt-issuing body corporate and politic was consolidated into the IFA in order to provide economic efficiencies and management synergies and to enable the State to communicate as one voice in financial markets. App. at 1468.

2. Major Moves represents another major advancement in public finance. Major Moves was precipitated by a desperate need to upgrade Indiana's transportation infrastructure. App. at 186 (testimony of IFA Chair Charles Schalliol that Indiana's infrastructure is "woeful" and lagging behind that of other States). In short, more and better roads, highways, and bridges are necessary to fuel Indiana's economic development. *See id.* At the same time, however, economic models also show that increasing taxes on citizens and corporations tends to stifle the very economic growth the State seeks. *See Daniel J. Mitchell, The Historical Lessons of Lower Tax Rates* (July 19, 1996), available at <http://www.heritage.org/Research/Taxes/BG1086.cfm> (last visited June 11, 2006). Hence, raising taxes is not an attractive option for financing the needed infrastructure.

Fortunately, the citizens of Indiana, through the IFA, have a non-tax asset to leverage in order to finance the much-needed projects: the revenue-generating Indiana Toll Road. State and IFA officials deduced that a highly capitalized private company or consortium might be willing to pay up-front for the privilege of operating the Toll Road and for receiving whatever revenue the Toll Road might generate. App. at 150-51.

The IFA first sought proposals from parties interested in leasing the Toll Road in the fall of 2005. App. at 156. The proposals were screened for financial capability and resulted in nine qualified consortia. *See id.* Once each of these consortia examined the Lease proposed by the IFA, they were asked to submit bids. App. at 158. In the end, the IFA received four bids and the winning bid was the high dollar amount of \$3.8 billion. App. at 159, 162. The Toll Road Lease was signed on April 12, 2006, App. at 162, and the transaction is set to close by June 30, 2006. App. at 163.

3. Because the need for infrastructure improvements is statewide, all 92 Indiana counties will receive a portion of the Toll Road Lease proceeds for infrastructure improvements. App. at 932; *see also* House Enrolled Act 1008, § 5; *see* <http://www.ai.org/dot/div/projects/tenyear/> (last visited June 11, 2006) (INDOT's summary of monies flowing from Major Moves legislation, which demonstrates that monies would flow to all 92 counties); *Bonney*, Slip Op. at 60, ¶ 288 (noting that Plaintiffs conceded that all 92 counties would benefit from the Major Moves legislation).

The General Assembly, however, recognized that leasing the Toll Road would not be a costless endeavor. For the lessees, one of the many values of operating the Toll Road lies in their ability to increase tolls (within specified limits). App. at 181-82. One consequence of increased tolls may be that local motorists, for whose shorter trips the convenience of the Toll Road may be less crucial, will use other local roads more frequently. App. at 344. One St. Joseph County resident testified at the bench trial in this case that the increase in tolls might drive some motorists off the Toll Road and onto alternate routes that “keep them in the same general area as the Toll Road.” App. at 344. This, in turn, might impose added road-maintenance costs and other infrastructure costs on the counties through which the Toll Road runs. App. at 180.

Because they were concerned that future toll increases would cause increased traffic to be diverted onto local roads, legislators “wanted to see . . . money set aside for those counties most closely aligned with the Toll Road so that they would be able to do mitigation.” *Id.* Accordingly, the five eastern-most counties on the Toll Road, including La Porte, St. Joseph, Elkhart, LaGrange, and Steuben, will receive \$40 million each for cost mitigation. The two western-most Toll Road counties, Lake and Porter, will receive \$15 million and \$25 million, respectively. *See* House Enrolled Act 1008, § 5. These amounts differ from the other Toll Road counties because Lake and Porter Counties are the only Toll Road counties who are also members of the Northwest Indiana Regional Development Authority (“NIRDA”).

App. at 179. The NIRDA receives a separate disbursement under the Major Moves legislation. *Bonney*, Slip. Op. at 14, ¶ 70.

SUMMARY OF ARGUMENT

This lawsuit represents an attempt to use the Indiana courts to achieve two goals that could not be achieved through representative government: To derail what may be the most ambitious public-infrastructure-improvement plan since the advent of the interstate-highway system, and to prevent the extension of I-69 from Indianapolis to Evansville.

More specifically, the lawsuit attacks a plan to leverage the value of the Indiana Toll Road by leasing it to a private company for an up-front cash payment that will be used to build new roads, bridges, and highways (including the aforementioned I-69 extension) and to improve existing infrastructure. That transaction must close by June 30, 2006, or the ITR Consortium, the entity that has agreed to lease the Toll Road from the IFA, may walk away from the deal at tremendous cost to the IFA and the citizens of Indiana.

As the IFA argues in its brief, the claims in this appeal have the capacity—regardless of their merit—to scuttle that deal if they simply remain alive on June 30, 2006. This threat, combined with the nature of the IFA as a municipal corporation, justify treating this case as a public lawsuit. The State Defendants defer to the IFA for any further argument on this point. This brief will focus instead on why the trial court was correct to rule that the Plaintiffs have not demonstrated a likelihood of success on the merits of any of their constitutional

claims (and hence that their claims be dismissed absent posting a bond by June 12, 2006, which the Plaintiffs have failed to do) and why Amicus William Stant's claims should be rejected.

First, the Major Moves legislation is not unconstitutional special legislation in violation of Article 4, section 23 because it allocates funds to the seven counties through which the Indiana Toll Road runs. Among other flaws, Plaintiffs' argument invites the Court to second-guess the judgment of the General Assembly that the Toll Road Lease could impose unique burdens on the Toll Road counties because higher tolls may divert more traffic to local roads and thereby drive up local-government costs. The General Assembly reasonably concluded that it should compensate the Toll Road counties for this burden, so even if this allocation represents special legislation (and it does not for the reasons explained by the IFA), it is easily justified by important government interests particular to the Toll Road counties.

Second, the Major Moves legislation does not violate Article 10, section 2 of the Indiana Constitution, which requires that proceeds from the sale of public works be used to retire the "Public Debt," because there is no "Public Debt." The framers of the Indiana Constitution understood Public Debt to be the State government's debt that existed in 1850, all of which was fully retired by 1915. Therefore, there is no "Public Debt" to pay, and the General Assembly may appropriate Lease proceeds however it wishes.

Third, the Major Moves legislation does not violate Article 10, section 1 of the Indiana Constitution because there is no requirement that the State impose real-property taxes on leasehold estates. The framers were concerned that the State equally assess and tax wealth such that the wealthy—understood at the time to be landowners, not lessees—would bear the burden of paying for government operations. Even though the General Assembly has, in some limited circumstances, chosen to tax some leasehold estates, it is not constitutionally required to do so.

Finally, Amicus argues that the trial court's Order, requiring Plaintiffs to post a \$1.9 billion bond, violates the Due Course of Law Clause of Article 1, section 12 of the Indiana Constitution because no Indiana citizen or group of citizens would be capable of posting this amount of money. However, Amicus ignores the fundamental design of the Public Lawsuit statute, which is to prevent vexatious litigation and to allow public-improvement projects to move forward. The Plaintiffs have had their day in court, and they have failed to demonstrate any likelihood of success. Amicus fails to present any facts or argument that show how his single claim is different from the claims already litigated by the Plaintiffs.

ARGUMENT

I. *Article 4, Section 23: Allocating Toll Road Lease proceeds to the Toll Road counties is justified by conceivable increased costs resulting from the Lease*

The Plaintiffs contend that, because the Major Moves legislation establishes a special fund (called the Major Moves Construction Fund), allocating proceeds from the Toll Road Lease to the seven counties through which the Toll Road runs (*see*

Ind. Code §§ 8-14-14-6(a)(3); 8-14-16-1), the legislation violates Article 4, section 23's restrictions on unjustified local and special laws. *See* Pl. Br. at 19. As the IFA has explained, Major Moves in fact distributes Lease proceeds to all 92 counties and it cannot fairly be characterized as special legislation. Even if it could, however, the Major Moves Construction Fund is justified because it follows from a reasonable judgment by the General Assembly that the Toll Road counties will bear unique burdens as a result of the Lease.

Article 4, section 23 does not prohibit all local and special laws. Instead, it permits such laws in circumstances where a general law could not achieve the General Assembly's goals. *See South Bend v. Kimsey*, 781 N.E.2d 683, 689-93 (Ind. 2003). A highly deferential test follows from this proposition: Local laws are presumptively valid and may be struck down only if the special treatment bears no rational relationship to any inherent characteristics of the privileged or burdened locale. *See id.* at 692-93.

Meeting this test is the same as meeting the Article 1, section 23 equal-privileges-and-immunities test. *See id.* at 692. Under that test, a plaintiff must negate every conceivable justification for the special classification (or treatment) in order to prevail. *See id.* at 694; *see also Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). And the government does not need to prove the existence of the problem justifying the special treatment or that the legislation will address that problem. *See id.* Rather, it is sufficient for the government to hypothesize a rationale for the

special treatment and explain some rational relationship between the special treatment and the hypothesized problem. *See id.*

The Major Moves Construction Fund's allotment of Lease proceeds to the seven Toll Road counties easily meets this test. The Lease might lead to increased tolls, which might, in turn, divert more traffic onto local roads in the Toll Road counties and thereby lead to higher road-maintenance costs in those counties. App. at 180 (testimony that the General Assembly was concerned about increased diverted traffic off the Toll Road because of increased tolls and therefore allocated additional monies to the Toll Road counties to allow for expansion of lanes on alternative roads and possible bypasses where necessary); App. at 344 (St. Joseph County resident testifying that the increase in tolls will drive some motorists off the Toll Road and onto alternate routes that "keep them in the same general area as the Toll Road").

Plaintiffs surmise that counties other than the Toll Road counties might also suffer from increased traffic owing to the Lease. *See Pl. Br.* at 21-22. But it is perfectly rational for the General Assembly to have concluded that the seven Toll Road counties will undertake special burdens. After all, motorists on the Toll Road who are confronted by higher tolls that they do not wish to pay will necessarily exit onto a road in a Toll Road county, though they may not eventually get to a road of another non-Toll Road county. And regardless whether the road of immediate exit is a county road or a State road, it stands to reason that generally increased traffic

on local roads in Toll Road counties will eventually impose greater costs of some sort on those counties.

In this regard, it is important to bear in mind that the legislature's policy judgments need not be backed by mathematical certainty—they need only be rational. *See Collins*, 644 N.E.2d at 80; *Graves v. City of Muncie*, 255 Ind. 360, 264 N.E.2d 607, 609 (1970) (stating under Article 4, section 23 that “[t]he classification need not be scientific, consistent, logical, or exact”). Because it is rational and conceivable that Toll Road counties will incur special burdens from the Lease that other counties will not incur, it is justifiable to allocate to those counties more money from the Lease to pay for that extra maintenance.

Whether the Toll Road counties actually spend the money on road maintenance is of no consequence. The Major Moves Construction Fund is merely an effort by the General Assembly to make whole, in some rough way, the counties that it believes are the most likely to bear the brunt of the collateral burdens of the Toll Road Lease. Money is fungible, and how the Toll Road counties, once made whole, choose to husband their resources has no impact on the legitimacy of the legislature's *a priori* rationale for providing those resources. *See Collins*, 644 N.E.2d at 80.

Plaintiffs also contend that the law does not apply to all locales where the justifying characteristics supporting the Major Moves Construction Fund exist. *See Pl. Br.* at 22. But this is simply not so. As stated, the justifying characteristic for an allotment from the Major Moves Construction Fund is that the Toll Road runs

through the county. All counties through which the Toll Road runs receive extra funding to mitigate the burden of increased tolls and increased diverted traffic.

App. at 180.

In sum, just because other counties may ultimately bear some collateral burdens from the Lease, that does not mean they are on the same footing as the Toll Road counties. The objective of the Major Moves Construction Fund is not to ameliorate *all* collateral burdens wherever they may exist, but merely to attempt to compensate those counties that may conceivably be the hardest hit. Courts are simply not in a position to second-guess this legislative judgment. Indeed, imposing strict, formal equal treatment of all counties in this circumstance would itself be arbitrary and unfair to the Toll Road counties.

II. Article 10, Section 2: No “Public Debt” exists, so the legislature may spend as it wishes

Plaintiffs urge invalidation of the Major Moves legislation because it calls for proceeds from the Toll Road Lease to be spent on various new construction projects and infrastructure improvements. *See* Pl. Br. at 23. The Plaintiffs’ theory is that, under Article 10, section 2 of the Indiana Constitution, these proceeds must be used to pay down the “Public Debt” and, therefore, cannot be used for the projects set forth in the Major Moves legislation. *See id.* This claim should be rejected on its face because, among other reasons, “Public Debt,” as that term was understood by our Constitution’s framers, no longer exists.

A. The “Public Debt” that existed in 1850 was retired nearly a century ago, so Article 10 places no limits on the use of proceeds from the Toll Road Lease

The text and structure of Article 10, not to mention the historical context in which it was promulgated, show that the term “Public Debt” has a very limited meaning: It refers only to the State debt that existed at the time of the 1850 Constitutional Convention, not to all debt that State or local governments might incur at some time in the future.

The structure and purpose of Article 10 are significant in this regard: Article 10 committed the State to paying off the staggering debt that necessitated the 1850 Convention in the first place, and it prohibited the State from incurring more debt in the future (whether on its own or by assuming the debts of others). *See* Ind. Const. art. 10. Toward this end, Article 10 differentiates between the “Public Debt,” which section 2 requires be paid from the sale of and income from public works—the very public works that happened to be purchased with the “Public Debt” in the first instance—from simple “debt,” which sections 5 and 6 prohibit the State from contracting or assuming (on behalf of counties) in the future (with limited emergency exceptions). *See* Ind. Const. art. 10, §§ 2, 5, 6. In short, section 2 does not contemplate the continuing existence of “Public Debt” after the debt that existed in 1850 was retired.

This inference is supported by the debates of the Convention, where the delegates focused solely on the State’s existing debt and the effects of paying off such debt. For instance, during deliberations concerning this specific provision,

Delegate Hall offered a detailed explanation of the State's finances and estimated that revenues generated by the Public Debt Clause and taxes would retire the Public Debt by 1866. *See* 2 Debates, at 1773-78; *see also* 1 Debates, at 228 (Delegate Maguire stating that it would only be proper to retire the Public Debt if the internal improvements were ever sold, since it was the improvements which were the cause of the Public Debt).

What is more, the Public Debt may be tracked to retirement. The debt that existed in 1850 may be divided into three categories: (1) "Butler Bills," or internal-improvement bonds converted to "State Stock Certificates;" (2) unconverted internal-improvement bonds issued prior to 1841; and (3) debt-refinancing instruments. *See* Carmony, at 310; *see also* 2 Debates, at 1774.

First, with regard to the Stock resulting from the Butler Bills, the 1898 Auditor's Report, the last year of detailed Auditor's Reports, lists these debts as 5% and 2 ½% Stocks and the amount outstanding as \$4,469.99 for the 5% Stocks, and \$2,145.13 for the 2 ½% Stocks. *See* Acts of 1898, at 623. However, the 1898 Auditor's Report also shows that this debt was functionally retired because both classes were called and due and interest had ceased to be paid in 1873. *See Carr v. State*, 127 Ind. 204, 26 N.E. 778, 781 (1891) (discussing the acts passed, and consequences of legislation calling the stocks and stopping the interest in 1873). The only reason they were not nominally retired was that the holders of the stocks had not physically redeemed their face value. *See id.*

Second, with respect to the unconverted internal-improvement bonds issued prior to 1841 (listed by the Auditor's Reports as "Internal Improvement Bonds"), legislation in 1872 identified 191 outstanding Internal Improvement Bonds and required the Governor, Attorney General, Secretary of State, and Treasurer to redeem them. *See* Acts of 1872, at 11; *see also Gray v. State*, 72 Ind. 567, 1880 WL 6368, at *4-5 (1880). The last Auditor's Report identifying these bonds is from 1882, and the Acts of 1883 reference only 24 remaining bonds and cite ongoing litigation concerning them. *See* Acts of 1883, at 235. This litigation, involving the duty of the State to redeem the bonds and the proper calculation of interest, was resolved in *Gray*, 72 Ind. at 567, and *State v. Porter*, 86 Ind. 404, 1882 WL 6477 (1882). Therefore, from all indications, the last of the remaining Internal Improvement Bonds were retired in 1882.

Third, with respect to debt-refinancing instruments, the Indiana Auditor's Reports conclusively establish that the debt was retired on April 1, 1915. The 1914 Auditor's Report, under the heading "Foreign Debt," shows that the \$130,000 owed pursuant to the last 3 ½% temporary-loan bonds (which bonds were used to refinance the public debt during times of falling interest rates) was due on April 1, 1915. *See* 1914 Auditor's Report, *Public Debt Statement*, at 60. Subsequently, the 1915 Auditor's Report lists the amount of Foreign Debt as "None," as those bonds

were retired on April 1 of that year as required.¹ See 1915 Auditor's Report, *Public Debt Statement*, at 62.

Plaintiffs contend that, because *Orbison v. Welsh*, 242 Ind. 385, 179 N.E.2d 727, 743-44 (1962), and *Ennis v. State Highway Comm'n*, 231 Ind. 311, 108 N.E.2d 687, 693-95 (1952), did not hold that no Public Debt exists, Public Debt must, perforce, exist. See Pl. Br. at 27. *Orbison* and *Ennis*, however, simply did not reach the existence *vel non* of Article 10 Public Debt. Both decisions focused entirely on whether the public works at issue would generate net income, which may reasonably be treated as a threshold question since section 2 refers to "net income" before it refers to "Public Debt." See *Orbison*, 179 N.E.2d at 743-44; *Ennis*, 108 N.E.2d at 697. Hence, there is no necessary implication from either decision that Article 10 Public Debt continues to exist.

Plaintiffs' contention that debt maintained by the IFA is "Public Debt" ignores the holding of *Ennis* and other cases differentiating bodies corporate and politic from the State. Such bodies have been a critical component of the State's public-finance programs for over 50 years. See *Ennis*, 231 Ind. 311, 108 N.E.2d at 697. The rule from *Ennis* and its progeny is that the IFA and like entities may issue bonds because their debts are *not* State debts. See *Ennis*, 108 N.E.2d at 697. And if that is true for purposes of issuing bonds, it must surely be true for retiring them. In fact, rather than making the State *more* liable for the debts of non-State

¹ In addition, in the Addendum to the 1915 Auditor's Report, the Auditor stated that the only other outstanding bonds issued by any State instrumentality (Indiana and Vincennes Universities), were retired on February 17, 1916. See 1915 Auditor's Report, *Addendum*, at 62.

entities, the Constitution makes it *less* liable for such debts. *See* Ind. Const. art. 10, § 5 (prohibiting the State from assuming the debts of municipalities); Ind. Const. art. 10, § 6 (prohibiting the State from assuming the debts of corporations).

The Plaintiffs argue that “Public Debt” of Article 10, section 2 encompasses more than the term “State debt” of Article 10, section 5. *See* Pl. Br. at 26. But the text and history behind the definition of “Public Debt,” as well as the structure of Article 10, show that while “Public Debt” is indeed different from “State debt,” it is actually narrower, referring only to the debt that existed in 1850. The framers did not have any experience with bonds issued by bodies corporate and politic, so they could not have understood that all public-works proceeds would be used to pay those bonds. Rather, they understood the “Public Debt” to be a discrete set of obligations that should be retired as quickly as possible and never repeated. In fulfillment of that vision, the Public Debt was retired nearly a century ago, and in this case, the citizens of Indiana will get the money for its infrastructure projects up-front.

Amicus William Stant agrees that “Public Debt” and State debt are two different categories of debt described by the Indiana Constitution. *See* Amicus Br. at 2-4. However, Amicus asserts that “Public Debt” is debt associated not with debt incurred in building the public works of the nineteenth century, but with the construction of public works in the future. Without support, Amicus asserts that the framers contemplated ongoing construction of public-works projects financed by State-government debt and that the Public Debt Clause simply requires that the State use the income from such projects to retire that new debt. *See* Amicus Br. at

3. In the Amicus' view, "State debt" is a limited category of debt that may be used only for the purposes allowed in Article 10, section 5, and not to fund public works. See Amicus Br. at 2-3.

This interpretation, however, ignores the lessons of 1850. The State was on the verge of financial ruin because of public-works projects that were improperly financed and that never gave rise to enough income to pay for themselves. The problem was not that income from the works was used for expenses other than the "Public Debt," it was that the (oft-abandoned) works failed to generate income. With all the fuss at the 1850 Convention concerning the need to avoid the same predicament in the future, it is utterly implausible to infer that the delegates contemplated that later generations would replicate the same scheme.

B. Contingent obligations of the IFA and Teachers' Retirement Fund are not debt at all, and are certainly not prohibited State debt or "Public Debt"

Plaintiffs contend that, because the Lease requires the IFA to indemnify the consortium against any future property-tax levies, and because some future obligations of the Teachers' Retirement Fund ("TRF") are at present unfunded, Article 10 "Public Debt" exists and must be retired with Lease proceeds. See Pl. Br. at 25. Payment of these obligations, Plaintiffs argue, is not limited to a specific fund, so they do not qualify for the "separate-fund doctrine." See *id.* This argument, however, fails for two reasons: (1) it is predicated on an erroneous understanding of what constitutes "debt" (of any kind); and (2) it ignores the

threshold consequences that would follow for those obligations if they did indeed constitute State debt.

1. First, indemnification is not indebtedness. “Debt” is defined as “something owed” such as a “specific sum of money or a performance due another especially by agreement.” Merriam-Webster’s Dictionary of Law 1996, *available at* <http://www.dictionary.com>; *see also Am. Nat’l Bank & Trust Co. v. St. Joseph Valley Bank*, 180 Ind. App. 546, 391 N.E.2d 685, 687 (1979) (“[D]ebt is defined generally as ‘a specific sum of money due from one person to another, and denotes, not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment.’”) (quoting *Angola Brick & Tile Co. v. Millgrove Sch. Twp.*, 73 Ind. App. 557, 127 N.E. 855, 857 (1920)). By contrast, a promise to cover another’s contingent obligation does not constitute a present obligation to pay a fixed sum, no matter how likely the contingency. The obligation to indemnify is conditioned upon the happening of an event, and the conditional aspect prevents it from being “debt.” *See Am. Nat’l Bank & Trust*, 180 Ind. App. 546, 391 N.E.2d at 687 (“This conditional aspect of mutual promises forming a contract prevents their being debt, since neither party can enforce the other’s promise without performing his own.”).

Here, the IFA’s promise to indemnify against any liability for future property-tax levies is a highly contingent and remote obligation, not a liquidated obligation for which payment can currently be demanded. There is no evidence that the consortium will ever be subjected to property taxes that the IFA will have to pay, or any evidence as to the likely amount of any such hypothetical property

taxes. Indeed, even if the IFA wished to use Lease proceeds to cover its indemnification of the ITR Concession Company, there is simply no sum certain for it to pay. Hence, it is implausible to speak of the indemnification agreement as “debt.” Moreover, the State is not a party to the Lease, and it is the IFA not the State that has agreed to indemnify the consortium against losses. Thus, this obligation, if any, belongs to IFA, which is a body corporate and politic, not the State.

The same goes for the contingent obligations of the TRF. The pension fund for teachers is similar to the federal Supplemental Security Income plan: rather than being fully funded, it is structured at least partially to be a “pay-as-you-go” plan, meaning that current contributions cover current obligations rather than future obligations. App. at 213. *See generally* U.S. Dep’t of Treasury, *Social Security and Medicare Trust Funds and the Federal Budget*, May 2006, available at http://www.USTreas.gov/offices/economic-policy/reports/budget_trust_fund_perspectives_2006.pdf. And while future obligations are reasonably calculable, they are not now due, and they need not be funded in advance. App. at 214.

The same principle that separates an obligation to indemnify from indebtedness is at work here as well. TRF obligations are simply unfunded actuarial liabilities, *i.e.*, the unfunded present value of reasonably expected future payments. App. at 214. But that does not mean that they are *presently* liquidated, or even payable. For example, TRF’s unfunded actuarial liability includes the value of accrued benefits for teachers whose benefits have not yet vested, and that may

never vest. App. at 214. Further, some vested beneficiaries may die or otherwise be disqualified before their benefits are paid, in which case the TRF obligation would expire. App. at 214. Thus, unfunded actuarial liabilities quite simply are not debts that beneficiaries have a presently vested *right* to collect. *See Am. Nat'l Bank & Trust*, 180 Ind. App. 546, 391 N.E.2d at 687 (“[D]ebt is defined generally as ‘a specific sum of money due from one person to another, and denotes, not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment.’”).

2. If the IFA’s indemnification agreement and the unfunded TRF obligations were understood to constitute State debt, more than the Major Moves disbursements would be vulnerable to invalidation. As noted in Part I.A., *supra*, Article 10, section 5 of the Indiana Constitution *prohibits* the State from incurring debt, except in exigent circumstances. *Cf. Am. Nat'l Bank & Trust Co. v. Ind. Dep't of Highways*, 439 N.E.2d 1129, 1135 (Ind. 1982) (holding that to allow the Indiana Department of Highways to issue toll-road revenue bonds based on the existence of a special-fund doctrine would in effect nullify Article 10, section 5 and thus the legislation was unconstitutional).

So, teachers could not have a pay-as-you-go retirement fund, which would likely mean no retirement fund at all. Other contingent actuarial liabilities of the State would also be invalid, such as PERF, the 1977 Police Officers and Firefighters’ Pension and Disability Fund, the Legislators’ Retirement System, the 1977 and 1985 Judges’ Retirement System, the Prosecuting Attorneys’ Retirement Fund, and

the State Excise Police, Gaming Agents', and Conservation Officers' Retirement Plan. See PERF Indiana, Funded Ratios by Plan, *available at* http://www.in.gov/perf/agency/ratios_by_plan.html (last visited June 9, 2006).

Furthermore, the State would not be allowed to indemnify its employees, officers, and judges for torts committed in the course of employment, and perhaps could not even pay for lawyers to represent those employees (which is just another form of indemnification). See Ind. Code §§ 4-15-11-1 *et seq.*; 34-13-3-5(e); 34-13-4-1; *see also S. Ind. Gas & Elec. Co. v. Cornelison*, 269 Ind. 71, 378 N.E.2d 845, 847 (1978) (finding the State's indemnification clause with regard to highway construction permissible).

These consequences—likely just the beginning—demonstrate just how far Plaintiffs are asking the Court to stretch the definition of “Public Debt.” The Court should reject this invitation to make such a drastic change in the law.

C. Municipal debt is not debt of the State

Even if “Public Debt” is understood to include debts incurred by the State after 1850, the only other evidence put forth by the Plaintiffs that any “Public Debt” currently exists relates to the municipal debt of the city of New Haven, Indiana. App. at 458-61. Though municipalities may by virtue of the Constitution incur some debt, *see* Ind. Const. art. 13, § 1, such debt does not, as a matter of constitutional structure, belong to the State.

As explained in Part I.A., *supra*, the delegates to the 1850 Constitutional Convention were intent on eliminating and preventing government debt at the

State level, so they prohibited it (with exceptions). *See* Ind. Const. art. 10, § 2. At the same time, the delegates expressly permitted limited municipal debt. *See* Ind. Const. art. 13, § 1. Equally as significant, the Constitution does not treat the limited authority for municipal debt as an exception to the Article 10 prohibition on State debt. Instead, municipal debt is authorized as part of Article 13, titled “Municipal Debt.” Therefore, while municipalities are political subdivisions of the State, the delegates thought of them as qualitatively separate from the State for purposes of regulating their ability to incur debt. This structurally distinct treatment signifies that the delegates did not anticipate that the State was responsible for using funds identified in Article 10 to pay any municipal debt authorized in Article 13.

Furthermore, in *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 139-40, 149 N.E.2d 273, 283-84 (1958), the Supreme Court held that bonds issued by a body corporate and politic, rather than a State agency, did not create Article 10 State debt or “Public Debt.” The Supreme Court reasoned that because the enabling legislation made clear that the bonds were issued by the Commission in its capacity as a separate corporate entity, the bonds did not constitute debt of the State. *See id.* The same rationale applies with respect to municipal debt, which is issued by a corporation that, though created and authorized by the State, is entirely distinct from the State.

For this reason, ascribing to the State the debt of any municipality would contravene not only the structural differences built into the Constitution, but would

also repudiate the reasoning of *Book* and thereby undermine the means by which State projects are frequently financed. And, of course, treating municipal debt as that of the State for purposes of Article 10 would also render that debt entirely invalid in contravention of Article 10, section 2.

With so many utterly implausible results in the offing, Plaintiffs' argument that proceeds from the Toll Road Lease must be used to pay the debt of municipalities cannot withstand even minimal scrutiny.

III. *Article 10, Section 1: There is no constitutional requirement that lessees be taxed on real property*

Major Moves specifically provides that the Toll Road lessees are not required to pay property taxes on the Toll Road. *See* House Enrolled Act 1008, § 39. The Plaintiffs argue that this provision of the legislation is invalid because operating a Toll Road does not qualify as a "municipal use" that may be exempted from property taxation under Article 10, Section 1. *See* Pl. Br. at 30-32. This argument, however, ignores the more fundamental issue that Article 10 does not require ad valorem property taxation on leaseholds. Since there is no such requirement, it is irrelevant whether Toll Road operations constitute a "municipal use."

The substance of what is now Article 10, section 1 was first proposed at the 1850 Convention by Delegate Daniel Read of Monroe County. His purpose for proposing this provision was to ensure that all property wealth was taxed so that "the burdens of supporting government should fall in just proportions upon those who enjoy its benefits." 1 Debates, at 946. Read explained that "[t]here is manifest injustice in permitting property, in the hands of the wealthy, which ought to be

taxed as other property, to escape taxation altogether, or to be taxed only on a very small part of its value.” *Id.* In 1850, “wealth” was understood in large part to refer to land ownership, so in the minds of the 1850 Convention delegates, a real-property tax properly placed the burden of financing government on the wealthy. Accordingly, Article 10, section 1 should be understood only to require ad valorem property taxes on private owners of real and personal property.

This principle leads to two conclusions relevant to this case. First, the delegates to the 1850 Convention did not intend to require State taxation of lands owned by State instrumentalities. Doing so would have no connection to requiring the wealthy to finance government, and indeed no provision of Indiana law imposes ad valorem property taxes on State agencies or other instrumentalities. Second, the delegates did not intend to require ad valorem taxes on any estates in land other than ownership in fee, which was the only relevant measure of wealth in 1850. Were Article 10 understood otherwise, ordinary residential lessees would be required to pay property taxes, which the Indiana Code currently does not require. See Ind. Code § 6-1.1-1-9 (“the holder of . . . legal title in fee is owner of that property”); Ind. Code § 6-1.1-2-4 (the owner of real property is responsible for property tax unless parties have agreed otherwise).

It follows from these principles that there is simply no real property at issue in the Toll Road Lease that is in any way subject to the ad valorem property-tax requirement of Article 10, section 1. The IFA owns the land (though it is titled in the name of the State) and is not, and has never been, required to pay taxes on that

land. App. at 148. Therefore, the lessees are no more constitutionally required to pay taxes on the property they lease than someone renting an apartment.

It is true that, despite not being constitutionally compelled to tax leaseholds, the General Assembly has in general chosen to tax leasehold estates when property that would otherwise be exempt from taxation is leased to another who does not share in the exemption. *See* Ind. Code § 6-1.1-10-37. So, lessees can, in some circumstances, become subject to real-property taxes. *See State Bd. of Tax Comm'rs v. Indianapolis Lodge No. 17, Loyal Order of Moose, Inc.*, 245 Ind. 614, 200 N.E.2d 221 (1964) (holding that rental of dining room for other than fraternal society purposes meant that dining hall was subject to taxation); *see also* 1938 Op. Att'y Gen. 148 (holding that lessee's interest in university property was not exempt from taxation); 1917-20 Op. Att'y Gen. 516 (noting that if church leased property, the property was subject to taxation as if owned by individual).

However, that is merely a function of a statute, not Article 10, section 1. Consequently, the General Assembly was perfectly free when it enacted the Major Moves legislation to make it clear that the Toll Road Lease was not subject to taxation as a leasehold estate. *See* Ind. Code § 8-15.5-8-1. Because the General Assembly is not constitutionally compelled to tax anything but private ownership in fee, the General Assembly is free to pick and choose when and if to tax leasehold estates, particularly when an instrumentality of State government (and not a private concern) owns the leased land in fee.

Plaintiffs cite cases from other States supposedly showing that private toll-road property may be taxable. Those cases, however, in no way establish the rule that such land *must* be taxed, so they have no significance here. *See Tex. Turnpike Co. v. Dallas County*, 271 S.W.2d 400 (Tex. 1954) (ruling that because the State only had a contingent interest in toll-road property, a private toll-road company was *statutorily* subject to taxation on that property); *Wilson v. Allegheny City*, 79 Pa. 272, 1876 WL 13769 (1875) (holding that the property abutting a private toll road could *not* *statutorily* be taxed to support the city's upkeep of the toll road); *Lake Shore & Mich. S. Ry. Co. v. Chicago & W. Ind. R.R. Co.*, 97 Ill. 506, 1881 WL 10433 (1881) (stating that private toll-road property *may* be taxed); *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So.2d 834, 844 (Ala. 2003) (holding as a matter of *statutory interpretation* that land owned by a private toll-bridge company was subject to ad valorem property taxation).

IV. The Public Lawsuit statute sufficiently provides a “day in court”

Amicus argues that the trial court's Order requiring the Plaintiffs to post a \$1.9 billion bond violates the Due Course of Law Clause of Article 1, section 12 of the Indiana Constitution. *See* Amicus Br. at 4-6. Amicus—but not Plaintiffs—argue that the Plaintiffs did not receive their “day in court.” *See* Amicus Br. at 5-6.

To begin, this assertion is patently counterfactual, which is perhaps why Plaintiffs themselves have not raised this argument. Under the Public Lawsuit statute, the Plaintiffs would not have been required to post a bond if they had been able to show—during their two days in court last month—that their claims had any

merit. *See* Ind. Code § 34-13-5-7(b). The trial court fully considered the Plaintiffs' legal theories and concluded they were not likely to be successful. *See Bonney*, Slip Op. at 82. Now Plaintiffs have a day before *this* Court to persuade it to conclude otherwise. If this Court concludes that Plaintiffs' theories have no merit, no purpose would be served by any additional days in court. The Public Lawsuit statute fully incorporates a meaningful opportunity for the parties to be heard on the merits; consequently, there can be no claim that the statute violates the Due Course of Law Clause.

Amicus also argues that the class-action provision of the Public Lawsuit statute is constitutionally problematic because it prohibits all but the first challenger from raising a challenge to legislation such as this. *See* Amicus Br. at 6. But Amicus' own separate lawsuit asserts only one claim, and that claim overlaps completely with the claim of Plaintiffs in this case that the proceeds from the Lease must be used to retire the "Public Debt." *See* Amicus Pet. Ex. A, at ¶ 23. Thus, Amicus' claim is indeed having its day in court. Moreover, the Public Lawsuit statute permits subsequent litigants, such as Amicus, to participate in the first-filed public lawsuit, *see* Ind. Code § 34-13-5-2(b), and Amicus has taken advantage of that opportunity by filing a brief in this Court. In that brief, Amicus seems to approve of the notion that, as the trial court concluded, the Public Lawsuit statute "was designed to prevent long litigation delays, avoid the harassment of multiple suits, and eliminate 'completely non-meritorious' litigation." Amicus Br. at 7 (quoting App. at 37) (further internal quotations and citations omitted). Yet Amicus

does not explain why those principles do not apply here or identify additional evidence he would like to present to show why his lone legal theory is anything other than “completely non-meritorious.” Again, no purpose would be served by any additional days in court for Amicus’ claim, so no due course of law issues arise.

On an even more fundamental level, the actual text of Article 1, section 12 does not seem to apply to citizen lawsuits such as this case and the separate lawsuit brought by Mr. Stant. Section 12 provides “remedy by due course of law,” but only to “every person, for injury done to him in his person, property or reputation.” Ind. Const. art. 1, § 12. But neither the Plaintiffs in this case nor Amicus Stant assert injuries to person, property, or reputation; they simply claim to be citizens and taxpayers. App. at 517; Amicus Pet. Ex. A, at ¶ 2. This Court’s public-standing doctrine permits such suits, but not because the plaintiffs have suffered any actual personal injury. *See, e.g., State ex rel. Citadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003) (according public standing to a plaintiff who did not “contend he ha[d] suffered a specific injury”).

This distinction is particularly important in view of Amicus’ argument that all subsequent challengers of Major Moves should have an independent day in court. Absent the reasonable limits and mandatory class-action procedure imposed by the Public Lawsuit statute, public-standing doctrine might conceivably permit a stream of individual citizens to bring a stream of successive lawsuits until such point as the court rejects all conceivable theories of invalidation. Far from securing access to justice for the genuinely injured, such a system would enable dissident

citizens to thwart the decisions of representative government *ad infinitum*. There is no textual or historical justification for treating the Due Course of Law Clause as such an extreme countermajoritarian tool.


In any event, the Public Lawsuit statute is validly applied here; hence, the Court may not declare it facially invalid. *See Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999) (holding that the burden for facial invalidation is whether there is “no set of circumstances under which the statute can be constitutionally applied”).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the St. Joseph Superior Court.

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CERTIFICATE OF WORD COUNT

Pursuant to Indiana Rule of Appellate Procedure 44(E), I verify that this brief, including footnotes and issues presented, but excluding tables and certificates, contains less than 14,000 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.



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CERTIFICATE OF SERVICE

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