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IN THE
INDIANA SUPREME COURT

Case No. _____

WEOC, INC. D/B/A WINGS, ETC., ET AL.,	)	On Petition to Transfer from the Indiana Court of Appeals
	)	
	)	Cause No. 22A-CT-1869
Petitioners (*Appellants-Defendants*),	)	
	)	Appeal from the LaPorte Superior Court
v.	)	
	)	Lower Court Cause No. 46D02-2107-CT-1342
CHRISTOPHER ADAIR, ET AL.,	)	
	)	
Respondent (*Appellee-Plaintiff).*	)	

AMENDED BRIEF OF *AMICI CURIAE* RESTAURANT LAW CENTER AND INDIANA RESTAURANT & LODGING ASSOCIATION IN SUPPORT OF PETITION TO TRANSFER FILED BY APPELLANTS-DEFENDANTS

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INTEREST OF *AMICI CURIAE*

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people—approximately ten percent of the U.S. workforce, making it the second-largest private-sector employers in the United States. Through regular participation in *amicus* briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members and highlights the potential impact of pending cases like this one.

The Indiana Restaurant & Lodging Association (INRLA) provides business solutions to the Indiana hospitality industry and represents the industry before all branches of government. The Association helps its members navigate complex laws and regulations and, when necessary, provides courts with the industry's views on cases, such as this one, that are important to our members. Restaurants are a driving force in Indiana's economy. The foodservice industry creates thousands of jobs, supports career growth, and plays a vital role in every community across the state. There are over 12,000 eating and drinking establishments in Indiana employing about 300,000 workers—roughly 10% of the employment in the state. Our thriving restaurant industry benefits the entire Indiana economy with over $15 billion in sales and with each million spent generating 21.8 jobs in the state.

Defendants-Appellants ably explain why the decision below is incorrect and why this Court should grant Defendants' petition to transfer to this Court. *Amici* support Defendants' request. *Amici* write separately to emphasize how time-honored tools of statutory interpretation squarely undermine the decision below and how affirmance could negatively impact the industry—causing harm to businesses, employees, tourists, and residents of Indiana.

SUMMARY OF ARGUMENT

Appellants-Defendants' Petition to Transfer should be granted. Indiana's Dram Shop Act, passed in 1986, limits liability for providers of alcoholic beverages except when the provider has actual knowledge of the consumer's visible intoxication. The Court of Appeals' decision below calls this immunity into question, despite the clear and unambiguous text of the statute. This Court should give the statute the meaning that the Legislature intended by giving full effect to the text of the law. Moreover, allowing the Court of Appeals' decision to stand would upset the long-held understanding of the restaurant and hospitality industry in Indiana, creating unnecessary legal uncertainty for establishments that serve alcohol.

The risks that can accompany alcohol are certainly serious. *Amici* and their members encourage patrons to drink alcohol responsibly and seek to abide by all applicable laws and regulations related to alcohol and its consumption. Likewise, the Indiana Legislature considered this very serious matter and enacted a statute making providers of alcoholic beverages—including individuals—liable when they knowingly serve alcohol to visibly intoxicated persons, while providing immunity if

this condition is not met. *BGC Ent., Inc. v. Buchanan ex rel. Buchanan*, 41 N.E.3d 692, 697-98 (Ind. Ct. App. 2015). Crafting the appropriate standard for recovery, and attendant limits on civil liability, represents a balance of competing interests that is precisely in the purview of the legislature, not the courts. *Thompson v. Ferdinand Sesquicentennial Comm., Inc.*, 637 N.E.2d 178, 180-81 (Ind. Ct. App. 1994). For decades, Indiana's restaurant and hospitality industry has been able to rely on this clear statement of immunity. This Court should honor the Legislature's judgment by hewing closely to the statute's text, which unambiguously immunizes those who furnish alcohol except in the statutorily provided circumstances.

ARGUMENT

I. When Interpreting Statutes, the Court's Role is to Give Effect to the Legislature's Intent.

In the interpretation of statutes, the Court's ultimate goal "is to determine and give effect to the intent of the legislature in promulgating it." *State v. Coats*, 3 N.E.3d 528, 531 (Ind. 2014). When the legislature speaks to an issue, the courts' "foremost duty is to determine and give effect to the true intent of the legislature." *Weida v. Dowden*, 664 N.E.2d 742, 748 (Ind. Ct. App. 1996). Courts should interpret statutes "with a primary goal in mind: to fulfill the legislature's intent." *Jackson v. State*, 105 N.E.3d 1081, 1087 (Ind. 2018). "[T]he 'best evidence' of that intent is the statute's language." *Mi.D. v. State*, 57 N.E.3d 809, 812 (Ind. 2016).[1]

[1] Unless stated otherwise, internal quotation marks and citations are omitted and quotations are "cleaned up" to remove extraneous material and enhance readability without materially changing the text. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Proc. 142 (2017).

Thus, when interpreting a statute, "the first step is to determine whether the Legislature has spoken clearly and unambiguously on the point in question." *Anderson v. Gaudin*, 42 N.E.3d 82, 85 (Ind. 2015). "When a statute is clear and unambiguous," the court will "apply words and phrases in their plain, ordinary, and usual sense." *Id.* Courts should "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results." *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195–96 (Ind. 2016). Courts will "examine the statute as a whole, . . . avoid excessive reliance on a strict literal meaning or the selective reading of words," *Maynard v. State*, 859 N.E.2d 1272, 1274 (Ind. Ct. App. 2007), and "'avoid an interpretation that renders any part of the statute meaningless or superfluous,'" *ESPN, Inc.*, 62 N.E.3d at 1199 (quoting *Hatcher v. State*, 762 N.E.2d 189, 192 (Ind. Ct. App. 2002)). Further, the court should be "mindful of both what [the statute] 'does say' and what it 'does not say.'" *Id.* at 1195 (quoting *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016)).

Even when a statute is susceptible to multiple interpretations, the court "must try to ascertain the legislature's intent and interpret the statute so as to effectuate that intent." *Reece v. State*, 181 N.E.3d 1006, 1009–10 (Ind. Ct. App. 2021), *transfer denied*, 186 N.E.3d 584 (Ind. 2022). In this circumstance, the court "resort[s] to rules of statutory interpretation so as to give effect to the [L]egislature's intent." *Suggs v. State*, 51 N.E.3d 1190, 1194 (Ind. 2016) (citing *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012)). The court will "read the statute as whole, avoiding excessive reliance on a strict, literal meaning or the selective reading of individual words. And [the court]

seek[s] to give a practical application of the statute by construing it in a way that favors public convenience and avoids an absurdity, hardship, or injustice." *Id.* (internal citation omitted). Courts should not "presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result." *ESPN, Inc.*, 62 N.E.3d at 1195–96 (quoting *Anderson*, 42 N.E.3d at 85). "In addition, the legislative intent behind a statute may be identified and effectuated by examining the act as a whole, the law existing before its passage, changes made to the law since enactment and the reasons for those changes." *Tax Analysts v. Ind. Econ. Dev. Corp.*, 162 N.E.3d 1111, 1118 (Ind. Ct. App. 2020).

The Indiana Supreme Court "has long recognized the ability of the General Assembly to modify or abrogate the common law." *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977 (Ind. 2000). "It is well settled that the legislature does not intend by a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication." *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 673 (Ind. 1991); *see N. Ind. Pub. Serv. Co. v. Citizens Action Coal. of Indiana, Inc.*, 548 N.E.2d 153, 159 (Ind. 1989) (same). Statutes in derogation of existing common law are to be strictly construed. *State Farm Fire & Casualty Co. v. Structo Div., King Seeley Thermos Co.*, 540 N.E.2d 597, 598 (Ind. 1989).

The legislature can override the common law by "express terms or by unmistakable implication." *Rocca v. S. Hills Counseling Ctr., Inc.*, 671 N.E.2d 913, 920 (Ind. Ct. App. 1996). "An abrogation of the common law will be implied where a

statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law or where the two laws are so repugnant that both in reason may not stand." *Id.* "The legislature is presumed to have had in mind the history of the Act, and the decisions of the courts upon the subject-matter of the legislation being construed." *Ind. State Bd. of Health v. J.-Gazette Co.*, 608 N.E.2d 989, 993 (Ind. Ct. App.), *opinion adopted sub nom. Ind. State Bd. of Health v. State J.-Gazette Co.*, 619 N.E.2d 273 (Ind. 1993); *see also Bailey v. Manors Grp.*, 642 N.E.2d 249, 252 (Ind. Ct. App. 1994) ("The legislature is presumed to know the common law and to incorporate it into the statute except where it expressly indicates otherwise.").

II. The Clear, Unambiguous Text of the Dram Shop Act Precludes Common Law Liability Except Cases Involving a Breach of the Statute.

The Court of Appeals' decision in this case failed to give full effect to the Legislature's intent when it enacted the Dram Shop Act, which clearly and unambiguously precludes civil liability against those who furnish alcohol unless actual knowledge of visible intoxication can be shown. By suggesting that the text of Ind. Code § 7.1-5-10.15.5 might not have been "intended to preclude common law liability for those furnishing alcohol," Opinion, 22A-CT-1896 at 10 (quoting *Buffington v. Metcalf*, 883 F. Supp. 1190, 1194 (S.D. Ind. 1994)), the court failed to give effect to the clear terms of the statute and the Legislature's intent—that a person "*is not liable in a civil action for damages*" except in the case of a statutory violation.

Indiana's Dram Shop Act, Ind. Code § 7.1-5-10.15.5, provides that those who furnish alcoholic beverages are immunized from civil liability except in one specific

instance: when the person serving the alcohol had actual knowledge that the person served was visibly intoxicated. Specifically, the statute provides that:

> (b) A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:
>
> > (1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and
> >
> > (2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

The law "represents a legislative judgment that providers of alcoholic beverages should be liable for the reasonably foreseeable consequences of knowingly serving alcohol to visibly intoxicated persons." *BGC Ent., Inc.*, 41 N.E.3d at 697. The law also reflects the Legislature's judgment that providers of alcoholic beverages should *not* be liable in a civil action *except* when the person has *actual knowledge* that the patron is visibly intoxicated. *See Baxter v. Galligher*, 604 N.E.2d 1245, 1248 (Ind. Ct. App. 1992) ("[O]ur legislature has set forth a specific standard of liability applicable when a person (including a social guest) is furnished alcoholic beverages."). Indeed, Indiana courts have recognized that "common law liability for negligence in the provision of alcoholic beverages is restricted to cases involving the breach of a statutory duty." *Rauck v. Hawn*, 564 N.E.2d 334, 337 (Ind. Ct. App. 1990).

Here, the text of the Dram Shop Act is unambiguous in its derogation of the common law. It "provides that a person who furnishes an alcoholic beverage to another *is not liable* for civil damages caused by the intoxication unless the recipient

was visibly intoxicated and the intoxication was the proximate cause of the alleged damage." *Weida*, 664 N.E.2d at 748 (emphasis added). The phrase "is not liable" most naturally means that the statute immunizes anyone who furnishes alcohol from civil liability, except as provided in the statute. *See id.* (noting that the Dram Shop Act "is clear and unambiguous" and applying "the plain and ordinary meaning to the words of the statute"); *see also* William Hurst, *A. the Dram Shop: Closing Pandora's Box*, 22 Ind. L. Rev. 487, 499 (1989) ("Clearly, the statute precludes civil liability unless it is shown that the provider had actual knowledge of intoxication."). And that clear and unambiguous language serves to "explicitly preempt the objective standards of the common law stated in *Picadilly* and *Gariup*." *Id.* at 498.

The contrary interpretation—that common law liability also attaches if the provider of alcohol "should have known" the consumer was intoxicated or owed the consumer certain additional duties—cannot be squared with the statutory text of the Dram Shop Act. It would render multiple words in the statute superfluous. It would also contravene the rule that courts must be mindful of both what the statute says and "what it 'does not say.'" *ESPN, Inc.*, 62 N.E.3d at 1195. Here, the Legislature could have expressly stated that the statute was not intended to derogate common law liability—but it did not. That further reinforces that the Act must be read to mean precisely what the Legislature said it meant and intended to accomplish.

Reading the Dram Shop Act as an immunity provision comports with prior caselaw and other provisions of the Indiana Code. *See Thompson*, 637 N.E.2d at 180 (referring to Ind. Code § 7.1-5-10-15.5 as an "immunity provision[]"); *BGC Ent., Inc.*,

41 N.E.3d at 698 n.3 ("[T]his court has previously referred to Indiana Code section 7.1-5-10-15.5 as an immunity provision."). In addition, Indiana Code § 34–30–2.1 identifies various statutes that provide immunity from civil liability outside of Indiana Code, chapter 34. *See* Ind. Code § 34-30-1-1; *id.* § 34-30-2.1-1. The Dram Shop Act is included in this list. Ind. Code § 34-30-2.1-73.

For the sake of argument, even if the statute could be somehow deemed ambiguous (which it is not), traditional tools of statutory interpretation point to the Legislature's intent to limit dram shop liability except as provided in the statute. When examining the law as a whole, the statute makes most sense when read to limit common law liability. The first relevant portion, subsection (b) provides that a person "is not liable in a civil action for damages" for furnishing alcohol, unless actual knowledge of visible intoxication is present. Ind. Code § 7.1-5-10-15.5(b). The second subsection of the statute, added in 1996, further provides that "[i]f a person who is at least twenty-one (21) years of age suffers injury or death proximately caused by the person's voluntary intoxication," that person or their dependents, heirs, or estate "may not assert a claim for damages for personal injury or death . . . unless subsections (b)(1) and (b)(2) apply." Ind. Code § 7.1-5-10-15.5(c); *See* 1996 Ind. Legis. Serv. P.L. 76-1996, Sec. 1.

Both sections limit civil liability to the particular circumstances found in subsection (b) for people over 21. The Legislature made the further distinction that people *may* assert a claim if the person who was voluntarily intoxicated was under 21, and that person suffered injury or death. The Legislature's intent to provide

broad immunity in the 1986 Dram Shop Act is reinforced by this 1996 amendment, which further broadened the immunity provided to furnishers of alcohol. This demonstrates that the Legislature intended for only narrow and limited statutory grounds for liability, and the judiciary should not broaden the statute by importing common law theories of liability that are in addition to what the Legislature provided.

This careful calibration of liability reflects the considered judgment of the Legislature. *See Marlow v. Better Bars, Inc.*, 45 N.E.3d 1266, 1271 (Ind. Ct. App. 2015) ("Indiana's Dram Shop Act 'represents a legislative judgment and the declared public policy of this state.'" (quoting *Pierson ex rel. Pierson v. Serv. Am. Corp.*, 9 N.E.3d 712, 716 (Ind. Ct. App. 2014))). Indeed, the Legislature would not have needed to amend the statute in 1996 to adjust the liability for minors if the statute did not otherwise preclude common law liability in toto. *See Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1232-33 (Ind. 1988) (DeBruler, J., dissenting) ("To say [that] the legislature has not acted in this area and established the public policy of this State is to ignore the facts clearly before us as an appellate court. … If the law needs to be changed to more stringently sanction those who furnish alcohol to abusers, it should be done by the legislature not by this court.").

In addition, the Dram Shop Act was enacted against the backdrop of Indiana Supreme Court cases that applied the general principles of common law negligence to dram shop liability. *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966); *see Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217 (Ind. 1988); *Gariup Constr. Co.*, 519 N.E.2d 1224. When enacting a new statute, "[t]he legislature is presumed to have had in mind the history

of the Act, and the decisions of the courts upon the subject-matter of the legislation being construed." *Ind. State Bd. of Health*, 608 N.E.2d at 993. In this context, courts can presume the Legislature was aware of these cases and enacted the Dram Shop Act specifically to limit common law liability. This Court should honor that considered legislative line-drawing and reverse the decision below.

III. Allowing the Court of Appeals' Decision to Stand Would Upset Decades of Settled Expectations About Immunity from Liability.

Since the enactment of the Dram Shop Act in 1986, restaurants and bars have benefited from the clear and predictable rule of liability that it provides. As explained above, the statute plainly and unambiguously immunizes those who provide alcoholic beverages from liability except when the provider had actual knowledge of the person's visible intoxication. In the decision below, the Court of Appeals called that immunity into question. Allowing that decision to stand, and modifying the governing interpretation of the statute, would upset the well-established understanding within the industry that has existed for almost 40 years. *Cf. Pierce v. State Dep't of Corr.*, 885 N.E.2d 77, 89 (Ind. Ct. App. 2008) (court's deference to agency interpretation of statutes recognizes the "increasing public reliance on agency interpretations" of the statutes they administer).

Restaurant and bar operators that furnish alcohol in their establishments must have a clear and reliable understanding of what actions might expose them to liability. It would be nearly impossible to run a bar or restaurant that serves alcohol if the common law standard for liability was constantly evolving. For example, the decision below raises the possibility that bars and restaurants could be liable to

patrons for violating certain duties, i.e., to restrain the person from leaving, prevent them from driving, notify the police, or provide alternate transportation. *See* Appellant-Defendant Wings, Etc.'s Brief at 22-29. Courts in Indiana have never imposed these duties on purveyors of alcoholic beverages. But allowing the Court of Appeals' decision to stand may invite the lower courts to reconsider these issues—despite the fact that no court in Indiana has expressly found such duties exist, and other states' courts reject them. *See Moranko v. Downs Racing LP*, 118 A.3d 1111 (Pa. Super. Ct. 2015); *Umble v. Sandy McKie & Sons, Inc.*, 690 N.E.2d 157 (Ill. App. Ct. 1998); *Reinert v. Dolezel*, 383 N.W.2d 148 (Mich. Ct. App. 1985).

Even if this Court steps in to correctly hold that such duties do not exist, the intervening litigation and specter of crushing liability creates tremendous, harmful uncertainty within the industry. A lack of clear guidance from this Court may, for example, lead bars and restaurants to revise their policies, retrain bartenders and servers, or increase their dram shop insurance coverage. The increased risk of legal exposure from additional civil claims could even cause many establishments—many of whom are small businesses, and which run on very tight operating margins—to close or forego serving alcohol altogether. And enterprising attorneys or motivated parties may see the decision below as an opening to go back to the bad old days before the Dram Shop Act provided much-needed clarity combined with statutory immunity when certain requirements were met.

Furthermore, allowing the decision below to stand would saddle the restaurant and bar industry with increased uncertainty, cost, and potential liability at exactly

the wrong time. Operators have been facing significant challenges from the COVID-19 pandemic, historic inflation and supply chain issues, and the resulting increases in the cost of labor, energy, and ingredients.[2] On top of these continuing challenges, as of February 2023 (the most recent data available), restaurant employment has not rebounded and remains below pre-pandemic levels.[3]

The restaurant and lodging industries play an integral role in Indiana's economy, employing over 400,000 people and generating nearly $30 billion in revenue statewide. In fact, in Indiana, every additional dollar spent at restaurants contributes $2.05 to the state economy.[4] A single restaurant contributes to the livelihoods of dozens of employees, suppliers, purveyors, and related businesses.

The restaurant and hospitality industry also serves as an anchor and cultural center. They create unique neighborhood identities—driving commercial revitalization, bringing "stability to the neighborhoods in which they are located," and investing "in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish." *LMP Servs., Inc. v. City of Chi.*,160 N.E.3d 822, 827 (Ill. 2019). Restaurants serve as a shining example of upward mobility. Eight in ten restaurant owners saying their first job in the industry was an entry-level

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[2] Nat'l Rest. Ass'n, *Rising Food Costs and Supply Chain Issues are Creating Challenges* (Oct. 21, 2021), https://restaurant.org/education-and-resources/resource-library/rising-food-costs-and-supply-chain-issues-are-creating-challenges/ (reporting that "95% of operators said their restaurant experienced supply delays or shortages of key food or beverage items").

[3] Nat'l Rest. Ass'n, *Restaurants Added 50,000 Jobs in March* (Apr. 28, 2023), https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/restaurants-added-50,000-jobs-in-march/

[4] Nat'l Rest. Ass'n, *Indiana Restaurant Industry at a Glance*, https://restaurant.org/getmedia/02914e6e-6950-4979-93d8-3294fe6718b2/Indiana.pdf

position and even more restaurant managers say the same.[5] In addition, restaurants provide opportunities for historically disadvantaged communities. "Restaurants employ more minority managers than any other industry," and "41% of restaurant firms are owned by minorities – compared to 30% of businesses in the overall private sector."[6]

If the decision below stands, the harm could be catastrophic for bars and restaurants that serve alcohol. And the harm will spread as the implications reverberate through the economy, negatively impacting not only business owners but also employees, patrons, neighborhoods, and the economy as a whole. These are the types of competing interests that were balanced when enacting the Dram Shop Act, with its clear standard for recovery and corresponding limits on civil liability.

Finally, all establishments deserve a clear and reliable standard for when their conduct may create a risk of liability. That is particularly true for those in the restaurant and hospitality industry that serve alcohol. The Legislature provided such a standard when it enacted the Dram Shop Act in 1986, but the decision below casts doubt on its continued efficacy. This Court should grant the petition for transfer and apply that statute as it was written, in order to "give effect to the true intent of the legislature." *Weida*, 664 N.E.2d at 748.

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[5] Nat'l Rest. Ass'n, *National Statistics*, https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/ (last accessed Apr. 28, 2023).

[6] *Id.*; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015), https://www.as-coa.org/articles/bringing-vitality-main-street-how-immigrant-small-businesses-help-local-economies-grow.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant the petition for transfer.

Dated: May 17, 2023.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Amended Brief *Amici Curiae* complies with Indiana Appellate Rule 44(E) word limitation in that it contains no more than 4,200 words.

/s/ *Melissa Root*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 17, 2023, a copy of the foregoing Amended Brief *Amici Curiae* was filed and served electronically via the Indiana E-Filing system upon the following, in accordance with Indiana Appellate Rules 24 and 68, following service of the Brief *Amici Curiae* in the same manner on the same parties on May 1, 2023:

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