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IN THE
INDIANA COURT OF APPEALS

Case No. 22A-PL-00337

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

BRIEF OF APPELLEES BALL STATE UNIVERSITY AND BOARD OF TRUSTEES OF BALL STATE UNIVERSITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

STATUTES, RULES & REGULATIONS

STATEMENT OF ISSUES

1. In the midst of the COVID-19 global pandemic, the Indiana General Assembly passed, and Governor Holcomb signed, Public Law 166, which, among other provisions, bars certain claims arising from COVID-19 against colleges and governmental entities from proceeding as class actions. Mellowitz argues that this class action bar in Public Law 166 conflicts with Trial Rule 23 and is an unconstitutional exercise of legislative authority. Under the framework set forth in the Supreme Court's recent decision in *Church v. State*, did the General Assembly violate separation of powers principles when, in furtherance of legitimate public policy objectives, it enacted legislation to protect colleges and governmental entities from the expense, burdens and potential liability associated with class action litigation in the narrow context of specific, substantive causes of action arising from COVID-19?

2. In the alternative, Mellowitz argues that losing the ability to pursue class-based allegations violates the Takings Clause. Does application of Public Law 166 to Mellowitz's claims constitute an unconstitutional taking when he maintains every accrued cause of action available to him and no case has held that service as a class representative is a vested property right?

3. In the alternative, Mellowitz argues that losing the ability to pursue class-based allegations violates the Contract Clause. Does the application of Public Law 166 to his claims constitute an unconstitutional impairment of contract when there is no contractual right to be a class representative?

STATEMENT OF CASE

Ball State agrees with Mellowitz's Statement of the Case, except it notes that the Supreme Court denied the parties' Joint Verified Motion for Transfer Pursuant to Appellate Rule 56(A) on May 19, 2022, after Appellant's Brief was filed.

STATEMENT OF FACTS

In response to the unprecedented global pandemic, Governor Holcomb issued numerous executive orders that, among other things, forbade Ball State University (and all other Indiana universities) from offering in-person learning and forbade Ball State students like Appellant Keller Mellowitz from traveling to campus for any purpose other than to facilitate remote instruction. Mellowitz filed this lawsuit in May 2020, seeking a partial refund of fees and tuition paid for the Spring 2020 semester when Ball State transitioned to remote instruction. Appellant's App. Vol. 2, p. 22. Although Mellowitz filed this case as a putative class action, he has not sought class certification. *Id.*, pp. 4-18.

Public Law 166-2021 became effective in April 2021. Section 13 bars class action lawsuits that (1) are against a post-secondary educational institution or governmental entity; (2) are based on a contract, implied contract, quasi-contract, or unjust enrichment claim; and (3) arise from COVID-19. Ind. Code 34-12-5 (hereafter referred to as "Public Law 166" or "Section 13 of Public Law 166"). By its unambiguous terms, Public Law 166 bars Mellowitz from bringing claims on behalf of any potential class.

Following the adoption of Public Law 166, Ball State filed a motion asking the trial court to direct Mellowitz to remove his class-based allegations. Applying Public Law 166 over Mellowitz's constitutional challenges (primarily the argument that Public Law 166 violates separation of powers as a procedural rule beyond the authority of the General Assembly), the trial court granted Ball State's Motion for Relief Under Trial Rule 23(D)(4) and ordered Mellowitz to amend his complaint to remove the allegations as to his representation of absent persons. Appellant's App. Vol. 2, pp. 19-21. This interlocutory appeal followed.

SUMMARY OF ARGUMENT

The trial court correctly granted Ball State's motion asking it to direct Mellowitz to remove his class-based allegations. The Supreme Court's subsequent decision in *Church v. State*, No. 22S-CR-201, 2022 WL 2254876 (Ind. June 23, 2022), articulating the difference between procedural and substance rules for purposes of analyzing separation of powers challenges, makes that very clear. Mellowitz's sole claim of error in this appeal is that Section 13 of Public Law 166 does not pass constitutional muster. Parties challenging the constitutionality of a state statute in any circumstance bear a heavy burden, and Mellowitz does not meet that burden here. This statute easily withstands Mellowitz's separation of powers, takings, and impairment of contracts-based challenges.

The thrust of Mellowitz's separation of powers argument is that Indiana's General Assembly is without authority to limit the availability of class actions *in any respect* because Indiana's Trial Rule 23 prescribes the method and means for certifying a class action, and the Trial Rules are committed to the province of the Indiana Supreme Court. As such, Mellowitz argues that the enactment of laws limiting the availability of class actions constitutes "legislative overreach into judicial powers" and violates separation of powers principles under the Indiana Constitution. Appellant's Br. p. 34. Mellowitz's challenge is bold: the logic of his argument would invalidate not just Public Law 166 but multiple class action bars on the books in Indiana, including high-priority legislation enacted to protect against certain other COVID-19 liability.

Church v. State simplifies the task before this Court by providing a clear test for resolving whether a statute is substantive or procedural (and any potential violation of separation of powers): "If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive." *Church*, 2022 WL 2254876, at *6 (quotation omitted). And if the statute is substantive, the separation of powers analysis is resolved in favor of constitutionality. *Id.* at 13. Under this clear test, the class action bar at issue in Section 13 of Public Law 166 is plainly substantive and therefore does not violate any separation of powers principles.

Mellowitz offers two backup arguments to his primary separation of powers contention. He suggests that Section 13 of Public Law 166 constitutes an unconstitutional taking or an unconstitutional impairment of contracts. Those alternative arguments likewise fail. The potential to serve as a class representative by merely proposing in a complaint to bring claims on behalf of absent persons is neither a vested right nor somehow baked into Mellowitz's implied contractual relationship with Ball State.

Ultimately, Indiana's General Assembly made a policy decision to protect Indiana's governmental entities and higher education institutions—along with other entities—from class-wide liability on certain defined causes of action arising out of the COVID-19 pandemic. Neither the federal nor state Constitution require this Court to invalidate those policy decisions. The decision of the trial court should be affirmed.

ARGUMENT

Section 13 of Public Law 166 bars class action lawsuits that (1) are against a post-secondary educational institution or governmental entity; (2) are based on a contract, implied contract, quasi-contract, or unjust enrichment claim; and (3) arise from COVID-19. Ind. Code 34-12-5.

Mellowitz does not dispute that, by its unambiguous terms, Public Law 166 bars him from bringing claims on behalf of any potential class, as the trial court so held. Rather he contends that Public Law 166 was beyond the power of the legislature to enact; indeed, that it is unconstitutional on its face. *See*

Appellant's Br., pp. 26-28. *Church* makes clear that is not the case. But in any event, a party making such a claim bears "a heavy burden of proof." *Meredith v. Pence*, 984 N.E.3d 1213, 1218 (Ind. 2013) (holding school voucher statute did not violate three separate provisions of state Constitution). Mellowitz "assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied.'" *Id.* (quoting *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999) (holding Indiana Seatbelt Enforcement Act did not facially violate search and seizure provision of state Constitution)). And Indiana courts do not presume the General Assembly violated the Constitution unless the unambiguous language of the statute so mandates. *See Sims v. United States Fid. & Guar. Co.*, 782 N.E.2d 345, 349 (Ind. 2003) (holding certain statutory authority of the Worker's Compensation Board did not violate three separate provisions of the state Constitution).

Mellowitz cannot meet his heavy burden of proof to show that Section 13 of Public Law 166 violates Indiana separation of powers principles, constitutes a taking of a vested right, or impairs a contractual right in violation of the state or federal Constitutions. Rather, Public Law 166 embodies a change to Indiana substantive law governing a discrete set of public and private actors—a quintessential exercise of legislative authority targeting public policy objectives within the General Assembly's exclusive purview that does not interfere with any constitutional right of Mellowitz. None of the citations in Mellowitz's brief overrides the test now adopted in *Church* to resolve the substantive or

procedural classification of the challenged statute. Certainly, no case says what Mellowitz essentially argues—that the General Assembly lacks power to proscribe or limit class actions in any context. Furthermore, application of Public Law 166 to Mellowitz's claims does not take a vested right or impair a contractually protected remedy, contrary to Mellowitz's other constitutional arguments. Under any analysis, Public Law 166 withstands constitutional scrutiny.[1] Accordingly, the Court should affirm the trial court's order directing Mellowitz to file an Amended Complaint removing all class action allegations pursuant to Rule 23(D)(4) of the Trial Rules.

I. Standard of Review

A trial court's determination on the constitutionality of a statute is reviewed de novo. *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014). "'[E]very statute stands before [the Court] clothed with the presumption of constitutionality unless clearly overcome by a contrary showing.'" *Baldwin*, 715 N.E.2d at 338 (quoting *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996)). As the party challenging the statute's constitutionality, Mellowitz bears the burden of proof, and "all doubts are resolved against that party." *State v. Rendleman*,

[1] Ball State is not alone in seeking protection under Public Law 166. Indiana University ("IU") and Purdue University ("Purdue") are defending putative class actions for breach of contract and unjust enrichment brought by students seeking partial refunds of tuition and fees paid for the spring 2020 semester and included similar arguments about Public Law 166 in recent briefing before this Court. In its decision on that consolidated appeal, this Court decided to defer consideration of Public Law 166's validity until the issue was raised before the respective trial courts. *Trustees of Ind. Univ. v. Spiegel*, 186 N.E.3d 1151, 1163 (Ind. Ct. App. 2022). IU and Purdue have petitioned for transfer.

603 N.E.2d 1333, 1334 (Ind. 1992) (citation omitted) (rejecting constitutional challenge to the Tort Claims Act). Mellowitz cannot defeat the presumption of constitutionality of Public Law 166 because the statute violates no constitutional provision or principle.

II. In Enacting Public Law 166, the Legislature Properly Exercised Its Authority To Modify Indiana's Substantive Law On Class Actions.

Church instructs that Section 13 of Public Law 166 is a substantive law and, therefore, no separation of powers analysis is required.

A. Public Law 166 Is Substantive Because It Predominantly Furthers Legitimate Public Policy Objectives Within the General Assembly's Exclusive Purview.

Public Law 166 reflects important public policy goals tethered to Indiana's response to COVID-19. By its express terms, it protects Indiana's higher education institutions from class action litigation involving specified common law claims arising from the pandemic. It serves as a shield against common law claims brought as class claims and thus limits litigants' ability to pursue those common law claims in a representative capacity. Notably, Public Law 166 was the *third* bar on class actions passed in last year's legislative session. *See* S. Enrolled Act 1, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021) ("Public Law 1"). Public Law 1, enrolled earlier in the session, prohibits class action lawsuits based on tort damages for exposure or treatment arising from COVID-19. Ind. Code § 34-30-32-10. And it prohibits class action lawsuits against

manufacturers and suppliers for damages arising from a COVID-19 protective product. Ind. Code § 34-30-33-8.

Public Law 166—like Public Law 1—is a textbook example of the General Assembly's exclusive power to enact substantive laws in furtherance of public policy goals—even if a statute contains a procedural element. It is fundamentally a substantive statute balancing competing interests and rights.

Just yesterday, in a case concerning the Child Deposition Statute, the Indiana Supreme Court adopted a new test for distinguishing procedural laws from substantive laws. At the outset of its analysis, the Court noted "our rules cannot abrogate or modify substantive law." *Church*, 2022 WL 2254876, at *4 (quotation omitted). "If the statute is 'a substantive law, it supersedes [our Trial Rules], but if such a statute merely establishes a rule of procedure, then [our Trial Rules] would supersede the statute.'" *Id.* (quoting *State ex rel. Blood v. Gibson Cir. Ct.*, 157 N.E.2d 475, 477 (Ind. 1959)). "The threshold question is how a statute with both procedural and substantive elements is classified." *Id.*

After examining Indiana precedent and other jurisdictions' approaches to the substantive versus procedural law divide, the Court "adopt[ed] a more thoughtful test that looks at the statute's predominant objective." *Id.* at *6 (citation omitted). "If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive." *Id.* (citation and quotation omitted).

Applying this new test to the Child Deposition Statute, the Court determined that the statute is substantive because it predominantly furthers public policy objectives—namely, creating protections for child victims of sex crimes to guard against potential trauma inflicted through compelled discovery depositions. The Court reasoned that the Child Deposition Statute implicates these substantive rights based, in part, on the statute's location in the "Victim Rights" Chapter of the Indiana Criminal Code. *Id.*

Under the new test in *Church*, it is abundantly clear that Public Law 166's protection from representative claims—essentially an immunity or liability shield—is substantive in nature because it furthers legitimate policy objectives within the General Assembly's purview. Knowing that Governor Holcomb's Executive Orders forbade universities like Ball State from holding in-person classes for a portion of the Spring 2020 semester, the General Assembly was well within its constitutional scope of authority to pass laws to protect such institutions from class action claims arising from compliance with state law. That is in keeping with the legislature's authority to define public policy. Indeed, Public Law 166 was passed in recognition of changed circumstances caused by a deadly and ongoing pandemic. *See Sidle v. Majors*, 341 N.E.2d 763, 774 (Ind. 1976), *disapproval on other grounds recognized by Clark v. Clark*, 971 N.E.2d 58, 61 n.1 (Ind. 2012) ("The great office of statutes is to remedy defects in the common law as they develop, and to adopt it to the change of time and circumstance.").

The General Assembly's objective in passing Public Law 166 is obvious: "to protect Indiana colleges and universities from widespread legal liability arising out of their efforts to combat and mitigate the spread of COVID-19." Appellant's App. Vol. 2, p. 128 (State of Indiana's Brief on the Constitutionality of Public Law 166). Public Law 166 plainly embodies a legislative intent to prohibit persons from bringing contract and unjust enrichment claims arising from COVID-19 as class actions against higher education institutions as explicitly stated in Ind. Code § 34-12-5-1, *et seq.* The General Assembly's choice is grounded in policy considerations. It saw fit to abolish a certain category of class action cases but left claimants like Mellowitz with an individualized remedy for any alleged damages they could prove for breach of contract or unjust enrichment against universities like Ball State. The General Assembly rationally determined that the scale of potential exposures associated with class action lawsuits arising from COVID-19 justified the special protection for colleges and universities provided in Public Law 166. All of this goes to policy objectives other than the "orderly dispatch of judicial business" and illuminates the law as substantive. *See Church*, 2022 WL 2254876, at *6.

Classification of Public Law 166 as a substantive law also is confirmed by prior decisions concerning the consequences of class action liability. First, the class action vehicle allows defendants to be liable to absent persons who have not sued them—a substantive consequence that affects rights and responsibilities. *Gaiser v. Buck*, 179 N.E. 1, 2 (Ind. 1931). Second, it allows absent

persons to be bound by a judgment—favorable or unfavorable—in a case they have not initiated or prosecuted—another substantive consequence that affects rights and responsibilities. *Board of Comm'rs of Vanderburgh Cnty. v. Sanders*, 30 N.E.2d 713, 715 (Ind. 1940) (affirming judgment in favor of unnamed plaintiffs); *Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1201 (Ind. Ct. App. 2004) ("[A] judgment in a class action has a res judicata effect on absent class members." (citation omitted)). And so Public Law 166's protection from class action liability fits squarely within the definition of a substantive law, given that it "regulates the conduct and relationship of members of society and the state itself" and "establish[es] rights . . . ." *Blood*, 157 N.E.2d at 478. It is certainly not a bill designed to further "judicial administration objectives." *Church*, 2022 WL 2254876, at *6.

Moreover—also similar to the Supreme Court's reasoning in *Church* regarding the Child Deposition Statute's codification in the "Victim Rights" Chapter of the Criminal Code—the codification of Public Law 166's class action bar in Title 34 underscores its substantive nature. *See Church*, 2022 WL 2254876, at *6. The class action prohibition appears in Article 12 of Title 34 of the Indiana Code, which contains various "Prohibited Causes of Action." In addition to Public Law 166's new provision—"Prohibited Class Actions Based on Contract Arising from COVID-19"—Article 12's three other chapters are titled "Failure to Abort," "Certain Domestic Relations Actions," and "Legal Actions Involving Firearms and Ammunition Manufacturers, Trade Associations, and Seller." Each

of the four chapters of Article 12 of Title 34 unquestionably regulates matters of Indiana substantive law by prohibiting specific causes of action.

With Public Law 166, the Indiana General Assembly decided to limit substantive rights and narrow the band of permissible class action lawsuits arising from COVID-19. This was a valid exercise of its legislative authority to shape Indiana's public policy. *City of Gary*, 126 N.E.3d at 826 n.14; *Sidle*, 341 N.E.2d at 774-75. That is what makes Public Law 166 a substantive, rather than a procedural, law under *Church*'s predominant-purpose test.[2]

And while *Church* is new authority for resolving separation of powers challenges, the conclusion that the General Assembly has authority to change rights available to civil litigants is well-established. The Indiana Supreme Court "has long recognized the ability of the General Assembly to modify or abrogate the common law." *McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*, 729 N.E.2d 972, 977 (Ind. 2000) (citations omitted). Similarly, the Indiana Supreme Court has recognized that the common law is not frozen in time and is not a "straight jacket about the legislature body rendering it powerless reasonably to regulate social relations in accordance with changing conditions."

[2] It bears note that, but for the statutorily created cause of action for contact claims against the State authorized by Indiana Code 34-13-1-1, Mellowitz's contract claim against Ball State would be barred by the doctrine of sovereign immunity. When viewed through the prism of sovereign immunity, Public Law 166's prohibition against class action claims against the government for breach of contract arising out of COVID-19 stems from the legislature's authority to regulate causes of action available against the State, public employees, public schools, etc. *See* Ind. Code 34-13, *et seq*.

Sidle, 341 N.E.2d at 774. In *Sidle*, the Indiana Supreme Court upheld the guest statute, which bars a guest passenger from recovering for personal injuries sustained as a result of the negligence of the vehicle's owner or operator, as a reasonable and constitutional exercise of the legislative's authority. *Id.* at 774-75. In that case, the Supreme Court recognized the legislature's authority to take away rights previously available to civil litigants. Here, because no citizen has a protectable interest in bringing a class action lawsuit, the General Assembly can abrogate the right to bring certain types of class actions as it did through Public Law 166. *Cf. McIntosh*, 729 N.E.2d at 977-78 ("[W]e have long held that the General Assembly has the authority to modify the common law and that there is no 'fundamental right' to bring a particular cause of action to remedy an asserted wrong.").

B. Public Law 166 Does Not Violate Separation of Powers.

Church makes clear that when a law is substantive in nature, there is no constitutional separation of powers problem to analyze. *Church*, 2022 WL 2254876, at *7 ("[W]e need not explore the constitutional consequences that might arise if the General Assembly enacted a purely procedural statute in conflict with one of our rules."). If this Court determines that Section 13 of Public Law 166 is substantive in nature, it need not undertake any further analysis of separation of powers, following the example set by the Supreme Court in *Church*.

However, because Mellowitz devoted a considerable portion of his brief to general separation of powers principles (*see* Appellant's Br., pp. 26-28), Ball State further notes that it was clear even before *Church* that Public Law 166 did not offend these principles. "The separation of powers or functions provision of the Indiana Constitution divides the functions of the government into three departments—the Legislative, the Executive, and the Judicial—and provides that 'no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.'" *Lemmon v. Harris*, 949 N.E.2d 803, 814 (Ind. 2011) (citing Ind. Const. art. III, § 1) (holding a provision of the Sex Offender Registration Act did not violate two separate provisions of state Constitution). "In general, 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.'" *Id.* (quoting *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000) (holding that the legislature may constitutionally abolish a court of general jurisdiction in this state)).

Mellowitz's separation of powers argument—that the General Assembly cannot enact Section 13 of Public Law 166 barring class actions in certain instances because the Supreme Court has adopted Rule 23 as the procedural rule defining how class actions proceed—carries with it the fallacy that the General Assembly has *no ability* to bar or limit class actions in any circumstance. But that is plainly incorrect. No Indiana authority supports

Mellowitz's contention that the General Assembly is powerless to restrict the availability of class actions in specific circumstances. In every respect, Public Law 166 hews to the General Assembly's constitutional function of shaping substantive Indiana law. It does not usurp or disturb the judicial branch's authority.

Indeed, clear Indiana Supreme Court precedent holds that the General Assembly may change or bar common law claims or restrict (1) against whom they may be brought or (2) available relief for such claims. The "legislature 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) (holding that the Product Liability Act does not violate the Open Courts or Single Subject provisions of state Constitution). Importantly, the Indiana Supreme Court has previously noted, "[i]t is not our office to question the wisdom of the legislature's enactments. As a reviewing court, we will not substitute our judgment or opinion on such matters for that of the legislature." *Id.* at 212 (citations omitted); *see also 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."). Changes to common law rights and remedies does not implicate, much less contravene, separation of powers principles.

A statute like Public Law 166 that expressly prohibits litigants from pursuing particular class actions creates substantive protections from litigation for the targets of those class actions. *Cf. Church*, 2022 WL 2254876, at *6 ("[The Child Deposition Statute] creates substantive protections for child victims of sex crimes that guard against needless trauma inflicted through compelled discovery depositions by declining to grant defendants in this limited set of circumstances the substantive right to take discovery depositions." (citations omitted)). If this Court does not apply the statute for Ball State's benefit, it would not only nullify the legislature's undeniable constitutional authority to protect governmental and higher education institutions from the specific COVID-19-related class action claims identified in Public Law 166, it would prevent the General Assembly from ever restricting the availability of class actions—an action the legislature undertook three times in the 2020/2021 legislative session. The ruling Mellowitz seeks would create, not solve, a separation of powers problem.

III. Public Law 166 Does Not Conflict with Trial Rule 23 or Indiana Statute.

Church effectively resolves that Section 13 of Public Law 166 should be deemed substantive in character. However, even if it is deemed procedural, it can stand. Indiana law is replete with decisions upholding procedural laws because they do not conflict with a rule adopted by the judicial branch. Indeed, "[t]he rule of law rendering a procedural statute a nullity applies only when a statute is in conflict with the rules of procedure as established by the Indiana

Supreme Court." *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993). Even if Public Law 166 were procedural in nature, it could be read in harmony with Trial Rule 23.

A conflict requires that the statute and the Trial Rule "be incompatible to the extent that both could not apply in a given situation." *State v. Bridenhager*, 279 N.E.2d 794, 796 (Ind. 1972). As the trial court held, there is no conflict here. Public Law 166 does not reference the Trial Rules or purport to alter them. Instead, and as explained above, Public Law 166 redefines the substantive law of Indiana concerning breach of contract, implied contract, and unjust enrichment—and only in a very limited respect involving purported representative claims against "covered entities" "arising out of COVID-19." Conversely, neither Trial Rule 23 nor any other provision of the rules creates a vested right to bring any claim as a class action. Indeed, Mellowitz admits that "Trial Rule 23 is a procedural rule that does not and cannot create new substantive rights[.]" Appellant's App. Vol. 2, p. 57. Rather, Trial Rule 23 outlines various procedures applicable to class actions, identifies prerequisites to a class action, and establishes factors for determining whether actions may be maintained as class actions.

Thus, Public Law 166 and Trial Rule 23 are concerned with two different things. Whereas Public Law 166 creates a complete bar to certain class actions arising out of COVID-19, Trial Rule 23 provides guidelines and tools for procedure and practice in class actions generally. There is no inherent conflict.

Mellowitz's contrary position—that Trial Rule 23 and Public Law 166 are in conflict because Public Law 166 prevents Mellowitz from proceeding under Trial Rule 23 on the specific claims he brings—presents far-reaching consequences. If accepted, Mellowitz's position would require invalidating not just the class action bar in Public Law 166, but also the two other COVID-19-related class action bars in Public Law 1 and any other class action bar the legislature might attempt to pass. The Court should reject such an extreme position and affirm the legislature's constitutional prerogative to limit the availability of the class action device as the change of time and circumstance may require.

Indeed, to hold otherwise—that the General Assembly is without authority to enact a class action limitation—would put Indiana in a distinct minority position. Many other states have passed class action bars covering a range of matters, some of which are reflected in the chart provided as Appendix A to this brief. Ten of these states with statutory class action bars—Alabama, Arizona, Arkansas, Florida, Idaho, Michigan, Missouri, Pennsylvania, Tennessee, and Washington—have procedural conflict resolution rules akin to Indiana's.[3]

[3] *Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc.*, 895 So.2d 225, 236 (Ala. 2004); *Albano v. Shea Homes Ltd. Partnership*, 254 P.3d 360, 366 (Ariz. 2011) (en banc); *Edwards v. Thomas*, 625 S.W.3d 226, 229 (Ark. 2021); *Hines v. State*, 931 So. 2d 148, 149-50 (Fla. Dist. Ct. App. 2006); *State v. Garner*, 390 P.3d 434, 437 (Idaho 2017); 906 N.W.2d 801, 808 (Mich. Ct. App. 2017); *Gabriel v. St. Joseph License, LLC*, 425 S.W.3d 133, 139-40 (Mo. Ct. App. 2013); *Com. v. McMullen*, 961 A.2d 842, 847-48 (Pa. 2008); *Willeford v. Klepper*, 597 S.W.3d 454, 466 (Tenn. 2020); *Banowsky v. Guy Backstrom, DC*, 445 P.3d 543, 552 (Wash. 2019).

Yet none of these statutory class action bars have been invalidated in those states as a violation of separation of powers.

A. Public Law 166 Can Be Read in Harmony with Trial Rule 23.

Ultimately, "this case does not involve a clash between a procedural statute and a Rule of [the Supreme Court]." *Budden v. Bd. of Sch. Comm'rs of City of Indianapolis*, 698 N.E.2d 1157, 1164 (Ind. 1998). By reading Trial Rule 23 as a whole, this Court can simultaneously apply Public Law 166 and the rule. And that is precisely the approach the Supreme Court has instructed — harmonization whenever reasonably possible:

> [A]s other courts have concluded in construing the Trial Rules, the first level of resolution turns on whether the class action device and the [statute] may be reconciled. *Elliott v. Roach*, 409 N.E.2d 661, 668–69 (Ind. Ct. App. 1980) (noting statutory origins of Trial Rule 21(B) and describing issue as whether particular statute and the Rule could both be given effect). Under settled rules of construction, our course is clear: "Where two statutes are in apparent conflict they should be construed, if it can be reasonably done, in a manner so as to bring them into harmony."

Id.

It must be assumed, in cases of potential conflict, that the legislature intended for both provisions to coexist. *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1092 (Ind. Ct. App. 2000). They can do so here. On the one hand, Public Law 166 clearly and unambiguously *prohibits* the pursuit of specific types of class actions against higher education institutions like Ball State. On the other, Trial Rule 23 *does not create an automatic right* for claimants in civil

actions to pursue class actions in the first instance. Public Law 166's outright prohibition on certain class actions arising out of COVID-19 does not run afoul of or impinge upon Trial Rule 23 in any respect. In fact, it is clear that Public Law 166 and Trial Rule 23 are wholly compatible and can apply in a given situation, including simultaneously in this case. Trial Rule 23(D)(4) is tailor-made for applying Public Law 166's prohibitions. Indeed, it authorized the trial court to order Mellowitz to abandon his substantively prohibited class allegations in an amended complaint just as the trial court did.

Trial Rule 23(D) provides, in part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> . . .
>
> (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;
>
> . . .
>
> The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Trial Rule 23(D).

Indiana Trial Rule 23(D)(4) is, in substance, the same as Rule 23(d)(1)(D) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23(d)(1)(D) (in conducting an action under Rule 23, a federal court may issue orders that "require that the pleadings be amended to eliminate allegations about representation of

absent persons and that the action proceed accordingly").[4] This provision was added to the Federal Rules of Civil Procedure in 1966, and the Advisory Committee Notes adopted in connection with the 1966 Amendment observed that: "A negative determination means that ***the action should be stripped of its character as a class action***. See subdivision (d)(4)." Fed. R. Civ. P. 23 Advisory Committee's Note to 1966 Amendment (emphasis added) (further noting that, upon such a "negative determination," "an action thus becomes a non-class action . . . .").

Under this rule, courts may properly strike class allegations or otherwise order the plaintiff to file an amended complaint that eliminates all class allegations where the basis for decision is separate from the conventional Rule 23 class certification analysis. For example, Rule 23(d)(1)(D) has been invoked when a plaintiff is not legally qualified to serve as a class representative. *See, e.g.*, *Jaffe v. Capital One Bank*, No. 09 Civ. 4106 (PGG), 2010 WL 691639, at *11 (S.D.N.Y. Mar. 1, 2010) (striking class allegations because a *pro se* plaintiff cannot legally represent a class). Similarly, in *Evancho v. Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at *5 (D.N.J. Dec. 19, 2007), the court struck class claims pursuant to Rule 23(d)(1)(D) where a separate statute precluded the plaintiff from litigating her claims on an opt-out class basis.

[4] When interpreting Indiana Trial Rule 23, it is appropriate for Indiana courts to look to federal courts' interpretations of Rule 23 of the Federal Rules of Civil Procedure. *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 848 (Ind. 1997).

Mellowitz contends that Rule 23(D)(4) is to be used to "clean up" the pleadings after class certification is denied. Appellant's Br., p. 47 (citing *Bank v. Am. Home Shield Corp.*, 2013 U.S. Dist. LEXIS 29546, at *7-8 (E.D.N.Y. Mar. 4, 2013)). But even the unpublished, district court opinion that contains this assertion acknowledges that courts use Trial Rule 23(D)(4)'s federal analogue to address issues that plainly prevent class certification before it is formally sought—just as Ball State did here. *Am. Home Shield Corp.*, 2013 U.S. Dist. LEXIS 29546, at *7-8.[5]

Indiana's counterpart to Federal Rule of Civil Procedure 23(d)(1)(D) applies here. Indeed, Indiana Trial Rule 23(D)(4) on its face empowers trial courts to enter orders that require would-be class representative plaintiffs like Mellowitz to amend their complaints and remove all allegations regarding any proposed class, effectively limiting plaintiffs to the pursuit of their individual claims. Because no Indiana statute and no case law interpreting Indiana Trial Rule 23 recognizes a freestanding right for a litigant to seek class certification

[5] Citing *Jaffe*, 2010 WL 691639, at *11 (striking class allegations before class certification sought because pro se plaintiff cannot serve as class representative); *In re Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2008 WL 2050781, at *2 (S.D.N.Y. May 13, 2008) ("I agree with the district courts that have held that [Rule 23(d)(1)(D)] motions may be addressed prior to the certification of a class if the inquiry would not mirror the class certification inquiry and if resolution of the motion is clear."); *Davito v. AmTrust Bank*, 743 F. Supp. 2d 114, 115-16 (E.D.N.Y. 2010) (striking class allegations because all members of the proposed class except the named plaintiffs failed to exhaust administrative remedies); *Rahman v. Smith & Wollensky Rest. Grp., Inc.*, No. 06 Civ. 6198 (LAK) (JCF), 2008 WL 161230, at *3 (S.D.N.Y. Jan. 16, 2008) (striking class allegations in Title VII discrimination claim as to any location except where named plaintiff worked).

on any type of claim that he may be able to pursue individually, invoking Trial Rule 23(D)(4) to require the elimination of class allegations from a complaint where such allegations are barred by statute aligns with the rule's clear purpose.

Mellowitz contends that Trial Rule 23(D)(4), "a single subdivision of a subpart to the rule," cannot be used to evade Public Law 166's conflict with the rest of Trial Rule 23 and asserts that there is no scenario where all of the other subdivisions and subparts of Trial Rule 23 "can be applied alongside PL 166," accompanied by a long list of Trial Rule 23's subparts and subdivisions. Appellant's Br., p. 46. Yet Mellowitz does not actually demonstrate the existence of a single conflict, and conclusory assertions should not substitute for well-reasoned analysis. *Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018).

B. Public Law 166 Resembles Other Indiana Statutes That Implicate But Do Not Conflict with Provisions of the Trial Rules.

Mellowitz's argument boils down to an assertion that a conflict arises simply because both the statute and the rule of court involve the same subject matter, here, class actions. But if that were the case, many Indiana statutes that touch on matters related to court proceedings and related provisions of the Trial Rules would be rendered unconstitutional under Mellowitz's approach to separation of powers.

For example, if Mellowitz's separation of powers argument had merit, Chapter 32 of the Indiana Business Corporation Law (the "Derivative

Proceedings Statute"), which establishes limitations on shareholder derivative actions, would be in conflict with Trial Rule 23.1, the procedural rule governing shareholder derivative actions. *See* Ind. Code 23-1-32, *et seq*. However, despite carefully examining the Derivative Proceeding Statute in *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985 (Ind. 2014), the Indiana Supreme Court, the chief arbiter of alleged conflicts between statutes and rules of court, did not hint at the possibility of legislative overreach in the statute's deference to corporations regarding the adjudication of shareholder derivative proceedings in Indiana courts. Rather, the Court confirmed the validity of the Derivative Proceedings Statute's directive for trial courts to defer to the business judgment of a corporate board's special litigation committee to determine whether a derivative proceeding may proceed in court. *See id.* at 991-92 (recognizing the statute takes an approach to derivative proceedings "which puts corporate decision-making largely outside judicial review" (citation omitted)); *see also In re Guidant S'holders Derivative Litig.*, 841 N.E.2d 571, 576 (Ind. 2006) (examining the Derivative Proceedings Statute and noting "[t]he availability of the disinterested committee ***will bar a separate derivative action*** unless the derivative plaintiff can establish that the committee was not disinterested or that its decision was not

undertaken after a good faith investigation." (emphasis added)).[6]

Public Law 166 is similar to the Derivative Proceedings Statute. Like the Derivative Proceedings Statute, which applies only to civil actions governed by Trial Rule 23.1, Public Law 166 comes into play only in connection with civil actions governed by Trial Rule 23. Both statutes afford substantive protections to persons who may be required to defend civil actions governed by those particular court-made rules of procedure. The Derivative Proceedings Statute contemplates limiting or barring shareholder derivative claims against corporate fiduciaries under Trial Rule 23.1, while Public Law 166 bars certain class

[6] Furthermore, numerous Indiana cases have declined invitations to find conflicts between statutes and provisions of the Trial Rules when the statute and the court rule coalesce around the same or a similar subject matter. *See, e.g.*, *Morrison v. Vasquez*, 124 N.E.3d 1217, 1221 (Ind. 2019) (no conflict between Ind. Code § 23-0.5-4-1, which requires Indiana corporations to designate and maintain a registered agent in the state, and Trial Rule 75(A)(4), which specifies a preferred venue for domestic corporate organizations is the county where its principal office is located); *Health and Hosp. Corp. of Marion Cnty. v. Foreman*, 51 N.E.3d 317, 319 (Ind. Ct. App. 2016) (no conflict between Ind. Code § 16-22-8-31(e), which governs the process for change of venue from a judge may be achieved for proceedings involving the particular plaintiff municipal corporation, and Trial Rule 76(C), which generally governs the process for taking a change of judge in certain situations); *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993) (no conflict between Security Box Statute, Ind. Code § 32-7-5-1, *et seq.* and any provision of the Trial Rules). Furthermore, numerous statutes in Title 34 by their very nature are meant to apply in civil actions and to temper the use of specific Trial Rules. *See, e.g.*, The Uniform Interstate Depositions and Discovery Act codified at, Ind. Code § 34-44.5-1-1, *et seq.* (requiring trial courts to apply provisions of Trial Rule 45 governing subpoenas to "foreign subpoenas" initially issued in "foreign jurisdictions"); The Public Lawsuits Act codified at Ind. Code § 34-13-5-1, *et seq.*) (*requiring* all claimants to bring class action suits under Trial Rule 23 if the claimant challenges public improvement projects undertaken by municipal corporations). If the General Assembly can *require* certain causes of action to be brought as class actions, it surely can prohibit others from being eligible for class treatment.

actions against the government or higher education institutions under Trial Rule 23. In view of *TP Orthodontic*'s recognition of the legitimate role that the Derivative Proceedings Statute plays in cases governed by Trial Rule 23.1, there is no reason to think that the Indiana Supreme Court would view Public Law 166 as encroaching on the judiciary's prerogatives under Trial Rule 23.

C. Public Law 166 Does Not Conflict With Indiana Statute.

Mellowitz makes but effectively jettisons an argument that Public Law 166 conflicts with Indiana Code §§ 34-8-1-3 and 34-8-2-1, which recognize the authority of the Supreme Court to make rules of civil procedure. *See* Appellant's Br., p 29 ("While the same result should be reached under either a conflict-of-statutes analysis or a constitutional separation-of-powers analysis, the latter is the better approach here."). Mellowitz acknowledges one flaw in the argument: that one session of the General Assembly cannot bind the hands of future general assemblies. Appellant's Br., p. 31. But more fundamentally, the argument is flawed for the reasons already discussed—because Public Law 166 does not conflict with the Trial Rules and in particular with Trial Rule 23. Again, "[t]he rule of law rendering a procedural statute a nullity applies only when a statute is in conflict with the rules of procedure as established by the Indiana Supreme Court." *Chasteen*, 625 N.E.2d at 502. As demonstrated above, Public Law 166 does not conflict with the Trial Rules. It therefore does not conflict with Indiana Code §§ 34-8-1-3 and 34-8-2-1.

IV. This Court Should Reject Mellowitz's Takings Clause and Contractual Impairments Clause Arguments.

Neither of Mellowitz's backup constitutional arguments has merit.

A. The Court's Application of Public Law 166 to Mellowitz's Claims Is Prospective, Not Retroactive.

Mellowitz argues that "retroactive application" of Public Law 166 to this proceeding raises additional constitutional problems. Appellant's Br. pp. 48 & 52. But the Supreme Court's decision in *Church v. State* addresses that issue as well. The Court explained in *Church* that the "operative event of a statute" is determinative as to whether a statute is being applied retroactively. *See Church*, 2022 WL 2254876, at *4. Because the statute regulates depositions of alleged child victims, the "operative" or "triggering event" is seeking to depose the victim. *Id.* The defendant did not seek to do so before the statute went into effect (even though he had already been charged), so "there is no retroactive application." *Id.*

Under this logic, the "operative" or "triggering event" of a class action bar would be certification of the class action. Mellowitz did not move for class certification and certainly no class has been certified before Public Law 166 went into effect. Just like in *Church*, therefore, this is not an instance of retroactive application of a statute. *Id.* Even when a desire to take a prohibited action "may have its origin in a situation existing prior to the enactment of the statute . . . this does not transform an otherwise prospective application into a retroactive one." *Id.* The fact that Mellowitz filed his lawsuit before the enactment of

Public Law 166, therefore, does not transform prospective application of a class action bar in his lawsuit to a retroactive application. *See also Morrison v. Vasquez*, 124 N.E.3d 1217, 1222 (Ind. 2019) (no retroactivity issue where preferred venue was not decided until after statutes at issue were enacted).

Regardless, the statute can be applied to the pending litigation because Public Law 166's class action bar contains a retroactivity clause that *requires* this Court to apply the Act to Mellowitz's claims. The General Assembly often passes or amends laws with a particular case or cases in mind, and it includes retroactivity clauses in these laws to ensure that they will apply both prospectively and to the case the legislature focused on in the first instance. *See, e.g.*, Pub. L. No. 36-2016, 2016 Ind. Acts 308-317 (amending law prescribing the payment of 911 fees in response to litigation regarding that issue); Pub. L. No. 106-2015, § 0.1, 2015 Ind. Acts 738-740 (amending effective date of statute providing immunity to firearm manufacturers to one day before the commencement of the litigation that motivated the statute).

Multiple Indiana cases have approved the application of new statutes to pending litigation. *See, e.g.*, *Guzzo v. Town of St. John*, 131 N.E.3d 179, 182 (Ind. 2019) (remanding for trial court to apply statute that was amended during pendency of the appeal); *Henderson v. State ex rel. Moon*, 58 Ind. 244, 247 (1877) (upholding a law that undid a trial court's tax-refund order because the claimants "had no vested right to have the taxes refunded, until their claims were reduced to judgment, and until that time the Legislature had the

undoubted right to repeal the law which entitled them to it"); *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Indiana Revenue Bd.*, 253 N.E.2d 725, 731 (Ind. 1969) (citation omitted) (upholding "the power of the Legislature to enact general laws, regulating the practice in courts of justice, which may materially affect or change the decision of causes pending before the courts"). Moreover, retroactive application of a law violates separation of powers only if it disturbs a final judgment—one from which no further appeal may be had. *See Lemmon v. Harris*, 949 N.E.2d 803, 814 (Ind. 2011) (citation omitted). Clearly, applying Public Law 166 here does not violate this rule.[7]

Notably, the General Assembly adopted COVID-19-related legislation as soon as it could. Indiana's citizen legislature is not continuously in session. According to the legislative calendar for the 2020 legislative session, March 14, 2020, was the last day for adjournment in both legislative houses. *See* iga.in.gov/legislative/2020/deadlines (last visited 6/24/2022). The General Assembly did not reconvene for its next legislative session until November 2020 (after Mellowitz had filed his lawsuit). *See* iga.in.gov/legislative/2021/deadlines (last visited 6/24/2022). The first meaningful opportunity to introduce bills in the 2021 legislative session was not until January 2021. *Id.* And the first bill introduced in the Indiana Senate proposed wide-ranging legislation pertaining specifically to problems arising from the pandemic, including

[7] Of course, if the Court considers PL 166 to be a procedural law, there also is no retroactivity problem. "[P]rocedural statutes may be applied retroactively." *Morrison v. Vasquez*, 124 N.E.3d 1217, 1222 (Ind. 2019).

establishing immunity from certain COVID-19-related liabilities. Thus, the legislature adopted Public Law 166 to implement COVID-19-related measures at its first opportunity.

Mellowitz cites no case in which an Indiana court invalidated the legislature's explicit directive that a statute be applied retroactively. Instead, Mellowitz invokes two clauses of the United States and Indiana Constitutions—the Takings and Contracts Impairment Clauses—to argue against retroactive application of Public Law 166. Because Public Law 166 preserves the claims of Mellowitz (and the members of his proposed class), there is no constitutional defect under these clauses irrespective of the retroactivity analysis.

B. Mellowitz Has Not Suffered an Unconstitutional Taking.

Takings claims generally involve physical property, which is obviously not at issue here. As our Supreme Court has noted:

> Insofar as the Takings Clauses are concerned, the federal and state constitutions are textually indistinguishable. The federal Takings Clause of the Fifth Amendment reads "nor shall private property be taken for public use, without just compensation," and the Article I, Section 21 of the state constitution reads "no person's property shall be taken by law, without just compensation." . . . [T]here is no difference in the terms "taken" or "property" found in both constitutions, and the courts have treated these issues as identical.

Cheatham v. Pohle, 789 N.E.2d 467, 473 (Ind. 2003) (citation omitted). Three years earlier, the Court observed "there can be little doubt that the framers intended that the [federal Takings Clause] apply only to physical acquisition or invasion of property[.]" *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1221 (Ind. 2000), *opinion amended in part on other grounds in order on*

rehearing, 737 N.E.2d 719 (Ind. 2000). While the U.S. Supreme Court has acknowledged that a taking might occur where there was no acquisition by the government,[8] "aside from acquisition or invasion most government regulation of property does not offend the Takings Clause." *Id.* (citing cases). Similarly, the Indiana Supreme Court has held that "Article 1, s 21 [of the Indiana Constitution] does not provide an applicable standard for review" where the State through a statute does not actually take property "for its own use and benefit." *Short v. Texaco, Inc.*, 406 N.E.2d 625, 631 (Ind. 1980) (rejecting takings-based challenge to the Mineral Lapse Act (Ind. Code § 32-5-11-1 *et seq.*), which terminated property interests in coal, oil, gas or other minerals not used for twenty years).

Of course, Public Law 166 is not a statute enabling the State to "take" or regulate property for the State's own use or benefit. While Mellowitz notes on page 49 of his Appellant's Brief that an accrued cause of action "may be a property right," *see Cheatham*, 789 N.E.2d at 473, Public Law 166 avoids Takings Clause scrutiny because it does not prevent Mellowitz from pursuing his individual contract or unjust enrichment causes of action. Instead, Public Law 166 solely concerns Mellowitz's attempt to bring claims in a representative capacity on behalf of absent parties and says he may not do so. This is why Mellowitz's Takings Clause argument is wrong. The only thing that Public Law 166

[8] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

arguably "takes" from Mellowitz is the potential for him to serve as a class representative. Mellowitz has not cited (and Ball State is not aware of) any authority recognizing class representative status as a vested property right for purposes of Indiana's or the United States' constitutional Takings Clause. Indiana case law does not support expanding the sphere of property rights protected by the Constitution to include service as a class representative.

Similarly, Public Law 166 does not restrict members of Mellowitz's proposed class from bringing their own contract or unjust enrichment claims. Mellowitz fails to articulate how Public Law 166 takes any vested property right from proposed class members. He cites no case that holds membership in a proposed class of litigants is a vested property right protected by the Indiana or United States Constitutions.

1. *Cheatham* Provides a Roadmap for Analysis of Mellowitz's Takings Argument.

The Supreme Court's analysis in *Cheatham* reveals the flaws in Mellowitz's Takings argument. *Cheatham* involved a challenge to the constitutionality of Indiana's punitive damages allocation statute—Ind. Code § 34-51-3-6—enacted in 1995. The statute provides that an award of punitive damages is to be paid to the clerk of court, and the clerk is to pay seventy-five percent of it to the State's Violent Crime Victims' Compensation Fund and twenty-five percent to the plaintiff. In *Cheatham*, a plaintiff who was awarded $100,000 in punitive damages following a jury trial sought to invalidate the punitive damages allocation statute as an unconstitutional taking. In rejecting this challenge, the

Court reasoned that the plaintiff did not have a cognizable property interest in the full award:

> [A]ny interest the plaintiff has in a punitive damages award is a creation of state law. The plaintiff has no property to be taken except to the extent state law creates a property right. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Indiana legislature has chosen to define the plaintiff's interest in a punitive damages award as only twenty-five percent of any award, and the remainder is to go to the Violent Crime Victims' Compensation Fund. The award to the Fund is not the property of the plaintiff. . . . As a result, there is no taking of any property by the statutory directive that the clerk transfer a percentage of the punitive damages award to the Fund.

Cheatham, 789 N.E.2d at 473.

So too here. Just as with a claim for punitive damages, any interest Mellowitz has in pursuing Indiana common law claims in a representative capacity is a creation of state law. He has no property interest in pursuing such claims in a representative capacity unless state law creates one. Through Public Law 166, the General Assembly has expressly forbidden claimants like Mellowitz from pursuing breach of contract and unjust enrichment claims on behalf of a class. The causes of action that belong to absent class members and that Public Law 166 bars Mellowitz from pursuing in a representative capacity are not Mellowitz's personal property to start. Therefore, there is no *taking* of any property by Public Law 166's prohibition on class action litigation.

2. Mellowitz's Takings Authorities Do Not Support His Position.

Mellowitz begins his discussion of vested rights by citing *Bailey v. Menzie*, 542 N.E.2d 1015, 1019 (Ind. Ct. App. 1989). Appellant's Br., p. 48. In *Bailey*, the Court of Appeals emphasized the necessity of a present interest:

> A right is vested when ... the right to enjoyment, present or prospective, has become **the property of some particular person or persons as a present interest**. The right must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of future benefit or contingent interest in property ... does not constitute a vested right.

Bailey, 542 N.E.2d at 1019 (citation omitted) (emphasis added). The court then reasoned that rights vested in adoptive parents are not "vested rights" under this definition, and that the retroactive application of a statute did not constitute a taking. *Id.* Ball State respectfully suggests that, as *Bailey* holds, if service as adoptive parents does not constitute a vested property right, service as a class representative cannot possibly constitute a vested property right.

Mellowitz cites other cases that analyzed retroactive application of statutes to cases that were pending at the time the laws were passed but where the statutes were silent regarding retroactivity. *See N.G. v. State*, 148 N.E.3d 971, 974 n.1 (Ind. 2020); *Hinds v. McNair*, 413 N.E.2d 586, 608-09 n.20 (Ind. Ct. App. 1980); *Guthrie v. Wilson*, 162 N.E.2d 79, 82 (Ind. 1959). These cases stand for Indiana's reluctance to apply new statutes retroactively in the absence of legislative intent to the contrary. But they provide no retroactivity analysis relevant to Public Law 166—a statute that by its plain terms applies

retroactively. They certainly do not say that courts may or must disregard the explicit effective date of a statute.

In addition, Mellowitz cites *W.R. Huff Asset Mgmt. Co., L.L.C. v. BT Sec. Corp.*, 190 F. Supp. 2d 1273, 1279-80 (N.D. Ala. 2001), and suggests the district court declined to apply Securities Litigation Uniform Standards Act (SLUSA) retroactively because it would impinge the right to a class action. Appellant's Br., p. 50-51. Not so. The court declined to apply SLUSA retroactively—in the absence of unambiguous retroactive statutory language—where retroactive application would "trim down Huff's case to a virtual nothing" since his state law claims would be preempted and his federal law claims barred by a shorter statute of limitations. *BT Sec. Corp.*, 190 F. Supp. 2d at 1281.

Finally, Mellowitz cites a number of cases for the quoted language that an accrued cause of action may be a property right, but he does not explain how these cases could inform the resolution of any issue related to enforceability of Public Law 166's express retroactivity provision—which of course leaves Mellowitz's claims (and those of putative class members) intact. *See* Appellant's Br., p. 49 (citing *Cheatham*, 789 N.E.2d at 467 (no retroactivity analysis); *Balt. & Ohio Sw. Ry. Co. v. Reed*, 62 N.E. 488 (Ind. 1902) (whether Indiana law applied to a tort that occurred in Illinois; no question of retroactivity); *Hoyt Metal Co. v. Atwood*, 289 F. 453 (7th Cir. 1923) (involving retroactive application of an Illinois statute to a case in which judgment had already been entered when the law went into effect); *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276 (7th

Cir. 1983) (confirming that both statutes of limitation and statutes of repose can cut off vested rights of action).

C. Mellowitz's Challenge to Public Law 166 Under the Contracts Clause Fails.

Applying Public Law 166 to Mellowitz's claims likewise does not run afoul of Article 1 § 24 of the Indiana Constitution or Article 1 § 10 of the U.S. Constitution because the statute impairs no remedy in contract. Article I, Section 10 of the U.S. Constitution provides that no state shall pass any law impairing the obligations of contracts. Similarly, Article 1, Section 24 of the Indiana Constitution provides that no law impairing the obligation of contracts shall ever be passed. "'It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties.'" *Mainstreet Prop. Grp., LLC v. Pontones*, 97 N.E.3d 238, 244 (Ind. Ct. App. 2018) (quoting *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977)). "'Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects.'" *Id.* (quoting *U.S. Tr. Co. of New York*, 431 U.S. at 17). The first inquiry in addressing a Contract Clause claim is "whether, and to what extent, the state law operated as a substantial impairment of a contractual relationship." *Clem v. Christole, Inc.*, 582 N.E.2d 780, 783 (Ind. 1991) (citing *Allied Structural Steel Co. v. Spanaus*, 438 U.S. 234, 245 (1978), in addressing Indiana constitutional claim).

1. Mellowitz Does Not Identify Any Contractual Right or Obligation Impaired by Public Law 166.

Mellowitz's argument is vague about the contractual rights or obligations allegedly impaired by Public Law 166. Of course, the only relevant contract is the one implied by Indiana law between Mellowitz and Ball State. Mellowitz alleges that this contract obligated Ball State to provide in-person instruction and various services. Public Law 166 did not prevent Mellowitz from attending classes at Ball State (in person or otherwise) or receiving services made available to Ball State students. Mellowitz does not allege in his Complaint that the right to pursue claims for breach of contract as class action claims was an essential term or obligation of his implied contract with Ball State. Instead, Mellowitz asserts in briefing that "[u]nless a contract provides otherwise," Indiana law as it existed at the time of contract formation became a part of his contract with Ball State, and that the Indiana law incorporated into this contract included a statutory right to pursue class action adjudication of his claims. *See* Appellant's Br., p. 55 (citing Ind. Code § 34-8-2-2). The cited statute creates no such right.[9] Moreover, none of Mellowitz's cited cases regarding the

[9] This statute simply recognizes the Supreme Court's authority to adopt the Trial Rules. In fact, no statute creates an absolute right to pursue class actions for common law claims like breach of contract or unjust enrichment. While certain Indiana statutes authorize class actions for certain statutory-based causes of action, *see, e.g.*, Ind. Code § 24-5-0.5-4 (provision of the Deceptive Consumer Sales Act that expressly authorizes claimants to bring class actions for statutory violations against covered suppliers); Ind. Code § 24-13-4-2 (Pyramid Promotional Schemes statute expressly authorizes certain class actions for statutory violations), those clearly aren't at issue. And as discussed, Trial Rule 23 provides no inherent right to bring a class action.

incorporation of existing law into contracts involve implied contracts. Mellowitz cannot explain how an implied contract "provides" anything about incorporating applicable law in force at the time of the agreement.

At any rate, Public Law 166 preserves Mellowitz's right (and, by extension, the rights of other potential plaintiffs) to pursue a remedy for any alleged breach of contract by Ball State. That the statute preserves these causes of action in contract should make it impossible for Mellowitz to succeed on his Contract Clause challenge. He cannot show that Public Law 166 results in a substantial impairment of his contractual relationship with Ball State.

2. Public Law 166 Reasonably and Necessarily Protects Higher Education Institutions From Class Action Litigation.

As discussed, Public Law 166 does not impair material contractual relations between Mellowitz and Ball State. But even if it did, "[t]he prohibition against impairment of contracts is not an absolute one." *Clem*, 582 N.E.2d at 783 (citation omitted). Legislation which impairs contracts nonetheless passes constitutional muster so long as it relates to the claimed objective and employs means which are reasonable and reasonably appropriate to secure the objective. *Id.* (citing *Dep't of Fin. Inst. v. Holt*, 108 N.E.2d 629, 635 (Ind. 1952).

As the person challenging a statute's constitutionality, Mellowitz bears the burden to "negative every conceivable basis" which supports the statute. *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 597 (Ind. 1980) (citing *Madden v. Commonwealth of Ky.*, 309 U.S. 83, 93 (1940)). Moreover, a statute's

purpose "need not be addressed to an emergency or temporary situation." *Energy Reserves Grp., Inc. v. Kan. Power and Light Co.*, 459 U.S. 400, 412 (1983) (citation omitted). By its terms, Public Law 166 both responds to a "period of a state disaster emergency" and is temporary. *See* Ind. Code § 34-12-5-2(a).

To determine whether a statute falls within the necessary police power exception to the Contract Clause, courts assess several factors. *Clem*, 582 N.E.2d at 784. In particular, courts assess whether the effect of the statute is a temporary alteration of the contractual relationships or a severe, permanent change. *Id.* And courts look to whether the statute addresses a broad problem general to society and whether it affects a field that is traditionally subject to legislation. In light of these factors and Public Law 166's purpose, Public Law 166 easily clears *Clem*'s factors. First, by its terms its effect is temporary. The class action bar in Public Law 166 applies only to claims arising after February 29, 2020 and before April 1, 2022. Ind. Code § 34-12-5-2. Second, education, including higher education, is the subject of extensive legislation in Indiana. Title 21 of the Indiana Code—devoted exclusively to higher education—includes provisions on everything from education savings programs to tuition to even a specific Article on Ball State University. Ind. Code 21-19. Moreover, and as discussed above, Public Law 166 does not impair any material provision of the implied contract between Mellowitz and Ball State. Finally, Public Law 166 addresses a broad problem general to society. For Hoosier institutions of higher education, the potential for class action litigation for reimbursement of tuition

and fees impedes their mission to provide quality education to their students. The benefits of higher education are well-documented. *See, e.g.,* Indiana Commission for Higher Education, Indiana College Value Report 2020, at 14, https://www.in.gov/che/files/2020_College_Value_Report_04_01_2020_pages.pdf (last visited 6/21/2022) ("92% of Hoosiers with a college degree rated their health status as 'good or better' compared to more than 65% of Hoosiers without education greater than high school, who rated their health status as 'fair or poor.'"); *see also id.* ("Hoosiers with higher degree levels are less likely to live in poverty.").

This Court should respect the General Assembly's pronouncement of Indiana's public policy relating to tolerable levels of COVID-19 litigation exposures for Indiana's governmental and higher education institutions. *See Dague*, 418 N.E.2d at 213; *see also Rassi,* 240 N.E.2d at 53 ("[N]o individual property owner should have the legal ability through the courts to question a legislative determination of the public need.").

3. None of Mellowitz's Cited Contracts Clause Cases Undermine Public Law 166's Constitutionality.

Mellowitz's authorities are either inapposite (because they do not mention or involve the constitutional law issues on which Mellowitz bases his challenge) or easily distinguished. *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 614 (Ind. Ct. App. 2019), involved a contract and wage and hour dispute that has nothing to do with either Article 1 § 24 or Article 1 § 10. *Dep't of Pub. Welfare of Allen Cnty v. Potthoff*, 44 N.E.2d 494, 496 (Ind. 1942), involved the

state's rights under a contract and, therefore, there was "no question as to the impairment of the obligation of a contract with the state involved in this case." *Potthoff*, 44 N.E.2d at 496. The Supreme Court clarified, "A state has no vested rights which are immune from its legislative control." *Id.* These cases have absolutely no bearing on the constitutionality of Public Law 166.

The cases Mellowitz cites that actually apply the relevant constitutional law provisions do not support his arguments regarding Public Law 166. He cites *Evansville-Vanderburgh Sch. Corp. v. Moll*, 344 N.E.2d 831, 841 (Ind. 1976) and argues that the retrospective application of a statute made before the effective date can impair the obligation of contracts. Appellant's Br., p. 53. But in *Moll*, the Indiana Supreme Court found no Article 1 § 10 violation where a contract between a school district and school bus drivers expressly contemplated and incorporated legislative amendment. Mellowitz cites *City of Indianapolis v. Robison*, 117 N.E. 861, 862 (Ind. 1917), and argues essentially that any change in the law which substantially affects the parties' obligations or the validity of the agreement infringes the Indiana Constitution and the Constitution of the United States. Appellant's Br., p. 53. He cites *Ahlborn v. Hammond*, 111 N.E.2d 70, 74 (Ind. 1953) and *Lewis v. Brackenridge*, 1 Blackf. 220, 221-22 (Ind. 1822) as supporting this same argument. *Id.* In *Robison*, the Indiana Supreme Court found violations of Article 1 § 10 of the U.S. Constitution and Article 1 § 24 of the Indiana Constitution. After the city issued a bond to a bondholder, the statute changed and relieved the city of certain of its

obligations with respect to the money given in exchange for the bond. *Robison*, 117 N.E. at 862. Rather than fund certain street improvement projects, as agreed, the new statute directed the funds to a "special fund" to be held in trust until future investment may be had. *Id.* In other words, the statute relieved the city of specific contractual obligations. Here, Public Law 166 relieves Ball State of no specific contractual obligations. *Ahlborn* is another bond case, but the Indiana Supreme Court found that the ordinance in question passed constitutional muster. In particular, the Court determined that issuing additional bonds that were to be paid from different funds than those used to pay the initial bonds would not impair the value of the initial bonds. *Ahlborn,* 111 N.E.2d at 74. *Lewis* is a 200-year-old case cited most recently in 1937. *Lewis* contains lofty language regarding contract rights, but because it includes no discussion of a statute that explicitly applies retroactively, it does not support Mellowitz's position.

Mellowitz cites *Budden* to suggest that the right to a class action is, as a practical matter, "often essential to the assertion of any claim at all." Appellant's Br., p. 56 (quoting *Budden*, 698 N.E.2d at 1162). Even though Mellowitz seems to concede that *Budden* characterized the class action as a substantive right—relevant to the earlier discussion—its status as such is unhelpful to the question of whether it was a material provision in the implied contract between Mellowitz and Ball State. And on that point, *Budden*, of course, is silent: nothing about *Budden* reflects a determination by the Supreme Court that

statutorily removing a right to pursue a class action materially alters a relationship between a college student and his university.

CONCLUSION

This Court should affirm the trial court's order under Trial Rule 23(D)(4) directing Mellowitz to amend his complaint to remove allegations as to the representation of absent parties.

APPENDIX A

SURVEY OF STATE CLASS ACTION BARS

State	Class Action Bar Subject Matter	Citation
Alabama	Customers suing sellers for overpayment of simplified sellers use tax	Ala. Code § 40-23-199(b)
Arizona	Actions regarding failures to acknowledge mortgage satisfaction	Ariz. Rev. Stat. § 33-712(C)
Arkansas	Actions under Arkansas's Equal Consumer Credit Act	Ark. Code § 4-87-103
California	Actions under Section 1812.30, prohibiting, among other matters, denial of credit on basis of sex	Cal. Civ. Code § 1812.31(b)
Connecti-cut	Mortgage applicants suing for discrimination under certain statutes and regulations	Conn. Gen. Stat. § 36a-740
	Actions under Connecticut law on consumer contracts	Conn Gen. Stat. § 42-155(c)
Florida	Certain actions related to medical claim reimbursement	Fla. Stat. § 624.155(6)
	Certain actions against a service warranty association	Fla. Stat. § 634.433(4)
	Certain actions against a home warranty association	Fla. Stat. § 634.3284(4)
	Certain actions against a legal expense insurance corporation	Fla. Stat. § 642.0475(4)
Georgia	Actions against a licensee regarding violations of certain laws as to installment loans	Ga. Code § 7-3-50(g)
	Actions claiming violation of any loan secured by an interest in real estate	Ga. Code § 7-4-21
	Applicants denied a loan or credit solely on the basis of discrimination because of sex, race, religion, national origin, or marital status	Ga. Code § 7-6-2
	Actions claiming violation of any loan or contract secured by an interest in a motor vehicle	Ga. Code § 10-1-36.1(a)
	Certain actions claiming violation of statutes regarding below cost sales	Ga. Code § 10-1-255(c)
	Certain actions related to deceptive, fraudulent, or abusive telemarketing practices	Ga. Code § 10-1-399(a)
	Customers suing marketplace facilitators for overpayment of sales or use tax	Ga. Code § 48-8-30(c.2)(7)
Hawaii	Applicants suing creditors for certain statutory violations	Haw. Rev. Stat. § 477E-4(b)

State	Class Action Bar Subject Matter	Citation
Idaho	Debtors suing creditors for collection of an excess charge or amount or enforcement of rights	Idaho Code § 28-45-201(1)
Iowa	Actions related to taxation	Iowa Code § 421.71(1)
	Debtors suing on a consumer credit transaction	Iowa Code § 537.5108(2)
	Certain consumer actions penalties	Iowa Code § 537.5201(1)
	Debtors suing for recovery of excess charges or refunds and penalties under Iowa's Consumer Credit Code	Iowa Code § 537.5201(3)
	Certain actions against creditors for failure to disclose information under the Truth in Lending Act	Iowa Code § 537.5203(1)
Kansas	Certain consumer action penalties	Kan. Stat. § 16a-5-201(1)
	Certain consumer action damages or penalties	Kan. Stat. § 50-634(b)
	Customers suing marketplace facilitators for overpayment of sales or use tax	Kan. Stat. § 79-5603(c)
Kentucky	Customers suing marketplace providers for overpayment of sales or use tax	Ky. Rev. Stat. § 139.450(5)
Louisiana	Certain actions for loss of money or property as a result of unfair or deceptive practices or other statutory violations	La. Rev. Stat. § 51:1409(A)
	Certain actions by debtors, obligors, or those with a security interest on collateral	La. Rev. Stat. § 10:9-625(c)(1)
	Actions to contest the appropriation by the Terrebonne Levee and Conservation District of property for levee or incidental levee drainage purposes or matters	La. Rev. Stat. § 38:301(C)(3)(a)
	Certain actions against dance studios for loss of money or property as a result of fraud, dishonesty or other statutory violations	La. Rev. Stat. § 51:1562(A)
Maryland	Applicants suing creditors for failure to comply with certain statutory requirements	Md. Code Com. Law § 12-707(b)
Michigan	Actions related to mortgage lending practices	Mich. Comp. L § 445.1611(1)
Minnesota	Certain penalties in actions by borrowers or purchasers under a credit sale contract suing	Minn. Stat. § 47.59(14)(a)

State	Class Action Bar Subject Matter	Citation
	a financial institution for violations related to collection of finance or other charges	
	Actions related to prevention of consumer fraud	Minn. Stat. § 325F.694(7)(e)
	Actions related to credit card disclosures	Minn. Stat. § 325G.44
	Certain consumer actions	Minn. Stat. § 325M.07
	Certain actions related to recovery of interest or finance charges	Minn. Stat. § 334.17
Mississippi	Certain actions related to individual on-site wastewater disposal systems	Miss. Code § 41-67-28(3)(b)
	Certain consumer protection actions	Miss. Code § 75-24-15(4)
Missouri	Actions by cities or towns to enforce or collect any business license tax imposed on a telecommunications company.	Mo. Stat. § 71.675
Montana	Certain consumer actions for unlawful practices	Mont. Code § 30-14-133(1)
Nebraska	Liquidated damages in an action by borrower against licensee	Neb. Rev. Stat. § 45-1058
New Hampshire	Certain actions against Internet service providers	N.H. Rev. Stat. § 359-H:4
New Jersey	Actions by borrowers under Home Ownership Security Act	N.J. Stat. § 46:10B-29(2)
North Carolina	Actions for violation of Motion Picture Fair Competition Act	N.C. Gen. Stat. § 75C-5
	Customers suing marketplace facilitators for overpayment of sales or use tax	N.C. Gen. Stat. § 105-164.4J(f)
Oklahoma	Actions for violation of Managed Health Care Reform and Accountability Act	Okla. Stat. tit. 36, § 6595
Pennsylvania	Actions for failure to provide notice of mortgage satisfaction	21 Penn. Stat. 721-6(d)(3)
	Actions under Pennsylvania's Plain Language Consumer Contract Act	73 Penn Stat. § 2208(d)
South Carolina	Certain penalties for violation of the Consumer Protection Code	S.C. Code § 37-5-108(2)
	Certain penalties in action by consumer against creditor	S.C. Code § 37-5-202(1)

State	Class Action Bar Subject Matter	Citation
	Damages and penalties in action by debtor for certain violations of South Carolina's Consumer Protection Code	S.C. Code § 37-10-105(A)
	Actions by borrowers of high-cost home loans against lenders or party charged with statutory violation	S.C. Code § 37-23-50(A)
	Actions by borrowers of consumer home loans against lenders or party charged with statutory violation	S.C. Code § 37-23-70(F)
	Certain actions for loss of money or property as a result of unfair or deceptive practices or other statutory violations	S.C. Code § 39-5-140(a)
	Certain penalties in action by pledgor against pawnbroker for statutory violations	S.C. Code § 40-39-160(1)
Tennessee	Certain actions for loss of money or property as a result of unfair or deceptive practices or other statutory violations	Tenn. Code § 47-18-109(a)(1)[10]
	Certain actions for fraudulent insurance act unless violations giving rise to the action resulted in criminal convictions	Tenn. Code § 56-47-108(c)
	Certain actions for unlawful insurance act	Tenn. Code § 56-53-107(a)(2)
	Purchasers suing marketplace facilitators for overpayment of sales or use tax	Tenn. Code § 67-6-515(e)
Texas	Certain consumer actions for rebate response	Tex. Bus. & Com. Code § 605.005
	Certain actions regarding email	Tex. Bus. & Com. Code § 321.109
	Certain actions regarding protection of identifying financial information as a class action	Tex. Bus. & Com. Code § 502.002(f)
	Certain actions against a marketplace provider	Tex. Tax Code § 151.0242(j)
Utah	Certain actions governing the sale of nonpublic personal information	Utah Code § 13-37-203(3)
	Certain actions regarding unconscionable consumer credit agreements except for injunctive or declaratory relief	Utah Code § 70C-7-106(6)

[10] *See also Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 308-10 (Tenn. 2008) (interpreting this statute to prohibit class actions).

State	Class Action Bar Subject Matter	Citation
Virginia	Purchasers suing marketplace facilitators for overpayment of sales and use tax	Va. Code Ann. § 58.1-612.1(I)
West Virginia	Actions for asbestos or silica exposure	W. Va. Code § 55-7G-8(d)(2)
Washington	Purchasers suing marketplace facilitators for overpayment of sales or use tax	Wash. Rev. Code § 82.08.0531(8)

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WORD COUNT VERIFICATION

I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this June 24, 2022, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on the same date the foregoing document was served upon the following counsel of record via IEFS:

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