Filed: 7/18/2022 4:26 PM

IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 22A-PL-337

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

APPELLANT'S REPLY

Eric S. Pavlack, #21773-49
Colin E. Flora, #29914-49
PAVLACK LAW, LLC
50 E. 91st St., Ste. 305
Indianapolis, IN 46240
(317) 251-1100
(317) 252-0352 *fax*
Eric@PavlackLawFirm.com
Colin@PavlackLawFirm.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

Indiana Statutes

Statutes of Other States

Secondary Sources

Other Authorities

SUMMARY OF ARGUMENT

Public Law 166's class-action bar ("PL 166") squarely fits the standard for procedural laws announced in *Church v. State*. Indeed, the source of the *Church* standard instructs that class actions are procedural matters for courts. Like numerous other courts that have found class-action bars to be procedural laws subordinate to Rule 23, this Court should find that PL 166 is an impermissible incursion into the judiciary's rulemaking authority under both the Indiana Constitution and Indiana Code §§ 34-8-1-3 & -2-1.

Even were PL 166 substantive, it would constitute both an unconstitutional taking of vested rights and a retroactive substantial interference with contracts by eliminating the only effective remedy for redress, a remedy existing at the time the Ball State students' contracts were formed, their causes of action accrued, and this action was commenced. Application of PL 166 to Mellowitz and the proposed class, as dictated by *Church*, is retroactive because, under Indiana law, the filing of his *Class Action Complaint* triggered his Rule 23 rights.

ARGUMENT

Because Public Law 166's class-action bar ("PL 166") is a procedural law prohibiting purely procedural rights and because PL 166 conflicts with Trial Rule 23, both the Indiana Constitution and Indiana Code §§ 34-8-1-3 & -2-1 render it unenforceable. Even if PL 166 were substantive, by eliminating the Ball State students' only effective means for redress, it constitutes both a taking of their vested rights and an interference with the remedy rights of their contracts. In

either instance, PL 166's class-action bar cannot stand.

I. Pursuant to *Church v. State*, PL 166 is a Procedural Statute in Conflict with T.R. 23.[1]

A. PL 166 is a Procedural Statute.

PL 166 is an impermissible procedural statue. That fact is the same whether analyzed under *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 399-400, 157 N.E.2d 475, 477-78 (1959), or through the standard articulated in *Church v. State*, 2022 WL 2254876, *6 (Ind. June 23, 2022). By prohibiting class actions, PL 166 undermines judicial-administration objectives and prohibits a rule that the law-review article from which the *Church* standard is derived recognizes is the exclusive purview of courts. PL 166 seeks to do what no relevant statute in Ball State's survey has done: prohibit the procedural right to class actions in vindicating non-statutory rights. As a right created by T.R. 23, there is no authority for a legislative exception. And the fact that the legislature has enacted three such statutes, all in the same session, does not render an otherwise unconstitutional act constitutional.

1. Class-Action Bars Predominantly Affect Judicial Administration Objectives.

Under *Church*, PL 166 is an impermissible procedural statute. *Church* provides: "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." 2022 WL 2254876, at *5 (citation omitted).

[1] Ball State suggests Mellowitz only presents a facial challenge. Mellowitz asserts both facial and as-applied challenges. [Appellant's Br. pp.28, 48 & 52].

Church upheld a statute protecting child sex-crime victims by constraining the statutory right to depositions in criminal cases. *Id.* (citing IND. CODE § 35-40-5-11.5 ("Child Deposition Statute")). Our Supreme Court found the 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." *Id.* at *6 (cleaned up). The statute acted in accordance with the Indiana Constitution and statutes protecting crime-victim rights. *Id.* (citing IND. CONST. art. 1, § 13(b); IND. CODE § 35-40-5-1). In so doing, it circumscribed the statutory right to depositions in criminal proceedings. *Id.* (citing IND. CODE § 35-37-4-3). As such, it was a permissible substantive law.

PL 166's class-action bar squarely affects the orderly dispatch of judicial business and undermines judicial-administration objectives. As the Alaska Supreme Court observed, class-action procedures avoid waste of "vast amounts of judicial, administrative, and private resources" and statutes subverting Rule 23 "prevent[] the court from controlling matters of practice and procedure in the most efficient manner." *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1043-44 (1981). The law-review article from which the *Church* standard derives specifically says that class actions are procedural matters for court rules. Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 648 (1957) ("Nothing could be more a part of practice than a determination as to what causes should be joined in a single action. ... The same thing that was said

about the joinder of causes can be said about parties. Who are required or permitted to be plaintiffs or defendants, are matters involving the orderly dispatch of judicial business. ... [C]lass actions[ ] are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters.").[2]

As one court recently observed:

> [T]he Court agrees that state law class action bars are procedural rules because "a rule barring class actions does not prevent individuals who would otherwise be members of the class from bringing their own separate suits or joining in a preexisting lawsuit." The substantive rights of these individuals are not affected whether they choose to pursue their claims individually, or as a collective group. The prohibitions against **class actions only affect "how the claims are processed,"** and does not preclude individuals from obtaining their day in court. The class action device, "leaves the parties' legal rights and duties intact and the rules of decision unchanged."

Lessin v. Ford Motor Co., 2021 WL 3810584, at *15 (S.D. Cal. Aug. 25, 2021) (emphasis added; citations omitted); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 396-436 (2010); *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1334-38 (11th Cir. 2015).

At least two state supreme courts have held that statutes limiting class-action rights under Rule 23 were invalid. In *Nolan*, the Alaska Supreme Court invalidated a statute requiring parties to be named in a complaint to toll their statutes of limitations, deeming it contrary to Rule 23's embodiment of *American Pipe* tolling. 627 P.2d at 1040-47. More squarely, the Supreme Court of Rhode Island found a statute prohibiting taxpayer class actions yields to Rule 23. *Johnston*

[2] *Church* takes its standard from the Colorado Supreme Court in *People v. McKenna*, 585 P.2d 275, 277 (1978), which quotes Joiner & Miller.

Businessmen's Assoc. v. Russillo, 274 A.2d 443, 436 (1971).[3]

Like those statutes and unlike the Child Deposition Statute, PL 166 is a procedural statute affecting judicial administration.

2. Unlike Statutes Limiting Statutory Rights, PL 166 Prohibits Rights Derived Entirely from T.R. 23.

Further demonstrating that PL 166 is an impermissible overreach is the source of the class-action right. As Mellowitz previously explained, the right to class actions derives from T.R. 23. [Appellants' Br. pp.34-36].[4] The Child Deposition Statute both manifested a substantive right for child sex-crime victims—furthering existing constitutional and statutory protections—and curtailed the substantive statutory right to depositions in criminal proceedings. *Church*, 2022 WL 2254876, at *6 (citing IND. CONST. art. 1, § 13(b); I.C. §§ 35-40-5-1 & 35-37-4-3); *id*. at *5 ("*Blood* foretells the General Assembly's power to narrow the scope of ***its substantive grant of deposition rights*** for criminal defendants in the service of protecting children. Or, stated differently, its power to extend a substantive right to children **by limiting a right previously conferred** without exception to defendants **by statute**." (emphases added)).

Similarly, the right to change of venue from county or judge has been

---

[3] The court's conclusion appears based on a statute substantively identical to I.C. § 34-8-1-3. *See id*. (citing *Gilbert v. Girard*, 272 A.2d 691, 693 n.3 (R.I. 1971) ("The Legislature in granting the Superior Court rule-making power also provided that its rules would prevail over conflicting statutes.")).

[4] As products initially of procedural statutes, before their present embodiment in T.R. 23, class actions are not, as the State argues, "derived from common law," [State's Br. p.13]; BLACK'S LAW DICTIONARY 313 (9th ed. 2009) (common law: "The body of law derived from judicial decisions, rather than from statute or constitutions").

permissibly limited because it is a right conferred by statute. IND. CODE art. 34-35; *Blood*, 239 Ind. 394, 157 N.E.2d 475; *State ex rel. Wade v. Cass Cir. Ct.*, 447 N.E.2d 1082, 1083 (Ind. 1983) ("[T]he right to a change of venue from the county or judge is a substantive right which can be conferred only by the legislature."); *State ex rel. Hatcher v. Lake Superior Court, Room 3*, 500 N.E.2d 737 (Ind. 1986); *see also* I.C. § 34-8-2-1 (legislature reserves authority relating to change of venue).

Because the class-action right comes from T.R. 23, it is a procedural right. *Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012) (Trial Rules cannot confer substantive rights). In order for PL 166 to survive, it would need to be a substantive law despite doing nothing but barring a procedural right. *Church* concerned a substantive law, I.C. § 35-40-5-11.5, that barred the "substantive grant of deposition rights". 2022 WL 2254876, at *5 (citing I.C. § 35-37-4-3). None of the responding parties have cited, nor has the undersigned located, a single instance in which a court has found a statute prohibiting a non-substantive right was itself substantive law. A statute barring procedural rights is a procedural statute.

Because the legislature is not the source of the class-action right, it is not a right the legislature can curtail. *State v. Bridenhager*, 257 Ind. 699, 704, 279 N.E.2d 794, 796-97 (1972) ("[A] procedural rule enacted by statute may not operate as an exception to one of our rules having general application. If such an exception is to be made, it lies within our exclusive province to make it.").

3. Our Supreme Court's Rulemaking Power Comes from the Constitution and is Recognized by Statute.

The General Assembly has affirmed "the inherent power of the supreme

court" to enact procedural rules. I.C. § 34-8-2-1. Despite clear statutory language, the State asserts, "It was a legislative enactment that gave the Supreme Court 'sole authority to promulgate procedural rules of court.'" [Br. p.18] (citation omitted). Speaking of a predecessor statute, our Supreme Court said:

> [I]t is quite clear on principle, as well as upon authority, that the court had such power without the statute. This court is a constitutional court, and as such receives its essential and inherent powers, rights and jurisdiction from the Constitution, and not from the legislature, and it has power to prescribe rules for its own direct government independent of legislative enactment.

Epstein v. State, 190 Ind. 693, 696, 128 N.E. 353, 353 (1920).

4. PL 166 is Not an Exercise of Legislative Authority to Regulate Causes of Action Against Governmental Entities.

Ball State contends that "but for the statutorily created cause of action for contract 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." [Br. p.23]. That assertion is based on the false premise that PL 166 is the product of "the legislature's authority to regulate causes of action available against" governmental entities. [*Id.*]. That is not consistent with *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972), in which the Indiana Supreme Court abrogated sovereign immunity. Even if *Campbell* had preserved sovereign immunity for contract claims, the legislature cannot retroactively apply immunity to existing contracts. [Appellant's Br. pp.54-55 n.24]. Ball State's position belies PL 166's full reach; it is not limited to governmental entities. IND. CODE § 34-12-5-5(2).[5] The legislature did not claim to act pursuant to its authority to regulate claims against the government.

[5] A private university, Notre Dame's presence as amicus curiae proves this fact.

5. Ball State's Survey Highlights the Uniqueness of PL 166's Attempt to Limit Non-Statutory Rights.

Ball State submits its "Survey of State Class Action Bars" to claim class-action bars are routine.[6] Ball State admits only ten of those states "have procedural conflict resolution rules akin to Indiana's." [Br. p.29]. Every statute identified for those states prohibits using class actions in vindicating **substantive rights created by statute, not common law rights such as breach of contract**. *See* ALA. CODE § 40-23-196; ARIZ. REV. STAT. §§ 33-712(A) & (B); ARK. CODE §§ 4-87-104 & -105; FLA. STAT. §§ 624.155(1), 634.433(1), 634.3284(1) & 642.0475(1); IDAHO CODE § 28-45-201(1); MICH. COMP. L. § 445.1611(1); MO. STAT. § 71.675;[7] 21 PENN. STAT. 721-6(d); TENN. CODE §§ 47-18-109(a)(1),[8] 56-47-108, 56-53-107 & 67-1-1802; WASHINGTON REV. CODE ch. 82.32. Ball State cites no cases in which those statutes passed procedural-substantive challenges. And, even if they had, each of those statues reflects a limitation on a substantive right given by the legislature; not procedural rights given by court rules.

6. The Indiana Code Location of PL 166 Does Not Make It Substantive.

Both Ball State and Amici contend that the location for codification of PL 166

---

[6] Ball State's survey is admittedly nonexhaustive and has notable omissions, such as: New York Civil Practice Law § 901(b), Alabama Code § 8-19-10(f), Colorado Revised Statute § 6-1-113(2), and 740 Illinois Compiled Statutes 10/7(2). Each of those class-action bars were deemed procedural inapplicable to Federal Rule 23. *Shady Grove*, 559 U.S. at 396-436; *Lisk*, 792 F.3d 1334-38; *Lessin*, 2021 WL 3810584, at *13-15; *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 817-18 (N.D. Ill. 2017).

[7] This statute only even bars cities and towns from serving as a class representative for claims to collect business license taxes on telecommunication companies.

[8] *Cardenas v. Toyota Motor Corp.*, 418 F. Supp. 3d 1090, 1106-07 (S.D. Fla. 2019) (Tenn. Code § 47-18-109(g) class-action bar is procedural, inapplicable in federal courts).

is instructive. Most courts presented with that argument find it has no impact on the analysis. *Lisk*, 792 F.3d at 1336; *Smith-Brown v. Ulta Beauty, Inc.*, 2019 WL 932022, at *13 (N.D. Ill. Feb. 26, 2019). The courts finding it instructive have done so because the prohibition is "in the same paragraph of the same statute that creates the underlying substantive right." *In re Dig. Music Antitrust Litig.*, 812 F. Supp. 2d 390, 416 (S.D.N.Y. 2011); *see also* [Amici Br. p.14] (citing *In re Nexium (Esomeprazole Antitrust Litig.)*, 968 F. Supp. 2d 367, 408-09 (D. Mass. 2013)).

Church found the Child Deposition Statute's substantive nature "evidenced by, among other things, its location in the 'Victim Rights' Chapter of the Indiana Criminal Code." 2022 WL 2254876, at *6. Chapter 35-40-5 bestows rights on victims. The Child Deposition Statute bestows the substantive right to child sex-crime victims of freedom from harassment, furthering their Indiana Constitutional rights. *Id.*

PL 166 is in its own chapter and bestows no rights; it only prohibits existing procedural rights. I.C. ch. 34-12-5. Its placement in article 34-12, "Prohibited Causes of Action," is even less informative because PL 166 claims to neither create nor eliminate causes of action. IND. CODE § 34-12-5-2(b).

7. PL 166 Was Opposed.

Church observes that the Child Deposition statute was passed without an opposing vote. 2022 WL 2254876, at *1. PL 166, however, was enacted over opposition. Actions for House Bill 1002, permanent link available at https://web.archive.org/web/20220424020003/http://iga.in.gov/legislative/2021/bills/house/1002 (9 senators, 21 representatives).

8. Class-Action Rights are Common Nationally and Indiana has No History of Limiting the Right.

Church also observed that criminal-deposition rights are rare—only seven states allow it. 2022 WL 2254876, at *2. Every state, except Mississippi and Virginia,[9] has class-action rules. Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 B.Y.U.L. REV. 1551, 1553.

"In addition to being rare, Indiana's statutory right to take depositions in criminal cases has never been absolute." *Church*, 2022 WL 2254876, at *3. Our Supreme Court has instructed: "One of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met." *Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157, 1162 (Ind. 1998). There is no history of class-action prohibitions in Indiana. Each of the statutory class-action bars Ball State cites was enacted in the same session as PL 166. *See* IND. CODE §§ 34-30-32-10 & -33-8.[10]

9. Repetition Does Not Render an Unconstitutional Act Constitutional.

Finally, Ball State contends, "The thrust of Mellowitz's separation of powers argument is that Indiana's General Assembly is without authority to limit the

---

[9] In neither state is it "a matter of statutory enactment banning class actions." Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448, 450 n.10 (2011).

[10] The State also cites Ind. Code §§ 6-8.1-9-7 & 9-33-3-3. Each requires would-be class members to exhaust administrative remedies. Those statutes are extensions of our caselaw applying the exhaustion doctrine in class actions. *Spencer v. State*, 520 N.E.2d 106, 109-10 (Ind. Ct. App. 1988), *trans. denied*. That is because a claim does not become ripe until such remedies are exhausted unless otherwise deemed futile. *See Rene v. Reed*, 726 N.E.2d 808, 819 (Ind. Ct. App. 2000), *trans. denied*. Those are not, however, class-action prohibitions. *See Spencer*, 520 N.E.2d at 109-10; *Neely v. Facility Concepts, Inc.*, 274 F. Supp. 3d 851, 857-58 (S.D. Ind. 2017).

availability of class actions *in any respect*". [Br. p.14]. Ball State continues, "Mellowitz's challenge is bold: the logic of his argument would invalidated 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." [*Id*.]. As mentioned above, the other class-action bars were passed in the same legislative session and target a different theory of liability resulting from COVID-19. I.C. §§ 34-30-32-10 (tort actions for exposure to or treatment of COVID-19) & -33-8 (claims against manufacturers of COVID-19 protective products). While invalidating PL 166 could lay the predicate to invalidate either of those prohibitions, the logic of Mellowitz's argument does not invalidate all conceivable class-action bars. As indicated above, it might be permissible for the legislature, in enacting statutory causes of action, to limit the remedy to individual relief.

But to agree with Ball State necessitates the opposite, more-extreme conclusion: that the legislature can limit class actions *in <u>all</u> respects*. That Ball State and Amici contend that PL 166 is permissible because it is not a blanket prohibition on all class actions, just in certain cases, demonstrates recognition that it would be unconstitutional for the General Assembly to enact an omnibus class-action bar. *Cf. Spencer v. State*, 520 N.E.2d 106, 109 (Ind. Ct. App. 1988) (noting statute "does not, by its terms, specifically limit grievance proceedings to actions by individuals"), *trans. denied*. Instead, they posit that what would be unconstitutional if done in one fell swoop is constitutional if done incrementally, as the three 2021 statutes seek to do.

"To be sure, unconstitutional acts do not become constitutional through age or repetition." *Bayh v. Sonnenburg*, 573 N.E.2d 398, 415 (Ind. 1991). To hold otherwise would allow incremental desiccation of the "privilege[of] our system of justice confer[red] on every citizen [in] the ability to assert claims in the form of a class action if the requirements of Rule 23 are met." *Budden*, 698 N.E.2d at 1162. If the General Assembly lacks the power to issue a blanket prohibition on class actions, then allowing piecemeal chipping away at the class-action right either affords the General Assembly the power to do by a thousand cuts what it may not do by one or foist upon future courts the impossible task of solving sorites paradox.[11]

B. PL 166 Conflicts with T.R. 23.

Because PL 166 is a procedural statute, the next question is whether it conflicts with T.R. 23.[12] "[W]hen a procedural statute conflicts with the Indiana

---

[11] Sorites paradox, or little-by-little arguments, addresses the concept that if a single grain of wheat is removed from a heap, it is still a heap. But the continued one-by-one removal of every grain at some indeterminate point is sufficient to render it no longer a heap. *See* Dominic Hyde, *Sorites Paradox*, in Stanford Encyclopedia of Philosophy (Dec. 6, 2011), permanent link available at https://web.archive.org/web/20220711153855/https://meinong.stanford.edu/entries/sorites-paradox/.

[12] Another approach to considering whether a statute is procedural is to first examine whether a conflict exists between the statute and procedural rules. All of the Trial Rules are rules of procedure; they cannot confer substantive rights. *See Ryan*, 972 N.E.2d at 370. The legislature "retains the 'entire lawmaking power of the state'" and wields the "exclusive" "power to make substantive law". *Church*, 2022 WL 2254876, at *5. Lest it be presumed that the Indiana Supreme Court has unconstitutionally exercised legislative authority by enacting a Trial Rule, the subject matter contained within a Trial Rule ought to be presumed to be procedural. Indeed, given the efforts of our Supreme Court in devising and implementing the rules as well as legislative support and adoption of the rules, I.C. §§ 34-8-1-3, -2-1 & -2-2, the Trial Rules, like their federal counterparts, should carry "presumptive validity under both the constitutional and statutory constraints." *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 6 (1987). Because a Trial Rule is presumptively constitutional, it must be presumed to have been properly

Rules of Trial Procedure, the trial rules govern, and phrases in statutes that are contrary to the trial rules are considered a nullity." *Key v. State*, 48 N.E.3d 333, 339 (Ind. Ct. App. 2015) (citation omitted); *accord* I.C. § 34-8-1-3.[13]

> To be "in conflict" with our rules ... it is not necessary that the statutory rule be in direct opposition to our rule, so that but one could stand per se. It is only required that they be incompatible to the extent that both could not apply in a given situation. Thus a procedural rule enacted by statute may not operate as an exception to one of our rules having general application. If such an exception is to be made, it lies within our exclusive province to make it.

Bridenhager, 257 Ind. at 704, 279 N.E.2d at 796-97.

The *Church* majority declined to consider whether the Child Deposition Statute conflicted with the procedural rules. *Church*, 2022 WL 2254876, at *6. Justice Goff considered the question and agreed with all nine judges of this Court who found the Child Deposition Statute plainly conflicted with the Trial Rules.[14] *Id.*

---

constrained to procedure. Thus, if a statute conflicts with a Trial Rule and the Trial Rules are presumed to cover only procedure, then the statute is presumptively procedural. This analysis is both consistent with I.C. § 34-8-1-3 ("all laws in conflict with the supreme court's rules have no further force or effect") and with Indiana caselaw repeatedly stating "that when there is a conflict between a procedural statute and a procedural rule adopted by our supreme court, the supreme court rule takes precedence and the conflicting statute is nullified." *City of Hammond v. Rostankovski*, 148 N.E.3d 1165, 1168 (Ind. Ct. App. 2020).

[13] Ball State alleges that Mellowitz "effectively jettisons" an argument under I.C. §§ 34-8-1-3 & -2-1. [Br. p.37]. Mellowitz asserted that this is an instance in which the Court ought to engage in a constitutional analysis first and not stop with a conflict-of-statutes analysis. [Appellant's Br. pp.29-32]. He has not abandoned his conflict-of-statutes argument. Neither Ball State nor the State make any argument against the validity or application of either code section, nor do they engage in analysis of whether the statutes waive amendment under Indiana Code § 1-1-5-2. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (failure to develop cogent argument constitutes waiver), *trans. denied*.

[14] *Sawyer v. State*, 171 N.E.3d 1010 (Ind. Ct. App. 2021), *vacated*; *Church v. State*, 173 N.E.3d 302 (Ind. Ct. App. 2021), *vacated*; *State v. Riggs*, 175 N.E.3d 300 (Ind. Ct. App. 2021), *vacated*; *Pate v. State*, 176 N.E.3d 228 (Ind. Ct. App. 2021), *vacated*;

at *14-15. After charting a table comparing the statute and applicable rules, he concluded "that a given case precludes dual application." *Id*. at *15.

A side-by-side comparison of PL 166 to T.R. 23 is unnecessary;[15] PL 166 is a blanket prohibition on using T.R. 23. There is no shortage of courts who have found prohibitions on class actions conflict with Rule 23. *See*, *e.g.*, *Shady Grove*, 559 U.S. at 401-02 (statute "prevents the class actions it covers from coming into existence at all"); *Lisk*, 792 F.3d at 1335 ("statute precluding class actions for specific kinds of claims conflicts with Rule 23"); *Johnston*, 274 A. 2d at 436; *Lessin*, 2021 WL 3810584, at *14; *cf. Nolan*, 627 P.2d at 1040-42.

Ball State, the State, and Amici further contend that there is no conflict because T.R. 23(D)(4) permits courts to order filing amended pleadings eliminating class allegations. Such a reading is not consistent with *Matter of M.S.*, in which our Supreme Court found a statute setting a hard 120-day deadline to complete CHINS factfinding hearings irreconcilably conflicted with T.R. 53.5, which permits continuances "upon a showing of good cause". 140 N.E.3d 279, 284 (Ind. 2020). Were Ball State, the State, and Amici correct that T.R. 23(D)(4) *allowing* a trial court to order amended pleadings eliminating class-action allegations permits the legislature to *mandate* trial courts do so, then *M.S.* should not have found conflict because T.R. 53.5 *allows* a court to deny a continuance. Nothing in T.R. 53.5 entitles

State v. Wells, 2021 WL 3478637 (Ind. Ct. App. Aug. 9, 2021) (memorandum), *vacated.*; *State v. Brown*, 2021 WL 4999123 (Ind. Ct. App. Oct. 28, 2021) (memorandum), *vacated*.

[15] Such comparison would simply show every portion of T.R. 23 prohibited, with the singular exception of Subdivision (D)(4).

a party to a continuance. Thus, under the argument of Ball State, the State, and Amici, a conflict could have been avoided by deeming the statute as a mandatory finding that no good cause exists.

Finally, Ball State extensively discusses *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985 (Ind. 2014), and further cites *In re Guidant Shareholders Derivative Litigation*, 841 N.E.2d 571 (Ind. 2006), to argue that the Derivative Proceeding Statute does not conflict with T.R. 23.1. While the Derivative Proceeding Statute's impact on T.R. 23.1 is easily distinguished,[16] neither *TP Orthodontics* nor *Guidant* were challenges to the statute as conflicting with T.R. 23.1. "[A] court won't normally accept as binding precedent a point that was passed by in silence, either because the litigants never brought it up or because the court found no need to discuss it." BRYAN A. GARNER *ET AL.*, THE LAW OF JUDICIAL PRECEDENT 229 (2016).

II. If PL 166 is Substantive, then it Affects Takings of Vested Rights.

PL 166 is clearly procedural. If, however, the Court finds it affects Ball State students' substantive rights, then it both retroactively removes their rights to an effective remedy. Because Mellowitz triggered his class-action rights by filing his *Class Action Complaint* and PL 166's very purpose is to remove Ball State's students' only effective means of redress, it constitutes an impermissible taking.

[16] Like the cases requiring exhaustion of administrative remedies in advance of pursuing class certification, *see Spencer*, 520 N.E.2d at 110, the Derivative Proceeding Statute is a requirement acting upon the ripeness of the putative class's causes of action. *See Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 499 (7th Cir. 1972) ("[A] predicate to a party's right to represent a class is his eligibility to sue in his own right.").

A. PL 166's Class-Action Bar is Retroactive to Mellowitz.

Ball State argues that PL 166 was not applied retroactively.[17] Relying on *Church*, it asserts that the triggering event would have been class certification.[18] But *Church* found "[t]he triggering event [was] **seeking to depose** an alleged child victim." 2022 WL 2254876, at *4 (emphasis added). The equivalent is **seeking to certify** a class. Anticipating that fact, Ball State emphasizes that Mellowitz did not move for class certification before PL 166's enactment, such that Mellowitz's filing of this action before PL 166's enactment would not render application retroactive. But Ball State overlooks a crucial aspect of T.R. 23: in Indiana, a court's obligation to rule on class certification is triggered by filing a class-action complaint; not by filing a motion for certification. *Am. Cyanamid Co. v. Stephen*, 623 N.E.2d 1065, 1070 (Ind. Ct. App. 1993); Jason M. Rosenthal & Kenneth E. Kraus, *Indiana*, *in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 919, 920 (2010) ("One significant difference between [F.R.C.P. 23 and T.R. 23] is that Indiana requires that a hearing take place on the class certification issue. This requirement is triggered by the filing of the complaint, not the filing of a motion to certify the class." (footnotes omitted)).

Mellowitz initiated this action by filing his *Class Action Complaint* in May 2020. [Appellant's App. Vol. II pp.22-30]. At that moment, he triggered his T.R. 23

[17] Ball State also asserts that "retroactive application of a law violates a separation of powers only if it disturbs a final judgment". [Br. p. 40] (emphasis added). But Mellowitz's separation-of-powers argument deals only with rulemaking, not the legislature invading judgments. Ball State's citation does not address takings or contract-clause violations.

[18] The State makes the same argument couched in terms of whether the right has vested.

rights.[19]

B. PL 166 Removes the Right to the Only Effective Remedy.

Ball State argues that PL 166 only "'takes' from Mellowitz [] the potential for him to serve as a class representative." [Br. pp.42-43]. That is not what PL 166 takes from Mellowitz and Ball State's students; it removes their only effective means of redress, which is precisely the purpose of PL 166. *See Budden*, 698 N.E.2d at 1162 ("As a practical matter, [class actions are] often essential to the assertion of any claim at all. The cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney, and financing such an enterprise on a pay as you go basis is often beyond the means of the aggrieved parties".); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). Amici acknowledge this: "[T]he statute's patent substantive goals [are] creating and abrogating rights and remedies for damages arising from COVID-19." [Br. p.15].[20]

While the legislature may enact laws affecting remedies, it may do so only if "it preserves or provides a reasonable means and opportunity for full enjoyment of

---

[19] Further demonstrating this fact is that the filing of a class-action complaint triggers numerous other results: class-action tolling, *Arnold v. Dirrim*, 398 N.E.2d 426, 439-40 (Ind. Ct. App. 1979); duties of loyalty to the class, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 327 (E.D. Pa. 1994); and expanded discovery. 5 MOORE'S FEDERAL PRACTICE–Civil § 23.85. Even the appealed order, which required Mellowitz to file an amended complaint to eliminate his class allegations so as to terminate the corresponding obligations, demonstrates this fact.

[20] PL 166 creates no rights; it only abrogates existing rights.

the right." *Sansberry v. Hughes*, 174 Ind. 638, 640, 92 N.E. 783, 784 (1910); *see also Guthrie v. Wilson*, 240 Ind. 188, 193-94, 162 N.E.2d 79, 81 (1959). Here, because PL 166 must first be deemed a statute affecting substantive rights,[21] the removal of those rights strips Mellowitz and his fellow students of substantive rights, foreclosing their only effective means for redress.[22]

"The purpose of a class action is to resolve matters as efficiently as possible". *7-Eleven, Inc. v. Bowens*, 857 N.E.2d 382, 389 (Ind. Ct. App. 2006). There is no scenario in which defending thousands of individual actions is more cost effective than defending a single class action. *Gunderson v. F.A. Richard & Assocs.*, 977 So.2d 1128, 1140 (La. Ct. App. 2008). The only way PL 166 can "protect Indiana colleges and universities from widespread legal liability"', [Ball State Br. p.21], is if it erects such substantial barriers to redress that it increases "[t]he cost and difficulty of pursuing only an individual claim", making "it uneconomic from the point of view of any capable attorney, and financing such an enterprise ... beyond the means of the aggrieved parties," *Budden*, 698 N.E.2d at 1162. PL 166's very purpose proves that it functionally eliminates their remedy. *See Carnegie v.*

---

[21] Because courts universally recognize class actions as procedural rights, analyzing them as substantive rights is a square-peg-round-hole problem. But, to reach this analysis, it must first be found that Indiana class actions constitute substantive law.

[22] The State asserts, "The Indiana Supreme Court has recognized that individuals do not have a right to bring a lawsuit on behalf of others or the public." [Br. p.20]. But the State provides no citation. It then pivots to cite *Dible v. City of Lafayette*, 713 N.E.2d 269, 275 (Ind. 1999), to say that "the ability to bring a public lawsuit as a class action neither confers new rights on litigants nor affords them new remedies." [Br. p.20] (quotation marks omitted). In *Dible*, the taxpayers were not prohibited from seeking class certification; they were relieved from the obligation to do so because they only sought individual relief.

Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (often the alternative to class actions is not a multitude but zero suits).

If allowed to achieve its goal, PL 166 is the functional equivalent of retroactive immunity, which is blatantly unconstitutional. *Ferretti v. Nova Se. Univ., Inc.*, 2022 WL 471213, at *6-8 (S.D. Fla. Feb. 16, 2022).

C. Ball State Relies on Multiple Inapplicable Cases.

Guzzo v. Town of St. John does not apply because, as its first paragraph says, the case was remanded for "the trial court ... to entertain any constitutional arguments why the facially retroactive statute ought not to apply". 131 N.E.3d 179, 180 (Ind. 2019). *State ex rel. Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, concerned a political subdivision from whom the constitution does not allow rights to vest that cannot be repealed by the legislature before a final judgment. 144 Ind. App. 63, 85, 253 N.E.2d 725, 730 (1969), *trans. denied*. Ball State also relies on *Henderson v. State ex rel. Moon*, 58 Ind. 244, 247 (1877), for the proposition that a party with a right of action does not possess a vested right until it is reduced to a judgment. To the extent *Henderson* may support that proposition, it is directly at odds with more recent Indiana Supreme Court precedent, *see*, *e.g.*, *Guthrie*, 240 Ind. at 195, 162 N.E.2d at 82. Accordingly, to the extent *Henderson* supported Ball State's position, it is no longer good law.[23]

Ball State further cites *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1221 (Ind. 2000), to assert that generally takings were intended to apply to

[23] As the more recently decided opinion, *Guthrie* controls. *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 885 n.22 (Ind. Ct. App. 2016).

physical acquisitions or invasions of property, but then immediately, citing the same opinion, acknowledges that the prohibition on takings is not actually so limited. Notwithstanding, Indiana caselaw recognizes accrued causes of action are constitutionally protected property rights. [Appellant's Br. pp.49-50].[24]

Short v. Texaco, Inc., also has no impact, because it dealt with a statute dictating that mineral rights not acted upon for more than twenty years are subject to termination unless the rights holder files a claim to maintain the right within two years of the statute's enactment. 273 Ind. 518, 520, 406 N.E.2d 625, 627 (1980). As *Short* recognized, mineral rights are no more defensible that fee-simple title to land, which is also terminable, and the statute acted similarly to a statute of limitations, which does not *per se* constitute a taking. *Id*. at 524, 406 N.E.2d at 629. It did not prevent parties from otherwise effectively exercising their rights; it just required them to take additional action within two years to do so.

Finally, Ball State and the State rely on *Cheatham v. Pohle*, but neither recognize that the punitive damages statute, enacted in 1995, antedated accrual of the *Cheatham* plaintiff's cause of action by three years. 789 N.E.2d 467, 470 (Ind. 2003). It was not a retroactive law usurping a right that existed after his claim accrued. Instead, he argued that he had a common-law right to punitive damages

[24] While debate may exist outside of Indiana on whether an accrued cause of action must be reduced to a final judgment, *see City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 826 n.14 (Ind. Ct. App. 2019), *trans. denied*, Indiana recognizes such right. *See*, *e.g.*, *Guthrie*, 240 Ind. at 195, 162 N.E.2d at 82; *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003); *see also Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir. 1983); Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373 (2009).

attaching after the jury verdict. By the time his claim accrued, that common-law right had been supplanted by statute. Mellowitz does not argue that the legislature may not alter or eliminate a common-law claim; but it may not do so once the claim has accrued.

Ball State's attempts to disregard *Gulzar v. State*, 148 N.E.3d 971 (Ind. 2020), *Hinds v. McNair*, 413 N.E.2d 586 (Ind. Ct. App. 1980), and *Guthrie* are similarly misguided. Those cases do not simply "stand for Indiana's *reluctance* to apply new statutes retroactively", [Ball State Br. p.45], they recognize that doing so in the face of vested rights or constitutional guaranties is prohibited by "[t]he constitutional prohibitions against the taking of property without due process of law". *Guthrie*, 240 Ind. at 195, 162 N.E.2d at 82.

III. PL 166 Violates the Contracts Clauses

The first step in assessing whether a contract-clause violation has occurred is to identify a substantial impairment. *Clem v. Christole, Inc.*, 582 N.E.2d 780, 783-84 (Ind. 1991). "[A]ny change of the law embodied in the contract, as here, which will substantially postpone, obstruct or retard its enforcement, or lessen its value, whether the change relates to its validity, construction, duration or discharge, impairs its obligation. And it is immaterial whether it is done by acting on the remedy, or directly on the contract itself." *Indianapolis v. Robison*, 186 Ind. 660, 663-64, 117 N.E. 861, 862 (1917).

> "It is well settled by the decisions of this court that 'the remedy subsisting in a state, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the

> value of the contract is forbidden by the Constitution, and is therefore void.'"

Id. (quoting *Seibert v. Lewis*, 122 U.S. 284, 294 (1886)); *see also Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1104 (9th Cir. 1999) (statute "slams the door on any effective remedy" leaving remedies "more theoretical than real" violates contract clause). As discussed above, the elimination of remedy via class-action effectively eliminates the right to redress for Ball State's students.

The State asserts that "because the contract was for an education in exchange for tuition and fees, Mellowitz would not have given the potential filing of a class action lawsuit against Ball State a second thought when he agreed to pay tuition and fees in exchange for an education." [Br. p.27]. But innate in all contracts is the reasonable expectation of redressability, the alternative is an illusory contract.

Ball State and the State each argue that the rule that existing governing law is implied into every contract, is inapplicable. *Robison*, quoting *Seibert*, specifically instructs that a remedy provided by governing law at the time of contract is part of the contractual obligations. *Robison*, 186 Ind. at 664, 117 N.E. at 862.

Because PL 166 creates a substantial impairment, it can only stand if it is an exercise of the State's *necessary* police powers. *Clem*, 582 N.E.2d at 784-85. When, as here, the effect is to relieve governmental entities of their obligations, the burden falls on the government to establish that the statute "is both reasonable and necessary to an important public purpose." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 894 (9th Cir. 2003). Further, the Court cannot overlook the very mischief the constitutional provision was intended to remedy. *Paul Stieler Enters., Inc. v.*

City of Evansville, 2 N.E.3d 1269, 1273 (Ind. 2014). The contract clause was "intended to prevent the remaining mischiefs which experience had shown to flow from legislative interferences with contracts, and to establish a great conservative principle, under which they might be protected from unjust acts of legislation in any form." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 254 (1827).

As discussed above, the entire purpose of PL 166 is to create barriers to redress so as to prohibit otherwise justified litigation. If that purpose were legitimate, then so too would have been the complete prohibition of such claims, as that is the only functional goal of PL 166. Because such legislation would be patently unconstitutional, *Ferretti*, 2022 WL 471213, at *6-8, it cannot be enacted simply through pretextual and thinly veiled alternative means. *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996).[25]

CONCLUSION

Because PL 166's class-action bar is a procedural law in conflict with T.R. 23, it must yield to T.R. 23. Even if PL 166 constituted substantive law, it is both an unconstitutional taking and unconstitutional impairment of contractual obligations. The trial court's order should be reversed, and this matter remanded for further proceedings.

Respectfully submitted,

[25] Ball State invokes the value of higher education but ignores that PL 166 shifts the financial burden on to its students in a nation bearing $1.75T in student-loan debt. Alicia Hahn & Jordan Tarver, *2022 Student Loan Debt Statistics: Average Student Loan Debt*, Forbes.com (June 9, 2022), permanent link available at https://web.archive.org/web/20220705183920/https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/.

/s/ Colin E. Flora
Eric S. Pavlack, #21773-49
Colin E. Flora, #29914-49
PAVLACK LAW, LLC
50 E. 91st St., Ste. 305
Indianapolis, IN 46240
(317) 251-1100
(317) 252-0352 *fax*
Eric@PavlackLawFirm.com
Colin@PavlackLawFirm.com

Counsel for Appellant

WORD COUNT CERTIFICATE

In accordance with Ind. Appellate Rule 44(F), I verify that this brief contains no more than 7,000 words in accordance with Ind. Appellate Rule 44(E). I further verify that this brief contains 6,999 words as measured by Microsoft Word and by manual count of text not subject to Microsoft Word's analysis.

/s/ *Colin E. Flora*
Colin E. Flora

CERTIFICATE OF SERVICE

I certify that on July 18, 2022, a copy of the foregoing was filed electronically with Efile.INCourts.Gov. On the same date the foregoing was served on the following parties by operation of the Court's electronic filing system pursuant to Ind. Appellate Rule 68:

Paul A. Wolfla
Jane Dall Wilson
Amanda L. Shelby
Jason M. Rauch
FAEGRE DRINKER
BIDDLE & REATH LLP
300 N. Meridian St., Ste. 2500
Indianapolis, IN 46204
Paul.Wolfla@faegredrinker.com
Jane.Wilson@faegredrinker.com
Amanda.Shelby@faegredrinker.com
Jason.Rauch@faegredrinker.com
Counsel for Ball State University and Board of Trustees of Ball State University

Brian E. Casey
Sarah E. Brown
BARNES & THORNBURG LLP
201 S. Main St., Ste. 400
South Bend, Indiana 46601
brian.casey@btlaw.com
sarah.brown@btlaw.com
Counsel for Amicus Curiae University of Notre Dame du Lac

Aaron T. Craft
Abigail R. Recker
Benjamin Jones
OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, 5th Fl.
302 West Washington Street
Indianapolis, IN 46204-2770
Aaron.Craft@atg.in.gov
Abigail.Recker@atg.in.gov
Benjamin.Jones @atg.in.gov
Counsel for Office of the Attorney General

Jodie Ferise
INDEPENDENT COLLEGES OF INDIANA, INC.
30 S. Meridian St., Suite 800
Indianapolis, IN 46204
jferise@icindiana.org
Counsel for Amicus Curiae Independent Colleges of Indiana Inc.

/s/ Colin E. Flora
Colin E. Flora