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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 BRIEF

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STATEMENT OF ISSUES

i. Whether Section 13 of Public Law No. 166-2021, which bars all class actions in certain proceedings against governmental entities and postsecondary educational institutions, is an impermissible procedural statute in conflict with Trial Rule 23.

ii. Whether the class-action prohibition of Section 13 of Public Law No. 166-2021, if it is deemed substantive and not procedural, is an unconstitutional taking of accrued rights without just compensation when applied to Keller Mellowitz and the members of the Proposed Class.

iii. Whether the class-action prohibition of Section 13 of Public Law No. 166-2021, if it is deemed substantive and not procedural, is an unconstitutional act retroactively interfering with the obligations of contract when applied to Keller Mellowitz and the members of the Proposed Class.

STATEMENT OF CASE

I. Nature of the Case

In May 2020, Named Plaintiff, Keller Mellowitz, initiated this putative class action on behalf of persons who were students at Ball State University during the spring 2020 academic semester to recover fees paid to the university for services the university ceased to provide midway through the semester when it terminated in-person and on-campus classes and services in response to the COVID-19 pandemic. [Appellants' App. Vol. II pp.22-30]. Mellowitz brought claims for breach of contract and, in the alternative, unjust enrichment. [*Id.*]. Nearly one year after this action

was filed, Governor Holcomb signed Public Law No. 166-2021. Section 13 of that law, with retroactive effect, prohibits certification of a class-action lawsuit in any action against a postsecondary educational institution for claims sounding in contract or unjust enrichment if the loss arises from implementing policies or procedures to address the COVID-19 pandemic and the claim arose after February 29, 2020 and before April 1, 2022. Relying on that law, the trial court ordered Mellowitz to file an amended complaint eliminating his class-action allegations. [*Id*. at pp.19-21]. Mellowitz appeals that order because Section 13 of Public Law No. 166-2021 is an impermissible procedural law in conflict with Trial Rule 23 and, even if it were a substantive law, it effectuates a taking and impairs obligations of contracts in contravention of the Indiana and Federal Constitutions.

II. Course of Proceedings

This action was commenced in the Marion Superior Court as a putative class action by Keller Mellowitz on May 1, 2020. [*Id*. at p.22-30]. On July 14, 2020, Judge Matthew Kincaid accepted appointment as special judge by agreement of the parties. [*Id*. at p.7]. Appellees, Ball State University and Board of Trustees of Ball State University (collectively "Ball State"), who were the Defendants below, unsuccessfully sought dismissal of the Class Action Complaint. [*Id*. at pp.5-10]; *Mellowitz v. Ball State Univ.*, 2020 WL 5524659 (Ind. Super. Ct. Aug. 14, 2020).

On April 29, 2021, Governor Holcomb signed into law House Enrolled Act 1002, which became Public Law No. 166-2021. Section 13 of Public Law No. 166-2021 ("PL 166"), codified at Ind. Code §§ 34-12-5-1 *et seq*., provides: "A claimant may not bring,

and a court may not certify, a class action lawsuit against a [governmental entity or an approved postsecondary educational institution] for loss or damages arising from COVID-19 in a contract, implied contract, quasi-contract, or unjust enrichment claim" if the claim arose after February 29, 2020 and before April 1, 2022.

Relying on PL 166, on August 10, 2021, Ball State filed *Defendants' Motion for Relief Under Trial Rule 23(D)(4)*, requesting the trial court "enter an order requiring [Mellowitz] to amend his complaint to eliminate allegations as to the representation of absent persons". [*Id*. at pp.31-51]. In opposition, Mellowitz contended that PL 166 is a procedural law in conflict with Indiana Trial Rule 23 and, accordingly, is a nullity. [*Id*. at pp.52-62 & pp.132-153]. Alternatively, he argued, if PL 166 is a substantive law, then it both effectuates an unconstitutional taking of vested rights and impairs the obligations of the contracts between Ball State and the members of the Proposed Class, including Mellowitz. [*Id*. at pp.62-74 & pp.153-162]. Because Mellowitz called into question the constitutionality of a state statute, pursuant to Ind. Code § 34-33.1-1-1(a), the Office of the Attorney General of Indiana was notified and provided opportunity to intervene. [*Id*. at pp.14-15]. The Office of the Attorney General intervened on behalf of the State and was afforded the opportunity to present arguments in defense of PL 166. [*Id*. at pp.106-131].

After full briefing, an oral argument was held on February 10, 2022. [*Id*. at p.19]. The following day, Special Judge Kincaid issued the *Order on Hearing of February 10, 2022*, granting Ball State's Motion and ordering Mellowitz to file an amended complaint eliminating his class-action allegations. [*Id*. at pp.19-21]. In the

same order, Special Judge Kincaid indicated his belief that the requirement under Trial Rule 11(A) that Mellowitz or his counsel sign the amended complaint was sufficient to trigger interlocutory appeal as of right under Appellate Rule 14(A)(2). [*Id*. at p.21]. Accordingly, Mellowitz filed his Notice of Appeal invoking jurisdiction pursuant to Appellate Rule 14(A)(2) on February 16, 2022. To avoid a jurisdictional deficiency, Mellowitz also sought and received certification of the Order on February 15, 2022 in accordance with Appellate Rule 14(B)(1) as well as a stay of proceedings below. [*Id*. at pp.164-171]. On February 17, 2022, Mellowitz filed his *Motion to Accept Interlocutory Appeal* requesting the Indiana Court of Appeals accept appeal pursuant to Appellate Rules 14(B) & (C). On March 21, 2022, the Court of Appeals issued an order rejecting Mellowitz's reliance on Rule 14(A)(2), accepting the appeal under Rules 14(B) & (C), directing Mellowitz to file an Amended Notice of Appeal (filed the same day), and ordering that Appellant's Brief be due on April 25, 2022.

On April 1, 2022, the parties filed their *Joint Verified Motion for Transfer Pursuant to Appellate Rule 56(A)*, which remains pending as of the filing of this brief.

III. Disposition Below

On February 11, 2022, Special Judge Kincaid issued the *Order on Hearing of February 10, 2022*, which found that PL 166 is enforceable because: (i) it does not conflict with Trial Rule 23; (ii) it is not an unconstitutional taking; and (iii) it is not an unconstitutional impairment of contract rights. [Appellants' App. Vol. II pp.19-21]. Based on those findings, Special Judge Kincaid granted *Defendants' Motion for Relief Under Trial Rule 23(D)(4)* and ordered Mellowitz to "file an amended complaint

excising allegations as to the Plaintiff's representation of absent persons." [*Id*.].

STATEMENT OF FACTS

Named Plaintiff, Keller Mellowitz, enrolled for in-person classes at Ball State University during the Spring 2020 academic semester. [Appellants' App. Vol. II pp.23-24]. To enroll, Mellowitz and the members of the Proposed Class were required to pay numerous fees to Ball State, including in-person tuition, student services fees, university technology fees, student recreation fees, student health fees, and student transportation fees. [*Id*. at pp.22-24]. As a result of Ball State sending students home, closing campus facilities, and cancelling in-person classes due to COVID-19, the services for which each fee was paid were terminated in or about March 2020. [*Id*.]. Ball State retained the full amount of fees paid despite terminating or materially altering the services for which the fees were paid. [*Id*. at pp.22-24 & 29].

Mellowitz brought this putative class action to recover damages on behalf of himself and other similarly situated students. [*Id*. at pp.22-30]. After the action was filed but before a determination on class certification, the Governor signed Public Law No. 166-2021 into law, Section 13 of which bars class actions against postsecondary institutions like Ball State for breach of contract and unjust enrichment arising from COVID-19. Pursuant to that statute, the trial court ordered Mellowitz to file an amended complaint eliminating his class allegations. [*Id*. at pp.19-21]. Mellowitz appeals that order.

SUMMARY OF ARGUMENT

Signed into law on April 29, 2021, Section 13 of Public Law No. 166-2021

("PL 166") prohibits certification of class actions against postsecondary institutions for claims sounding in breach of contract and unjust enrichment if the claims both accrued between February 29, 2020 and April 1, 2022 and arose from COVID-19. IND. CODE §§ 34-12-5-1 *et seq*. In categorically prohibiting Indiana courts from using Indiana Trial Rule 23, PL 166 is a procedural statute in conflict with Trial Rule 23. Because procedural statutes that conflict with the Indiana Trial Rules both unconstitutionally invade the powers of the Indiana Supreme Court and otherwise violate Indiana Code §§ 34-8-1-3 & 34-8-2-1, PL 166 is a nullity.

Even if PL 166 were substantive rather than a procedural, its retroactive application to the vested rights of Keller Mellowitz and the members of the Proposed Class effects an uncompensated taking as well as a substantial impairment of contractual obligations in violation of the Indiana and Federal Constitutions.

ARGUMENT

"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). That privilege exists in Indiana exclusively through Trial Rule 23. Because Section 13 of Public Law No. 166-2021 ("PL 166") instructs courts that class certification under Trial Rule 23 may not be had in certain cases, it is a procedural statute in conflict with Trial Rule 23 and an unconstitutional overreach by the General Assembly into the powers of the judicial branch.

Moreover, if the right to pursue a class action is substantive rather than procedural, the attempt to strip that right from Keller Mellowitz and the members of the Proposed Class constitutes both: (i) an unconstitutional taking of the right without just compensation; and (ii) an unconstitutional law impairing contractual obligations of governmental entities.

In any instance, PL 166 is unconstitutional and not a permissible basis to prohibit class certification in this matter. As such, *Defendants' Motion for Relief Under Trial Rule 23(D)(4)* should have been denied, the trial court's *Order on Hearing of February 10, 2022* should be reversed, and this matter should be remanded to proceed accordingly.

I. Standard of Review

This appeal concerns the constitutionality and interpretation of statutes, which are questions of law reviewed *de novo*. *Budden*, 698 N.E.2d at 1160; *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014). When considering a constitutional challenge, statutes are initially "presumed constitutional." *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 804 (Ind. 2008). But "[t]he power of the legislature is not without limitations." *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014) (cleaned up). Where it is "clearly rational and necessary" to do so, a statute is deemed unconstitutional. *Smith*, 883 N.E.2d at 804. "An unconstitutional law is a nullity. It has no validity whatever. Every person may disregard it and treat it with contempt. Of itself it can neither confer nor take away rights." *Indianapolis v. Dillon*, 212 Ind. 172, 180, 6 N.E.2d 966, 969 (1937).

"Though it has matured through the years, the Indiana Constitution remains a vibrant guarantor of rights; and it plays a critical role in 'securing the Blessings of Liberty' that flow from federalism's diffusion of power." Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form a More Perfect Union – Indiana's Story*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 378 (2019) (footnote omitted).

> The doctrine of constitutional interpretation in Indiana has been that the Constitution is a fundamental instrument, not to be stretched and strained to meet the exigencies and necessities of the moment. It is a basic instrument which is rigid and firm and will withstand the emotional upheavals of the time, in the interest of protecting continually the rights guaranteed in the Constitution. The Constitution was framed to be strictly observed by all public officials and particularly the courts as guardians of the citizens' rights stated therein.

Finney v. Johnson, 242 Ind. 465, 472, 179 N.E.2d 718, 721 (1962).

It is for the judicial branch "to determine whether the exercise of legislative discretion violates express provisions of the Indiana and Federal constitutions." *Paul Stieler Enters.*, 2 N.E.3d at 1277. That is particularly true where the separation of powers is concerned. "The separation of powers doctrine 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. The judiciary is one of the three co-equal branches of government and its independence is essential to an effective running of the government." *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000). "The true interpretation of this [separation of powers] is, that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution." *Id.* (cleaned up).

II. In Dictating that Trial Rule 23 May Not be Used to Certify a Class Action, PL 166 Impermissibly Eliminates a Procedural Right Created by the Indiana Supreme Court Through Indiana Trial Rule 23.

The General Assembly may not enact procedural laws that conflict with the Trial Rules. Under Indiana law, the right to proceed as a class action, so long as the requirements of Trial Rule 23 are met, is a procedural right deriving entirely from Trial Rule 23. In prohibiting courts from using Trial Rule 23 to certify certain class actions, PL 166 invades the courthouse and the exclusive province of the judiciary. Because PL 166 is a procedural law operating as an exception to Trial Rule 23, it conflicts with Trial Rule 23 and constitutes an impermissible exercise of judicial power by the legislature.

A. The Indiana Constitution Allocates the Final Say on Rules Governing Procedure in Indiana Courts to the Indiana Supreme Court Such that Any Statute in Conflict with a Promulgated Rule of Procedure Must Yield to the Rule.

The Indiana Constitution divides the powers of the State among three co-equal branches. IND. CONST. ART. 3, § 1. "If the separation of powers is to be maintained, it is essential that the judicial branch of government not be throttled by either the legislative or administrative branches, and that the courts be empowered to mandate what is reasonably necessary to discharge their duties." *McAfee v. State*, 258 Ind. 677, 681, 284 N.E.2d 778, 782 (1972). Accordingly, "the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business." *Monfort*, 723 N.E.2d at 411.

Although "the power to make rules of procedure in Indiana is neither exclusively legislative nor judicial", *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind.

394, 399, 157 N.E.2d 475, 477 (1959), it is not a power equally shared. The split of power permits the General Assembly to enact procedural statutes only to the extent that such statutes do not conflict with rules promulgated by the Indiana Supreme Court. *State v. Bridenhager*, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972). It is the Indiana Supreme Court in whom the Indiana Constitution[1] entrusts "the inherent power to establish rules governing the course of litigation in the trial courts." *Owen Cnty. v. Ind. Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1287-88 (Ind. Ct. App. 2007). As such, "when a procedural statute conflicts with the Indiana 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 Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018).

Even when a statute concerns substantive matters within the province of the General Assembly, procedural aspects of the statute in conflict with the rules adopted by the Indiana Supreme Court are a nullity. *Blood*, 239 Ind. at 402-03, 157 N.E.2d at 479 (procedural portions of statute affixing time for filing change of judge deemed unconstitutional); *Shepard v. Schurz Communs., Inc.*, 847 N.E.2d 219, 224 (Ind. Ct. App. 2006) ("Phrases in statutes that are contrary to the rules of procedure are considered a nullity."); *State v. Riggs*, 175 N.E.3d 300, 309 (Ind. Ct. App. 2021) ("Based on *Blood*, we conclude that regardless of whether the Child Deposition Statute embodies matters of substantive law, any and all procedural provisions of

[1] Specifically, Article 7, §§ 4 & 6. *In re Ind. Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments*, 142 N.E.3d 907, 908 (Ind. 2020); *State v. Haldeman*, 919 N.E.2d 539, 542 (Ind. 2010); *Owen Cnty. v. Ind. Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1288 (Ind. Ct. App. 2007).

the Child Deposition Statute are subject to the well-established rule of law that a procedural statute that conflicts with a trial rule is a nullity."), *trans. pending*.

Despite past instances of overreach,[2] the General Assembly has affirmed this allocation of power through statutes. *State ex rel. Bicanic v. Lake Circuit Court*, 260 Ind. 73, 76, 292 N.E.2d 596, 598 (1973); IND. CODE § 34-8-1-3; IND. CODE § 34-8-2-1. Nevertheless, "it is quite clear on principle, as well as upon authority, that the court had such power without the statute[s]." *Epstein v. State*, 190 Ind. 693, 696, 128 N.E. 353, 353 (1920).

Because the relevant portions of PL 166 are procedural and conflict with Trial Rule 23, PL 166 is unconstitutional both facially and as applied in violation of Article 3, § 1's separation of powers, making it a nullity.

B. PL 166 Also Conflicts with Indiana Code §§ 34-8-1-3 & 34-8-2-1.

PL 166 is also in conflict with Indiana Code §§ 34-8-1-3 & 34-8-2-1, which provide:

The supreme court has authority to adopt, amend, and rescind rules of

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[2] *See*, *e.g.*, *Monfort*, 723 N.E.2d at 411-12 (collecting cases); *State ex rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741, 742 (Ind. 1984) (statute conflicting with Indiana Criminal Rules for change of judge declared unconstitutional); *City of Hammond v. Rostankovski*, 148 N.E.3d 1165, 1168-69 (Ind. Ct. App. 2020) (to extent statute governing appeals from Hammond City Court prohibited subsequent appeals to the Court of Appeals of Indiana, "the Indiana Appellate Rules take precedence"); *Shepard*, 847 N.E.2d at 224 (portion of anti-SLAPP statute heightening burden at summary judgment yields to T.R. 56); *Yang v. Stafford*, 515 N.E.2d 1157, 1160 (Ind. Ct. App. 1987) (statute regarding verification to out-of-state affidavits yields to Trial Rules); *Sawyer v. State*, 171 N.E.3d 1010 (Ind. Ct. App. 2021) (procedures under the Child Deposition Statute, IND. CODE § 35-40-5-11.5, contrary to the Indiana discovery rules are unconstitutional), *trans. pending*; *Church v. State*, 173 N.E.3d 302 (Ind. Ct. App. 2021) (same), *trans. pending*; *Riggs*, 175 N.E.3d 300 (same); *Pate v. State*, 176 N.E.3d 228 (Ind. Ct. App. 2021) (same), *trans. pending*.

> court that govern and control practice and procedure in all the courts of Indiana. These rules must be promulgated and take effect under the rules adopted by the supreme court, and thereafter all laws in conflict with the supreme court's rules have no further force or effect.

I.C. § 34-8-1-3.

> The general assembly of the state of Indiana affirms the inherent power of the supreme court of Indiana to adopt, amend, and rescind rules of court affecting matters of procedure, and the general assembly reaffirms the power given to the supreme court to adopt, amend, and rescind rules of court, including the rules of court adopted in this chapter, as set forth by IC 34-8-1-1. However, the power of the supreme court to adopt, amend, and rescind rules of court does not preclude the creation, by statute, of alternatives to the change of venue.

I.C. § 34-8-2-1.

PL 166 could also be invalidated based on these statues. Doing so, on first blush, would seem consistent both with the approach taken in *Budden*, 698 N.E.2d at 1163-64, and the general preference to "avoid constitutional declarations when a dispute can be resolved through non-constitutional means." *Founds. of E. Chi., Inc. v. City of E. Chi.*, 927 N.E.2d 900, 905 (Ind. 2010).[3] 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.

Since at least 1852, the General Assembly has recognized the authority of the Indiana Supreme Court to promulgate rules governing procedure in Indiana courts.

[3] At oral argument in *Church v. State*, the Indiana Supreme Court inquired into the propriety of resolving a conflict between a statute and the discovery rules under the statutory provisions as opposed to doing so on constitutional grounds. *See* Oral Argument at 23:47, Church v. State, No. 21A-CR-68 (Ind. Dec. 2, 2021), *available at* https://mycourts.in.gov/arguments/default.aspx?&id=2602&view=detail&yr=&when=&page=1&court=sup&search=&direction=%20ASC&future=False&sort=&judge=&county=&admin=False&pageSize=20 (argument prior to transfer).

INDIANA REVISED STATUTES, Part First, ch. 1 § 5 (1852).[4] In 1937, the General Assembly enacted the Rule Making Bill, bringing the language of the controlling statute in line with the modern iterations in Sections 34-8-1-3 & 34-8-2-1. *See* Albert H. Cole, *Legislation of the 1937 General Assembly Affecting Legal Procedure*, 12 IND. L.J. 317, 317 (1937).

Despite the long history of statutory predecessors to Sections 34-8-1-3 & 34-8-2-1, the Indiana Supreme Court's powers arise under the constitution, not statute. *Epstein*, 190 Ind. at 696, 128 N.E. at 353. The statutes merely embody recognition of the inherent powers of the judiciary and formal abandonment of any attempt to contest those powers. *Blood*, 239 Ind. at 400-01, 157 N.E.2d at 478. As such, they reflect legislative recognition of delineated constitutional powers. In the analogous context of long-arm statutes that extend to the constitutional limits of the Federal Due Process Clause,[5] courts routinely recognize that statutory and constitutional inquiries merge, such that the analysis solely focuses on whether the exercise of jurisdiction violates constitutional due process. *See Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996); *Collazo v. Enter. Holdings*, 823 F. Supp. 2d 865, 868 (N.D. Ind. 2011) (Simon, C.J.); *Subacz v. Town Tower Motel*

[4] "[The Indiana Supreme C]ourt shall have authority; *First*. To frame, direct, and cause to be used, all process; to establish modes of practice which may be necessary in the exercise of its authority; and make regulations respecting the same, and cause them to be printed. ... *Fourth*. To establish regulations respecting proceedings which are requisite in such court in the exercise of its authority, not specially provided for by law." *Id*. (footnote and annotation omitted).

[5] "The 2003 amendment to Indiana Trial Rule 4.4(A) was intended to, and does, reduce analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause." *LinkAmerica Corp. v. Cox*, 857 N.E.2d 961, 967 (Ind. 2006).

Corp., 567 F. Supp. 1308, 1311 (N.D. Ind. 1983) (Sharp, C.J.); *see*, *e.g.*, *Sanders Kennels, Inc. v. Lane*, 153 N.E.3d 262, 271 n.2 (Ind. Ct. App. 2020).

It also appears that resolving the issue through a conflict-of-statutes analysis could trigger a novel constitutional question: Whether the language of Section 34-8-1-3, dictating that "all laws in conflict with the supreme court's rules have no further force or effect", may permissibly prohibit subsequent legislation. It has long been recognized that one session of the General Assembly cannot bind the hands of future general assemblies. *See Wall v. State*, 23 Ind. 150, 153 (1864) ("To hold that the legislature may, by the mere exercise of legislative power, say what a future legislature may or may not do, would be but to declare that the whole legislative power of the government may be lawfully annihilated, and the government summarily brought to an end, by the action of one of its departments."); *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 249 Ind. 498, 513, 233 N.E.2d 656, 665 (1968) ("Neither could [the legislature] bind the hands of future general assemblies."); *Wencke v. Indianapolis*, 429 N.E.2d 295, 297 (Ind. Ct. App. 1981). As a subsequently enacted specific statute in conflict with a general statute purporting to invalidate subsequent statutes, *State v. Greenwood*, 665 N.E.2d 579, 583 (Ind. 1996) ("A general rule of statutory construction states that when faced with an irreconcilable conflict, the specific statute will prevail over the more general one."), the question arises as to whether Section 34-8-1-3 can permissibly impair enactment of PL 166. A further novel question arises as to how directly the legislature must speak in amending a prior statute purporting to foreclose future

amendments. *Cf.* IND. CODE § 1-1-5-2. Such questions tend toward addressing the legislature's own self-governance, an area long viewed as non-justiciable, *see*, *e.g.*, *Brown v. Hansen*, 973 F.2d 1118, 1121-22 (3d Cir. 1992), and may best be wholly avoided through a constitutional separation-of-powers analysis.

C. In Attempting to Prohibit a Purely Procedural Mechanism—i.e., Class Actions—PL 166 Constitutes a Procedural Law.

The rights afforded to Indiana litigants through Trial Rule 23 are procedural rights because class actions regulate the conduct and relationship of individuals, courts, and officers in the course of judicial litigation. In categorically prohibiting courts from using Trial Rule 23 of the Indiana Rules of Trial *Procedure*,[6] PL 166 constitutes a procedural law.

The dividing line between substantive and procedural laws was announced in *Blood*:

> "In general terms substantive law can be defined as including that body of rules which regulates the conduct and relationship of members of society and the state itself as among themselves apart from the field of litigation and jurisdiction. In general form procedural law can be defined as that body of law regulating the conduct and relationship of individuals, courts, and officers in the course of judicial litigation."

As a general rule laws which fix duties, establish rights and

[6] Ball State reads PL 166 as not prohibiting use of Trial Rule 23 *per se*; rather, Ball State contends, PL 166 mandates trial courts always use Trial Rule 23(D)(4) to require the filing of an amended complaint eliminating class allegations, while otherwise foreclosing judicial use of any other portion of Rule 23. [Appellants' App. Vol. II pp.48-49]. As discussed *infra* at [pp.46-47], that is a distinction without a difference because PL 166 is an exception to a rule of general application, which can be done only by the judiciary, not the legislature. *Bridenhager*, 257 Ind. at 704, 279 N.E.2d at 796-97 ("[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.").

> responsibilities among and for persons, natural or otherwise, are substantive in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are procedural.
>
> The time, place and method of doing an act in court properly fall within the category of procedural rules and are appropriate subjects for such regulation.

239 Ind. at 400, 157 N.E.2d at 478 (citations omitted).

More recently, in *Morrison v. Vasquez*, the Indiana Supreme Court instructed:

> Procedural law is law that prescribes the method of enforcing a right or obtaining redress for invasion of that right. By contrast, substantive law creates, defines and regulates rights. Here, the venue rules merely prescribe the preferred location of filing. They do not deprive Morrison of a right to seek damages from the defendants but only govern where she may seek redress. Accordingly, the statute is procedural and applies to Morrison.

124 N.E.3d 1217, 1222 (Ind. 2019) (cleaned up).[7]

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[7] At oral argument in *Church v. State*, the court inquired into whether the standard may be more clearly articulated than was done in *Blood*. *See* Oral Argument at 3:13, Church v. State, No. 21A-CR-68 (Ind. Dec. 2, 2021). Perhaps a more useful articulation, consistent with the "course of judicial litigation" language quoted in *Blood*, is that the primary effects of substantive law "occur outside the courthouse and have no bearing on the quality or accuracy of judicial proceedings." Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290 (1989); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1006 (2011) ("Here procedure, in opposition to substantive law, means the societal process for submitting and resolving factual and legal disputes over the rights and duties recognized by substantive law, which rights and duties concern primary conduct in the private and public life that transpires essentially outside the courthouse or other forum."); *Schoenvogel v. Venator Group Retail Inc.*, 895 So.2d 225, 248 (Ala. 2004) ("Professor Dudley suggests the line of demarcation between substance and procedure as being between rules 'designed to affect behavior outside the courtroom' and rules designed 'to enhance the accuracy of the fact-finding process.' Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, at 1781, 1792 (1994)."); *see*, *e.g.*, *Commonwealth v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010) ("Privileges are ultimately substantive law, at least those that apply outside the courtroom.... The statutory restriction on disclosure of KASPER records fosters these objectives, and it obviously applies outside of the

Under that rubric, class actions are procedural rights that have been granted by the Indiana Supreme Court through Trial Rule 23. Class actions are not, like the right to change venue, a substantive right granted only by the legislature. Rather, like rules prescribing preferred venue, class actions are the how and where substantive rights are vindicated. As such, the General Assembly's attempt to prohibit use of the class-action device in actions such as this is legislative overreach into judicial powers.

1. In Indiana, the right to pursue class-action adjudication derives exclusively from Trial Rule 23.

The Indiana Supreme Court has recognized that class-action adjudication is "[o]ne of the privileges our system of justice confers on every citizen ... if the requirements of Rule 23 are met." *Budden*, 698 N.E.2d at 1162. That privilege is not, however, one conferred by the legislature or common law. Instead, it is a right currently deriving exclusively from Trial Rule 23.

Indiana class-action procedures originate from the 1843 statutory enactment of expanded Indiana chancery-court procedures allowing for such claims, mirroring the creation of Federal Equity Rule 48, that same year. JOSEPH M. MCLAUGHLIN, 1 MCLAUGHLIN ON CLASS ACTIONS: LAW AND PROCEDURE § 1:1 (9th ed. 2012); INDIANA REVISED STATUTES, Part III, ch. 46, § 16 (1843); LEANDER J. MONKS, 1 COURTS AND LAWYERS OF INDIANA 135-36 (1916). Following the adoption of the 1851 Indiana

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courtroom, unlike a rule of practice or procedure would."). The primary effects of class actions occur within the courthouse and directly concern the quality and accuracy of judicial proceedings by governing the parties to litigation and creating a process to avoid inconsistent adjudications. Moreover, class actions serve to utilize judicial resources most efficiently by avoiding duplicative proceedings.

Constitution, which merged Indiana courts of law and equity, a commission was created by the legislature to harmonize the rules for procedure. CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICAN AND ENGLAND 99 (1897). That commission preserved class procedures through statute. *Budden*, 698 N.E.2d at 1162 n.8. Ultimately, after various amendments to the statute, it was superseded by the 1970 adoption of Trial Rule 23. *Id*.[8]

Although Trial Rule 23 possesses a dual history as both a Trial Rule and previously as a rule mirrored by statute, there is not now a statute directly conferring the right to class actions on Indiana litigants. *Budden*, 698 N.E.2d at 1163-64. Instead, the General Assembly has simply incorporated the Indiana Trial Rules into the Indiana Code by reference. IND. CODE § 34-8-2-2. If the Indiana Supreme Court were to vacate Rule 23 from the Trial Rules, with it would go any right to class actions in Indiana state court. *Cf. Arnold v. Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *31, 2002 WL 1941546 (N.D. Ill. Aug. 20, 2002) ("As a general matter, the right to bring a class action in federal court is a procedural right created by Rule 23 of the Federal Rules of Civil Procedure."); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 923 (N.D. Tex. 2000) ("Emanating from Federal Rule of Civil Procedure 23, class actions are just that: procedural. Rules of procedure are established to facilitate the just resolution of

[8] That class-action procedures were statutory prior to the 1970 adoption of the Trial Rules, as with other Indiana procedural law, was permissible because the Indiana Supreme Court had not yet exercised its constitutional authority to prescribe the rules of procedure within Indiana courts. *Bowyer v. Ind. Dep't of Nat. Res.*, 798 N.E.2d 912, 917 (Ind. Ct. App. 2003) ("A procedural statute that does not conflict with any of the trial rules may be held operative.").

substantive rights.").[9]

That the General Assembly incorporated into a statute by reference the trial rules clearly does not morph the rights conferred by the Trial Rules from procedural to substantive or each trial rule would be substantive. *See*, *e.g.*, *Morrison*, 124 N.E.3d at 1222 (preferred venue in Trial Rule 75 is procedural not substantive). Whatever power the General Assembly may ever have had "to impose regulations and restrictions upon the jurisdiction of the Supreme Court with respect to rules of court which shall govern and control practice and procedure in all the courts of this state", it has abandoned. *Blood*, 239 Ind. at 400-01, 157 N.E.2d at 478 (cleaned up).

Because the right to class-action adjudication comes from the judiciary and not the legislature, it is not one the legislature can unilaterally revoke. That fact distinguishes the right to class actions from the right to change of venue, which both the Indiana Supreme Court and the General Assembly agree "is a substantive right which can be conferred only by the legislature." *State ex rel. Wade v. Cass Cir. Ct.*, 447 N.E.2d 1082, 1083 (Ind. 1983); *accord Blood*, 239 Ind. at 400, 157 N.E.2d at 478; *State ex rel. Hatcher v. Lake Sup. Ct., Room Three*, 500 N.E.2d 737, 739 (Ind. 1986) (same); IND. CODE § 34-8-2-1 ("[T]he power of the supreme court to adopt, amend, and rescind rules of court does not preclude the creation, by statute, of alternatives to the change of venue.").[10] As a right to *only* be conferred by the

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[9] Indiana's class action procedures mirror those of Rule 23 of the Federal Rules of Civil Procedure. *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1269 (Ind. Ct. App. 2015).

[10] Change of venue encompasses both change of judge and change of county. *Hatcher*, 500 N.E.2d at 739 ("change of venue from a judge or county"); IND. TRIAL RULE 76.

General Assembly, change of venue is a right that can be removed unilaterally by the General Assembly.[11] That is not true of class actions.

2. PL 166's prohibition on class actions squarely fits the procedural rubric.

Class actions under Trial Rule 23 are, as all Indiana Trial Rules, matters of procedure, not substantive law. *See Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012) ("Like all of our Trial Rules, Trial Rule 60(B) is a rule of procedure; it does not confer any substantive right on a party that invokes it."); *GM Corp. v. Arnett*, 418 N.E.2d 546, 549 (Ind. Ct. App. 1981) ("The procedural rules T.R. 15(C) and T.R. 17(A) cannot create a new substantive right for Mrs. Arnett in place of the one she lost."); IND. TRIAL RULE 1.

Class actions are species of traditional joinder that enable courts "to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). At its core, the ability to join numerous individual claims into a single, efficient proceeding exists to safeguard judicial resources. *7-Eleven, Inc. v. Bowens*, 857 N.E.2d 382, 389 (Ind. Ct. App. 2006) ("The purpose of a class action is to resolve matters as efficiently as possible[.]"); MCLAUGHLIN, *supra*, at

[11] Notably, even though the General Assembly has the exclusive power to create a substantive right to change of venue, the power to establish preferred venue is a procedural matter reserved for the Indiana Supreme Court. *Morrison*, 124 N.E.3d at 1222 ("Here, the venue rules merely prescribe the preferred location of filing. They do not deprive Morrison of a right to seek damages from the defendants but only govern where she may seek redress. Accordingly, the statute is procedural and applies to Morrison.").

§ 1:1 ("As the Supreme Court has recognized, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" (alteration in original; otherwise cleaned up)). It also ensures the avoidance of "inconsistent or varying adjudications". IND. TRIAL RULE 23(B)(1)(a); MCLAUGHLIN, *supra*, at § 1:1 ("[T]he class action avoids inconsistent results by offering the efficiency and predictability of a unitary adjudication or settlement of the claims of all persons to whom the defendant may be liable based on similar facts.").

Finding that class actions are quintessential matters of procedural law, an influential law-review article provides:

> *Joinder of Causes.* **Nothing could be more a part of practice than a determination as to what causes should be joined in a single action.** Whether a counterclaim should be permitted to be filed or required, whether a crossclaim should be permitted or required, whether third-party claims should be permitted, all involve the orderly dispatch of judicial business and fall within the court's rule-making power.
>
> *Parties.* **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.** Intervention, substitution, inter-pleader, third-party practice, **class actions, all are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters.**

Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 648 (1957) (emphasis added);[12] *see also*

[12] The article was a basis for the Michigan Supreme Court's adoption of its current standard to distinguish between substantive and procedural laws, adopted in *McDougall v. Schanz*, 597 N.W.2d 148, 156 (1999). Both in the proceedings below and at oral argument in *Church v. State*, the State invoked the *McDougall*

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); MCLAUGHLIN, *supra*, at § 1:1 ("[T]he modern class action 'is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency, and fairness in handling large numbers of similar claims.'" (citing *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 62 (W. Va. 2003); *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004)).

PL 166 does not change the substantive law between the parties. By its own terms, PL 166 "does not: (1) create a cause of action; (2) eliminate a required element of any existing cause of action; (3) affect a worker's compensation claim under IC 22-3; or (4) except as otherwise provided in this chapter, amend, repeal, alter, or affect any immunity, defense, limitation of liability, or procedure available or required under law or contract." IND. CODE § 34-12-5-2(b). Instead, it merely instructs courts that they cannot adjudicate otherwise permissible claims in a judicially economical manner as provided for in the Trial Rules. That is precisely what the Indiana Constitution and Indiana Code §§ 34-8-1-3 & 34-8-2-1 prohibit. *Cf. Morrison*, 124 N.E.3d at 1222 ("[The venue rules] do not deprive Morrison of a right to seek damages from the defendants but only govern where she may seek redress. Accordingly, the statute is procedural and applies to Morrison.").

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standard as what Indiana should apply. *See* [Appellants' App. Vol. II pp.112-113]; Oral Argument at 3:48, Church v. State, No. 21A-CR-68 (Ind. Dec. 2, 2021). While both the *McDougall* dissent and the Supreme Court of Alabama explain well why that standard should not apply in Indiana, *McDougall*, 597 N.W.2d at 159-176 (Cavanagh, J., dissenting); *Schoenvogel v. Venator Group Retail Inc.*, 895 So.2d 225, 251 (Ala. 2004), even under that standard, which heavily slants toward finding laws to be substantive, class actions are procedural matters for courts.

As Ball State asserted in its briefing to the trial court, "Indiana statutes that create protections from litigation are quintessential 'substantive' laws." [Appellants' App. Vol. II p.82]. That is not, however, what PL 166 purports to do. It provides no affirmative protections against litigation other than to increase the costs of litigation by instructing courts that litigants may only seek redress either by joining voluntarily into a single action, thereby placing tremendous burdens on courts,[13] or in through individual adjudications throughout the state. *See Gerlib v. R. R. Donnelley & Sons Co.*, 1997 U.S. Dist. LEXIS 16842, at *22, 1997 WL 672645 (N.D. Ill. Oct. 24, 1997) ("For a group this numerous, joinder or intervention by hundreds of individual claimants is likely to be more burdensome for the court than treating them as a class. Moreover, hundreds of individual actions could lead to repetitious litigation, inconsistent decisions and numerous appeals."). Class actions have been implemented to avoid the problems of taxing judicial time, energy, and resources. Class actions govern "[t]he time, place and method of doing an act in court[,] properly fall[ing] within the category of procedural rules". *Blood*, 239 Ind. at 400, 157 N.E.2d at 478 (citations omitted). Class actions are nothing more than a method—i.e. a procedure—for enforcing substantive rights.

The Alaska Supreme Court addressed an analogous circumstance: a challenge to a statute prohibiting application of *American Pipe* tolling[14] to class-

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[13] As a prerequisite to class certification, Rule 23(A)(1) presupposes that joinder of the class members would be impracticable. IND. TRIAL RULE 23(A)(1).

[14] Derived from the Supreme Court of the United States' decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), "*American Pipe* tolling permits an absent class member to rely on a pending class action to toll the statute of

action claims under Alaska's Wage and Hour Act. *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1040-47 (1981). Finding the statute an impermissible procedural law in conflict with Alaska's Rule 23,[15] the court observed:

> ... Rule 23, allowing the filing of a class action complaint to toll the statute of limitations, supersedes the inconsistent mandate of the Wage and Hour Act, since the manner in which the judicial power is invoked over class actions is as much a matter of judicial concern as where a litigant sues only in his or her own name.
>
> This view receives further support when the policy objectives of the civil rules, and of court promulgations of rules of practice and procedure, are considered. The Rules of Civil Procedure seek a uniform approach to the efficient conduct of judicial business. These policies implicate the questions of when joinder of parties and claims should be allowed, and the proper procedure for handling cases in which numerous parties or claims are involved. Absent an ability to provide for these matters by appropriate rules of procedure, it is possible that vast amounts of judicial, administrative, and private resources would be wasted.
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> ... This regime [of the Wage and Hour Act requiring class members to opt-in to preserve their statutes of limitation] ... turns the purported class suit into a permissive joinder device, making it likely that a court will have to decide the same questions of law or fact in another action. Such a legislative change results in a waste of resources that the rules are designed to prevent. In addition, requiring the naming of each member of the class at an early stage of the litigation, and examining the facts surrounding satisfaction of the limitations period, may require the expenditure of time and effort not necessary to the initial determination of whether the action is properly brought as a class action under Rule 23's provisions. Requiring a return to the use of class actions as a permissive joinder mechanism thus prevents the court from controlling matters of practice and procedure in the most efficient manner.

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limitations as to her individual claim, obviating the need for her to file a separate action to guard against the possibility that class certification will eventually be denied." *Vincent v. Money Store*, 915 F. Supp. 2d 553, 561 (S.D.N.Y. 2012) (cleaned up). Indiana applies *American Pipe* tolling. *Arnold v. Dirrim*, 398 N.E.2d 426, 439-40 (Ind. Ct. App. 1979); *Ling v. Webb*, 834 N.E.2d 1137, 1142 (Ind. Ct. App. 2005).

[15] Like Indiana, Alaska's Rule 23 is patterned on Federal Rule 23. *Id.* at 1041.

Id. at 1043-44.

Just as the statute confronting the Alaska Supreme Court sought to invade that court's ability to control the expenditure of judicial resources and the joinder of claims on its courts' dockets, PL 166 invades the province of the Indiana Supreme Court. In barring use of the class-action mechanism in actions such as this, the General Assembly has sought to displace the judiciary's judgment in how to manage cases on its dockets, thereby exposing Indiana courts to the waste of judicial resources and inconsistent results specifically sought to be avoided by the enactment of Trial Rule 23. By its very nature, class actions regulate the conduct of individuals and courts exclusively during the course of litigation and at no other time. *See Blood*, 239 Ind. at 400, 157 N.E.2d at 478. As Joiner and Miller aptly wrote, "class actions [ ] are matters of judicial procedure and involve the how instead of the what." Joiner & Miller, *supra*, at 648. As such, class actions are procedural law "that prescribe[ ] the method of enforcing a right or obtaining redress for invasion of that right[,]" *Morrison*, 124 N.E.3d at 1222, and PL 166 is a procedural law impermissibly creating a legislative exception to Trial Rule 23.

"The legislature has no more right to break down the rules prescribed by [the Indiana Supreme Court] for conducting its official business than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties." *Epstein*, 190 Ind. at 697, 128 N.E. at 353 (cleaned up). The procedural right to class actions, created by and instilled in Trial Rule 23, dictates how courts conduct their official business; it is unconstitutional for the legislature to shift the burden of

duplicative and repetitious litigation onto courts by barring class-action procedures.

3. PL 166's codification in Title 34 does not alter the analysis.

In the briefing below, Ball State contended that the General Assembly's choice to codify PL 166 "in Title 34 underscores its substantive nature." [Appellants' App. Vol. II p.45]. A similar argument was made to the Eleventh Circuit and rejected, as it should be here. *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1336 (11th Cir. 2015) ("[H]ow a state chooses to organize its statutes affects the analysis not at all. ... [T]he question whether a federal rule abridges, enlarges, or modifies a substantive right turns on matters of substance—not on the placement of a statute within a state code."); *see also Smith-Brown v. Ulta Beauty, Inc.*, 2019 U.S. Dist. LEXIS 30460, at *40-41, 2019 WL 932022 (N.D. Ill. Feb. 26, 2019) ("A leading treatise states that '[m]ost courts considering the question have determined that the legislature's placement of a class action prohibition within a specific state consumer protection act (as opposed to a free-standing rule of procedure) does not necessarily mean that the prohibition is a substantive one.' This Court agrees with those decisions holding that the fact that a class action bar is included within a consumer protection statute does not make it any more substantive than if it were found instead among the state's rules of procedure." (citations omitted)).

4. That PL 166 applies to a discreet set of cases, instead of having general application, not only fails to counsel in favor of it being substantive, but more squarely shows that it is an impermissible procedural law.

Before the trial court, the State argued that PL 166 is constitutional because it applies to only certain causes of action. For that proposition, the State relied on

Health & Hospital Corporation of Marion County. v. Foreman, 51 N.E.3d 317 (Ind. Ct. App. 2016), *trans. not sought*, which found a change-of-judge statute requiring the filing of an affidavit to be "substantive because they apply to requirements for special types of actions ...." *Id*. at 319. While *Foreman* can be read for that proposition, it is a proposition directly in conflict with Indiana Supreme Court precedent.[16]

In both *State ex rel. Gaston v. Gibson Circuit Court*, 462 N.E.2d 1049 (Ind. 1984), and *State ex rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741 (Ind. 1984), the Indiana Supreme Court struck down a statute dictating that change of judge in criminal actions should be mandatory as it is in civil proceedings. As Justice Hunter, observed in dissent: "Our lawmakers were not attempting to set forth any standards for the method and time of a change, areas that are admittedly controlled by our rules. The conflict here concerns, as the majority correctly points out, 'whether or not a change of judge is mandatory.'" *Gaston*, 462 N.E.2d at 1051 (Hunter, J., dissenting) (citation omitted); *accord Jeffries*, 467 N.E.2d at 742 (Hunter, J., dissenting). In each instance, it was not enough that the General Assembly sought to act exclusively relating to criminal actions instead of all other matters at law.

The Indiana Supreme Court's conclusion in both *Gaston* and *Jeffries* is consistent with its pronouncements in *Bridenhager*: "[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." 257 Ind. at 704, 279 N.E.2d at 796-97. The reason for requiring such uniformity was

[16] Likely the result of the *pro se* appellee failing to bring the controlling precedent to the court's attention.

to avoid slipping back into the "hodgepodge" of dual authority meant to be vanquished by adoption of the Trial Rules. *Id*. at 703, 279 N.E.2d at 796; *see also Nolan*, 627 P.2d at 1045 ("[I]t specifies a procedure applicable only to one statutory scheme, defeating the uniformity essential to attaining efficient judicial procedures.").

D. PL 166 Conflicts with Trial Rule 23.

PL 166's prohibition on certain class actions conflicts with Trial Rule 23. Because it conflicts with Rule 23, PL 166's prohibition on class actions is a nullity.

> 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; *accord Key*, 48 N.E.3d at 339-40; *Owen Cnty*., 861 N.E.2d at 1288.

In prohibiting class actions, PL 166 conflicts with Trial Rule 23. Construing Federal Rule of Civil Procedure 23, on which Trial Rule 23 is based, the Eleventh Circuit found: "A state statute precluding class actions for specific kinds of claims conflicts with Rule 23 and so is displaced for claims in federal court so long as applying Rule 23 does not 'abridge, enlarge or modify any substantive right.'" *Lisk*, 792 F.3d at 1335. By contrast, in order to find a statutory obligation to exhaust administrative remedies not in conflict with Trial Rule 23, the Indiana Court of Appeals observed that the statute "does not, by its terms, specifically limit grievance proceedings to actions by individuals." *Spencer v. State*, 520 N.E.2d 106,

109 (Ind. Ct. App. 1988), *trans. denied*. Had the statute in *Spencer* confined such claims to individual actions, it would have conflicted with Trial Rule 23, as here and in *Lisk*.

Nevertheless, Ball State contended below that PL 166's prohibition is not in conflict with Trial Rule 23 because:

> Trial Rule 23(D)(4) is tailor-made for applying PL 166's prohibitions. It authorizes th[e] Court to order Mellowitz to abandon his substantively prohibited class allegations in an amended complaint. Thus, there is not even the potential for conflict between PL 166 and Trial Rule 23.

[Appellants' App. Vol. II p.49].[17] Under Ball State's contention, an Indiana Trial Rule is not contradicted when the entire gravamen of the rule is statutorily prohibited, so long as a single subdivision of a subpart to the rule can be cited when disregarding application of the rest. As the Indiana Supreme Court has instructed, a conflict exists when the Trial Rule is prohibited in a given situation. *Bridenhager*, 257 Ind. at 704, 279 N.E.2d at 796. There is no scenario in which T.R. 23(A)(1), T.R. 23(A)(2), T.R. 23(A)(3), T.R. 23(A)(4), T.R. 23(B)(1), 23(B)(2), 23(B)(3), T.R. 23(C)(1), T.R. 23(C)(2), T.R. 23(C)(3), T.R. 23(C)(4), T.R. 23(D)(1), T.R. 23(D)(2), T.R. 23(D)(3), T.R. 23(D)(5), T.R. 23(E), T.R. 23(F)(1), or T.R. 23(F)(2) can be applied alongside PL 166. That is the epitome of a conflict.

The conflict between PL 166 and Trial Rule 23 is no more reconcilable through Trial Rule 23(D)(4) than the Child Deposition Statute through Trial Rule 26(C)'s

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[17] "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 ... ." IND. TRIAL RULE 23(D)(4).

allowance for entry of orders limiting discovery[18] or any statute conflicting with the Appellate Rules through Appellate Rule 1 "permit[ting] deviation from the [Appellate] Rules." Indiana appellate courts have never relied on Appellate Rule 1 to save statutes conflicting with the Appellate Rules, the functional equivalent of which Ball State would have done here. *See*, *e.g.*, *State v. Holtsclaw*, 977 N.E.2d 348, 349-50 (Ind. 2012); *McCormick v. Vigo Cnty. High Sch. Bldg. Corp.*, 248 Ind. 263, 266, 226 N.E.2d 328, 330 (1967); *S. Ind. Rural Elec. Coop., Inc. v. Civil City of Tell City*, 179 Ind. App. 217, 384 N.E.2d 1145 (1979); *Citizens Indus. Grp. v. Heartland Gas Pipeline, LLC*, 856 N.E.2d 734, 738 (Ind. Ct. App. 2006), *trans. denied*. In fact, the lone instance an appellant invoked Appellate Rule 1 to circumvent a conflict, the Indiana Court of Appeals rejected. *Owen Cnty.*, 861 N.E.2d at 1287-89.

The type of categorical invocation of Trial Rule 23(D)(4) that Ball State calls for is inconsistent with the purpose of Rule 23(D)(4), which is simply "to allow a [ ] court to 'clean up' the pleadings if class certification is denied" and affords the avenue by which a plaintiff may continue to pursue his or her claims individually. *Bank v. Am. Home Shield Corp.*, 2013 U.S. Dist. LEXIS 29546, at *7-8, 2013 WL 789203 (E.D.N.Y. Mar. 4, 2013). It is not a safeguard against otherwise unconstitutional statutes impairing the rights of litigants to invoke the procedures of Trial Rule 23.

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[18] In six recent opinions for which transfer has been sought in each, the Indiana Court of Appeals found the procedures under the Child Deposition Statute, IND. CODE § 35-40-5-11.5, contrary to the Indiana discovery rules. *Sawyer v. State*, 171 N.E.3d 1010 (Ind. Ct. App. 2021), *trans. pending*; *Church v. State*, 173 N.E.3d 302 (Ind. Ct. App. 2021), *trans. pending*; *Riggs*, 175 N.E.3d 300; *Pate v. State*, 176 N.E.3d 228 (Ind. Ct. App. 2021), *trans. pending*; *State v. Wells*, 2021 WL 3478637 (Ind. Ct. App. Aug. 9, 2021) (memorandum decision), *trans. pending*; *State v. Brown*, 2021 WL 4999123 (Ind. Ct. App. Oct. 28, 2021) (memorandum decision), *trans. pending*.

See also Shady Grove, 559 U.S. at 401 (finding conflict between state statute and Federal Rule 23 because the statute "prevents the class actions it covers from coming into existence at all").[19] Indeed, even under Ball State's view, PL 166 would amount to the General Assembly dictating that trial courts must use a specific Trial Rule, Rule 23(D)(4), in every putative class action to which PL 166 applies. That is the type of invasion of the courthouse that the separation of powers cannot abide.

III. Even were Class Actions a Substantive Right, Retroactive Application of PL 166 to these Proceedings is an Unconstitutional Taking of Vested Rights in Accrued Causes of Action.

Even were the privilege of our system of justice that is conferred on every citizen to assert claims in the form of a class action if the requirements of Rule 23 are met a substantive right and not a procedural right, as Ball State contended below, PL 166 would still be unconstitutional as applied to this action and the members of the Proposed Class because it constitutes a taking of vested rights—i.e. accrued claims—of Mellowitz and the members of the Proposed Class.[20] As such, PL 166 would still be a nullity.

While the General Assembly may enact legislation with retroactive applicability, in so doing, "[t]he General Assembly shall not violate a constitutional guarantee and shall not impair vested rights." *Bailey v. Menzie*, 542 N.E.2d 1015, 1017 (Ind. Ct. App. 1989) (cleaned up); *see also Gulzar v. State*, 148 N.E.3d 971, 976

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[19] Under Ball State's reasoning, the Supreme Court of the United States could not have found a conflict because Federal Rule 23(d)(1)(D) mirrors Trial Rule 23(D)(4).

[20] As "an as-applied challenge, [Mellowitz] need only show the statute is unconstitutional on the facts of the particular case." *State v. Zerbe*, 50 N.E.3d 368, 369 (Ind. 2016) (cleaned up).

n.1 (Ind. 2020) ("[R]etroactive application is not appropriate if it would violate a vested right or constitutional guaranty."); *Hinds v. McNair*, 413 N.E.2d 586, 609 n.20 (Ind. Ct. App. 1980) ("the long standing rule that a statute may not be retroactively applied if such application impairs vested rights"). That is so because "[t]he constitutional prohibitions against the taking of property without due process of law forbid the legislature from taking away a vested right, and similarly forbid any legislative attempt to take away immediately and completely all legal means for the enforcement of said right, as that would amount to a subversion of the right itself." *Guthrie v. Wilson*, 240 Ind. 188, 195, 162 N.E.2d 79, 82 (1959).[21]

If PL 166's class-action prohibition is substantive and not procedural, then it violates the vested rights of Mellowitz and the members of the Proposed Class because their causes of action accrued and this case was initiated prior to the enactment of PL 166. *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003) ("It has long been recognized that an accrued cause of action may be a property right."); *Balt. & Ohio Sw. Ry. Co. v. Reed*, 158 Ind. 25, 32, 62 N.E. 488, 490 (1902) ("[A] vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference." (cleaned up)); *Hoyt Metal Co. v. Atwood*, 289 F. 453, 454 (7th Cir. 1923) ("That an accrued right of action is a vested property right is well settled."); *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir. 1983) ("An accrued cause of action is a right of property

[21] The constitutional provisions are embodied by Article 1, section 21 of the Indiana Constitution along with the Fifth and the Fourteenth Amendments of the United States Constitution. *Balt. & Ohio Sw. Ry. Co. v. Reed*, 158 Ind. 25, 31, 62 N.E. 488, 490 (1902).

protected by the Fourteenth Amendment; an unaccrued cause of action is not." (citations omitted)); *cf. Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 529, 418 N.E.2d 207, 213 (1981) ("Plaintiff here is not in the position of having had a vested right taken from her. Her cause of action had not yet accrued at the time the no-cause provision became effective under the act; at the time of her loss and damages, there was no cause of action existing .... Thus, she had no vested right in a remedy.").

Perhaps the clearest caselaw example is provided by *Guthrie v. Wilson*, in which the Indiana Supreme Court held that retroactive application of a statute shortening the time for a minor to file an action was unconstitutional as applied to the minor because the underlying cause of action had already accrued when the statute was enacted. *Id*. at 240 Ind. at 193-95, 162 N.E.2d at 81-82.

In addressing the enactment of a statute that, if given retroactive effect, would remove the right of a litigant to pursue class actions in state court, the Northern District of Alabama found:

> [T]he question is whether SLUSA, if it denies Huff and its unnamed party-clients the use of the various incarnations of "covered class action" as they seek to recover for injuries caused by defendants' alleged violations of state law, is also denying them procedural rights that cannot be retrospectively yanked from under them without running afoul of the notions of "fair notice", "reasonable reliance", and "settled expectations".
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> If SLUSA applies, it will deny Huff and the individuals on whose behalf it purports to act the efficient resolution of claims naturally suited to group action and will expose them to the shortcomings inherent in separate actions. Such exposure runs counter to the concepts of fair notice, reasonable reliance, and settled expectation and would attach legal consequences to completed events that form the factual basis for Huff's complaint.

W.R. Huff Asset Mgmt. Co., L.L.C. v. BT Sec. Corp., 190 F. Supp. 2d 1273, 1279-80 (N.D. Ala. 2001).[22]

Mellowitz and the Proposed Class advance two causes of action: (i) breach of contract and (ii) unjust enrichment/*quantum meruit*, pleaded in the alternative. [Appellants' App. Vol. II pp.22-30]. The breach of contract claim accrued in the spring of 2020, when Ball State breached its numerous contractual obligations to Mellowitz and the members of the Proposed Class. *Meisenhelder v. Zipp Express, Inc.*, 788 N.E.2d 924, 928 (Ind. Ct. App. 2003) ("a cause of action for breach of contract accrues at the time the breach occurs"). It was also at that time that any claim for unjust enrichment/*quantum meruit* accrued. *King v. Terry*, 805 N.E.2d 397, 400-01 (Ind. Ct. App. 2004) (claim accrues when plaintiff discovers defendant was unjustly enriched). PL 166 was not enacted until April 29, 2021. Indeed, this lawsuit had commenced almost a year before then. [Appellants' App. Vol. II pp.22-30]. As such, Mellowitz and each member of the Proposed Class had vested rights in their accrued causes of action prior to enactment of PL 166. If the right to pursue a class action is a substantive right, then it is a right that was retroactively taken from Mellowitz and each member of the Proposed Class by PL 166 without any compensation in violation of both the Indiana and Federal Constitutions.

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[22] Because most federal authority recognizes Rule 23 provides only a procedural right to class actions, *W.R. Huff* is an outlier examining class actions as though they are a substantive right that cannot be retroactively disturbed. *See Blaz*, 368 F.3d at 505. But, because this part of the analysis only applies if Ball State is correct that class actions are a substantive right to be conferred by the legislature and not a procedural right conferred by the Indiana Supreme Court through Trial Rule 23, the *W.R. Huff* analysis is informative.

IV. Because the Right to Pursue a Class Action is One Implied into the Students' Contracts with Ball State and Was Not Waived, the Retroactive Taking of that Right Constitutes a Substantive Interference with Contracts, and Ball State, as a Governmental Entity, Has Not Carried its Burden to Show PL 166 was Properly Enacted Under the State's Limited *Necessary* Police Powers.

Retroactive application of a statute to an existing contractual obligation runs afoul of both the Indiana and Federal Constitutions if application of the statute effects a substantial impairment on the contractual relationship. *Clem v. Christole, Inc.*, 582 N.E.2d 780, 783-84 (Ind. 1991). If such an impairment occurs, then "[o]nly those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause." *Id.* at 784. Because retroactively removing the right to pursue remedy by class action is a substantial impairment of the contractual relationship and Ball State, as a governmental entity,[23] has failed to carry its burden to show that PL 166 is a proper exercise of the State's *necessary* police power, rather than just the State's *general* police power, as applied to Ball State's contracts with Mellowitz and the members of the Proposed Class, PL 166 violates the contract clauses of both the state and federal constitutions.

A. The Contract Clauses of the Indiana and Federal Constitutions Prohibit Substantial Impairment of Contractual Obligations.

PL 166 purports to retroactively eliminate the contractual right to pursue recourse through collective action. IND. CODE § 34-12-5-2(a)(1). Article 1, section 24 of the Indiana Constitution specifically prohibits such after-the-fact legislative attempts to sidestep legal obligations. IND. CONST. Art. 1, § 24 ("No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."). "[T]he

[23] *See generally* IND. CODE art. 21-22.

Legislature's retrospective application of a statute to a contract made before the effective date of the statute can [also] impair the obligation of contracts, contrary to Art. 1, § 10 of the United States Constitution." *Evansville-Vanderburgh Sch. Corp. v. Moll*, 264 Ind. 356, 369-70, 344 N.E.2d 831, 841 (1976).

> It is settled in this State ... that: "The law, under which the contract was executed, is to be and remain the only rule by which the contract shall be construed. The obligations shall not be increased, nor the rights diminished, by any act of future legislation."
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> A fair statement of the rule applicable to this class of cases as established by the authorities, is that any 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. In either case such legislation is inhibited by § 10, Art. 1, of the Constitution of the United States, and by § 24, Art. 1, of the Constitution of this State.

Indianapolis v. Robison, 186 Ind. 660, 663-64, 117 N.E. 861, 862 (1917) (citations omitted); *accord Ahlborn v. Hammond*, 232 Ind. 12, 20, 111 N.E.2d 70, 74 (1953); *see also Lewis v. Brackenridge*, 1 Blackf. 220, 221-22 (Ind. 1822) ("[A]ll contracts, that is, all obligations created by them, and all rights arising under them, are to be held sacred, and forever to continue unaffected by legislative interference. The law, under which the contract was executed, is to be and remain the only rule by which the contract shall be construed. The obligations shall not be increased, nor the rights diminished, by any act of future legislation. ... There can be no question but this guarantee extends to all rights, arising under all contracts, whether written or parol, whether express or implied, whether arising from the stipulation of the parties, or accruing by operation of law.").

The protections of the contract clause do not merely prohibit interference in contracts between private parties; "the contract clause of the Constitution protects parties dealing with the State". *Cnty. Dep't of Pub. Welfare v. Potthoff*, 220 Ind. 574, 580, 44 N.E.2d 494, 496 (1942). In such instances, the opportunity for mischief is at its zenith. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 254 (1827) ("The prohibition of 'laws impairing the obligation of contracts,' 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."). In order to safeguard against legislative meddling in governmental obligation, "[w]hen the state enters into a valid contract with an individual, the state relinquishes its sovereign power to prescribe conditions, or to regulate practices involved, so far as the other party to the contract is concerned." 5A INDIANA LAW ENCYCLOPEDIA, *Constitutional Law* § 125 (2005) (citing *Bruck v. State*, 228 Ind. 189, 91 N.E.2d 349 (1950)).[24]

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[24] Ball State contended below that PL 166 constitutes a permissible exercise of the legislature's ability to curtail the reach of the statutory waiver of sovereign immunity for suits arising in contract. [Appellants' App. Vol. II p.47] (citing IND. CODE § 34-13-1-1). To the extent it may be argued that *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972), abrogated sovereign immunity only as to tort liability—a conclusion seemingly in contrast to the Indiana Supreme Court's understanding of the history of abrogation of sovereign immunity in the State, *see Esserman v. Ind. Dep't of Envtl. Mgmt.*, 84 N.E.3d 1185, 1189-90 (Ind. 2017)—the ability to retroactively withdraw a waiver of sovereign immunity is necessarily curtailed by the prohibition on impairing the obligation of contracts because to hold otherwise would render a contract with the State illusory as the State would always have the power to vitiate its contractual obligations. *See Fla. Dep't of Envtl. Prot. v. Contractpoint Fla. Parks, LLC*, 986 So.2d 1260, 1269-71 (Fla. 2008); *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4 (Fla. 1984); *184 Windsor Ave., LLC v. Conn.*, 875 A.2d 498, 507 n.11 (Conn. 2005) (collecting cases); Enrico G. Gonzalez, Note, *Contract Law/Sovereign Immunity — the Demise of Sovereign Immunity*

B. Mellowitz and the Members of the Proposed Class Had a Contractual Right to Pursue Remedy Via Class Action.

The state of the law at the time the contract is formed becomes a snapshot governing the contract throughout its duration. *Bruck*, 228 Ind. at 197, 91 N.E.2d at 352 ("If a contract is valid when executed, which contemplates the lapse of several years before all its terms are carried out, it must be held to remain valid and enforceable to the end, under the laws in force at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract." (cleaned up)). In part, that occurs by all applicable statutes in effect at the time of the contract being implied into the contract. *Alexander v. Linkmeyer Dev. II, LLC*, 119 N.E.3d 603, 614 (Ind. Ct. App. 2019) ("[U]nless a contract provides otherwise, it is implied that the parties intend to comply with all applicable statutes and city ordinances in effect at the time of the contract."). At the time of the relevant contracts, Mellowitz and the members of the Proposed Class had a right to seek remedy via class action through Indiana Trial Rule 23 as incorporated into the Indiana Code by Section 34-8-2-2,[25] which they did not contractually agree to

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in the Contractual Battle Against State Agencies — Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988), 17 FLA. ST. U.L. REV. 899, 904-07 (1990); Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 PUB. CONT. L.J. 265, 270-71 (1996).

[25] Because Trial Rule 23 is part of the Indiana Trial Rules, it is automatically incorporated by reference into Ind. Code § 34-8-2-2. *Budden*, 698 N.E.2d at 1164 (recognizing that General Assembly's statutory adoption and incorporation of the Indiana rules of trial procedure gives T.R. 23 dual status as both a right of the trial rules and a right further secured by statute). Nevertheless, because I.C. § 34-8-2-2 merely acts to incorporate the Trial Rules by reference, the right to class-action adjudication remains a right stemming from the Indiana Supreme Court, not the General Assembly. If the Indiana Supreme Court chose to unilaterally

waive.[26] As such, it was a right incorporated into each of the contracts with Ball State.

C. Involuntary Elimination of Remedy Via Class Action is a Substantial Impairment on the Contracts of Mellowitz and the Members of the Proposed Class.

"[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." *Robison*, 186 Ind. at 663-64, 117 N.E. at 862 (citations omitted); *accord Ahlborn*, 232 Ind. at 20, 111 N.E.2d at 74.

The interference with the rights of Mellowitz and the members of the Proposed Class to vindicate their claims via class action effects a substantial impairment that obstructs or retards enforcement of their contracts with Ball State. As the Indiana Supreme Court explained in *Budden v. Board of School Commissioners*, the ability to vindicate rights through class action, "[a]s a practical matter, [ ] is 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 ...." *Budden*, 698 N.E.2d at 1162; *see also Butler*

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vacate Trial Rule 23, it would automatically be removed from the Indiana Code in its entirety by operation of I.C. § 34-8-2-2. The General Assembly, to the contrary, lacks the power to unilaterally remove Trial Rule 23 from the Indiana Trial Rules.

[26] While contracts may waive the class-action right, *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514, at *6, 1999 WL 35304 (N.D. Ill. Jan. 7, 1999); *see*, *e.g.*, *Agnew v. Honda Motor Co.*, 2009 U.S. Dist. LEXIS 53914, at *4, 2009 WL 1813783 (S.D. Ind. May 20, 2009), there has been no such waiver claimed here.

v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013). By removing that right, PL 166 substantially impairs enforcement of the contracts.

D. To the Extent the State May Interfere with Contracts, it is Only Through Exercise of the State's *Necessary* Police Power, Not the *General* Police Power, and the Governmental Entity Shoulders the Burden to Prove Interference is Permitted.

Despite the absolute language of both the Indiana and federal contract clauses, the State may interfere with the obligations of contract in limited circumstances through the exercise of its police power. *Clem*, 582 N.E.2d at 782.

> However, simply because a statute is a valid exercise of legislative authority pursuant to such general police power does not necessarily immunize it from our state constitution's contract clause. Only those statutes which are necessary for the general public and reasonable under the circumstances will withstand the contract clause. It is only this latter necessary police power, rather than the general police power, which provides the exception to the contract clause.

Id. at 784. In determining whether the State has properly exercised its necessary police power, the Court must remain mindful of the purpose of the contract clauses, which are "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*, 25 U.S. (12 Wheat.) at 254.

Where, as here, the contractual obligations to be impaired are contracts with governmental entities, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *U.S. Tr. Co. v. N.J.*, 431 U.S. 1, 25-26 (1977). As the Supreme Court of the United States observed:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 26. "[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *Id*. at 30-31. As a result, the burden falls on the governmental entity 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); *accord Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998); *see*, *e.g.*, *U.S. Tr. Co.*, 431 U.S. at 31 ("In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary."); *cf. Cuyahoga Metro. Hous. Auth. v. U.S.*, 57 Fed. Cl. 751, 778 (2003) ("Consistent with the Supreme Court's 'Contracts Clause' jurisprudence, the court must scrutinize this assertion of Congress' purpose with an extra measure of vigilance 'because the [government's] self-interest is at stake.'" (quoting *U.S. Tr. Co.*, 431 U.S. at 26)).

Ball State failed to carry its burden of establishing PL 166 is a constitutional exercise of the *necessary* police powers. Exemplifying what must be shown to overcome that burden is *Clem v. Christole, Inc.*, in which the Indiana Supreme Court found unconstitutional a statute vitiating restrictive covenants that prevented use of property for business or commercial purposes, thereby allowing the property to be used as a residential facility for persons with disabilities or mental illnesses. 582 N.E.2d at 782-85 (discussing *Allied Structural Steel Co. v. Spanaus*,

438 U.S. 234 (1978)). After recognizing that only the State's necessary police power would be sufficient to avoid application of the contract clauses, the court observed:

> We recognize that the state's general police power authorizes the legislature's enactment of laws which promote the mainstreaming of developmentally disabled persons by prohibiting future subdivision contract restrictions which permit residential use but prohibit use by a residential facility for such persons. However, statutory impairment of existing restrictive covenants does not fall within the necessary police power exception to the contract clause because of the absence of societal necessity.
>
> When juxtaposed against the broad and explicit mandate of the contract clause in Article 1, Section 24 of the Indiana Constitution, we find that the legislative justification for [the statute] fails to fall within the necessary police power exception. Notwithstanding the social utility in providing homes for the developmentally disabled in ordinary residential areas and the resulting indirect societal benefits, several countervailing considerations compel our decision. The enactment is not reasonably necessary for the protection of the health, safety, and welfare of the general public. It does not address a broad problem general to society. Its effect is not temporary but permanent, irrevocable, and retroactive in altering the contractual relationships created in restrictive covenants. The provision imposes statutory regulation in a field not traditionally subject to legislation. In seeking to alter the enforceability of restrictive covenants, the statute represents a considerable impairment of contractual obligations.
>
> Restrictive covenants permit property owners to collectively provide or obtain protections significantly contributing to the peace, safety, and well-being of themselves and their families. These purposes are consistent with values identified in our Indiana Constitution. Article 1, Section 1 expressly recognizes that government is instituted for the peace, safety, and well-being of the people. Article 1, Section 31 protects the right of citizens to assemble together in a peaceable manner to consult for their common good.
>
> Application of these considerations leads us to conclude that the statute falls outside of the necessary police power exception to the contract clause, Art. I, Section 24, of the Constitution of Indiana.

Id. at 784-85 (emphases in original).

Here, PL 166 does not address a broad problem general to society. It simply presents a desire by governmental entities to effectively hinder the rights of parties that have contracted with them in order to avoid holding up the government's ends of the bargains. Whereas the statute in *Clem* sought the beneficent goal of "promot[ing] the mainstreaming of developmentally disabled persons[,]" which was not even enough to pass constitutional muster, PL 166 seeks to do nothing more than permit Ball State and similarly situated universities to retain unearned moneys for services they did not fully provide. "[A] state must do more than mouth the vocabulary of the public weal in order to reach safe harbor; a vaguely worded or pretextual objective, or one that reasonably may be attained without substantially impairing the contract rights of private parties, will not serve to avoid the full impact of the Contracts Clause." *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996); *accord Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727, 733 (8th Cir. 2019).

It is also not reasonably necessary for the protection of the health, safety, and welfare of the general public. The sole purpose advanced by the State below is "to protect Indiana colleges and universities from widespread legal liability arising out of their efforts to combat and mitigate the spread of COVID-19." [Appellants' App. Vol. II p.128]. That purpose is no more justifiable than a state facing financial deficits enacting retroactive laws to vitiate liabilities in order to balance the books. It also fails to acknowledge the costs left shouldered by students, often paid with burdensome student loans, for services that Ball State did not provide.

Moreover, while PL 166 does not act to directly bar the individual claims of

Mellowitz and members of the Proposed Class, as overtly doing so would be more blatantly unconstitutional,[27] the State's expressed purpose for PL 166—to reduce the exposure to liability for colleges and universities for their breaches—demonstrates that the goal is to make individual claims infeasible. That is, the General Assembly seeks to effectuate the same result by retroactively erecting barriers and increasing costs to vindicate the rights of Mellowitz and members of the Proposed Class.

As in *Clem*, the rights at issue here merit comparison to other rights secured by the Indiana Constitution, chiefly the Open Courts Clause of Article 1, section 12.[28] The intended effect of PL 166 is to effectively close the doors of the courthouse. *See Upshaw v. Ga. Catalog Sales, Inc.*, 206 F.R.D. 694, 697 (M.D. Ga. 2002) ("In addition to promoting the efficiency and economy of litigation, the class-action device also provides a key to the courthouse for parties with legitimate claims whose access to justice may be slammed shut because the individual amounts of their claims make it economically infeasible to pursue them on an individual basis." (citing *Deposit Guar.*, 445 U.S. at 339)). That does not pass constitutional muster.

CONCLUSION

Because Section 13 of Public Law No. 166-2021 is a procedural law in conflict with Indiana Trial Rule 23, it must yield to Trial Rule 23 and is a nullity. Even if Section 13 of Public Law No. 166-2021 constituted a substantive law, as applied to

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[27] *See*, *e.g.*, *Ferretti v. Nova Se. Univ., Inc.*, 2022 WL 471213 (S.D. Fla. Feb. 16, 2022).

[28] "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. Art. 1, § 12.

Keller Mellowitz and the members of the Proposed Class, it is both unconstitutional takings without just compensation and unconstitutional impairment of contractual obligations. As such, *Defendants' Motion for Relief Under Trial Rule 23(D)(4)* should have been denied, the trial court's *Order on Hearing of February 10, 2022* should be reversed, and this matter should be remanded for further proceedings.

Respectfully submitted,

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WORD COUNT CERTIFICATE

In accordance with Ind. Appellate Rule 44(F), I verify that this brief contains no more than 14,000 words in accordance with Ind. Appellate Rule 44(E). I further verify that this brief contains 13,943 words as measured by Microsoft Word and by manual count of text not subject to Microsoft Word's analysis.

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CERTIFICATE OF SERVICE

I certify that on April 25, 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:

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