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IN THE
COURT OF APPEALS OF INDIANA

No. 22A-PL-337

KELLER J. MELLOWITZ,
Appellant-Plaintiff,

v.

BALL STATE UNIVERSITY and BOARD OF TRUSTEES OF BALL STATE UNIVERSITY,
Appellees-Defendants,

and

STATE OF INDIANA,
Appellee-Intervenor.

Interlocutory Appeal from the Marion Superior Court

No. 49D01-2005-PL-15026,

The Honorable Matthew C. Kincaid, Special Judge.

BRIEF OF APPELLEE-INTERVENOR STATE OF INDIANA

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INTRODUCTION

To protect governmental entities and post-secondary educational institutions from certain class-action suits related to the COVID-19 pandemic, the General Assembly passed Public Law 166-2021, §13, now codified as Indiana Code section 34-12-5-7. Public Law 166 prohibits class-action suits for breach of contract, implied contract, quasi-contract, or unjust enrichment claims for loss of damages resulting from COVID-19.

Keller Mellowitz sued Ball State University for breach of contract after the university discontinued in-person education during the spring of 2020 due to the COVID-19 pandemic. He sought to bring his claims on his own behalf and on behalf of a proposed class of similarly situated persons. Ball State moved the court to order Mellowitz to amend his complaint to remove the request for class certification. Mellowitz responded that Public Law 166 was a procedural statute in conflict with Trial Rule 23, and that Public Law 166 violated the Takings Clauses and Contracts Clauses of the state and federal constitutions. The trial court disagreed and granted the motion.

AGREEMENT WITH THE STATEMENTS

The State agrees with the statement of the issues and the statement of the case from the brief of appellant and appellees, and the statement of the facts from appellees' brief. *See* Ind. Appellate Rule 46(B)(1).

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's order directing Mellowitz to amend his complaint to exclude allegations related to a representative class, for three reasons:

First, Public Law 166 does not conflict with Trial Rule 23 because it is a substantive law that limits an individual's right to bring a class-action lawsuit—it does not affect the procedures for maintaining a class action. But even if Public Law 166 were procedural, it can be read harmoniously with Trial Rule 23. Public Law 166 does not conflict with any of the procedural requirements found in Trial Rule 23, which itself specifically allows a court to order a plaintiff to amend his complaint to exclude references to class actions. Further, the General Assembly did not violate the separation of powers when it enacted Public Law 166 because the judiciary does not have the exclusive constitutional authority to promulgate procedural rules.

Second, Public Law 166 is not an unconstitutional taking. Mellowitz does not have a property right to bring a class action, and even if such a right existed it could not vest before class certification, at the earliest.

Third, there was no unconstitutional impairment on Mellowitz's contractual obligations with Ball State. At most, Mellowitz contracted with Ball State for an education in exchange for tuition and fees. He did not contract for the ability to file a class-action lawsuit against the university. In any case, the General Assembly had a legitimate public interest in enacting Public Law 166, which was to protect its

entities from widespread legal liability arising out of their efforts to combat and mitigate the spread of COVID-19.

This Court should thus affirm the trial court's order.

ARGUMENT

The constitutionality and interpretation of statutes are questions of law that the Court reviews de novo. *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017); *State v. International Business Machines Corp.*, 964 N.E.2d 206, 209 (Ind. 2012). One challenging the constitutionality of a statute faces a heavy burden, for all statutes carry a strong "presumption of constitutionality until clearly overcome by a contrary showing," *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014) (citation omitted), and all doubts are resolved against Plaintiffs, *KS&E Sports v. Runnels*, 72 N.E.3d 892, 905–06 (Ind. 2017).

I.
Public Law 166 is a substantive law that does not conflict with Trial Rule 23, and it does not violate the separation of powers.

The trial court did not err in applying Public Law 166 because it is a substantive law that provides a limitation on an individual's ability to bring a class action under a very limited situation, and it does not address any of the manners in which class actions are maintained. Public Law 166 provides that "[a] claimant may not bring, and a court may not certify, a class action lawsuit against a covered entity [including a post-secondary educational institution] for loss or damages arising from COVID-19 in a contract, implied contract, quasi-contract, or unjust enrichment claim." I.C. §§ 34-12-5-7, 34-12-5-5. It applies to claims arising from

COVID-19 after February 29, 2020, but before April 1, 2022. I.C. § 34-12-5-2(a). "Arising from COVID-19" includes, in pertinent part, the implementation of policies in order to "prevent or minimize the spread of COVID-19." I.C. §§ 34-12-5-3, 34-6-2-10.4(c). The General Assembly passed Public Law 166 as a legislative policy for how to allocate the societal costs of COVID-19. In addition to protecting our postsecondary educational institutions, it also included protects for healthcare workers, I.C. §§ 25-1-20-3, 34-30-13.5-3, and protections for governmental employees, I.C. § 34-13-3-3(b).

But regardless of whether Public Law 166 is substantive or procedural, there is no conflict with Trial Rule 23, which sets out the procedural rules for how to maintain a class action. In addition, even if Public Law 166 were procedural, the General Assembly did not violate the separation of powers when it enacted Public Law 166 because the judiciary does not possess the exclusive constitutional authority to enact procedural rules.

A. Public Law 166 is a substantive law.

Public Law 166 is substantive change to Indiana's law because it limits the right to bring a class action; it does not regulate procedures for bringing and maintaining a class action. The judiciary "'cannot abrogate or modify substantive law.'" *Church v. State*, ___ N.E.3d ___, No. 22S-CR-201, slip op. at 8 (Ind. June 23, 2022) (quoting *State ex re. Zellers v. St. Joseph Cir. Ct.,* 247 Ind. 394, 401, 216 N.E.2d 548, 553 (1966)). That means that if there is a conflict between a substantive

statute and a procedural trial rule, the substantive statute supersedes the trial rule. *Id*.

Indiana courts have long held that "laws are substantive when they establish rights and responsibilities, and laws are procedural when they 'merely prescribe the manner in which such rights and responsibilities may be exercised and enforced.'" *Id*. at 9 (quoting *State ex rel. Blood v. Gibson Cir. Ct*., 239 Ind. 394, 400, 157 N.E.2d 475, 478 (1959)); *see also Morrison v. Vasquez*, 124 N.E.3d 1217, 1222 (Ind. 2019) (recognizing that substantive law "creates, defines and regulates right," and procedural law "prescribes the method of enforcing a right or obtaining redress for invasion of that right" (cleaned up)). The Supreme Court in *Church* established the standard for determining whether a statute is procedural or substantive: "If a statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominately furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive." *Church*, slip op. at 11 (cleaned up). In *Church*, applying that standard, the Court held that a statute limiting child depositions of child victims of sex offenses was "substantive because it predominately furthers public policy objectives." *Id*. at 12.

Although *Church* gives clarity to the standard, the Supreme Court has been applying that standard for years. For instance, the court has held a statute to be substantive when it conferred a right to change of judge, *Blood*, 239 Ind. at 400, 157 N.E.2d at 478, established venue for certain kinds of intra-municipal suits, *Hatcher*

v. Lake Superior Court, Room Three, 500 N.E.2d 737, 738–39 (Ind. 1986), and forbade the stay of a condemnation order pending appeal, *State ex rel. Indiana & Michigan Elec. Co. v. Sullivan Circuit Court*, 456 N.E.2d 1019, 1020–21 (Ind. 1983). On the other hand, the Court has held that a statute is procedural when it required a CHINS factfinding hearing to be held within 120 days, *Matter of M.S.*, 140 N.E.2d 269, 284 (Ind. 2020), and set out the procedures for determining venue, *Morrison*, 124 N.E.3d at 122.

Like the statute at issue in *Church*, Public Law 166 is a substantive law because it "predominately furthers public policy objectives." The purpose of Public Law 166 is to help shield governmental entities and postsecondary educational institutions from a massive class action lawsuit regarding their responses to a public health emergency. The prohibition on class actions did not foreclose an individual's ability to separately bring suit against Ball State altogether. But the prohibition on class action suits protects the university from a class action that would encompass seemingly any student at Ball State impacted by the March 2020 shutdown—unless they opted out of the class action—as opposed to a few individuals bringing a suit on their own accord. The statute protects these entities by prohibiting a class action under these circumstances. It is not a procedural statute dictating the "manner in which such rights and responsibilities may be exercised and enforced." *Church*, slip op. at 9 (citing *Blood*, 239 Ind. at 400, 157 N.E.2d at 478); *see also Morrison,* 124 N.E.3d at 1222.

The Supreme Court's decision in *Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157 (Ind. 1998), does not support that Public Law 166 is procedural (*contra* Appellant's Br. 34–36). Mellowitz highlights one specific sentence from *Budden*: "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 Trial Rule 23 are met." *Id*. at 1162. But that does not support that the right to bring a class action comes from Trial Rule 23. Indeed, *Budden* further explained that class actions derived from common law, that Indiana codified the right to bring a class action in 1852, and that it remained "on the books" for more than 100 years. *Id*. at 1162 n.8. Because the right to bring a class action is derivative from common law, the General Assembly maintains the ability to modify that right. *McIntosh v. Melroe Co., a Div. of Clark Equipment Co., Inc.*, 729 N.E.2d 972, 977 (Ind. 2000).

Further, the policy reason behind class actions—i.e., protecting judicial resources—does not render Public Law 166 a procedural statute (*contra* Appellant's Br. 40–42). Indeed, in *Church*, the Supreme Court looked at the policy reasons behind the child-deposition statute, not policy reasons behind depositions generally. *Church*, slip op. at 12. The policy reasons behind Public Law 166 that make it a substantive law, in addition to the fact that it does not place any restraints on the manner in which class actions are brought.

Public Law 166's categorical prohibition on class actions for certain claims is a substantive law and does not implicate the judiciary's procedural rule-making authority.

B. In any case, Public Law 166 can be applied harmoniously with Trial Rule 23 and the General Assembly did not violate the separation of powers.

Regardless of whether Public Law 166 is substantive or procedural, it does not conflict with Trial Rule 23 and thus the court can apply them harmoniously. In addition, the General Assembly did not violate the separation of powers because the passing of procedural rules is not constitutionally limited to the judiciary.

1. Public Law 166 does not conflict with Trial Rule 23.

The General Assembly provided the Supreme Court with the authority to promulgate procedural rules of court and, in doing so, expressly provided that generally when a procedural statute conflicts with a procedural rule the rule prevails. I.C. § 34-8-1-3; *Church*, slip op. 8 (citing *Blood*, 239 Ind. at 399, 157 N.E.2d at 477). A procedural statute and a procedural rule are "incompatible to the extent that both could not apply in any given situation." *Matter of M.S.*, 140 N.E.3d at 284 (cleaned up); *see also Key v. State*, 48 N.E.3d 333, 340 (Ind. Ct. App. 2015). But when dealing with a procedural statute and a procedural rule, courts prefer to harmonize the two. *Budden*, 698 N.E.2d at 1164. When there is no conflict, the procedural statute still applies. *Chasteen v. Smith*, 625 N.E.2d 501, 502 (Ind. Ct. App. 1993).

A procedural statute and a procedural rule can be reconciled when the two can be read in harmony. In *Key*, this Court was tasked with determining whether an expungement statute requiring a hearing on contested petitions conflicted with Trial Rule 12(C), which permitted judgment on the pleadings. 48 N.E.3d at 339–40.

The Court held that "the legislature's inclusion of Subsection 35-38-9-9(b) avoids the potential conflict with which the State is concerned" because it "permits a court to enter summary denial when the petition reveals the petitioner has not met the statutory requirement for expungement." *Id.* at 340. Thus, the Court recognized that both procedures "permit the court to enter judgment where the motion or pleading will fail as a matter of law." *Id.* The Court also noted that Indiana Code section 35-38-9-9(c) was more than just a procedural rule because it also granted a due process right to a hearing when the prosecutor objected. *Id.*; *see also Spencer v. State*, 520 N.E.2d 106, 110 (Ind. Ct. App. 1988) (holding that there was no conflict between Trial Rule 23 and a statute requiring employees to exhaust through a grievance process before filling suit because Trial Rule 23 also required the court to determine whether there were other avenues to adjudicate the issue).

Trial Rule 23 provides the mechanisms for bringing a class action. An individual cannot bring a class action unless: "(1) the class is so numerous that joiner of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Ind. Trial Rule 23(A). It provides rules for when a class action can be maintained, such as there being a risk of inconsistent judgments, opposing party has failed to act generally as to the class, and the questions of law pertaining to the members outweigh those affecting individual members. T.R. 23(B). The rule also provides that the court must determine whether

a class action can be maintained, when members of the class should be notified of the suit, that the judgment identify the members of the class, and when an action may be maintained on particular issues or divided into subclasses. T.R. 23(C). The rule also sets forth certain orders the court can make with respect to class actions. T.R. 23(D). Pertinent to this case, it permits the trial court to order the plaintiff to amend his complaint to "eliminate therefrom allegations as to representation of absent persons." T.R. 23(D)(4).

There is no conflict between Public Law 166 and Trial Rule 23 (*contra* Appellant's Br. 45–48). Public Law 166 does not change any of the procedures set forth in Trial Rule 23. It does not conflict with the way in which a court certifies a class action, the rules for maintaining an action, or how class members are to be notified. Instead, Public Law 166 just cuts out a very specific carve out for when a class action cannot be brought. Trial Rule 23 does not give a litigant the right to bring a class action. It simply provides the mechanism for doing so once that right has been established. There is no conflict between Public Law 166 and Trial Rule 23.

Public Law 166 and Trial Rule 23 can be applied harmoniously. Indeed, the provision of Trial Rule 23(D)(4)), which allows a court to order that a complaint be amended to exclude any reference to class actions, can be used when a litigant—such as Mellowitz—attempts to file a class action lawsuit against a governmental entity for breach of contract related to COVID-19. This is much different from the other cases in which the Court has held there to be a conflict because the statute

and rule could not be applied simultaneously. *See Matter of M.S.*, 140 N.E.3d at 284 (holding that the statute and rule could not be applied together because the statute required dismissal for failure to comply with the timeline and the rule allowed for an extension upon a showing of good cause).

To hold that Public Law 166 and Trial Rule 23 conflict would undoubtedly affect numerous other statutes. *See* I.C. § 34-30-33-8 (prohibiting a class action based on tort damages for harm resulting from design, manufacture, labeling, sale, distribution, or donation of a COVID-19 protective produce); I.C. § 34-30-32-10 (prohibiting a class action based on tort for damages resulting from COVID-19); I.C. § 5-8.1-9-7 (providing an exhaustion requirement before bringing a class action regarding to taxes); I.C. § 9-33-3-3 (providing an exhaustion requirement before bringing a class action regarding refund of fees against the BMV).

Mellowitz has identified no certain conflict between Public Law 166 and Trial Rule 23 and the two can—and should—be read harmoniously.

2. The General Assembly did not violate the separation of powers when it enacted Public Law 166.

The Indiana Constitution "clearly and explicitly command[s] that each branch of state government respect the constitutional boundaries of the coordinate branches." *Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013); *see* Ind. Const. art. 3, § 1. The purpose of the separation of powers "is 'to rid separate departments of government from any influence or control by the other department.'" *Berry*, 990 N.E.2d at 415 (quoting *A.B. v. State*, 949 N.E.2d 1204, 1212 (Ind. 2011)). It is the function of the General Assembly to make laws, and it is the function of the

judiciary to "interpret and apply the law." *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005).

The General Assembly did not frustrate the separation of powers because the Indiana Constitution does not give the judiciary the exclusive authority to enact procedural rules. The Supreme Court noted in *Blood* that "the judicial and legislative history of the State leads us to the conclusion that the power to make rules of procedures in Indiana is neither exclusively legislative nor judicial." 239 Ind. at 399, 157 N.E.2d at 477; *see also Church*, slip op. at 13. It was a legislative enactment that gave the Supreme Court "sole authority to promulgate procedural rules of court." *Blood*, 239 Ind. at 400–01, 157 N.E.2d at 478.

Because the Supreme Court does not have the exclusive constitutional authority to enact procedural rules, even if Public Law 166 were procedural and not substantive, the General Assembly did not frustrate the separation of powers in enacting Public Law 166.

II.
Public Law 166 is not an unconstitutional taking in violation of either the Indiana or United States Constitutions.

Public Law 166 is not an unconstitutional taking because Mellowitz does not have a compensable right to bring a class action on behalf of other people. Article 1, section 21 of the Indiana Constitution provides, in pertinent part, that "No person's property shall be taken by law, without just compensation; nor except in the case of the State, without such compensation first assessed and tendered." In addition, the Fifth Amendment to the United States constitution provides that "nor shall private

property be taken for public use, without just compensation." Both Indiana's takings clause and the federal takings clause are "textually indistinguishable" and are analyzed identically. *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 210 (Ind. 2009); *see also Himsel v. Himsel*, 122 N.E.3d 935, 946 (Ind. Ct. App. 2019), *trans. denied, cert. denied*.

There are two types of takings: physical takings and regulatory takings. *See Kimco,* 902 N.E.2d at 210–11; *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 575–78 (Ind. 2007). A regulatory taking, which is at issue here, is defined as governmental action that "deprives an owner of all or substantially all economic or productive use of his or her property." *Kimco*, 902 N.E.2d at 211 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–40 (2005)). The Court looks at the "economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action." *Id.* (citing *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978)).

Public Law 166 does not violate the Takings Clauses for two reasons. First, Mellowitz has no vested property interest in maintaining a class action. Second, Public Law 166 does not deprive him of his own cause of action to bring a suit against Ball State. There has therefore been no violation of either Takings Clause.

A. Mellowitz has no vested interest in maintaining a class action lawsuit.

Mellowitz's takings claim fails because he does not have a legally cognizable interest in bringing a class-action lawsuit. For there to be a taking, there must first

be a property interest involved. *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003) ("Only 'property' is protected from under either [federal or state taking] clause."). But there is no property right in bringing a class action to vindicate the rights of others.

The Indiana Supreme Court has recognized that individuals do not have a right to bring a lawsuit on behalf of others or the public. Indeed, in *Dible v. City of Lafayette*, the Court recognized that "[t]he ability to bring a public lawsuit as a class action neither confers new rights on litigants nor affords them new remedies." 713 N.E.2d 269, 275 (Ind. 1999) (citing *Huber v. Franklin Cnty. Cmty. Sch. Corp. Bd. of Trustees*, 507 N.E.2d 233, 236 (Ind. 1987)). Public lawsuits are akin to regular class actions because they both involve an individual or individuals bringing a suit on behalf of other individuals not named in the lawsuit. *See Williamson v. Razer*, 186 N.E.3d 641, 645 (Ind. Ct. App. 2022) (recognizing that the "Public Lawsuit Statute does not apply when a plaintiff's lawsuit seeks remedies regarding their personal property or property rights" (cleaned up)); *Huber*, 507 N.E.2d at 236 (recognizing that the goal of the Public Lawsuit Statute is "to require those attacking governmental decisions to bring their suits as class actions and to put a stop to serial litigation"). It follows then that if an individual does not have a right to bring a public lawsuit class action on behalf of the public, he also does not have a right to bring a class action asserting the individual rights of others.

In addition, the Supreme Court's ruling in *Cheatham* that litigants do not possess a vested right in an award of punitive damages is also instructive. 789

N.E.2d at 473–74. The Court recognized that the right to punitive damages was originally a "creature of common law" and that "no person has a vested interest or property right in any rule of common law." *Id.* at 471. Eventually, Indiana codified the right to punitive damages, but with certain constraints. *Id.* at 472. In holding that a litigant did not have a property right to punitive damages, the Court held that "any interest the plaintiff has in a punitive damages award is a creature of state law. The plaintiff has no property to be taken except to the extent state law creates a property right." *Id.* at 473. In addition, the Court noted that, "[m]any legal doctrines serve to reduce the potential recovery by a civil plaintiff. The lawyer and the client get to play the hand the legislature deals them, no more and no less." *Id.* at 475; *cf. KS&E Sports v. Runnels*, 72 N.E.3d 892, 906 (Ind. 2017) (recognizing that "[t]he legislature has wide latitude in defining the existence and scope of a cause of action and in prescribing the available remedy"); *Himsel v. Himsel*, 122 N.E.3d 935, 946 (Ind. Ct. App. 2019) (holding that there was no violation of the Open Courts Clause where "the legislature has exercise its broad discretion and modified the substantive law of nuisance by eliminating a nuisance cause of action"), *reh'g denied, trans. denied, cert. denied.*

Like in *Cheatham*, Mellowitz has no property interest in bringing a class action asserting the rights of others. Just as in an award of punitive damages, the ability to bring a class action is rooted in common law. *Budden*, 698 N.E.2d at 1162 n.8. The General Assembly can define a litigant's interest and ability to bring a class action as it sees fit. *Cheatham,* 789 N.E.2d at 473 (recognizing that "[t]he

Indiana legislature has chosen to define the plaintiff's interest in a punitive damages award as only twenty-five percent of any award"). Here, the General Assembly chose to limit an individuals' ability to file a class action in a specific cause of action. Mellowitz has no property right to bring that class action.

The application of Public Law 166 does not deprive Mellowitz of his individual cause of action. He is still able to bring a suit on his own behalf—the only thing he loses is his ability to bring the suit also on behalf of other students. He cites to no case law supporting that he has a property right in bringing a cause of action on behalf of others. And in fact, as the Supreme Court in *Dible* supports, he does not. *See Dible*, 713 N.E.2d at 275.

Mellowitz cites to no persuasive authorities for his argument that he has a property interest in bringing a class action. He relies on *Cheatham,* along with a long line of cases, which recognized that a litigant has a property interest in an accrued cause of action (Appellant's Br. 49–50). But a class action is not the same as one's own accrued cause of action. Indeed, a person can maintain his or her right to bring a cause of action absent a class action suit—just as he or she can maintain the right to bring a cause of action absent the ability to collect a full sum of punitive damages. Just as the Court held that the right to punitive damages is not a property right for purposes of the Takings Clauses, *Cheatham*, 789 N.E.2d at 474–75, Mellowitz does not have a legally cognizable interest in bringing a class action.

B. Even if Mellowitz has an interest in bringing a class action, there was not a taking because his interest has not been vested.

Further, even assuming that the ability to bring a class action could be a property right, there has been no taking because his right is not vested (*contra* Br. 48–51). When passing new legislation, the General Assembly "shall not impair invested rights." *Bailey v. Menzie*, 542 N.E.2d 1015, 1017 (Ind. Ct. App. 1989) (cleaned up). A vested right is one that "must be absolute, complete and unconditional, independent of a contingency." *Id.* at 1019 (cleaned up). A "mere expectation of future benefit or contingent interest in the property … does not constitute a vested right." *Id*. (cleaned up).

Here, Mellowitz did not have a vested right in bringing a class action to vindicate the rights of others because the class had not yet been certified. It is not enough that Mellowitz had filed his complaint (*contra* Appellant's Br. 48–51). Indeed, whether a party can maintain a class action is at the trial court's discretion. *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 682 (Ind. 2005). At the time that the court ordered Mellowitz to amend his complaint and remove reference to representation of absent parties, Mellowitz had not yet completed any of the steps necessary under Trial Rule 23 to bring a class action. Mellowitz had not asked the court to certify the class, and the court had not yet determined whether Mellowitz could maintain the class action. *See* T.R. 23(C)(1). In addition, there had been no notice sent to the prospective members informing them about the lawsuit. *See* T.R. 23(C)(2). The ability for Mellowitz to bring a class action in this case was not "absolute" or "complete." *Bailey*, 542 N.E.2d at 1019. And the "mere expectation"

that he would be able to maintain a class action is not enough. *Id*. So even if Mellowitz had a right in bringing a class action to vindicate the rights of others, his right would not have yet been vested, which means that Public Law 166 would not effect a taking.

III.
Public Law 166 is not an unconstitutional law impairing contractual obligations.

Nor does Public Law 166 violate the Contracts Clauses of the state and federal constitutions. Article I, section 24 of the Indiana Constitution provides that "No … law impairing the obligation of contracts, shall ever be passed." The federal counterpart, *see Clem v. Christole, Inc*., 582 N.E.2d 780, 783 (Ind. 1991); *see also Indiana Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc*., 643 N.E.2d 331, 339 (Ind. 1994), provides that "No State shall … pass any … Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10. The Contracts Clause, however, is not "the Draconian provision that its words might seem to imply." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978). Instead, "'literalism in the construction of the contracts clause … would make it destructive of the public interest by depriving the State of its prerogative of self-protection.'" *Id*. at 240 (quoting *W.B. Worthern Co. v. Thomas*, 292 U.S. 426, 433 (1934)). As this Court has recognized, "the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effect." *Mainstreet Prop. Grp., LLC v. Pontones*, 97 N.E.3d 238, 244 (Ind. Ct. App. 2018)

(quoting *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977)), *trans. denied*.

To determine whether a statute impairs the Contracts Clause, the Court first looks toward "whether, and to what extent, the state law operated as a substantial impairment of a contractual relationship." *Id.*; *see also Allied Structural Steel Co.*, 438 U.S. at 245. The Court considers "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). When there is "minimal alteration of contractual obligations," the inquiry ends there. *Allied Structural Steel Co.*, 438 U.S. at 245; *see also Mainstreet Prop. Grp.*, 97 N.E.3d at 244.

If there was a substantial impairment, the second question is "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance a 'significant and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822; *Allied Structural Steel Co.*, 438 U.S. at 245 (recognizing that if there is substantial impairment, "a careful examination of the nature and purpose of the state legislation" will be required).

Public Law 166 did not substantially impair Mellowitz's contract with Ball State because the ability to bring a class action lawsuit was not part of that contract. Moreover, the General Assembly had a legitimate purpose for passing Public Law 166: to protect governmental entities and postsecondary educational institutions from class action lawsuits related to COVID-19. The law thus does not violate the Contracts Clauses of the state and federal constitutions.

A. Public Law 166 did not substantially impair Mellowitz's contract.

Mellowitz cannot get past the first hurdle of showing that Public Law 166 substantially impaired his contract with Ball State because he cannot establish that the contract gave him an expectation that he could maintain a class action for breach of the contract. In *Mainstreet Property Group*, this Court rejected a claim that a moratorium on state licensure violated the Contracts Clause where the contract was for the buying and selling of property. Mainstreet's business was to acquire property for the development of traditional care facilities, and while Mainstreet was in the middle of several projects, the Indiana State Department of Health placed a moratorium on the licensure of care facilities. *Id*. at 241–44. Mainstreet submitted plans to the Department, but the Department did not act on them because they were submitted after the deadline set forth in the moratorium. *Id*. at 243. As a result, Mainstreet canceled its four of the existing purchase agreements and did not execute one on the remaining five projects. *Id*. Mainstreet filed a complaint for declaratory and injunctive relief. In addressing Mainstreet's claim that the moratorium violated the contracts clause, this Court held that the contact was not substantially impaired because the moratorium did not prevent Mainstreet from purchasing or selling land; there was no obligation in the contract that landowners grant Mainstreet a license to operate a healthcare facility—that was reserved for the Department. *Id.* at 244. Because the Court held that the contract was not substantially impaired, it did not go onto the second question. *Id*.

Here, the trial court's application of Public Law 166 did not substantially impair Mellowitz's contract with Ball State. When Mellowitz enrolled in classes at Ball State in spring 2020 and paid tuition and other fees in exchange for an education (App. 24), it was not an expectation of the contract that Mellowitz also be able to file a class action against Ball State should they fail to perform on the contract. Public Law 166 did not substantially burden the "essential obligation" of the contract for Mellowitz to pay tuition and fees in exchange for Ball State to provide him an education. *See Mainstreet Prop. Grp., LLC*, 997 N.E.3d at 244. The contract between Ball State and Mellowitz for tuition and fees in exchange for an education did not provide Mellowitz with a right to file a class action against Ball State should Ball State not comply with the contract. *See D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150, 1156 (Ind. Ct. App. 1996) (holding that there was no substantial impairment of the contract because "D.A.X. never had a [contractual] right to pay premiums based solely on Indiana's rates").

Further, 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. *See Sveen*, 138 S. Ct. at 1822 (recognizing that one of the factors for whether a law substantially impairs a contract is whether it "interferes with a party's reasonable expectations"). Therefore, at the time that Mellowitz entered into the contract with Ball State, he had no reasonable

expectation of being entitled to file a class action lawsuit against Ball State. Nor does he ever state that he did.

The Indiana law applicable at the time Mellowitz entered into the contact does not became part of the contract in the sense that Mellowitz implies (*contra* Br. 55). The cases Mellowitz relies on do not stand for that proposition. Mellowitz cites *Alexander v. Linkmeyer Development, LLC*, which states "unless 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." 119 N.E.3d 603, 614 (Ind. Ct. App. 2019). Yet that means only that when a contract is made it is compatible with the law applicable at that time and that when a court interprets a contract, the court can do so with the applicable law in mind. But it does not mean that every statute and trial rule in place at the time—especially when they have nothing to do with the essential function of the contract—becomes part of the contract. To hold that would potentially impair a contract anytime a law is changed.

Here, the contract between Ball State and Mellowitz was for Mellowitz to pay fees and tuition in exchange for an education. Public Law 166 did not substantially impair Mellowitz's contract with Ball State. In fact, Mellowitz can still proceed in his lawsuit for breach of contract against Ball State. He is just not entitled to do so on behalf of others.

B. The General Assembly had a legitimate purpose for passing Public Law 166.

Public Law 166 does not impair any right of Mellowitz under his contract with Ball State, but he is also not entitled to relief because the law advances the

State's "significant and legitimate public purpose." *Sveen*, 138 S.Ct. at 1822 (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)). A legitimate purpose may include "remedying of a broad and general social or economic problem." *Energy Reserves Grp., Inc.*, 459 U.S. at 412. After a legitimate public purpose is established "the next inquiry is whether the adjustment of 'the rights and responsibilities of contacting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id*. (quoting *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)). In reviewing the statutes, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co.*, 431 U.S. at 22–23.

The General Assembly had a significant and legitimate purpose to protect certain entities—including Indiana's colleges and universities—from widespread legal liability and the burdens of defending class actions arising out of their efforts to protect students and staff from the spread of COVID-19. The fact that the General Assembly passed Public Law 166 in response to a public-health emergency is further support that it had a specific and legitimate purpose. The Supreme Court has acknowledged that legislation may satisfy the legitimate-purpose test even in the absence of an emergency or temporary situation, *Energy Resources Group, Inc.*, 459 U.S. at 412, and in this case the legislation was prompted by an emergency and applies only to temporary situations. *See* I.C. § 34-12-5-2(a) (limiting the application

"to a claim arising from COVID-19 during a period of a state disaster emergency," between February 29, 2020, and before April 1, 2022).

There is nothing unreasonable about the State passing a law prohibiting class actions in this context. Indeed, Mellowitz still had the ability to seek a remedy from Ball State for his own breach-of-contract claim—that right remains unaffected. Because Mellowitz has at all times retained his own right to sue, the General Assembly's bar on class actions does not impair any right or obligation under his contract theory and his claim necessarily fails.

* * *

Public Law 166 is a substantive statute that the General Assembly passed to restrict class action suits in a limited set of circumstance. It does not provide any procedural mechanisms for how to bring or maintain that class action. It thus does not conflict with Trial Rule 23. Nor does the application of Public Law 166 to Mellowitz's case violate the state and federal Takings Clauses because Mellowitz does not have a vested property interest in bringing a class action and his right to bring an individual cause of action is not affected. Public Law 166 also does not violate the federal and state Contracts Clauses because his agreement with Ball State was for an education, not the right to bring a class action.

CONCLUSION

This Court should affirm the trial court's order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief of appellee-intervenor contains no more than 7,000 words, not including those portions excluded by Indiana Appellate Rule 44(C).

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CERTIFICATE OF SERVICE

I certify that on June 24, 2022, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on June 24, 2022, the foregoing was served upon the following via IEFS:

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