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SUPREME COURT OF FLORIDA

CASE NO. SC23-126

ANTHONY ROJAS,

Petitioner,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Respondent.
_____/

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association ("FDLA") in support of the Respondent University of Florida Board of Trustees.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of civil defense attorneys formed in 1967, and it has over 1,500 members. Its goal is to "support and work for the improvement of the adversary system of jurisprudence in our courts." To this end, the FDLA maintains an active amicus curiae committee through which members donate their time and skills to submit briefs in cases pending in state and federal appellate courts. The FDLA has actively participated in amicus briefing in numerous cases which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice statewide, many of which have impacted tort, litigation, and insurance issues.

This case carries statewide importance as it addresses whether sovereign immunity applies to bar a student's breach of contract claims against a state university based on the university's alleged failure to provide student access to on-campus services and facilities during the Covid-19 pandemic. The FDLA is uniquely suited to address this issue as many of its

members defend public entities, including educational institutions, in cases in which sovereign immunity is at issue. Its members have expended significant resources to address this legal issue in courts throughout the state. This Court's decision will have widespread impact accordingly.

SUMMARY OF ARGUMENT

Sovereign immunity has been in existence since the reign of King Edward I. Its principles are firmly entrenched in English common law and were adopted by Florida when it was still a territory. Our Constitution only allows waiver of liability and suit in limited circumstances—by the Legislature enacting clear and unambiguous general law allowing suit against the State. This Court's precedent of Pan-Am was not true to that constitutional text.

Despite that, the Court only allows waiver where there is an express, written contract. The Petitioner has not—and cannot—meet this burden. The hodge podge of documents put forth by the Petitioner does not meet even the most basic of contract principles. The First District correctly concluded that the subject documents do not "obligat[e] the University to provide specific, on-campus services to any student during any specific time." Univ. of Fla. Bd. of Trs. v. Rojas, 351 So. 3d 1167, 1171 (Fla. 1st DCA 2022). As a result, this Court should answer the certified question in the affirmative.

ARGUMENT

I. THE FOUNDATIONAL PRINCIPLES OF SOVEREIGN IMMUNITY NECESSITATE A STRICT CONSTRUCTION OF THE EXPRESS, WRITTEN WAIVER REQUIREMENT.

"The doctrine of sovereign immunity, which provides that a sovereign cannot be sued without its own permission, has been a fundamental tenet of Anglo-American jurisprudence for centuries." Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005).

The doctrine was well-entrenched in the common law of England. See William Blackstone, 1 Commentaries on the Laws of England at 235-237 (1st ed. 1765); see id. at 246 ("Besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute perfection. The king can do no wrong."). Since at least the reign of King Edward I (1272 -1307), the Crown has not been subject to suit unless it expressly consented. See generally United States v. Lee, 106 U.S. 196, 205 (1882); Ludwik Ehrlich, Proceedings Against the Cros (1216-1377), Oxford Studies in Social and Legal History, Vol 6, pt. 12 (Paul Vinogradoff ed., 1921).

These broad principles were ever present in the founding of our great country. In Federalist Papers No. 81, Alexander Hamilton wrote,

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now

> enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

Alexander Hamilton, Federalist Papers No. 81. See also James Madison, Federalist Papers No. 39 (explaining states retain "a residuary and inviolable sovereignty").

After the Revolutionary War ended, many states adopted the common law of England as their own. See, e.g., Lathrop v. Deal, 801 S.E.2d 867, 871 n.9 (Ga. 2017); Porter v. State, 1 Mart. & Y. 226, 227 (Tenn. 1827). Indeed, the English common law—including the doctrine of sovereign immunity—was adopted by the Territory of Florida in 1822. Fla. Terr. Acts 1822, p. 50; see also Fla. Terr. Acts 1823, p. 111; § 2.01, Fla. Stat. (1829).

Our 1868 Constitution enshrined the doctrine and provided a limited mechanism for waiving immunity. Art. IV, § 19, Fla. Const. (1868) ("Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating."); see also Art. III, § 22, Fla. Const. (1885). This exact provision is still in our Constitution. Art. X, § 13, Fla. Const. (1968). Its plain text allows waiver "by general law," which is law that "operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible

classification." Dep't of Bus. Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1157 (Fla. 1989).

In 1888, this Court first addressed the doctrine of sovereign immunity. In McWhorter v. Pensacola & A. R. Co., 5 So. 129 (Fla. 1888), the Court explained:

> [T]he rule which forbids a suit against officers because in effect a suit against the State applies only where the interest of the State is through some contract, or some property right of hers, or where her interest is in a suit brought or threatened by her officers, in her own name, to enforce some alleged claim of hers. And it is important to observe the character of the interest. It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement as affecting the public at large or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity -- of value in a material sense. She has an interest in the success of the policy of her laws, and in the just administration and execution of those laws, yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, when it is not an otherwise and more direct interest inhering in some separate right or claim of right of her own.

Id. at 133.

During this Court's early decisions, contracts of the State were not a recognized exception to the doctrine. Bloxham v. Fla. C. & P. R. Co., 17 So. 902, 917 (Fla. 1895); Hampton v. State Bd. of Educ., 105 So. 323, 326 (Fla. 1925); S. Drainage Dist. v. State, 112 So. 561, 563 (Fla. 1927); State ex rel. Davis v. Love, 126 So. 374, 375 (Fla. 1930).

Over the years, this Court has articulated many reasons for the doctrine: (1) the preservation of constitutional separation of powers principles; (2) the "protection of the public treasury;" and (3) the "maintenance of the orderly administration of government." Am. Home Assurance Co., 908 So. 2d at 471; see also State Rd. Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) ("If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.").

Nevertheless, in 1984, this Court recognized that a party can sue the State on a contract—despite the plain language of the Constitution and no general law enacted by the Legislature allowing suit against the State.[1] In Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4 (Fla. 1984), this Court explained that the Legislature, while it explicitly waived sovereign immunity

[1] But see Israel v. DeSantis, 269 So. 3d 491, 495 (Fla. 2019) ("Where the language of the Constitution is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written, as the constitutional language must be allowed to speak for itself.") (cleaned up); Advis. Op. to the Gov. Re: Implementation Of Amendment 4, The Voting Rest. Amendment, 288 So. 3d 1070, 1078 (Fla. 2020); Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

in tort, it has not done so in contract. Id. at 5. The Court turned to laws which allowed the State to enter into a contract and noted that a contract that is not mutually enforceable is illusory. Id. It reasoned that a party must be able to sue the State to enforce those contracts. Id. The Court limited the waiver to only express, written contracts. Id. at 6.

Presently, only express, written contracts fall within this exception. "[A]ny waiver of must be clear and unequivocal." Am. Home Assurance Co., 908 So. 2d at 471 (Fla. 2005). "[W]aiver will not be found as a product of inference or implication." Hightower v. Fla. Dep't of Highway Safety and Motor Vehicles, 306 So. 3d 1193, 1196 (Fla. 1st DCA 2020). Allegations of waivers are strictly construed to ensure compliance. Manatee Cnty. v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla. 1978). Above all, sovereign immunity must remain "the rule, rather than the exception." Pan-Am Tobacco Corp., 471 So. 2d at 5.

A. THERE IS NO EXPRESS, WRITTEN CONTRACT, AND THEREFORE, ANY CLAIM OF WAIVER OF SOVEREIGN IMMUNITY FAILS.

UF summarizes the variety of materials Petitioner claims constitute an express, written contract. (AB at 14-18). These materials include informational statements from webpages, statutory and regulatory text, statements of charges, and registration agreements. Critically, none of these

documents oblige UF to provide or ensure access to any specific on-campus services or facilities.

While Petitioner acknowledges the express, written contract requirement, his argument disregards basic contractual principles. Specifically, an express contract is "[a] contract whose terms the parties have explicitly set out." Black's Law Dictionary (11th Ed. 2019). It is "based on the parties' words," as distinct from an implied in fact contract, which is "based on the parties' conduct." Baron v. Osman, 39 So. 3d 449, 451 (Fla. 5th DCA 2010).

The Petitioner attempts to piece together a contract the way one pieces together their plate at a buffet—with random items. This attempt falls short of the explicit requirement mandated by this Court's precedent.

Indeed, formation of an express contract "depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing." Oliver Wendall Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 464 (1897). "[F]or the parties to have a contract, there must be reciprocal assent to certain and definite propositions." Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc., 125 So. 2d 903, 905 (Fla. 3d DCA 1961). In other words, there must be a meeting of the

minds as to all essential terms. Greater N.Y. Corp. v. Cenvill Miami Beach Corp., 620 So. 2d 1068, 1070 (Fla. 3d DCA 1993).

For example, in Acosta v. Dist. Bd. of Trustees of Miami-Dade Comm. Coll., 905 So. 2d 226, 227-28 (Fla. 3d DCA 2005), the Third District held that a school acceptance letter outlining various program costs did not establish a contract on which a breach of contract claim could be based when the college subsequently increased such costs. The Court noted that for an express contract to this effect to exist, "there must be reciprocal assent to certain and definite propositions." Id. (internal quotations and citation omitted).

The writing at issue in Acosta was far more explicit and detailed than the hodge podge of materials in this case and in other cases across the state. There is no meeting of the minds to form an express contract for the specific modes of instruction and the use of and access to specific facilities as Petitioner claims. The registration agreement, estimate of tuition and fees, and webpages at issue do not suggest—much less expressly state—that students were entitled to these particular services so as to compel a refund based on reasonable measures implemented to protect them in a global pandemic. See Cnty. of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049,

1051 (Fla. 1997) (holding sovereign immunity barred recovery for work not addressed in a written contract).

Stated another way, Petitioner fails to establish "two sets of external signs" showing the parties "said the same thing." Holmes, supra at 464. This is why University of Kentucky v. Regard, 670 S.W.3d 903 (Ky. 2023) is inapplicable here. The Regard court, in finding Rojas unpersuasive, acknowledged that "the Rojas opinion does not apply the same rules of law as we do in Kentucky" and reasoned "an enforceable written contract of some sort" more closely aligns with Kentucky law. Regard, 670 S.W.3d at 920. The loose, "some sort" of written contract requirement that suffices in Kentucky has been repeatedly rejected in Florida. See, e.g., Acosta, 905 So. 2d at 227-28.

Furthermore, the relationship between a public university and its students is, at most, an implied contract. See generally Rabon v. Inn of Lake City, 693 So. 2d 1126, 1131 (Fla. 1st DCA 1997). It is certainly not in the nature of an express contractual relationship. See Williams v. Fla. State Univ., No. 4:11-cv-350-MW/CAS, 2014 WL 340562, at *5-*6 (N.D. Fla. Jan. 29, 2014) (applying sovereign immunity doctrine, holding a student's relationship with a university is an implied, not an express, written contract), aff'd sub nom, Williams v. Becker, 608 Fed. App'x 905 (11th Cir. 2015);

Pinkston v. Univ. of S. Fla. Bd. of Trs., No. 8:18-cv-2651-T-33SPF, 2019 WL 1383467, at **3-4 (M.D. Fla. Mar. 27, 2019) (citing Williams and concluding that no express contractual relationship exists between a Florida university and its students); see also Brevard Cnty. v. Morehead, 181 So. 3d 1229, 1232 (Fla. 5th DCA 2015) (holding that "[w]hen an alleged contract is merely implied, . . . sovereign immunity protections remain in force") (internal citations and quotation omitted).

The documents in this case, at most, provide some context for Petitioner's apparent expectations or hopes surrounding the specific way he would receive services from UF. But expectations or hopes are insufficient to create an enforceable contractual right—let alone one that is express and unequivocal so as to overcome the foundational principles of sovereign immunity. See, e.g., Shaffer v. George Washington Univ., 2021 WL 1124607, at **2-3 (D.D.C. Mar. 21, 2021) (rejecting breach of contract claim in a similar action on motion to dismiss and noting "plaintiffs do not identify any language or other evidence, in these university documents or elsewhere, indicating GW's intent to be bound to provide in-person instruction"); Charity v. Bd. of Regents of Div. of Univ. of Fla. Dep't of Educ., 698 So. 2d 907, 907-08 (Fla. 1st DCA 1997) (applying sovereign immunity to bar breach of

contract claim by student who was prevented from pursuing doctoral degree).

B. THIS COURT SHOULD REJECT THE SOCIETAL CONCERNS OF THE PETITIONER AND HIS AMICI.

The societal concerns raised by Petitioner and the National Association of Consumer Advocates (NACA) pertaining to the rising costs of education and perceived disparate impacts are outside the scope of the judicial task at hand. They have nothing to do with whether an express, written contract exists. Allowing an exception to sovereign immunity on a hodge podge of allegations and policies presented by Petitioner would constitute an unprecedented expansion of waiver—violating the foundational principles of sovereign immunity, disregarding prior precedent, and ignoring the plain text of our Constitution. This Court should reject the constitutional redesign proposed by Petitioner and answer the certified question in the affirmative.

CONCLUSION

This Court should answer the certified question in the affirmative and affirm the First District's well-reasoned decision. This case simply does not rise to the level of an express, written contract to meet the hurdle of overcoming sovereign immunity.

WHEREFORE, the FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully request this Court to affirm the First District's decision and answer the certified question in the affirmative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served via the eportal to: **Jospeh W. Jacquot, Esq,** and **Lauren V. Purdy, Esq.**, Gunster Yoakley & Stewart, P.A., 1 Independent Drive, Suite 2300, Jacksonville, FL 32202; (jjacquot@gunster.com; lpurdy@gunster.com; wpruim@gunster.com; awinsor@gunster.com), **Jounice Nealy-Brown, Esq.**, Gunster Yoakley & Stewart, P.A., 401 E. Jackson Street, Suite 1500, Tampa, FL 33602; (jnealy-brown@gunster.com; tkennedy@gunster.com); **Douglas F. Eaton, Esq.,** Eaton & Wolk, P.L., 2665 S. Bayshore Drive, Suite 609, Miami, FL 33133, (deaton@eatonwolk.com; cgarcia@eatonwolk.com); **Robert J. Sniffen, Esq., Jeffrey D. Slanker, Esq.** and **Matthew J. Carson, Esq.,** Sniffen & Spellman, P.A., 123 North Monroe Street, Tallahassee, Florida 32301; (rsniffen@sniffenlaw.com; jslanker@sniffenlaw.com); and **Adm Moskowitz, Esq, Barbara C. Lweis Esq., Howard M. Bushman, Esq.,** and**, Adam A. Schwartzbaum, Esq.,** The Moskowitz Law Firm, PLLC, 2 Alhambra Plaza, Suite 601, Coral Gables, FL 33134, (howard@moskowitz-law.com; adam@moskowitz-law.com; adams@moskowitz-law.com; barbara@moskowitz-law.com); **Janet R. Varnell, Esq.,** Varnell & Warwick, P.A., 400 N, Ashley Drive, Suite 1900, Tampa, FL 33602, (jvarnell@vandwlaw.com); on this 12th day of February, 2024.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Amicus Curiae Brief complies with the requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B), as it has been prepared in 14-point Arial font and contains less than 5,000 words.

/s/ Kansas R. Gooden
KANSAS R. GOODEN