Filing # 185286685 E-Filed 11/01/2023 08:00:33 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC23-126

ANTHONY ROJAS,

Petitioner,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

EATON & WOLK, PL
BY: DOUGLAS F. EATON
FBN: 0129577
Attorneys for Petitioner
2665 So. Bayshore Drive, Suite 609
Miami, Florida 33133
Telephone: (305) 249-1640
Telecopier: (786) 350-3079
Email: deaton@eatonwolk.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Authorities

I. STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION.

This is a class action lawsuit brought by Plaintiff Anthony Rojas ("Plaintiff"), who was a graduate student at the University of Florida, against the University of Florida Board of Trustees ("Defendant" or "UF"). (App.6)[1] Plaintiff brought a breach of contract claim (and others not at issue in this appeal) seeking a refund of fees for services that UF did not make available to students due to the campus closures associated with the COVID-19 pandemic. UF moved to dismiss the claim as barred by sovereign immunity. The trial court denied the motion, and UF appealed to the First District. The First District reversed, holding that Plaintiff had failed to establish the existence of an express contract that would provide a refund to the class members, and therefore, his claim was barred by sovereign immunity. *Univ. of Florida Bd. of Trustees v. Rojas*, 351 So. 3d 1167 (Fla. 1st DCA 2022).

The First District certified a question of great public importance to this Court:

[1] References to the Appendix appear as "(App.[page number])."

> WHETHER SOVEREIGN IMMUNITY BARS A BREACH OF CONTRACT CLAIM AGAINST A STATE UNIVERSITY BASED ON THE UNIVERSITY'S FAILURE TO PROVIDE ITS STUDENTS WITH ACCESS TO ON-CAMPUS SERVICES AND FACILITIES?

Rojas at 1169.

Prior to the *Rojas* decision, the Second District, in *Univ. of S. Florida Bd. of Trustees v. Moore*, 347 So. 3d 545, 549 (Fla. 2d DCA 2022), *review denied*, SC22-1398, 2023 WL 105592 (Fla. Jan. 5, 2023) ruled that the student plaintiff had sufficiently alleged the existence of an express contract to proceed beyond the motion to dismiss.

Since *Rojas*, several other District Courts have followed *Rojas* in dismissing similar claims and certifying similar questions to this Court. *See Heine v. Florida Atl. Univ. Bd. of Trustees*, 360 So. 3d 412 (Fla. 4th DCA 2023) (affirming dismissal and certifying question); *Florida Int'l Univ. Bd. of Trustees v. Alexandre*, 365 So. 3d 436 (Fla. 3d DCA 2023) (reversing order denying dismissal and certifying question); *Goldstein v. Univ. of Cent. Florida Bd. of Trustees*, 6D23-1203, 2023 WL 5492043 (Fla. App. 6 Dist. Aug. 25, 2023) (affirming dismissal); *Burke v. Santa Fe Coll. Dist. Bd. of*

Trustees, 368 So. 3d 543 (Fla. 1st DCA 2023) (affirming dismissal); and *Stready v. Florida A&M Univ., Univ. Bd. of Trustees*, 359 So. 3d 446 (Fla. 1st DCA 2023) (affirming dismissal).

Plaintiff submits that the First District's opinion results in the creation of an illusory contract, where students are obligated to pay mandatory fees for services, but Florida's schools are not obligated to provide any services in exchange for those fees. Plaintiff asks this Court to adopt the well-reasoned dissent of Judge Makar and quash the majority's opinion.

B. PLAINTIFF'S COMPLAINT.

Because this case was decided at the motion to dismiss stage, this Court must accept the allegations of the complaint as true, and determine whether they state a claim for breach of an express contract that would result in a waiver of sovereign immunity.

Plaintiff's complaint alleges that "UF has improperly retained funds for services it did not provide, in violation of its *express contracts* with students, which allow it to collect fees *only for certain statutorily-specified purposes*." (App.8) (emphasis added); *see also* (App.21) ("Plaintiff and other Class Members each entered into an

express, written contract with UF whereby Plaintiff and the other Class members would pay fees to UF and, in exchange, UF would provide specific educational services to students during the 2020 Spring and/or Summer terms."). In support of this allegation, the complaint incorporates several documents that together constitute the express written agreement between the parties. (App.14, ¶29; 15, n. 22; 35–46.)

First, as all students do when they register for courses at the university, Plaintiff executed a Financial Liability Agreement pursuant to which Plaintiff acknowledged and agreed to the following terms:

> I agree to pay all UF debts and chargers pursuant to UF policies. I understand that the university is advancing value to me in the form of educational services and that my right to register is expressly conditioned upon my agreement to pay the costs of tuition, fees, and other charges and any additional costs when those charges become due.
>
> . . .
>
> I understand that past due student amounts will result in university registration and services being withheld in accordance with university regulations. Delinquent debts may be reported to a credit bureau and referred to collection agencies, or litigated. I agree to pay all costs of

> collecting unpaid charges, including a percentage based third-party collection fee up to 30%, reasonable attorney's fees, and court costs the university may incur in efforts of collecting my account.

(App. 43-44)

On the Terms and Agreements page are a list of "Related Articles,"(App.45) one of which is titled "Non-Tuition Charges"[2]:

What are Non-Tuition Charges?

Non-tuition charges are various goods and services provided by UF departments that co-exist with the education and fulfillment of a student's campus life. Examples of UF department non-tuition charges include:

- Student Health Care Center
- Housing
- Dining and Gator 1 Card
- Parking decals and tickets
- Library
- Computer accounts
- Printing
- Short-term loans
- Other University goods and services

How does a student view the charges due?

The University Bursar serves as the central billing office for these departments and maintains the record in ONE.UF. Charges are listed by the due date with the oldest charges being listed first. Student account charges may be viewed by the following:

[2] https://www.fa.ufl.edu/directives/non-tuition-charges/

- Log into ONE.UF
- Select View My Account (under Campus Finances)
- Charges Due (tab)

Second, the university charged Plaintiff fees—that he paid—in exchange for specific services to be provided (by the university) for each fee. (App.7) This written agreement is memorialized in the documents that Plaintiff attached to his complaint: the invoices he received from UF, entitled "Tuition Statement," and the tuition and fee schedules that the university provides to students (hereinafter, the "Fees Schedule"). (App.35–41) The Tuition Statement and Fees Schedule itemize the fees and the specific services to be provided for each fee. (Id.) "The fees included activity and service fees, athletic fees, health fees, and transportation access fees authorized by statute, specifically section 1009.24, Florida Statutes" *Rojas* at 1172.

With respect to these fees, the Complaint specifically alleged:

> 20. According to Defendant, these fees—the Activity and Service, Health, Athletics, and Transportation Fees—explicitly cover resources and services available to students on or around campus. In fact, UF explains that students are charged "a variety of student fees, in addition to tuition, each semester to

provide for valuable services that benefit the entire stud[ent] body."

21. The Activity and Service Fee, for example, is used to "provide services for all student body and cater to overall enrichment in safety, entertainment, health, professional skills and personal development." This fee funds student organizations and events, as well as the "SG Bike Repair, SG Print Lab, and the SG Graphics and Copy Center, all of which provide certain services at no charge or a reduced cost to students or student organizations." Moreover, this fee provides access to "[p]articipation in recreational sports and intramurals, access to recreation and fitness facilities, and participation in programs like Gator Nights."
22. The Transportation Access Fee, "is used to help support the on-campus shuttle bus system" and to provide "[f]are-free service on the Regional Transit System (RTS)." On-campus students depend on these shuttles to move around the university's large campus.
23. The Health Fee "is a service fee . . . that goes to many campus-wide health initiatives," including maintaining the university's Student Health Service. In exchange for paying this fee, students are "eligible for Student Health Care Center (SHCC) services" and afforded "[a]ccess to the Student Health Care Center and Counseling and Wellness Center."
24. Finally, the Athletics Fee provides students with "[a]ccess to student sections and discounted pricing for athletic events."

. . .

26. For students enrolled in on-campus programs and courses, the fees detailed above are mandatory. For students enrolled in the University of Florida's Online programs ("UF Online"), the fees are instead

optional. That is, UF Online students can opt to purchase a "UF Online Optional Fee Package," which includes the (i) Activity and Service, (ii) Health, (iii) Athletics, and (iv) Transportation Fees, in order to gain access to the services that these fees support. By purchasing the Optional Fee Package and paying these included fees, UF explains that students will have "an avenue to access a broader range of services."

27. UF thus issues invoices to (i) all on-campus students and (ii) UF Online students who purchase the Optional Fee Package for certain fees—namely, the Activity and Service, Health, Athletics, and Transportation Fees—which, when paid, are to guarantee students' access to a wide range of on-campus services, activities, and amenities.

(App.12-14) (footnotes omitted)

While we have omitted the footnotes from the above complaint excerpt, one is worth highlighting. Paragraph 26 is drawn from https://ufonline.ufl.edu/tuition/optional-fee-package/. This page reads:

> The UF Online Optional Fee Package is designed to give UF Online students who choose to reside in or frequently visit Gainesville full access to on campus student services. The optional fee package consists of the following fees and services:
>
> - Activity and Service – Participation in recreational sports and intramurals, access to recreation and fitness facilities, and participation in programs like Gator Nights

- Health Services – Full access to the Student Health Care Center and Counseling and Wellness Center
- University Athletics – Access to student sections and discounted pricing for athletic events (based on ticket availability)
- Transportation – Fare-free service on the Regional Transit System (RTS)

For full details and list of services, please visit UF Online's Student Fees page.

The above link is to UF's student handbook,[3] which states:

> In an effort to make your UF degree as affordable as possible, you are not required to pay the majority of student fees as a UF Online student. The fees which you are not required to pay include the following:
>
> 1. Activity and Service Fee
> 2. Health Fee
> 3. Transportation Fee
> 4. Athletic Fee
> 5. GATOR*ONE* Service Fee
>
> While these fees fund crucial services **for our residential students**, the majority of our online students are not in Gainesville and do not use the services associated with our physical campus in Gainesville.

(emphasis supplied)

Third, the complaint alleges that these contracted-for services are further explicated by (a) the conditions of section 1009.24,

---

[3] https://handbook.ufonline.ufl.edu/students/student-fees/

Florida Statutes ("section 1009.24"), (b) the regulations enacted by the Florida Board of Governors ("FBOG") and UF, and (c) UF's publications relating to the fees it charges. (App.12-15, ¶¶ 18–30)

The class action complaint seeks to certify a class of all persons who paid fees for on campus services during the Spring and Fall academic semesters in 2020 and who, because of UF's response to the COVID-19 pandemic, did not receive the benefits of the services for which they paid their fees and did not have a pro-rated portion of those fees refunded to them or otherwise waived in full and without condition (the "Class"). (App.18–19)

C. PROCEEDINGS BELOW.

Plaintiff filed the class action complaint on April 21, 2021. (App.6–46) UF moved to dismiss or alternatively, for a judgment on the pleadings (the "Motion"), arguing that Plaintiff's claims were barred by sovereign immunity. (App.54–69)

Plaintiff opposed the Motion, arguing that his breach of contract claim is not barred because UF waived sovereign immunity when it entered an express written contract with Plaintiff concerning the payment of fees in exchange for services. (App.77–

87)

The circuit court conducted a hearing concerning the Motion on September 1, 2021. (App.151–253) The circuit court entered an order granting in part and denying in part the motion to dismiss. (App.138–48) (the "Order").[4]

The Order concluded that Plaintiff's breach of contract claim was not barred by sovereign immunity. (App.141–144) While the Order recognized the existence and importance of the sovereign immunity privilege, (App.141), it explained that "when a governmental entity enters into an express, written contract that is authorized by the powers granted to it by the Legislature, it waives its sovereign immunity." (App.142) (citing *Pan-Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4 (Fla. 1984)).

Based on the allegations and attachments to the complaint, the Order found that Plaintiff "adequately supports his allegations" that "UF breached an express, written agreement with him concerning fees that he paid when he registered for courses at UF"

[4] The trial court dismissed the claim for unjust enrichment. That ruling was not challenged on appeal.

by "attach[ing] to his Complaint invoices assessing the fees and tuition and fee schedules of the university which itemize the fees that Plaintiff was charged and the specific services to be provided for each fee," and "a document from the university called a 'Financial Liability Agreement' which provides that he agreed that he was incurring a legal debt to pay the fees and further provides that his account can be sent to a collection agency should he fail to pay the charges." (App.142)

The Order found that these documents sufficiently supported Plaintiff's allegation of an express contract that waives sovereign immunity because they "identify the specific fees charged to Plaintiff, their purpose and their price, and the amounts that Plaintiff agreed to pay, and did pay, for the fees for each semester." (App.142). (*See also* App.143) ("In addition, the Financial Liability Agreement specifically states that a UF student 'agree[s] to pay UF debts and charges pursuant to UF policies,' including 'the costs of tuition, fees and other charges and any additional costs when those charges become due' and that it "lists the consequences that occur should the student not pay, such as having their account sent to

collections."). The Order further found that "[t]hese documents are sufficiently definite to constitute an express contract because they incorporate section 1009.24, the law applicable to Plaintiff's invoices." (App.143)

Based on the foregoing, the Order concluded that, "*at this stage of the litigation*," Plaintiff has "adequately plead the existence of an express contract between himself and UF in which Plaintiff agreed to pay fees in exchange for specific services to be provided by UF during the Spring 2020 and Summer 2020 semesters, in accordance with section 1009.24, Florida Statutes, and its corresponding regulations." (App.143) (emphasis added). The Order explains that "a contract is made under Florida law" when there is "offer, acceptance, and consideration" and that Plaintiff's "invoices from UF contain written information establishing that UF offered to provide specific categories of services and that Plaintiff accepted that offer by providing consideration in the form of monetary payment." (App.143–144)

D. THE FIRST DISTRICT'S OPINION.

The First District reversed the trial court's order, holding that:

> Absent from the series of documents is any language obligating the University to provide specific, on-campus services to any student during any specific time. Nor is there any language that can be read to obligate the University to a refund of fees when any such services are paused, limited, or outright cancelled.

Rojas at 1171.

Judge Maker, in his dissent, explained how this conclusion rendered the contract between UF and its students illusory:

> Little doubt exists that an enforceable written contract of some sort exists; if one did not, the university would have difficulty collecting tuition and fees for services because of the lack of mutuality. As the supreme court held in *Pan-Am Tobacco Corporation*, it "is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." 471 So. 2d at 5 (internal citation omitted). If the tables were turned, and students failed to pay tuition and fees, a breach of contract claim would be the first in a university's complaint.

Rojas at 1175. (Makar, J., dissenting) Makar's view is the correct view, and we ask this Court to adopt it.

II. SUMMARY OF THE ARGUMENT

The question certified by the First District does not accurately reflect the issue before this Court. If the Court does not restate it, it

must be answered in the negative, because the law is clear that sovereign immunity does not bar a claim for breach of an express written contract against State Universities. The issue in each of these cases is whether the plaintiffs have alleged the existence of an express contract sufficient to open the courthouse door at the motion to dismiss stage. This requires a cases by case analysis.

Among the Courts that have issued opinions in these cases, a consensus has emerged on legal principles that apply to each case. First, the schools have waived sovereign immunity for claims of breach of express, written contracts. Second, the plaintiffs can use several writings to establish the existence of express written contracts between the schools and their students. Florida law allows for the incorporation by reference of those writings or their consideration as parol evidence. Finally, the terms of Fla. Stat. § 1009.24 are incorporated into those contracts. The question this Court must decide is what obligations this express contract places on UF relative to the provision of on-campus in-person services in exchange for the fees that are collected for such services.

Moore correctly held that its plaintiff sufficiently alleged the existence of an express written contract to survive a motion to dismiss. Conversely, *Rojas* and its progeny held that plaintiffs have failed to demonstrate that their contracts required the schools to provide any services in exchange for the fees or that they were required to provide a refund when no services were provided.

There is no authority supporting this argument because it ignores that implied covenants of good faith and fair dealing and commercial reasonableness that are part of every Florida contract. To the extent that terms are missing from the contract, they are covered by the covenant of good faith and fair dealing. When Rojas paid fees in exchange for services, he expected UF to perform its part of the bargain and provide those services. And when UF couldn't perform, Rojas reasonably expected to be refunded his fees.

Upon registering, Plaintiff agreed to pay the university specific fees in exchange for certain services - health services, athletics, transportation, and student activities – that are described in the Florida Statutes, FBOG and UF's regulations, and UF's publications as being accessible only on-campus. The Tuition Statement and

Fees Schedule that Plaintiff attached to his complaint provide the exact amounts that Plaintiff paid and the services UF was obligated to provide in return. These documents provide the written offer, acceptance, and consideration necessary to create a contract between Plaintiff and UF under Florida law.

Rojas' holding that students are not entitled to on-campus services in exchange for these fees runs afoul of Florida law that requires fees to be used for the specific purpose for which they are described. Further, the holding ignores the fact that the fees are only mandatory for students who enrolled in UF's on-campus programs and courses. Students enrolled in the University of Florida's Online programs may opt-in to the fees if they wish to partake of the on-campus services the fees pay for. Finally, the holding ignores the language of § 1009.24, which "refers to the provision of services 'on the main campus' or in a 'university health center.'"

This Court should follow the lead of the Kentucky Supreme Court in *Univ. of Kentucky v. Regard*, 670 S.W.3d 903 (Ky. 2023). *Regard* is factually indistinguishable from the instant case and

applies the same principles of law applied by *Rojas* and its progeny. Unlike *Rojas*, however, the Court ruled that the students had sufficiently alleged the existence of an express written contract to provide on campus services in exchange for fees to allow the case to proceed to a determination of its merits.

As recognized by Judge Makar in his dissent, *Rojas* results in a contract that allows UF to sue its students if they fail to pay fees for services, but doesn't obligate UF to provide any services in exchange for those fees. Such a contract would be void for lack of mutuality of remedy in any other context. Further, it violates the doctrine of fundamental fairness.

In attempting to extricate Florida's schools from their obligations to refund fees collected to pay for services that were not provided, *Rojas* and their progeny bring uncertainty to all contractual relationships between the State and private parties. Unless their contracts specially state that refunds are available, Vendors to the State can now freely default on their service agreements with State entities without having to worry about being forced to refund their upfront payments. This Court should not

adopt a position that would create such uncertainty, especially when the Legislature has already passed a law designed to address these particular lawsuits, without impacting any of the State's other contractual relationships. Adopting *Rojas* would necessarily mean that, in passing this law, the Legislature engaged in a useless act. Such a holding violates a rule of statutory construction.

The Court should quash the *Rojas* decision, and remand with instructions to reinstate the trial court's order denying UF's motion to dismiss. This case should proceed for consideration of its merits.

III. ARGUMENT

A. STANDARD OF REVIEW.

Judge Makar ably set forth this Court's standard of review, as follows:

> [T]wo standards of review govern disposition of this case. The first is that "a court may consider only the factual allegations set forth in the complaint, *must accept those allegations as true*, and *must resolve in the plaintiff's favor all inferences that might be drawn from those allegations*." *Mosby v. Harrell*, 909 So. 2d 323, 326 (Fla. 1st DCA 2005) (emphasis added). Applied here, the trial court—and this Court—must accept Rojas's allegations in his complaint as true along with inferences to be drawn from the complaint and its attachments. Second, a trial court's ruling regarding sovereign immunity is a question of law

> and is reviewed de novo. *DeSantis v. Geffin*, 284 So. 3d 599, 602 (Fla. 1st DCA 2019).

Rojas at 1173-74. (Makar, J., dissenting)

Judge Makar also points out that this Court's instruction to "determine entitlement to sovereign immunity as early as the record permits," per *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185–86 (Fla. 2020), does not always mean at the motion to dismiss stage:

> In this regard, sovereign immunity can't always be determined on the face of a complaint, making it advisable to allow factual development to crystalize as to the viability of specific claims arising from the exercise of authority under section 1009.24, Florida Statutes, and the scope of a potential waiver of immunity. Judicial line-drawing is necessary, but erring on the side of caution, as courts are required to do at this initial stage of this lawsuit, countenances against dismissal in light of the written documentation and allegations presented.

Rojas at 1175. (Makar, J., dissenting) It, is, of course, possible that discovery will provide additional support for Plaintiff's claim. For example, if Plaintiff were able to show that, while campus was shut down, UF incurred zero expenses of the type these fees typically paid for, and UF simply realized a windfall as a result, would Courts be as willing to dismiss these claims? Judge Makar's call for

prudence at the motion to dismiss stage is warranted. *See also Univ. of S. Florida Bd. of Trustees v. Moore*, 347 So. 3d 545, 549 (Fla. 2d DCA 2022), *review denied*, SC22-1398, 2023 WL 105592 (Fla. Jan. 5, 2023) (Affirming denial of motion to dismiss based on sovereign immunity because Plaintiff sufficiently alleged existence of express contract.)

B. THE CERTIFIED QUESTION.

Before we begin the argument proper, we want to address the language of the certified question, which we don't believe accurately reflects the issue before this Court. The First District asks:

> WHETHER SOVEREIGN IMMUNITY BARS A BREACH OF CONTRACT CLAIM AGAINST A STATE UNIVERSITY BASED ON THE UNIVERSITY'S FAILURE TO PROVIDE ITS STUDENTS WITH ACCESS TO ON-CAMPUS SERVICES AND FACILITIES?

Rojas at 1169. The answer to this question, as written, calls for a legal conclusion, and is quite obviously no. And *Rojas* didn't so hold. Nor did any of its progeny. Instead, they each held that while sovereign immunity does not bar a breach of contract claim against a State University based on an express contract, the respective

plaintiffs failed to allege a sufficient express contract to maintain their claims.

The question certified by the Third District in *Florida Int'l Univ. Bd. of Trustees v. Alexandre*, 365 So. 3d 436, 442 (Fla. 3d DCA 2023), is closer to the mark, but is still written in a manner that calls for a legal conclusion based on a factual premise that remains in dispute:

> WHETHER SOVEREIGN IMMUNITY BARS A BREACH OF CONTRACT CLAIM AGAINST A STATE UNIVERSITY BASED ON THE UNIVERSITY'S FAILURE TO PROVIDE ITS STUDENTS WITH ACCESS TO ON CAMPUS SERVICES AND FACILITIES, NOTWITHSTANDING THE ABSENCE OF AN EXPRESS, WRITTEN CONTRACT TO PROVIDE SUCH SERVICES AND FACILITIES IN A SPECIFIC TIME, MANNER, OR PLACE?

The *Alexandre* plaintiffs alleged the existence of an express written contract that required the provision of on-campus services in exchange for the fees they were charged.

As we will demonstrate below, the law is clear that sovereign immunity does not bar a claim for breach of an express written contract against State Universities. The issue in these cases is whether the plaintiffs have alleged the existence of an express

contract sufficient to open the courthouse door at the motion to dismiss stage. Because the various documents comprising the agreements between the schools and the plaintiffs are unique to each school, a case by case analysis is required. There is no reason to or basis for creating a bright line rule of law that would apply uniformly to each of these cases that would avoid the need to conduct an inquiry into the factual allegations. The Court should revise the certified question to reflect this reality.

C. AREAS OF CONSENSUS.

Three areas of consensus have been reached by the various District Courts that have heard these appeals. The first is the applicability, to these cases, of the rule waiving sovereign immunity for claims alleging breach of an express contract by the State. Second, because a contract with the State is governed by the same rules as contracts between private parties, an express contract with the State may be made of several writings. Finally, Fla.Stat. 1009.24, which dictates how these fees are to be collected and spent, is part of the contract as if it was expressly referred to or

actually incorporated therein. We will address each of these principles below.

1. Sovereign immunity is waived in suits to enforce express contracts entered into by the State of Florida.

Forty years ago, this Court recognized that sovereign immunity is waived for breach of contract claims where there is an express, written contract. *Pan-Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4 (Fla. 1984). In *Pan-Am Tobacco Corp.,* this Court explained:

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless.

Pan-Am Tobacco Corp. at 5. *Rojas* and its progeny threaten this principle, as they establish the existence of a contract between the student and the state that obligates the student to pay fees but does not obligate the State to provide anything in exchange for those fees.

2. An express contract can be formed by several writings.

Rojas and its progeny have recognized that the combination of UF's Financial Liability Agreement, ("FLA") the invoices, and UF's various publications (which tell students the services that the university provides in exchange for the fees the students pay) may constitute an express contract.

Again, we return to Judge Makar's dissent for a clear summary of this principle:

> It is important to note that an express written agreement need not be neatly packaged in one comprehensive document, particularly at the onset of litigation. Instead, it is well-established that "[s]everal writings may constitute a valid and binding written contract when they evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract." *Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004). Consistent with this principle, the Second District recently rejected the argument—in a sovereign immunity case—that "without a unified, finalized, typed, paginated document, signed by the parties in a suitable place (or something to that effect), there can be no enforceable express contract." *Sarasota Cnty. Pub. Hosp. Dist. v. Venice HMA, LLC*, 325 So. 3d 334, 344 (Fla. 2d DCA 2021). Factual allegations, supported by some (but perhaps not all) of the relevant documents (remember, discovery has not occurred), must be accepted as true, including resolving all inferences in a plaintiff's favor. Every piece of the contractual puzzle

> need not be firmly in place to conclude preliminarily that an express contract exists. *See, e.g., Amiker v. Mid-Century Ins. Co.*, 398 So. 2d 974, 975 (Fla. 1st DCA 1981) (reversing dismissal of complaint because plaintiff "could not attach to the complaint what they did not have"). Only the available and *material* pieces are necessitated. *Id.*; *see also* Fla. R. Civ. P. 1.130 (requiring attachment of "a copy of the portions thereof *material* to the pleadings") (emphasis added).

Rojas at 1174. (Makar, J., dissenting)

The *Rojas* majority did not disagree with this principle. They did, however, question whether the "gratuitous informational statements on a university's website could be legally binding for purposes of waiving sovereign immunity." *Rojas* at 1171.

In affirming the denial of University of South Florida's motion to dismiss, the Second District in *Moore, supra*, noted that such statements can create binding obligations: "courts have recognized 'the proposition that a student handbook or publication can create contractual obligations on the part of [the] university that are not necessarily limited to the 'service' of providing a college degree.'" *Moore* at 550. (internal citation omitted)

Florida law provides two avenues to incorporate such statements into the contract. The first is incorporation by

reference. The FSL refers to the "tuition and fee costs" and links to the student's account at ONE.UF. It lists as "Related Articles" pages detailing "Non-Tuition Charges" and "Billing of Students and Former Students." (App.45) The "Non-Tuition Charges" page states that "Non-tuition charges are various goods and services provided by UF departments that co-exist with the education and fulfillment of a student's campus life." [5] The Billing page also refers to non-tuition charges and links to the ONE.UF page.[6]

In *First Guar. Corp. v. Palmer Bank & Tr. Co. of Fort Myers, N.A.*, 405 So. 2d 186, 188 (Fla. 2d DCA 1981), the Court catalogued the Florida principles of law that applied to incorporation by reference:

> However, several writings, only one of which is signed, may be aggregated to satisfy the statute, *Bader Brothers Transfer & Storage, Inc. v. Campbell*, 299 So.2d 114 (Fla. 3d DCA 1974), provided the signed writing expressly or implicitly refers to the unsigned document. *Meek v. Briggs*, 80 Fla. 487, 86 So. 271 (1920); *Socarras v. Claughton Hotels, Inc.*, 374 So.2d 1057 (Fla. 3d DCA 1979); *Ashland Oil, Inc. v. Pickard*, 269 So.2d 714 (Fla. 3d DCA 1972); 15 Fla.Jur. Statute of Frauds, s 11 (1964).

[5] https://www.fa.ufl.edu/directives/non-tuition-charges/

[6] https://www.fa.ufl.edu/directives/billing-of-students-and-former-students/

> An implied reference may be established by either the fact that the documents relate to the same subject matter or by physical annexation. *Simmons v. Tobin*, 89 Fla. 321, 104 So. 583 (1929). Moreover, parol evidence is, in certain instances, admissible to clarify the writing.

The second avenue, as noted by the *First Guar. Corp.* Court, is the use of these publications as parol evidence. The majority contends that the writings provided by the Plaintiff do not specify that these services can only be provided on-campus and in-person. When a contract "does not specify the rights or duties of the parties under certain conditions or in certain situations," like when campuses are closed due to a pandemic, "[and] the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document," the Court may look to parol evidence to interpret the contract's meaning. *Id.*; *see also, e.g., Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC*, 915 So. 2d 657, 660 (Fla. 2d DCA 2005) (concluding where an extraneous circumstance revealed a latent ambiguity in a contract, a trial was needed to resolve the dispute). Whether the statements in UF's publications are incorporated by reference or considered as parol

evidence, it is clear that these fees are charged only of residential students to pay for on-campus, in-person services.

3. Fla. Stat. § 1009.24 is incorporated in the contract.

As this Court explained in *Shavers v. Duval County*, 73 So. 2d 684, 689 (Fla. 1954), "[i]t has long been firmly established that the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."

Here, Fla. Stat. § 1009.24 mandates the collection of the fees Rojas paid UF. The *Rojas* majority acknowledged that § 1009.24 was part of the express contract, because it imposed "implied conditions [into] UF's express contracts with its students." *Rojas* at 1171. *See also Florida Int'l Univ. Bd. of Trustees v. Alexandre*, 365 So. 3d 436, 440 (Fla. 3d DCA 2023) ("we agree that any statement of fees incorporates section 1009.24(14), Florida Statutes (authorizing the fees at issue)").

Thus, the consensus is that an express contract existed between the named plaintiffs and the various schools, and that the terms of § 1009.24 are incorporated into those contracts. Where the consensus dissolves is in determining what obligations these express contracts place on the schools.

D. ROJAS AND ITS PROGENY HAVE DISMISSED CLAIMS FOR THE FAILURE TO ALLEGE SPECIFIC CONTRACTUAL TERMS.

Moore and *Rojas* took markedly different approaches to addressing this question. *Moore* held that "a determination regarding whether the parties' 'legal, binding contract' included a promise to provide on-campus services in exchange for fees is more appropriate at the summary judgment stage." *Moore* at 549.

The *Moore* Court explained that USF's "registration agreement," (the equivalent of UF's FLA):

> … states that Ms. Moore is responsible for knowing all registration policies. Therefore, the "terms and conditions" of the registration agreement along with any associated registration policies must be examined to determine whether they contain a promise by USF to provide any specific services in exchange for the fees it charged students. Additionally, Ms. Moore agreed to "USF policies" when she clicked "Submit Changes" on the website and, therefore, USF policies must be examined to

> determine if USF promised to provide any specific services in exchange for student fees.

Moore at 549-50.

UF's FLA contains the same terms. First, UF agreed to provide "educational services" in exchange for "[Rojas'] agreement to pay the costs of tuition, fees, and other charges." (App.43) This is black letter contractual language. Rojas "agree[d] to pay all UF debts and charges pursuant to UF policies." (Id.) Thus, UF's policies must be examined. Rojas accepted "responsibility to view [his] charges in ONE.UF." (Id.) Thus his invoiced charges and the breakdown of those charges between tuition and fees are part of this contract. If Rojas didn't pay, this would result in "services being withheld in accordance with university regulations." Thus, UF"s regulations are part of this contract and must be examined. If Rojas did not pay, he would "no longer will be eligible to attend and participate in classes or other university activities." (Id.) Those "university activities" are the activities at issue in this case. If a student is prevented from engaging in university activities if they do not pay, it necessarily

follows that they are entitled to utilize those activities and services if they fulfill their payment obligation.

Rojas and its progeny chose a different path. They each held that their respective plaintiffs' inability to point to a very specific set of contractual terms in their express contracts was fatal to their claims. *Rojas* held:

> Absent from the series of documents is any language obligating the University to provide specific, on-campus services to any student during any specific time. Nor is there any language that can be read to obligate the University to a refund of fees when any such services are paused, limited, or outright cancelled.

Rojas at 1171. *Alexandre*, *supra*, quoted this language is explaining the perceived deficiency in its plaintiffs' case. *Alexandre* at 441.

Similarly, in *Goldstein*, the Sixth District held that "because neither [section 1009.24 nor the] documents [attached to the complaint] state that UCF agreed to, or was obligated to provide on-campus, in-person services in exchange for the various fees collected, and because [neither section 1009.24 nor the] documents provided state that students would be entitled to a prorated refund

for any unused fees, our analysis aligns with *Rojas. Goldstein, supra*, at *2.

Finally, in *Heine, supra*, the Court demanded that the plaintiff "identify an express, written contractual obligation for FAU to provide any on-campus or in-person services in exchange for their payment of the various fees." *Heine* at 420. The Court further demanded the plaintiff point to "any language in the documents of record that can be read to 'obligate [FAU] to a refund of fees when any such services are paused, limited, or outright cancelled.'" *Heine* at 418.

Absent from these analyses are citations to any cases that have held that a party to a contract only needs to provide services in exchange for fees paid for those services if the contract expressly states so.[7] Also absent is a citation to any case that holds that a

[7] *Rojas* is an unusual decision in that, after citing to *Pan Am Tobacco* for the proposition that the state waives sovereign immunity for breaches of an express contract, it cites to **no** other cases. The only case cited in **any** of these opinions (*Heine* and *Goldstein*) in support of this argument has been *City of Miami Firefighters & Police Officers Trust & Plans v. Castro,* 279 So. 3d 803 (Fla. 3d DCA 2019). But *Castro* provides no support for this argument. In *Castro*, the plaintiff attempted to transform "general

party to a contract only needs to refund fees paid for services that were not provided if the contract expressly states so. There are no citations because no such cases exist. This requirement that the party performing the service must expressly state that it will provide the service in exchange for the fees it is charging or refund the fees if it does not provide the service is a requirement created from whole cloth to extricate these schools from their obligations under their contracts.

E. PLAINTIFF'S CONTRACT WITH UF CONTAINS IMPLIED COVENANTS.

The reason there are no cases cited in support of this argument is that a party's obligation to provide the services they are being paid for and to refund the money if they don't are two of the most basic covenants included in every contract entered into in Florida.

---

language in a retirement plan ordinance – requiring that the performance of a pension administrator be observed and evaluated – into an express contractual duty guaranteeing the accuracy of advice provided to pension beneficiaries on pending legislation." *Castro* at 808. Here, Plaintiff is simply asking for a refund of the services he paid for but did not receive.

While *Rojas* and its progeny acknowledge that section 1009.24 ostensibly creates implied covenants that UF must meet,[8] they all ignore the most fundamental covenants included in any Florida contract - the implied covenants of good faith and commercial reasonableness. *See Green Cos., Inc. v. Kendall Racquetball Invs., Ltd.*, 560 So.2d 1208, 1210 (Fla. 3d DCA 1990); *Champagne-Webber*, Inc. at 697; *Avant Design Group, Inc. v. Aquastar Holdings LLC*, 351 So. 3d 62, 71 (Fla. 3d DCA 2022) ("Every Florida contract contains an implied covenant of good faith and fair dealing that protects parties' reasonable expectations of honest conduct in their contractual obligations."); and *Kies v. Hollub,* 450 So.2d 251, 255 (Fla. 3d DCA) ("a requirement for commercial reasonableness will be read into any contract where possible, language to the contrary notwithstanding").

---

[8] Florida law is clear that "where a suit is brought on an express, written contract entered into by a state agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or *implied condition or covenant* of that contract." *Champagne-Webber v. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988), *aff'd, Cnty. of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049 (Fla. 1997) (emphasis in original).

"Florida's implied covenant of good faith and fair dealing is a gap-filling default rule." *Overseas Inv. Group v. Wall St. Electronica, Inc.*, 181 So. 3d 1288, 1291 (Fla. 4th DCA 2016). "It is usually raised when a question is not resolved by the terms of the contract." *Id.* This covenant "arises because '[a] contract is an agreement whereby each party promises to perform their part of the bargain in good faith, and expects the other party to do the same.'" *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999), it is "designed to protect the contracting parties' reasonable expectations." *Id.*

Rojas and its progeny claim a gap exists in the terms of the contracts between the schools and the students – the obligation to provide services in exchange for the fees and the obligation to refund the fees when no services are provided. To the extent that this gap exists, it is filled by the covenant of good faith and fair dealing. When Rojas paid fees in exchange for services, he expected UF to perform its part of the bargain and provide those services. And when UF couldn't perform, Rojas reasonably expected to be refunded his fees.

Invoking the covenant of good faith to fill in these gaps does not in any way "override the express terms of the agreement between the parties." *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001). The Eight and Tenth Circuits have applied this principle in cases where plaintiffs sought to avoid express "no refund" clauses in their contracts. In *Stokes v. DISH Network, L.L.C.*, 838 F.3d 948 (8th Cir. 2016), the Eighth Circuit held the plaintiffs could not recover based on a breach of the implied covenant of good faith and fair dealing because they had expressly agreed to a contract stating Dish would not issue refunds based on changes in available programming. In *McAuliffe v. Vail Corp.,* 69 F.4th 1130 (10th Cir. 2023), the plaintiffs sought a partial refund of their season ski passes because the ski resort was forced to close because of Covid. The Tenth Circuit affirmed dismissal of the plaintiffs' claim, pointing to the clause in the contract that stated that the passes were "not eligible for a refund of any kind," and citing the principle that "the duty of good faith cannot be used to contradict terms or conditions for which a party has bargained." *McAuliffe* at 1149, 1152.

We cite these cases because they suggest that, but for the "no refund" clauses in both contracts, plaintiffs could have relied on the implied covenant of good faith and fair dealing to obtain refunds. Here, *Rojas* and its progeny have effectively given the schools the benefit of a "no refund" clause, even though their contracts contain no such clause. These cases demonstrate that, pursuant to the covenant of good faith, the default posture is to allow for refunds. To eliminate that obligation, the party providing the service must expressly contract it away. It is undisputed that UF did not do so.

F. THE EXPRESS CONTRACT BETWEEN PLAINTIFF AND UF REQUIRED THE PROVISION OF ON CAMPUS IN PERSON SERVICES IN EXCHANGE FOR THE FEES.

With these concepts in mind, we turn to the specifics of this case. The *Rojas* majority contends that documents and statute that make up the express contract in this case did not actually require the provision of any services in exchange for these fees. The allegations show otherwise.

UF does not deny that Plaintiff paid the fees referenced in the documents attached to his complaint. (*See e.g.*, App.159, 163, 181) The invoices and the Fees Schedule make clear which fees were

charged and paid by Plaintiff. For example, for the Spring 2020 semester, Plaintiff was charged and paid:

1. The "Athletics Fee." (App.10–12, 39–40) This fee provides students with "[a]ccess to student sections and discounted pricing for athletic events." (App.13)

2. The "Health Fee". (App.10–12, 39–40) By paying the Health Fee, students gain access to the university's Student Health Care Center (SHCC) and Counseling and Wellness Center and can receive SHCC services on campus. (App.13)

3. The "Transportation Access Fee." (App.10–12, 39–40) This fee "is used to help support the on-campus shuttle bus system." (App.13) *See also* UF Reg. 3.0372(4); *see also* § 1009.24(14) Fla. Stat. (stating that use fees, such as those for transportation, "shall be based on reasonable costs of services"); § 7.003(10), FBOG Regs. (requiring that if a state university charges a transportation access fee, the fee must have "appropriate input from students" and be used "to support the

university's transportation infrastructure *and to increase student access to transportation services*") (emphasis added). Students use the school's shuttles to move around the university's large campus. (App.13)

4. The "Activity and Service Fee." (App.10–12, 39–40) This fee, which Plaintiff alleged is used to fund on-campus services that were stopped due to the campus closures, must "be expended for lawful purposes to benefit the student body in general." § 1009.24(10)(b) FBOG Regs. Further, by paying this fee, students can access the school's recreation and fitness facilities on campus and are able to participate in recreational sports and intramurals. (App.12–13)

When UF closed its campus, there were no longer any athletic events. Students could not access the health center, the shuttle service, or the fitness facilities. The students were not receiving any of the services that they were required to pay fees for.

The Third District, in *Dist. Bd. of Trustees of Miami Dade Coll. v. Verdini*, 339 So. 3d 413, 419–20 (Fla. 3d DCA 2022), dismissed

the case against Miami Dade College but acknowledged that the plaintiff could have stated a claim for specific user fees for on-campus services had they been properly alleged.

> With respect to the parking fee, the Complaint concedes that for the Summer 2020 semester, students were not assessed the parking fee and that the fee would be credited to their account if they already paid. Thus, only the parking fee for the Spring 2020 semester is at issue. However, Verdini has failed to identify an express, written contract for this fee because the attached Spring 2020 invoice does not list a parking fee.
>
> . . .
>
> Finally, Verdini's response in opposition to MDC's motion to dismiss raised allegations, for the first time, related to laboratory fees. As with the parking fee, a laboratory fee is a user fee that "shall not exceed the cost of the services provided and shall only be charged to persons receiving the service." § 1009.23(12)(a). Although a laboratory fee is listed on the attached Spring 2020 invoice, Verdini's Complaint does not contain any allegations with respect to laboratory fees as a basis for his breach of contract claim.

Verdini thus recognized that 1) certain services could necessarily only be provided on campus, and 2) a properly alleged and documented claim for a refund of the invoiced fees for those services could support a breach of contract claim.[9] *See also Omori v.*

[9] Invoices are clearly components of an express contract and can be sufficient to establish an express contract on their own. *See Leader*

Brandeis Univ., 635 F. Supp. 3d 47, 58 (D. Mass. 2022) (Denying summary judgment on breach of contract claim seeking refund of a "Studio Fee," because it was "reasonable to infer that students who paid a Studio Fee for a particular course would have expected to receive in-person services in return.")

The Third District's subsequent decision in *Alexandre*, *supra*, moved the goalposts set by *Verdini*. Whereas *Verdini* only faulted the plaintiff for not including the invoice for Spring parking or alleging the lab fee, *Alexandre* demanded "documents containing express terms requiring FIU to provide on-campus or in-person services as an exchange for the fees." *Alexandre* at 440. The Court then held that though Fla. Stat. 1009.24 mandates the collection of these fees, it "makes no provision for what specific services must be

---

Global Solutions, LLC v. Tradeco Infraestructura, S.A. DE C.V., 155 F. Supp. 3d 1310 (S.D. Fla. 2016) (finding an invoice was "an express contract" that "governs the subject matter of the dispute"); *Elof Hansson Paper & Board, Inc. v. Caldera*, 2011 WL 13115561, at *4 (S.D. Fla. Sept. 6, 2011) (denying motion to dismiss breach of contract claim based on allegations that invoices attached to complaint were "valid and enforceable contracts"); *Mancini Enters., Inc. v. Am. Exp. Co.*, 236 F.R.D. 695, 699 (S.D. Fla. July 31, 2006) (noting that invoices could be later "found to constitute express contracts" which would result in dismissal of plaintiff's quantum meruit claim.)

provided, providing only that the fees 'shall be based on reasonable costs of services.'" *Id.*

First, by their very nature, health services, athletics, transportation, and student activities could only be provided on campus, in-person. Second, the agreement's failure to specify which services must be provided is not fatal to the Plaintiff's claim. When a contract does not expressly set forth a term within its four corners, the implied covenant of reasonableness will apply. *See Greenfield v. Manor Care, Inc.,* 705 So. 2d 926, 928–29 (Fla. 4th DCA 1997) ("Since the prices to be charged by the facility were not expressly stated within the four corners of the contract, a reasonable fee was implied, and appellant was not foreclosed from bringing an action based on Manor Care's breach of this implied covenant."); and *Payne v. Humana Hosp., Orange Park,* 661 So.2d 1239 (Fla. 1st DCA 1995) (Since the contract between Humana and Payne did not expressly set the governing prices within its four corners, Humana was bound by a reasonableness requirement.)

As shown above, the Transportation Access Fee, the Athletics Fee, the Health Fee, and the Activity & Services Fee are subject to

specific conditions on how the fees may be spent and for what purpose. In holding that these contracts did not actually require UF to provide any services in exchange for these fees, the *Rojas* majority ignored the reasonableness covenant.

There is another principle of Florida law that obligated UF to provide Plaintiff *something* in exchange for the fees it received. Each of the fees was designated to be collected for a specific purpose. In Florida, "if a fee is described in a contract as for a specific purpose or based on actual costs, then not using the fee for that purpose or basing it on those costs could constitute a breach." *Maor v. Dollar Thrifty Auto. Grp., Inc.*, 303 F. Supp. 3d 1320, 1325 (S.D. Fla. 2017) (denying motion to dismiss breach of contract claim where "administrative fee" charged by car rental company was alleged to be much greater than defendant's cost to process tolls because "to decide the meaning of the disputed terms at this preliminary stage would entail a factual inquiry more appropriate at a further stage of the proceedings"); *see also Coleman v. CubeSmart*, 328 F. Supp. 3d 1349, 1366 (S.D. Fla. 2018) (concluding plaintiff stated claim for breach of contract based on allegation that a fee

was "described in a contract for a specific purpose" but not actually used for that purpose) (citing *Maor*, 303 F. Supp. 3d at 1325); *Costa v. Kerzner Int'l Resorts, Inc.,* No. 11-60663-CV, 2011 WL 2519244, at *4 (S.D. Fla. June 23, 2011) ("the Court would agree with Plaintiff if she alleged that some of the money collected for the 'mandatory housekeeping gratuity and utility service fee' went to neither the housekeeping staff nor to pay the utility service fee," her breach of contract claim would have survived a motion to dismiss). Per these authorities, by collecting fees for certain categories, UF provided students with a contractual right to obtain the services described.

The *Rojas* majority responded to this argument by stating that §1009.24 "provides universities with discretion over the *specific* use of the fees." *Rojas* at 1171. The majority acknowledged that § 1009.24 "provided direction to the University . . . as to the amount of fees as well as general descriptions of certain categories of services the fees may (or may not) go towards" but then held that "no provision of section 1009.24 directs the University to provide a specific service or requires that a service be provided in person or on campus." *Id.* at 1172.

There are two problems with the majority's argument. First, UF's discretion is not unbounded. It is constrained by the implied covenant of good faith and fair dealing. *Overseas Inv. Group v. Wall St. Electronica, Inc.*, 181 So. 3d 1288, 1291 (Fla. 4th DCA 2016). As the *Overseas* Court explained, this covenant is also implicated "when one party has the power to make a discretionary decision without defined standards." *Id.* "Where there are no standards for exercising discretion, the implied covenant of good faith protects contracting parties' reasonable commercial expectations." *Id.* There is no scenario where a contracting party's "discretionary" decision to provide nothing in return for the payment it received could be considered commercially reasonable.

Second, these fees are only mandatory for students who enrolled in UF's on-campus programs and courses. (App.14) For students enrolled in the University of Florida's Online programs, the fees are instead optional. (Id.) That is, UF Online students can opt to purchase a "UF Online Optional Fee Package," which includes the (i) Activity and Service, (ii) Health, (iii) Athletics, and (iv) Transportation Fees, in order to gain access to the services that

these fees support. (Id.) UF does not charge UF Online students these fees because they will not be able to use the services, **unless they are able to access the campus**. During Covid, every UF student became a UF Online student. Why should these newly online students have to pay for services their already online colleagues did not?

UF's description of the optional fee package for its online students makes it abundantly clear that these fees are allocated to the provision of in-person, on-campus services **only**:

> As part of our continued commitment to provide an excellent student experience, the University of Florida offers an optional fee package that provides UF Online students access to additional student services *when in the Gainesville area*.
> All UF Online students, including Pathway to Campus Enrollment (PaCE) students in UF Online, can opt into this optional fee package for the same price as their *on-campus peers*.
>
> . . .
>
> Students who choose the fee package will be able to sign up for season football tickets, access the UF Student Health Center and more.
>
> . . .
>
> "Participation in this fee package is entirely optional, as we are sensitive to any additional costs for our online students," says Cummings. "We also appreciate that many of our online students will likely remain at a distance and will not seek out this optional fee package

for on-campus services. However for those students that reside in or frequent the Gainesville area, this optional fee package simply provides an avenue *to access a broader range of services*."

The UF Online Optional Fee Package is designed to give UF Online students who choose to reside in or frequently visit Gainesville full access to *on campus student services*. The optional fee package consists of the following fees and services:

> Activity and Service – Participation in recreational sports and intramurals, access to recreation and fitness facilities, and participation in programs like Gator Nights
> Health Services – Full access to the Student Health Care Center and Counseling and Wellness Center
> University Athletics – Access to student sections and discounted pricing for athletic events (based on ticket availability)
> Transportation – Fare-free service on the Regional Transit System (RTS)
> For full details and list of services, please visit UF Online's Student Fees page.

While these fees fund crucial services *for our residential students*, the majority of our online students are not in Gainesville and do not use *the services associated with our physical campus in Gainesville*. As a University committed to removing as many barriers as possible to the high quality undergraduate education that we offer, we have embraced this cost-reducing effort.

(App.14, n.20)[10] (emphasis supplied).

[10] https://ufonline.ufl.edu/tuition/optional-fee-package/

This is entirely consistent with § 1009.24, which, as Judge Makar pointed out in his dissent, "refers to the provision of services 'on the main campus' or in a 'university health center,' which directly supports the claim for recovery of denial of on-campus/in-person types of services, an issue best suited for disposition on a motion for summary judgment than a motion to dismiss." *Rojas* at 1174-75. (Makar, J., dissenting) The majority simply ignores this language when it asserts that nothing in § 1009.24 "requires that a service be provided in person or on campus." *Rojas* at 1172.

This distinction between the fees charged for on campus students and online students was one of the factors the Kentucky Supreme Court, in *Univ. of Kentucky v. Regard*, 670 S.W.3d 903 (Ky. 2023), pointed to as creating an express obligation to provide on campus services in exchange for those fees. The Court noted that on-campus and off-campus students "were charged substantially different mandatory fees based on that distinction." *Regard* at 917. The Court rejected as "untenable" the argument made here by UF and the *Rojas* majority - that the University was

"nowhere bound by clear and explicit language to provide in-person classroom instruction." *Id.* at 918. The Court went on to explain:

> The same logic applies for mandatory fees: on-campus students are charged a higher rate than those students off-campus. We simply cannot credit the sophistic argument that by defining a product or service in writing and then charging a price for those products or services in writing, the University nonetheless has no reciprocal contractual obligation to provide said products and services as defined once the offer has been accepted.

Id.

In our estimation, *Regard* provides an excellent model for this Court to follow. It is factually indistinguishable from the instant case and applies the same principles of law applied by *Rojas* and its progeny. But, unlike *Rojas*, it reaches the correct conclusion. It therefore merits a detailed analysis.

G. THIS COURT SHOULD FOLLOW *UNIV. OF KENTUCKY V. REGARD*, 670 S.W.3D 903 (KY. 2023).

Like Rojas, Plaintiff Regard was enrolled as an on-campus student at the University of Kentucky ("UK"). Regard filed a class action to recover tuition and fees for on-campus services that were not provided as a result of the pandemic. Like here, UK's motion to

dismiss based on sovereign immunity was denied at the trial level, and UK appealed the case to the Kentucky Supreme Court.

Regard alleged that UK's Student Financial Obligation (SFO) (here the FLA), in conjunction with other documents such as invoices and fee schedules, "taken as a whole, constitute the written contract for on-campus instruction and use of facilities and other benefits related to mandatory fees ...." *Regard* at 909. The UK SFO stated: "*completion of registration constitutes a contractual financial obligation to pay tuition and fees for which I am liable.*" *Id.* (emphasis in original) Like UF's Student Handbook, UK's Bulletin shows that on campus students were charged mandatory fees for on campus services that were not charged to online students. *Id.* at 910.

In Kentucky, the General Assembly passed the same waiver of sovereign immunity for all express contracts that this Court created in *Pan-Am Tobacco*. *Id.* at 911. As in Florida, "the same rules of contract formation and interpretation apply to contracts with the Commonwealth as they do to contracts between private individuals or entities." *Id.* at 912. As in Florida, "[i]t is black letter law that multiple documents, each individually incomplete, may form a

contract, when combined and read as one to provide the necessary elements of contract formation." *Id.* Finally, as in Florida, "[i]t is a rule of general application that contracts of public bodies, like those of individuals, are made with reference to existing statutes and that statutory provisions enter into the contracts by operation of law." *Id.* at 918.

UK made the same arguments that UF makes here:

> [UK] argues that the only contract it has with the Students (and all its students generally) is a "contract for registration." In other words, in exchange for a promise of payment of thousands of dollars in tuition and hundreds of dollars in mandatory fees on the part of the student, the University obligates itself to do nothing more than provide that student with the opportunity to register or enroll for classes. Beyond that, the University argues it has no written contractual obligation to the students.

Regard at 916.

The Supreme Court rejected that argument, as follows:

> To use a colloquial phrase, that dog just won't hunt. We reject the interpretation advanced by the University that it has nothing more than a contract for an opportunity to register. Such a position is illogical. Instead, it is clear the Students and the University entered into a written contract offered by the University, to receive a collegiate-level education in exchange for the payment of an applicable tuition, based on the registered classes, at a rate determined by the University; and to the use of

> ancillary services offered by the University such as (but not limited to) health services and recreational facilities in exchange for the mandatory fees.

Regard at 916.

UK then made the argument that the *Rojas* Majority accepted – "It claims that because there are no express provisions in those documents obligating the University to provide in-class instruction or access to other ancillary services, any contractual obligation the University might have to provide those things are at best implied, thus, there is no written contract and governmental immunity has not been waived." *Regard* at 916-917. UK also argued that the fee statements were not incorporated in the SFO.

The Court also rejected these arguments. First the Court explained that "[UK] is arguing a much too narrow understanding of its own contract." *Regard* at 917. The Court went on - "By offering students to enter into a contractual agreement to pay tuition and fees in the SFO and then identifying what those tuition and fees would be in the Bulletin—based on whether the students were registering for on-campus class instruction or on-line classes, as well as differing fee rates for students taking or not taking on-

campus courses—the University could not have but understood that definite, unambiguous material terms existed in writing that it was contractually bound to adhere to once the offer was accepted." *Id.* As to UK's incorporation argument, the Court responded, [t]he SFO clearly mentioned tuition and fees and the Bulletin clearly set out the differing rates of tuition and fees, required to determine the dollar amount of the financial obligation the Students had agreed to per the clickwrap agreement in the SFO." *Id.* As we demonstrated above, UF's FLA required students to review their tuition and fee invoices, UF's policies and regulations, and listed the "non-tuition charges" as a "related article."

The Court held it would be "absurd" to suggest that UK's tuition and fee rates described in its Bulletin were not part of its contract with its students. *Regard* at 918. "Indeed, it is *only* by referencing the Bulletin that the University could determine what amount of tuition and fees the Students promised to pay it, per the clickwrap agreement of the SFO." *Id.* The Court made it "painfully clear that all the material terms related to tuition and fees are written down in plain English that the University of Kentucky was

clearly aware of and assented to." *Id.* at 919. The Court explained that the "waiver of sovereign immunity for all written contracts then is properly understood as a waiver for all contracts with the Commonwealth that can be proved by writing." *Id.* That is exactly what Rojas has alleged here. He can prove the existence of a written contract that incorporates all material terms consisting of UF's FLA, combined with its related articles, its tuition and fee statements, its invoices, and § 1009.24.

In response to the argument adopted by the *Rojas* Majority that "the University is nowhere bound by clear and explicit language to provide" on-campus services in exchange for the mandatory fees, the Court found that argument "untenable." The Court noted that "on-campus students are charged a higher rate than those students off-campus." *Id.* As a result, the Court refused to "credit the sophistic argument that by defining a product or service in writing and then charging a price for those products or services in writing, the University nonetheless has no reciprocal contractual obligation to provide said products and services as defined once the offer has been accepted." *Id.*

The Court concluded with this summation, which is equally applicable to the instant case:

> The University offered its students a contract. It required them to agree to a "contractual financial obligation to pay tuition and fees[,]" in writing, in the Student Financial Obligation. Contemporaneously, it delivered to the Students the University Bulletin that set forth, in writing, the material terms of the tuition and fees according to, *inter alia*, whether the students were registering for on-campus classes or on-line classes. In exchange for the payments of the tuition and fees, the students had a legitimate expectation to receive what they paid for. These two documents were delivered together, share mutuality of subject matter, and the overwhelming implication and surrounding circumstances leave no doubt that they were meant to be read together, thereby forming one binding contract. Because the General Assembly has waived governmental immunity for all written contracts with the Commonwealth, the contract at issue is within the scope of the waiver.

Regard at 922. The analysis and the outcome should be no different here.

H. THE MAJORITY OPINION VIOLATES THE DOCTRINE OF FUNDAMENTAL FAIRNESS.

Rojas and its progeny fail to grapple with the significance of their conclusion that none of these schools entered into an express written contract that obligated them to provide any services in

exchange for the fees paid by these students. *Rojas* at 1172. The *Rojas* majority offered no rebuttal to Judge Makar's dissent, where he correctly pointed out:

> Little doubt exists that an enforceable written contract of some sort exists; if one did not, the university would have difficulty collecting tuition and fees for services because of the lack of mutuality. As the supreme court held in *Pan-Am Tobacco Corporation*, it "is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." 471 So. 2d at 5 (internal citation omitted). If the tables were turned, and students failed to pay tuition and fees, a breach of contract claim would be the first in a university's complaint.

Rojas at 1175. (Makar, J., dissenting).

That is precisely the issue here: UF declares that students cannot bring claims against it for failing to provide the on-campus services for which students paid fees while maintaining that UF *can put students into debt collections for failing to pay those very fees*. (*See* App.43) Put simply, UF asserts a contract exists when it wants to collect money from its students, but disavows that same contract when students seek refunds of fees they paid for unperformed services. As this Court has previously made clear, such a contract

is void for lack of mutuality of remedy. *Fla. Dep't of Envt'l Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008) ("a contract that grants one party the right to sue, but also afford the other party the right to declare that it has no legal obligation to pay, is void for lack of mutuality of remedy")

Besides violating the basic rules of contract construction, this outcome also violates the doctrine of fundamental fairness. In *Interair Services, Inc. v. Ins. Co. of N. Am.*, 375 So. 2d 317 (Fla. 2d DCA 1979), the Second District recognized the waiver of sovereign immunity for express contracts subsequently adopted by this Court in *Pan American Tobacco*. It based its conclusion on the doctrine of "fundamental fairness."

The Second District relied on this Court's opinion in S*tate Road Department of Florida v. Tharp*, 1 So. 2d 868 (Fla.1941), authored by Justice Terrell:

> The spirit of Justice Terrell's opinion strongly suggests that one-way contracts between the state and private citizens are equally abhorrent. Justice Terrell criticized the "something for nothing" or "unfairness" of the state in taking advantage of a private citizen. A noteworthy passage was as follows:

> In the administration of constitutional guaranties, the State cannot afford to be other than square and generous. To deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of the plea of non-suability of the State is too anomalous and out of step with the spirit and letter of the law to claim protection under the Constitution.

1 So. 2d at 870.

> Where the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no mutuality or fairness where a state or a county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations. Particularly, as here, where the contract and the obligation are expressly authorized by statute. It goes without saying that the contract obligations must be alleged and proven.
>
> We do not find any decision of the appellate courts of Florida allowing the state to hide behind the doctrine of sovereign immunity to avoid its clearly established contractual obligations.

Interair Services, Inc. at 319. *Rojas* allows for the existence of a contract that obligates the Plaintiff to pay fees for services but does not obligate UF to provide any services in exchange for those fees. UF has thus accepted the benefits of the contract but refused to perform its obligations. This Court did not countenance such an outcome in 1941, and it should not do so today.

I. ROJAS WILL MAKE IT DIFFICULT FOR THE STATE TO ENFORCE ITS CONTRACTS WITH PRIVATE PARTIES.

Rojas and its progeny create risks for the State as well. According to these cases, unless a contract specifies that a refund will be given when no services are provided, then the defaulted party is not entitled to a refund. Vendors can now freely default on their service agreements with State entities without having to worry about being forced to refund their upfront payments. This Court should not adopt a position that would bring uncertainty to the enforcement of contracts with the State in order to let these schools off the hook, especially when the Legislature has already protected these schools in a manner that will not bring uncertainty to other contractual relationships.

The Legislature passed Fla. Stat. § 768.39, which granted all Florida schools immunity from any suit filed after its effective date of July 1, 2021. Specifically, the statute granted immunity from any claims arising from the "closing or modifying the provision of facilities, other than housing or dining facilities, on the campus of the educational institution; or pausing or modifying ancillary

student activities and services available through the educational institution." Fla. Stat. § 768.39(3)(a).

Additionally, the Statute narrowed the definition of what could be considered a contract, stating that "invoices, catalogs, and general publications of an educational institution are not evidence of an express or implied contract to provide in-person or on-campus education and related services or access to facilities during the COVID-19 public health emergency." Fla. Stat. § 768.39(3)(a).

Of course, the Legislature's passing of this law begs the question - if *Rojas* and its progeny are correct, there was no need for this legislation. The schools were already immune from suit because even with the use of multiple writings, no express contract existed. So the Legislature was wrong when it stated in § 768.39(1) that "there is an overpowering public necessity for, *and no reasonable alternative to*, providing educational institutions with liability protections against lawsuits." (emphasis supplied) And contrary to the rules of statutory construction, the Legislature enacted useless protections that these schools were already entitled to. *See State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) ("a basic rule

of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.")

It is clear that the Legislature enacted this law to alter the common law and afford protections that the schools did not already have. The statute did not apply to cases, like this one, filed before the effective date, but it was not a useless act. It precluded additional suits from being filed that would have otherwise been viable under the common law. This Court should not adopt the *Rojas* majority's interpretation of the law, because doing so would require this Court to simultaneously hold that the Legislature's act was useless.

V. CONCLUSION

Rojas and its progeny are a triumph of form over substance. It is inarguable that these schools entered into a "a classic marketplace contract between a buyer (student) and a seller (university)." *Rojas* at 1174. (Makar, J., dissenting) As part of that contractual relationship, and as mandated by statute, UF collected, only from its residential students, fees designated for certain on-

campus services. For part of the semester, UF did not provide services in exchange for those fees. In any other contractual relationship, there outcome would be clear. UF would have to refund the portion of the fees that would have paid for the services that were not provided.

Here, the *Rojas* majority made a decision to let UF off the hook for that refund, and invented a technicality on which to do so. The argument that a party to a contract is only obligated to provide a service or refund the fees if the contract specifically states so is, in the words of the Kentucky Supreme Court, sophistic. That obligation to perform is the fundamental obligation of *every* contract. Denying the existence of the obligation is to undermine the very existence of enforceable contracts. This Court should reject such an outcome.

For the reasons set forth above, Plaintiff respectfully requests that this Court answer the certified question in the negative, quash the District Court's decision, and remand to the District Court with directions to reinstate the order denying the motion to dismiss.

Respectfully submitted,

EATON & WOLK, P.L.
2665 S. Bayshore Drive, Suite 609
Miami, Florida 33133
Telephone: 305-249-1640
Telecopier: 786-350-3079
Email: deaton@eatonwolk.com
cgarcia@eatonwolk.com

By: */s/ Douglas Eaton*
Douglas F. Eaton
FBN: 0129577

-And-

Adam Moskowitz, Esq.
Florida Bar No: 984280
Barbara C. Lewis, Esq.
Florida Bar No: 118114
Howard M. Bushman, Esq.
Florida Bar No: 364230
THE MOSKOWITZ LAW FIRM, PLLC
Attorneys for Petitioner
2 Alhambra Plaza, Suite 601
Coral Gables, FL 33134
Email: adam@moskowitz-law.com
barbara@moskowitz-law.com
howard@moskowitz-law.com

CERTIFICATE OF FONT SIZE AND PITCH

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B), counsel for Appellant hereby certifies that this brief complies with the applicable font and word count requirements because it is written in 14-point Bookman Old Style font and contains less than 13,000 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this **1st** day of **November 2023**, via the Florida e-Portal Filing System to: **Joseph W. Jacquot, Esq., Lauren V. Purdy, Esq., Jounice Nealy-Brown, Esq.,** GUNSTER, YOAKLEY & STEWART, P.A., *Attorneys for Respondent*, 1 Independent Drive, Suite 2300, Jacksonville, Florida 32202; jjacquot@gunster.com; wpruim@gunster.com; lpurdy@gunster.com; awinsor@gunster.com; jnealy-brown@gunster.com; tkennedy@gunster.com; and **Robert J. Sniffen, Esq., Jeffrey D. Slanker, Esq., Matthew J. Carson, Esq.,** SNIFFEN & SPELLMAN, P.A.,

Attorneys for Appellant, 123 North Monroe Street, Tallahassee, Florida 32301; rsniffen@sniffenlaw.com; jslanker@sniffenlaw.com.

Respectfully submitted,

By: */s/ Douglas Eaton*
Douglas F. Eaton
FBN: 0129577