SC23-126

In the Supreme Court of Florida

ANTHONY ROJAS,
Petitioner,

v.

UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
Respondent.

ON DISCRETIONARY REVIEW FROM THE COURT
OF APPEAL FOR THE FIRST DISTRICT

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF RESPONDENT

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IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The Attorney General submits this brief for the State of Florida as amicus curiae in support of Respondent. The Attorney General may appear in any suit in which the State has an interest, *see* § 16.01(4), Fla. Stat., and the State has an interest in preserving its sovereign immunity. The First District was correct in concluding that there is no express, written contract between the University and Rojas. But the First District should have reversed on the antecedent ground that the Legislature had neither clearly nor unequivocally authorized universities to enter into contracts like the one Rojas claims. Without such authorization, there is no waiver of immunity even for express, written contracts. After all, the Constitution gives the Legislature—and the Legislature alone—the power to waive sovereign immunity.

SUMMARY OF ARGUMENT

Florida's sovereign immunity prevents private citizens from suing the State unless general law clearly and unequivocally provides otherwise. Even then, language allegedly constituting waiver is to be construed narrowly and in favor of the State.

In this case, the First District purported to identify two separate exceptions to sovereign immunity: waiver by general law and waiver by contract. This Court has explained, however, that the "exception" for waiver by contract is in fact merely one variant of waiver by general law. If the Legislature, through general law, clearly and unequivocally authorizes state entities to enter into a specific class of contracts, that authorization waives the State's sovereign immunity for the breach of such contracts.

In this case, Rojas sued UF alleging (at 3–4) that he "entered into an express, written contract with UF whereby [he] would pay fees to UF and, in exchange, UF would provide specific educational services." But in contending that the State waived its sovereign immunity for his breach-of-contract claim, Rojas has not identified any provision of law authorizing the specific kind of contract at issue. The services at issue were authorized by statute, as were the fees collected, but no statute authorizes the University to bind the State to provide one in exchange for the other. That is, no provision of law indicates that the Legislature contemplated the kind of contract Rojas alleges—one guaranteeing uninterrupted access to a suite of

unspecified extracurricular services in exchange for fees, much less that the Legislature intended to waive sovereign immunity for litigation to recover the unused portions of student fees. And in the absence of a "clear" and "unequivocal" provision waiving sovereign immunity for the kind of contract alleged, the suit must be dismissed.

The Court should therefore approve the result reached by the First District.

ARGUMENT

The State of Florida, since its inception, has enjoyed immunity from suit. *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 512 (Fla. 2020) (per curiam). This doctrine—which the U.S. Supreme Court has described as a "fundamental aspect of [] sovereignty," *Alden v. Maine*, 527 U.S. 706, 713 (1999)—dates back to the thirteenth century. *Barnett*, 303 So. 3d at 512. It is recognized in the Florida Constitution, which grants the Legislature the power to waive it by "general law." Art. X, § 13, Fla. Const. And it extends to state agencies and subdivisions, including the Respondent University of Florida Board of Trustees. *See, e.g.*, *Plancher v. UCF Athletics Ass'n, Inc.*, 175

So. 3d 724, 726 (Fla. 2015) (citing § 768.28(2), Fla. Stat.); §§ 1001.705(1)(d), 1001.71(3), Fla. Stat.

Under the Florida Constitution, sovereign immunity "is the rule, rather than the exception." *Pan-Am Tobacco Corp. v. Dep't of Corrs.*, 471 So. 2d 4, 5 (Fla. 1984). Exceptions can be provided only by general law. *See id.*; Art. X, § 13, Fla. Const.; *see also* § 1001.705(3)(g), Fla. Stat. ("[T]he Legislature has the [responsibility to] . . . [e]stablish[] and regulat[e] the use of state powers and protections, including . . . sovereign immunity."). And they cannot be accidental. "Waiver will not be reached as a product of inference or implication," so "statutes purporting to waive the sovereign immunity must be clear and unequivocal." *Spangler v. Fla. State Turnpike Auth.*, 106 So. 2d 421, 424 (Fla. 1958); *see also Barnett*, 303 So. 3d at 513 (reaffirming *Spangler*). Even then, "waivers of sovereign immunity must be construed narrowly in favor of the government." *Barnett*, 303 So. 3d at 513 (quotation and brackets omitted).

A typical example is the Florida Legislature's express waiver of the state's sovereign immunity for torts. Section 768.28(1), Fla. Stat., provides that "the state, for itself and for its agencies or subdivisions,

. . . waives sovereign immunity for liability for torts, but only to the extent specified in this act." But in contrast to that torts waiver, Florida law contains no general waiver of sovereign immunity for breach-of-contract actions. *Cf.* 28 U.S.C. § 1491 (waiving the United States' sovereign immunity from contract claims).

Despite that absence, this Court has held—based on "legislative intent in general"—that, if the Legislature specifically authorizes the State to enter into the type of contract at issue, it has waived immunity for suits on breach of such contracts. *See Pan-Am*, 471 So. 2d at 5; *see also Arnold v. Shumpert*, 217 So. 2d 116, 118–19 (Fla. 1968). And because sovereign immunity is jurisdictional, *see, e.g.*, *Wallace v. Dean*, 3 So. 3d 1035, 1044–45 & n.14 (Fla. 1945); *Hutchins v. Mills*, 363 So. 2d 818, 821 (Fla. 1st DCA 1978) (per curiam), the question of authorization must always be answered before proceeding to the merits of the case. Neither the First District's opinion nor Rojas's brief have confronted that threshold question. Once one does, it becomes apparent that the University of Florida Board of Trustees is immune from this lawsuit.

I. Rojas cannot sue the University of Florida Board of Trustees for breach of contract unless the Florida Legislature clearly and unequivocally authorized the University to enter into the contract Rojas seeks to enforce.

In *Pan-Am*, this Court held that a vendor could sue the Department of Corrections for breaching a contract to provide vending machines at correctional centers, if the Legislature "authorized" the Department to enter into such a contract, or if it "authorized" the Department "to undertake those activities which, as a matter of practicality, require[d] entering into the contract." 471 So. 2d at 5. The Department of Corrections' regulations required facilities to provide "a canteen or commissary" for inmates to purchase noncontraband items. *Pan-Am Tobacco Corp. v. Dep't of Corrs.*, 425 So. 2d 1167, 1171 n.4 (Fla. 1st DCA 1983) (citing Fla. Admin. Code R. 33-3.02(3)), *rev'd by Pan-Am*, 471 So. 2d 4. And general law directed facilities to hire outside help "when available and appropriate," rather than develop their own institutional capabilities. § 20.315(11)(d), Fla. Stat. (1983). So, in accordance with its legislative authorization to procure goods and services, *see* § 20.315(8)(b), Fla. Stat. (1983), the Department contracted, in writing, to allow Pan-Am to install vending machines in six correctional facilities. *Pan-Am*, 471 So. 2d at 4. Inmates would

purchase candy, beverages, and cigarettes from Pan-Am's vending machines, and the Department would receive a portion of the proceeds as commission. *Pan-Am Tobacco Corp. v. Dep't of Corrs.*, 425 So. 2d at 1168, *rev'd by Pan-Am*, 471 So. 2d 4.

The Department breached the contract by terminating it on short notice, without explanation. *Pan-Am*, 471 So. 2d at 4–5. Pan-Am sought damages. This Court held that the State could not "invoke sovereign immunity as a bar to an action on the breach of contract" after its agency "improperly rescind[ed] an express executory contract with a private vendor who suffer[ed] a loss of profit as a consequence." *Id.* at 5.

In so doing, this Court began with the Constitution's provision that sovereign immunity can be waived by general law. *Id.* (citing Art. X, § 13, Fla. Const.). Despite the Legislature's failure to waive immunity from contract actions directly, as it had done for tort actions, this Court recognized that "the legislature ha[d], by general law, explicitly empowered various state agencies to enter into contracts," and had "authorized certain goals and activities which [could] only be achieved if state agencies ha[d] the power to contract for

necessary goods and services." *Id.* (citations omitted). Because such contracts would be illusory if parties could not enforce them in court against state agencies, this Court reasoned that the Legislature had expressly waived sovereign immunity through its authorization to contract. *Id.*

Pan-Am thus establishes that citizens can bring contract claims against the State when a state agency enters into an "express, written contract[] into which the state agency has statutory authority to enter." 471 So. 2d at 6. But *Pan-Am*'s reasoning does not compel, or even suggest, the same conclusion when the Legislature has not clearly authorized the type of contract at issue. Instead, foundational precedent from this Court tells us the opposite: citizens cannot bring claims against the State without the Legislature's clear and unequivocal authorization to do so. *Spangler*, 106 So. 2d at 424; *see also, e.g.*, *Barnett*, 303 So. 3d at 513 (reaffirming *Spangler*). As a result, if the Legislature has neither "clear[ly]" nor "unequivocal[ly]" provided that an agency has authority to enter into a given contract, the agency is immune from suit. *Spangler*, 106 So. 2d at 424; *Pan-Am*, 471 So. 2d at 5.

This Court, time and time again, has reaffirmed this understanding of *Pan-Am*. *See, e.g.*, *Fla. Dep't of Transp. v. Schwefringhaus*, 188 So. 3d 840, 844–45 (Fla. 2016) (asking whether an agency "had statutory authority to enter into" an agreement); *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks*, 986 So. 2d 1260, 1262 (Fla. 2008) (describing *Pan-Am* as preventing state entities from invoking a sovereign-immunity defense after "enter[ing] into a legislatively authorized contract"). Some district courts, however, have read *Pan-Am* as effectively creating a super-constitutional, common-law-based exception to sovereign immunity, detached from any legislative authorization. *See, e.g.*, *Univ. of Fla. Bd. of Trs. v. Rojas*, 351 So. 3d 1167, 1170 (Fla. 1st DCA 2022) (describing Article X, Section 13 and *Pan-Am* as two separate means by which sovereign immunity can be waived); *Fla. Int'l Univ. Bd. of Trs. v. Alexandre*, 365 So. 3d 436, 439 (Fla. 3d DCA 2023) (describing *Pan-Am*'s rule as "a common law exception" to the constitutional waiver process); *Heine v. Fla. Atl. Univ. Bd. of Trs.*, 360 So. 3d 412, 418 (Fla. 4th DCA 2023) (framing the question as whether the Legislature has waived immunity *or* whether a contract exists). Those holdings overlook *Pan-Am*'s requirement that, in any

breach-of-contract action against the State, a court first must consider whether the contracts at issue were expressly authorized by statute.

Rojas is thus wrong to suggest (at 24) that sovereign immunity can be waived by a state agency's mere act of entering into a contract. Legislative authorization to contract will sometimes be uncontroversial, of course, so the question of immunity may simply turn on whether the claim arises from breach of an "express, written contract[]." *Pan-Am*, 471 So. 2d at 6; *see, e.g.*, *Schwefringhaus*, 188 So. 3d at 843 n.3 (summarily dispensing with the authorization analysis because prior cases had already established that contracts of the type at issue were authorized by general law). But the Florida Constitution and *Pan-Am* are clear that the general law waives sovereign immunity, not the contract made possible by it.

II. The Legislature did not clearly and unequivocally authorize the University to enter into contracts guaranteeing uninterrupted access to unspecified extracurricular services in exchange for mandatory fees.

In this case, no statute clearly and unequivocally authorizes the State to enter into the type of contract Rojas asserts.

Rojas claims (at 7, 24) a contract by which he would pay fees to the University in exchange for a smorgasbord of different services, ranging from bicycle repair to preferred seating for home basketball games to access to "campus-wide health initiatives." Critically, he does not break his claim down into separate contracts corresponding to the separate fees supporting each of these services. Rather, he alleges a single, umbrella contract that entitles him to lump-sum recoupment of all his fees if he does not get all he expects. The burden to establish legislative authorization for such a contract rests on Rojas, the party alleging the contract and the breach. *City of Miami v. Robinson*, 364 So. 3d 1087, 1091 (Fla. 3d DCA 2023); *Alexandre*, 365 So. 3d at 441 n.6. Far from meeting this burden, Rojas has made no effort to do so. Even if he had tried, he would not have succeeded.

Broadly speaking, it is true that the University is a "public body corporate" with "all the powers of a body corporate, including the power . . . to contract and be contracted with, to sue and be sued, [and] to plead and be impleaded in all courts of law or equity." § 1001.72, Fla. Stat. But that does not mean that the University has free range to enter into any imaginable contract and thereby waive

the State's sovereign immunity. This Court has made clear that these kinds of general grants of power are not enough to waive sovereign immunity from specific causes of action. In *Spangler*, the relevant statute provided that the defendant Florida State Turnpike Authority had the power "to sue and be sued in its own name." 106 So. 2d at 423 (quoting § 340.06, Fla. Stat.). "[T]his general provision," however, "[wa]s not adequate in and of itself to constitute a waiver of immunity." *Id.*

If a statute providing that a state entity can generally be sued is not clear and unequivocal enough to waive sovereign immunity, then neither is a statute providing that a state entity has the general capacity to "contract." *See Arundel Corp. v. Griffin*, 103 So. 422, 422–23 (Fla. 1925) (Board of Commissioners of Everglades Drainage District was immune from suit for negligence, even though it had the power "to sue and be sued" *and* the power "to make contracts"). Under *Spangler*, the Legislature must supplement such a provision with a statute specifically authorizing the type of contract alleged. The Legislature has done so for the University in numerous instances. *See, e.g.*, §§ 1005.02, 1007.25(9)–(10), Fla. Stat. (University may

"offer[] to furnish instruction" for academic credit and "offer[] to confer" degrees to students who complete certain programs of study); § 1009.98(1), Fla. Stat. (University may enter into "advance payment contracts" with students who wish to pay tuition and fees up front rather than per semester).

What the Legislature has not done is authorize a contract of the exotic nature imagined by Rojas. Rojas alleges an umbrella contract of sorts, under which he was guaranteed full access to all services the University would ordinarily make available and to which he had become accustomed. He thinks this contract was breached when COVID-19 prevented the University from offering him universal access. Under his theory, the University would apparently be open to lawsuits every time a hurricane or other cataclysmic weather event temporarily shut the campus down, or whenever the University altered its service offerings mid-schoolyear. Rojas is unable to point to any statute authorizing such an extraordinary contract.

The closest Rojas can come to such authorization is § 1009.24, Fla. Stat.—the statute cited by the circuit court and Judge Makar in his dissent from the First District's reversal of the circuit court. That

statute directs the University to "establish separate activity and service, health, and athletic fees," which are to be "collected as component parts of tuition and fees," "retained by the university," and "paid into the separate activity and service, health, and athletic funds." § 1009.24(9), Fla. Stat.; *id.* § 1009.24(10)–(12). But the establishment of these mandatory fees in § 1009.24(9)–(12) is more akin to imposing a tax than authorizing a contract. *See Kathleen Citrus Land Co. v. City of Lakeland*, 169 So. 356, 358 (Fla. 1936) ("A burden directly or indirectly imposed upon persons or property for the support of governmental activities is an exercise of the taxing power."). Taxes, of course, do "not create any contract right"; they merely "lay[] a burden upon" those taxed and "create[] the duty to pay the tax." *Bishoff v. State*, 30 So. 808, 812 (Fla. 1901). Rojas has not couched his claim as one for refund of taxes, nor could he absent authorization to sue. *See, e.g.*, § 72.011(1)(a), Fla. Stat. (no mention of chapter 1009).

The reason the mandatory fees operate more like taxes than consideration for contracts is that they are scaled to tuition and paid into general funds, unaccompanied by the guarantee of any

particular service or benefit. The money from the student activity-and-service fee, for example, is drawn from the activity-and-service fund and distributed according to a budget put together by the student government association. § 1009.24(10)(b), Fla. Stat. The money in the fund might be transferred elsewhere, *see id.* § 1009.24(9); it might also be rolled over into the next year, *id.* § 1009.24(10)(b). The University, because it is not authorized to decide whether to provide specific services to students, cannot promise access to any specific service. *See Pan-Am*, 471 So. 2d at 5 (requiring the Legislature to "explicitly empower[]" the University to bind itself in such a way or to "authorize[] certain goals and activities which can only be achieved" if the University has such power).

To be sure, § 1009.24(9)–(12) might authorize universities to contract with vendors and service providers for the benefit of students. For example, § 1009.24(10)(b) authorizes the university to spend the money in the activity-and-service fund "for lawful purposes to benefit the student body in general" through "student publications," "grants to duly recognized student organizations" and other things, so long as students are not separately charged for them. If

the University wanted to draw money from this fund to support a "student-government-association-sponsored concert[]," *id.*, such an authorization would seemingly allow the University to enter into a contract with a musician, sound engineer, or the like. And if the University reneged on its promise to pay for such services, the musician or sound engineer presumably could sue the University for breach of contract. But nothing in paragraphs (9)–(12), narrowly construed, can be read as authorizing a money-back guarantee of student access to each and every service ever offered by the University.

In contrast to the mandatory-fee provisions in paragraphs (9)–(12), a separate paragraph of § 1009.24 authorizes the University to establish fees pegged to "reasonable costs" of offering things such as replacement diplomas and transcripts, childcare, and access to transportation. *Id.* § 1009.24(14), Fla. Stat. But nowhere in § 1009.24 has the Legislature authorized an umbrella contract in which students pay a lump-sum fee and, in return, are guaranteed either unfettered, uninterrupted access to the full panoply of services the University may provide or recoupment of the part of the fee that

went unused. Section 1009.24 thus fails to provide clear and unequivocal authorization for the kind of contract Rojas claims here.

Further casting doubt on any waiver of immunity broader than the authorizations in paragraph (14), § 1009.24(4)(e) allows the University to charge other fees "related to specific activities" only if the activities are "optional" and "payment of such fees is not required as a part of registration for courses." The mandatory fees Rojas zeroes in on are component parts of tuition. And while the mandatory fees do benefit students by improving the quality of life on campus, they are not "related to specific activities" (other than, perhaps, transportation access). They thus do not guarantee access to or funding of any specific activity.

When this Court has deemed the Legislature to have waived sovereign immunity against a claim for breach of contract, the statute in question has contained authorizing language much clearer and less equivocal than anything Rojas can point to in this case. In *Pan-Am*, for instance, the Legislature granted the Department of Corrections purchasing power and directed its facilities to "purchase specialized services when available and appropriate," rather than

develop its own institutional capabilities. § 20.315(8)(b)10., (11)(d), Fla. Stat. (1983). Similarly, in *Schwefringhaus*, the Department of Transportation had authority under § 337.11, Fla. Stat., to enter into contracts for road construction and maintenance, pursuant to which it entered into an agreement allowing it to build and maintain a road crossing over railroad tracks. 188 So. 3d at 844–45. And in *ContractPoint*, the Department of Environmental Protection had authority under § 258.007(3), Fla. Stat., to "grant privileges, leases, concessions, and permits for the use of land for the accommodation of visitors." That authority supported a concessions agreement between the Department and ContractPoint, whereby ContractPoint would "finance, construct, and operate" facilities in eight state parks. 986 So. 2d at 1262, 1268–72; *cf. also, e.g.*, *Citrus Cnty. Hosp. Bd. v. Citrus Mem'l Health Found.*, 150 So. 3d 1102, 1107 (Fla. 2014) (§ 155.40, Fla. Stat., authorized private not-for-profit corporation to take control of public hospital by contract; corporation could therefore sue the State and the hospital board for violation of Florida's Contracts Clause). The authorizing statutes in these cases, even when narrowly

construed, all clearly and unequivocally authorized the State to enter into and be bound by the contracts at issue.

The only other statute Rojas cites, § 768.39, Fla. Stat., even more strongly rebuts any notion that the Legislature waived sovereign immunity here. That statute immunizes all postsecondary institutions in Florida for "reasonably necessary actions" taken in compliance with government guidelines designed to mitigate the spread of COVID-19. § 768.39(3)(a), Fla. Stat. And § 768.39(4) provides that "invoices, catalogs, and general publications of an educational institution"—exactly what Rojas relies on here—are "not evidence of an express or implied contract to provide in-person or on-campus education." Far from surplusage, as Rojas claims (at 60–62), § 768.39 strengthens the State's sovereign immunity from suit. It also affords its own immunity from damages where the State had entered into an express contract pursuant to one of the above-noted express authorizations to do so that are inapplicable here. These provisions, both independently and taken together, confirm that the Legislature intended to insulate universities from the very type of lawsuits the Court is presented with now.

In sum, the State, as sovereign, has inherent immunity from suit. *Spangler*, 106 So. 2d at 424. For suit on a contract, that immunity is waived only by clear and unequivocal authorization for the State to enter into the contract. *See Pan-Am*, 471 So. 2d at 4–5. In this case, the Florida Legislature has not provided such clear and unequivocal authorization. The University is therefore immune from Rojas's breach-of-contract suit.

CONCLUSION

This Court should approve the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.370 and contains 3,763 words.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this 12th day of February, 2024, to the following:

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