

**IN THE SUPREME COURT
STATE OF FLORIDA**

ANTHONY ROJAS,

Petitioner,

Case No.: SC23-126

Lower Tribunal No(s):
1D21-3430

v.

UNIVERSITY OF FLORIDA BOARD
OF TRUSTEES,

Respondent.

_____ /

**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES
ANSWER BRIEF**

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PRELIMINARY STATEMENT

This Court accepted jurisdiction of the following question certified by the First District as one of great public importance:

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?

The answer to the certified question is yes.

This Court has long recognized that it should address the legal issue of whether a contract is an express one to waive sovereign immunity at the motion to dismiss stage. This requires a substantive analysis of the complaint's allegations and attachments. Otherwise, the University of Florida Board of Trustees ("the University") loses its immunity from being sued by which public funds are protected.

Here, while the student agrees to pay tuition and fees to enroll, neither the Complaint's allegations nor attachments to the Complaint show the University expressly obligated itself to provide specific services as Petitioner demands. As such, the First District correctly held the University's sovereign immunity bars Petitioner's breach of contract claim.

I. STATEMENT OF CASE AND FACTS

This litigation attacks the State's responses to COVID-19 in which the University strove to ensure the health and safety of its students. In accord with the Governor's COVID-19 executive orders and the Florida Board of Governors directives, the University took action in March of 2020 to transition to remote learning. To protect on-campus students and staff, the University urged them to return home and limited or closed many of the campus facilities. This was no bait-and-switch to bring students onto the University's campus at the start of the semester to supposedly leave them empty-handed months later, but the premise of Petitioner's lawsuit challenges how the State and the University responded to an emergency pandemic on the campus in a responsible and legal manner.

A. Petitioner's allegations

Petitioner filed a class action complaint against the University alleging two counts for unjust enrichment and breach of contract. R. 41-60.

He seeks relief for various fees, but not tuition, paid when the University implemented restrictions on campus due to COVID-19.

R. 41. Specifically, Petitioner sued on behalf of students who allegedly:

(i) entered express contracts with [the University] for specific on-campus resources and services during the Spring and Summer 2020 terms, (ii) paid fees in exchange for receiving or accessing specific on-campus resources or services during the 2020 Spring and/or Summer 2020 terms, (iii) did not receive the on-campus services or access to on-campus resources ...

and did not receive a refund of those fees. R. 41-42.

The particular fees at issue are: activity and service fee, transportation fee, athletic fee, and health fee. R. 47-48, 56-57.

While a University webpage referenced but not attached to the complaint describes these fees, R. 48-49, the first exhibit is Petitioner's Financial Liability Agreement. R. 78-81. It references that Petitioner's right to register at the University is "expressly conditioned upon [his] agreement to pay the cost of tuition, fees, and other charges." R. 78-81. In pertinent part, the Financial Liability Agreement provides:

I agree to pay all [University] debts and charges pursuant to [University] 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 cost of tuition, fees, and other charges ...

R. 78-81.

The other documents attached as exhibits to the complaint are Petitioner’s tuition statement (which did not detail each of the fees at issue) and a University webpage of various fees estimates for 2019-2020 (which did not further describe each fee). R. 71-77.

B. The lower courts’ analysis of the sovereign immunity issue

The University filed a motion to dismiss asserting that Petitioner’s claims were barred by sovereign immunity. R. 89-104. The circuit court dismissed Petitioner’s unjust enrichment claim but denied the motion on the breach of contract claim. R. 173-183. The circuit court held the complaint’s attachments “are sufficiently definite to constitute an express contract because they incorporate section 1009.24,” although the court did not analyze section 1009.24 itself. R. 20.

The University appealed, and the First District Court of Appeal reversed the denial as to the breach of contract claim. R. 527-540. The First District stated that for Petitioner to pierce the University’s sovereign immunity, “there must be an express, written agreement that is legislatively authorized.” *Univ. of Fla. Bd. of Trs. v. Rojas*, 351 So. 3d 1167, 1170 (Fla. 1st DCA 2022) (citing *Pan-Am Tobacco v.*

Dep't of Corr., 471 So. 2d 4, 6 (Fla. 1985)). The First District analyzed the attached documents and found their plain reading failed to “obligat[e] the University to provide specific, on-campus services to any student during any specific time.” *Id.* at 1171. The First District also acknowledged the absence of any contractual language for a refund in this case. *See id.* Accordingly, the First District held that the complaint and its attachments “do not constitute an express, written contract sufficient to overcome sovereign immunity.” *Rojas*, 351 So. 3d at 1169.

The First District recognized the Financial Liability Agreement provides a right to enroll upon the student’s agreement to pay tuition and fees. *See id.* But the First District found the Financial Liability Agreement’s provision for “educational services” to be too general to constitute the University expressly promising in-person or on-campus services. *See id.* The First District considered the other attached documents, finding none created an express contract for several reasons. First, the estimate of tuition and fees obligated no specific services. Second, the University webpages formed no binding contract. Third, section 1009.24, rather than creating implied

contractual conditions, provides discretion to the University over the use of fees. *See id.* at 1171–72.

The dissent in *Rojas* found the language of the Financial Liability Agreement enough to form a contract. *See id.* at 1174. In the dissent’s view, the additional documents further support a contractual arrangement of fees paid for services that are referenced in section 1009.24. *See id.* The dissent would have held an express written contract existed to waive sovereign immunity at the motion to dismiss stage. *Id.* at 1175.

The First District certified a question of great public importance to this Court concerning the doctrine of sovereign immunity applied to a breach of contract claim. *See id.* at 1169.

II. SUMMARY OF THE ARGUMENT

The University has sovereign immunity as a state entity. Article X, section 13 of the Florida Constitution provides a waiver of sovereign immunity “by general law.” When considering a statutorily-authorized contract to waive sovereign immunity, this Court has required a contract that is express and written. As the University enjoys immunity from suit as a matter of separation of

powers, courts must evaluate at the earliest stage of the litigation whether an express, written contract exists.

Petitioner's complaint alleges an "express" contract for the payment of fees requiring the University to provide "specific on-campus services and resources." The University does not deny that it must provide "educational services" in exchange for tuition and fees paid, but Petitioner does not present any document requiring on-campus services and facilities to be provided in the Spring and Summer 2020 semesters for the fees that were paid. Thus, there is no express, written contract for in-person services and resources as Petitioner demands in his complaint.

Just because Petitioner alleges an "express" contract in his complaint does not make it so. Taking his factual allegations as true, whether a contract is express is a question of legal sufficiency to avoid the application of sovereign immunity. That determination was necessary and proper for the First District at the motion to dismiss stage.

Petitioner argues that various implied covenants should be considered to establish an express contract for specific services for each fee. Petitioner paints an all-or-nothing scenario - either the

University is providing nothing for the fees paid (a supposed illusory contract) or the University must provide certain in-person, on-campus services as Petitioner demands (a supposed express obligation). That's a false choice. The University does provide educational services related to each fee paid; however, the University maintains discretion in how and when it provides those services. Implied covenants do not create an express contractual requirement mandating the specific services at issue here.

Petitioner further argues that section 1009.24 is incorporated into a contract and embodies an express mandate on the University for specific services. The statute certainly sets out the fees at issue - an activity and service fee, transportation fee, athletic fee, and health fee. Yet a close analysis of section 1009.24 reveals more discretion than restriction in how the University applies each fee, including explicit statutory language allowing funds to be carried over to the next fiscal year beyond the Spring and Summer 2020 semesters.

Finally, Petitioner urges this Court to adopt the reasoning from the Kentucky Supreme Court which self-identified with the *Rojas* dissent. But in Kentucky, all that is needed to waive sovereign immunity is a written contract, not an express one. The question

before the First District was whether there is an express, written contract that obligates the University to provide specific fee-related services at a specific time. There is not, and the University's sovereign immunity is not waived.

III. ARGUMENT

A. Standard of review

Under Florida Rule of Appellate Procedure 9.130(a)(3)(F)(iii), the First District reviewed the denial of a motion that “asserts entitlement to sovereign immunity,” and under Rule 9.030(a)(2)(v), this Court has accepted jurisdiction of a certified question of great public importance.

This question of sovereign immunity is a legal issue reviewed *de novo*. *Plancher v. UCF Athletics Ass'n*, 175 So. 3d 724, 725 n.3 (Fla. 2015). A waiver of sovereign immunity for a contract claim “is applicable only to suits on express, written contracts into which the state agency has authority to enter.” *Pan-Am*, 471 So. 2d at 6.

In accordance with *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020), courts should make an initial determination regarding sovereign immunity at the earliest possible stage of the litigation, including a motion to dismiss. At the motion to dismiss

stage, a court tests the legal sufficiency of the complaint, not the factual issues. *The Fla. Bar. v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006); *see also Execu-Tech Bus. Sys. Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000) (“A trial court’s ruling on a motion to dismiss based on a question of law is subject to de novo review.”).

B. Doctrine of sovereign immunity in Florida

Sovereign immunity prevents the State and its entities from being sued without their permission. *See Am. Home Assurance Co. v. Nat’l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). It is a product of the common law and codified in Florida statutes. *Id.* (citing § 2.01, Fla. Stat.). This Court has recognized three principles for upholding sovereign immunity: the preservation of separation of powers, the protection of the public treasury, and the provision of an orderly administration of government. *Id.* (citing cases). These principles are at stake in this appeal.

This Court considers sovereign immunity to be both immunity from suit and immunity from liability. *See Jackson*, 288 So. 3d at 1185. For this case at the motion to dismiss stage:

precisely because sovereign immunity includes immunity from suit, entitlement to sovereign immunity should be established as early in the litigation as possible. That is especially true in

light of the separation of powers principles that animate the doctrine of sovereign immunity.

Id. *Jackson* entreats “courts should determine entitlement to sovereign immunity as early as the record permits.” *Id.* at 1185-86.

Sovereign immunity may be waived in accordance with the Florida Constitution. Article X, section 13 of the Florida Constitution requires: “Provision may be made by general law for bringing suit against the state...”. Thus, statutory (or constitutional) authority must provide for a lawsuit against the State and its agencies. See *Ingraham ex. rel. Ingraham v. Dade Cnty. Sch. Bd.*, 450 So. 2d 847, 848 (Fla. 1984) (“Article X, section 13 of the Florida Constitution provides absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.”); *Am. Home*, 908 So. 2d at 472 (“Only the Legislature has authority to enact a general law that waives the state’s sovereign immunity.”).

In *Pan-Am*, this Court answered a certified question concerning whether a breach of an “express executory contract” could waive sovereign immunity. *Pan-Am* recognized that “[i]n Florida, sovereign immunity is the rule, rather than the exception, as evidenced by

article X, section 13 of the Florida Constitution.” 471 So. 2d at 5. This Court allowed a breach of contract suit to proceed where “the legislature, by general law, explicitly empowered [the state agency] to enter into contracts” and where “[legislature] has authorized certain goals and activities which can only be achieved if [the state agency had] the power to contract.” *Id.* Citing various Florida Statutes (1981), *Pan-Am* reasoned that where the Legislature authorized a state agency to contract, the Legislature similarly intended the contract to be valid and enforceable. *Id.* Thus, this Court held sovereign immunity was waived “only to suits on express written contracts into which the state agency has authority to enter.” *Id.* at 5-6.

Importantly, *Pan-Am* grounded its reasoning in “legislative intent in general law” to overcome the rule of sovereign immunity, or to counter the presumption against waiver of sovereign immunity. *Id.* at 5-6; see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 281 (2012) (“A statute does not waive sovereign immunity [] unless that disposition is unequivocally clear.”).

A waiver of sovereign immunity must be “clear and unequivocal.” *Rabideau v. State*, 409 So. 2d 1045, 1046 (Fla. 1982) (citing *Arnold v. Shumpert*, 217 So. 2d 116, 118 (Fla. 1968)). In *Arnold*, this Court considered whether the statute at issue authorized a county to contract, “and by doing so, to waive its sovereign immunity.” 217 So. 2d at 118. *Arnold* applied the standard:

[w]hen dealing with a statute that purports to authorize such a waiver, this Court has held that such statutory language “must be clear and unequivocal,” “waiver will not be reached as a product of inference or implication,” and that such statutes should be “strictly construed.”

Id. (citing *Spangler v. Fla. State Turnpike Auth.*, 106 So. 2d 421, 424 (Fla. 1958)). In considering whether sovereign immunity was available when a statute authorized a contract, *Arnold* applied the clear and unequivocal standard. *Id.*

Moreover, a waiver of sovereign immunity is strictly construed in favor of the state. *Hardee Cnty. v. FINR II, Inc.*, 221 So. 3d 1162 (Fla. 2017) (citing *Manatee Cnty. v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978)). Particularly relevant in this case, “[t]his Court construes waivers of sovereign immunity narrowly to protect public funds.” *FINR II, Inc.*, 221 So. 3d at 1166 (citing *Rabideau*, 409 So. 2d at 1046; *Town of Longboat Key*, 365 So. 2d at 147; and *Spangler*,

106 So. 2d at 424). In *Town of Longboat Key*, this Court applied the principles that the constitution “requires specific, clear, and unambiguous language in a statute to constitute a waiver of sovereign immunity” and the governmental entity “enjoys the state’s sovereign immunity unless the Legislature provides otherwise by general law.” 365 So. 2d at 147. *Town of Longboat Key* found that where the Legislature has established a certain remedy, which was in that case a process to petition for services, courts will enforce that remedy. *Id.* This Court applied the strictly construed standard when evaluating a statute which ultimately demanded a remedy. *See Pan-Am*, 471 So. 2d at 6 (citing *Town of Longboat Key*, 365 So. 2d 143, for the court’s authority to look “to legislative intent” when evaluating sovereign immunity).

C. Petitioner misapplies three contract-related principles, which do not apply in this case to determine whether there is an express contract for specific services

The First District reasoned that, “for waiver-by-contract, there must be an express, written agreement that is legislatively authorized.” *Rojas*, 351 So. 3d at 1170 (citing *Pan-Am*, 471 So. 2d at 6). As he argued at the District Court, Petitioner seeks to establish

three principles for this case, IB at 23-24, yet each is inconsequential and does not demonstrate that an **express** contract exists for the specific services that Petitioner alleges.

First, Petitioner argues that the First District's decision allows for a contract that requires students to pay fees but does not obligate the University "to provide anything in exchange for those fees." IB at 24. In other words, Petitioner argues against an illusory contract.

The First District found that a student's agreement to pay tuition and fees gained the right to enroll as well as the University's provision of educational services. *Rojas*, 351 So. 3d at 1171. Yet that court held while "educational services" are generally mentioned in the Financial Liability Agreement, there is no express provision for "the University to provide in-person or on-campus services to a student at any specific time." *Id.* The First District is not saying the University will provide nothing, but that the University is not obligated to provide a specific service in a specific manner as Petitioner demands.

Second, Petitioner argues that certain University webpages are to be incorporated into the contract. IB at 26-27. The Financial Liability Agreement recommends that a student view tuition, fees,

and other charges via the centralized ONE.UF website. R. 78. Petitioner states the website contains a link to a “Non-Tuition Charges” webpage which provides the following statement: “[n]on-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.” IB at 27. But that webpage does not detail specific, nor exclusive, services that must be provided for each fee. R. 80.

The First District questioned whether such webpages and statements are legally binding, and ultimately the First District found they place no obligation upon the University to provide specific services. *Rojas*, 351 So. 3d at 1171. Petitioner argues for the incorporation of such statements into a contract with the University, but his reliance on *First Guar. Corp. v. Palmer Bank & Tr. Co. of Fort Myers, N.A.*, 405 So. 2d 186, 188 (Fla. 2d DCA 1981) is misplaced. IB at 27-28. That case specifically addressed the statute of frauds to find the statute’s essential terms requirement is satisfied by an incorporated writing. *See First Guar.*, 405 So. 2d at 188 (citing caselaw interpreting the statute of frauds). Moreover, that case recognized that parol evidence is only admitted where a contract is

ambiguous. *See id.* at 190. Here, Petitioner asserts parol evidence to cure a supposed ambiguity. IB at 28 (citing *Mac-Gray Servs, Inc. v. Savannah Assocs. of Sarasota, LLC*, 915 So. 2d 657, 660 (Fla. 2d DCA 2005), to address a “latent ambiguity in a contract”). If such an ambiguity exists in a contract with the University, it cuts against an assertion of there being an express contract.

Third, Petitioner invokes section 1009.24. IB at 29-30. Petitioner relies on *Shavers v. Duval County*, 73 So. 2d 684, 689 (Fla. 1954), which reasoned broadly that the federal and state constitutions and all statutes are part of every contract. IB at 29. The existence of a regulatory statute like section 1009.24 determines how the University can or cannot act, including when the University contracts, but *Shavers* did not say statutory provisions are transformed into actual contractual terms. And here, there is no allegation the University is violating the regulatory law.

Petitioner stretches his incorporation theory to insinuate that the First District agreed that section 1009.24’s provisions are “implied conditions [into] express contracts.” IB at 29. That quotation was not the *Rojas* majority’s “acknowledgement” as Petitioner claims, *see* IB at 29, but the court instead quoting

Petitioner's own argument and brief. *Compare Rojas*, 351 So. 3d at 1171 to *Rojas Answer Br.* at 28. Further, as the First District correctly held, section 1009.24 does not direct the University to provide specific services. *Rojas*, 351 So. 3d at 1172.

D. In this case and other District Court cases, the contracts alleged to be express are not because they do not require specific services

i. Petitioner's complaint and attachments are not legally sufficient to constitute an express contract

Petitioner asserts he and other class members entered into a contract with the University based on the Financial Liability Agreement that states in part:

I agree to pay all [University] debts and charges pursuant to [University] 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.

R. 78-81. The document sets out two expectations with respect to Petitioner's payment. One, the University provides Petitioner "educational services," and two, he has a right to register for classes. The "expressly conditioned" phrase modifies "right to register" and not "educational services." As the First District held, "educational

services” is a general phrase that does not promise any specific on-campus services during any particular semester. *Rojas*, 351 So. 3d at 1171.

Petitioner’s other attachments do not reveal any specific fee-based services. His tuition statement lists tuition charges for four classes and a “University DL Fee” for \$6.00. R. 71. Nothing more. And his 2019-20 Academic Year Tuition and Fees webpage only lists an estimate of the cost of each fee without further description. R. 73-74. These attachments plainly do not demonstrate “specific on-campus resources and services during the 2020 Spring and/or Summer 2020 terms” to substantiate an express contract as alleged in Petitioner’s complaint. R. 41.

Petitioner generally asserts that he and members of the class “entered express contracts,” but a court must still evaluate the legal sufficiency of his allegations. “The purpose of a motion to dismiss is to test the legal sufficiency of a complaint, not to determine factual issues.” *Sealy v. Perdido Key Oyster B. and Marina, LLC*, 88 So. 3d 366, 367–68 (Fla. 1st DCA 2012); *see also Berdick v. Costilla*, 97 So. 3d 316, 318 (Fla. 2d DCA 2012) (same). Taking the complaint’s allegations as true, courts engage in a legal analysis to ultimately

determine the sufficiency of a complaint when examining whether a cause of action exists. *Vienneau v. Metro. Life Ins. Co.*, 548 So. 2d 856, 859 (Fla. 4th DCA 1989) (“the trial court was bound to accept [the plaintiff’s] allegations as true, and then proceed to resolve the question of law of whether the allegations sufficiently stated a cause of action”); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d DCA 1985) (“The existence of a clear and unambiguous contract is the best evidence of the intent of the parties, and its meaning and legal effect are questions of law for determination by the court.”).

Here, the First District correctly concluded the complaint and the attached exhibits did not sufficiently plead an express contract. “[A]n express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language.” *Rabon v. Inn of Lake City, Inc.*, 693 So. 2d 1126, 1131 (Fla. 1st DCA 1997) (quoting *Black’s Law Dictionary* 323 (6th Ed.1990)).¹ Petitioner’s mere allegation of a

¹ The *Rojas* dissent relied on *Waite Development, Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004) for the point that various documents can constitute a written contract if the documents themselves “evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract.” While the *Waite* court found that standard was met where

contract that is “express” is not sufficient to waive the University’s immunity from suit. *See Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 213 (Fla. 1983) (facts for a waiver of sovereign immunity must be pled in the complaint); *Arnold*, 217 So. at 120 (specific methods must be alleged in the complaint to waive sovereign immunity). The First District appropriately conducted its motion to dismiss analysis to find that the attachments to Petitioner’s complaint revealed no contractual terms requiring specific on-campus services in the semester in which fees are paid. While the University is to provide “educational services,” there are no contractual words that detail what those services must be. The First District ultimately held there is no express, written contract obligating the University “to provide specific services at a specific time in a specific way.” *Rojas*, 351 So. 3d at 1172.

the City agreed to provide water, sewer, and natural gas lines to each lot upon construction of subdivision roads, here, the documents lack similar specificity for what the University is to provide.

ii. Other District Courts decided similar cases addressing whether universities were required to provide specific on-campus services

Petitioner asserts that the First District below and the Second District in *University of South Florida Board of Trustees v. Moore*, 347 So. 3d 545 (Fla. 2d DCA 2002), *review denied*, reached different results even though the financial liability and registration agreement of each school “contains the same terms.” See IB at 30-31. That’s not correct as the agreements’ language differed. Compare *Rojas*, 351 So. 3d at 1171, n.4, *with Moore*, 347 So. 3d at 549 (“I am entering a legal, binding contract with USF...”). At any rate, *Moore* did not definitively find an express contract but delayed that inquiry unlike *Rojas*.

Moore addressed the University of South Florida (“USF”) financial liability agreement, which reads: “I am entering a legal, binding contract with USF and I hereby acknowledge that I have read and understand the terms and conditions of this registration agreement.” 347 So. 3d at 549. The *Moore* court found the phrase “terms and conditions” may consist of a promise by USF to provide

specific services. *Id.* at 549-50.² The Second District acknowledged that such terms and conditions and associated registration policies must be examined in order to determine whether USF was obligated to provide specific services, yet the Second District left that examination for the summary judgment stage. *Id.* at 549.

Where *Moore* erred is, once identifying the expression of a contract (from the language, “I am entering a legal, binding contract with USF”), the Second District did not proceed to evaluate whether it was express for purposes of USF’s immunity from suit. *Id.* This Court, in *Jackson*, has said courts must do so as early as possible in

² *Moore* quoted at length *Shaffer v. George Washington Univ.*, 27 F.4th 754, 762-63 (D.C. Cir. 2022), a case addressing a similar lawsuit. *Moore*, 347 So. 3d at 550. *Moore*’s block quotes on contract interpretation, however, stop short of the *Shaffer* punchline:

Plaintiffs contend that a material term of their contracts with the Universities, whether express or implied, was that the Universities would provide on-campus education and experiences in exchange for their tuition and fees. We easily conclude that Plaintiffs fail to plausibly allege the parties had *express* contracts with such a term, as they point to no language indicating that the provision of in-person education and on-campus services was an explicit term of the parties’ agreements.

Shaffer, 27 F.4th at 763.

the litigation in respect of separation of powers to not subject the executive branch to litigation when sovereign immunity exists. 288 So. 3d at 1185. Instead of evaluating whether the phrase “terms and conditions” expressly required specific services, *Moore* punted and exposed USF to further litigation.

Petitioner also challenges the Financial Liability Agreement’s enforcement provision, for which a failure to pay may cause ineligibility to attend classes and participate in “classes or other university activities.” IB at 31; R. 78. Yet, like his pursuit of “educational services,” Petitioner identifies no specific on-campus resources or services that the University would withhold if a student was ineligible for university activities. It is conjecture whether such activities would include fee-based services.

Petitioner argues that *Rojas* and similar decisions among the District Courts “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.” IB at 32. But what Petitioner misunderstands is that the “specific set of contractual terms” is what is needed to make an express contract. Petitioner assumes that an

alleged contract is “express” without identifying any provisions to make it so. He puts the cart before the horse.

In his Initial Brief, Petitioner discusses the Third District’s decision in *Florida International University Board of Trustees v. Alexandre*, 365 So. 3d 436 (Fla. 3d DCA 2023). IB at 32. *Alexandre* found that a contract existed between the student and the university, but it was an implied, not express, contract. 365 So. 3d at 440. Considering whether the contract impliedly incorporated other documents, the Third District held there is no incorporation of “express terms requiring FIU to provide on-campus or in-person services as an exchange for the fees.” *Id.*

Petitioner also discusses the Sixth District’s decision in *Goldstein v. University of Central Florida Board of Trustees*, No. 6D23-1203, 2023 WL 5492043 at *1 (Fla. 6th DCA, Aug. 25, 2023), and the Fourth District’s decision in *Heine v. Florida Atlantic University Board of Trustees*, 360 So. 3d 412 (Fla. 4th DCA 2023), as examples of decisions in line with the *Rojas* reasoning. The Sixth District stated that “Goldstein’s complaint incorporates no such documents containing express terms requiring UCF to provide on-campus or in-person services in exchange for fees.” *Goldstein*, 2023 WL 5492043

at *2; accord *Dist. Bd. of Trs. of Miami Dade Coll. v. Verdini*, 339 So. 3d 413 (Fla. 3d DCA 2022).

The Fourth District affirmed the trial court’s decision, which held that the attachments to the complaint did not “clearly and unequivocally show the existence of an express contract.” *Heine*, 360 So. 3d at 415-16. *Heine* reached two important conclusions. First, the Fourth District held the plain language of section 1009.24 did not authorize the lawsuit. *Id.* at 418. Second, the Fourth District applied *Jackson* to justify the trial court’s proper review of the available attachments to the complaint to determine no express contract existed. *Id.* at 419.

Heine faulted *Moore* for not applying *Jackson* to evaluate sovereign immunity on the available documents. *Id.* When the District Courts have tested the legal sufficiency of each complaint and any alleged contract-forming documents at the motion to dismiss stage, they have uniformly found no provision expressly requiring specific services for the fees.

E. Petitioner’s reliance on implied covenants does not create or facilitate an express, written contract for the specific services he seeks

Petitioner argues, on one hand, that there cannot be an illusory contract and, on the other hand, that implied covenants of good faith and fair dealing are read into an express contract. But those theories fail to first address whether an express contract exists for the specific services that Petitioner demands. In a footnote, Petitioner relies on *Champagne-Webber v. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988) in that, where an express, written contract is in place, sovereign immunity may be contested by either an express or an implied covenant of that existing contract. IB at 35, n. 8. In the Florida Supreme Court’s review of *Champagne-Webber’s* approach, this Court held that:

[b]inding the sovereign to the implied covenants of an express contract is quite different from requiring a sovereign to pay for work not contemplated by that contract.

Cnty. of Brevard v. Miorelli Eng’g, Inc., 703 So. 2d 1049, 1051 (Fla. 1997) (quashing the denial of the County’s motion asserting sovereign immunity). The same is true here where Petitioner seeks to add new obligations onto the University when the complaint’s attachments do not contemplate specific services. Even considering

Petitioner's asserted implied covenants below, the specific services that Petitioner alleges in his complaint are outside the scope of the Financial Liability Agreement and other attachments. *See id.* The Financial Liability Agreement's "educational services" language "falls short of conveying an express promise" and the webpages cited are not "legally binding for purposes of waiving sovereign immunity." *Rojas*, 351 So. 3d at 1171. In other words, the notion of specific services required at specific times for fees paid is not found in the complaint's attachments (the alleged express contract) but only alleged by the Petitioner in his complaint.

Petitioner argues the implied covenant of good faith and fair dealing is a "gap-filling default rule." IB at 36 (citing *Overseas Inv. Group v. Wall St. Electronica, Inc.*, 181 So. 3d 1288, 1291 (Fla. 4th DCA 2016)). To raise an argument for an implied covenant, Petitioner must first demonstrate the existence of an express, written contract, which, again, he has not. In *Resnick v. AvMed, Inc.*, the Eleventh Circuit court found, under Florida law, that an implied covenant of good faith and fair dealing cannot alone create a breach of contract claim. 693 F.3d 1317, 1329 (11th Cir. 2021).

Petitioner further asserts an implied covenant is “usually raised when a question is not resolved by the terms of the contract.” IB at 36 (citing *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999)). However, the implied covenant of good faith must “relate[] to the performance of an express term of the contract.” *Id.* (quoting *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1235 (Fla. 4th DCA 2001)). Here, Petitioner cannot rely on the implied covenant of good faith because he fails to demonstrate the existence of an express contract requiring the University to provide specific on-campus, in-person services at a specific time.³

Petitioner adopts a false premise: “The *Rojas* majority contends that the 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.” IB at 38. But that is not what *Rojas* held. It would be a dubious understanding of the First District’s

³ Petitioner attempts to turn the tables by requiring a contract to have a “no refund” for no services clause, relying on *Stokes v. DISH Network, LLC*, 838 F.3d 948 (8th Cir. 2016), and *McAuliffe v. Vail Corp.*, 69 F.4th 1130 (10th Cir. 2023). IB at 37. That is not relevant as the University is not altogether denying services for the fees paid. The University is just not mandated by a contract for specific on-campus services in the 2020 Spring and Summer semesters.

decision to think that **if** an express contract existed that the University could provide **no** services at all in exchange of fees.

Petitioner recognizes this in his reliance on implied covenants due to “the agreement’s failure to specify which services must be provided []. When a contract does not expressly set forth a term within its four corners, the implied covenant of reasonableness will apply.” IB at 43 (citing cases).⁴ Accordingly, the University may provide some form of services or resources at some time related to the fees paid. Petitioner argues the University is obligated to provide “something,” IB at 44,⁵ yet the University does not dispute providing

⁴ Petitioner relies on *Omori v. Brandeis University*, 635 F. Supp. 3d 47, 58 (D. Mass. 2022), for the point that students would have expected in-person services. But in that case, the court found multiple indicators of such services including Massachusetts law on a contractual relationship between the school and its students governed by the school’s promotional materials as well as a higher tuition for studio classes than online classes. *Omori*, 635 F. Supp. 3d at 54-55. The court found on-campus services were “reasonably expected” by students; that standard was sufficient for the existence of a contract as *Omori* did not involve an express contract. *Id.* at 55.

⁵ Petitioner relies on *Maor v. Dollar Thrifty Automobile Group, Inc.*, 303 F. Supp. 3d 1320, 1325 (S.D. Fla. 2017), where a fee was charged for tolls but never sent to the toll collector. The *Maor* court’s holding was based on where “courts denied motions to dismiss because the complaints alleged the breach of a contract term imposing costs on customers that were labeled for specific purposes.” 303 F. Supp. 3d at 1325. Yet of course in the instant case, the question is whether

“educational services.” The University disputes the existence of an express, written contract requiring specific services.

Lacking an express contract, Petitioner merely relies on implied covenants. But, as this Court has said, “waiver [of sovereign immunity] will not be found as a product of inference or implication.”

Am. Home, 908 So. 2d at 459.

F. Section 1009.24, Florida Statutes, governs the University’s use of fees without requiring services that are on-campus, in-person and during the semesters in which Petitioner paid fees

The circuit court in this case denied the University’s motion to dismiss the breach of contract claim because it held the complaint’s attachments created an express contract by incorporating section 1009.24. R. 20. The trial court, however, did not consider whether section 1009.24 requires any specific services for the fees at issue. In the First District’s analysis of section 1009.24, it found the statute provides discretion to the University in its use of the fees. *Rojas*, 351 So. 3d at 1171.

fees were expressly for specific on-campus services, rather than generally for “activity and service” or “athletic” or “health.” *Maor* is distinguished because the fees at issue here are not for specific purposes.

Petitioner's relief is premised on four fees which he describes based on various University webpages as follows: an "Activity and Service Fee" to "provide services for all student body and cater to overall enrichment in safety, entertainment, health, professional skills and personal development;" a "Health Fee" that "goes to many campus-wide health initiatives;" an "Athletics Fee" that gives "access to student sections and discounted pricing for athletic events;" and a "Transportation Access Fee" that "is used to help support the on-campus shuttle bus system" and pays for rides "on [the Gainesville] Regional Transit Service." R. 47-48. Petitioner asserts these services "could only be provided on campus, in-person," despite the general webpage statements. IB at 43. As shown below, Petitioner has not sufficiently pled his descriptions are the required or exclusive use of each fee.

Petitioner states the use of these fees with references to University webpages is "entirely consistent with § 1009.24." IB 48-49. Indeed, Section 1009.24 supports the First District's conclusion that no provision requires the University to provide a specific service on-campus or in-person at a specific time. *Rojas*, 351 So. 3d at 1172. Section 1009.24 mandates that all students, other than those

exempt,⁶ must be charged fees (with no statutory provision for a refund of those fees). § 1009.24(2), Fla. Stat.; *see also* § 1009.24(4)(d), Fla. Stat. (“the sum of the activity and service, health, and athletic fees a student is required to pay to register for a course...”).

Section 1009.24(9) authorizes an activity and service fee, a health fee, and an athletic fee. § 1009.24(9). Fla. Stat. Subsection (9) does not specify services for each fee; it provides that:

a university may transfer revenues derived from the fees authorized pursuant to this subsection to a university direct-support organization of the university to be used only for the purpose of paying and securing debt on projects approved pursuant to s. 1010.62 and pursuant to a written agreement approved by the Board of Governors.

Id. Section 1010.62, Florida Statutes, defines a capital project as acquiring, constructing, improving, or changing the use of land, buildings or other facilities, including furniture and equipment. § 1010.62(b)(1.), Fla. Stat. Thus, with Board of Governors’ approval,

⁶ Petitioner argues that online students are not able to access the campus and thus not charged fees. IB at 46-47. However, it is simply optional for online students, and presumably some do pay fees and utilize the resulting services. Whatever the reason for the distinction, the University discloses such fees to students and the University uses such fees for appropriate services and resources, in compliance with section 1009.24, Florida Statutes, as discussed below.

the University may use the fees for capital projects in lieu of on-campus services for that semester.

Section 1009.24(10), Florida Statutes, provides that a university must establish a student and activity fee on the main campus but does not mandate such a fee on branch campuses. § 1009.24(10)(a), Fla. Stat. Petitioner cites the *Rojas* dissent to assert “the provision of services ‘on the main campus’” but that is not correct. IB at 49 (quoting *Rojas*, 351 So. 3d at 1174 (Makar, J., dissenting)). The “on the main campus” language modifies the “fee” charged to students. The subsection dictates what population of students are charged the fee – those attending on the main campus – not where services are provided. § 1009.24(10)(a), Fla. Stat.

Subsection (10) requires that this fee benefit “the student body in general,” not an individual student’s access to specific services. § 1009.24(10)(b), Fla. Stat. This subsection also requires this student body benefit to include “student publications and grants to duly recognized student organizations,” while not limited to other uses. *Id.* The statute further provides that allocation and expenditure of student and activity fees shall be determined by student government. *Id.* And the statute anticipates fees may not be

used in the semester they are paid because it mandates unused funds be carried over to the next year:

Unexpended funds and undisbursed funds remaining at the end of a fiscal year shall be carried over and remain in the student activity and service fund and be available for allocation and expenditure during the next fiscal year.

*Id.*⁷

Section 1009.24(11), Florida Statutes, mandates the universities to establish a health fee on the main campus. That subsection contains no reference to the use of the fee. Petitioner relies on the *Rojas* dissent to assert that section 1009.24 refers to the provision of services “in a ‘university health center’” but that is wrong. IB at 49 (quoting *Rojas*, 351 So. 3d at 1174 (Makar, J., dissenting)). The dissent, in discussing the health fee in subsection (11), imports language from a completely different subsection - subsection (14). § 1009.24(14)(h), Fla. Stat. Subsection (14)(h)

⁷ The Sixth District in *Goldstein* recognized that unused activity and service fee funds are statutorily carried over to the next year. 2023 WL 5492043 at *3. The District Court determined that “[n]othing in section 1009.24 directs how or when the funds collected for the health, athletic, and transportation access fees must be used.” *Id.* There is no implication that funds from those three fees must be used during the semester in which they are paid.

authorizes other, unrelated fees including a “fee for miscellaneous health-related charges for service provided at cost by the university health center ***which are not covered by the health fee set under subsection (11).***” *Id.* (emphasis added). Petitioner did not incur and does not allege this subsection (14) fee. R. 45, fn. 8.

Section 1009.24(12), Florida Statutes, mandates the University establish an athletic fee on the main campus. § 1009.24(12), Fla. Stat. Like the health fee, the athletic fee may be increased upon a recommendation of a student-led committee and final approval of the Board of Trustees. §§ 1009.24(12)-(13), Fla. Stat. The statute tasks the Board with developing regulations and timetables for implementing each fee. *Id.*

Section 1009.24(14)(r), Florida Statutes, authorizes a transportation access fee. § 1009.24(14)(r), Fla. Stat. Similar to the health and athletic fees, the statute mandates the Board of Governors to “adopt regulations and timetables necessary to implement the fee.” § 1009.24(14), Fla. Stat. The Florida Board of Governors’ Regulation 7.003(12) has authorized the transportation access fee which is, “with appropriate input from students, to support the university’s

transportation infrastructure and to increase student access to transportation services.” Fla. Bd. of Governor’s Reg. 7.003(12).

Overall, section 1009.24 mandates (or otherwise authorizes) certain fees, not certain services.⁸ How the funds from each fee are used, and when they are used, is largely within the discretion of the University, as demonstrated in the statute itself. See *e.g.* § 1009.24(9), (11)-(12), Fla. Stat. And while there may be reasonable uses for each individual fee, there is no explicit requirement for the fees to be used only for on-campus, in-person services during the semesters in which the fees are paid. The statute does not mandate specific services, and it does not create an express contract regarding those services.

G. This case is unlike *University of Kentucky v. Regard*, and the *Regard* court said so

Petitioner urges this Court to follow *University of Kentucky v. Regard*, despite *Regard*’s pointed acknowledgement that “the *Rojas*

⁸ Section 1001.705(3)(c), Florida Statutes, confirms that, under the Florida Constitution, the Legislature has the authority to mandate tuition and fees, as it has done in Section 1009.24. In doing so, the Legislature has not obligated universities to use fees to deliver on-campus services only in the semester in which the fees are paid. Petitioner seeks to read into the statute such specific services that the Legislature has clearly not required.

opinion does not apply the same rules of law as we do in Kentucky.” 670 S.W.3d 903, 920 (Ky. 2023). To waive sovereign immunity via a contract, Florida and Kentucky law unquestionably differ.

Kentucky provides a “waiver of sovereign immunity for all written contracts.” *Regard*, 670 S.W.3d 903 at 919; see Ky. Rev. Stat. § 45A.245(1). But in Florida, a potential waiver of sovereign immunity demands an express **and** written contract. *Pan-Am*, 471 So. 2d at 6. *Regard* does not address whether the contract is express, as there is no need to prove a contract is express under Kentucky law. This is a dispositive distinction between Kentucky and Florida law for waiving sovereign immunity.

And the documents at issue in each case critically differ. *Regard* found a more definitive obligation regarding fees because “the [University of Kentucky] clearly identified eighteen different services to which those fees would be applied.” *Id.* at 917. That is not the case here, as discussed above, where section 1009.24 provides discretion rather than such specificity for use of the fees. Petitioner also asserts *Regard* relied on the different fee rates charged to on-campus and off-campus students, IB at 49, but Petitioner makes no

allegation that University online students charged such fees pay a lower rate.

Once again, Petitioner conflates a contract with an express contract. Petitioner incorrectly asserts that: “In Kentucky, the General Assembly passed the same waiver of sovereign immunity for all **express** contracts that this Court created in *Pan-Am Tobacco*.” IB at 51. *Regard* concluded that Kentucky’s waiver of sovereign immunity is satisfied by contracts “that can be proved by writing.” 670 S.W.3d at 919. That is not enough under Florida law.

H. Petitioner’s arguments on fundamental fairness and other state contracts do not justify an express contract where none exists

Petitioner asserts that the *Rojas* decision upholds a supposed contract where Petitioner pays fees “but does not obligate [the University] to provide any services.” IB at 59. Relying upon *Interair Services, Inc. v. Insurance Co. of North America*, 375 So. 2d 317 (Fla. 2d DCA 1979), Petitioner argues such a contract violates fundamental fairness. IB at 58. But the University is not refusing all services; the University is just not obligated to provide specific services as demanded by Petitioner.

Moreover, *Interair Services* supports the principle that a waiver of sovereign immunity must be statutorily-based. 375 So. 2d at 318 The Second District held that general law “specifically empowered” the county “to enter into the precise type of lease agreement” at issue and that the contract was “expressly authorized by general law to repair and maintain such leased premises the particular clause of the contract at issue.” *Id.* There, a binding agreement to waive sovereign immunity existed “where the contract and the obligation are expressly authorized by statute,” similar to the statute at issue in *Pan-Am*. *Id.* at 320. But here, section 1009.24 does not itself authorize a specific contract nor expressly obligate in-person or on-campus services to be provided in the semesters in which the fees are charged.

Finally, Petitioner charges that if *Rojas* is correct that no waiver of sovereign immunity exists here, then the Legislature committed a futile act in passing section 768.39, Florida Statutes. IB at 60-62. That statute provides its own statutory immunity for universities and disallows the attempted use of “invoices, catalogs, and general publications of an educational institution” as evidence of an express

contract. § 768.39(4), Fla. Stat.⁹ That is the very issue here. Section 768.39 would ensure such litigation is dismissed early on by eliminating any argument that such materials can even be alleged as substantiating an express contract.

CONCLUSION

For the foregoing reasons, the University respectfully requests this Court answer the certified question in the affirmative and affirm the judgment of the First District.

⁹ Notably, section 768.39 provides immunity for private institutions which otherwise have no state sovereign immunity.

Dated this 31st day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission through the Florida courts e-filing portal to all counsel or parties of record listed below, on this 31st day of January, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief complies with the type size and style requirements of Rule 9.210(b) 9.045(b), Florida Rules of Appellate Procedure and has been prepared in Bookman Old Style, 14 Point Font. This Answer Brief complies with the type volume limitations set forth in Rules 9.210(b) and 9.370(b), Florida Rules of Appellate Procedure. This brief contains 8,148 words, excluding the parts of the brief exempt by Rule 9.045(e).

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