IN THE SUPREME COURT OF FLORIDA

CASE NO: SC23-126

ANTHONY ROJAS,

Petitioner,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Respondent.

PETITIONER'S REPLY BRIEF

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

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I. ARGUMENT

A. INTRODUCTION.

Before we turn to the merits of our reply, we must reject the framing that UF adopts in its answer brief, when it suggests "this litigation attacks the State's responses to COVID-19 in which the University strove to ensure the health and safety of its students." (AB at 2) This litigation in no way attacks UF's decision close its campuses in order to protect the health and safety of its students. Nor does it accuse UF of participating in a "bait and switch" scheme to unjustly profit from these unfortunate circumstances. This litigation simply challenges UF's decision to retain funds paid by its students for services that UF no longer had to provide because the campus was closed.

Turning to the merits, we note that on occasion, lawyers can become so lost in the weeds of a technical argument that they fail to recognize when the argument begins to defy common sense. Such is the case here. UF argues that asking it to actually provide services in exchange for the statutorily required service fees imposes "new obligations" on it. (AB at 27) Reduced to its core, UF's argument is

that it did not have to provide any services in exchange for the fees it charged, because UF allegedly did not specifically put in writing that it would provide services in exchange for those fees. This argument defies both common sense and Florida law.

The true question before this Court is not whether terms obligating UF to provide on-campus services in exchange for the on-campus service fees exist in UF's writings referenced by the Plaintiff in his complaint. The question is whether the writings containing those terms constitute an express contract. There can be no doubt that if all of the following terms were contained in a single writing, Rojas' claim for breach of contract would not be barred by sovereign immunity.

UF's Financial Liability Agreement ("FLA") states that a student must "pay the costs of tuition and fees" in order to receive "educational services." (App.43-44) The statutorily mandated tuition and fee schedule identifies the amount UF charges per credit hour for the statutorily mandated fees:

Activity and Service Fee	$19.06
Athletic Fee	$1.90
Health Fee	$15.81
Transportation Access	$9.44
Total Florida Resident Rate/Credit Hour	**$212.71**

(App.35-41)

Finally, UF describes the "on-campus student services" students receive in exchange for those fees:

> 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)

(App.12-14, quoting https://ufonline.ufl.edu/tuition/optional-fee-package/)

Were all these terms included in a single document entitled "Contract," no Court would have any difficulty holding that an express contract existed that obligated UF to provide on campus services in exchange for the fees. That same holding should be reached here even though these terms were not all contained in a single document.

B. PLAINTIFF DID NOT "MISAPPLY" THE PRINCIPLES OF CONTRACT LAW.

UF argues that its contract with the students is not illusory because UF agreed to provide "educational services" in exchange for payment of tuition and fees. This misses the point and ignores the fact that the fees at issue are not charged for general educational services but are charged for the services they describe. Per the allegations of the complaint, UF did not provide any of the services for which the fees were charged. (App.16) The contract with respect to those fees is therefore illusory because there was no mutuality of

obligation. Under the First DCA's ruling, Rojas was obligated to pay the fees, but UF was not obligated to deliver anything in return.

Even though each Court following *Rojas* reached the same holding, not one of them grappled with this argument. The only time the word "illusory" even appears in any of these opinions is in Judge Makar's dissent in the instant case. Each opinion was content to rest on the argument that because there was no language in the respective contracts or in Fla. Stat. § 1009.24 specifically requiring these schools to provide services in exchange for the fees they charged, then the schools were not obligated to provide such services.

Extending this argument to its logical conclusion would grind the wheels of commerce to a halt. A repair vendor could defeat a breach of contract claim by responding "in exchange for $100, I gave you a paper that says 'repair services - $100,' but nowhere on that paper does it say that I actually had to provide any repair services to you or that I would give you a refund if I did not provide those services, so I get to keep your money." This is not an argument a first year law student would make, as it violates the most basic

principles of contract law and good faith. It is certainly not one the highest Court in the State should adopt.

UF next argues that we misapplied the "several writings" principle discussed in *First Guar. Corp. v. Palmer Bank & Tr. Co. of Fort Myers, N.A.*, 405 So. 2d 186, 188 (Fla. 2d DCA 1981). We did not. Instead, it is UF that seems to misunderstand some basic contract concepts. First, in challenging the application of *First Guar. Corp.*, UF seems to imply that the "several writings" principle is only relevant in the context of a statute of frauds challenge. It is not.

In *Sarasota County Pub. Hosp. Dist. v. Venice HMA, LLC,* 325 So. 3d 334, 345 (Fla. 2d DCA 2021), the Second District applied the "several writings" principle in a sovereign immunity case like *Rojas*, holding that the question of whether an express contract was created by a "county ordinance, coupled with the hospital's provision of indigent healthcare services and remittance of bills" was a question for the finder of fact. *Sarasota County* catalogues a number of agreements that were deemed "express contracts" even though there was no "unified, finalized, typed, paginated document, signed by the parties in a suitable place." *Id.* at 345. Not only does *Sarasota*

County support Plaintiff's argument that dismissal was improperly granted here, it suggests that it should be for the jury to decide whether UF had an express contract with Rojas that required it to provide services in exchange for the fees.

UF demonstrates further confusion regarding basic contract principles when it argues that *Univ. of Kentucky v. Regard*, 670 S.W.3d 903 (Ky. 2023), is inapplicable because "there is no need to prove a contract is express under Kentucky law." (AB at 38) UF argues that Kentucky waives sovereign immunity for "all written contracts," but in Florida, sovereign immunity is only waived for "express ***and*** written" contracts. (AB at 38) It should be unnecessary to explain that "[w]here an agreement is arrived by words, oral or written, the contract is said to be express." *Sarasota County* at 345. Because a written contract is therefore a subset of express contracts, Kentucky and Florida law do not differ.

UF's confusion about what constitutes an express contract persists in its argument that "if [] an ambiguity exists in a contract with the University, it cuts against an assertion of there being an express contract." (AB at 17) This is an incorrect statement of law.

Ambiguities, be they patent or latent, can only exist in *written* contracts, which are by definition, express contracts. So their presence does not "cut against" the existence of an express contract.

Finally, UF suggests that § 1009.24's provisions *are not* incorporated into UF's agreement with the students. UF states the incorporation doctrine doesn't mean that "statutory provisions are transformed into actual contractual terms." (AB at 17) On the contrary, that is exactly what the doctrine means. As explained in Justice Canaday's concurrence in *Suarez Trucking FL Corp. v. Souders*, 350 So. 3d 38 (Fla. 2022):

> Under [the generally applicable] presumption of incorporation, valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract. Thus, contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law.

Suarez Trucking at 46-47. (Canaday, J., concurring, quoting Richard A. Lord, *Williston on Contracts* § 30:19 (4th ed. 2012)). *Rojas* did not contest this principle, it simply found that § 1009.24 did not require

UF to provide any services in exchange for the fees mandated by the statute.

C. THE COMPLAINT DEMONSTRATES A PROMISE TO PROVIDE ON-CAMPUS SERVICES IN EXCHANGE FOR THE FEES.

UF's summary of the allegations of and attachments to Plaintiff's complaint simply ignores the description of on-campus student services provided on UF's "Tuition" webpage, quoted above, at page 3. (App.14, Note 20)[1] These descriptions are clearly "specific on-campus resources and services" that correspond to the fee charges specifically listed on UF's Tuition webpage.[2] (App.38-41)

UF also raises the argument that the FLA merely provides a right to register for courses, rather than a right to receive educational services. (AB at 18) The Court in *Univ. of Kentucky v. Regard*, 670 S.W.3d 903 (Ky. 2023), roundly 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

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

[2] UF is required by § 1009.24(20) to "prominently post[] [the fees] on the state university's website in an area that is transparent and easily accessible." Under the doctrine of incorporation, the fee schedule is part of the contract with the students.

> Students and the University entered into a written contract offered by the University, … [for] 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. That dog shouldn't hunt in Florida either.

D. *University of South Florida Board of Trustees v. Moore*, 347 So. 3d 545 (Fla. 2d DCA 2022) correctly affirmed the denial of USF's motion to dismiss.

UF attacks our reliance on *Moore* by first suggesting that because the language of USF's and UF's respective financial responsibility agreements "differed," *Moore's* holding should be inapplicable to UF's agreement. While UF is correct that the language in the agreements is not identical, the material terms of both agreements are. (IB at 30-32) Further, contrary to UF's representation, *Moore* did find the existence of an express contract. *Moore* at 549 ("Ms. Moore has sufficiently pleaded the existence of a contract.")

It is true, as UF points out, that other District Courts challenged *Moore's* decision to allow the case to proceed to the summary judgment stage, but none of the other Courts actually grappled with the substantive law that served as the basis for *Moore's* decision to

affirm. Specifically, Florida Courts, going back for 60 years, 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; *See also University of Miami v. Militana,* 184 So. 2d 701, 704 (Fla. 3d DCA 1966) ("It is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment. As such, they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law."); *Sharick v. Se. Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. 3d DCA 2000) (same); and *Jallali v. Nova Se. Univ., Inc.,* 992 So. 2d 338, 342 (Fla. 4th DCA 2008) ("the student-university relationship is contractual in nature and [] the terms of the contract may be derived from a student handbook, catalog, or other statement of university policy.").

Here, UF's publications, which are incorporated by reference in the FLA, clearly delineate the nature of the on-campus services that are provided in exchange for the mandatory service fees. *Rojas*

actually asks if "gratuitous informational statements on the university website could be legally binding for purposes of waiving sovereign immunity." *Rojas* at 1171. The answer, per the *Militana* line of cases, is yes. But *Rojas* and its progeny simply ignore these cases, and hold that these statements cannot bind the schools, without citing any precedent in support. (IB at 33, FN7) If, as *Sarasota County, supra,* held, it is for the jury to determine whether UF's publications created a binding obligation, then dismissal was inappropriate.

E. UF'S MISAPPREHENDS THE ROLE THAT THE IMPLIED COVENANTS PLAY IN THIS EXPRESS CONTRACT.

UF argues that in order for the implied covenant of good faith and fair dealing to apply, there must first be an express contract "for the specific services the petitioner demands." (AB at 27) Of course, if there was a contract that explicitly required UF to provide on-campus services in exchange for the mandatory fees, then we would not be before this Court. The question before this Court is whether the FLA, the regulations, and UF's website describing the services it provides in exchange for the mandatory fees creates a binding

obligation to provide those services, or whether that obligation needs to be filled in by an implied covenant.

It cannot be disputed that an express contract existed between Rojas and UF. At a minimum, the express terms of that contract required Rojas to pay tuition and fees, in the amounts delineated on UF's statutorily mandated "Tuition" webpage Terms and Conditions in order to receive educational services. The Tuition page specifically itemizes fees for activities, health, athletics, and transportation. UF contends that even though these specific service fees are itemized, Plaintiff is asking UF "to pay for [services] not contemplated by that contract." (AB at 27) UF claims that Plaintiff is seeking "to add new obligations onto the university." (Id.) This, again, is the argument that simply defies common sense. It is not imposing a new obligation onto UF to ask that UF provide "transportation" in exchange for the "transportation fee".

UF next claims that our premise - that *Rojas* held that UF was not required to provide any services in exchange for the fees – is false. (AB at 29) But this was *Rojas's* holding: Neither the FLA nor the Tuition page "contains [any] language obligating the University to

provide any specific in-person or on-campus services." *Rojas* at 1171. However, to the extent that express language obligating UF to provide a service in exchange for the fee is missing, the obligation is provided by the implied covenant of good faith and fair dealing. When you charge money for a service in Florida, you are required to provide that service.

We are not, as UF argues, relying solely on implied covenants in the absence of an express contract. (AB at 31) We rely on the FLA (which is an express contract), the regulations, and UF's publications, which identify the purpose of the fee, the amount charged for it, and the description of the on-campus services provided in exchange for those fees. The covenants present in every Florida contract required UF to provide those services and refund those fees if they did not.

As a final note, UF's effort to distinguish *Maor v. Dollar Thrifty Automobile Group, Inc.*, 303 F. Supp. 3d 1320 (S.D. Fla. 2017), is unavailing. UF says that the question here is whether the fees were charged "expressly for specific on-campus services." (AB at 31,FN5) That question is answered by UF's own publications, which specifies

that those fees are charged to residential students for on-campus services, and are not charged to on-line students, which every UF student became during Covid.

F. UF'S ARGUMENTS REGARDING FLA. STAT. § 1009.24 DEMONSTRATE WHY DISCOVERY WAS NECESSARY IN THIS CASE.

UF's arguments regarding § 1009.24 support Plaintiff's argument that these issues should not have been resolved at the motion to dismiss stage. First, UF writes, "Petitioner argues that online students were not able to access the campus and thus not charged fees." (AB at 33, FN 6) This is not an argument, it is a fact, which UF confirms one page later when it writes that, "those attending on the main campus" are the "population of students [] charged the fee." (AB at 34)

Next, UF writes that "the University uses such fees for appropriate services and resources, in compliance with § 1009.24." (AB at 33, FN 6) First, this appears to be an admission that in order to comply with § 1009.24, the fees must be utilized to pay for appropriate services and resources. Second, this statement is contradicted by the allegations that no services and resources were

provided in exchange for these fees, which must be accepted as true. If it matters whether UF actually provided services and resources in exchange for these fees even after the main campus shut down, then discovery on that issue was appropriate, and dismissal was improper.

Similarly, if it is relevant that § 1009.24(9) authorizes UF to utilize these fees for capital improvements, then discovery is necessary as to whether UF obtained approval of the Board of Governors to divert the fees to such improvements. If they were not diverted to capital improvements, subsection (10)(b) requires that the student activity fees "shall be expended for lawful purposes to benefit the student body in general" and that the allocations and expenditures of those fees are "determined by the student government association of the university." If discovery demonstrates that the funds were not expended as allocated by the student government at the outset of the semester, then reimbursement is required.

To the extent that subsection (10)(b) allows unexpended funds to be carried over to the next fiscal year, this language is not present in subsections (11), (12) and (14)(r), which mandate the health fee,

athletic fee, and transportation fee, respectively. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997). If these fees, unlike the activities fee, cannot be rolled over to the following semester, they must be returned to the students.

As we noted above, subsection (20) requires UF to post all fees charged pursuant to this section. Subsection (20) also requires that students be notified of any potential change in those fees. That notice must "specifically outline the details of existing tuition and fees, including how such tuition and fees are expended." Of course, we already know how the fees are expended, because UF has posted a description of the services provided in exchange for those fees on their website. (App.12-14) UF should be bound by that description.

At the conclusion of its argument, UF states that the manner in which the fees are used is within the discretion of the university. As we explained in our initial brief, pursuant to *Overseas Inv. Group v. Wall St. Electronica, Inc.*, 181 So. 3d 1288, 1291 (Fla. 4th DCA 2016),

UF's discretion is constrained by the implied covenant of good faith and fair dealing: "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.

G. KENTUCKY APPLIES THE SAME RULES OF CONTRACT LAW AS FLORIDA.

UF quotes one sentence from *Regard,* removes it from its context, and then asserts that "Florida and Kentucky law unquestionably differ." (AB at 38) They do not. And *Regard* did not so hold. It said that the *Rojas* majority failed to apply the law of incorporation that exists in both Kentucky and Florida. In our initial brief, we discussed each principle of law applied by the Kentucky Supreme Court and demonstrated why it was identical to Florida law. UF made no attempt to rebut any of that argument.

For ease of reference, we reprint the relevant portion of the Court's discussion of *Rojas*:

> We find the decision rather unpersuasive. First, the court accepted the "contract for registration" theory that we have firmly rejected. *Id.* at 1171. Additionally, nowhere in the majority opinion is there mentioned the doctrine of incorporation by reference or other authority relating to that doctrine. In fact, the only implied discussion of the doctrine of incorporation by reference came from Judge Makar's partial dissent. *Id.* at 1174-75. Consequently, Judge Makar concluded "Rojas has adequately alleged sufficient facts—buttressed by relevant documentation—to demonstrate that an express agreement exists such that the university has potential liability on a breach of contract claim." *Id.*
>
> . . .
>
> In short, the *Rojas* opinion does not apply the same rules of law as we do in Kentucky; and to the extent it does, it is the dissent, which agreed "that an enforceable written contract of some sort exists[,]" *id.*, that more closely comports with Kentucky law.

Regard at 919–20.

UF next erroneously claims "there is no need to prove a contract is express under Kentucky law." (AB at 38) We earlier addressed UF's misunderstanding of this concept. Because Kentucky requires a written contract to waive sovereign immunity, it necessarily requires an express contract.

UF attempts to distinguish *Regard* by stating that Kentucky's publications, "clearly identify 18 different services to which those fees

would be applied."[3] (AB at 38) UF's publications identified eight specific services provided in exchange for the fees. (IB at 8-9) The number of services funded by the fees has no impact on the analysis.

H. EXCUSING UF FROM PROVIDING ANY SERVICES IN EXCHANGE FOR THE FEES VIOLATES THE DOCTRINE OF FUNDAMENTAL FAIRNESS.

UF responds to our fundamental fairness argument by stating "the University is not refusing all services; the University is just not obligated to provide specific services as demanded by Petitioner." (AB at 39) Again, at the motion to dismiss stage, this Court must accept the allegations of the complaint as true, and the complaint alleges that UF provided no services in exchange for the fees.

Contrary to UF's representation, nowhere does *Interair Services, Inc. v. Insurance Co. of North America*, 375 So. 2d 317 (Fla. 2d DCA 1979), hold that "a waiver of sovereign immunity *must* be statutorily based." (AB at 40) *Interair Services,* simply states that in circumstances "where the contract and the obligation are expressly

[3] Among those services were the following analogues to UF's services: "the Student Government Association; Johnson Center; Student Center; Student Services; Transportation; Student Health Fee; and Student Wellness." *Regard* at 910.

authorized by statute," the failure to hold the State to its obligations is particularly egregious. *Interair Services* at 319. Further, not only is the contract here statutorily based, the statute mandates that UF collect these fees. UF's argument that the statute must also specify that services must be performed in exchange for these fees finds no support in Florida law.

Finally, UF's response to our argument regarding the enactment of Fla. Stat. § 768.39 is a concession that the statute was necessary because the writings it describes could otherwise form an express contract.

II. CONCLUSION

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.

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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 3,986 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this **1st** day of **May, 2024**, 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.

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