No. 105PA23

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SUPREME COURT OF NORTH CAROLINA

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DEENA DIECKHAUS, GINA MCALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY and VIVIAN HOOD, each individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA,

Defendant.

From N.C. Court of Appeals
No. 21-797

From Orange County
No. COA21-797

****

PLAINTIFFS-APPELLANTS' BRIEF

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SUPREME COURT OF NORTH CAROLINA

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DEENA DIECKHAUS, GINA MCALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY and VIVIAN HOOD, each individually and on behalf of all others similarly situated, Plaintiffs, v. BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendant.	From N.C. Court of Appeals No. 21-797 From Orange County No. COA21-797

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PLAINTIFFS-APPELLANTS' NEW BRIEF

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ISSUES PRESENTED

I. Did the Court of Appeals err when it determined that N.C.G.S. § 116-311 did not violate the Contracts Clause of the United States Constitution?

II. Did the Court of Appeals err when it determined that N.C.G.S. § 116-311 did not violate the Takings Clause of the United States Constitution?

III. Did the Court of Appeals err when it determined that the legislature's enactment of N.C.G.S. § 116-311 did not violate the due process clauses of both the United States and North Carolina Constitutions?

IV. Did the Court of Appeals err when it determined that Defendant's breach of contract was "reasonably related to protecting the public health, safety, and welfare" as required under N.C.G.S. § 116-311(a)(2)

STATEMENT OF THE CASE

Plaintiffs Deena Dieckhaus, Gina McAllister, Brady Wayne Allen, Jacoria Stanley, Nicholas Spooney and Vivian Hood ("Plaintiffs") filed their Complaint on 22 May 2020. (R p 5). Defendant Board of Governors of the University of North Carolina ("Defendant" or "UNC") moved to dismiss the action on 14 August 2020. (R p 44). In response, Plaintiffs filed their Amended Complaint ("FAC") on 30 December 2020. (R p 48).

The FAC alleges that Plaintiffs and all other similarly situated students enrolled in an on-campus course of study in the University of North Carolina System, and prepaid tuition and various fees in exchange for Defendant's promise to provide the unique benefits of an in-person, on-campus education experience, including face-to-face academic instruction and a host of other services, extracurricular activities and access to campus buildings and spaces. (R p 54-55, ¶ 44). But when Defendant cancelled in-person instruction and closed down campus in response to the COVID-19 crisis in March 2020, it refused to refund tuition, fees, room, and board paid as consideration for this on-campus experience, breaching its agreement with Plaintiffs and similarly situated students. (R p 64-65, ¶¶ 79-83, 86-87, 90-91).

Thus, the FAC alleges that students like Plaintiffs lost the benefits of the bargain for services and education for which they paid but could no longer access or use, in violation of their implied contact with Defendant. (R p 76-85, ¶¶ 144-199); (R p 87-89, ¶¶ 217-230). Likewise, the FAC alleges claims for breach of contract as it relates to on-campus housing and meals. (R p 91-92, ¶¶ 247-254); (R p 94-95, ¶¶ 271-278).

On 15 January 2021, Defendant filed a motion to dismiss the FAC on the grounds that, *inter alia*, Plaintiffs failed to state claims for breach of contract, Plaintiffs' claims were barred by sovereign immunity, and Plaintiffs' claims were barred by the recently enacted N.C. Gen. Stat. § 116-311. (R p 100-101). Judge Wilson, Jr. presiding, heard arguments on the motion to dismiss on 19 May 2021. A judgment and order dismissing the case was entered on 17 June 2021. (R p 105).

Plaintiffs filed and served notice of appeal on 15 July 2021. (R p 107). A transcript of the 19 May 2021 hearing was ordered on 29 July 2021 and delivered on 26 September 2021. (R p 110). The record was settled by stipulation on 13 December 2021, filed on 28 December 2021, and docketed on 13 January 2022. (R p 110). Chief Judge Stroud, and Judges Collins and Carpenter presiding, heard arguments on 10 May 2022. The Opinion on the Appeal was issued on 17 January 2023 affirming dismissal of the case. The Court of Appeal determined that Plaintiffs had adequately pled claims for breach of implied contract that were not barred by sovereign immunity, however, such viable claims were barred by N.C. Gen. Stat. § 116-311. In so doing, the Court of

Appeals determined that N.C. Gen. Stat. § 116-311 was constitutional as applied.

Plaintiffs filed their Petition for Certiorari review to this Court on 18 April 2023 challenging the constitutionality of N.C. Gen. Stat. § 116-311 as applied. Defendant filed a Motion for Extension of Time to Respond to the Petition on 20 April 2023 and filed its Response on 23 May 2023. Certiorari review was granted in part by this Court on 12 December 2023.

STATEMENT OF GROUNDS OF APPELLATE REVIEW

The North Carolina Court of Appeal's Order, dismissing all of Plaintiffs' claims and granting Statutory Immunity to Defendant, is a final judgment, and appeal therefore lies to the Supreme Court of North Carolina pursuant to N.C. Gen. State. § 7A-27(b).

STATEMENT OF THE FACTS

Plaintiffs allege throughout their FAC that they and similarly situated students enrolled in an on-campus course of study at the University of North Carolina ("UNC"), and prepaid tuition and various fees in exchange for Defendant's promise to provide the unique benefits of an in-person, on-campus educational experience, including face-to-

face academic instruction and a host of other services, extracurricular activities, and access to campus buildings and spaces. (R pp 76 ¶ 146, 87 ¶ 222).

Plaintiffs further allege that they and similarly situated students paid significant sums for room and board. (R pp 91 ¶ 249, 94 ¶ 273). But after in-person instruction was cancelled and the campus was closed down in response to the COVID-19 crisis in March 2020, Defendant refused to provide appropriate refunds for the tuition, fees, and room and board paid as consideration for this on-campus experience, thereby breaching its agreement with Plaintiffs and similarly situated students and unjustly enriching itself at the expense of its students. (R pp 64-65 ¶¶ 83-89, 66-67 ¶¶ 97-103).

Plaintiffs' FAC makes clear that Defendant attracts students to its more expensive and separately marketed on-campus programs with promises like "cocurricular experiences [that] support – and are supported by – the classroom learning experience," "a complete [experience] – with a thriving student environment, exciting athletics and enriching cultural events," "[o]ur students conduct cutting-edge research in state-of-the-art facilities," and "[s]tudy in a place where on-

campus research comes to life in off-campus applications throughout area communities, businesses and industries," all of which appear prominently in the school's marketing materials and catalog offerings. (R pp 77-78 ¶¶ 155-161). In response, students enroll at Defendant's on-campus programs and classes for the several benefits and services Defendant promised them. (R pp 54-55 ¶ 44).

In exchange for in-person instruction and these numerous on-campus amenities, students pay higher tuition than students who receive online instruction and pay a bevy of fees for on-campus services. (R pp 53-54, ¶¶ 41-43). Specifically, Plaintiffs and putative class members prepaid tuition at the on-campus, rather than online, rate and fees for the Spring 2020 semester that included a Health Services Fee, a Student Activities Fee, Athletics Fee, Education and Technology Fee, Association of Student Government Fee, and Campus Security Fee. (R p 62 ¶ 66). In addition to these fees, Defendant charges several additional mandatory fees specific to each of its constituents. (R pp 55-61 ¶¶ 49-64). As their names indicate, many of these fees were clearly paid in exchange for access to various on-campus services and facilities.

When Plaintiffs paid these tuition, fees and room and board costs, they entered into legally binding contract with Defendant. (R pp, 76 ¶ 146, 87 ¶ 222, 91 ¶ 249, 94 ¶ 273). The parties began performance under the contract. Upon enrollment, Plaintiffs registered for on-campus classes through the registration portal that specifically designated such classes as "fact-to-face instructional method," and identified them by physical locations. (R p 82 ¶ 182). This is in stark contrast to Defendant's online classes, which are designated in the registration portal as "online instructional method," and identified as taking place on the "distance education campus." (R p 82 ¶ 183). Each day of the first half of the semester, Plaintiffs attended in-person classes in physical classrooms on campus. (R p 83 ¶ 187). Each day for the first half of the semester, Plaintiffs had access to the full campus. (R p 83 ¶ 188).

In March 2020, in response to the outbreak of COVID-19, Defendant moved all learning online for the remainder of the Spring 2020 semester, cancelled athletic and other on-campus recreational events, cancelled students' meal plans, and ordered students to stay away from campus. (R pp 63-64 ¶¶ 77-80). As a result, UNC students

were locked out from all on-campus classes, dining, facilities, and other services and amenities. (R p 64 ¶ 82). The FAC alleges that despite these harsh realities, Defendant refused to provide a prorated refund of fees tied to on-campus services and amenities that were not available to students for a significant part of the Spring 2020 semester. (R p 64 ¶ 83). In addition, by requiring students to pay (and many to borrow) full tuition for the Spring 2020 semester, Defendant did not take into account the difference in value between the college experience the school is now offering compared to what students were promised. (R p 84 ¶¶ 196-99).

Thus, the FAC alleges that students like Plaintiffs have lost the benefits of the bargain for services and education for which they paid but can no longer access or use, in violation of their contract with Defendant. (R pp 76-86, 87-89, 91-92, 94-95). In the alternative, the FAC alleges that Defendant was unjustly enriched by retaining the full amount of tuition, fees and room and board for the Spring 2020 semester while reducing services and cutting operating costs at the expense of its students. (R pp 85-87, 89-90, 92-93, 95-96).

Weeks after the commencement of this action, Governor Roy Cooper signed N.C. Gen. Stat. § 116-311 ("An Act to Provide Immunity for Institutions of Higher Education for Claims Related to COVID-19 Closures for Spring 2020"). N.C. Gen. Stat. § 116-311 seeks to immunize institutions of higher education for the exact claims brought here. Specifically, the statute states: "an institution of higher education shall have immunity from claims by an individual, if all of the following apply:

1. The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020.

2. The claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order.

3. The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention.

4. The institution of higher education offered remote Learning options for enrolled students during the spring academic semester that allowed students to complete the semester coursework.

N.C. Gen. Stat. §§ 116-310(1) and 116-311(a).

However, the Statute exempts claims for losses or damages that resulted solely from a breach of an express contract, allocating liability in the event of a pandemic event or losses or damages caused by an act or omission of the institution of higher education done in bad faith or maliciously. Finally, the Statute mandates that its provisions apply to all actions by an institute of higher education commenced on or after March 27, 2020.

ARGUMENT

I. STANDARD OF REVIEW

For challenges under both the federal and State Constitutions, this Court reviews the constitutionality of statutes *de novo*. *See North Carolina Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (stating, in a case where a party argued a statute was unconstitutional under Article I, § 10 of the United States Constitution, "we review *de novo* any challenges to a statute's constitutionality"); *Cooper v. Berger*, 376 N.C. 22, 33, 36, 852 S.E.2d 46, 56, 58 (2020) (stating, in a case challenging the constitutionality of a statute under our State Constitution, "[a]ccording to well-established North Carolina

law," appellate courts "review[ ] constitutional questions using a *de novo* standard of review"). "In exercising *de novo* review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56 (citation and quotation marks omitted).

II. N.C. GEN. STAT. § 116-311 VIOLATES THE U.S. CONST. ART. I, § 10 CL. 1 WHICH PROHIBITS STATES FROM PASSING LAWS IMPARING THE OBLIGATION OF CONTRACTS.

This Statute is clearly unconstitutional as applied here because it violates the Contracts Clause of the Constitution, which in part, mandates "No State shall pass any Law impairing the Obligation of Contracts." *See* U.S. Const. art. I, § 10; *See also North Carolina Ass'n of Educators,* 368 N.C. at 786, 786 S.E.2d at 262 (explaining the Contract Clause of the United States Constitution bars a state from passing "any Law impairing the Obligation of Contracts")(citations omitted). Statutes in derogation of the common law and which infringe upon the common law property rights of others must be strictly construed to encompass no more than is expressly provided. *Turlington v. McLeod*, 323 N.C. 591,

594, 374 S.E.2d 394, 397 (1988)(citing *Candler v. Studer*, 259 N.C. 62, 130 S.E.2d 1 (1963)).

Constitutional issues are analyzed by Courts on a tier scale of scrutiny, where "'the upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class,' we apply the lower tier or rational basis test if the statute neither classifies persons based on suspect characteristics nor impinges on the exercise of a fundamental right." *See Liebes v. Guilford Co. Dept. of Public Health*, 724 S.E.2d 70 (N.C. Ct. App. 2011) (quoting *White v. Pate,* 308 N.C. 759, 766–67, 304 S.E.2d 199, 204 (1983)).

When this statute and its effects are analyzed at even the lowest standard of scrutiny, rationale basis, North Carolina's interest in protecting a party's financial interests is not significant enough to grant immunity absolving the party from their contractual obligations. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)(holding that while the contract clause does not operate to obliterate the police power of the states, it does impose some limits on the power of state to

abridge existing contractual relationships, *even in the exercise of its otherwise legitimate police power*.)(emphasis added).

This Court uses the three-factor test set out in *Bailey* to determine whether a Contract Clause violation exists. *Bailey v. State*, 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92). The three prongs of this test include: (1) whether a contractual obligation is present; (2) whether the state has impaired that contract; and (3) whether the impairment was reasonable and necessary to serve an important public purpose. *See Allied Structural Steel Co.,* 438 U.S. 234 at 244. Each point will be discussed in turn.

a. Plaintiffs entered into Contracts with Defendant for the Spring 2020 Semester

As the Court of Appeals appropriately found, Plaintiffs had implied contracts with Defendant for the Spring 2020 semester. *Dieckhaus, et al. v. Board of Gov. of the Univ. of N.C.*, 883 S.E.2d 106, 119 (N.C. App. 2023).

An "implied-in-fact contract" is one where the terms of the contract are not manifested by words, but rather manifested by conduct. *Ellis Jones, Inc. v. Western Waterproofing Co., Inc.*, 66 N.C.App 641,

646, 312 S.E.2d 215, 218 (1984)("An implied in fact contract is a genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in an explicit set of words."). There is no legal difference between an express contract and a contract implied-in-fact.

Here, Plaintiffs' allegations clearly plead a breach of contract with Defendant in which it, through both words and conduct, offered specified services, benefits and opportunities in exchange for the payment of tuition, fees, and room and board.

In their FAC, Plaintiffs pleaded a straightforward breach of contract. The FAC alleges Defendant represented that upon registration and payment of tuition and fees, students were entitled to an entirely in-person, on-campus education and experience, which includes face-to-face academic instruction, along with a host of other on-campus educational services and extracurricular activities. (R pp 76 ¶ 146, 87 ¶ 222, 91 ¶ 249, 94 ¶ 273). Defendant made this offer in a number of places, including UNC's websites and recruitment brochures, and differentiated between in-person and online courses in its online

course descriptions and academic catalogs. (R pp 77-79 ¶¶ 151-165)(identifying approximately a dozen representations regarding Defendant's various campus benefits of attending in person at UNC). The FAC further illustrates this promise by alleging that Defendant differentiates between its classes on its registration portals by "Instructional Method" including options for "Face-to-Face Instruction," "Online: No Specific Mtg Times," and "Online: Specific Meeting Times." (R pp 81-82 ¶ 181), and floods prospective students with information about the on-campus experience during its admitted students' day and orientation. (R p 80 ¶¶ 173-75). The FAC also alleges that Plaintiffs accepted this offer and fulfilled their end of the bargain when they paid the tuition, fees and room and board costs due for the Spring 2020 semester. (R pp 83 ¶ 191, 88 ¶ 224, 91 ¶ 250, 94 ¶ 274). Thus, the first prong of *Bailey* is satisfied. *Dieckhaus*, 883 S.E.2d 408-409.

b. The Statute Impairs the Contracts with Defendant for the Spring 2020 Semester

It is well established that a cause of action accrues at the time of breach. *See Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967). Here, the FAC makes clear that Defendant breached the contract when it suspended in-person instruction and ordered students home in March

2020, yet failed to provide students a refund of the tuition, fees and room and board that students pre-paid to guarantee those services. (R pp 63-65 ¶¶ 77-88, 66 ¶ 95-97). Accordingly, Plaintiffs right to a cause of action for breach of contract vested when Defendant breached by ceasing to provide in-person instruction and campus access in March 2020, over 3 months before the statute was enacted. (R p 64, ¶¶ 79-83).

However, N.C. Gen. Stat. § 116-311 specifically impairs the very contract Plaintiffs seek to enforce. Accordingly, the second prong of *Bailey* is satisfied. The statute specifically states that: "The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020." However, as stated above, a valid implied-in-fact contract existed between the University and students like Plaintiff, and this breach of contract is exactly what Plaintiff and the proposed class is suing for now. (R pp 76 ¶ 146, 87 ¶ 222)

c. The Impairment was not reasonable or necessary to serve an important public purpose.

This Court's analysis of the third prong involves "a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both

a reasonable and necessary means of addressing that purpose." *See North Carolina Ass'n of Educators v. State,* 368 N.C. 777, 791 (2016). According to the Court of Appeals, the Statute's purpose is for higher education institutions to be able to fulfill their "educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided in this Article." When determining this, the Court of Appeals erroneously relied on a clearly distinguishable case. In *North Carolina Ass'n of Educators v. State,* teachers of public schools sued over a retroactively changed law that altered their employment status within the N.C. Education system. *See North Carolina Ass'n of Educators,* 368 N.C. 777, 791 (2016). The focus of that case was elementary and secondary school educators, something entirely different from the higher education scope this case exists in. The mere fact that North Carolina's public universities are both public and schools does not mean that they are anywhere close to being in need of statutory protections like public elementary and secondary schools.

As such, the Statute's remedial measures may be reasonable and necessary if applied to public elementary and secondary schools where a

contractual relationship between the school and student does not exist. However, they are not reasonable and necessary as applied to the Defendant in this action because the relationship between students like Plaintiffs and public universities like Defendant is inherently contractual. *See Ryan v. Univ. of N.C. Hosps.*, 128 N.C.App. 300, 301, 494 S.E.2d 789 (1998) ("It is held generally in the United States that the basic legal relation between a student and a university or college is contractual in nature.")(quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992)).

Here, the statute benefits a narrow group of defendants by preventing financially strained students from seeking judicial relief from Defendant's failure to provide contracted-for services. But safeguarding colleges and universities by eliminating such meritorious claims does not protect members of the public nor provide widespread relief to North Carolinians. If anything, by keeping refunds out of the hands of loan-bearing students-many of whom have suffered significantly during COVID-19-the statute works *against* the general public.

According to §116-313, "It is a matter of vital State concern affecting the public health, safety, and welfare that institutions of higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided for in this article." However, §116-311 only relates to claims related to the "spring academic semester of 2020." *See* N.C. Gen. Stat. § 116-311(a)(1). Accordingly, the statute does nothing to address the abilities of Defendant to continue to be able to fulfill their educational mission during the COVID-19 pandemic after its enactment.

Defendant had already closed its campuses in response to COVID-19, and the statute only applies to closures from March 10, 2020 to June 1, 2020. Thus, the only emergency addressed by the statute is the fact that educational institutions have been sued over their failure to return funds for services for which they did not provide. All the while, Defendant received just under $180 million in federal stimulus funds through the CARES Act, and was supported by a $3.1 billion endowment. (R p 50, ¶¶ 13-14).

Protecting well-resourced colleges and universities by extinguishing meritorious claims over their failure to provide contracted-for services-at the expense of the student who did not receive the benefit of their bargain-is not an important public purpose that can possibly justify the impairment of existing contract.

The Court of Appeals misunderstood the nature of the litigation stating "the immunity statute was a reasonable means of ensuring the quality of education because it allowed Universities to focus on how to best deliver education online rather than trying to continue in person and expending resources on all the public health measures necessary to try to achieve that prospect safely." *Dieckhaus*, 883 S.E.2d 422. To be clear, this lawsuit seeks to resolve the lack of refunds resulting from the loss of the contracted on-campus instruction and access as a result of the closure, and not the closure itself. As such, the Court of Appeals should not have held Defendant was subject to statutory immunity, ultimately placing the financial burden of Covid-19 in the higher education sphere on the students and parents of students who paid for what they believed was on-campus instruction, services, and on-campus access, while UNC continues to benefit from their financial gain.

Accordingly, this Court must consider the interest the State argues is furthered by this Statute. The burden is upon the State when it seeks to justify an otherwise unconstitutional impairment of contract. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S.Ct. at 1522, 52 L.Ed.2d at 115. Relying on Article I, Section 15 of the North Carolina Constitution, which establishes the duty of the State to guard and maintain the people's right to the privilege of education, the State claims that improving and protecting public education is an essential constitutional responsibility. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614–15, 599 S.E.2d 365, 376 (2004). The State's reasoning for this statute is: "educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided in this Article." However, this reasoning is flawed because the Statute was not passed until three months after the Defendant had already made their decision to cancel classes and not issue refunds. *See* N.C. Gen. Stat. § 116-311. In other words, there was no need to allow for the Defendant to focus on delivering education instead of worrying about lawsuits as the entire situation, as it pertained to the Spring 2020 semester, was already over. The Statute only covers Spring 2020 actions; therefore it

is blatantly unfair to use other semesters as justification for the reasonableness of this Statute. Further, there is nothing in the record to indicate that lawsuits stemming from the Spring 2020 breach has inhibited Defendant from providing education to it's current students.

For these reasons, the goal of the statute is not reasonable or justified, and this Court should rule that the Court of Appeals erred in dismissing adequately plead breach of contract claims under N.C. Gen. Stat. § 116-311 under the impression it did not violate the Contracts Clause of the U.S. Constitution.

III. N.C. GEN. STAT. § 116-311 VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH PROHIBITS THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Moving to the Court of Appeals second error, dismissing Plaintiff's claims as it is related to the Takings Clause. The Takings Clause mandates, "Nor shall private property be taken for public use, without just compensation." *See* U.S. Const. amend. V. The Takings Clause is "designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49, 80

S.Ct. 1563, 4 L.Ed.2d 1554 (1960). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318–319, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123–125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). And "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951)).

Courts have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area. *Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23, 133 S. Ct. 511, 184 L.Ed.2d 417 (2012).

In general, the government must pay just compensation when it takes public property that is leased to private individuals or businesses,

but the amount of compensation may depend on various factors such as the length of the lease, the nature of the property, and the impact of the taking on the leaseholder's investment-backed expectations. *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302 (2002).

Applying the facts above, all factors weigh in favor of plaintiffs. Plaintiffs had a well enumerated, albeit implied, contract for the occupation of spaces at Defendant Universities, including food, rent for room, and use of school facilities. The length of this access and occupation is also well defined within the contract, clearly showing that the time of lease was for that semester, as students would lose access to the facilities at the end of the calendared semester.

Finally, the impact of the taking on the leaseholder's investment backed expectations weighs heavily in favor of Plaintiffs. Plaintiffs entered into valid contracts with Defendant and paid thousands of dollars with reliance on Defendant that they would in fact receive an in person and on campus education and have access to university facilities as offered. Instead, Plaintiffs received an online education, while either sitting in their childhood homes, or alternatively, sitting at their off-campus apartments. Regardless, the Plaintiffs at the time of contract

relied on these representations from Defendant and ultimately did not receive what they expected to receive, and as well documented throughout briefing, the price of online at home education is much cheaper than what Plaintiffs expected, even at many of Defendant's own institutions.

The Court of Appeals also misrepresents the argument in its order on this section discussing the justification of N.C. Gen. Stat. § 116-311. The Statute addresses the decision to close campus, and/or shift to online learning, which is not the crux of the issue for this multiyear litigation. The crux of the issue is that this decision was not followed up with reimbursement to students for services contracted and already paid for. Had Plaintiffs been refunded appropriately for services that they did not receive, yet already paid for at the beginning of the semester, these claims would not exist.

Plaintiffs do not contest that Legislatures can make laws, and that they have the ability to make laws that give immunities. Rather, Plaintiffs contest that the specific immunities put forth by the Legislature, which effectively act as takings under the U.S. Constitution are unlawful according to the Supreme Court. For this

reason, this Court should reverse the holding of the Court of Appeals and rule that N.C. Gen. State § 116-311 as affected here is an improper taking under the Takings Clause of the U.S. Constitution.

IV. N.C. GEN. STAT. § 116-311 VIOLATES THE DUE PROCESS CLAUSES OF THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS

The Court of Appeals further incorrectly relies on the same analysis with Plaintiffs' Due Process Clause claims. The U.S. Due Process Clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This is also reiterated in the North Carolina constitution, which repeats this right, "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. 1 § 19.

"The touchstone of due process is protection of the individual against arbitrary action of the government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Only "the most egregious official conduct" qualifies as constitutionally arbitrary." *Huggins v. Prince George's Cnty., Md.*, 683 F.3d 525, 535 (4th Cir.2012) (quoting Lewis, 523 U.S. at 846, 118 S.Ct. 1708). Both

the federal due process clause and the North Carolina constitution limits the State's police power. See *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). If no fundamental right is implicated, under federal due process law a governmental action must pass the so-called "minimal scrutiny" test: whether the challenged action has a legitimate purpose and whether it was reasonable for the legislature to believe that the statute would achieve that purpose. *Western & Southern L.I. Co. v. Cal. Bd. of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

To give rise to a substantive due process violation, the arbitrary action must be "unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir.1991).

This current action represents exactly what the above cases aimed to prevent. While the Court of Appeals does state that Due Process was given through the legislature's determination, this is not the be-all-end-all determination, as laws passed by legislatures can still be unlawful or

unconstitutional, as discussed earlier. As stated above, Plaintiffs entered into valid contracts with Defendant and paid thousands of dollars with reliance on Defendant that they would in fact receive an in person and on campus education and have access to university facilities as offered. Upon closing of the campus, Plaintiffs were deprived of almost all of the items they had contracted for. Instead, Plaintiffs received an at home, online education, wherever home was located for that individual. Plaintiffs were offered no pro-rated refunds for the portion of the semester spent online, regardless of what they thought they were paying for or were deprived of during that time, and are now told ex-post facto that they can no longer seeks their hard-earned money back.

Further, this situation is entirely the result of arbitrary decisions made by lawmakers in Raleigh. The statute itself, in practice, is effectively designed to prevent universities from reimbursing students for undelivered products. This is nonsensical because under North Carolina law, neither impossibility nor frustration of purpose justifies retaining a party's already paid moneys in a breach of contract setting.

See Sunbelt Rentals, Inc. v. Head & Engquist Equipment, LLC, 797 S.E.2d 487 (N.C. Ct. App. 2017).

The stated goals of furthering education do not appear to be harmed by Defendant returning wrongfully kept funds that were paid for services never rendered. Plaintiffs only seek funds that they paid to Defendant for services unrendered, and for that reason, Plaintiffs only seek funds that they are minimally entitled to under the law. However the Legislature has decided that allowing Defendant to retain these funds, at the expense of North Carolina residents, somehow progresses education in the state. Plaintiffs paid fees and dues for property rights related to spaces on campus, including their dormitories, athletic facilities, and academic facilities. To be deprived of these spaces is essentially no more than evicting someone without process who is also totally "paid up" on rent or lease. The Plaintiffs in question had to pay their fees related to the occupation of such spaces before their semester, or lease period, began, and were not able to return to their lease after the lease period, showing the definite impact of this decision.

For these reasons, the actions of the State Legislature and the effect of N.C. Gen. State § 116-311 have deprived Plaintiffs of their

right without due process, and therefore have not been properly protected against arbitrary action of the government, which is in direct violation of the U.S. and N.C. constitutions.

V. DEFENDANT'S BREACH WAS NOT REASONABLY RELATED TO PROTECTING THE PUBLIC HEALTH, SAFETY, AND WELFARE AS REQUIRED BY N.C. GEN. STAT. § 116-311.

N.C. Gen. Stat. § 116-311(a)(2) states: "The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention." As Defendant's brief made clear, in enacting the statute, the General Assembly declared that: "[i]t is a matter of vital State concern affecting the public health, safety, and welfare that institutions of higher education continue to be able to fulfill their educational missions during the COVID-19 pandemic without civil liability for any acts or omissions for which immunity is provided."

It is well-settled that "the State possesses the police power in its capacity as a sovereign, and in exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the

health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also Barsky v. Board of Regents*, 347 U.S. 442, 449, 74 S.Ct. 650, 654, 98 L.Ed. 829, 838 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.")

However, whenever the State exercises its police power, there is necessarily a deprivation of individual liberty. *In re Aston Park Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973). As a result, "the legislative power is not unlimited, but is subject to specific limitations imposed by the Constitution of this State and the Constitution of the United States." *Hartford Accident & Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 466, 226 S.E.2d 498, 504 (1976).

Here, Plaintiffs' argument rests on the application of this statute. It cannot be denied that this decision was made in the interest of "health and safety" for residents of North Carolina. However, the Defendant's purely financial decision to not provide appropriate pro-rated refunds to students who did not receive the on-campus education

and access they contracted for is not in the contemplation of "health, safety, and well being" of the Residents of North Carolina. Defendant's decision to retain funds for a contract they did not perform has nothing to do with the health, safety, or well being of North Carolina residents. Instead, the focus of this decision was the bottom line of Defendant's finances. Defendant attempts to offset this by attempting to reflect an increase in costs associated with COVID-19, while conveniently skimming over the millions in federal aid the school received as part of the CARES Act and other federal emergency relief funds.

To reiterate, Defendant's decision to close the campus was fully within the scope of "protecting the public health, safety, and welfare", but that rationale ended at that decision. The financial decisions made by Defendant after closure were made solely in the interest of Defendant's institutions, not the greater North Carolina population. Given the large number of North Carolina resident students who attend Defendant's institutions, it can even be argued that the decision to not issue refunds actually hurt the welfare of citizens in North Carolina. To uphold Defendant's purely financial decisions as done in the interest of "public welfare" is effectively stating that Universities like Defendant

can breach contracts and retain unearned funds, because its better for the people who paid them for products they did not receive. This goes against the entire established jurisprudence of Contract Law and cannot stand in this situation. For this reason, Defendant's decision to not issue pro-rated refunds of tuition and fees for the Spring 2020 semester should not be deemed a decision done for "protecting the public health, safety, and welfare" as required by N.C. Gen. Stat. § 116-311.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court (1) to declare N.C.G.S. § 116-311 is unconstitutional in that it violates the Contracts Clause of the United States Constitution; (2) to declare that N.C.G.S. § 116-311 is unconstitutional in that it violates the Takings Clause of the United States Constitution; (3) to declare the legislature's enactment of N.C.G.S. § 116-311 unconstitutional as it violated the due process clauses of both the United States and North Carolina Constitutions; and (4) to declare that Defendants' breach was not "reasonably related to protecting the public health, safety, and welfare".

Dated: February 12, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this new brief is formatted and printed in typeface Century Schoolbook, 14 point font size, and contains 6,570 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiffs-Appellants' Brief was on February 12, 2024 electronically filed and served upon all interested parties by email, addressed as follows:

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APPENDIX

N.C. Gen. Stat. § 116-3:

The Board of Trustees of the University of North Carolina is hereby redesignated, effective July 1, 1972, as the "Board of Governors of the University of North Carolina." The Board of Governors of the University of North Carolina shall be known and distinguished by the name of "the University of North Carolina" and shall continue as a body politic and corporate and by that name shall have perpetual succession and a common seal. It shall be able and capable in law to take, demand, receive, and possess all moneys, goods, and chattels that shall be given for the use of the University, and to apply to same according to the will of the donors; and by gift, purchase, or devise to receive, possess, enjoy, and retain forever any and all real and personal estate and funds, of whatsoever kind, nature, or quality the same may be, in special trust and confidence that the same, or the profits thereof, shall be applied to and for the use and purpose of establishing and endowing the University, and shall have power to receive donations from any source whatever, to be exclusively devoted to the purposes of the maintenance of the University, or according to the terms of donation.

The corporation shall be able and capable in law to bargain, sell, grant, alien, or dispose of and convey and assure to the purchasers any and all such real and personal estate and funds as it may lawfully acquire when the condition of the grant to it or the will of the devisor does not forbid it; and shall be able and capable in law to sue and be sued in all courts whatsoever; and shall have power to open and receive subscriptions, and in general may do all such things as are usually done by bodies corporate and politic, or such as may be necessary for the promotion of learning and virtue.

N.C. Gen. Stat § 116-311:

(a) Notwithstanding any other provision of law and subject to G.S. 116-312, an institution of higher education shall have immunity from claims by an individual, if all of the following apply:

(1) The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020.

(2) The claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order.

(3) The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention.

(4) The institution of higher education offered remote learning options for enrolled students during the spring academic semester of 2020 that allowed students to complete the semester coursework.

(b) Subsection (a) of this section shall not apply to losses or damages that resulted solely from a breach of an express contractual provision allocating liability in the event of a pandemic event.

(c) Subsection (a) of this section shall not apply to losses or damages caused by an act or omission of the institution of higher education that was in bad faith or malicious.

N.C. Gen. Stat § 7A-27(b):

(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

e. Determines a claim prosecuted under G.S. 50-19.1.

f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly. This sub-subdivision only applies where the State or a political subdivision of the State is a party in the civil action.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.