No. 105PA23 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

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-Appellants,

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA,

Defendant-Appellee.

From Orange County

**********

# DEFENDANT-APPELLEE'S NEW BRIEF

**********

## INDEX

## TABLE OF AUTHORITIES

**Cases**

**Constitutions**

**Statutes**



**Session Laws**



**Rules**

**Other Authorities**

No. 105PA23 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

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-Appellants,

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA,

Defendant-Appellee.

From Orange County

**********

# DEFENDANT-APPELLEE'S NEW BRIEF

**********

## INTRODUCTION

Sovereign immunity requires the dismissal of lawsuits against the State when the State does not consent to be sued. As this Court has also held, even when the State consents to be sued, the General Assembly reserves the right to decide whether public funds will be used to pay any resulting judgement. *See, e.g.*, *Smith v. State*, 289 N.C. 303, 321, 222 S.E.2d 412, 424 (1976). Thus, when citizens are owed a commitment by the State, they often rely on the State's good faith for performance. The State, in turn, regularly fulfills its commitments in good faith. This case is no exception.

In May 2020, Plaintiffs filed this class action, alleging that the Board of Governors of the University of North Carolina (the "University") breached implied-in-fact contracts with them when it moved to online instruction in the spring of 2020 in response to the COVID-19 pandemic. Although Plaintiffs acknowledge that the University acted reasonably in continuing to educate students by successfully transitioning to remote education, (Appellants' Br. at 33; R pp 48-71), Plaintiffs nonetheless demand more than $260,000,000 in damages from the University for having done so.

In June 2020, the General Assembly recognized that the University had fulfilled its educational mission in good faith at the onset of the pandemic. The University—by successfully implementing virtual learning to allow students to complete their courses amidst the pandemic—had faithfully performed

whatever obligations it might have owed; Plaintiffs were entitled to nothing more. At that time, the General Assembly was also facing an economic emergency caused by the pandemic, and it needed to safeguard the public fisc. Therefore, the legislature would not open the doors of the state treasury to satisfy Plaintiffs' novel claims.

In light of Plaintiffs' lawsuit, the General Assembly enacted the Immunity Statute, N.C. Gen. Stat. §§ 116-310 to 116-313, to make clear that it was exercising its immunity as a sovereign to dispense with the lawsuit. The Immunity Statute also offered immunity to private colleges, although no issue of immunity for private entities is before this Court. *See id.* § 116-311. The immunity in the Statute was time limited, applying only to claims that arose from the Spring 2020 semester. It was also conditional: unless the University had allowed students to complete their courses remotely, the University could be liable. *See id.* Simply put, so long as the University performed its educational mission in good faith, Plaintiffs could not sue for monetary damages.

The trial court and Court of Appeals correctly dismissed Plaintiffs' lawsuit based on the Immunity Statute. Plaintiffs assail the Immunity Statute with a panoply of challenges under the federal and state constitutions. None of these constitutional provisions, however, provide an absolute right to sue the State for monetary damages. Just as the General Assembly has the power to

deny public funds to pay a judgment, it can assert sovereign immunity and extinguish lawsuits that would lead to an uncollectable judgment.

Starting with Plaintiffs' federal constitutional challenges to the Immunity Statute, another immunity—Eleventh Amendment sovereign immunity—stands in Plaintiffs' way. The Eleventh Amendment preserves state sovereign immunity, barring individuals from using federal law to invade a state's treasury. In addition to this barrier, the merits of these challenges fail as the federal constitution makes clear that claims for damages from a state are subordinate to the legislature's power and duty to provide for the common good.

Plaintiffs' challenge to the Immunity Statute under the state constitution fares no better. As Plaintiffs admit, the Law of the Land Clause requires the most deferential review of legislation, and the Immunity Statute easily satisfies rational basis review.

This case, therefore, was properly dismissed. The opinion of the Court of Appeals should be affirmed.

## STATEMENT OF FACTS

The University is "a public, multi-campus university dedicated to the service of North Carolina and its people." N.C. Gen. Stat. § 116-1. The University includes "16 diverse constituent institutions and other educational, research, and public service organizations" who share a common mission "to

discover, create, transmit, and apply knowledge to address the needs of individuals and society." *Id.* § 116-1(b).

North Carolina law requires the constituent institutions to collect tuition and fees in amounts set by the University. *Id.* § 116-143(a). The tuition and fees are expressly tied to enrollment and collected at the beginning of each semester. *Id.*

On or about 23 March 2020, as a result of the sudden onset of the COVID-19 pandemic, North Carolina's public universities transitioned to online instruction for the final weeks of the Spring 2020 semester. (R pp 63-64.) On 27 March 2020, North Carolina Governor Roy Cooper issued Executive Order 121, a mandatory stay-at-home order. Under Executive Order 121, the University was only permitted to operate to the extent necessary to facilitate remote learning, perform critical research, and engage in essential functions. Exec. Order 121 § 2(17), 34 N.C. Reg. 1903 (Mar. 27, 2020). The University was not allowed to keep its various constituent campuses open to students. There is no dispute that the University successfully transitioned to online instruction for the final weeks of the semester, allowing students to receive instruction, remain enrolled in school, and receive full course credit for the entire semester. (Appellants' Br. at 33; R pp 48-71.)

Plaintiffs were students, or parents of students, enrolled at some of the University's constituent institutions. (R pp 51-52.) Plaintiffs filed this suit in

May 2020 seeking refunds for tuition, fees, and other expenses which they contend they are entitled to recover for the period of several weeks at the end of the semester during which exclusively online instruction was provided. (R pp 5-43.) In their amended (and operative) complaint, Plaintiffs asserted breach of contract and unjust enrichment claims against the University. (R pp 48-99.) For their breach of contract claims, Plaintiffs request damages for the loss they claim to have suffered from receiving online instruction versus an in-person experience. (*E.g.*, R p 84 ¶ 199.) As Plaintiffs' counsel explained at the hearing on the motion to dismiss, counsel filed a spate of these class actions across the country all alleging "the same thing." (T p 4.)

On 25 June 2020, the General Assembly enacted N.C. Sess. Law 2020-70, entitled "An Act to Provide Immunity for Institutions of Higher Education for Claims Related to COVID-19 Closures for Spring 2020" (the "Immunity Statute"). Codified at N.C. Gen. Stat. §§ 116-310 to -313, the Immunity Statute granted universities in North Carolina, including the University's constituent institutions, finite and conditional immunity from claims based on actions taken in the Spring 2020 semester related to COVID-19.

The Immunity Statute only provided immunity for claims arising between 10 March 2020 (the date of the Governor's Executive Order 116[1]) and 1 June 2020. N.C. Gen. Stat. § 116-312. Immunity was available to the University only if it continued to provide students with a remote education that allowed them to complete their semester's coursework. *Id.* § 116-311(a)(4). The statute covered only claims for damages related to tuition or fees paid for the Spring 2020 semester and the damages had to be caused by an action taken in response to the Governor's Executive Orders. *Id.* § 116-311(a)(1), (2). Moreover, the University's action had to be reasonably related to protecting the health, safety, or welfare of the public. *Id.* § 116-311(a)(1), (2). And any actions made in bad faith or with malice would not be barred by the immunity. *Id.* § 116-311(c). Finally, this statutory immunity was "in addition to all other immunities provided by applicable State law." *Id.* § 116-312.

The University moved under Rule 12(b) for dismissal based on the Immunity Statute, sovereign immunity, and failure to state a claim. (R pp 100-01.) The trial court granted the motion, dismissing the action in its entirety. (R p 105.) Plaintiffs then appealed to the Court of Appeals. (R p 107.)

---

[1] Section 116-312 states that the Immunity Statute applies to acts "occurring on or after the issuance of the COVID-19 emergency declaration until June 1, 2020." The Statute states that the "COVID-19 emergency declaration" means "Executive Order No. 116 issued March 10, 2020, by Governor Roy A. Cooper." N.C. Gen. Stat. § 116-310(3).

The Court of Appeals affirmed. *Dieckhaus v. Bd. of Governors of Univ. of N.C.*, 287 N.C. App. 396, 412-26, 883 S.E.2d 106, 119-28 (2023). The court held that the Immunity Statute applied to Plaintiffs' lawsuit. As for Plaintiffs' challenges to the constitutionality of the Immunity Statute, the court rejected each challenge. Plaintiffs then petitioned this Court for certiorari on the questions of whether the Immunity Statute was applicable to Plaintiffs' claims and, if so, whether the Statute was unconstitutional.[2] The Court allowed Plaintiffs' petition.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Appeals' holdings that the Immunity Statute bars Plaintiffs' claims and that the statute is constitutional.

First, as additional context for this appeal, it is one of two related cases before this Court stemming from the University's transition to online learning during 2020. Here, the Court confronts breach-of-contract claims from the spring of 2020, while the appeal in *Lannan v. Board of Governors of the University of North Carolina,* No. 316PA22, 883 S.E.2d 449 (N.C. Mar. 1, 2023), deals with similar claims from the fall of 2020. Although the appeals are different in many respects, both cases raise common questions. Should the

[2] Plaintiffs did not seek review of the Court of Appeals' affirmance of the dismissal of their unjust enrichment claim, *see Dieckhaus*, 287 N.C. App. at 406, 883 S.E.2d at 115-16, which leaves Plaintiffs only with their breach of contract claims.

Court rule in favor of the University in *Lannan*, the resolution of these common issues would dispense with this case as well.

Second, the Immunity Statute applies to Plaintiff's claims. Immunity is triggered when a university takes some act in response to the COVID-19 pandemic that is reasonably related to protecting public health and safety. The act at issue here is the University's alleged breach of contract, which ostensibly occurred when it transitioned to remote learning. Even Plaintiffs admit that this act was a reasonable health-and-safety response to the pandemic. That means the Immunity Statute bars Plaintiffs' lawsuit seeking damages unless Plaintiffs can show that it's unconstitutional.

Third, turning to the federal constitution, Plaintiffs argue that the Immunity Statute violates the Contract Clause, Takings Clause, and Due Process Clause because the Statute denies them monetary damages for a breach of contract. But those arguments never get out of the gate. The Eleventh Amendment preserves the states' immunity from demands to pay monetary damages, even when such demands are based on federal constitutional rights and raised in a state's own courts.

Fourth, Plaintiffs' federal constitutional arguments fare no better on the merits. If Plaintiffs have any protectable rights at stake, each alleged constitutional violation is reviewed deferentially, especially when, as here, a state legislature is taking reasonable measures to respond to an emergency.

But there are threshold problems, too: Before Plaintiffs can expect the Court to review the Immunity Statute's constitutionality, they must establish a contractual relationship with the University and a protected interest in suing the State for damages. They can establish neither.

Finally, Plaintiffs' substantive due process claim under the North Carolina constitution meets the same end. Plaintiffs admit that the same test governing federal due process claims governs the state-law due process claim. That test—the rational-basis test—is exceedingly deferential to the legislature. Because the Law of the Land Clause requires no scrutiny beyond rational-basis review, the Immunity Statute easily survives Plaintiffs' state constitutional challenge.

## ARGUMENT

### I. The Court's Ruling in *Lannan* Could Resolve This Case.

Although this appeal and the *Lannan* appeal have some key distinctions, there are also some issues in common. In both, students allege that they entered into implied-in-fact contracts with the University that entitle them to damages due to the transition to remote education. In both, the students assert that these implied-in-fact contracts implicitly waived the State's sovereign immunity. In *Lannan*, the University has explained why Plaintiffs are wrong on both counts. Should the Court rule for the University on either of these issues, it would resolve both cases.

In *Lannan*, the University explains why it never formed implied-in-fact contracts with the students. *See, e.g.*, Def.-Appellants' Reply Br. at 27-33, *Lannan v. Bd. of Governors*, No. 316PA22 (22 June 2023). Those arguments are equally applicable here, where Plaintiffs have also failed to adequately allege the existence of a contract.

Every contract must have an offer. *See Se. Caissons, LLC v. Choate Const. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016) ("The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." (citing *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980)). Plaintiffs argue that statements appearing in websites and recruitment brochures constituted an offer by the University to provide in-person services. (Appellants' Br. at 15-16.) As a matter of law, statements appearing in a school's advertisements and websites are not enough to create a contract. *See, e.g., Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 640, 641-42, 781 S.E.2d 511, 517 (2016); *see also Shaw v. Elon Univ.*, 400 F. Supp. 3d 360, 365 (M.D.N.C. 2019); *McLean v. Duke Univ.*, 376 F. Supp. 3d 585, 606 (M.D.N.C. 2019); *Chandler v. Forsyth Tech. Cmty. College*, 294 F. Supp. 3d 445, 458-59, *aff'd*, 739 F. App'x 203 (4th Cir. 2018); *Amable v. New Sch.*, 551 F. Supp. 3d 299, 308 (S.D.N.Y. 2021); *Barkhordar v. President & Fellows of Harvard Coll.*, 544 F. Supp. 3d 203, 214 (D. Mass. 2021); *Smith v. Univ. of Pa.*, 534 F. Supp. 3d 463,

473 (E.D. Pa. 2021); *Berlanga v. Univ. of San Francisco*, 100 Cal. App. 5th 75, 318 Cal. Rptr. 3d 782, 789 (2024); *Croce v. St. Joseph's Coll. of N.Y.*, 219 A.D.3d 693, 695–96 (N.Y. App. 2023). Courts have held such statements are binding only when they are expressly incorporated into a separate, written contract. *See Ryan v. Univ. of N. Carolina Hosps.*, 128 N.C. App. 300, 300, 494 S.E.2d 789, 790 (1998).

Like the plaintiffs in *Lannan*, Plaintiffs here cannot point to any specific promise by the University. Instead, Plaintiffs seek to construct a contract from statements in the University's websites and online brochures, which merely suggest what a student's educational experience might include. (*See* R pp 53-65.) Plaintiffs are not permitted to extrapolate hidden promises from these online descriptions. *See Fid. & Cas. Co. of N. Y.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959) ("Neither party can obtain an interpretation and result contrary to the express language of a contract by the assertion that it does not truly express his intent."). And student fees, being imposed by statute, are not "user fees" that would entitle students to promised government services. *Cf. Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 45, 442 S.E.2d 45, 50 (1994) (distinguishing between the collection of "user fees" and "the levying of taxes"). Should the Court hold that Plaintiffs did not have contracts with the University, then Plaintiffs' claims are subject to dismissal.

The University also explains in *Lannan* that this Court's precedents have never recognized a waiver of sovereign immunity based on the State forming an implied-in-fact contract. *See, e.g.*, Def.-Appellants' Reply Br. at 29-34, *Lannan v. Bd. of Governors*, No. 316PA22 (22 June 2023). This Court's opinions in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), and *Wray v. City of Greensboro*, 370 N.C. 41, 802 S.E.2d 894 (2017), show that the Court looked for an express contract before it inferred that immunity had been waived. Years after the decision in *Smith*, the Court of Appeals first held that *all* contracts waive the State's immunity. *See, e.g., Jones v. Kearns*, 120 N.C. App. 301, 311, 462 S.E.2d 245, 251 (1995) (Wynn, J., concurring). In *Lannan*, the University asks this Court to remedy the Court of Appeals' departure from this Court's precedent or, at the very least, cabin the departure to implied-in-fact employment contracts with the State. Should the Court hold that an implied-in-fact contract does not waive the State's immunity, then Plaintiffs' breach of contract claims are subject to immediate dismissal based on sovereign immunity.

For these reasons, the Court's resolution of *Lannan* could resolve this case and obviate the need to resolve the issues briefed below regarding the Immunity Statute.

## II. The Immunity Statute Bars Plaintiffs' Claims for Breach of Contract.

Plaintiffs filed four claims for breach of contract against the University, seeking damages related to tuition, student activity fees, housing fees, and dining fees. For each claim, Plaintiffs' complaint alleges that the University breached its contract by closing campuses and moving to remote education. Plaintiffs' claims of purported contractual breaches are the exact claims that the General Assembly intended to cover with the Immunity Statute. The courts below, therefore, correctly ordered dismissal.

The question before the Court is whether the University's alleged breach—i.e., its closure of campuses in spring 2020—was "reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency." N.C. Gen. Stat. § 116-311(a)(3).[3] When construing a statute, the "cardinal principle" is that "the intent of the legislature is controlling." *State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 309 N.C. 195, 210, 306 S.E.2d 435, 443 (1983). The General Assembly intended that campus closures in spring 2020 would be "reasonably related" to public health, safety, and welfare.

---

[3] Three other elements are also required to trigger immunity. *See* N.C. Gen. Stat. § 116-311(a)(1), (2), (4). But Plaintiffs challenge only whether subsection (a)(3) is met. (*See* Appellants' Br. at 31-34.)

One clear piece of evidence is the title of the Immunity Statute. Courts consider a statute's title when interpreting the statutory text itself. *See, e.g.*, *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012) ("The title and headings are permissible indicators of meaning."). The Session Law for the Immunity Statute is entitled, "An Act to Provide Immunity for Institutions of Higher Education for Claims Related to COVID-19 Closures for Spring 2020." N.C. Sess. Law 2020-70. The title plainly states that the Immunity Statute was aimed at ensuring immunity existed for "Closures for Spring 2020." *Id.*

Plaintiffs don't dispute that the Immunity Statute was intended to cover campus closures. To the contrary, Plaintiffs freely admit that the University's closure of campuses and transition to remote learning was a response to the pandemic that was reasonably related to public health, safety, and welfare: "To reiterate, Defendant's decision to close the campus was fully within the scope of 'protecting the public health, safety, and welfare . . . .'" (Appellants' Br. at 33.)

Such a construction of the statute is further buttressed by the General Assembly's requirement that courts interpret this provision liberally in favor of immunity. The statute "shall be *liberally construed* to effectuate" its purpose. N.C. Gen. Stat. § 116-313 (emphasis added). This legislative direction should

be "carefully followed." Scalia & Garner, *supra*, at 225; *see Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 208, 593 S.E.2d 764, 774 (2004) (liberally construing a statute when the statute itself directed a liberal construction).

This would not be the first court to have concluded that campus closures in spring 2020 were reasonably related to public health, safety, and welfare. A Massachusetts statute that provided similar immunity to universities also required that any campus closure be "'reasonably related to protecting public health and safety interests in response to the COVID-19 emergency.'" *Dutra v. Trustees of Bos. Univ.*, 96 F.4th 15, 19 (1st Cir. 2024) (quoting 2023 Mass. Acts, ch. 28, § 80(b)((iii)). The First Circuit, in holding that the statute was constitutional, found that campus closures during the spring 2020 semester were related to public safety and welfare. *Id.* at 21 ("Underlying BU's compliance was the need for public safety and the reality that large in-person gatherings throughout Massachusetts were no longer an option.").

To avoid application of the statute, Plaintiffs pivot to arguing not about the campus closures but about the lack of a refund: "The financial decisions made by Defendant after closure were made solely in the interest of Defendant's institutions, not the greater North Carolina population." (Appellants' Br. at 33.)

Below, the Court of Appeals correctly rejected this sleight of hand because it mischaracterizes how the University allegedly breached any contracts with Plaintiffs. *Dieckhaus*, 287 N.C. App. at 414, 883 S.E.2d at 120. Plaintiffs argued to that court (as they do here) that the University's "refusal to provide fair tuition and fee refunds is not reasonably related to protecting public health or safety." *Id.* (cleaned up). But this argument shows that Plaintiffs misunderstand the relevant "act or omission" that triggers immunity under the Immunity Statute.

The Immunity Statute first asks (for an element not contested by Plaintiffs) whether a plaintiff "alleges losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19." N.C. Gen. Stat. § 116-311(a)(2). The next element (contested here) asks whether that "alleged act or omission" by the University was reasonably related to protecting health or safety in response to the COVID-19 emergency. *Id.* § 116-311(a)(3).

For Plaintiffs' claims, the relevant act is the University's transition to remote learning. *That* is what the complaint alleges the University did to breach its contract in all four of its breach-of-contract claims. In each of these claims, Plaintiffs plainly allege that "the University breached the contract with Plaintiffs . . . by moving all classes for the Spring 2020 semester to online

distance learning platforms" and limiting access to campus. (R p 84 ¶ 192; *accord* R p 88 ¶ 225; R p 91 ¶ 251; R p 94 ¶ 275.)

In short, Plaintiffs pleaded themselves into the Immunity Statute and out of court. Plaintiffs' arguments about refunds are not a complaint about the University's acts giving rise to the claim. Instead, those are arguments about the remedies Plaintiffs seek. *See, e.g.*, *Holmes v. Solon Automated Servs.*, 231 N.C. App. 44, 50-51, 752 S.E.2d 179, 183 (2013) (explaining that a plaintiff may be entitled to restitution when a contract has been partly performed because impossibility prevented full performance). When the University closed its campuses, according to Plaintiffs' complaint, the University breached its various contracts, regardless of whether the University gave some refund, no refund, or a full refund. Because the University's transition to online learning in spring 2020 was, as Plaintiffs admit, reasonably related to health and safety, the Immunity Statute shields the University from their breach-of-contract claims. Given the Immunity Statute's clear application to their claims, Plaintiffs' only option is to attack the Statute's constitutionality.

## III. Sovereign Immunity Bars Plaintiffs' Federal Law Challenges to the Immunity Statute.

To overcome the Immunity Statute, Plaintiffs first argue that it violates the Contract, Takings, and Due Process clauses of the federal constitution. Under the federal constitution, however, states cannot be hauled into court by

individuals seeking money damages, even when the demand for monetary damages is based on a constitutional right, *see Hans v. Louisiana*, 134 U.S. 1 (1890), and even if they opt to sue the state in its own courts, *see Alden v. Maine*, 527 U.S. 706 (1999). If an individual seeks to reach the public treasury by claiming that a state has violated federal law, sovereign immunity requires that the lawsuit be dismissed.

Such is the case here. Plaintiffs have sued the University, an arm of the State, for breach of contract. They demand money damages for their remedy, and they argue that the federal constitution guarantees them the payment they seek from the State. Because Plaintiffs seek to use federal law to unlock the State's treasury, sovereign immunity under the federal constitution bars their claims.

### A. The federal constitution preserves North Carolina's sovereign immunity.

Under the federal constitution, an individual cannot sue a nonconsenting state. The founders' understanding of state sovereignty—as emphasized by the Eleventh Amendment's adoption—underscores this core federalism principle.

After North Carolina and the other twelve colonies gained independence, these states "considered themselves fully sovereign nations." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237 (2019). An "integral" part of the states'

sovereignty "was their immunity from private suits." *Id.* (cleaned up). This understanding was "universal" among the founders. *Alden*, 527 U.S. at 715-16.

The universal acceptance of sovereign immunity explained the nation's immediate and dramatic reaction to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793). The *Chisholm* Court held that the federal constitution abrogated the states' sovereign immunity, and empowered citizens to sue a state without the state's consent. *See Alden*, 527 U.S. at 719 (discussing *Chisholm*). Justice Iredell (of North Carolina) dissented on the grounds that a "suit for the recovery of money against a State" was not authorized at the time of the constitution's ratification. *Chisholm*, 2 U.S. at 434-35 (Iredell, J., dissenting). *Chisholm* caused "widespread alarm" among the public, which responded by "promptly forc[ing] through the adoption of the eleventh amendment to the constitution of the United States." *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364, 364 (1898). Indeed, the day after *Chisholm* was announced, a proposal was introduced in the U.S. House to amend the Constitution to undo the holding. *Alden*, 527 U.S. at 721. The proposal was promptly ratified as the Eleventh Amendment. *Id.*; *see State v. S. Ry. Co.*, 145 N.C. 495, 59 S.E. 570, 580 (1907).

The Eleventh Amendment not only overruled *Chisholm* but rejected *Chisholm*'s reasoning altogether, *see Hans*, 134 U.S. at 14, and "restore[d] the original constitutional design," *Alden*, 527 U.S. at 722. Sovereign immunity is

"a constitutional principle" that "is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 728. Thus, the Supremacy Clause, while making federal statutes and constitutional provisions the highest law of the land, did not erase the states' sovereign immunity. *Id.* at 731-32. Because this immunity "is based on the United States Constitution itself," *Farmer v. Troy Univ.*, 382 N.C. 366, 386, 879 S.E.2d 124, 137 (2022) (Barringer, J., dissenting), "the Supreme Court of the United States is the final arbiter" of the immunity's contours, *Constantian v. Anson Cnty.*, 244 N.C. 221, 229, 93 S.E.2d 163 (1956).

### B. Sovereign immunity prevents an individual from enforcing the federal constitution against a state to collect monetary damages.

Over a century ago, in *Hans v. Louisiana*, the Supreme Court held that, in light of the Eleventh Amendment's preservation of sovereign immunity, the federal constitution does not empower individuals to collect monetary damages from a state.

This case comes to this Court much like *Hans* came to the Supreme Court of the United States. Hans alleged that he had a contract, a state bond, which the state breached. 134 U.S. at 1-3. When Hans sued Louisiana for breach of contract, Louisiana raised the defense that, since the bonds' issuance, the state had adopted a new constitution that "relieved [it] from the obligation of [the] aforesaid contract and from the payment" thereon. *Id.* at 2-3. Hans responded

to this state-law defense by arguing that the new constitutional provision impaired his contract with Louisiana, violating the Contract Clause. *Id.* at 2-3.

Louisiana further argued that it was immune from Hans's Contract Clause challenge. *Id.* The Supreme Court agreed. As the Supreme Court held, states are immune from suits by their own citizens even for claims arising under federal law. *Id.* at 1-3, 10. The Court reasoned that, in light of the Eleventh Amendment, Justice Iredell's dissenting view had been right all along. *Id.* at 16, 18-19. "The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted." *Id.* at 16. The immunity applied even to "cases arising under the constitution." *Id.* at 10.

As in *Hans*, Plaintiffs have sued the University for breach of contract, seeking damages. (R pp 76-85, 87-89, 91-92, 94-95.) The University, like Louisiana, has responded that state law (here, the Immunity Statute; in *Hans*, the state constitution) relieves it from any obligation to pay damages. Plaintiffs, like Hans, object that a law relieving the state of its obligation to pay monetary damages violates the federal constitution. The Supreme Court's ruling that sovereign immunity bars individuals from enforcing the federal

constitution against states to collect money damages applies equally to Plaintiffs as Hans. *See Hans*, 134 U.S. at 10.

The Supreme Court has repeatedly adhered to *Hans* and expounded on it. *See, e.g.*, *Alden*, 527 U.S. at 727-30; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64-65, 68-70 (1996); *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011); *North Carolina v. Temple*, 134 U.S. 22, 22-23, 30 (1890) (holding immunity barred North Carolina citizen from seeking to force North Carolina to honor its bond agreements under the Contract Clause). It has also made clear that states are equally immune from challenges under the Fourteenth Amendment. *See Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978) (per curiam) (Eighth and Fourteenth Amendments); *Edelman v. Jordan*, 415 U.S. 651, 653 (1974) (Fourteenth Amendment); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 460-61 (1945) (Fourteenth Amendment and the Commerce Clause), *overruled in part on other grounds by Lapides v. Bd. Of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002). Plaintiffs' federal constitutional challenges to the Immunity Statute, therefore, fare no better than the one raised in *Hans*.

### C. Sovereign immunity under the federal constitution applies in state court.

Although *Hans* was a case originally filed in federal court, its immunity principle applies equally to claims originating in state court.

The applicability of state sovereign immunity to actions in state court came to a head a century after *Hans* in *Alden v. Maine*, 527 U.S. 706 (1999). In *Alden*, state probation officers sued their employer, the state of Maine, in state court for overtime wages owed under the federal Fair Labor Standards Act. *Id.* at 711. The Maine courts dismissed the suit based on sovereign immunity. *Id.* at 712. The Supreme Court affirmed, concluding that the Fair Labor Standards Act did not overcome Maine's sovereign immunity in its own courts. *Id.*

The Supreme Court analyzed its prior precedents to see whether the forum in which an action was brought had any bearing on a state's ability to assert sovereign immunity against federal claims. "The logic" of the court's prior decisions, like *Hans*, "does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well." *Id.* at 733. These precedents "described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745. "We have said on many occasions, furthermore, that the States retain their immunity from private suits prosecuted in their own courts." *Id.* (collecting nine such cases).

*Alden* confirmed those views. The "history, practice, precedent, and the structure of the Constitution" led the Supreme Court to hold that "States retain immunity from private suit in their own courts." *Id.* at 741. This doctrine rests on a "structural principle," which "inheres in the system of

federalism established by the Constitution." *Id.* at 730. State sovereign immunity "applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned." *Id.* at 742. Indeed, if states thought that they were forfeiting immunity in their own courts by joining the Union, "it is difficult to conceive that the Constitution would have been adopted." *Id.* at 743.

This isn't to say that states were free to ignore their obligations. Instead, state sovereign immunity means that a "State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts." *Id.* at 752. The court also assured citizens that states would not be free to "disregard the constitution," *id.* at 755, because established exceptions to state sovereign immunity adequately protect federal constitutional rights. *See id.* at 756-57; *see infra* Section III.D. These "[e]stablished rules provide ample means to correct ongoing violations" and made it unnecessary "to subject nonconsenting States to private suits in their own courts" in order to "uphold the Constitution." *Alden*, 527 U.S. at 757.

Thus, the principle in *Hans* applies to this case, according to *Alden*, even though the action is pending in state court.

**D. No exception to sovereign immunity applies.**

Although the Supreme Court of the United States has recognized exceptions to state sovereign immunity, none apply here.

Under the doctrine in *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity does not bar an action against a state official sued in his official capacity for a claim seeking prospective relief. *E.g.*, *Green v. Mansour*, 474 U.S. 64, 68 (1985) (explaining the doctrine); *Stewart*, 563 U.S. at 254 (same). But Plaintiffs have not sued a state official, nor does their remaining breach-of-contract claim seek prospective relief. Instead, Plaintiffs seek retroactive relief: money damages for an alleged breach of contract.[4] That falls outside of the *Ex parte Young* doctrine because it would reach into "the state treasury." *Alden*, 527 U.S. at 757.[5]

---

[4] In this way, Plaintiffs' claims against the University are different from the claims against the State in *Hoke County Board of Education v. State*, 382 N.C. 386, 393-94, 879 S.E.2d 193, 200 (2022). In that case, plaintiffs sought declaratory relief and a prospective injunction that would compel future action by the State. *See id.* Plaintiffs do not seek prospective relief here because they have no need to do so: the Immunity Statute has no prospective application; immunity applies only to claims from the spring semester 2020. N.C. Gen. Stat. § 116-312.

[5] Even if Plaintiffs' challenge is viewed as some type of request for a declaratory judgment, it still fails. The State itself is immune from all claims for relief, whether retrospective (money damages) or prospective (injunctive or declaratory relief). *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984); *see Missouri v. Fiske*, 290 U.S. 18, 27 (1933) (immunity applies to "suits in equity as well as at law"). And even if Plaintiffs had sued a state official under *Ex parte Young*, the claim would still fail because a declaration

Plaintiffs' decision to name the University as the defendant, rather than the State itself, does not permit them to evade the State's immunity. State sovereign immunity makes no distinction between the states and their various arms. *See id.* at 756. This Court has already recognized that the University *is* the State and is entitled to sovereign immunity. *Farmer*, 382 N.C. at 370, 879 S.E.2d at 128; *accord McAdoo v. Univ. of N.C. at Chapel Hill*, 248 F. Supp. 3d 705, 719 (M.D.N.C. 2017) (reaching same conclusion).[6]

Finally, a state can consent to be sued by electing to waive its sovereign immunity. *Alden*, 527 U.S. at 755. This is typically done by state statute. *See id.*; *Est. of Graham v. Lambert*, 898 S.E.2d 888, 896 (N.C. 2024) (sovereign immunity is "waivable by clear statutory language," like the "State Tort Claims Act"). For example, in *Bailey v. State*, the Court held that the plaintiffs' Contract Clause claims entitled them to receive damages for the State's overcollection of taxes because the General Assembly had waived sovereign immunity as to such payments by passing a statute that authorized tax

---

would serve no purpose but to unlock the state treasury, which would still be barred by state sovereign immunity. *See Green*, 474 U.S. at 73-74.

[6] Sovereign immunity also does not bar claims brought by the federal government or claims authorized against a state by Congressional legislation under section five of the Fourteenth Amendment. *Alden*, 527 U.S. at 755-56. Plaintiffs aren't the federal government, and their state-law contract claims aren't brought under any federal law enacted under section five of the Fourteenth Amendment.

refunds. *See* 348 N.C. 130, 163-67, 500 S.E.2d 54, 73-76 (1998); *see also Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N. Carolina*, 345 N.C. 683, 696, 483 S.E.2d 422, 430 (1997) (holding that, in a Contract Clause case, a statute's authorization of payment of interest waived the State's immunity from such payments).[7] Plaintiffs can point to no legislation that would authorize their challenges to the Immunity Statute.

Of course, in *Smith v. State*, this Court held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). But that holding is not relevant here. *Smith* was not applying sovereign immunity as preserved in the federal constitution. Instead, *Smith* was creating a special state-law rule for state-law sovereign immunity governing purely state-law breach of contract claims. Here, by contrast, Plaintiffs are raising challenges to the Immunity Statute under the federal constitution to collect money damages, which the Supreme Court of the United States has held Plaintiffs cannot do. *Smith* doesn't apply.

---

[7] In other cases in which the Court addressed Contract Clause claims against the State, the plaintiffs were seeking declaratory and injunctive relief, *e.g.*, *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 783, 786 S.E.2d 255, 260 (2016), or the Court did not address immunity under the Eleventh Amendment, *e.g.*, *Lake v. State Health Plan for Tchrs. & State Emps.*, 380 N.C. 502, 503, 869 S.E.2d 292, 297 (2022).

In addition, the holding in *Smith* would not support a waiver of the State's sovereign immunity to Plaintiffs' federal constitutional challenges here. The Supreme Court has held that a state's waiver of immunity must "be unequivocally expressed." *Pennhurst*, 465 U.S. at 99; *see Edelman*, 415 U.S. at 673. This Court has likewise held that a "[w]aiver of sovereign immunity may not be lightly inferred," and, when a waiver does occur, it "must be strictly construed" because it is "in derogation of the sovereign right to immunity." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983); *see Farmer*, 382 N.C. at 371, 879 S.E.2d at 128 ("[A]ny waiver of sovereign immunity must be explicit."). Even assuming the Plaintiffs had implied-in-fact contracts with the University, those implied contracts would have (at most) implied the University consented to be sued for a breach of the contract itself—but nothing more. Yet, Plaintiffs' appeal asks the Court to strike down legislation enacted by the General Assembly. Such a far-reaching waiver cannot be inferred from an alleged implied-in-fact contract.

Even if an implied waiver under *Smith* could authorize a constitutional challenge to legislation, the State has withdrawn any implied waiver by enacting the Immunity Statute and asserting immunity thereunder. If a state had previously consented to be sued, it can nevertheless withdraw its consent and reassert sovereign immunity at any time. *See, e.g.*, *Hans*, 134 U.S. at 17 (1890); *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *Beers v. Arkansas*, 61 U.S.

527, 529 (1857); *see also Carpenter v. Atlanta & C.A.L. Ry. Co.*, 184 N.C. 400, 114 S.E. 693, 694 (1922) (quoting *Beers*, 61 U.S. at 529); *O'Neal v. Wake Cnty.*, 196 N.C. 184, 145 S.E. 28, 30 (1928) (same). A state can even withdraw consent by passing a statute that asserts immunity in the midst of pending litigation. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *see Beers*, 61 U.S. at 529.

In *Beers v. Arkansas*, for example, Arkansas passed legislation allowing the state to be sued and, after certain suits were filed, narrowed the jurisdiction of its courts to hear such claims. 61 U.S. at 528–29. The Supreme Court affirmed Arkansas's ability to respond to the pending lawsuits in such a manner, explaining that Arkansas was free to "withdraw its consent to be sued whenever" it decided that the public interest required it. *Id.* at 529. Should the Court hold that the doctrine of *Smith v. State* is adequate to waive state sovereign immunity under the federal constitution, the State was free to withdraw any implied waiver by passing a statute that asserted its immunity. The Immunity Statute did just that. Indeed, in contrast to *Bailey* and *Faulkenbury*, which involved statutes that had waived sovereign immunity, *see Bailey*, 348 N.C. at 163-67, 500 S.E.2d at 73-76; *Faulkenbury*, 345 N.C. at 696, 483 S.E.2d at 430, here, the State has passed a statute that expressly

asserts immunity from claims such as Plaintiffs'.[8] The State has not consented to Plaintiffs' federal constitutional challenges.

* * *

Plaintiffs cannot pursue damages against the University on the theory that the Immunity Statute violates federal law. That theory is barred by the State's sovereign immunity as preserved by the federal constitution. Taken together, *Hans* and *Alden* teach that the federal constitution cannot be used to pry open the State's treasury.

## IV. Plaintiffs' Federal Law Challenges Fail on the Merits.

Plaintiffs challenge the validity of the Immunity Statute under the Contract Clause, the Takings Clause, and the Due Process Clause of the federal constitution.

As a threshold matter, should the Court rule, as the University argues in *Lannan*, that students did not have implied-in-fact contracts, then Plaintiffs' federal constitutional challenges fail from their inception. If there are no

---

[8] To be clear, although a state can pass a statute that withdraws its consent to be sued at any time, *see Beers*, 61 U.S. at 529, the University raised its immunity in the trial court (R p 100 ¶ 2). And, in any event, sovereign immunity may be raised for the first time before this Court. *See Edelman*, 415 U.S. at 677-78 ("[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *Lord & Polk Chem. Co. v. State Bd. of Agric.*, 111 N.C. 135, 15 S.E. 1032, 1033 (1892) ("[Sovereign immunity] is a defect which could be taken advantage of *ore tenus* at any time, and the court will take notice of it *ex mero motu*." (citations omitted)).

contracts in the first place, then the Immunity Statute could not interfere with any rights protected by the federal constitution—indeed, the claims even fail on the merits. In addition, as explained above, the State's sovereign immunity, per the Eleventh Amendment, forecloses these federal challenges because Plaintiffs are not allowed to assert such challenges absent the State's consent—and the State does not consent.

Should the Court nevertheless reach the merits of Plaintiffs' federal constitutional challenges, it will find them wanting. As a threshold matter, the Supreme Court of the United States has held that a citizen does not have a constitutionally protected right to sue a State for monetary damages. Therefore, the Immunity Statute, which makes clear the State does not consent to be sued for certain damages, does not implicate Plaintiffs' constitutional rights.

Moreover, a review of the Supreme Court's precedents shows that, even if the Immunity Statute did interfere with a protected right, the federal constitution does not give citizens an unassailable right to enforce a contract against a state. Rather, the Contract Clause, the Takings Clause, and the Due Process Clause all permit states to pass legislation that impacts contracts so long as the law furthers legitimate state interests.

### A. The Immunity Statute's assertion of immunity does not implicate a right protected by the federal constitution.

Setting aside sovereign immunity, the Contract Clause, the Takings Clause, and the Due Process Clause do not protect a citizen's right to sue a state for damages in every instance. As explained below, North Carolina courts cannot coerce the State to pay a monetary judgment absent legislative authorization for such a payment; and Plaintiffs do not point to any legislative authorization for the large payment that they demand here. As such, Plaintiffs' claims, even if successful, will yield only an unenforceable judgment—which is not a right protected by the federal constitution.

#### 1. Plaintiffs have only an expectation that the General Assembly would approve funds to pay the enormous monetary judgment they seek.

For Plaintiffs' breach-of-contract claims to give rise to a right protected by the federal constitution, their claims must have guaranteed them something, such as a judgment upon which they could collect. Plaintiffs' claims against the University, which would require a legislative appropriation to pay, do not entitle them to an enforceable judgment. Under the state constitution, courts cannot force the State to appropriate money to pay damages.

The Appropriations Clause dictates that public funds "'be disbursed only in accordance with legislative authority.'" *Cooper v. Berger*, 376 N.C. 22, 42, 852 S.E.2d 46, 61 (2020) (quoting *Gardner v. Bd. of Trustees of N.C. Loc.*

*Governmental Employees' Ret. Sys.*, 226 N.C. 465, 468, 38 S.E.2d 314, 316 (1946)). Because the Appropriations Clause "vests the authority to appropriate money solely in the legislative branch, the Separation of Powers Clause 'prohibits the judiciary from taking public monies without statutory authorization.'" *Richmond Cnty. Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 427, 803 S.E.2d 27, 31 (2017) (Dietz, J.) (quoting *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). Thus, the state constitution does not permit the judiciary to force other branches of state government to use public funds to pay a monetary judgment unless the legislature has authorized such a payment. *See Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 172, 459 S.E.2d 626, 629 (1995); *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364, 364 (1898); *Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 427, 803 S.E.2d at 31. The constitutional limits placed on the judiciary's power mean that, even when the State waives immunity (which it has not done here), the most a court can do—absent statutory authorization to pay a judgment—is adjudicate whether the citizen has a valid monetary claim against the State.

This Court's decision in *Smith v. State* highlights this principle. There, the Court held that the State, by entering certain contracts, "implicitly consents to be sued for damages on the contract." 289 N.C. at 320, 222 S.E.2d at 424. However, despite the State having consented to be sued, the Court held that the judiciary lacked the power to enforce a monetary judgment against

the State: "In the event plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment." *Id.* at 321, 222 S.E.2d at 424; *see Able Outdoor*, 341 N.C. at 172, 459 S.E.2d at 629 (recognizing that, in *Smith*, the Court "held that if a plaintiff is successful in establishing his claim, he cannot obtain execution to enforce the judgment").[9]

In *Smith*, the Court acknowledged a "far-reaching difference between the contracts of citizens and those of sovereigns . . . . The one may defeat enforcement, but the other cannot." 289 N.C. at 311, 222 S.E.2d at 418 (internal quotation marks omitted). Individuals contracting with the State are charged with knowledge of the unique characteristics of the State's contractual obligations. *Rotan v. State*, 195 N.C. 291, 141 S.E. 733, 735 (1928) ("Every person who enters into a contract with the state . . . *does so with knowledge* that he has no right of action against the state to enforce such contract or to recover of the state." (emphasis added)); *see Smith*, 289 N.C. at 311, 222 S.E.2d at 418.

---

[9] In *Richmond Cnty. Bd. of Educ.*, Justice Dietz, writing as a judge for the Court of Appeals, identified a limited circumstance in which a court might be able to command State officials to tender payment as a remedy if appropriated funds had yet been spent. *See* 254 N.C. App. at 427-28, 803 S.E.2d at 31-32. This exception is inapplicable here because Plaintiffs are not asking State officials to transfer unspent funds. They are asking the Court to force the University to pay damages when the General Assembly has passed an *anti*-appropriation statute, precluding the payment of damages.

When Plaintiffs sued the University, they were charged with the knowledge that they could not get an executable monetary judgment absent statutory authorization. Plaintiffs cannot point to statutory authorization for the University to pay such a large judgment—meaning any payment must come from a legislative appropriation, which cannot be compelled by the judiciary. Thus, Plaintiffs' lawsuit, even if successful, would give a mere expectation that the State might be willing to pay on a judgment. An expectation is not a protected interest. *See Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

Plaintiffs, though, are not without recourse. The financial remedy they seek merely rests with a different branch of government: the legislature. A plaintiff who cannot enforce a judgment against the State can petition the legislature for the requisite appropriation and vote for representatives willing to make such an appropriation. *See* N.C. Const. art. I, §§ 9, 12. Recourse in cases such as this one "lies not with the courts, but at the ballot box." *Richmond Cnty. Bd. of Educ.*, 254 N.C. App. at 429, 803 S.E.2d at 32.

**2. The Contract Clause permits a state to refuse to be sued over a contract if the suit would not result in a collectible judgment.**

Under the Contract Clause, if a state agrees to be sued over a contractual obligation but retains its discretion to pay damages, then the state can later

refuse to be sued without impairing the citizen's contract. Here, because Plaintiffs were never entitled to collect such a large judgment against the State, the State could refuse to be sued without impairing any alleged contracts.

For example, in *Memphis & Charleston Company Railroad v. State of Tennessee*, the state sued a bank, and the bank counterclaimed for debts owed. 101 U.S. 337, 338-39 (1879). The debt owed to the bank had accrued at a time when a Tennessee statute empowered courts to adjudicate, but *not enforce*, claims against the state. *Id.* Before the suit was filed, the state had repealed this statute, and the bank argued that the repeal had impaired its contracts with the state. *Id.*

In rejecting the bank's Contract Clause claim, the Supreme Court explained that an "adjudication" was merely a "judicial ascertain[ment]" of an obligation, whereas a true "remedy" was the "enforcement" of that obligation. *Id.* at 339-41. Only the latter was protected by the Contract Clause:

> Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

*Id.* at 339-40. Because the bank had a "right to sue" that never included the power to enforce, Tennessee did not impair the contract when it refused to be sued. *Id.* at 341.

Similarly, in *Baltzer v. North Carolina*, a citizen sued North Carolina for payments owed on State-issued bonds. 161 U.S. 240, 241-42 (1896). The citizen claimed the bonds were impaired by the repeal of a state constitutional provision that gave this Court jurisdiction to hear claims against the State but not to execute judgments. *Id.* Relying on its decision in *Memphis & Charleston Railroad Company*, the Supreme Court held that stripping this Court's jurisdiction did not impair the citizen's contracts because the State had always been free to "refuse to pay" even before the repeal of jurisdiction. *Id.* at 243-45.

Here, the Contract Clause did not protect Plaintiffs' right to sue the State because, as explained above, even if Plaintiffs obtained a judgment for millions of dollars against the University, the courts could not enforce it without an appropriation. *See, e.g.*, *Smith*, 289 N.C. at 321, 222 S.E.2d at 424. Because Plaintiffs never had an enforceable remedy—they could never *force* the State to pay a judgment—the State could also refuse to be sued without impairing any purported contract.

**3. Because a sovereign can refuse to be sued, the right to sue is not a protected property interest under the Takings and Due Process clauses.**

The analysis for the Takings and Due Process challenges is the same. Although these clauses can offer qualified protection of a citizen's contract with a sovereign, these clauses do not stop a sovereign from asserting immunity to dispense with a breach of contract claim.

In *Lynch v. United States*, the Supreme Court reviewed a statute that removed a remedy for the United States' breach of an insurance contract. 292 U.S. 571 (1934). The United States had issued renewable term insurance during World War I. *Id.* at 574. Insureds paid premiums in exchange for insurance coverage. *Id.* at 576. As part of the enabling legislation, Congress consented to be sued over the insurance contracts. *Id.* at 581. Years later, Congress repealed the laws regarding the insurance, *id.* at 575, and, upon repeal, the government prohibited future payment on claims made under the policies. *Id.* at 583 n.13. The insureds sued. *Id.* at 575.

The *Lynch* Court started by acknowledging that a valid contract—whether with "a private individual, a municipality, a state, or the United States"—was a protected property interest, and the United States was "'as much bound by [its] contracts'" as citizens. *Id.* at 579, 580 (quoting *Union Pac. R. Co. v. United States*, 99 U.S. 700, 719 (1878)). However, while "[c]ontracts between individuals or corporations are impaired . . . whenever the right to enforce them by legal process is taken away or materially lessened[, a] different rule prevails in respect to contracts of sovereigns." *Id.* at 580 (citation and footnote omitted). Citing *Memphis & Charleston Railroad Company* and *Baltzer*, the Court acknowledged that "Congress retained power to withdraw the consent [to be sued] at any time." *Id.* Contracts with a sovereign are "'only binding on the conscience of the sovereign and have no pretensions to

compulsive force.'" *Id.* at 580-81 (quoting Alexander Hamilton, *Federalist No. 81*).

Therefore, the right to sue the United States for breach of contract was not "a property right protected by the Fifth Amendment." *Id.* at 581.[10] Although the Takings and Due Process clauses require the United States to honor its contracts, they do not protect the citizen from the sovereign withdrawing its consent to be sued for a breach of those contracts. *See id.* at 580-81; *see also Perry v. United States*, 294 U.S. 330, 352 (1935) (holding that there is "no difference" between a contract with the United States and a contract with a citizen "except that the United States cannot be sued without its consent").

Plaintiffs argue that the Immunity Statute, by terminating their ability to sue the State for breaching their alleged contracts, violated the Takings and Due Process clauses. But their argument can't be squared with *Lynch*. The State was always free to assert its immunity from suit, since any judgment against the State would never be executable. And the Immunity Statute in fact made explicit that the State was refusing to be sued for Plaintiffs' claims. Thus, Plaintiffs' qualified property interest in their purported contracts, if any, had to give way to the State's superior power to refuse to be sued.

---

[10] Although *Lynch* concerned the Due Process Clause in the Fifth Amendment, which applies to the United States, the Due Process Clause of the Fourteenth Amendment places identical restrictions on the states. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *Poe v. Ullman*, 367 U.S. 497, 540 (1961).

### B. The Statute survives Plaintiffs' challenges under the Contract, Takings, and Due Process clauses.

Even if the Court holds that Plaintiffs had a protectable interest in suing the University, the Immunity Statute still withstands scrutiny under the federal constitution. Each of Plaintiffs' challenges fails under the law governing these particular constitutional provisions.

#### 1. The Immunity Statute does not unconstitutionally impair a contractual obligation.

To prevail on their Contract Clause argument, Plaintiffs must establish three elements. Plaintiffs must prove (1) "a contractual obligation is present," (2) that "the state's actions impaired that contract," and (3) the state impairment wasn't "reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60. Plaintiffs argue that they can satisfy all three factors, (Appellants' Br. at 14-23), but they are mistaken.

##### a. No contract existed.

For the reasons already set forth in Section I, Plaintiffs have failed to establish that they have formed implied-in-fact contracts with the University. Statements in the University's websites and online brochures are not enough to create a contract. *See, e.g,*, *Montessori Children's House of Durham*, 244 N.C. App. at 641-42, 781 S.E.2d at 517. The statements merely suggest what a student's educational experience might include, and Plaintiffs cannot

extrapolate promises from such descriptions. Plaintiffs had no contracts with the University.

**b. There was no substantial impairment.**

Plaintiffs also must prove that the Immunity Statute "has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983) (quotation marks omitted). Plaintiffs assert that the Immunity Statute impaired their contracts by preventing them from suing the University to enforce the contracts. (Appellants' Br. at 16-17.) But, as explained above in Section IV.A.1, the State cannot be forced to pay damages absent statutory authorization. Here, Plaintiffs are not only unable to point to legislative authorization for the damages they demand, but the Immunity Statute makes clear that the legislature will not pay such damages. Because Plaintiffs will not collect the $260,000,000 or so in damages they seek, removing their ability to waste the parties' resources on fruitless litigation does not impair their alleged contractual rights. *See, e.g.*, *Baltzer*, 161 U.S. at 245. Or, as Maryland's highest court put it:

> The rule that is gleaned from the Supreme Court decisions is that the State may waive immunity, enter into a contract and later rescind or repeal the waiver of immunity. Such action does not violate the Constitutional ban on impairment of contract because where there is no judicial remedy of enforcement, there is no contract within the meaning of [the Contract Clause of] the Constitution.

*Md. Port Admin. v. I.T.O. Corp. of Baltimore*, 395 A.2d 145, 153 (Md. 1978) (collecting cases). Thus, the Contract Clause issue raised by Plaintiffs has already been decided against them.

Plaintiffs also must prove that the *Immunity Statute* impaired their contracts, since the statute is the object of their constitutional challenge. In *Bailey*, for example, the statute in question reduced the tax exemption for retirement benefits, which "substantially impaired the employees' contractual right to a tax exemption." 348 N.C. at 151, 500 S.E.2d at 66. Here, it wasn't the Immunity Statute that impaired any ostensible contracts Plaintiffs had with the University. Rather, it was the Governor's Executive Orders. It was the Executive Orders that rendered it impossible for the University to provide in-person education and access to the University's facilities and services. The Immunity Statute couldn't have been the cause of any impairment since it wasn't enacted until the spring semester ended. *See* N.C. Sess. Law 2020-70 (enacted by the General Assembly 25 June 2020 and approved by the Governor 1 July 2020).

And even if there was some impairment caused by the Immunity Statute, it wasn't substantial. "Minimal alteration of contractual obligations may end the inquiry at this stage." *Bailey*, 348 N.C. at 151, 500 S.E.2d at 66 (cleaned up). A minimal alteration is one that removes a benefit that was not an inducement for the contract. *City of El Paso v. Simmons*, 379 U.S. 497, 514

(1965); *see id.* at 515 ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause . . . ."); *see also Energy Rsrvs. Grp.*, 459 U.S. at 411.

The pandemic and Executive Orders caused students to return home in late March 2020, forcing them to attend classes remotely for the final weeks of the semester. (*See* R pp 48, 63-64.) It cannot seriously be contended that students were induced to attend the University's various institutions by the prospect that the University would give them a partial refund in case of an unprecedented global pandemic occurring as final exams started to approach. And because the University's immunity was conditioned on providing students with a remote option to complete their semester's coursework, Plaintiffs necessarily received the core of their purported contracts: a full semester's worth of instruction and course credits needed to earn their diplomas. Plaintiffs therefore received what they reasonably expected from their purported bargains. *See Sveen v. Melin*, 584 U.S. 811, 812 (2018) ("[T]he Court has considered the extent to which the law undermines the contractual bargain [or] interferes with a party's reasonable expectations . . . ."). Thus, if the University had any contractual obligations to Plaintiffs, it performed them in good faith. The General Assembly's subsequent refusal to pay damages was not a substantial impairment of any purported contract.

**c. The State's interest outweighs any impairment.**

The last element weighs "a state's interest in exercising its police power against the impairment of individual contractual rights." *N.C. Ass'n of Educators, Inc.*, 368 N.C. at 791, 786 S.E.2d at 265. "[T]he States retain residual authority to enact laws to safeguard the vital interests of their people." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (cleaned up). Thus, "[t]his portion of the inquiry 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." *N.C. Ass'n of Educators*, 368 N.C. at 791, 786 S.E.2d at 265.

"[S]tanding alone," the fact that a contractual obligation "might require the General Assembly to make difficult choices regarding how to allocate resources to best manage its fiscal obligations" does not necessarily justify breaching the obligation. *Lake*, 380 N.C. at 531, 869 S.E.2d at 314. Undoubtedly, though, economic *emergencies* justify a state's interference with contracts. *See Energy Rsrvs. Grp.*, 459 U.S. at 411-12; *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 n.19 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437, 439-40, 444 (1934). As the Court explained in *Lake*, "the State always retains the authority to act to protect the public should it be faced with a grievous fiscal emergency." 380 N.C. at 531, 869 S.E.2d at 315 (cleaned

up). And fiscal emergencies need not be "of great magnitude" to "justify a state law impairing the obligations of contracts." *Allied Structural Steel*, 438 U.S. at 249.

The Supreme Court's ruling in *Blaisdell* serves as the lodestar for determining whether the Immunity Statute was reasonable and necessary. Viewed as "the leading case in the modern era of Contract Clause interpretation," *U.S. Tr. Co.*, 431 U.S. at 15, the *Blaisdell* opinion addressed a Minnesota law passed in the Great Depression that allowed courts to temporarily extend the time for redemption from foreclosure. *See Blaisdell*, 290 U.S. at 415-16. During the extension, the mortgagor had to pay a reasonable income or rental value to the mortgagee. *Id.* at 416-17. The law was effective only for a finite period. *Id.* at 416.

Although the mortgagor argued that the law violated the Contract Clause, the Supreme Court upheld the law, affirming the state's power to interrupt "contractual obligations by a temporary and conditional restraint" to further "vital public interests." *Id.* at 440. The need for interrupting contracts could be justified by "a great public calamity such as fire, flood, or earthquake" as well as "economic causes." *Id.* at 439-40. Turning to the law at issue, the Court found that it was needed because of an "economic emergency." *Id.* at 444. The law was a reasonable response to the emergency because it was "temporary and conditional," *id.* at 425: the duration of the law was "limited to

the exigency which called it forth," *id.* at 447, and the law permitted redemption extensions "only upon reasonable conditions," *id.* at 445.

**The Immunity Statute was needed**. Comparing this case to *Blaisdell*, the Immunity Statute was also enacted in response to an economic emergency. Plaintiffs deny the existence of an economic crisis. They characterize the University's response to the COVID-19 pandemic as yielding a "financial gain." (Appellants' Br. at 9.) They speculate that the transition to remote education allowed the University to "reduc[e] services and cut[] operating costs," (*id.*), and they insist that the University should now "return[] wrongfully kept funds" to them, (*id.* at 20). The Court, however, can take judicial notice of the economic reality facing the State in the summer of 2020. *See, e.g.*, *Hughes v. Vestal*, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965); *see also Allied Structural Steel*, 438 U.S. at 249 ("[T]he Court in *Blaisdell* took judicial notice" of "emergency economic conditions of the early 1930's.").

The University did not receive a windfall from the pandemic. Transitioning to remote education did not relieve the University from paying for faculty, staff, and facilities. In addition to these unavoidable costs, the University also had to acquire the technology infrastructure necessary to provide remote instruction to over 200,000 students. This happened while the General Assembly faced an economic emergency of unprecedented magnitude. In the summer of 2020, the prospects of the state fisc looked bleak. For the

months of April, May, and June, North Carolina's collection of sales-and-use tax had plummeted by over $200 million compared to 2019.[11] As for taxes based on income, unemployment in North Carolina skyrocketed to 12.9% in March and then remained as high as 7.6% by June.[12] At the national level, the federal government passed the largest economic stimulus package in its history, offering $2.2 trillion in emergency relief to stabilize the economy, which was quickly supplemented by another $484 billion. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281 (2020); Paycheck Protection and Health Care Enhancement Act, Pub. L. No. 116-139, § 101(a)(1), 134 Stat. 620 (2020).

In the middle of 2020, the General Assembly was wrestling with an economic crisis unseen in our times. Then comes Plaintiffs' class-action lawsuit against the University, in which Plaintiffs asserted that the State owed them a collective payment that could exceed $260,000,000.[13] The University—having

---

[11] *See* N.C. Dep't Revenue, *Monthly Report of State Sales and use Tax Gross Collections and Taxable Sales* (Apr. 2019, May 2019, June 2019, Apr. 2020, May 2020, June 2020), *available at* https://www.ncdor.gov/news/reports-and-statistics/monthly-sales-and-use-tax-statistics.

[12] *See* N.C. Dep't Commerce, *North Carolina's June Employment Figures Released* (17 July 2020), *available at* https://www.commerce.nc.gov/news/press-releases/north-carolina%E2%80%99s-june-employment-figures-released-0.

[13] The size of Plaintiffs' claim is calculable from publicly available documents. Plaintiffs claim the class they represent is owed damages equal to the prorated

already spent the collected funds in ensuring the students could complete their courses—did not have surplus funds to appease Plaintiffs' demand. The money would have to come from taxpayers' pockets. The General Assembly could have reasonably concluded that, because of the unprecedented economic crisis, North Carolinians should not bear such an enormous unbudgeted expense for students who had been able to complete their semesters' courses. Thus, the

---

amount of tuition and fees they paid for the final weeks of the Spring 2020 semester that were conducted remotely. (R p 49 ¶ 4; Appellants' Br. at 9.) The University publishes its approved tuition and fees for the constituent institutions, including those approved for the 2019-20 academic year. *See* Univ. of N.C. Bd. of Governors, Meeting Minutes, app. O (Mar. 22, 2019), *available at* https://www.northcarolina.edu/apps//bog/doc.php?id=62460&code=bog. The University also publishes student enrollment figures for each year. *See* Univ. of N.C. System, Interactive Data Dashboards, *available at* https://www.northcarolina.edu/impact/stats-data-reports/interactive-data-dashboards/ (select "Enrollment" and then "Build Your Own Report").

Based on this publicly available information, the University grossed over $859 million in tuition and fees for the 2020 Spring semester (i.e., multiplying tuition and fees by enrollment). After accounting for scholarships and uncollectibles, the net amount of tuition and fees for the semester was approximately $653 million. *See* Univ. of N.C. Bd. of Governors, Meeting Agenda, Item A-3: 2019-20 UNC System Consolidated Financial Report (Apr. 21, 2021) (page 8 of the Report shows uncollectibles and scholarships accounting for roughly 24% of gross tuition and fees for the year), *available at* https://www.northcarolina.edu/apps/bog/doc.php?id=66017&code=bog. If one assumes Plaintiffs completed 40% of the semester remotely, the prorated amount for damages purposes would be approximately $261 million.

Immunity Statute benefited the public at large, not "a narrow group of defendants." (Appellants' Br. at 19.)[14]

In addition to the financial implications of the class-action lawsuit, the litigation was disruptive. The University's educational mission is not just an important interest but a constitutional imperative. The state constitution commands the General Assembly to maintain a public system of higher education. N.C. Const. art. IX, § 8. Plaintiffs' lawsuit risked distracting the University from its primary objective at the time: figuring out how to continue to operate during a pandemic. Courts recognize that states have an interest in terminating disruptive lawsuits. *See, e.g.*, *City of El Paso*, 379 U.S. at 513; *Hughes v. Tobacco Institute Inc.,* 278 F.3d 417, 425 (5th Cir. 2001); *Cloverleaf Golf Course, Inc. v. FMC Corp.*, 863 F. Supp. 2d 768, 771-72 (S.D. Ill. 2012). Those cases are particularly instructive here, since, even if Plaintiffs received the $260,000,000-plus judgment they sought, it would be up to the General Assembly whether to pay Plaintiffs such an amount. *See supra* Section IV.A.1.

The General Assembly determined in 2020 that public funds would not be used to pay Plaintiffs such a large judgment. Thus, it logically followed that

---

[14] Indeed, North Carolina's private universities faced similar class-action lawsuits. *See, e.g.*, *Talab v. Board of Trustees of Duke University*, Case No. 1:20-cv-489-WO-JEP (M.D.N.C. Jan. 1, 2020). The Immunity Statute was a law of general applicability that covered these private state institutions as well. This was not an instance in which only "the State's self-interest [was] at stake." *U.S. Trust. Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

the General Assembly could also terminate disruptive litigation that would be fruitless. That was especially true in early 2020, when it was clear that the University needed to focus on educating students in an evolving environment. The General Assembly had valid grounds for asserting sovereign immunity.

**The Immunity Statute was tailored to the need**. Not only is this case similar to *Blaisdell* in that the challenged law was passed to protect valid state interests, but the Immunity Statute was also very narrowly tailored to address those interests. Here, as in *Blaisdell*, the Statute was "temporary and conditional." 290 U.S. at 425.

The University's statutory immunity was confined to claims arising over a three-month period. *See* N.C. Gen. Stat. § 116-310(3), -311(a)(2), -312 (March 10 and June 10 of 2020). This wasn't forever immunity but certain immunity for acts over a three-month period, when uncertainty had been at its peak. Immunity was also conditioned on the University accomplishing its core mission of educating students: The Statute offered immunity *only if* the University continued to offer remote education to allow students to complete their semester's studies. *See id.* § 116-311(c).

The immunity was not only finite and conditional, but it was also limited in scope. The Statute did not award the University license to take any and all actions upon the onset of the pandemic. Immunity was only available if an action was reasonably related to public health, safety, or welfare. And the

Statute permits liability for any actions done maliciously or in bad faith. *See id.* § 116-311(a)(3); *id.* § 116-311(c). Plaintiffs allege neither.

Given the finite, conditional, and limited immunity afforded by the Immunity Statute, it is clearly tailored to the problems faced by the General Assembly concerning Plaintiffs' lawsuit against the University. The lawsuit posed two threats: it demanded an enormous payout from taxpayers at a time when the State was facing an economic emergency; and it was a distraction to the University's challenge to educate students during a pandemic. The litigation itself was the threat, and the General Assembly acted reasonably to end it. To do so, the General Assembly enacted a narrow law that gave the University immunity for a defined period of time, and only so long as the University succeeded in allowing students to complete their coursework remotely. The Immunity Statute was not a "drastic impairment" but, at most, a narrow one. *Lake*, 380 N.C. at 531, 869 S.E.2d at 314. There was no "evident and more moderate course" that would have served the State's interests. *Id.*

* * *

Should the Court reach the merits of Plaintiffs' Contract Clause challenge and find that contracts existed, Plaintiffs received the benefits of whatever bargains they struck. Plaintiffs enrolled at one of the University's institutions to receive a college education, and *the University delivered* on its educational mission despite a pandemic and Executive Orders forcing the

closure of its campuses. The General Assembly, when considering Plaintiffs demand for $260,000,000 or more in damages, determined the University performed its commitment to students in good faith. Students were not entitled to more. Amid an economic crisis, the General Assembly acted well within its constitutional bounds in shutting the doors of the public treasury to Plaintiffs and terminating their claims against the University.

**2. Plaintiffs are not entitled to compensation under the Takings Clause.**

The Takings Clause of the Fifth Amendment requires just compensation for takings of private property for public use. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 120-21, 388 S.E.2d 538, 550 (1990).

The first hurdle for a Takings claimant is to "identify a specific interest in property that has been taken." *Kitt v. United States*, 277 F.3d 1330, 1336 (Fed. Cir.) (collecting cases), *on reh'g in part,* 288 F.3d 1355 (Fed. Cir. 2002); *see also Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294 (1981) ("We conclude that the District Court's ruling on the 'taking' issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act.").

Before looking at what property interests Plaintiffs did (or did not) raise in the opening brief, the Court can dispense with the Takings claim by

concluding that Plaintiffs did not have an implied-in-fact contract with the University. *See supra* Section I. Absent a contract, Plaintiffs have no protected interest.

In the Court of Appeals, Plaintiffs argued that they had an identifiable property interest in a "chose in action." *Dieckhaus*, 287 N.C. App. at 425, 883 S.E.2d at 128. Plaintiffs are *not* pursuing that argument before this Court. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). But even if they were, it would be unavailing. The Supreme Court in *Lynch* already held that a claim for damages against a sovereign is not a property interest protected by the Takings Clause. *See* 292 U.S. at 581.

For the first time, Plaintiffs argue in their brief before this Court that they had a "lease" agreement with the University, which included obligations beyond property: "food" and "use of school facilities." (Appellants' Br. at 25.) Plaintiffs cannot try to swap horses in search of a better argument before this Court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). But this argument isn't an improvement because the Immunity Statute could not have taken any purported "lease" because the statute just asserts sovereign immunity as a bar to a lawsuit. The Takings argument can begin and end with Plaintiffs' failure to identify a protected property interest at stake.

Next, even if Plaintiffs had identified some property interest, it still wouldn't amount to a taking. An unconstitutional taking "does not occur simply because government action deprives an owner of previously available property rights." *Finch v. City of Durham*, 325 N.C. 352, 366, 384 S.E.2d 8, 16 (1989). Where the government regulates or limits an individual's use of their property, but does not physically occupy the property, a "regulatory taking" may have occurred. *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992). Regulatory takings require courts to conduct "complex factual assessments of the purposes and economic effects of government actions." *Id.*

To guide the assessment of whether a regulatory taking has occurred, a court typically applies the three-factor *Penn Central* inquiry. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). This inquiry requires the court to review "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.*; *see Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Based on these three factors, the Immunity Statute's extinguishment of Plaintiffs' claims does not amount to a taking.

First, to assess a regulation's impact, courts do not look at a particular property interest in isolation but instead measure the impact of the regulation on the property "as a whole." *Penn Cent.*, 438 U.S. at 130-31; *accord Andrus v.*

*Allard*, 444 U.S. 51, 66 (1979). For example, in *Andrus*, the plaintiffs challenged a federal law that prevented them from selling artifacts made with the feathers of protected birds. 444 U.S. at 54-55. The Supreme Court of the United States explained "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66 (cleaned up). Therefore, despite the law having destroyed the artifacts' "most profitable use," there was no taking because plaintiffs "retain[ed] the right to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66.

Here, Plaintiffs' claim for damages against the State is just "one strand of the bundle" of rights included in Plaintiffs' alleged contracts with the University. *Id.* The Court must measure the impact of the Immunity Statute in the context of the entire bundle of rights that would be included in these ostensible contracts. It seems evident that, because campuses did not shut down until late March (with only about six weeks remaining in the semester), the University had, by that time, already fulfilled the bulk of any obligations it might have owed to students. In addition, given that the University's immunity was conditioned on providing remote instruction, the most economically valuable part of Plaintiffs' purported contracts—a college education—was necessarily left untouched by the State, as Plaintiffs were still able to receive their expected course credits. Because Plaintiffs still received

most of the benefits of their alleged bargains—including the most central benefits, an education and credits toward a degree—the Immunity Statute did not amount to an unconstitutional taking of a contract. *See Andrus*, 444 U.S. at 65-66.

Second, a "reasonable investment-backed expectation must be more than a unilateral expectation." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quotation marks omitted). The reasonableness of a property owner's expectation is informed by background principles of state law that might restrict the owner's rights. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001); *cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."). As explained in detail in Section IV.A.1 *supra*, the North Carolina constitution does not empower State courts to force the State to pay monetary damages absent legislative authorization; therefore, one who contracts with the State generally "does so with knowledge that he has no right of action against the state to enforce such contract or to recover of the state." *Rotan*, 195 N.C. at 141 S.E. at 735. Plaintiffs did not have a *reasonable* expectation of forcing the University to pay damages for their class-action breach-of-contract claims; any hope of recovery is a mere unilateral expectation. *See Ruckelshaus*, 467 U.S. at 1005. The Immunity Statute, in

extinguishing Plaintiffs' claims for damages, did not interfere with their reasonable expectations.

Third, the character of the governmental action looks at "[t]he purposes served, as well as the effects produced, by a particular regulation." *Palazzolo*, 533 U.S. at 633. A taking is less likely to be found when the government action seeks to "adjust[] the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124. Since the COVID-19 pandemic, courts across the country have also acknowledged that a government's response to a pandemic is "an effort to adjust the benefits and burdens of economic life to promote the common good." *TJM 64, Inc. v. Shelby Cnty. Mayor*, 526 F. Supp. 3d 331, 338 (W.D. Tenn. 2021) (cleaned up); *see, e.g.*, *Daugherty Speedway, Inc. v. Freeland*, 520 F. Supp. 3d 1070, 1078 (N.D. Ind. 2021); *Blackburn v. Dare Cnty.,* 486 F.Supp.3d 988, 1001 (E.D.N.C. 2020); *Pcg-Sp Venture I LLC v. Newsom*, No. EDCV 20-1138 JGB (KKx), 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020).

In the middle of the pandemic, the General Assembly had to consider, on one hand, the alleged harm students claimed to have suffered from completing the semester remotely and, on the other hand, the risk of this class-action lawsuit to the public fisc and the University's educational mission. At the time, the General Assembly concluded that the University had performed its educational commitments in good faith, and the public treasury and the

University should not be plagued by Plaintiffs' claims for over $260,000,000 in damages. To resolve the matter, the General Assembly crafted a narrowly tailored statute that immunized the University from damages *only if* the University succeeded in continuing to provide the students an education. The General Assembly's careful balancing of interests leans heavily against finding a taking—especially when the Immunity Statute did not interfere with most of Plaintiffs' benefits or their reasonable expectations.

### 3. The Immunity Statute does not violate substantive due process.

Plaintiffs contend that the Immunity Statute violates the substantive component of the due process clause of the Fourteenth Amendment. (Appellants' Br. at 27-28.) Plaintiffs admit that their challenge is given the lightest of scrutiny: rational-basis review. (*Id.*) The Immunity Statute easily withstands that deferential standard.

To establish a due process violation, a citizen must first show that the State deprived the citizen of a protected property interest. *See Peace v. Emp. Sec. Comm'n of N.C.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). "To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994). As explained in Section I *supra*, there was no contract between

Plaintiffs and the University. As explained in Section IV.A.1 *supra*, even if there were a contract, State courts cannot enforce a monetary judgement against the State absent statutory authorization. Therefore, a citizen is not guaranteed damages for the State's breach of a contract. *Rotan*, 195 N.C. 291, 141 S.E. at 735. Accordingly, Plaintiffs do not have a property interest in their claims for damages against the State. *See Lynch*, 292 U.S. at 581. The Immunity Statute cannot violate Plaintiffs' substantive due process rights.

But assuming that a claim for damages against the State was a protected interest, Plaintiffs' federal due process challenge would still fail. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Lowe v. Tarble*, 313 N.C. 460, 461, 329 S.E.2d 648, 650 (1985) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955)); *accord Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022). "As long as there could be some rational basis for enacting [a statute], this Court may not invoke the due process clause of the fourteenth amendment to disturb the statute." *Lowe*, 313 N.C. at 462, 329 S.E.2d at 650. The rational basis standard "merely requires" that a statute "bear some rational relationship to a conceivable legitimate interest of government." *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

Given the "exceedingly deferential" standards of rational basis review, *King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. of Educ.*, 364 N.C. 368, 386, 704 S.E.2d 259, 270 (2010), if the Immunity Statute satisfies the strictures of the Contract Clause, then it satisfies the Due Process Clause. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (describing the standard applied to due process challenges as "less searching" than "the limitations imposed on States by the Contract Clause"). That is not a surprising result, since "health and welfare laws [are] entitled to a strong presumption of validity." *Dobbs*, 597 U.S. at 301 (cleaned up). The Court need not conduct a separate analysis.

Not surprisingly, the United States Court for Appeals of the First Circuit held that an immunity statute in Massachusetts, which offers similar protections as those found in the Immunity Statute, did not violate students' federal substantive due process rights. *See Dutra*, 96 F.4th at 17. The Massachusetts statute, which was enacted in August 2023, provides immunity on almost identical terms to North Carolina's Immunity Statute. *See id.* at 19 (quoting 2023 Mass. Acts, ch. 28, § 80(b)). Applying rational basis review, the First Circuit concluded that the Massachusetts statute was appropriately tailored to accomplish the legitimate interests of relieving universities of disproportionate financial burdens and ensuring that, in the future, universities do not hesitate to follow government orders during a public

emergency. *See id.* at 19-25. Likewise, should the Court apply rational basis review to North Carolina's Immunity Statute, it would easily withstand such scrutiny.

## V. The Due Process Guarantee of the Law of the Land Clause Does Not Prohibit the General Assembly from Enacting the Immunity Statute.

Plaintiffs' challenge under the state constitution fails for similar reasons that it fails the federal due process challenge. As a threshold matter, Plaintiffs' claims against the University are not legal entitlements that are protected by the constitution. Even if they were protected, Plaintiffs agree that the Court should apply the rational-basis standard, (Appellants' Br. at 27-28), and the Immunity Statute easily survives this deferential standard of review for the reasons given for the federal due process challenge. Moreover, the Law of the Land Clause offers no basis for applying a different, state-law due-process standard to the Immunity Statute.

### A. Plaintiffs' claims against the University are not property interests protected by the Law of the Land Clause.

A threshold question for any due process challenge under the Law of the Land Clause is whether a plaintiff has a constitutionally protected property interest at stake—absent such an interest, a plaintiff's due process rights are not implicated. *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 217 (2018). "'To demonstrate a protected property interest under the [Law of

the Land Clause], a party must show more than a mere expectation; he must have a legitimate claim of entitlement.'" *Id.* (quoting *Dwyer*, 338 N.C. at 447, 450 S.E.2d at 890).

Plaintiffs do not have a protected property interest here because, as explained in Section 1, Plaintiffs do not have contracts with the University. If there is no contract, then the Immunity Statute could not have implicated Plaintiffs' due process rights.

In addition, even if Plaintiffs had actual contracts, Plaintiffs do not have a property interest in their claim for damages for the University's breach of such contracts. Because the legislature had never authorized payment for such a large damages claim, Plaintiffs' claim is (at most) a mere expectation of payment, contingent on the General Assembly's discretion. This is not a legal entitlement that is protected by the constitution. *See Tully*, 370 N.C. at 538, 810 S.E.2d at 217; *accord Lynch*, 292 U.S. at 580-81.

Because Plaintiffs have, at most, an expectancy rather than an actual property interest, their due process claim under the Law of the Land Clause cannot prevail. In fact, the State is free to withdraw its consent to be sued *at any time*. This constitutional truth has been repeatedly acknowledged by both this Court and the Supreme Court of the United States for over a century.

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it

> may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And, as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, *and may withdraw its consent whenever it may suppose that justice to the public requires it*."

*O'Neal*, 196 N.C. 184, 145 S.E. at 30 (quoting *Beers*, 61 U.S. at 529) (emphasis added); *Carpenter*, 184 N.C. 400, 114 S.E. at 694 (same); *see Hans*, 134 U.S. at 17 (same); *see also Coll. Sav. Bank*, 527 U.S. at 676 (citing *Beers*, 61 U.S. at 529).

### B. The state-law due process challenge fails for the same reasons the federal-law challenge fails.

Plaintiffs ask this Court to apply the rational-basis standard to their due process challenges under both the federal and state constitutions. (Appellants' Br. at 27-31.) The University agrees that the same standard—deferential, rational-basis review—should govern both. *See Tully*, 370 N.C. at 538, 810 S.E.2d at 216-17 (explaining that "'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states"). And under that standard, Plaintiffs lose.

This Court recently reiterated that the rational-basis test governs restrictions on non-fundamental rights protected by the Law of the Land Clause. *Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs.,*

*Div. of Health Benefits*, 898 S.E.2d 685, 689 (N.C. 2024). Under that standard, this Court "ask[s] whether the government action in question is rationally related to a legitimate government purpose." *Id.* (cleaned up). The standard is easily satisfied because "any conceivable legitimate purpose is sufficient, and the act is not arbitrary so long as it bears a rational relation to the public health, morals, order, or safety, or the general welfare." *Id.* (cleaned up).

For the reasons stated on the federal due process claim, the Immunity Statute easily withstands rational-basis review. It is reasonable for the legislature to assert immunity to end disruptive litigation when it pre-determines that it won't appropriate money to pay a judgment. The legislature doesn't lightly enact such legislation, but, when it does so during a global pandemic, the legislation isn't arbitrary or irrational. *See supra* Section IV.B.3.

### C. A breach-of-contract claim for damages from the State does not receive any heightened protection from the Law of the Land Clause.

Even assuming Plaintiffs did have a property interest in their claims for damages against the State, the Law of the Land Clause does not afford this property interest any heightened protection. Although the Law of the Land Clause creates a right to be free from deprivation of property except by the law of the land, *see* N.C. Const. art. I, § 19, the Clause "does not define that right," *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 235, 886 S.E.2d 16, 46 (2023).

However, "[o]ther provisions in the state constitution give that right content." *Id.*

The Appropriations Clause provides contour for what constitutes "property" under the Law of the Land Clause. As explained in Section IV.A.1, because the State cannot be forced to pay a monetary judgment absent a legislative authorization, an individual does not necessarily have a protected property interest in a claim for damages against the State. *See, e.g., O'Neal*, 196 N.C. 184, 145 S.E. at 30; *see also Lynch*, 292 U.S. 580-81. The Ex Post Facto Clause provides content for the definition of the "law of the land." The provision makes clear that two categories of retroactive laws fall outside of the "law of the land": retroactive criminal laws and retroactive tax laws. *See* N.C. Const. art. I, § 16. The Court has held that the Ex Post Facto Clause prohibits the retroactive laws identified therein, but no others. *State v. Bell*, 61 N.C. 76, 83, 86 (1867); *see State v.* —, 2 N.C. 28, 39 (N.C. Super. L. & Eq. 1794) (holding that the General Assembly was free to pass non-criminal retroactive laws and that "the affairs of government will sometimes, nay often, require the exercise of this power").

The Law of the Land Clause, when read in the context of the Appropriations Clause and the Ex Post Facto Clause, cannot be construed to place any special limitations on the General Assembly's power to enact a retroactive law that shields the State from monetary liability.

## CONCLUSION

This Court should affirm the Court of Appeals' opinion. This class action should be dismissed.

Respectfully submitted, this the 13th day of May, 2024.

Electronically Submitted
/s/ Craig D. Schauer
DOWLING PLLC
3801 Lake Boone Trail
Raleigh, NC 27607
T: 919-529-3351
State Bar No. 41571
E-mail: cshauer@dowlingfirm.com

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed.

DOWLING PLLC

/s/ Troy D. Shelton
State Bar No. 48070
E-mail: tshelton@dowlingfirm.com
3801 Lake Boone Trail
Raleigh, NC 27607
T: 919-529-3351

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Laura McHenry
Special Deputy Attorney General
North Carolina Department of Justice
State Bar No. 45005
E-mail: lmchenry@ncdoj.gov
Post Office Box 629
Raleigh, North Carolina 27602
T: 919-716-6532

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP

/s/ Jim W. Phillips, Jr.
State Bar. No. 12516
E-mail: Jphillips@brookspierce.com

/s/ Jennifer K. Van Zant
State Bar No. 21280
E-mail: jvanzant@brookspierce.com

/s/ Katarina Wong
State Bar No. 55040
E-mail: kwong@brookspierce.com
2000 Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
T: 336-373-8850
F: 336-232-9132

Attorneys for Defendant-Appellee
The Board of Governors of the University of North Carolina

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF upon the Plaintiffs by electronic mail, addressed to their ATTORNEY OF RECORD as follows:

Blake G. Abbott
E-mail: blake.abbott@poullinwilley.com
Poulin Willey Anastopoulo, LLC

This the 13th day of May, 2024.

Electronically Submitted
/s/ Craig D. Schauer
Craig D. Schauer