IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. SC22-1398

THE UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,

Petitioner,

vs.

VALERIEMARIE MOORE,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE ISSUE

Whether the Second District misapprehended Respondent's pleading burden in ruling that a plaintiff can state a cause of action for breach of contract in a case involving a claim of sovereign immunity without identifying the contractual provisions which impose the contractual duty the plaintiff claims the sovereign allegedly breached.

STATEMENT OF THE CASE AND FACTS

Respondent sued Petitioner, The University of South Florida Board of Trustees ("USFBOT"), for breach of contract and unjust enrichment stemming from USFBOT's alleged failure to make certain campus services available as a result of campus closures in 2020 due to the pandemic. Although Respondent alleged there was an express written agreement between the parties, she did not incorporate in or attach to her Complaintany writing containing an express promise by Petitioner to provide on-campus or in-person services. Petitioner moved to dismiss Respondent's lawsuit based on its sovereign immunity. The district court denied Petitioner's motion on Respondent's breach of contract claim.

Petitioner appealed the trial court's denial of its motion to dismiss. On June 1, 2022, the Second District Court of Appeal affirmed the trial court's Order denying Petitioner's motion to dismiss, holding that to survive a

motion to dismiss in a case involving a defense of sovereign immunity, Respondent was not required to identify a written contract with Petitioner that imposes the contractual duty the sovereign allegedly breached. Instead, the Second District Court of Appeal determined Respondent was only required to plead the existence of a contract, generally, with Petitioner.

On June 30, 2022, Petitioner filed a Motion for Rehearing, Rehearing *En Banc* or Certification to the Florida Supreme Court. The Court denied Petitioner's motion on September 30, 2022. The Court issued its Mandate on October 18, 2022. Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court on October 19, 2022.

SUMMARY OF THE ARGUMENT

Waiver of sovereign immunity for contract claims is limited to suits on express, written contracts. *Pan-Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4, 5 (Fla. 1984). Respondent's breach of contract claim should have been dismissed because Respondent cited no express, written contract obligating Petitioner to provide her with specific on-campus services. The Court's Opinion misapprehends plaintiff's pleading burden to identify a written contract that imposes the contractual duty the sovereign allegedly breached. The Second District Court of Appeal's Opinion also directly conflicts with the Third District Court of Appeal's decision in *District*

Board of Trustees of Miami Dade College v. Verdini, 339 So. 3d 413 (Fla. 3d DCA 2022), in which that court reversed the trial court's denial of Miami Dade College's motion to dismiss, concluding that Verdini had "not alleged breach of an express, written contract to provide on-campus or in-person services sufficient to overcome sovereign immunity." 339 So. 3d 413, 415.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION IGNORES THAT A PLAINTIFF MUST IDENTIFY A WRITTEN CONTRACT THAT IMPOSES THE CONTRACTUAL DUTY THE SOVEREIGN ALLEGEDLY BREACHED TO SURVIVE A MOTION TO DISMISS.

The Second District Court of Appeals misapprehended a plaintiff's pleading burden to survive a motion to dismiss a claim of sovereign immunity: to identify "an express written contract" that "impose[s] the express duty" the plaintiff alleges was breached. *City of Miami Firefighters & Police Officers Trust & Plans v. Castro*, 279 So. 3d 803, 807 (Fla. 3d DCA 2019). When pleading a claim for breach of a written contract, "a copy thereof or a copy of the portion thereof material to the pleadings, must be incorporated in or attached to the pleading." Fla. R. Civ. P. 1.130(a).

Respondent neither attached any USFBOT registration policies to her Complaint nor alleged in her Complaint that those policies contain a specific promise by Respondent to provide in-person or on-campus services. The Second District Court of Appeal overlooked Respondent's

failure to incorporate in or attach to her pleading any registration policy containing a promise to provide in-person or on-campus services, which is at odds with the requirements of Fla. R. Civ. P. 1.130. Instead, the Opinion notes Respondent was responsible for knowing all registration policies and agreed to pay her account charges pursuant to those policies, and that the "'terms and conditions' of the policies must be examined to determine whether they contain a promise by USF to provide any specific services in exchange for the fees it charged students." 2022 Fla. App. LEXIS 3707, *6.

The Court erroneously cited *Zainulabeddin v. University of South Florida Trustees*, 2016 U.S. Dist. LEXIS 49730 (M.D. Fla. Apr. 13, 2016) for the proposition that, at the motion to dismiss stage, a plaintiff is not required to identify a specific written contract but instead is merely required to allege one. The Court's reliance on *Zainulabeddin* was error.

First, *Zainulabeddin* treated sovereign immunity as any other affirmative defense and was decided before this Court's teaching in *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020) that, "precisely because sovereign immunity includes immunity from suit, entitlement to sovereign immunity should be established as early in the litigation as possible." Second, *Zainulabeddin* was decided under the Federal Rules, which do not contain any analog to Fla.R.Civ.P. 1.130(a).

II. THE SECOND DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *MIAMI DADE COLLEGE V. VERDINI*

This Court may review any decision of a district court of appeal that directly conflicts with a decision of another district court of appeal, or of this Court itself, on the same question of law. Art. V, §3(b)(3), Fla. Const. This review is primarily to avoid confusion and to maintain uniformity in the case law of this state. *Wainwright v. Taylor*, 476 So. 2d 669 (Fla. 1985).

The Second District Court of Appeal held that to survive a motion to dismiss in a case involving a defense of sovereign immunity, Respondent was not required to identify a written contract that imposes the contractual duty the sovereign allegedly breached. Instead, the Court determined that Respondent was only required to plead the existence of a contract, generally, with Petitioner. That finding is expressly contrary to the ruling of the Third District Court of Appeal in *District Board of Trustees of Miami Dade College v. Verdini*, 339 So. 3d 413 (Fla. 3d DCA 2022). Because the Second District Court of Appeal ignored or misapprehended the principles discussed in *Verdini* concerning a plaintiff's pleading burden to identify a written contract that imposes the contractual duty the sovereign allegedly breached, its decision is in conflict with *Verdini*.

Verdini, like this case, involved the appeal of a trial court's denial of a motion to dismiss a breach of contract claim based on sovereign immunity.

The Third District Court of Appeal reversed the trial court's denial of Miami Dade College's motion to dismiss, concluding Verdini had "not alleged breach of an express, written contract to provide on-campus or in-person services sufficient to overcome sovereign immunity." 339 So. 3d at 415.

Verdini's Complaint alleged "he paid certain mandatory fees for on-campus services pursuant to express, written contracts with MDC, and MDC breached when it failed to provide the on-campus services for which the fees were intended." 339 So. 3d at 416. Verdini's contract claim also relied on student invoices and Miami Dade College's Financial Obligation Agreement, which Verdini attached to his Complaint. *Id*. Verdini also alleged that "he does not have all the documents constituting the express contracts, but he asserts he should be given the opportunity to establish those unidentified documents by way of discovery." *Id*.

The Third District Court of Appeal rejected Verdini's argument that he should be permitted further discovery to ascertain if any written documents exist that contain specific promises by MDC to provide in-person or on-campus services. The Court stated: "As clearly set forth in Rule 1.130(a), any documents [a plaintiff] relies on to establish an express contract must be incorporated or attached to the complaint. In the case of a complaint based on a written instrument it does not state a cause of action until the

instrument or an adequate portion thereof is attached to or incorporated in the pleading in question." 339 So. 3d 413, 420.

In reversing the denial of MDC's motion to dismiss, the Third District stated the issue was "whether Verdini has sufficiently identified an express, written contract to provide on-campus or in-person services." 339 So. 3d at 418. The Court concluded: "[T]here is nothing in the Complaint or the attachments that expressly requires MDC to provide on-campus services… Moreover, Verdini has not identified anything that expressly prohibits MDC from providing remote services in exchange for those fees." *Id*.

In its opinion in this case, the Second District Court of Appeal noted that the Complaint, as in *Verdini*, alleged that there was an express written agreement between the parties. 339 So. 3d at 416. Also as in *Verdini*, Respondent did not incorporate in her Complaint or attach to it any writing containing a promise by Petitioner to provide on-campus or in-person services. However, the Second District Court of Appeal affirmed the trial court's denial of Petitioner's motion to dismiss.

Therefore, the Second District Court of Appeal's decision that Respondent was not required to identify a written contract containing the provisions allegedly breached by Petitioner "expressly and directly conflicts with a decision of another district court of appeal . . . on the same question

of law." Fla. R. App. P. 9.030(2)(iv).

III. THE SOVEREIGN IMMUNITY QUESTION AT ISSUE PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE BECAUSE IT AFFECTS A LARGE NUMBER OF CASES

The question at issue in this case is of "great public importance." This is not the only case arising from a Florida public university's alleged failure to provide on-campus services during the COVID-19 pandemic, and it will not be the last. *See Verdini, supra*.[1] Moreover, the question whether Florida public colleges are entitled to the protection of sovereign immunity in breach-of-contract actions is one of great public importance because the issue has been – and undoubtedly will continue to be – a central issue in numerous cases brought against public colleges and universities in Florida. *See, e.g., DeSantis v. Geffin*, 284 So. 3d 599 (Fla. 1st DCA 2019).

Sovereign immunity bars a breach of contract claim against the Petitioner to the extent there is not an express, written contract obligating it to provide appellee with the services to which she claims entitlement. Sovereign immunity involves "immunity from suit rather than a mere defense to liability, which is an entitlement that is effectively lost if a case is erroneously permitted to go to trial." *Seminole Tribe of Fla. v. McCor*, 903

[1] Currently, at least eleven of the state universities and colleges are facing similar lawsuits seeking refunds of tuition or fees due to measures taken in response to the Covid-19 pandemic.

So. 2d 353, 357–58 (Fla. 2d DCA 2005).

In 2020, this Court reiterated "the most important societal interests underlying sovereign immunity," and explained "[e]very wrongly denied claim of sovereign immunity prolongs unnecessary litigation and siphons resources from the government entity's core mission." *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020). Thus, the correct pleading standard for defeating sovereign immunity is a question of "great public importance" under Section 3(b)(4) of Article V of the Florida Constitution.

If the Second District Court of Appeal's decision stands, it will undermine the protection of sovereign immunity by relieving plaintiffs the burden to identify the contract terms allegedly breached by a defendant. This will have far-reaching consequences; the sovereign immunity question at issue affects large numbers of persons. In response to the COVID-19 pandemic, state colleges and universities across Florida transitioned from in-person to online instruction in early 2020. That triggered a spate of putative class actions brought on behalf of students seeking refunds of tuition and fees. Indeed, the *Verdini* court noted a dozen such cases have been filed against various state universities and colleges. 339 So. 3d 413, 417 n. 6. Thus, this is a case of exceptional importance because it will affect every Florida state college and university and the hundreds of

thousands of students who were enrolled in those institutions when the COVID-19 pandemic struck.

This case also is of great public importance because it will have significant implications for sovereign immunity jurisprudence generally, not just as to state educational institutions. All governmental agencies enter into contracts and are susceptible to breach of contract claims. It is important that this Court clarify whether a plaintiff bringing a breach of contract claim against the sovereign need only allege the existence of a written contract *per ipsum* or whether instead a trial court must focus on whether that contract "impose[s] the express duty that [Plaintiff] allege[s] was breached." *City of Miami Firefighters' & Police Officers' Ret. Tr. & Plan v. Castro*, 279 So.3d 803, 807 (Fla. 3d DCA 2019).

Finally, this case is of great public importance because of its effect on the fundamental constitutional protections provided under Article X, Section 13 of the Florida Constitution. This Court has repeatedly exercised its discretionary jurisdiction in cases involving sovereign immunity. *See, e.g., Wallace v. Dean*, 3 So. 3d 1035, 1040 (Fla. 2009) (conflict jurisdiction existed based upon lower court's misapplication of Court's decisions on sovereign immunity); *Sanchez v. Miami-Dade Cnty.*, 286 So. 3d 191, 192 (Fla. 2019) (same).

CONCLUSION

For the foregoing reasons, Petitioner USFBOT respectfully requests that this Court accept jurisdiction and determine the merits of the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 31, 2022, I electronically filed the foregoing brief with the Clerk of the Court using the Florida Courts E-Filing Portal. I also certify that the foregoing is being served on counsel via e-mail generated by the E-Portal system:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Arial, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.045(b) and contains

10 pages, in compliance with Florida Rule of Appellate Procedure 9.210(a)(5)(A).

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