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SUPREME COURT OF TEXAS
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No. 23-0565

IN THE SUPREME COURT OF TEXAS

LUKE HOGAN, ON BEHALF OF HIMSELF AND OTHER INDIVIDUALS SIMILARLY SITUATED,

Appellant,

v.

SOUTHERN METHODIST UNIVERSITY, AND OTHER AFFILIATED ENTITIES AND INDIVIDUALS,

Appellee.

Certified Question from the
United States Court of Appeals for the Fifth Circuit
No. 22-10433

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STATEMENT OF THE CASE

Nature of the Case:	Plaintiff-Appellant Luke Hogan brought a putative class action against Southern Methodist University ("SMU") for breach of contract, conversion, and unjust enrichment as a result of SMU's transition to online instruction in March 2020 in compliance with COVID-19 government shut-down orders. ROA.327-49.[1] Plaintiff sought a prorated refund of tuition and fees and other relief, complaining that his online education was inferior to in-person instruction. *Id.* SMU moved to dismiss, asserting pleading deficiencies and that the Texas Pandemic Liability Protection Act ("PLPA")—passed by supermajorities of both chambers of the Texas Legislature to protect educational institutions from financial ruin due to compliance with government orders—barred Plaintiff's claims. ROA.354-85. In response, Plaintiff challenged the PLPA as unconstitutionally retroactive. ROA.427-62.
Trial Court:	Hon. Brantley Starr, United States District Court for the Northern District of Texas
Trial Court Disposition:	The district court granted SMU's motion to dismiss because Plaintiff never pointed to a specific contractual provision where SMU promised in-person learning and thus did not meet applicable pleading standards. The district court also ruled that the PLPA barred Plaintiff's claims for monetary relief and, applying *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 139 (Tex. 2010), that the PLPA was not unconstitutionally retroactive under the Texas Constitution. ROA.643-64.
Court of Appeals:	United States Court of Appeals for the Fifth Circuit (Duncan, Southwick, and Weiner, JJ).
Court of Appeals Disposition:	The Fifth Circuit reversed the district court's dismissal for failure to state a claim and certified to this Court the question regarding the constitutionality of the PLPA's application to Plaintiff's breach-of-contract claim under the Texas Constitution. 74 F.4th 371, 378 (5th Cir. 2023).

[1] "ROA" refers to the Fifth Circuit's stamped Record on Appeal, prepared by the Clerk for the United States District Court for the Northern District of Texas.

TO THE HONORABLE SUPREME COURT OF TEXAS:

In March 2020, SMU, like nearly every school in the country, transitioned from in-person education to an online, distance-learning format for the remainder of the semester in compliance with government shut-down orders as a result of the unprecedented COVID-19 pandemic. Although Plaintiff took advantage of SMU's extensive and costly efforts to provide its students classes and credits without disruption, and graduated on time in the Spring of 2020, he proceeded to file this putative class action. He alleged principally that SMU's decision to sustain its academic instruction through an online curriculum during the onset of the pandemic breached an implied contractual promise of an in-person experience.

In light of the onslaught of lawsuits like Plaintiff's across Texas and nationwide, supermajorities in both chambers of the Texas Legislature passed the Pandemic Liability Protection Act ("PLPA"). The PLPA bars only monetary recovery against educational institutions stemming from course modifications, consistent with government mandates, made in response to the COVID-19 health emergency. As the Legislature found, the PLPA protects those essential institutions, already saddled with strained budgets, from long-term damage.

Plaintiff does not dispute that the PLPA covers his claim against SMU; instead, he urges this Court to take the extraordinary step of declaring it unconstitutionally retroactive. But the PLPA, which serves the indisputably

compelling public purpose of stabilizing Texas's educational institutions and limits only monetary relief (not Plaintiff's novel contract claim or the other forms of relief he expressly sought thereunder), does not run afoul of the Texas Constitution. Applying 175 years of this Court's retroactivity jurisprudence—as distilled in *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 139 (Tex. 2010), and recently reaffirmed in *Fire Protection Services v. Survitec Survival Products, Inc.*, 649 S.W.3d 197, 201-02 (Tex. 2022)—all three federal courts to have decided the issue agree. This Court should hold the same and avoid yet another shock to the State's vital educational institutions.

STATEMENT OF FACTS

The Fifth Circuit correctly stated the nature of the case, as clarified below.

A. Plaintiff Enters Into The Student Agreement Governing This Dispute

SMU is a private university in Dallas, Texas. ROA.339 ¶ 66-1.[2] Like other universities, SMU requires each student to enter into a contract between the student and the university—the Student Rights and Responsibilities agreement ("Student Agreement")—as a condition to enrollment. ROA.393 ¶¶ 3-4, 396-99. Plaintiff does not dispute that he entered into the Student Agreement and that it governs this dispute.[3] *See* Br. 5.

[2] Plaintiff's amended complaint repeats paragraphs 50 through 66. For clarity, Appellee's Brief therefore adds "-1" or "-2" to differentiate between the repeated paragraph numbers.

[3] In the district court, Plaintiff argued that the Student Agreement "[wa]s not a contract at all" and did not govern this dispute, and that instead SMU's catalog, admissions materials, and the

Under the Student Agreement, Plaintiff promised "the timely payment of University tuition, fees, and other charges" in exchange for registration and enrollment in classes. ROA.396. Specifically, the Student Agreement required Plaintiff to agree to his "financial obligations . . . before enrolling in classes," *id.*, and agree that if he failed to meet those obligations, SMU could "cancel [his] enrollment," "deny [him] the privilege of registering for classes," "withhold the awarding of any degree(s) or diplomas," and "withhold [his] official transcripts," ROA.397. The Student Agreement further provided:

> I [the student] understand that the enrollment action constitutes a binding obligation between the student and Southern Methodist University and all proceeds of this agreement will be used for educational purposes and constitute an educational loan pursuant to 11 U.S.C. § 523(a)(8).

ROA.396. The Student Agreement added that SMU could "in its discretion amend or change these terms at any time and from time to time." ROA.399.

The Student Agreement contained no provision requiring in-person classes, let alone as a condition for payment. *See* ROA.396-99. Nor did it state that tuition or fees would be refunded if in-person classes were not provided. *See id.*

B. In March 2020, SMU Suspends In-Person Classes Due To The COVID-19 Pandemic And Related Government Orders

In response to the unprecedented public health concerns posed by COVID-19,

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parties' prior course of conduct formed an implied contract for SMU to provide in-person education and services. ROA.447. Plaintiff abandoned his implied contract argument on appeal.

on March 19, 2020, Governor Abbott issued a temporary school closure order,[4] and in mid-April ordered that "schools shall remain temporarily closed to in-person classroom attendance by students and shall not recommence before the end of the 2019-2020 school year."[5] That same March, SMU announced that the university would "cancel all in-person classes and college experiences" and transition to online education for the remainder of the semester after spring break. ROA.332 ¶ 31. SMU expended enormous resources to offer a wide array of online classes so that it could continue to fulfill its mission of providing students a world-class education, while simultaneously protecting the health and safety of its students, faculty, and staff, in compliance with government orders. ROA.361. SMU resumed in-person classes in Fall 2020. *See* ROA.328 ¶ 5 & n.2.

During the period of remote learning, SMU continued to provide its students with classes and accompanying academic credits necessary for its degree programs. ROA.327-28, 361. As a result, Plaintiff continued to receive course credits, and he graduated at the end of the Spring 2020 semester with a Master of Science in Management (MSM) degree from the Cox School of Business at SMU. ROA.338-

[4] *See* Tex. Exec. Order No. GA-08 (Mar. 19, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

[5] Tex. Exec. Order No. GA-16, at 4 (April 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-16_Opening_Texas_COVID-19_FINAL_04-17-2020.pdf.

39 ¶ 64-1. Because SMU continued to provide classes and credits, it did not refund tuition. *See* ROA.327 ¶ 1, 328 ¶ 3. SMU made other financial accommodations, however, including by providing credit adjustments or refunds exceeding $7 million for housing, dining, and parking expenses.[6]

C. The Texas Legislature Enacts The Pandemic Liability Protection Act

On June 14, 2021, Governor Abbott signed the PLPA into law, and it became effective immediately as it was passed by a bipartisan supermajority of the Legislature. Act of June 14, 2021, 87th Leg., R.S., ch. 528, 2021 Tex. Gen. Laws, S.B. 6, § 3 (codified at Tex. Civ. Prac. & Rem. Code § 148.004(b)) (ROA.413-21); *see also* Tex. Const. art. III, § 39. The PLPA provides civil liability protections to various sectors affected by "[t]he onslaught of COVID-19 on Texas," including the State's educational institutions, as well as healthcare institutions, businesses, and nonprofits. H.R. 87-26985, 87th Reg. Sess., at 1 (Tex. 2021); *see also* S.R. 87-26985, 87th Reg. Sess., at 1 (Tex. 2021). The legislation was motivated by concerns about "the long-term effects of the pandemic on these sectors, including the effects of . . . lawsuits that have already been filed in Texas and across the nation" against institutions that "attempt[ed] to follow applicable governmental standards,

[6] Although the district court declined to take judicial notice of the publicly available announcements of such refunds, ROA.645-46 n.2, Plaintiff has never disputed their accuracy. *See* ROA.82 (citing SMU Blog, *Credit adjustments for housing, dining, and parking*, (Apr. 15, 2020), https://blog.smu.edu/coronavirus-covid-19/2020/04/15/credit-adjustments-for-housing-dining-and-parking/; SMU Blog, *SMU adapts to challenges created by COVID-19*, (Apr. 23, 2020), https://blog.smu.edu/coronavirus-covid-19/2020/04/23/smu-adapts-to-challenges-created-by-covid-19/).

guidelines, or protocols with the purpose of minimizing the spread of a pandemic disease." H.R. 87-26985, 87th Reg. Sess., at 1 (Tex. 2021).

As pertinent here, the PLPA provides that "[a]n educational institution is not liable for damages or equitable monetary relief arising from a cancellation or modification of a course, program, or activity . . . if the cancellation or modification arose during a pandemic emergency and was caused . . . by the emergency." Tex. Civ. Prac. & Rem. Code § 148.004(b) (the "Education Provision"). The term "educational institution" covers institutions ranging from preschools to universities, public and private. *Id.* § 148.004(a).

D. Plaintiff Brings This Putative Class Action Against SMU

Plaintiff originally filed suit against SMU in Texas state court, bringing claims on behalf of himself and a purported class for (i) breach of contract, (ii) conversion, and (iii) unjust enrichment. ROA.4, 13-22, 27-36. Plaintiff alleged principally that SMU's transition to remote learning breached an unspecified implied contractual obligation to provide in-person education. ROA.27 ¶ 2. The petition, however, made no mention of the "educational purposes" provision on which Plaintiff relied on appeal, and alleged no breach of any other specific provision of the Student Agreement.

SMU removed the case to federal court and moved to dismiss Plaintiff's suit. ROA.4, 13-22, 71-101. The district court denied Plaintiff's ensuing motion to

remand to state court. ROA.4-5, 308-15, 668. "Rather than moving next to consideration of the motion to dismiss," the district court gave Plaintiff an opportunity "to file an amended complaint that complies with federal pleading standards." ROA.315.

Plaintiff filed an amended complaint on July 26, 2021—over a month after the PLPA became effective—again asserting claims for breach of contract, unjust enrichment, and conversion against SMU due to its transition to online learning in the Spring 2020 semester. ROA.342-49. As for remedies, Plaintiff requested monetary, injunctive, and declaratory relief, in contrast to Plaintiff's original petition (filed in state court on August 12, 2020), which requested only monetary damages for his breach-of-contract claim. *Compare* ROA.27, 36 ¶ 58, *with* ROA.330 ¶¶ 16-18, 342 ¶ 66-1, 347.

The amended complaint, like the original petition, made no mention and alleged no breach of the "educational purposes" provision, or of any other specific provision of the Student Agreement. Plaintiff also "d[id] not challenge Defendant's compliance with the COVID-19 orders that were in place in Texas," ROA.329 ¶ 13, and the amended complaint confirmed that SMU provided Plaintiff with courses and credits for Spring 2020 permitting him to receive his degree, ROA.338-39 ¶ 64-1. But Plaintiff took issue with the quality of his education after SMU shifted to online learning for the remainder of the semester in compliance with government orders,

complaining of the "materially different education and other experiences that [SMU] provided." ROA.338 ¶ 63-1.

E. The District Court Grants SMU's Motion To Dismiss

SMU moved to dismiss Plaintiff's amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), including based on the PLPA. ROA.354-86. The State of Texas filed an amicus brief in support of the PLPA's constitutionality. ROA.587-605. The district court granted SMU's motion and entered judgment dismissing all of Plaintiff's claims with prejudice. ROA.643-64.

The district court noted that Plaintiff's allegations were "long on words but short on actionable detail." ROA.651. The court dismissed Plaintiff's breach-of-contract claim because he never pointed to a specific contractual provision where SMU promised in-person education and thus did not meet applicable pleading standards. ROA.649.

In the alternative, the district court held that the PLPA barred Plaintiff's claims for monetary relief. ROA.655. The court rejected Plaintiff's argument that the PLPA was unconstitutionally retroactive as applied to his claims. *Id.* Applying *Robinson*, the court reasoned that the PLPA served a compelling public interest while limiting only Plaintiff's monetary remedies. ROA.663.

F. The Fifth Circuit Certifies The Constitutionality Of The PLPA To This Court

Plaintiff appealed to the Fifth Circuit. Plaintiff abandoned his unjust

enrichment and conversion claims, as well as the implied contract theory underlying his breach-of-contract claim. Plaintiff argued instead that the parties had an express contract (the Student Agreement), which was ambiguous as to the meaning of "educational purposes"—specifically, whether in-person classes were subsumed within the term "educational purposes"—an assertion he had never pleaded. *See* 74 F.4th at 374. Plaintiff also challenged the PLPA as unconstitutionally retroactive under the Texas Constitution, and argued for the first time that the PLPA was unconstitutional under the Contracts Clauses of the Texas and United States Constitutions.[7] Again, the State of Texas filed an amicus brief, as well as presented oral argument, in support of the PLPA's constitutionality. 74 F.4th at 377.

Pursuant to its intervening decision in *King v. Baylor University ("Baylor I")*, 46 F.4th 344 (5th Cir. 2022), the Fifth Circuit reversed the district court's dismissal of the contract claim and remanded for further analysis of whether Plaintiff's new express contract theory as to the Student Agreement's "educational purposes" provision created an enforceable promise of in-person education. 74 F.4th at 374. Additionally, the Fifth Circuit certified to this Court the question of whether the PLPA is unconstitutionally retroactive as applied to Plaintiff's claim. *Id.* at 373.

[7] The Fifth Circuit deemed the Contracts Clause challenges "forfeited" because Plaintiff "fail[ed] to raise them before the district court." 74 F.4th at 376 n.2.

SUMMARY OF THE ARGUMENT

This Court should reject Plaintiff's extraordinary claim that the PLPA is unconstitutionally retroactive as applied to his breach-of-contract claim.

This Court has construed the Texas Constitution's bar on retroactivity extremely narrowly, sustaining such challenges only four times in its history. This Court has never invalidated as retroactive a Texas statute that impairs just one form of remedy, as the PLPA does, even if the statute causes a plaintiff to recover less or nothing at all. And this Court has never invalidated as retroactive a statute that furthers an indisputably compelling purpose, grounded in the legislative record, like the PLPA. Faithful application of this Court's framework for analyzing retroactivity challenges—as distilled in *Robinson*, and recently reinforced in *Fire Protection*—demonstrates the futility of Plaintiff's challenge here.

First, the statute does not impair "settled expectations." Plaintiff seeks a pro-rated refund of tuition and fees arising out of SMU's compliance with government orders precluding in-person education during a global pandemic, based on a contract that contains no express promise of in-person education. Plaintiff's ability to recover monetary relief based on such a novel claim can hardly be considered "settled," much less at this pre-discovery stage (subject to a remand for further proceedings on whether an enforceable promise even exists).

Second, the PLPA does not extinguish Plaintiff's substantive claim or deny him all recovery; Plaintiff can and does (as his amended complaint makes explicit) seek non-monetary equitable relief. Since 1849, this Court has continually recognized that statutes that merely affect remedies are not unconstitutionally retroactive.

Third, the PLPA serves the compelling public interest of protecting the State's public and private educational institutions—from preschools to universities—from value-destroying lawsuits attacking the very measures those institutions were mandated to take in response to the pandemic. That compelling interest is borne out in the Legislature's express findings about the long-term risk to schools, including from hundreds of lawsuits that had already been filed in Texas and across the nation, that had been strained economically by the pandemic. Many other states' legislatures passed similar measures, likewise protecting the broader public interest in seeking to stabilize educational institutions.

Taken together, these considerations leave no doubt that the PLPA, as applied to Plaintiff's claim, does not run afoul of this Court's retroactivity jurisprudence.

ARGUMENT

The PLPA Is Not Unconstitutionally Retroactive Under The Texas Constitution

Although the Texas Constitution includes a prohibition on retroactivity, "[m]ere retroactivity is not sufficient to invalidate a statute," for "[r]etroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies . . . or simply to give comprehensive effect to a new law [the Legislature] considers salutary." *Robinson*, 335 S.W.3d at 139 (quoting *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) and *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994)); *see also* Br. 13 (conceding that "a compelling public interest" can "overcome the presumption" against retroactivity) (quoting *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014)). This Court has thus sustained constitutional retroactivity challenges in just four instances, "all of which dealt with laws that revived expired claims or fully extinguished vested rights." *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 389 (5th Cir. 2019) (citing *Tenet*, 445 S.W.3d at 708). Neither scenario applies here.

Texas's prohibition against retroactive laws "advances two fundamental objectives of [its] system of government: the protection of 'reasonable, settled expectations' and protection against 'abuses of legislative power.'" *Fire Prot.*, 649 S.W.3d at 201 (quoting *Robinson*, 335 S.W.3d at 139). Through the lens of these twin objectives, this Court recently reaffirmed *Robinson*, explaining that in

analyzing whether a law violates the Texas Constitution's retroactivity bar, courts "first consider the nature of the rights claimed and the statute's impact on them." *Id.*; *see also Robinson*, 335 S.W.3d at 145 (considering the "nature of the prior right impaired by the statute" and "the extent of the impairment").[8] "If the statute disturbs a party's settled expectations," courts next "consider whether the statute serves a public interest as opposed to simply benefiting one or a few private entities." *Fire Prot.,* 649 S.W.3d at 201; *see also Robinson*, 335 S.W.3d at 145 (considering the "nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings").[9] This framework respects the Legislature's power to legislate—when such legislation is supported by findings showing the law's compelling public interest—and avoids improper judicial legislating. *See Robinson*, 335 S.W.3d at 159, 161 (recognizing "the authority of the Legislature to make reasoned adjustments in the legal system," but emphasizing that "[t]he Legislature's police power cannot go unpoliced") (internal quotations omitted) (Willett, J. concurring).

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[8] Neither party has challenged the applicability of *Robinson* to the constitutionality inquiry at issue here.

[9] In *Fire Protection*, which also arose from a question certified from the Fifth Circuit, this Court observed that "[a]lthough *Robinson* refined our framework for analyzing whether laws are unconstitutionally retroactive, it did not break new ground, but, rather, provided a unifying statement of the principles that we had applied in our earlier cases." *Fire Prot.*, 649 S.W.3d at 201.

Under this constitutional retroactivity analysis, "[t]he burden is on the party attacking the statute to show that it is unconstitutional," and courts "presume that the Legislature intended for the law to comply with the . . . Texas Constitution[], to achieve a just and reasonable result, and to advance a public rather than private interest." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002) (citations omitted); *see also Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 55 (Tex. 2014) (similar). Plaintiff has not met his burden here. To the contrary, Plaintiff's right at this stage is by no means "settled," only one of his three pleaded remedies is impaired, and Texas had a compelling state interest in enacting the PLPA's Education Provision.

In addition to Judge Starr's opinion in this case (ROA.643-64), two other Texas federal courts have upheld the PLPA as constitutional. *See King v. Baylor Univ. ("Baylor II")*, No. 20-cv-0054-DC, 2023 WL 2518335, at *12-13 (W.D. Tex. Mar. 11, 2023) (finding PLPA's Education Provision constitutional under *Robinson*), *appeal pending*, No. 23-50259 (5th Cir.); *Norman v. Dallas Tex. Healthcare LLC*, No. 3:20-cv-03022-L, 2023 WL 4157485, at *8 (N.D. Tex. June 7, 2023), *obj. filed* Sept. 21, 2023 (report and recommendation finding PLPA provision concerning healthcare providers constitutional under *Fire Protection* and *Robinson*). No courts have found the statute unconstitutional.

1. Plaintiff Had No "Settled Expectation" of Recovery on His Novel Refund Claim

The nature of the right impaired turns largely on the predictability of a plaintiff's recovery at the time a challenged law was enacted. *See Tenet*, 445 S.W.3d at 708 (giving little weight to impaired right where a "sparse record . . . fail[ed] to provide any indication of the strength of [plaintiff's] claim"); *DeJoria*, 935 F.3d at 388 (concluding new law minimally impaired plaintiff's rights where it was unclear "how likely [the claims] were to succeed"). If, at the time of enactment, a plaintiff's "personal injury claim had matured, recovery was predictable, and discovery had demonstrated [the] claim[] to have a substantial basis in fact," the right impaired may be significant. *Union Carbide*, 438 S.W.3d at 58 (describing *Robinson*, 335 S.W.3d at 148-49); *see also Robinson*, 335 S.W.3d. at 155 (noting that "the Robinsons filed suit, litigated their claim for several months, and obtained a partial summary judgment" all before "the Legislature enact[ed] Chapter 149, taking away the Robinsons' summary judgment and their underlying cause of action") (Medina, J. concurring). But none of those circumstances applies here.

At the time the PLPA was enacted on June 14, 2021, the parties were still litigating whether Plaintiff's case should be remanded to state court; Plaintiff had not litigated the merits of his claims; and no discovery had occurred. *See* ROA.1-5; *see also* ROA.661-62 ("[T]he lack of discovery in this particular case distinguishes it from *Robinson*, where fleshed out discovery showed the strength of Robinson's

claim that the new law fully extinguished.”). Indeed, Plaintiff had not even filed the amended complaint that now serves as the basis of his suit, in which he specifically added requests for non-monetary relief. *See* ROA.327-86 (filed July 26, 2021); ROA.330 ¶ 17 (“Plaintiff seeks for himself and the Class members protections including injunctive and declaratory relief protecting Class Members from paying the full cost of tuition and Mandatory Fees during the pendency of the pandemic in light of the educational services, opportunities, and experiences Defendant can actually safely provide.”); ROA.347. As the district court found, any recovery at the time he brought his novel COVID-19 claims was far from predictable (ROA.662), rendering the nature of Plaintiff’s right impacted by the PLPA’s Education Provision less significant.

To the extent any expectation beyond the predictability of recovery matters, the objective inquiry turns on what Texas would be expected to do in response to the strain placed on the State’s educational institutions by a global pandemic (or any comparable emergency). *See, e.g.*, *Robinson*, 335 S.W.3d at 145 (relevant to the retroactivity inquiry in a separate case was the fact that “[t]here can be no settled expectation that a limited resource like groundwater, affected by public and private interests, will not require allocation” by the State); *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (declining to hold a statute unconstitutionally retroactive where plaintiff “could not reasonably expect that the State would not act to provide a safe

environment for his children while he was imprisoned"). Here, Plaintiff could not reasonably have expected that the Legislature, in light of the "severe and adverse impacts" from the COVID-19 pandemic on "the ordinary functioning" of Texas educational institutions, PLPA § 4(C), would not intervene to protect schools and universities from further damage stemming from their pandemic response—in compliance with government mandates.

Plaintiff attempts to move the goalposts by claiming that it is his "expectation *to be able to assert* [his] common law causes of action" that the PLPA unsettled. Br. 18 (emphasis added). But that is not the correct inquiry, and, in any case, the PLPA has in no way undercut that expectation. Plaintiff *has* been able to assert his common-law cause of action, but assertion does not guarantee recovery. And although Plaintiff seeks to characterize his contract claim as run-of-the-mill, he is in fact pursuing a novel theory for a refund because his education took place online rather than in-person during a global pandemic. *See Tenet*, 445 S.W.3d at 708 (although "the *type* of claim" plaintiff asserted was "clearly established," what mattered was whether "the *strength* of [plaintiff's] individual claim" was clear) (emphasis added).

As the district court found, Plaintiff's suit hardly presented a "slam-dunk contract case" at the time the PLPA was enacted. ROA.661. Although the Fifth Circuit reversed the dismissal for failure to state a claim, it by no means recognized

a viable theory of recovery. Rather, the Fifth Circuit remanded Plaintiff's (new) express contract theory to the district court to analyze whether the "educational purposes" provision in the Student Agreement creates a promise of in-person education. 74 F.4th at 375 ("The district court did not resolve this dispute, nor did it consider whether Hogan's capacious interpretation of educational [purposes] is reasonable, and if so, whether the term is latently ambiguous.") (quoting *Baylor I*, 46 F.4th at 363) (cleaned up). Thus, Plaintiff may not even have an enforceable right in the first place, let alone an unconstitutional impairment of a "settled expectation" under the retroactivity inquiry. Further underscoring the unsettled nature of Plaintiff's expectations, given the existing governmental orders, Plaintiff would have to know that conducting in-person classes would have been impossible or even illegal.

The unsettled nature of Plaintiff's claim at the time the PLPA was enacted was even more pronounced to the extent his claim implicated educational malpractice. Adjudicating the merits of Plaintiff's claim would require the district court to put a price on the difference in quality and value between two different educational methods, in-person and online instruction—something the educational malpractice doctrine prevents courts from doing. *See, e.g.*, *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992); *see also Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 907

(Tex. 2021) (stating that "courts are ill equipped to evaluate the academic judgment of professors and universities").[10]

Finally, Plaintiff asserts that "*Robinson* emphasized the importance in maintaining an established common-law cause of action when a retroactive law seeks to extinguish it." Br. 18. But *Robinson* did not adopt a categorical rule barring the application of retroactive laws to common-law claims. Instead, it determined that the particular statute at issue in *Robinson* could not survive a retroactivity challenge because (1) recovery on the plaintiff's claim was predictable; (2) the statute fully extinguished the plaintiff's cause of action; and (3) there were no legislative findings justifying the statute and the statute favored one Texas company in particular. *See Robinson*, 335 S.W.3d at 147-50. None of those are true here.[11]

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[10] To be sure, the Fifth Circuit stated that the educational malpractice doctrine did not bar Plaintiff's claim at the pleading stage. 74 F.4th at 375 n.1. However, at the time the PLPA was enacted, there was uncertainty surrounding the applicability of this doctrine to Plaintiff's pleading.

[11] Plaintiff also cites two distinguishable Texas intermediate court cases. Br. 15. The court in *Zaatari v. City of Austin* held that the relevant ordinance was unconstitutionally retroactive only after finding that there was nothing in the record to justify the City of Austin's ban on certain types of rentals, that the ban eliminated a long-settled property right, and that it did so completely. 615 S.W.3d 172, 182-92 (Tex. App.—Austin 2019, pet. denied). In *Brazos River Authority v. City of Houston*, the challenging party had a "settled" interest in a "permit allocating it a specific amount of water," which was completely eliminated by the relevant statute and was justified by only "a minimal public interest." 628 S.W.3d 920, 935-36 (Tex. App.—Austin 2021, pet. granted, op. & judgm't vacated w.r.m.). Moreover, this Court vacated the court of appeals' opinion in *Brazos*, and it therefore has no precedential value. *See Brazos River Auth. v. City of Houston*, No. 21-0642, 2022 WL 4099236 (Tex. Sept. 2, 2022) ("Because the State was not a party to the settlement and the issues presented may be of consequence in other contexts, the Court vacates the court of appeals' opinion.").

2. *The PLPA Limits Only Monetary Relief, Not Other Forms of Relief That Plaintiff Expressly Sought*

Courts next consider the extent to which a plaintiff's rights have been impaired. *Fire Prot.*, 649 S.W.3d at 201; *Robinson*, 335 S.W.3d at 145. Such impairment could be grave if the Legislature abrogated entirely a substantive right; for instance, if the Legislature barred the cause of action or all judicial relief against an educational institution. But contrary to Plaintiff's representation that the PLPA "extinguishes . . . [his] claims completely," Br. 20, the PLPA affects only which *remedy* Plaintiff may obtain, not his ability to bring a contract *claim*. *See* Tex. Civ. Prac. & Rem. Code § 148.004(b) (barring "damages or equitable monetary relief," but still allowing injunctive, declaratory, or other non-monetary relief).

In addition to monetary relief, Plaintiff's amended complaint sought injunctive and declaratory relief. ROA.330 ¶¶ 16-18, 342 ¶ 66-2, 347. His self-serving attempt on appeal to disclaim the practical benefit of any such relief (Br. 20-21) is both too late and beside the point. Although Plaintiff may no longer want an injunction (precluding online instruction) or a declaration that his rights had been violated (as vindication of his position) or whatever other non-monetary relief he had in mind, the relevant point is that the PLPA has not made such remedies unavailable as a matter of law.

Because the PLPA affects the availability of only one type of remedy, it cannot be unconstitutionally retroactive under Texas law. This Court has squarely

held that "applying . . . *remedial* . . . statutes retroactively does not violate the Constitution's prohibition on retroactive laws." *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 161 (Tex. 2018) (emphasis added); *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981) (concluding that "a statute or rule which affects remedy" is "considered remedial in nature and ha[s] been held not to violate" the bar on retroactivity); *see also DeJoria*, 935 F.3d at 388 (noting that "'changes in the law that merely affect remedies . . . are usually not unconstitutionally retroactive'" under Texas law) (quoting *Robinson*, 335 S.W.3d at 146).

Plaintiff is wrong to suggest (at 20) that the impairment in his case is not materially different from the impairment found unconstitutionally retroactive in *Robinson*. By extinguishing successor liability for asbestos claims brought in Texas courts, the statute at issue in *Robinson* prevented a plaintiff from bringing *any* claim whatsoever against the defendant. *Robinson*, 335 S.W.3d at 148. *Robinson* thus involved "a retroactive restriction on a *cause of action*," *id.* at 143 (emphasis added), not a restriction on a remedy. Recovery in *Robinson* was also "more predictable" because the injury was "mesothelioma, a uniquely asbestos-related disease," and discovery had shown that "Robinsons' claims had a substantial basis in fact." *Id.* at 148. The PLPA, by contrast, does not "abrogate [Plaintiff's] claim," nor as discussed (*supra*, pp. 15-19) is Plaintiff's recovery predictable here. *Id*.

Plaintiff's real complaint appears to be that the PLPA prevents him from recovering his preferred remedy—money. But this Court has never shied away from upholding laws as constitutional even though they foreclose a plaintiff's desired relief. Indeed, as discussed in *Robinson*, this Court has upheld as constitutional statutes that retroactively "affected only a remedy, not a right, even though a claimant would recover less or perhaps not at all." *Robinson*, 335 S.W.3d at 140-41 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997)); *see also In re A.D.*, 73 S.W.3d 244, 249 (Tex. 2002) ("The Legislature was free to adopt new remedies for collecting delinquent child support, such as the administrative writ at issue here, and to apply those remedies in cases in which the court's enforcement power had lapsed. The administrative withholding statute, being remedial in nature, does not violate the Texas Constitution's ban on retroactive laws.").

Indeed, for nearly 175 years, this Court has upheld laws that retroactively limit a remedy. *See, e.g.*, *Tex. Water Rights Comm'n*, 464 S.W.2d at 648 ("Retroactive laws have been upheld if the change is called a remedy, and denied if it is a right."); *De Cordova v. City of Galveston*, 4 Tex. 470, 479-80 (1849) ("Laws are deemed retrospective and within the constitutional prohibition which by retrospective operation destroy or impair vested rights or rights to 'do certain actions or possess certain things, according to the laws of the land,' but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away

altogether or incumbered with conditions that would render it useless or impracticable to pursue it.") (internal citations omitted).[12]

Even a statute that "oust[s] jurisdiction"—and thus prevents a court from hearing a claim at all—does not violate the prohibition on retroactivity under this Court's jurisprudence. *Estate of Arancibia*, 324 S.W.3d at 548 (concluding retroactivity bar did not apply to law that made notice requirement jurisdictional). Similarly, applying *Robinson*, the Fifth Circuit has held that a Texas law adding two grounds for the nonrecognition of a foreign judgment was not unconstitutionally retroactive, even though the plaintiff's claim would no longer be recognized as a

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[12] Many cases and legal scholars observe that procedural, remedial, and jurisdictional statutes can never be unconstitutionally retroactive because "'such statutes typically do not affect a vested right.'" *Oncor Elec. Delivery Co. v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 851 (Tex. 2012) (quoting *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010)); *see also* Shambie Singer, 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41:3 (8th ed. 2022) (collecting cases). Under this view, by definition, statutes that impact procedures, remedies, or jurisdiction are not "retroactive"; rather, such statutes would necessarily apply to cases pending at the time the law is adopted, even absent express legislative authorization. *See, e.g.*, *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); *Estate of Arancibia*, 324 S.W.3d at 548 ("Because application of a new jurisdictional rule generally takes away no substantive right but simply impacts a tribunal's power to hear the case, present law normally governs in such situations.") (citation omitted); *City of Austin v. Whittington*, 384 S.W.3d 766, 790 (Tex. 2012) (applying remedial statute that went into effect after case was filed, stating "procedural and remedial laws that do not affect vested rights should be enforced as they exist at the time judgment is rendered"); *see also* Oral Argument (April 3, 2019), *DeJoria v. Maghreb Petrol. Explor., S.A.*, No. 18-50348 (5th Cir.), https://www.ca5.uscourts.gov/OralArgRecordings/18/18-50348_4-3-2019.mp3 (argument of former Texas Supreme Court justice Craig Enoch, starting at 42:41). While *Robinson* points out the difficulty of the "vested rights" analysis, 335 S.W.3d at 143, and sets forth other considerations to determine constitutionality—seemingly even to be applied to procedural, remedial, and jurisdictional statutes—the result is the same here: the PLPA's Education Provision is not unconstitutionally retroactive as applied to Plaintiff's claim.

result. *DeJoria*, 935 F.3d at 389. Just because Plaintiff believes that the PLPA unfairly limits his recovery, "unfair does not always equal unconstitutional," *Robinson*, 335 S.W.3d at 160 (Willett, J., concurring), and the PLPA does not extinguish his substantive claim.[13]

Plaintiff also suggests (at 19) that a right has been greatly impaired if one accounts for the unknown members of his proposed class (and even students at other Texas educational institutions altogether). But "retroactivity challenges are, by definition, as-applied constitutional challenges," *Tenet*, 445 S.W.3d at 710, and, at this pre-certification stage, only the interests of Plaintiff—and not those of potential class members, much less Texas students with no relation to SMU—are at issue.

Finally, Plaintiff is wrong (at 21) that the PLPA's lack of a grace period tips the scales of impairment in favor of unconstitutionality. This Court has recognized that "a change in the law need not provide a grace period to prevent an impairment of vested rights." *Robinson*, 335 S.W.3d at 141 (citing *Barshop v. Medina-Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996)). And here, Plaintiff effectively had a grace period to shore up his claims after the PLPA became effective. In fact, Plaintiff amended his complaint over a month after the

[13] *See also* ROA.663 ("[C]utting off a right to certain remedies is not the same as barring a suit altogether.").

statute was enacted, adding a request for non-monetary relief—relief that the PLPA has not affected in any way. ROA.330 ¶ 17, 347.

3. The PLPA Clearly Serves a Compelling Interest Well Supported in the Legislative Record

As this Court has explained, even some impairment of settled expectations or remedies does not necessarily result in a constitutional violation if the Legislature has shown a compelling interest in doing so. *See, e.g., Fire Prot.*, 649 S.W.3d at 201 ("If the statute disturbs a party's settled expectations, we then must consider whether the statute serves a public interest as opposed to simply benefiting one or a few private entities."); *Robinson*, 335 S.W.3d at 147 (considering whether statute serves a "compelling justification"). Here, the legislative record amply establishes that the PLPA's Education Provision serves the compelling public interest of protecting the State's educational institutions; it is not a statute that "simply benefit[s] one or a few private entities." *Fire Prot.*, 649 S.W.3d at 201. It is not a close call.

Governor Abbott issued a disaster proclamation on March 13, 2020, "certify[ing] that COVID-19 pose[d] an imminent threat of disaster . . . for all counties in Texas,"[14] and then issued Executive Order No. GA-08 ordering that "[i]n accordance with the Guidelines from the President and the CDC, schools shall

[14] *See* Tex. Proc. of Mar. 13, 2020, https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

temporarily close."[15] With the pandemic still progressing, in mid-April the Governor ordered schools to "remain temporarily closed to in-person classroom attendance by students" until "the end of the 2019-2020 school year."[16] As a consequence, the PLPA was enacted to protect all educational institutions, from preschools to universities—whose resources were already strained by the COVID-19 pandemic—from value-destroying lawsuits attacking the very measures they were mandated to take in response to a global pandemic.

Contrary to Plaintiff's (perplexingly) incorrect statement that "the Legislature did not include *any* actual findings of fact related to educational institutions," Br. 15—a statement that ignores the PLPA's plain text—the Texas Legislature expressly found that the PLPA

> serves a compelling public interest in establishing certain procedures and standards for addressing potential claims against individuals and entities faced with *an unprecedented public health emergency that has had severe and adverse impacts on* both the health and safety of individuals and *the ordinary functioning of . . . educational . . . institutions*, . . . upended by the emergency.

ROA.660 (quoting PLPA § 4(C)) (emphases added). The House Report elaborated that the PLPA was justified by the fact that

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[15] *See* Tex. Exec. Order No. GA-08 (Mar. 19, 2020), https://gov.texas.gov/uploads/files/press/EO-GA_08_COVID-19_preparedness_and_mitigation_FINAL_03-19-2020_1.pdf.

[16] Tex. Exec. Order No. GA-16, at 4 (Apr. 17, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-16_Opening_Texas_COVID-19_FINAL_04-17-2020.pdf.

> [t]he onslaught of COVID-19 on Texas *has strained the state's . . . educational institutions*, and there are widespread concerns regarding the long-term effects of the pandemic on these sectors, including the effects of lawsuits that have already been filed in Texas and across the nation.

ROA.660 (quoting H.R. 87-26985, 87th Reg. Sess., at 1 (Tex. 2021)) (ellipsis in original) (emphasis added); *see Zaatari*, 615 S.W.3d at 189 (under *Robinson*, courts should consider the "entire legislative record" in assessing whether a statute serves a compelling public purpose). And the Legislature's concerns about the pandemic's impact on educational institutions were not theoretical or abstract; indeed, in late 2020 there were already 237 lawsuits pending against colleges and universities nationwide, with six suits pending in Texas. ROA.172-88.[17]

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[17] The PLPA's Education Provision's compelling public interest is also demonstrated by similar statutes in other states, including those that survived constitutional challenges or were not challenged at all, which the Court can consider under *Robinson*. ROA.423-26. *See Robinson*, 335 S.W.3d at 149-50; *Texas Educ. Agency v. Am. YouthWorks, Inc*., 496 S.W.3d 244, 264 n.111 (Tex. App.—Austin 2016) ("[T]he supreme court [in *Robinson*] willingly considered not only the entire legislative record, but additional facts such as similar legislation as adopted in other states."), *aff'd sub nom.*, *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54 (Tex. 2018). In particular, seven comparable state statutes (Alabama, Louisiana, Tennessee, West Virginia, Florida, Indiana, and North Carolina) have been enacted with the express purpose of shielding educational institutions from liability in the wake of COVID-19. *See* Ala. Code 1975 §§ 6-5-791, 792 (eff. Feb. 12, 2021); LSA-R.S. 17:3392(A) (eff. March 11, 2020); T.C.A. § 49-7-159 (eff. Aug. 17, 2020); W. Va. Code §§ 15-19-3(11), 55-19-4 (eff. Mar. 11, 2021); F.S.A. § 768.39 (eff. July 1, 2021); Ind. Code §§ 34-12-5-5(1), 34-12-5-7 (eff. Apr. 29, 2021); N.C. Gen. Stat. § 116-311(a) (eff. July 1, 2020). Of these, three have been subject to constitutional challenges (Florida, North Carolina, and Indiana), with North Carolina's statute upheld on grounds that a compelling public interest justified the law's impairment of contractual rights, and Indiana's statute ruled a nullity under procedural rules. *See Dieckhaus v. Bd. of Governors of Univ. of N. Carolina*, 883 S.E.2d 106, 113 (N.C. Ct. App. 2023); *Mellowitz v. Ball State Univ*., 196 N.E.3d 1256, 1258-63 (Ind. Ct. App. 2022), *opinion vacated*, 205 N.E.3d 196 (Ind. 2023). Only Florida's statute has been held unconstitutional. *Ferretti v. Nova Se. Univ., Inc.*, 586 F. Supp. 3d 1260, 1265 (S.D. Fla. 2022). But unlike Florida's statute, which acts as a complete bar to civil liability, F.S.A. §768.39(3)(a), the PLPA only limits Plaintiff's monetary remedies while maintaining his substantive claim.

Such findings place the PLPA far afield from statutes struck down because they were "enacted to help only [the defendant] and no one else," *Robinson*, 335 S.W.3d at 150, and put it firmly in the category of statutes that have survived retroactivity challenges because they were "enacted to protect a broad societal interest," *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 631 (5th Cir. 2010).

For example, in *Tenet*, the Legislature overhauled Texas's medical malpractice law after holding hearings and finding "a spike in healthcare liability claims was causing a malpractice insurance crisis that adversely affected the provision of healthcare services in Texas." *Tenet*, 445 S.W.3d at 707. This Court upheld the retroactive application of the statute, determining that it "aimed at broadening access to health care by lowering malpractice insurance premiums" and thus served a compelling public interest. *Id.*

Likewise in *Union Carbide*, this Court upheld as constitutional a statute that required individuals seeking damages for asbestos-related injuries to serve physician reports. *Union Carbide*, 438 S.W.3d at 57. The Legislature's findings showed that the statute was enacted to address "a litigation crisis in which more asbestos-related suits were filed in Texas than in any other state, negatively affecting the financial resources available for compensating persons with asbestos-related injuries and the judicial resources available for allocating those financial resources," thus serving a compelling public interest. *Id.*; *see also Barshop*, 925 S.W.2d at 634 (retroactive

effect of statute establishing the Edwards Aquifer Authority to regulate groundwater withdrawals did not render the statute unconstitutional, as it was supported by legislative findings that the aquifer was "vital to the general economy and welfare of this state").

Here, the PLPA is not targeted to one entity as in *Robinson*, but broadly covers all educational institutions, as well as healthcare institutions, businesses, and nonprofits, and serves the public interest by protecting these entities from value-destroying suits. *E.g.*, Tex. Civ. Prac. & Rem. Code § 74.155 *et seq.*; *id.* § 148.001 *et seq.*

Moreover, the Legislature's findings reveal the fallacy of Plaintiff's accusation that the PLPA "leav[es] educational institutions with a windfall of payments for services the schools did not provide." Br. 16-17. Plaintiff's attempt to portray the Legislature's concern for the stability of Texas's educational institutions as a nefarious effort to protect "a subset of business," Br. 17, further falters because the PLPA protects Texas's entire education system—encompassing educational institutions ranging from preschools to universities, public and private—and because the Texas Constitution itself mandates that the Legislature protect certain of those institutions. *See* Tex. Const. art. 7, § 1 (mandating "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools" because "[a] general

diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people").

As Texas courts have found, moreover, "Texas's interest in ensuring that its citizens are educated" is "an unarguably compelling public purpose." *Tex. Educ. Agency*, 496 S.W.3d at 263-64; *cf. Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting as compelling state interest proposition "that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence," and that "education prepares individuals to be self-reliant and self-sufficient participants in society"). Plaintiff's suggestion that the Legislature pursued mere economic protectionism rather than the broader public interest in seeking to stabilize Texas educational institutions cannot be reconciled with such holdings, the Legislature's constitutional mandate and findings, or the scope of relief provided by the PLPA's Education Provision.

* * *

The PLPA serves a compelling public interest in protecting educational institutions that complied with government orders during Spring 2020 from the long-term financial effects of the global pandemic. The remedial impact of the PLPA on Plaintiff's novel claim did not upset settled expectations, and Plaintiff is not precluded from seeking non-monetary relief. Accordingly, the PLPA's Education

Provision is not unconstitutionally retroactive under *Fire Protection*, *Robinson*, and this Court's other longstanding precedents.

PRAYER

SMU requests that the Court answer the certified question by holding that the Pandemic Liability Protection Act is not unconstitutionally retroactive as applied to Plaintiff's claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of Appellee is being served on counsel of record/interested parties by e-filing pursuant to the Texas Rules of Appellate Procedure on September 25, 2023.

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Elizabeth Scott		edscott@akingump.com	9/25/2023 3:40:52 PM	SENT