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SUPREME COURT OF TEXAS
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Supreme Court of Texas

No. 23-0565

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

Appellant,

v.

SOUTHERN METHODIST UNIVERSITY, AND OTHER AFFILIATED ENTITIES AND INDIVIDUALS,

Appellee.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S BRIEF ON THE MERITS

Philip J. Furia
Jason P. Sultzer
THE SULTZER LAW GROUP P.C.
85 Civic Center Plaza, Suite 104
Poughkeepsie, New York 12601
Tel. 854-705-9460

Jeff Edwards
Michael Singley
David James
EDWARDS LAW
603 W. 17th St.
Austin, Texas 78701
Tel. 512-623-7727

Jeffrey K. Brown
Michael A. Tompkins
LEEDS BROWN LAW, P.C.
One Old Country Road, Suite 347
Carle Place, New York 11514
Tel. 516-873-9550

Counsel for Appellant

IDENTITY OF THE PARTIES AND COUNSEL

The following list depicts the parties to this case and their counsel.

1) Party

    a. Luke Hogan, a natural person seeking to represent a class of similarly situated persons; and

        i. Current Counsel

            Philip J. Furia
            Jason P. Sultzer
            THE SULTZER LAW GROUP P.C.

            Jeff Edwards
            Michael Singley
            David James
            EDWARDS LAW

            Jeffrey K. Brown
            Michael A. Tompkins
            LEEDS BROWN LAW, P.C.

2) Party

    a. Southern Methodist University.

        i. Current Counsel:

            M Scott Barnard
            Brennan Holden Meier
            Jessica Jones Mannon
            Molly E Whitman
            AKIN GUMP STRAUSS HAUER & FELD

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STATEMENT OF THE CASE

This putative class action seeking damages for breach of contract comes to this Court on a certified question from the United States Court of Appeals for the Fifth Circuit.

On August 12, 2020, Plaintiff-Appellant Luke Hogan sued Defendant-Appellee Southern Methodist University seeking damages, including prepaid tuition and fees, due to the suspension of in-person learning and campus services for the Spring 2020 semester. CR 31.[1] Suit was originally filed in the 191st Judicial District of Dallas County, but SMU removed the action to federal court. CR 13.

On March 29, 2022, Judge Brantley Starr, United States District Court for the Northern District of Texas, dismissed all of Hogan's claims. CR 643-664.

On July 20, 2023, the Fifth Circuit—Circuit Judges Stuart Kyle Duncan, Jacques Loeb Wiener, Jr., and Leslie H. Southwick, with Judge Duncan delivering the opinion of the court—reversed the trial court's ruling on the validity of Hogan's breach of contract claim and certified to this Court the following question:

> "Does the application of the Pandemic Liability Protection Act to Hogan's breach-of-contract claim violate the retroactivity clause in article I, section 16 of the Texas Constitution?"

Hogan v. S. Methodist Univ., 74 F.4th 371, 375, 378 (5th Cir. 2023).

[1] The Fifth Circuit's stamped Record on Appeal, prepared by the Clerk for the United States District Court for the Northern District of Texas, is referred to as CR.

STATEMENT OF JURISDICTION

This Court has jurisdiction to answer the question of state law certified from a federal appellate court in this case. TEX. CONST. art. V, § 3–c(a); *see also* TEX. R. APP. P. 58.1.

ISSUED PRESENTED – CERTIFIED QUESTION

Does the application of the Pandemic Liability Protection Act to Appellant Luke Hogan's breach-of-contract claim violate the retroactivity clause in article I, section 16 of the Texas Constitution?

STATEMENT OF FACTS

The Fifth Circuit Court of Appeals correctly stated the nature of the case.

I. Factual Background – Plaintiff Enrolls at SMU and Executes the Student Agreement.

Hogan was enrolled as a full-time graduate student at Southern Methodist University during the Spring 2020 semester. CR 330-331. Tuition at SMU was approximately $25,000.00 for undergraduate students. CR 331. SMU priced the cost of tuition based on the assumption of a full term of in-person learning. CR 332. Students were also assessed a mandatory general fee ("Mandatory Fee") of approximately $3,180.00. CR 331. SMU priced the Mandatory Fee based on services that students like Hogan would receive via in-person access to campus services and facilities. CR 332.

SMU offers students the option to enroll in classes based on "Location" which includes options for "Dallas (Main Campus)," "Abroad," "Online," & "SMU-in-Taos." CR 331. Hogan chose and registered for classes that were offered on the physical campuses of SMU, and paid tuition for and reasonably expected to receive the benefit of on-campus live interactive instruction and an on-campus educational services throughout the semester. CR 331.

SMU requires students such as Hogan to sign a Student Rights and Responsibilities Agreement ("Student Agreement") which reads as follows:

> I understand that as a student at Southern Methodist

> University, I am solely responsible and obligated for the timely payment of University tuition, fees, and other charges incurred by myself or on my behalf at Southern Methodist University. Regardless of any expected reliance on third-party resources, including but not limited to financial aid, family gifts, employer reimbursement or any other external resource, I remain personally responsible for paying any and all outstanding balances, which collectively represent my student financial obligation. I 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). CR 396.

Thus, pursuant to the Student Agreement, Hogan agreed to pay tuition and fees to SMU, and SMU agreed to use those funds for "educational purposes."

II. Factual Background – Context Surrounding the Execution of the Student Agreement Repeatedly Reinforces SMU's Offer of In-Person Education

The context surrounding Hogan's execution of the Student Agreement makes clear that these educational purposes necessarily included the cost of offering providing an on-campus, in-person collegiate services.

In its acceptance emails and acceptance letter, SMU touted students' ability to "benefit from and contribute to the SMU community." CR 334. In fact, first year students at SMU are required to live on campus and the University promotes "campus [has] built-in resources and opportunities…" including "campus resources, student leadership positions, and increased faculty interactions." CR 334. The Student Affairs website promotes the on-campus educational services,

including encouraging students to take a look at the data on "SMU on-campus students as they relate to retention, satisfaction, and success." CR 334-335.

On the Admissions website of SMU, the University promotes its campus and physical location and then states, "From your very first semester at SMU, you have access to everything that defines the signature SMU experience: research opportunities in a variety of disciplines, outstanding faculty who love to mentor, advisors who will help you navigate your academics, business pitch competitions to start a company and so much more." CR 334.

The same SMU webpage promotes "Life on Campus" and "Explore Campus" and introduces the physical location as, "Welcome to our vibrant community, where relationships matter – faculty who will encourage you to think big, friends you will have your back and alumni who will help you get a foot in the door. Take the Virtual [Campus] Tour." CR 335.

In SMU's policy statement and Student Handbook, SMU refers to its policies as campus based or campus wide policies – and utilizes phrases that promote the "campus" and "community." CR 333. In the 2019-2020 Student Handbook, SMU's Vice President for Student Affairs conveys that, "Again, we are pleased that you are part of the SMU community. We believe SMU offers much to its students, and we hope that you will take full advantage of all SMU has to offer you. We also look forward to what you will contribute to our community." CR 333. The Student

Handbook thereafter goes on to list campus and in-person educational services that are available to students at SMU, including 129 physical buildings and areas on campus. CR 333-334. According to the University Policy Manual, the Student Handbook "is a guide for students on the services available at the University." CR 334.

In fact, the Student Handbook lists "campus" 203 times and "community" 116 times as it conveys the policies, practices, and rights of students at the University. CR 334. The Student Handbook goes so far as to define what "campus" and "campus grounds" mean, describing these terms as "refer[ing] to any buildings or grounds owned, leased, operated, controlled, or supervised by the University," indicating that it is a physical location being offered to students. SMU has established different departments within its infrastructure that provide "essential services, support and programs to students, faculty, staff, and the University as a whole" and on its website states that, "Quality resources that enable students to thrive." CR 334. Those essential services are on campus and in person. CR 334.

III. Factual Background – SMU Cancels In-Person Education and Offers No Refunds

On or around March 12, 2020, SMU announced that because of COVID-19, they would suspend and cancel all in-person classes and college services for the remainder of the Spring Semester 2020 (following Spring Break recess) and that all instruction would transition to online beginning on or around March 26, 2020. CR

332. SMU, thus, failed to provide in-person educational services, access, and opportunities for approximately 59% of the Spring 2020 semester. This includes services for which the Mandatory Fee was assessed, such as SMU's health and wellness facilities, programs or services, fitness facilities, student events or sports, and an in-person commencement. CR 332.

As a result of SMU's response to the Coronavirus, Hogan was denied access to such facilities, services, and technology despite paying tuition and the Mandatory Fee. CR 332-333. SMU has not made any refund of any portion of the tuition Hogan paid for during the semesters affected by COVID-19, and have offered no discount, rebates, or refunds going forward. CR 338. SMU has not refunded any portion of the Mandatory Fee it collected from Hogan for the affected semester even though it closed or ceased operating the services and facilities for which the Mandatory Fee was intended to pay. CR 338.

IV. Hogan Files this Action and the Trial Court Grants SMU's Motion to Dismiss

On August 12, 2020, Hogan commenced the instant class action on behalf of himself and others similarly situated, seeking to recover damages sustained as a result of SMU's failure to refund students any amounts following the cancellation of in-person education. CR 27.

While this action was pending, on June 14, 2021, the Texas Legislature passed the Pandemic Liability Protection Act. 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) (West), CR 413-421.

After SMU moved to dismiss, on March 29, 2022 the trial court issued a Memorandum Opinion and Order (the "Order") granting the motion. CR 643-664. The trial court ruled that Hogan had not identified a "specific contractual purpose of in-person learning." CR 651. Relevant to the certified question before this Court, the trial court also concluded that Hogan's claims are barred by the Pandemic Liability Protection Act. CR 655-663. Hogan timely appealed the trial court's Order.

V. The Fifth Circuit Reverses the Trial Court in part and Certifies a Question to this Court.

On July 20, 2023, the Fifth Circuit issued its decision on Hogan's appeal of the trial court order. The Fifth Circuit reversed the trial court's ruling that Hogan failed to plead a breach of contract claim, finding that the trial court had not resolved a dispute concerning "competing interpretations as to whether the Student Agreement is an enforceable contract for on-campus instruction." *Hogan*, 74 F.4th at 375.

On the issue of the constitutionality of the PLPA, the Fifth Circuit found that "this question is close enough to warrant certification." *Id*. at 377. The Fifth Circuit noted that it found it "hard to answer under existing Texas law whether the PLPA impairs Hogan's well-settled expectations" *Id.* The court further noted that

while laws impacting remedies are *usually* not unconstitutionally retroactive, "[t]he PLPA strips Hogan of any damages remedy, and it is unclear . . . how an injunction would give him anything meaningful." *Id.*

Accordingly, the Fifth Circuit certified to this Court the question of whether the PLPA is constitutional as applied to Hogan's breach of contract claim. *Id. at* 378.

SUMMARY OF THE ARGUMENT

The Texas Pandemic Liability Protection Act's retroactive provision is unconstitutional as applied to the educational institution in this case. The Texas Constitution expressly forbids the Act from retroactively depriving Hogan of the contractual rights he derives from the Student Agreement. There is no public interest that justifies an exception to the Constitution for educational institutions, and certainly not one that overcomes the strong public interest against retroactively eliminating common law breach of contract claims.

ARGUMENT

I. Section 148.004(b) of the Pandemic Liability Protection Act Violates the Texas Constitution's Prohibition on Retroactive Laws.

The Pandemic Liability Protection Act (the "PLPA") relates to certain claims arising out of a pandemic and seeks to limit the liability of certain healthcare businesses and educational institutions. *See* 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) (West), CR 413-421. § 148.004(b) provides that an "educational "nstitutio" Is not liable for damages or equitable monetary relief arising from a cancellation or modification of a course, program, or activity of the institution if the cancellation or modification arose during a pandemic emergency and was caused, in whole or in part, by the emergency." CR 419. Despite the PLPA's enactment on June

14, 2021, the Act applies to actions "commenced on or acter March 13, 2020," CR 420. Thus, § 148.004(b) violates the Texas Constitution's prohibition on retroactive laws and is unenforceable as applied to this matter, where the cause of action accrued and was filed before § 148.004(b) was enacted.

1. Standard for Determining that a Retroactive Law is Unconstitutional

The Texas Constitution prohibits enactment of retroactive laws. TEX. CONST. art. I. § 16 ("No bill of attainder, ex post facto law, retroactive law, or any other law impairing the obligation of contracts shall be made."). "A retroactive law is one that extends to matters that occurred in the past." *Brazos River Auth. v. City of Hous*., No. 03-20-00076-CV, 2021 Tex. App. LEXIS 5197, *14 (Tex. App.--Austin June 30, 2021, no pet.) (quoting *Tenet Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014)). Moreover, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 128 L. Ed. 2d 229 (1994). The purpose of the constitutional prohibition against retroactive laws is to safeguard the people's settled expectations and protect against abuses of legislative power. *Robinson v. Crown Cork & Seal Co., Inc*., 335 S.W.3d. 126, 139 (Tex. 2010).

In *Robinson v. Crown Cork & Seal Co., Inc.*, the seminal case on retroactivity, this Court set forth the three factors that courts must consider when determining whether a law is unconstitutionally retroactive. *Id*. at 145. The courts must consider:

(1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. *Id.* This three-part "test acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption." *Tenet*, 445 S.W.3d at 707 (citing *Robinson*, 335 S.W.3d at 145). When considering these factors, § 148.004(b) is demonstrably unconstitutionally retroactive as applied to this matter.

2. Section 148.004(b) of the PLPA is Unconstitutionally Retroactive Under *Robinson*.

There is no dispute that the PLPA is retroactive in nature, as it applies to matters that have occurred in the past and specifically applies to claims that accrued and were filed prior to the enactment of the PLPA, such as this case. Thus, this Court must undertake the *Robinson* inquiry to determine whether the law is *unconstitutionally* retroactive. As demonstrated below, balancing the *Robinson* factors requires a finding that § 148.004(b) of the Act – prohibiting recovery from educational institutions on claims arising out of the cancellation or modification of courses, programs or activities as a result of the COVID-19 pandemic – violates Texas' constitutional prohibition on retroactive laws as applied to this case because the slight, if any, public interest is significantly outweighed by the extinction of Hogan's settled interest in his common-law causes of action for breach of contract, unjust enrichment, and conversion.

a. The Nature and Strength of the Public Interest Weighs Against Retroactivity.

The first factor is "the nature and strength of the public interest served by the [retroactive] statute *as evidenced by the Legislature's factual findings*." *Robinson*, 335 S.W.3d. at 145 (emphasis added). "There must be a compelling public interest to overcome the heavy presumption against retroactive laws." *Id.* at 146. Here, there is no factual finding to meet this burden. *All* of the Legislature's specific findings regarding public interest in the PLPA relate to individuals and entities in the healthcare field. For example, the Legislature found:

> The frequency and severity of such cases in this state have severely taxed the physicians and health care providers, including health care institutions, stressed the state's health care system, and created shortages of medical staff, therapeutics, hospital beds, testing equipment, and safety supplies
>
> ***
>
> many physicians and health care providers have placed themselves, their loved ones, and their livelihoods at risk by trying to respond to the disaster;
>
> ***
>
> protecting physicians and health care providers from unnecessary liability supports their efforts during a pandemic, including the COVID-19 pandemic;

See Act of June 14, 2021, 87th Leg., R.S., ch. 528, 2021 Tex. Gen. Laws, S.B. 6, § 4(a).

Similarly, the Legislature stated that because of these findings the purpose of the law is "to improve and modify the system by which *health care liability claims*

are determined[.]" *Id*. § 4(b) (emphasis added); see also H.R. 87-26985, 87th Reg. Sess., at 1-2 (Tex. 2021). Significantly, the Legislature did not include *any* actual findings of fact related to educational institutions. Likewise, *nowhere* in its statement of purpose does the Texas Legislature include the protection of educational facilities or student's rights as a concern or driving purpose. Instead, the Legislature addressed educational institutions generally and observed, without providing any factual underpinning, that "[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." *Hogan v. S. Methodist Univ.*, 595 F. Supp. 3d 559, 570-71 (N.D. Tex. 2022).

The lack of findings of fact justifying the law was a crucial factor for the Supreme Court in *Robinson*. *Robinson*, 335 S.W.3d at 149 ("The Legislature made no findings to justify Chapter 149"); *see also Zaatari v. City of Austin*, 615 S.W.3d 172, 189 (Tex. App.--Austin 2019, pet. denied) (finding public interest for city's retroactive ban on short term rentals slight given the lack of factual findings); *Brazos River Auth.*, 2021 Tex. App. LEXIS 5197, at *22 ("Legislature made no findings to justify [the retroactive law], and, based on the record before us we conclude the public interest served is slight."). The lack of findings of fact to support the nature and strength of any public interest in the PLPA with respect to educational

institutions is even more glaring here than it was in *Robinson*. While in *Robinson*, the Legislature made no findings of fact at all for the law at issue, in this case the Legislature included many findings of fact, but none of them pertain to educational institutions or § 148.004—instead, the Legislature was concerned with a provision (not at issue in this appeal) that affected health care. The Legislature's silence is deafening and demonstrates that the protection of educational institutions to the detriment of its student body is not supported by a compelling – or even significant – public interest. *See PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004) ("A statute's silence can be significant. When the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended."); *Cameron v. Terrell & Garrett*, 618 S.W.2d 535, 540 (Tex. 1981) ("It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.") (internal citations omitted).

Moreover, unlike for health care providers, there is not a meaningful public interest served by § 148.004(b). § 148.004 only acts to pick winners and losers: If the Act applies to this case, then educational institutions get to retain all of the tuition and fees paid by students in the Spring of 2020, forcing their students to shoulder the entire financial burden of the pandemic – leaving educational institutions with a

windfall of payments for services the schools did not provide. Public interest should militate *against* choosing one side over another in an ongoing dispute, but § 148.004 directly counteracted the lawsuits, like the instant one, seeking a partial or equitable refund of a portion of those tuition and fees resulting from the cancellation of on-campus, in-person educational services.

This supposed public interest is not compelling on its own, let alone when weighed against the nature of the prior right impaired as described above – namely the rights of students and their families that entered into these contracts for specific, concrete, and foundational educational services, i.e. access to campus, in-person engagement for higher educational goals, and access to the in-person community. *See Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc*., No. 4:15-CV-2755, 2015 U.S. Dist. LEXIS 188087, at *17-18 (S.D. Tex. Nov. 24, 2015) (finding "protection of a subset of business, or a regulation of an industry" is not a compelling public interest); *compare Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 57 (Tex. 2014) (holding that retroactive legislation aimed at resolving asbestos-related litigation crises and supported by legislative findings of fact served compelling public interest); *In re A.D.M.*, No. 13-09-00677-CV, 2011 Tex. App. LEXIS 6063, at *12 (Tex. App.--Corpus Christi-Edinburg Aug. 4, 2011, pet. denied) (protecting children involved in parentage issues is a compelling public interest.).

Accordingly, the "public interest" factor of the *Robinson* test weighs strongly

in favor of a finding that the PLPA is unconstitutionally retroactive, due to the Legislature's conspicuous omission of any findings to show a public interest in the portion of the statute related to educational institutions and invoked by SMU in this case.

b. The Nature of the Prior Right Impaired Weighs Against Retroactivity.

The second factor of the *Robinson* test – the nature of the prior right impaired – weighs heavily in favor of invalidating § 148.004(b) as applied to this case. Section 148.004(b) eliminates Hogan's right to assert well-established common law claims against SMU for their actions and decisions to cancel or modify contracted for and agreed upon terms regarding educational services. Hogan had a settled expectation to be able to assert the common law causes of action he included in his claim against SMU. Moreover, § 148.004(b) does not simply impair or limit Hogan's available remedy for these common law causes of action, it completely extinguishes any right of recovery, not only in this case but for all students in Texas – at all universities within the state. *Robinson* emphasized the importance in maintaining an established common-law cause of action when a retroactive law seeks to extinguish it. *Robinson*, 335 S.W.3d at 148 ("An interest in maintaining an established common law cause of action is greater than an interest in choice of law rules.").

Courts have consistently held that when a fundamental right – like the one to assert an established common law cause of action such as breach of contract or unjust

enrichment – is impaired or, in this case, extinguished by a retroactive law, the scales are tipped in favor of finding the law unconstitutional. *See Zaatari*, 615 S.W.3d at 188 (holding municipal ordinance unconstitutionally retroactive because "it operates to eliminate well-established and settled property rights that existed before the ordinance's adoption"); *see also Brazos River Auth.*, 2021 Tex. App. LEXIS 5197, at *33 (holding unconstitutional a retroactive law that extinguished Houston's "settled" property interest in a permit). Indeed, the prior right implicated here is Hogan's settled interest in bringing well-established common law causes of action. Analogous to the Supreme Court finding in *Robinson*, "[a]n interest in maintaining an established common-law cause of action is greater than" the interest in allowing Texas educational institutions to keep the full tuition and fees paid by their students. 335 S.W.3d at 148.

The scope of the prior right impaired also underscores the interest in maintaining the common law cause of action. Hogan brings this claim on behalf of himself and a putative class of students at SMU during the Spring 2020 semester. The potential recovery that these students could obtain is meaningful. Additionally, students at other Texas educational institutions also have vested rights in the same or similar common law causes of action seeking the same type of recovery. Accordingly, the scope of the prior right impaired is potentially sizable both in terms of the individuals whose rights are extinguished and the value of recovery available.

c. The Extent of the Impairment Weighs Against Retroactivity.

Finally, the Court must consider the extent of the impairment of the prior right. Once again, this factor weighs in favor of invalidating § 148.004(b). The extent of the impairment is severe as § 148.004(b) extinguishes Hogan's claims completely. While SMU has argued that Hogan's claim is indirectly extinguished, because the provision prevents him from being able to plead a necessary element of his claim, that does not change the inquiry because the outcome is the same: complete extinction. *Robinson* is, again, directly on point as it also involved indirect extinction of a common-law cause of action. In *Robinson*, a retroactive choice-of-law provision resulted in the extinction of plaintiff's common-law claim and the Supreme Court held "Chapter 149 extinguishes the Robinson's claim and all other such claims against Crown in Texas, and *while it does so indirectly*, extinction was the Legislature's specific intent." 335 S.W.3d at 148 (emphasis added).

Here, as with the statute in *Robinson*, the PLPA completely eliminates any possibility of monetary recovery by Hogan on common law causes of action. While the PLPA leaves open the possibility of injunctive relief, that possibility rings hollow in a case like this, particularly since Hogan's claim is so clearly aimed at a monetary recovery. Moreover Hogan's pleading does not request any particular injunctive relief and only mentions the potential of an injunction or declaration in the very last sentence of his "prayer for relief." *See* CR 347 (seeking an "order awarding such

other and further relief as may be just and proper, including injunctive relief and declaratory relief.").

Moreover, this Court's retroactivity cases "have considered the period of time between a statute's enactment and effective date in weighing the degree of notice afforded and a statute's impairment of a party's rights." *Fire Prot. Serv. v. Survitec Survival Prods.*, 649 S.W.3d 197, 206 (Tex. 2022). "In determining whether a law disrupts or impairs settled expectations, [this Court] consider[s] whether the law gives parties a 'grace period' to adapt before the law takes effect." *Id*. at 201-02. Here, the PLPA provided no grace period whatsoever to allow parties to adapt prior to the law taking effect. This is yet another hallmark of the unconstitutional nature of the PLPA.

The extinction of a well-established common-law cause of action, without any grace period whatsoever, weighed against a slight, if any, public interest in educational institutions retaining full tuition and fees necessitates a finding that the PLPA is unconstitutionally retroactive.

PRAYER

For the reasons above, this Court should determine that the PLPA, TEX. CIV. PRAC. & REM. CODE § 148.004(b), is unconstitutional as applied to Appellant Luke Hogan's claims against Appellee Southern Methodist University.

Respectfully submitted,

By /s/ *Philip J. Furia*

Jeff Edwards
State Bar No. 24014406
jeff@edwards-law.com
Michael Singley
State Bar No. 00794642
mike@edwards-law.com
David James
State Bar No. 24092572
david@edwards-law.com

EDWARDS LAW
603 W. 17th Street
Austin, Texas 78701
Tel. 512-623-7727
Fax. 512-623-7729

AND

THE SULTZER LAW GROUP P.C.
Philip J. Furia. Esq.
Jason P. Sultzer, Esq.
85 Civic Center Plaza, Suite 104
Poughkeepsie, NY 12601
Tel: (845) 483-7100
Fax: (888) 749-7747
furiap@thesultzerlawgroup.com
sultzerj@thesultzerlawgroup.com

AND

LEEDS BROWN LAW, P.C.
Jeffrey Brown, Esq.
Michael A. Tompkins, Esq.
One Old Country Road, Suite
347 Carle Place, NY 11514-
1851 (516) 873-9550

jbrown@leedsbrownlaw.com

Counsel for Appellant

CERTIFICATE OF SERVICE

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/s/ Jeff Edwards
Jeff Edwards

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Bar No. 24014406
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Associated Case Party: Southern Methodist University

Name	BarNumber	Email	TimestampSubmitted	Status
Elizabeth Scott		edscott@akingump.com	9/5/2023 11:09:07 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brennan HMeier		bhmeier@akingump.com	9/5/2023 11:09:07 AM	SENT
Lizzy Scott		edscott@akingump.com	9/5/2023 11:09:07 AM	SENT
Scott Barnard		sbarnard@akingump.com	9/5/2023 11:09:07 AM	SENT
Heather Peckham		hpeckham@akingump.com	9/5/2023 11:09:07 AM	SENT
Scarlett York-Cockrill		syork-cockrill@akingump.com	9/5/2023 11:09:07 AM	SENT
Lisa Monreal		lmonreal@akingump.com	9/5/2023 11:09:07 AM	SENT
Jeffrey Edwards	24014406	jeff@edwards-law.com	9/5/2023 11:09:07 AM	SENT
Jessica Mannon		jmannon@akingump.com	9/5/2023 11:09:07 AM	SENT

Associated Case Party: Luke Hogan

Name	BarNumber	Email	TimestampSubmitted	Status
Paul Samuel		paul@edwards-law.com	9/5/2023 11:09:07 AM	SENT
David James		david.james.tcrp@gmail.com	9/5/2023 11:09:07 AM	SENT
Stephen Lemmon		stephen@edwards-law.com	9/5/2023 11:09:07 AM	SENT
Lisa Snead		lisa@edwards-law.com	9/5/2023 11:09:07 AM	SENT
Matthew Kirkwood		matthew@edwards-law.com	9/5/2023 11:09:07 AM	SENT
Jason Sultzer		sultzerj@thesultzerlawgroup.com	9/5/2023 11:09:07 AM	SENT
David James		david@edwards-law.com	9/5/2023 11:09:07 AM	SENT
Michael Tompkins		mtompkins@leedsbrownlaw.com	9/5/2023 11:09:07 AM	SENT

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