No. 21-50352

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALLISON KING,

Plaintiff - Appellant

v.

BAYLOR UNIVERSITY,

Defendant - Appellee

On Appeal From

United States District Court for the Western District of Texas

6:20-CV-504

REPLY BRIEF OF APPELLANT ALLISON KING

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INTRODUCTION

The District Court erred in dismissing Plaintiff-Appellant Allison King's claims. She pleaded straightforward contract and unjust enrichment claims arising from Defendant-Appellee Baylor University's refusal to refund the tuition and fees she paid for on-campus, in-person education, facilities, and related services after Baylor moved to online-only instruction during the Spring 2020 academic term. Contrary to Baylor's arguments, this is not an "educational malpractice" case concerned with the quality or sufficiency of the instruction Plaintiff received—it is simply about services promised, contracted for, and paid for but never delivered *at all*. Baylor's Financial Responsibility Agreement ("FRA") does not extinguish Plaintiff's claims because it is an ambiguous promissory note that comprises only a small portion of the parties' contractual relationship. Texas law does not preclude an alternatively pleaded unjust enrichment claim, either. And Baylor's claim that the Pandemic Liability Protection Act ("PLPA") extinguishes this suit is not properly before this Court and incorrect in any event.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S BREACH OF CONTRACT CLAIM

Baylor asserts (Resp. Br. at 4) that the District Court correctly ruled that the FRA is a "valid, integrated, and unambiguous contract" that does not require Baylor to offer in-person, on-campus courses or services and precludes consideration of any

other documents to ascertain Baylor's contractual responsibilities. This cannot be correct for multiple reasons. Op. Br. 9–28. First, standing alone, the FRA is not a contract at all because it does not contain the essential terms of the parties' agreement and imposes no cognizable obligations on Baylor. Second, even if the FRA were a contract, it cannot be the sole contract between the parties because it is limited in scope and ambiguous with respect to Baylor's responsibilities.

Baylor fails to show otherwise in its Response Brief. Indeed, the interpretive gymnastics it employs in attempt to save the FRA demonstrate the unreasonableness of its reading of that document.

A. Standing Alone, the FRA Is Not a Valid Contract

As detailed in Plaintiff's Opening Brief, the FRA is a three-page promissory note concerned primarily with establishing the due dates of tuition payments and terms and conditions related to Plaintiff's financial obligations. Op. Br. 14–15. It is not, and was never intended to be, an integrated expression of the parties' full contractual relationship. *Id.* And standing alone, it is not a valid contract because it does not contain many of the essential terms of the parties' relationship, including the services Baylor was obligated to provide, the price, and the duration of performance. *Id.* at 15–17. It does not address these terms simply because it was

never meant to do so: it is part of a larger universe of documents that collectively make up the parties' agreement. *Id.* at 10.

Baylor attempts to address each of the missing terms, but its arguments are unavailing. To save the FRA, a court would have to simultaneously incorporate documents not specifically referenced in some places, incorporate documents for one purpose while the FRA references them for another purpose in other places, *and* refuse to incorporate other documents that support Plaintiff's interpretation in still other places. The FRA clearly does not support such a mind-bending interpretive exercise.

Services Provided. Baylor asserts (Resp. Br. at 21–23) that the term "educational services" supplies the services that Baylor was obligated to provide, and that because "online education is a form of educational service," Baylor satisfied its obligation. But a term so ambiguous that it gives one party virtually unbridled discretion is no term at all. *See City of The Colony v. N. Texas Mun. Water Dist.*, 272 S.W.3d 699, 725 (Tex. App. – Fort Worth 2008, pet dism'd); 49 *Texas Practice Series, Contract Law* § 2.52 (observing an agreement "where one party does not in fact have any obligations" is "illusory"). That is exactly what the term "legal services" is here. Under Baylor's interpretation, Baylor could retain the money a student pays for a semester-long course on quantum physics after shipping the student a CD with materials on how to read music, because it has provided "a form

of educational service." When a student enters into an educational contract with a university, the student expects a specific type of "educational services" in a specific format, just as a client who enters into a contract with an attorney expects a certain type of "legal services" in a particular court. Baylor provides no precedent supporting its claim that such an open-ended term can suffice as an essential contractual term.

Price. The FRA also does not include the price of the "educational services" that Baylor promised to render, nor does it incorporate any document that supplies the price. In support of its preferred interpretation of the FRA, Baylor selectively quotes the FRA's incorporation of a series of ambiguously referenced documents for the sole purpose of establishing the due date of Plaintiff's payments. The FRA requires a student to "promise to pay for all assessed tuition, fees, and other associated costs by the scheduled due date as reflected in" related documents. ROA.318. Baylor claims (Resp. Br. at 24) that it is unreasonable to read the FRA as incorporating "one half of that sentence but ignor[ing] the other." But this ignores the *very next sentence*: **These three sources for the due date information** are hereinafter collectively referred to as the "PUBLISHED/ASSIGNED DUE DATE." ROA.318 (emphasis added).

Baylor objects (Resp. Br. at 24–25) that "incorporation by reference of the price is the only way the [FRA] would work" because "the price each student pays

is student-specific." But this is not what the FRA says, and it is only a problem under Baylor's strained interpretation. If, as Plaintiff argues and the FRA's text makes clear, the FRA is *not* an integrated expression of the parties' full contractual relationship, there is no need to "incorporate[e] by reference" a document for a certain purpose when it does not reference the document for that purpose.

Duration of performance. Baylor again asserts (Resp. Br. at 27–28) that the FRA incorporates Baylor's online registration Portal, BearWeb, to supply the duration of performance—but, somehow, *only* the duration of performance. In an attempt to counter Plaintiff's showing that the portions of BearWeb attached to Baylor's own motion to dismiss contained *on-campus* class locations, Baylor argues (Resp. Br. at 28) that only a page entitled "Confirm Attendance & Financial Responsibility," not "the entirety of BearWeb—was incorporated into the FRA." Yet Baylor does not explain how the FRA could selectively incorporate only this page from BearWeb. As Plaintiff explained, the FRA only references BearWeb generally and in regards to *dropping* classes or updating contact information. Op. Br. 21. How, then, could the FRA serve as the full expression of the parties' agreement while also incorporating a specific page within the BearWeb application that it never references?

More importantly, Baylor has no answer for the fact that the FRA simply does not list BearWeb as an incorporated document. Baylor's discussion about

"clickwrap" agreements (Resp. Br. at 25–27) further demonstrates the internal inconsistency of its position: it wishes to treat the FRA as excluding reliance on any document outside its four corners—when doing so would benefit Baylor—but it also wishes to read into the FRA a clickwrap agreement never referenced in the FRA.

Baylor wants the FRA to be a fully integrated agreement so long as it excludes documents unfavorable to its position, but it also wants to rely on documents and online agreements not referenced by the FRA to fill in the FRA's manifest holes. Baylor cannot have it both ways.

B. Even if the FRA Was a Valid Contract, Extrinsic Evidence Is Needed to Interpret It Because It Is Ambiguous

Assuming for sake of argument that the FRA, standing alone, is a valid contract, it is patently ambiguous and therefore requires admission of extrinsic evidence to interpret it. Baylor's arguments to the contrary do not change this result.

First, Baylor claims (Resp. Br. at 30) that the FRA precludes extrinsic evidence because its text states that it "constitutes the entire agreement between the parties with respect to the matters described." But Baylor has no answer for the fact that this clause does not claim to extinguish agreements between Plaintiff and Baylor regarding the matters *not* described. As Plaintiff explained, "the matters described" in the FRA are matters related to financial obligation, payments, billing, and a few other topics like privacy of student records, but nothing about the "educational services" Baylor was obligated to provide in exchange for Plaintiff's financial

obligations. Op. Br. 26. At most, the FRA's merger clause is ambiguous, which supports admission of extrinsic evidence to establish the full details of Plaintiff and Baylor's relationship. *Id.* at 26–28.

Next, Baylor again argues (Resp. Br. at 33–35) that the term "educational services" is unambiguous. The crux of Baylor's argument is that because online instruction is *one* type of educational service, it must be acceptable for an institution to provide it *any* time the term "educational services" is used in a contract. This ignores the principle of Texas contract law that "determinations regarding whether a contract is ambiguous should be made by examining the contract as a whole in light of the circumstances present when the contract was entered into by the parties." *Phoenix Aero Aviation Eng'g, Ltd. v. Trace Engines, L.P.*, 2012 WL 13032937, at *5 (W.D. Tex. June 22, 2012) (citing *Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 457 (Tex. 2011)). The circumstances present when Plaintiff signed the FRA clearly establish that it was reasonable to interpret Plaintiff's agreement with Baylor as requiring in-person instruction and on-campus services.

Until March 2020, Baylor provided Plaintiff with in-person, on-campus educational experiences, including face-to-face academic instruction and numerous on-campus extracurricular activities, in exchange for her payment of the required tuition and fees. Op. Br. 3. Moreover, the presence of separately marketed and

attended—and separately priced—online and in-person courses of study is another circumstance that further reinforces Plaintiff's interpretation. *Id.* at 10–11. And common sense is yet another circumstance. Students choose specific classes, courses of study, and modes of instruction according to individualized needs and in pursuit of specific objectives. In this context, it stands to reason that a student and a university contemplate that a *specific* type of "educational services" will be provided, not *any* type. If a client contracts with an attorney for the provision of "legal services," it would be unreasonable to read the term to mean that *any* legal service by the attorney is sufficient. If a vehicle's owner contracts with an auto mechanic for the provision of "vehicle services," it would be unreasonable to read the term to mean that *any* vehicle service by the mechanic is sufficient. And it is equally unreasonable to read the term "educational services" to mean that *any* educational service is sufficient, notwithstanding the circumstances surrounding the contract.

This is not, as Baylor claims (Resp. Br. at 31), an attempt to "smuggle" extrinsic evidence into interpretation of the FRA. To the contrary, it is commonsense consideration of the circumstances present when Plaintiff contracted with Baylor for instruction and other services for the Spring 2020 semester. *See Strickland v. Coleman*, 824 S.W.2d 188, 192 (Tex. App. 1991) (noting that the "course of dealing

between the parties . . . is probative and admissible to prove the actual terms of the contract").

Finally, Baylor asserts (Resp. Br. at 37) that even if it did promise an on-campus experience, it was free to revoke this benefit at any time because one line in an academic calendar purported to authorize Baylor to change or terminate its educational programs at any time. The problems with this argument are manifest.

First, it would be inappropriate to latch onto this isolated, cherry-picked statement—which is a part of a much larger universe of catalogs, marketing materials, websites, and other sources not yet before this Court or the District Court—to decide the claim against Plaintiff as a matter of law when it could at best create an ambiguity.

Second, this disclaimer expressly fails to do the work that Baylor wants it to do because it authorizes Baylor to make changes to its program, ROA.325, not to make those changes *without providing a refund* for the services and instruction it does not to provide.

Third, even if it did purport to give Baylor unfettered discretion to withhold the performance it promised under its agreement, this provision would be unenforceable under Texas law as an illusory provision lacking mutuality of obligation. *See Waldrop v. Waldrop*, 552 S.W.3d 396, 413 (Tex. App. 2018) (observing that "[a] contractual provision that purports to allow for modification of

the contract without a meeting of the minds as to the circumstances that would trigger such a possibility" is "illusory"). This statement is simply not enough to interpret the contract in Baylor's favor as a matter of law and before the record has been fully developed.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S UNJUST ENRICHMENT CLAIM

Baylor raises two arguments against Plaintiff's *alternative* unjust enrichment claim: (i) that the existence of the FRA bars that claim (Resp. Br. at 39-40)—even though Plaintiff does not allege and expressly disputes the FRA as the basis for her breach of contract claim; and (ii) that Plaintiff does not sufficiently allege the "factual predicates for an unjust enrichment claim" (Resp. Br. at 41-44)—even though her complaint includes the key allegation that Baylor has received a benefit that would be unconscionable for it to retain. Both of those arguments are wrong, and the district court's reliance on either to support dismissal of Plaintiff's alternate unjust enrichment claim was error.[1]

[1] Baylor recognizes that to the extent the district court's dismissal of the unjust enrichment claim was based on there ostensibly not being an independent cause of action under Texas law denominated "unjust enrichment" (*see* ROA.815-16), that determination would be an improper basis for dismissal insofar as Plaintiff's allegations nevertheless constitute a cause of action that seeks *quatum meruit* or compensation for a benefit conferred. *See* Resp. Br. at 40, n. 8.

A. Baylor's Factual Arguments About the Effect of The Unalleged FRA Does Not Bar Plaintiff's Alternate Unjust Enrichment Claim

With respect to the impact of the unalleged FRA on Plaintiff's alternate unjust enrichment claim, Baylor misstates the relevant factual allegations and misunderstands the relevant law. Baylor is wrong when it says that: Ms. King does not dispute that the existence of a valid contract forecloses recovery for unjust enrichment; it is irrelevant that such a claim is pleaded in the alternative; and, Ms. King has no response to the district court holding that the FRA forecloses any relief under a theory of unjust enrichment. Resp. Br. at 41-44.

Rather, as alleged and argued in the court below, a plaintiff can plead an alternate claim seeking unjust enrichment whenever, as here, the "validity or terms" of the contract between the parties are "in dispute." *Click v. Gen. Motors LLC*, 2020 WL 3118577 (S.D. Tex. Mar. 27, 2020); *see also PharMerica Corp. v. Advanced HCS LLC*, 2017 WL 7732174, at *4 (E.D. Tex. July 13, 2017) ("Plaintiffs are permitted to plead unjust enrichment in the alternative"); *Leal v. Bank of Am.*, N.A., 2012 WL 1392089, at *5 (S.D. Tex. Apr. 20, 2012) ("While [p]laintiffs cannot recover for quantum meruit where a valid express contract exists, a party to a contract may nonetheless seek alternative relief under both contract and quasi-contract.").

Clearly, the "validity or terms" of the parties' contract are "in dispute" here. On the one hand, Plaintiff alleges that her contract is *implied* and does not allege the

FRA as a basis for contractual relief. On the other hand, Baylor disputes both the "validity [and] terms" of Plaintiff's implied contract, and instead asserts that the FRA is the sole contract that governs. Further, Plaintiff, in turn, disputes the "validity [and] terms" of the FRA. *See supra* section I.

Therefore, the district court erred in allowing Baylor's factual arguments about the FRA to bar Plaintiff's contract claim at the pleading stage (*see* section I, *supra*), and compounded that error by then allowing such factual disputes to also bar at the pleading stage Plaintiff's alternate unjust enrichment claim.

Baylor did not address any of the above-cited authority recognizing the propriety of *pleading* unjust enrichment *in the alternative* in circumstances such as these. And the authority that Baylor cites is inapposite. Both *Hoffman v. L&M Arts* and *Fortune Prod. Co. v. Conoco, Inc.* were appeals after full jury trials and did not addressing pleading standards, and, in any event, both of those decisions recognized that a contract only bars an unjust enrichment claim when there is an actual determination as to the validity and terms of the contract. *See Hoffman v. L&M Arts*, 838 F.3d 568, 585 (5th Cir. 2016); *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 683–84 (Tex. 2000). Moreover, cases such as *Click* and *Leal* acknowledged *Conoco, Inc.*, but nevertheless recognized the propriety of *pleading* unjust enrichment *in the alternative*. *See Click*, 2020 WL 3118577 at *10; *Leal*, 2012 WL 1392089, at *5.

B. Ms. King Sufficiently Alleges A Claim for Unjust Enrichment

With respect to the sufficiency of Plaintiff's allegations of unjust enrichment, Baylor spends most of its time reciting one of the more common articulations of how a plaintiff can satisfy her pleading burden, *i.e.* by asserting that the defendant "obtained a benefit from [the plaintiff] by fraud, duress, or the taking of an undue advantage." *See, e.g.*, Resp. at 41 (quoting *Matter of Connect Transp., L.L.C.*, 825 F. App'x 150, 154 (5th Cir. 2020) (internal quotation marks omitted)).

But Baylor seeks to gloss over that multiple decisions from Texas Courts of Appeal still recognize that a claim for unjust enrichment also "may lie where a defendant passively receives an unjust benefit," and the Texas Supreme Court has not rejected those holdings. *See* Resp. Br. at 43 (citing *Digital Drilling Data Sys, LLC. v. Petrolink Servs., Inc.*, 965 F.3d 365, 380 (5th Cir. 2020)); *see also Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App. 2004) ("Unjust enrichment occurs when the 'person sought to be charged [has] wrongfully secured a benefit *or [has] passively received one which it would [be] unconscionable to retain.*'") (emphasis added); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (same); *Stiger v. Deutsche Bank Nat'l Tr. Co.*, 2016 WL 11474099 at *3 (N.D. Tex. July 5, 2016) (same).

Those courts have similarly recognized that "unjust enrichment is an equitable right and is not dependent on the existence of a wrong." *Tex. Integrated Conveyor Sys., Inc.*, 300 S.W.3d at 367; *see also Stiger*, 2016 WL 11474099 at *3.

Indeed, Baylor relies on *In re Okedokun* to argue that a "plaintiff can *only* recover when 'one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.'" Resp. Br. at 43 (quoting 968 F.3d at 391 (emphasis in Baylor's brief)). Yet after the *In re Okedokun* decision (which addressed a trial on the merits finding that plaintiff's misconduct barred recovery in equity), courts have continued to recognize that (especially absent misconduct by plaintiff), the proper inquiry under Texas law is not whether defendant obtained the benefit by wrongdoing, but whether it would be inequitable for the defendant to retain the benefit. *See, e.g., SVT, LLC v. Seaside Vill. Townhome Ass'n, Inc.*, 2021 WL 2800463, at *5 (Tex. App. July 6, 2021); *Zuntych v. Walding-Zuntych*, 2020 WL 5047897, at *4 (Tex. App. Aug.27, 2020); *Assure re Intermediaries, Inc. v. W. Surplus Lines Agency, Inc.*, 2021 WL 2402485, at *7 (N.D. Tex. June 11, 2021).

III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE EDUCATIONAL MALPRACTICE DOCTRINE

Plaintiff's claims are not for "educational malpractice," as Baylor contends. Resp. Br. at 45. Plaintiff alleges only that Baylor did not provide the in-person, on-campus educational experience that she paid for, and, therefore, Baylor is not entitled to retain her full tuition payments or those of the putative Class. Similarly,

Baylor is not entitled to retain the fees Plaintiff and the putative Class paid for other services not rendered. The First Amended Complaint ("FAC") does not claim that Plaintiff is dissatisfied with the quality of the education she received. Rather, the FAC alleges that Baylor offered, and Plaintiff and other students agreed to accept an in-person, on-campus educational experience and adjacent services, which Baylor did not deliver or only delivered for approximately half the semester. This is a straightforward contract action.

Certainly, colleges and universities are vested with decision-making autonomy to determine *what* should be taught and *how* it should be taught. *See* Resp. Br. at 45-46. But those rights are not being challenged here. This case is similar to *Metzner v. Quinnipiac Univ.*, 2021 U.S. Dist. LEXIS 56744 (D. Conn. Mar. 25, 2021), where the court found that "the promise to have been breached is not a promise to provide an effective or adequate education but instead to provide an in-person education." The *Metzner* court observed that the factfinder would not "be called upon to assess such questions as whether a lecture delivered by Zoom is less valuable than the one offered in person," but instead simply whether the defendant fulfilled "a specific contractual promise." *Id.*

Like the plaintiffs in *Metzner*, Plaintiff does not contest the manner in which Baylor and its faculty implemented online teaching instruction or assert that classes should have been taught differently; nor does Plaintiff claim that Baylor failed to

fulfil a promise to provide an effective or adequate education. Instead, Plaintiff contests Baylor's decision to retain tuition and fees for educational services that Baylor promised but never provided. Accordingly, the educational malpractice doctrine is not implicated.

Texas law recognizes that "the relationship between a private school and its student has by definition primarily a contractual basis." *Eiland v. Wolf*, 764 S.W.2d 827, 838 (Tex. App. 1989). And courts issuing decisions in similar cases have repeatedly held that students seeking refunds for tuition and fees for in-person, on-campus classes, services, and activities not received following COVID-19 are *not* asserting educational malpractice claims. *See, e.g.*, *Polley v. Nw. Univ.*, 2021 U.S. Dist. LEXIS 175822, at *19-20 (N.D. Ill. Sept. 16, 2021); *Mooers v. Middlebury Coll.*, 2021 U.S. Dist. LEXIS 176354, at *11 (D. Vt. Sept. 16, 2021); *Ninivaggi v. Univ. of Del.*, 2020 U.S. Dist. LEXIS 157709, at *14-15 (D. Del. Aug. 20, 2021); *In re Univ. of S. Cal. Tuition & Fees Covid-19 Refund Litig.*, 2021 U.S. Dist. LEXIS 15, at *11 (C.D. Cal. Aug. 6, 2021).

Even the cases cited in Baylor's Response Brief demonstrate that the claims at issue here are clearly not for educational malpractice. Those cases illustrate the difference between an educational malpractice claim and the standard contract and unjust enrichment claims Plaintiff brings here. For example, in *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992), the plaintiff asserted claims against a

university for negligence and breach of contract that were both dismissed by the district court. *Id.* at 412-13. The Seventh Circuit affirmed dismissal of the plaintiff's negligence claim, which (unlike the claims set forth by Plaintiff in this case) was based on the school's "'educational malpractice' [for] not providing him with a meaningful education and preparing him for employment after college." *Id.* at 412, 415. Conversely, the court reversed and remanded the judgment as it related to the breach of contract claim, stating that a plaintiff "must point to an identifiable contractual promise that the defendant failed to honor." *Id.* at 416-17. Citing several cases that allowed breach of contract actions against universities to proceed, the court noted:

> In these cases, the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.

Id. at 417.

As *Ross* and other cases demonstrate, courts have universally allowed claims against schools for breaching a specific promise where such claims do not involve judicial review of the quality of the education. *See e.g., Ross*, 957 F.2d at 417; *Kashmiri v. Regents of the Univ. of California,* 67 Cal. Rptr. 3d 635 (2007), *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 96 (D. Conn. 2000), *Cencor, Inc. v. Tolman*, 868 P.2d 396, 399-400 (Colo. 1994).

These cases call for the same outcome here. Baylor cites two cases in which courts have dismissed similar claims based on the educational malpractice doctrine. Resp. Br. at 54-55.[2] But, as Baylor admits, "not every court to consider the educational malpractice doctrine in the context of COVID-19 tuition refunds has granted dismissal on that basis." *Id.* Indeed, "[t]he majority of courts have held that the educational malpractice doctrine does not apply to th[ese] type[s] of claim[s]." *Mooers*, 2021 U.S. Dist. LEXIS 176354 at *10 (collecting cases).

Contrary to Baylor's assertion (Resp. Br. at 54), Plaintiff's claims do not require this Court to assess, on the pleadings, the measure by which damages may be calculated. There is a distinction between what a party is required to *allege* in a pleading and what a party must *prove* at the summary judgment or trial stage. Here, at the pleadings stage, Plaintiff has sufficiently alleged the requisite elements of her claims, including damages. The district court's refusal to allow her a chance to prove her alleged damages was in error.

[2] These cases are also distinguishable. In *Linder*, the court found no promise for in-person education where the plaintiff pointed merely to a policy stating that "[r]egular class attendance is expected of all students" and that classes were assigned to specific classrooms. *Linder v. Occidental College*, 2020 U.S. Dist. LEXIS 235399, at *21 (C.D. Cal. Dec. 11, 2020); *see also Gociman v. Loyola Univ. of Chi.*, 515 F. Supp. 3d 861, 867 (N.D. Ill. 2021)) (plaintiffs' claims barred by educational malpractice doctrine where complaint "repeatedly claim[ed] that the online instruction was 'worth less' than the traditional in-person instruction," and "clearly challenged the quality of online instruction").

IV. THE PLPA DOES NOT BAR PLAINTIFF'S CLAIMS

Baylor argues (Resp. Br. at 57) that a new Texas law, the PLPA, is an independent basis for affirming the district court's judgment, but this is incorrect for many reasons.

First, even if the PLPA applied in this case (it does not),[3] this Court should not decide in the first instance whether it bars Plaintiff's claims. The federal appeals courts are "court[s] of review, not of first view," and thus should generally not consider issues not argued or decided below. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005); *see also, e.g.*, *Rodriguez v. Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017). Further, appeals courts are not well suited to make factual findings and should avoid doing so.[4] This Court has explained that "an issue will not be addressed when raised for the first time on appeal unless it is a purely legal matter and failure to consider the issue will result in a miscarriage of justice." *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021) (internal quotation marks omitted) (quoting *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008)).

Neither circumstance is true here. Whether the PLPA applies and is constitutionally valid are mixed questions of law *and* fact, and the factual issues have

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[3] The PLPA applies only to an action "for which a judgment has not become final" before the law went into effect. Tex. Gen. Laws, 87th Leg., R.S., Act of June 14, 2021. The PLPA went into effect two months after the District Court entered final judgment. [D.E. 56].

[4] *See, e.g.*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *United States v. Cheama*, 783 F.2d 165, 168 (10th Cir. 1986); *Woods v. Cohen*, 171 F.2d 888, 889 (5th Cir. 1949).

not been developed (through no fault of the parties). Plaintiff will show that the PLPA violates the Retroactive Laws and Contracts Clauses of the Texas Constitution, as well as the Contracts Clause in the federal Constitution. This showing requires considerable factual development, including the number of institutions, students, and contracts impacted by the law, the degree to which the provision impairs those and other contracts, and the respective impacts of COVID-19 on students and universities. Moreover, to assess the provision under the state and federal Contracts Clauses, an analysis of less drastic alternatives to the challenged contract modifications is necessary. *See Buffalo Teachers Federation v Tobe*, 464 F.3d 362, 368 (2d Cir. 2006). This cannot be performed without an adequate factual record, much less solely on appellate briefing. *See Aaron v. Aguirre*, 2006 WL 8455871, at *9–10 (S.D. Cal. Dec. 13, 2006) (noting that assessing degree of contractual impairment "is an intensely factual question that cannot be determined in a vacuum"). Further, no miscarriage of justice will occur if this Court declines to consider these issues in the first instance. To the contrary, no party will benefit from a hasty decision on these issues of great importance to people across the State of Texas.

Finally, although this Court does not need to decide it here, the PLPA's educational-institution provision is invalid because it violates the Texas and United States constitutions. First, the Texas Constitution expressly prohibits retroactive

laws. TEX. CONST. ART. I. §16. To determine whether a law is unconstitutionally retroactive, Texas courts examine (1) the nature of the prior right impaired by the statute; (2) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; and (3) the extent of the impairment. *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010). "This three-part test acknowledges the *heavy presumption against retroactive laws* by requiring *a compelling public interest* to overcome the presumption." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 706 (Tex. 2014) (emphases added).

The PLPA's prohibition on recovery from educational institutions fails this exacting standard. As for the first and third factors, the provision eliminates Plaintiff's and the putative class's well-settled common-law right (and the right of every student in Texas) to enforce contracts they negotiated and agreed upon and recover thousands of dollars expended in reliance on those contracts. *See Robinson*, 335 S.W.3d at 148 (emphasizing the importance in maintaining an established common-law cause of action when a retroactive law seeks to extinguish it); *see also Zaatari v. City of Austin*, 615 S.W.3d 172, 188 (Tex. App.-Austin 2019, pet. denied) (retroactive ordinance unconstitutional because "it operates to eliminate well-established and settled property rights that existed before the ordinance's adoption"); *Brazos River Auth. v. City of Houston*, 2021 WL 2677121, at *12 (Tex. App. June 30, 2021) (retroactive law unconstitutional because it extinguished a "settled"

property interest in a permit). And the impairment of that right is complete: the provision extinguishes Plaintiff's and the putative class's claims—and *any* claim "arising from" COVID-related program modifications or cancellations.

As for the second factor, the nature and strength of the interest purportedly served by the provision falls far short of overcoming the "heavy presumption against retroactive laws." *Id.* at 146. The PLPA contains pages of findings regarding the interests served by its various provisions, with most relating to the healthcare industry, but not *a single* specific finding related to the provision on educational institutions snuck into the bill. This failure to articulate or support the asserted interest in this provision dooms it. *See Robinson*, 335 S.W.3d at 149 ("The Legislature made no findings to justify Chapter 149"); *Zaatari*, 615 S.W.3d at 189 (finding public interest for city's retroactive ban on short term rentals slight given the lack of factual findings); *Brazos River Auth.*, 2021 WL 2677121, at *9 ("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 Legislature made no finding indicating the presence of a compelling interest served by the provision and no finding that the interests of a handful of educational institutions outweighed the rights of students across the State to obtain the courses and services they paid for from institutions with much more money and bargaining power.

Thus, the Legislature's silence speaks volumes. The apparent, and perhaps only possible, interest served by the provision is protecting universities from their duty to perform under their contracts with students. This interest is not compelling and certainly does not outweigh the well-settled contractual rights extinguished by the provision. *See Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 2015 WL 13660130, at *6 (S.D. Tex. Nov. 24, 2015) ("protection of a subset of business, or a regulation of an industry" not a compelling public interest); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose …."); *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) ("[N]aked economic preferences are impermissible to the extent that they harm consumers."). Accordingly, the provision is an unconstitutional retroactive law.

The provision also violates the Texas Constitution's Contracts Clause. Article I, Section 16 of the Texas Constitution states that "[n]o … law impairing the obligation of contracts shall be made." The Texas Supreme Court has explained that under this provision, the Legislature has no authority to impair existing contracts except when the state's exercise of *police power incidentally* impairs contracts. Here, economic protectionism is not a valid exercise of the police power, which Texas courts define as the authority "to regulate conduct (subject to constitutional

limitations) to protect or advance "the health, welfare, morals, and safety of its citizens." *R.R. Comm'n v. Texas Coast Utilities Coal.*, 357 S.W.3d 731, 740 (Tex. App. 2011), *aff'd sub nom. Texas Coast Utilities Coal. v. R.R. Comm'n*, 423 S.W.3d 355 (Tex. 2014) (quoting *Black's Law Dictionary* 1541 (9th ed. 2009)); *Texas Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 517 (Tex. 1968) (stating that the Texas Constitution protects "the contractual rights of the private enterprise from arbitrary and unreasonable alteration by legislation, unless the statute or ordinance directly promotes the general health, safety, and welfare of the public").

Further, even if this favoritism was a valid exercise of the police power, the provision is still invalid because it *directly* impairs Plaintiff's and the putative class's contractual rights. As one Texas court explained, "the police power is subject to the bill of rights" and, therefore, "where a police regulation *directly* impairs the obligation of a contract, it is contrary to the Bill of Rights and null and void." *Murphy v. Phillips*, 63 S.W.2d 404, 408 (Tex. Civ. App. 1933) (emphasis added). This includes during times of crisis. For example, the Texas Supreme Court held that because of the Texas Contracts Clause, the police power did not justify a moratorium statute enacted during the Great Depression that precluded note holders from foreclosing on real property, despite the exigencies of the time. *See Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1010–24 (Tex. 1934) (holding that the Texas Contracts Clause applies even despite "the existence of depressed conditions" like

those present during the Great Depression). The same is true here. Even if the Legislature had enacted the educational-institution provision to protect *the public* (the opposite of what it actually did), its direct and obviously targeted impairment of students' contracts with educational institutions render it invalid under the state's Contracts Clause.

Likewise, the provision violates the federal Contracts Clause. U.S. Const. Art. I, § 10, Cl. 1. To determine whether a state law violates the federal Contracts Clause, courts apply a "two-step test": (1) whether the law has "operated as a substantial impairment of a contractual relationship" and (2) whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018).

As to the first step, the PLPA substantially impairs Plaintiff's and the putative class's contractual relationship with Baylor. As to the second, the law is unnecessarily overbroad because it terminates liability for all damages or equitable monetary relief "arising from" an educational institution's COVID-related "cancellation or modification of a course, program, or activity," as long as the pandemic state of emergency remains. S.B. 6 § 148.004(b)). This blanket grant of immunity far outstrips any legitimate public interest. Assuming, for example, that the Legislature's true purpose was to allow universities to transition to online courses during the public health emergency (rather than to allow those universities to profit

off of students in the midst of a pandemic—a clearly illegitimate purpose), it is unnecessary to eliminate a university's requirement to return a pro rata portion of the tuition and fees paid for services not rendered. Under this statute, a university could cancel all classes due to the pandemic without any replacement or substitute classes, yet retain the *full amount* of tuition and fees paid for that program without offering anything in return. Again, Plaintiff does not question the wisdom of cancelling in-person courses to prevent the spread of COVID-19, but handing universities a financial windfall is not reasonably necessary to further that interest.

Constitutional prohibitions on retroactive laws and impairment of contracts were designed to prevent laws just like the PLPA. While the United States Constitution was being debated, James Madison explained that retroactive legislation is "contrary to the first principles of the social compact, and to every principle of sound legislation" because it can be used to grant special legislative benefits to the "influential," to the detriment of "private rights." *The Federalist No. 44* at 278–79 (Charles Kesler ed. 1961); *see also Landgraf v. USI Film Prod.*, 511 U.S. 244, 267 n.20 (1994) (reviewing the policy undergirding constitutional prohibitions on retroactive laws). That is exactly the concern presented here: a retroactive law favoring a chosen few, to the detriment of students across the State of Texas.

But again, this Court does not need to address these weighty, fact-dependent issues. They deserve the full factual development and robust briefing in the District Court.[5]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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Respectfully submitted,

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[5] If the Court nevertheless decides to apply the PLPA on appeal, because of this need for a complete record and briefing, Plaintiff respectfully requests leave to file a supplemental brief addressing the law's constitutionality.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which sends notification of such filing to the parties that are registered or otherwise entitled to receive notices in this action, including Counsel for Defendant-Appellee:

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I further certify that (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the filed document in compliance with Fifth Circuit Rule 25.2.1; (3) the document has been scanned with the most recent version of Avira antivirus software and is free of viruses.

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/s/ Eric M. Poulin