IN THE SUPREME COURT FOR THE STATE OF MONTANA
No. DA 23-0564

ANTHONY CORDERO, on behalf of
himself and others individually situated,
Plaintiff/Appellant,

v.

MONTANA STATE UNIVERSITY
and WADED CRUZADO,
Defendants/Appellees.

On Appeal from the Montanan First Judicial District Court,
Lewis and Clark County, Cause No. DV-25-2020-0001975-BC
Honorable Michael F. McMahon

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3. Did the District Court correctly grant summary judgment in MSU's favor on Cordero's express contract claim?

STATEMENT OF THE CASE

When COVID-19 hit in March 2020, Montana State University (MSU) quickly transitioned its courses online for the rest of the semester so students could continue their education and remain on track for graduation. Anthony Cordero, an MSU student at the time, agrees this was appropriate. Cordero moved to California in mid-March 2020, where in May 2020, he successfully completed the two courses in which he enrolled. After graduating at the end of the Spring 2020 semester and receiving his computer engineering degree, Cordero went to work for Boeing. Cordero sued MSU and its president, Waded Cruzado[1], contending MSU should have issued prorated fee and tuition refunds for the Spring 2020 semester. Cordero appeals the District Court rulings on his breach of express contract, breach of implied

[1] Cordero does not appeal the District Court's ruling dismissing his claims against President Cruzado.

contract, and unjust enrichment claims. The District Court properly rejected each claim. Its rulings should be affirmed.

STATEMENT OF THE FACTS

In January 2015, Cordero applied to and was accepted by MSU. JA000282–285, 287. His signed application provided in part:

> I agree to abide by the present and future rules and regulations, both academic and nonacademic, and the scholastic standards of [MSU], including, but not limited to, those rules, regulations, and standards stated in the undergraduate/graduate catalog. I further acknowledge that if I fail to adhere to these regulations or meet these requirements, my registration may be canceled.
>
> … I agree to pay all tuition, fees, fines and debts to the university that I may incur….
>
> If I fail to pay any tuition or fees when due, I understand the university will treat any unpaid amount as an educational loan extended to finance my education.

JA000285.

For the Spring 2020 semester, Cordero registered for two three-credit courses.[2] JA000330–331. The MSU catalog listed each course as a lecture. JA000353 ("Lecture-LEC"), JA000372 (EELE 321), JA000373 (EELE 489E). The MSU catalog provided a lecture is the "[p]resentation of course material by the instructor, utilizing the lecture method." JA000353. Neither the MSU catalog,

[2] Contrary to Cordero's representation that he "was charged $19,901" in tuition and fees, he was charged $6,585.22 in tuition and fees. Opening Br. A033; JA000400. He neglected to mention his $13,315.78 overpayment refund. JA000400.

Cordero's course syllabi, nor any other document specified how lectures for either of Cordero's courses would be delivered. JA000351, 372–373; JA000375–378.

In mid-March 2020, following orders and directives from the Governor of Montana and the Commissioner of Higher Education, respectively, MSU transitioned to online or other remote teaching modalities. Opening Br. A034; JA000474. After this transition, MSU kept its campus open and operational and continued to offer services to all students for the remainder of the Spring 2020 semester. Opening Br. A034; JA000474. Although the Margo Hoseaus Fitness Center and fitness domes were temporarily unavailable to students, MSU continued to maintain and support the fitness center and domes. Opening Br. A035; JA000474. While intramural activities—none of which Cordero participated in—were stopped for the remainder of the Spring 2020 semester, MSU kept practice fields accessible to students. Opening Br. A035; JA000474; JA000317–318 (34:25–35:2). Cordero was not a member of any student organization during the Spring 2020 semester. JA000319-320 (38:21–39:6, 39:15–18). The student newspaper, which is generally published weekly during a semester, continued to be published after mid-March 2020, except for five issues; Cordero does not remember making a point to look at the student newspaper before going home to California. JA000474; JA000320–321 (39:19–40:5).

In mid-March 2020, Cordero moved to California where he lived for the rest of the semester, continued coursework, worked on his capstone project, and attended lectures. Opening Br. A035; JA000290; JA000315, 333. For lectures, Cordero recalled "the professor would record the lectures and then post them on the class website for [the students] to view at [their] own time." Opening Br. A035; JA000323, 326–327, 334.

Cordero's Spring 2020 courses counted toward his degree requirements. Opening Br. A035; JA000332. At the end of the semester, he graduated with a computer engineering degree and then went to work for Boeing. *Id.*

Cordero subsequently sued MSU and President Cruzado claiming "MSU explicitly promised Cordero and other students in-person learning and access to on-campus facilities and services." Opening Br. 11. Yet, when asked in written discovery and his deposition, Cordero could not identify *any statement* in *any document* where MSU made such a promise. JA000291–307 (discovery responses); JA000314, 326, 335 (deposition). Cordero admitted he simply *inferred* the alleged promise:

> Q. Have you seen any document from Montana State that says it will provide your education in person in the spring of 2020?
>
> A. I don't recall any specific document, but from everything that I saw and experienced, that was my belief is that it would be in person on campus.

Q. That's just what you inferred from – from the documents you had reviewed.

A. From everything at the time and that I reviewed, I – I can't say – point to a specific document right now.

JA000314.

After extensive written discovery, multiple depositions, briefing, and oral argument, the District Court found "no express contract existed between MSU and Cordero wherein MSU agreed to provide Cordero with in-person educational services, experiences, opportunities, and other related services." Opening Br., A036. The District Court found "MSU did not promise Cordero any tuition or fees refund after the 15th instruction day." *Id.*; *see* JA000348, 421, 427, 459.

STANDARD OF REVIEW

The District Court's dismissal and summary judgment orders are subject to de novo review. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655; *Brookins v. Mote*, 2012 MT 283, ¶ 22, 367 Mont. 193, 292 P.3d 347. The District Court's conclusions of law are reviewed for correctness, while its findings of fact are reviewed to determine whether they are clearly erroneous. *Brookins*, ¶ 22.

SUMMARY OF THE ARGUMENT

Peretti v. State, 238 Mont. 239, 777 P.2d 329 (1989), held the State has sovereign immunity from implied contract claims. MSU is a subdivision of the State.

§ 2-9-101(7), MCA. The District Court correctly dismissed Cordero's breach of implied contract and unjust enrichment claims. Even if sovereign immunity did not bar Cordero's unjust enrichment claim, his contract with MSU displaced that claim.

The District Court correctly held Cordero's claimed express contract for in-person education and services simply does not exist. Nowhere in Cordero's contract with MSU did MSU promise to provide in-person, on-campus education or services, or tuition or fee refunds after the 15th day of instruction. Cordero simply *inferred*—"from everything that [he] saw and experienced"—he "would receive an in-person education at Montana State for the spring of 2020."

Cordero asked the District Court to infer an express contract for in-person education and services, and tuition and fee refunds after the 15th day of classes, based on MSU's website, course catalog, student handbooks, and marketing materials, Cordero's application and acceptance letter, a student bill of rights, and other unidentified documents. But as the District Court found, nothing in the record supports Cordero's claimed express contract. In fact, no case analyzing students' Covid-19 tuition and fee refund claims—all of which have been based on the same types of documents and statements Cordero relies on here—has held an express contract existed between a university and students for in-person education or services or tuition refunds.

ARGUMENT

I. The District Court correctly dismissed Cordero's implied contract claim.

Peretti required dismissal of Cordero's implied contract claim. Faced with this precedent, Cordero argues *Peretti* "has been implicitly overruled" or "should be overruled." Opening Br. 11–19. Cordero is mistaken that *Peretti* has been "implicitly overruled." Cordero also fails to show that *Peretti* was manifestly wrong.

In *Peretti*, students sued the State for terminating their aviation program. 238 Mont. at 240–41, 777 P.2d at 330–31. The students alleged the State impliedly contracted to provide a two-year course of study and breached by discontinuing the program after their first year. *Id.* The Court disagreed, holding sovereign immunity barred implied contract claims against the State. 238 Mont. at 243–45, 777 P.2d at 332–33. *Peretti* explained the State "cannot be sued in its own courts without its plain and specific consent to suit either by constitutional provision or by statute." 238 Mont. at 244, 777 P.2d at 332 (citing *Heiser v. Severy*, 117 Mont. 105, 158 P.2d 501 (1945); *State ex rel. Freebourn v. Yellowstone County*, 108 Mont. 21, 88 P.2d 6 (1939)).

As to constitutional provision, *Peretti* explained that while Article II, Section 18 of the Montana Constitution waived sovereign immunity for actions involving injury to a person or property, constitutional waiver "extends only to *tort* actions, and *not contract* actions." 238 Mont. at 243, 777 P.2d at 332 (citing *Leaseamerica*

Corp. v. State, 191 Mont. 462, 625 P.2d 68, 71 (1981)). As the Court explained, this interpretation not only "effectuated the intent to *prevent* a constitutional waiver of sovereign immunity as to contract actions" but also "comports with the principle that any waiver of a State's sovereign immunity must be strictly construed." 238 Mont. at 243–44, 777 P.2d at 332 (citing *Storch v. Bd. of Dirs. of E. Mont. Region Five Mental Health Ctr.*, 169 Mont. 176, 179, 545 P.2d 644, 646 (1976)).

As to statutory consent, *Peretti* explained that while the Legislature waived sovereign immunity for *express* contract actions, it did not waive immunity for *implied* contract actions. 238 Mont. at 244–45, 777 P.2d at 332–33. *Peretti* pointed out that if read "in a vacuum," § 18-1-404, MCA, "appears to provide … an unambiguous and specific waiver of the State's immunity as to all contract actions, express and implied alike." 238 Mont. at 244, 777 P.2d at 332. But, as *Peretti* further explained, a statute "may not be read and properly understood in a vacuum. Rather, it must be read and construed in such a manner 'as to insure coordination with the other sections of an act.'" 238 Mont. at 244, 777 P.2d at 332–33 (quoting *Hostetter v. Inland Dev. Corp. of Mont.*, 172 Mont. 167, 171, 561 P.2d 1323, 1326 (1977)). Interpreting the Legislature's intent, *Peretti* addressed § 18-1-404 in conjunction with § 18-1-401, MCA and the title of the Act.

Peretti explained while § 18-1-404 "appears to waive sovereign immunity as to both express and implied contracts," district court jurisdiction exists, under § 18-

1-401, over only "express" contract actions. 238 Mont. at 244, 777 P.2d at 333. The Court concluded it was "readily apparent from the title" of the Act—"An Act Permitting Actions on Express Contracts Against the State of Montana and Describing the Practice and Procedure Therefor"—the Legislature "intended only to waive the State's immunity as to express contracts." 238 Mont. at 245, 777 P.2d at 333. Therefore, § 18-1-404(1), MCA, does not subject the State to liability on implied contracts. *Id.*

Pursuant to *Peretti,* the District Court correctly dismissed Cordero's implied contract claim.

A. *Peretti* has never been overruled or abrogated.

Cordero concedes "this Court has not expressly overruled *Peretti*." Opening Br. 11. Nevertheless, Cordero insists five decisions have "implicitly" overruled *Peretti*. *Id.*, 11–13 (citing *Nelson v. State*, 2008 MT 336, ¶ 16, 346 Mont. 206, 195 P.3d 293; *Massee v. Thompson*, 2004 MT 121, ¶ 89, 321 Mont. 210, 90 P.3d 394;[3] *Rosenthal v. County of Madison*, 2007 MT 277, ¶ 25, 339 Mont. 419, 170 P.3d 493; *Orr v. State*, 2004 MT 354, ¶¶ 69, 71, 324 Mont. 391, 106 P.3d 100; and *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 13, 389 Mont. 270, 405 P.3d 88). None, implicitly or otherwise, overruled *Peretti.*

[3] Cordero fails to note that this citation is to Justice Nelson's dissent, as the District Court observed. Opening Br. A021 n.4.

Nelson, *Massee*, *Rosenthal*, and *Orr*, were all tort, not contract, actions. *Nelson*, ¶ 10 (negligence); *Massee*, ¶ 21 (negligence); *Rosenthal*, ¶ 2 (malicious prosecution and infliction of emotional distress); *Orr*, ¶ 7 (negligence). *Flathead Joint Bd. of Control* involved plaintiffs' claim that two provisions of a water compact created "new sovereign immunities" and, therefore, two-thirds legislative approval was required under Article II, Section 18 for immunity to apply. *Id.* ¶ 6. The Court rejected the claim. *Id.* ¶¶ 15, 17, 19. One provision was a constitutional *waiver* of immunity, not an imposition of new immunities, and therefore, the water compact statute could be enacted by less than a two-thirds majority of each house. *Id.* ¶ 15. The other provision created new immunities for certain individuals; it did not "establish or alter any immunity as to the 'state….'" *Id.* ¶ 17. Thus, *Flathead Joint Bd. of Control* does not support Cordero.

Further, *Nelson*, *Massee*, *Rosenthal*, *Orr*, and *Flathead Joint Bd. of Control* did not discuss or even cite *Peretti*,[4] *Leaseamerica*, or §§ 18-1-401 or -404. Not one discussed implied contracts.

Nor has the Legislature abrogated *Peretti*. While § 18-1-404 has been amended three times since *Peretti*, none of the amendments waived sovereign immunity as to implied contracts or otherwise affected *Peretti*'s holding. *See* H.B.

[4] *Flathead Joint Bd. of Control*, ¶ 13, cited the Ninth Circuit's *Peretti* decision regarding Eleventh Amendment immunity.

534 (1997); S.B. 463 (1999); S.B. 90 (2001). Further, not once since *Peretti* has the Legislature amended § 18-1-401's jurisdictional limitation ("any express contract").

Cordero argues this legislative silence abrogates sovereign immunity as to implied contract claims. Opening Br. 19. Cordero misunderstands its import. "The Legislature is presumed to know this Court's interpretations of its statutes." *E.g., Certain v. Tonn*, 2009 MT 330, ¶ 18, 353 Mont. 21, 220 P.3d 384; *Sampson v. Nat'l Farmers Union Prop. & Cas. Co.*, 2006 MT 241, ¶ 20, 333 Mont. 541, 144 P.3d 797. Thus, if the Legislature disagreed with *Peretti*, it could have amended §§ 18-1-401 and -404 to allow implied contract actions against the State. Having not done so, the Legislature is presumed to approve of *Peretti*.

B. Cordero fails to show *Peretti* was manifestly wrong.

Once the Court has construed constitutional or statutory language, the Court will not overrule its precedent unless it was "manifestly wrong." *E.g., Zolnikov v. Nat'l Bd. of Med. Exam'rs*, 2023 MT 51, ¶ 16, 411 Mont. 339, 526 P.3d 1088; *McDonald v. Jacobsen*, 2022 MT 160, ¶¶ 21, 30, 409 Mont. 405, 515 P.3d 777.

Here, Cordero argues *Perretti* was "manifestly wrong" because: (1) *Peretti* misunderstood that the Montana Constitution abolished sovereign immunity; (2) sovereign immunity never extended to implied contract claims; or (3) § 18-1-404 is unambiguous and the Court erred by reading § 18-1-404 in conjunction with § 18-1-404 and the title of the Act. Opening Br. 11–19. Cordero is incorrect. *Peretti* was

not wrong, let alone "so 'manifestly wrong' as to justify a departure from stare decisis." *McDonald*, ¶ 37.

1. *Article II, Section 18: Constitutional Waiver of Immunity from Tort Claims*

Cordero fails to offer a single decision supporting his argument that, contra *Peretti* and *Leaseamerica*, the Montana Constitution waived sovereign immunity as to implied contract actions. The cases Cordero cites—*Nelson*, *Massee*, *Rosenthal*, *Orr*, and *Flathead Joint Bd. of Control*—did not discuss implied contracts or even cite *Peretti* or *Leaseamerica*.

Cordero incorrectly asserts *Orr* "ruled that there is no limitation on the constitutional waiver of sovereign immunity in Section 18." Opening Br. 12–13. *Orr* held the State was immune to even tort claims prior to July 1, 1973 (when Article II, Section 18 became effective), but that immunity did not apply to Plaintiffs' negligence action against the State because the plaintiffs' claims did not accrue until after sovereign immunity for tort claims had been abrogated. *Orr*, ¶ 80. Nowhere did *Orr* hold, contrary to *Peretti* and *Leaseamerica*, the phrase "suit for injury to a person or property" includes contract actions. Contract claims were not even at issue in *Orr*.

Cordero also ignores *Peretti*'s and *Leaseamerica*'s constitutional intent discussions. This Court has "long held" that determining "constitutional intent" requires considering "not only … the plain meaning of the language used, but also

… the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *McDonald*, ¶ 49 (quoting *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058).

Peretti and *Leaseamerica* reviewed the Article II, Section 18 Constitutional Convention debate and concluded the Framers intended to waive sovereign immunity only as to tort—not contract—actions. *Peretti*, 238 Mont. at 243–44, 777 P.2d at 332; *Leaseamerica*, 191 Mont. at 468, 625 P.2d at 71; *see also Massee*, ¶¶ 71–75 (Nelson, J., dissenting) (discussing Constitutional Convention materials, § 2-9-102, MCA); Anthony Johnstone, *Confusion Over Sovereign Immunity: What Is Article II, Section 18 About?*, 42 Montana Lawyer 16, 17–19 (Mar. 2017) ("Article II, § 18 concerns only state liability immunity from tort damages."). Article II, Section 18 was adopted against the backdrop of the principle that any waiver of sovereign immunity requires "plain and specific consent" and must be "strictly construed." *Peretti*, 238 Mont. at 244, 777 P.2d at 332.

Cordero fails to establish *Peretti* (or *Leaseamerica*) was "manifestly wrong."

2. *Immunity from Contract Claims*

Cordero next claims the "State never enjoyed sovereign immunity from contract claims." Opening Br. 14–16. Cordero reasons the "law cannot require a waiver of something never granted." *Id.*, 15. Then, relying on *Means v. State Bd. of*

Educ., 127 Mont. 515, 267 P.2d 981 (1954), and *State ex rel. State Sav. Bank v. Barret*, 25 Mont. 112, 63 P. 1030 (1901), Cordero argues *Perretti* was wrong because the State "did not enjoy immunity from any contract claims"—"implied or express." *Id.*, 14–15. Cordero errs in two respects.

First, the State's immunity from suit is a fundamental aspect of sovereignty; it is not something which must be granted to the State. *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 18, 336 Mont. 302, 311, 158 P.3d 377, 383, citing *The Federalist No. 81* (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."). Indeed, the "first Montana case embracing sovereign immunity" predated statehood—and rejected an attempt to sue the State to enforce a contract. *Orr*, ¶ 54 (citing *Langford v. King*, 1 Mont. 33, 38 (Mont. Terr. 1868) (no citizen may sue the State absent its consent)).

This principle has endured: "a state cannot be sued in its own courts without its plain and specific consent to suit either by constitutional provision or by statute." *Peretti*, 238 Mont. at 244, 777 P.2d at 332; *Heiser*, 117 Mont. at 111, 158 P.2d at 503 ("It is elementary that a state cannot be sued in its own courts without its consent…."); *State ex rel. Freebourn*, 108 Mont. at 28, 88 P.2d at 9 (authorization to sue the State "must be plain and specific and cannot arise simply by implication").

Second, Cordero's reliance on *Barret* and *Meens* is misplaced. Opening Br. 14–15. Both cases involved express, not implied, contracts.

In *Barret*, the plaintiff sought a writ of mandamus to compel the state treasurer to pay certain warrants for the construction of the Montana School of Mines, which the contractor had undertaken pursuant to a written contract. 25 Mont. at 113, 63 P. at 1030. Several statutes had been enacted to provide for the school's construction and authorized a commission to enter into a construction contract. 25 Mont. at 113–15, 63 P. at 1030–31. One statute, Section 1601, incorporated expressly into the contract, provided the contractor would be entitled to interest (in the event of insufficient funds). 25 Mont. at 114–15, 63 P. at 1030–31. After the contractor performed most of the work, the Legislature repealed Section 1601. 25 Mont. at 116, 63 P. at 1031. The state treasurer then refused to pay interest. 25 Mont. at 117, 63 P. at 1031. The Court held the contractor was entitled to interest because the agreement to pay interest was "explicitly set forth in Section 1601 and referred to by the contract." 25 Mont. at 121, 63 P. at 1033.

In *Meens*, a professor sued the State Board of Education claiming that its action "in reducing his salary and denying him permanent tenure status was … in violation of his contract of employment and the rules and regulations of the defendant board." 127 Mont. at 516–17, 267 P.2d at 981–82. Like *Barret*, *Meens* involved an express contract; the contract "embodie[d]" and "incorporate[d]" rules,

regulations, and provisions of the State Board of Education. 127 Mont. at 517, 267 P.2d at 981.

Notably, the year after *Meens*, the Legislature passed the "Act Permitting Actions on Express Contracts Against the State of Montana and Describing the Practice and Procedure Therefor." *Peretti*, 238 Mont.at 245, 777 P.2d at 333 (emphasis added). Had the Legislature intended the Act to permit actions on implied contracts, the Legislature could have done so. The Legislature did not waive the State's sovereign immunity as to implied contract actions.

Simply put, *Barret* and *Meens*, express contract actions, do not undermine *Peretti*.

3. *§ 18-1-404: Waiver of Immunity from Express Contract Claims*

Cordero's final attack is that *Peretti* was wrong because § 18-1-404 unambiguously waived sovereign immunity as to both express and implied contract actions, and therefore, *Peretti* should not have addressed § 18-1-401 or the title of the Act. Opening Br. 16–19.

Cordero ignores three key principles. First, any waiver of sovereign immunity requires "plain and specific consent" and must be "strictly construed." *Peretti*, 238 Mont. at 244, 777 P.2d at 332. Second, statutes must be harmonized as much as possible. 238 Mont. at 244, 777 P.2d at 332–33; *see Rogers v. Lewis & Clark County*, 2020 MT 230, ¶ 32, 401 Mont. 228, 472 P.3d 171 (statutes relating to same subject

must be harmonized as much as possible, giving effect to each; courts must presume Legislature would not pass useless or meaningless legislation). Third, the Legislature is presumed to approve of this Court's statutory interpretations if the Legislature does not amend the statutes in response thereto. *Tonn*, ¶ 18; *Sampson*, ¶ 20.

Moreover, Cordero ignores that § 18-1-401 is a jurisdictional provision that grants district courts jurisdiction only over "express" contract actions. While § 18-1-404 provides for liability, § 18-1-401 provides the court's jurisdiction. "Subject matter jurisdiction is the threshold power of a court to consider and adjudicate particular types of cases and controversies." *Larson v. State*, 2019 MT 28, ¶ 17, 394 Mont. 167, 434 P.3d 241. The jurisdictional limitation cannot be ignored.

Finally, Cordero wrongly claims *Peretti* "created an ambiguity by reviewing … the title to a past legislative act." Opening Br. 19. Not so. The Court "turn[ed] to the legislative history" only after concluding that §§ 18-1-401 and -404, "when read together, render the plain meaning of each ambiguous." *Peretti*, 238 Mont. at 245, 777 P.2d at 333. In such cases, the Court turns to the title of an act to determine legislative intent. *Department of Revenue v. Puget Sound Power & Light Co.,* 179 Mont. 255, 263, 587 P.2d 1282, 1286 (1978) ("The title of an act is presumed to indicate the legislature's intent."); *In re Maynard,* 2006 MT 162, ¶¶ 9–10, 332 Mont. 485, 139 P.3d 803 (title of an act, not a statute, "is the Legislature's way of giving notice of what a piece of legislation covers and intends").

Cordero fails to show that *Peretti* has been or should be overruled. The District Court's dismissal of Cordero's implied contract claim should be affirmed.

II. The District Court correctly dismissed Cordero's unjust enrichment claim.

A. The State has sovereign immunity from unjust enrichment claims.

The District Court correctly dismissed Cordero's unjust enrichment claim for the same reason as his implied contract claim: an unjust enrichment claim is a type of implied contract claim from which the State has sovereign immunity. Opening Br. A021–22. Even if an unjust enrichment claim were not a type of implied contract claim, sovereign immunity would still bar that claim.

Peretti held that the State has sovereign immunity as to "implied contracts," and an unjust enrichment claim is a type of implied contract claim. *E.g., Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶ 33, 386 Mont. 98, 386 P.3d 937 ("[C]ourts have applied the doctrine of unjust enrichment when a contract in law is implied by the facts and circumstances of the case, but no actual contract exists between the parties."); *Owen v. Skramovsky*, 2013 MT 348, ¶ 25, 372 Mont. 531, 536, 313 P.3d 205, 209 ("[T]he doctrine of unjust enrichment may create an implied contract in law."); *Ragland v. Sheehan*, 256 Mont. 322, 327, 846 P.2d 1000, 1004 (1993) ("An implied contract does not arise from the consent of the parties—it springs from principles of natural justice and equity, based on the doctrine of unjust enrichment."); *Brown v. Thornton*, 150 Mont. 150, 156, 432 P.2d 386, 390 (1967)

("[A] contract [may] be implied at law on the basis of unjust enrichment…."); *Butler v. Peters*, 62 Mont. 381, 385, 205 P. 247, 249 (1922) ("[A]n implied contract has its foundation in the doctrine of unjust enrichment….").

Cordero argues, however, that an unjust enrichment claim is not an implied contract claim or alternatively, sovereign immunity must have been waived on sovereign immunity claims. Opening Br. 20–22 (citing *Christian v. Atlantic Richfield Co.*, 2015 MT 255, ¶ 51, 380 Mont. 495, 358 P.3d 131; *Est. of Pruyn v. Axmen Propane, Inc.*, 2009 MT 448, ¶ 63, 354 Mont. 208, 223 P.3d 85; *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶¶ 64–65, 392 Mont. 139, 424 P.3d 571); *Knudsen v. Univ. of Mont.*, 2019 MT 175, 396 Mont. 443, 445 P.3d 834; *Sebena v. State*, 267 Mont. 359, 361, 883 P.2d 1263, 1264 (1994); and *Hamlin Constr. & Dev. Co. v. Mont. DOT*, 2022 MT 190, ¶ 33, 410 Mont. 187, 521 P.3d 9). None of the decisions support Cordero.

Christian held an unjust enrichment claim is "an implied contract theory." *Christian*, ¶ 51. *Pruyn* held "a contract in law is implied" in an unjust enrichment claim. *Pruyn*, ¶ 63. *Ruff* discussed that unjust enrichment is "an equitable claim," but not whether sovereign immunity was waived as to unjust enrichment claims against the State. *Ruff*, ¶ 64

Knudsen involved a class certification order concerning an express contract between the University of Montana and a third-party vendor. *Knudsen* did not

address unjust enrichment beyond mentioning that the plaintiffs asserted the claim. *Knudsen*, ¶ 5. *Sebena* affirmed summary judgment in favor of the State on the plaintiffs' *quantum meruit* claim because there was no indication of misconduct or fault on the part of the State. *Sebena*, 267 Mont. at 367, 883 P.2d at 1268. *Hamlin* affirmed dismissal of the unjust enrichment claim because plaintiffs failed to allege facts sufficient to demonstrate one of the elements of unjust enrichment. *Hamlin*, ¶ 33. These decisions' silence regarding sovereign immunity as to unjust enrichment claims cannot establish a waiver thereof. *See Peretti*, 238 Mont. at 244, 777 P.2d at 332; *State ex rel. Freebourn*, 108 Mont. at 28, 88 P.2d at 9.

As *Perretti* explained, any waiver of sovereign immunity requires "plain and specific" consent "either by constitutional provision or by statute," and "cannot arise simply by implication." *Peretti*, 238 Mont. at 244, 777 P.2d at 332; *State ex rel. Freebourn*, 108 Mont. at 28, 88 P.2d at 9. Article II, Section 18 of the Montana Constitution waived sovereign immunity only as to tort actions. The Montana Constitution did not waive sovereign immunity as to unjust enrichment actions. Nor has the Legislature waived sovereign immunity as to unjust enrichment actions. With no waiver, Cordero's claim for unjust enrichment is barred by sovereign immunity regardless of whether an unjust enrichment claim is an implied contract claim. The District Court correctly dismissed Cordero's claim for unjust enrichment.

B. Even if the State did not have sovereign immunity, Cordero's express contract displaces his unjust enrichment claim.

Cordero alleged unjust enrichment in the "alternative to his contract claims," if the District Court did "not find that there was a valid contract between MSU and Plaintiff." JA000080. Because there was a contract—just not the one Cordero inferred—his unjust enrichment claim fails for that reason alone. Now, attempting to avoid his pleading, Cordero misstates the District Court's holding. Cordero now argues: "Because the district court has found that MSU had no obligation to its students after the 15th day of the semester under an express contract, Cordero still has a claim for unjust enrichment for the remainder of the semester if it is not covered by an express contract." Opening Br. 20 n.5.

Cordero correctly supposes that a contract displaces any claim for unjust enrichment based on matters covered by the contract. *Ruff*, ¶ 67. "Consequently, unjust enrichment applies in the contract context only when a party renders 'a valuable performance' or confers a benefit upon another under a contract that is invalid, voidable, 'or otherwise ineffective to regulate the parties' obligations.'" *Id.* (quoting Restatement (Third) of Restitution § 2(2) cmt. c).

But Cordero misrepresents what the District Court found. Nowhere did the District Court find that "MSU had no obligation to its students after the 15th day of the semester." Rather, the District Court found that MSU did not owe *the obligations claimed by Cordero.* Opening Br. A036, ¶¶ 21, 22 (no express contract existed where

MSU agreed to provide in-person services or education; MSU did not promise any tuition or fee refund after the 15th instruction day); A042–43 (patchwork of MSU documents did not constitute express contract claimed by Cordero, including Cordero's tuition and fee reimbursement claim; MSU did not promise Cordero to refund tuition or fees after the 15th instruction day).

The contract between MSU and Cordero, which was in his application, provided that Cordero agreed: (i) to abide by MSU's present and future rules, regulations, and scholastic standards, including the undergraduate/graduate catalog, his registration could be canceled; (ii) to pay all tuition and fees; and, (iii) if he failed to pay them when due, MSU would treat any unpaid amount as an educational loan to finance his education. JA000285. Neither the application nor any other document promised MSU would provide in-person, on-campus education or services. Opening Br. A036, 42–43.

Nor did the application or any other document promise MSU would issue tuition or fee refunds other than to students withdrawing or dropping courses on or before the 15th day of instruction. *Id.*; JA000348, 421, 427. MSU's refund policy adheres to Board of Regents (BOR) policies. The BOR is empowered to "prescribe tuition rates, matriculation charges, and incidental fees for students in institutions under their jurisdiction." § 20-25-421(1), MCA. The BOR controls and uses the funds for the support of universities. §§ 20-25-422, -425, MCA. The BOR's policies

(in effect for the Spring 2020 semester) provided: there will be no refunds of fees "after the 15th day of classes"; mandatory fees "are assessed to all students registering"; course fees "are assessed to cover … costs associated with delivery of a specific course"; and tuition is "assessed to all students on a per credit basis." JA000459, 461–462. As BOR's and MSU's policies make clear, Cordero had no right to a refund after the 15th day of classes—long before mid-March 2020. Tuition is assessed for credits, and fees are for registering and delivery of courses. Not only did Cordero receive his credits, MSU kept its campus open and operational and continued to offer services to all students for the Spring 2020 semester. Opening Br. A034; JA000474.

In short, there was an express contract—just not for what Cordero claims. In misstating the contract and offering counterfactuals (e.g., Opening Br. 39, citing JA001399–1402), Cordero fails to show that the contract between MSU and Cordero was invalid, voidable, or otherwise ineffective to regulate the parties' obligations. Therefore, the contract displaces his unjust enrichment claim, even if it were not barred by sovereign immunity.

III. The District Court correctly granted summary judgment in MSU's favor on Cordero's express contract claim.

Cordero claims "MSU explicitly promised Cordero and other students in-person learning and access to on-campus facilities and services." Opening Br. 11. He alleges MSU breached by "ceasing in-person instruction … and shutting down

campus facilities and services." Opening Br. A040 (quoting Cordero's Complaint). Cordero's various complaints miss the mark.

Cordero's claimed express contract simply does not exist. As the District Court found: "no express contract existed between MSU and Cordero wherein MSU agreed to provide Cordero with in-person educational services, experiences, opportunities, and other related services." Opening Br. A036. Cordero "failed to establish any specific contractual promise that MSU allegedly breached with respect to in-person instruction, tuition, fees, or any other costs." *Id.*, A043.

A. Cordero's arguments that the District Court "misconstrued" his claim and "misapplied the standard for breach of contract" lack merit.

Cordero maintains "MSU explicitly promised … in-person learning and access to on-campus facilities and services." Opening Br., at 11. Cordero concedes, however, that he can point to no document with that promise and instead simply inferred it. JA000314. To try to get around that deficit, Cordero now argues the District Court "misconstrued" his claim and "misapplied the standard for breach of contract." Opening Br. 22–24, 28–31.

Citing three cases, Cordero claims he "was not under any obligation to identify a specific promise to continue in-person education and campus access in the face of a global pandemic." Opening Br. 23 (citing *Durbeck v. Suffolk Univ.*, 547 F. Supp. 3d 133, 146 (D. Mass. 2021); *Holmes v. Univ. of Mass.*, 2021 Mass. Super.

LEXIS 11, at *5–6 (Mar. 8, 2021); and *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1213 (M.D. Fla. 2020)). But each of those cases dealt with implied contracts.

Durbeck held the plaintiffs stated a "plausible claim for breach of an implied-in-fact contract." 547 F. Supp. 3d at 146. *Holmes*'s contract claims were "based on an implied, rather than express, contract." 2022 Mass. Super. LEXIS 30, at *8 (Aug. 23, 2022). The *Salerno* students adequately pled a breach of an "implied-in-fact contract" claim. 488 F. Supp. 3d at 1217; *id.*, 1218 (""Florida law recognizes that the college/student contract is typically implied in the College's publications…. [T]his is not a typical contract situation where there is an express document with delineated terms that a plaintiff can reference. It is more nebulous.").

Cordero next claims the District Court wrongly "requir[ed] Cordero to identify a promise by MSU to specifically provide in-person learning and access to campus," a requirement "not supported by Montana law or recent decisions in other COVID-19 refund cases." Opening Br. 30–31. Cordero is wrong. Under Montana law, the terms of an express contract must be stated in words and explicitly set out. § 28-2-103, MCA; *Blazer v. Wall*, 2008 MT 145, ¶ 43, 343 Mont. 173, 183 P.3d 84 ("'express' is defined as '[c]learly and unmistakably communicated; directly stated'"; "'expressed' is defined as '…stated in words; not left to inference or implication'" ((citing Black's Law Dictionary 620 (8th ed. 2004) (parties must explicitly set out express contract terms))).

The District Court simply found that none of the documents Cordero relies on said MSU promised in-person education and services. The "Montana law" Cordero looks to, § 28-2-103, MCA, *Aetna Fin. Co. v. Ball*, 237 Mont. 535, 774 P.2d 992 (1989), and *Chipman v. Nw. Healthcare Corp. (Chipman I)*, 2012 MT 242, 366 Mont. 450, 288 P.3d 193, does not support his argument.

Cordero cites *Aetna* and *Chipman I* for the proposition that express contracts may contain terms requiring "interpretation of intent and expectation." Opening Br. 29. But in *Aetna*, there was a verbal, not written, express contract and the parties disagreed about what they said to each other in telephone calls and meetings. 237 Mont. at 536–39, 774 P.2d at 993–94. There was no dispute as to what any written document meant or said. Based on the parties' disagreement over what was said by the client and the attorney in meetings and telephone conversations, the district court determined that the terms of the contractual relationship were ambiguous and thus examined the nature of past legal dealings between the parties. 237 Mont. at 538–39, 774 P.2d at 994. In contrast to *Aetna,* the contract here was written and there is no dispute about the wording of the written documents. The documents say what they say—they just do not say what Cordero alleges should be inferred.

As for *Chipman I*, just as he did below, Cordero ignores *Chipman v. Nw. Healthcare Corp. (Chipman II)*, 2014 MT 15, 373 Mont. 360, 317 P.3d 182. In *Chipman I* and *II*, the plaintiffs claimed a (written) sick-leave policy was part of their

employment contract. *Chipman I*, ¶¶ 1, 9. Citing *Chipman I*, ¶ 52, Cordero argues "the Montana Supreme Court determined that an express contract does not have to be one single document but may be a 'standardized group contract' consisting of handbooks and manuals which 'contained uniform language' used by defendants to maintain consistency." Opening Br. 29. But *Chipman I*, ¶ 52, did not hold the express contract included the employers' handbooks and manuals; instead, it held the plaintiffs established commonality under M.R.Civ.P. 23(a). In fact, in *Chipman II*, the Court held just the opposite of what Cordero claims—the language relied upon by the plaintiffs in the sick leave policy was not part of the express contract. *Chipman II*, ¶¶ 14–23, 30.

The "recent decisions in other COVID-19 refund cases" Cordero cites are *In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, 2023 U.S. Dist. LEXIS 38255 (C.D. Cal. Mar. 7, 2023), and *King v. Baylor Univ.*, 46 F.4th 344 (5th Cir. 2022). Neither helps Cordero.

Not only does *Pepperdine* not support Cordero's arguments, it refutes them. Representing *Pepperdine* "ultimately denied summary judgment," Cordero argues *Pepperdine* "confirm[s] that an express contract can have implied terms that are subject to multiple reasonable interpretations" and the "terms of the contract include the documents incorporated in it and the parties' course of conduct." Opening Br. 29–31. But, Cordero does not mention *Pepperdine* involved *both* express and

implied contract claims. *Pepperdine* denied summary judgment as to the *implied* contract claim, but as to the *express* contract claim held:

> Pepperdine is entitled … to summary judgment on Plaintiffs' claim for an express breach of contract. The terms of an express contract 'are stated in words,' whereas the existence and terms of an implied contract 'are manifested by conduct.' Plaintiffs point to no express or formal agreement that Pepperdine will provide in-person instruction….

2023 U.S. Dist. LEXIS 38255, *15 (citation omitted).

King addressed a motion to dismiss—subject to a much lower burden than summary judgment. King's express contract, the Financial Responsibility Agreement, secured her enrollment, and she agreed "that my registration at Baylor and acceptance of the terms of this [FRA] constitutes a promissory note agreement … in which Baylor is providing me educational services,… and I promise to pay for all assessed tuition, fees and associated costs…." 46 F.4th at 353. *King* did not hold that Baylor promised to provide in-person, on-campus educational services. *King* did not even hold that the term "educational services" was ambiguous. Instead, *King* simply held the district court should have considered, before granting the university's motion to dismiss, "whether [the plaintiff's] capacious interpretation of 'educational services' is reasonable and, if so, whether the term is latently ambiguous." *Id.*, 362. As to the "circumstances surrounding the contract," *King* held they could be considered "only to the extent they elucidate, rather than contradict or

supplement" the contract language, and could not be "used to manufacture an ambiguity." *Id.*, 365.[5]

Here, by contrast, the contract between MSU and Cordero had no promise that "MSU is providing me 'educational services.'" Instead, the contract provided Cordero agreed: (i) to abide by MSU's present and future rules, regulations, and scholastic standards, including the undergraduate/graduate catalog, his registration could be canceled; (ii) to pay all tuition and fees; and (iii) if he failed to pay when due, MSU would treat any unpaid amount as an educational loan to finance his education. Cordero points to no ambiguous contract language.

Like below, Cordero continues to ignore the tuition/fee-refund cases (including *Pepperdine*) holding financial responsibility agreements with language akin to the contract between MSU and Cordero, and even the one in *King*, do not constitute express contracts for in-person, on-campus education or services or tuition or fee refunds. JA000267–269, discussing *Milanov v. University of Michigan* (Mich. Ct. Cl. May 12, 2022); *Bergeron v. Rochester Inst. of Tech.*, 2023 U.S. Dist. LEXIS 18547 (W.D.N.Y. Feb. 3, 2023); *Randall v. Univ. of the Pac.*, 2022 U.S. Dist. LEXIS 96065 (N.D. Cal. May 28, 2022); *Univ. of Fla. Bd. of Trs. v. Rojas*, 351 So. 3d 1167

[5] *Minjarez-Almeida v. Kan. Bd. of Regents*, 527 P.3d 931, 944 (Kan. Ct. App. 2023), which Cordero cites elsewhere, relied on *King* and likewise held that "it is unclear—and indeterminate at this stage in the case—whether the 'educational services' [in the financial responsibility agreement] included things like facility access or in-person instruction."

(Fla. Dist. Ct. App. 2022); *Zwiker v. Lake Superior State Univ.*, 2022 Mich. App. LEXIS 859 (Ct. App. Feb. 10, 2022).

B. Cordero's claimed express contract simply does not exist.

Cordero can point to no document where MSU promised to provide in-person, on-campus education or services. Nor can Cordero point to any document where MSU promised to refund any tuition or fees, other than to students withdrawing or dropping courses on or before the 15th day of instruction. Cordero simply *inferred* these alleged promises existed.

Cordero insists, however, the District Court missed something. He claims the District Court "overlooked the express terms of Cordero's Application" and "fail[ed] to consider MSU's official policy documents, marketing materials, advertisements, and other documents" because in those documents MSU "promise[d] an in-person education in exchange for payment of tuition" and "access to on-campus activities, facilities, and equipment in exchange for mandatory fees." Opening Br. 24–28, 31-34, 35–36. The District Court did no such thing.

The District Court laid out Cordero's allegations referencing "MSU's website, Catalogs, and … other materials"; MSU's Student Bill of Rights; "MSU's 'Welcome to MSU' page"; and the "'MSU at a Glance' webpage." *Id.*, A038–41. The District Court set forth the relevant provision of Cordero's application. *Id.*, A033. The summary judgment record included Cordero's application (JA000282–285);

Cordero's acceptance letter (JA000287); excerpts of the catalog (JA000340–373); Cordero's course syllabi (JA000375–378); a slideshow entitled Paying for School (JA000384–398); Cordero's January 21, 2020 account statement (JA000400); the student bill of rights for the Spring 2020 semester (JA000411–414); the course listings for Cordero's two courses (JA000416); MSU's Spring 2020 Registration Handbook (JA000418–457); and Board of Regents policies for the Spring 2020 semester (JA000459, 461–462). In fact, Cordero added the entire catalog (JA000500–1133); "An Introductory Guide to Montana State University" (JA001147–1150); MSU's "Academic Guide" (JA001152–1191); the "CatCourse Instructions" (JA001193–1206); and a "Code of Student Conduct" (JA001293–1321).

Ultimately, the District Court concluded the "various MSU catalogs, marketing or promotional materials, publications, web pages and other materials … do not constitute an express contract for MSU to provide, at all times, in-person educational services." Opening Br. A042. The District Court found "nothing in this record" to support Cordero's claimed express contract—not because the District Court overlooked or failed to consider anything, but because Cordero failed to identify anything to support his claim.

Moreover, just as below, Cordero continues to ignore the cases MSU cited holding materials similar to those relied upon by Cordero do not constitute express

contracts for in-person, on-campus education or services or for tuition or fee refunds. JA000270–273, discussing *In re Univ. of Miami Covid-19 Tuition & Fee Refund Litig.*, 2022 U.S. Dist. LEXIS 233708 (S.D. Fla. Dec. 30, 2022); *Mooers v. Middlebury Coll.*, 2022 U.S. Dist. LEXIS 95129 (D. Vt. May 27, 2022); *Hutchinson v. Univ. of Saint Joseph*, 2022 U.S. Dist. LEXIS 85 (D. Conn. Jan. 3, 2022); *Oyoque v. DePaul Univ.*, 520 F. Supp. 3d 1058 (N.D. Ill. 2021); *Doe v. Emory Univ.*, 2021 U.S. Dist. LEXIS 22800 (N.D. Ga. Jan. 22, 2021); *Randall*, 2022 U.S. Dist. LEXIS 96065; *Shaffer v. Geo. Wash. Univ.*, 27 F.4th 754 (D.C. Cir. 2022); *Jones v. Adm'rs of Tulane Educ. Fund*, 51 F.4th 101 (5th Cir. 2022); *Gociman v. Loyola Univ. of Chi.*, 41 F.4th 873 (7th Cir. 2022); *Pepperdine*, 2023 U.S. Dist. LEXIS 38255; *Rojas*, 351 So. 3d 1167; *see also Alexandre v. Fla. Int'l Univ. Bd. of Trs.*, 2023 Fla. App. LEXIS 3313 (Fla. Dist. Ct. App. May 17, 2023); *Heine v. Fla. Atl. Univ. Bd. of Trs.*, 2023 Fla. App. LEXIS 2820 (Fla. Dist. Ct. App. Apr. 26, 2023).

Contrary to Cordero's arguments, none of the referenced documents "promise an in-person education in exchange for payment of tuition" or "access to on-campus activities, facilities, and equipment in exchange for mandatory fees." Opening Br. 31–36.

1. *MSU Catalog*

Cordero states there are 242 references to "campus," 397 references to "community," and 208 references to "classroom" or "classrooms" in the catalog.

Opening Br. 33. And he quotes descriptions about *opportunities* at MSU, some of which include the word "campus," "community," or "classroom." *Id.*, 31–33. Nowhere does Cordero, however, cite a single sentence in which MSU promised to provide in-person, on-campus education or services.

Cordero does not address that the MSU catalog expressly states it is a "general catalog … published by [MSU] as a guide for students, faculty and others interested in the institution." JA000347 (emphasis added). Nor does Cordero address that the catalog states credits are earned based on "instruction and student work/engaged effort … regardless of pedagogical format (lab, web-enhanced, on-line, condensed coursework, internships, studio, independent study, etc.)." JA000353.

Cordero argues MSU's catalog's fee descriptions "promised access to on-campus activities, facilities, and equipment in exchange for mandatory fees." Opening Br. 35–36. They do no such thing. Fees are charged per credit hour and to operate facilities.

> **Computer Fee** is a mandatory per credit hour fee used to provide and enhance student computer labs and access.
>
> **Student Equipment Fee** is a mandatory per credit hour fee used to provide and enhance classroom and student lab equipment.
>
> ….
>
> **The Associated Students of Montana State University (ASMSU) Fees** are mandatory fees charged to all students registered for seven (7) credits or more. ASMSU Fees are set by student vote. Payment of the

> ASMSU Activity Fee entitles the student to participate in ASMSU student government and use of the gym, swimming, weight room facilities, day care facilities, legal aid, tutoring, and other sponsored activities.
>
> **ASMSU Activity Fee** provides for the operation of the student government (ASMSU) and its committees.
>
> **ASMSU Intramural Fee** contributes to the operational cost of the intramural facilities and programs.
>
> ….
>
> **SFEP Fee** includes funds pledged for debt service on the Student Facilities Enhancement Project, as well as Operations & Maintenance fee for the Health & PE Complex.

JA000349. The Board of Regents ("BOR") rule defining "mandatory fees" makes clear there is no such promise. Mandatory fees "are assessed to all students registering at the campuses, regardless of the academic program or course of study chosen by the student." JA000462. And as mentioned above, Cordero admits he received all credit hours for which he enrolled, and MSU kept all facilities operational.

Cordero incorrectly represents "MSU specifically ordered him not to return to campus" and "closed" its "facilities." Opening Br. 36. Neither statement is true. President Cruzado told students: "Courses and labs will continue to be delivered via distance, remote and online means through the end of the semester." JA001258. President Cruzado clarified: "If students have absolutely no other place to go for

internet connectivity for their courses and homework, there are resources available on campus, including computer labs." JA001256 (emphasis added). The District Court found it undisputed that "MSU kept its campus open and operational and continued to offer services to all students for the remainder of the Spring 2020 semester." Opening Br. A035. Even though the Margo Hoseaus Fitness Center and fitness domes were temporarily unavailable to students, MSU continued to maintain and support the fitness center and domes. *Id.* And while intramural activities were stopped for the remainder of the Spring 2020 semester, practice fields remained accessible to students. *Id.*

2. *ASMSU Student Bill of Rights*

Cordero relies on the following provisions in the ASMSU Student Bill of Rights:

> Students, as valued members of the Montana State University academic community, have the right to a living and learning environment that emphasizes the dignity and worth of every member of its community, as provided in Montana State University's discrimination policy.
>
> Students are free to express their opinions on the Montana State University campus, and in the classroom as it related to the course content, in accordance with Montana State University's Free Expression Policy.
>
> The university has established academic responsibilit[i]es for instructors and students. In accordance with the Instructor Responsibilit[i]es, instructors are expected to … [m]ake time available for student meetings, preferably through regularly scheduled office hours, with the opportunity provided for prearranged appointments.

JA000411–412.

None of these provisions, however, promises MSU will provide in-person, on-campus education or services. *E.g., Univ. of Miami*, 2022 U.S. Dist. LEXIS 233708, at *14–15.

3. *Cordero's Acceptance Letter*

Cordero claims a portion of a sentence from his 2015 acceptance letter is a "promise[] that at MSU Cordero will 'enjoy a challenging and collaborative atmosphere that encourages innovation, exploration, and creativity in a spectacular Rocky Mountain Setting.'" Opening Br. 33 (emphasis omitted). In full, the paragraph from which Cordero quotes a portion of a sentence provides:

> I am very excited for you to join the MSU community and look forward to helping you achieve your academic goals. You will find MSU to be a vibrant and growing institution where students, faculty and staff enjoy a challenging and collaborative atmosphere that encourages innovation, exploration, and creativity in a spectacular Rocky Mountain Setting.

JA000287. This is plainly not a promise at all, let alone one for in-person, on-campus education or services.

4. *Marketing Materials*

Cordero claims his alleged promise of in-person education and services and refunds is in "a host of official MSU marketing materials, advertisements, and other documents … [that] are replete with … statements touting its campus, facilities, extracurricular activities, and classrooms." Opening Br. 34. Court after court has

held that similar materials do not create express contracts for in-person, on-campus education or services.[6] *E.g., Marbury v. Pace Univ. (In re Columbia Tuition Refund Action)*, 523 F. Supp. 3d 414, 423 (S.D.N.Y. 2021) (marketing materials referencing "on-campus experience" are "mere opinion or puffery that is too vague to be enforced as a contract" (internal quotation marks omitted)); *Bergeron*, 2023 U.S. Dist. LEXIS 18547, at *25–26 (marketing materials referencing the "finest laboratories," or "working side-by-side and networking with world-class faculty members," "simply tout the benefits of these potential experiences, services, or facilities" and are "opinion or puffery that is too vague to be enforced as a contract" (internal quotation marks omitted)); *Univ. of Miami*, 2022 U.S. Dist. LEXIS 233708, at *11–12; *Mooers*, 2022 U.S. Dist. LEXIS 95129, at *9; *Hutchinson*, 2022 U.S. Dist. LEXIS 85, at *6; *Oyoque*, 520 F. Supp. 3d at 1064–65; *Doe*, 2021 U.S. Dist. LEXIS 22800, at *15–16; *see also Randall*, 2022 U.S. Dist. LEXIS 96065, at *16–17 (university's promotional materials and course catalogs created an expectation classes would be taught in-person and students would be able to take advantage of a myriad of on-campus opportunities, but "these materials do not contain any specific or identifiable promise that is adequate to support a breach of contract, even one

[6] Cordero seemingly concedes this by describing the representations in these materials as "extracontractual." Opening Br. 34.

implied in fact"; "materials offered nothing more than a generalized and non-specific impression of typical student life").

Rather than quoting any language with such a promise, Cordero cites to identified classrooms and course listings for Cordero's two Spring 2020 courses and portions of Cordero's deposition. JA000416; JA001147–1150; JA001152–1191; JA001193–1206; JA001214, 1226.

Courts have rejected a theory that those listings constitute a promise or express contract.

> No university could reasonably intend, and no student could reasonably expect, that a university's course catalog [or registration platform] would create a binding obligation to hold each and every course in the specifically listed classroom under any and all circumstances. That theory would expose universities to litigation any time a professor fell ill and canceled a class, an administration moved a class to a larger or smaller room to accommodate enrollment, or a room was changed due to a scheduling conflict. The University's course catalog reflected its intent to hold the listed courses in certain buildings and rooms. It did not create a binding obligation to do so.

Raimo v. Wash. Univ. in St. Louis, 2022 U.S. Dist. LEXIS 46566, at *30–31 (E.D. Mo. Mar. 16, 2022); *see Randall*, 2022 U.S. Dist. LEXIS 96065, at *16 (statements about the "days and times" and "location" of courses are not express promises to provide in-person instruction).

Finally, as to Cordero's deposition, he admitted he simply *inferred*—based on everything he saw and experienced—that MSU would provide him an in-person education. JA000314.

In sum, Cordero failed to offer any evidence to support his claim that "MSU explicitly promised Cordero and other students in-person learning and access to on-campus facilities and services."

C. Cordero failed to manufacture ambiguity.

Cordero's penultimate argument is the District Court should have found ambiguity in the patchwork of documents Cordero referenced. Opening Br. 36–37. The contract is not ambiguous just because Cordero says so. To establish an ambiguity, Cordero must identify contract language that is "susceptible to at least two reasonable but conflicting meanings." *E.g., Performance Mach. Co. v. Yellowstone Mountain Club, LLC*, 2007 MT 250, ¶ 39, 339 Mont. 259, 169 P.3d 394. Yet, Cordero identifies no potentially ambiguous language—no language that can reasonably be read as promising in-person, on-campus education or services, or tuition or fee refunds after the 15th day of instruction.

D. MSU's refund policy does not support Cordero's claim.

Cordero's final argument is the District Court "improperly relied on MSU's refund policy" because it "has no applicability here." Opening Br. 37–39. Not so.

MSU's refund policy is relevant to Cordero's apparent claim that he was entitled to a refund. The refund policy is part of the contract between Cordero and MSU; it provides when refunds will be made. By enrolling, Cordero agreed to that policy. To try to get around his agreement to that policy, Cordero again cites

inapposite cases. *Id.*, 38 (citing *Ninivaggi v. Univ. of Del.*, 555 F.Supp.3d. 44 (D. Del. 2021); *In re Bos. Univ. Covid-19 Refund Litig.*, 2022 U.S. Dist. LEXIS 140296 (D. Mass. Aug. 8, 2022); and *Jones*, 51 F.4th 101 (5th Cir. 2022)).

Ninivaggi and *Jones*, respectively, relying on documents similar to those at issue here, held the university did not expressly promise in-person classes or activities, and therefore, while allowing claims for breach of implied contract and unjust enrichment, the students' express contract claims were rejected. 555 F. Supp. 3d at 50; 51 F.4th at 113. For example, in *Ninvaggi,* the Court specifically addressed the student course catalog and advertisements and found while they may support an implied contract claim, they failed to support an express contract claim.

> Course catalogs are full of tentative plans: when and where each class will meet, who will teach it, even what textbook it will use. If just scheduling a class in person amounted to promising in-person teaching, then by the same logic the catalog would have promised thousands of other details. But U. Delaware did not plausibly commit to turning its entire catalog into an enforceable code. And nothing in the catalog singles out in-person classes as the one detail that would never change. So the catalog does not help the students on its own. For the same reason, neither do the school's advertisements.

555 F. Supp. 3d at 50–51.

Jones addressed the students' reliance on statements or phrases like: "[W]hen you choose to study here…. You're choosing a place to live and work.... That means your education is inextricably tied to the world around you."; "on-campus gym"; "state-of-the-art recreational facility"; physical facilities are "a focal point for

campus life"; "theatrical performances, concerts and speakers on campus"; "many ways to get involved on campus"; "convenient[] locat[ion] across [] from" Audubon Park; and "contact time" with professors. 51 F.4th at 107. Yet, *Jones* held that even if a course catalog specified instruction in each class at certain times and specific campus locations, that was not an express contract for in-person education or services. *Id*.

In *Boston University*, Boston University closed and required students to vacate the campus. 2022 U.S. Dist. LEXIS 140296, at *3, 4. In contrast, MSU kept its campus open, did not order students to leave, and continued to operate all facilities. Further, unlike MSU's catalog—a "guide"—incorporated into Cordero's application and no MSU document promising in-person education and services, Boston University's documents contained "certain representations" that might be the basis for a binding contract for in-person education and services. *Id.*, * 10. Therefore, because there were issues of material fact, the court denied summary judgment as to the students' express and implied contract claims, but dismissed the students' unjust enrichment claim. *Id.*, at *13.

In sum, none of these cases support Cordero's argument. Two rejected express contract claims, and the third found disputed issues of material fact based on "certain representations" in university documents. None of the cases involved refund policies like the one at issue here, which was established by the BOR under its statutory

authority to "prescribe tuition rates, matriculation charges, and incidental fees for students in institutions under their jurisdiction," and to control and use the funds for the support of universities. §§ 20-25-421(1), -422, -425, MCA.

Even if the refund policy were irrelevant, that does not save Cordero's claim. Ultimately, his claim fails because he offered no evidence to support his claim:

> Cordero's contract breach claim against MSU fails as a matter of law because he has failed to establish any specific contractual promise that MSU allegedly breached with respect to in-person instruction, tuition, fees, or any other costs. He has failed to identify a specific and bargained for promise made by MSU that it breached during the Spring 2020 semester COVID educational and campus transition.

Opening Br. A043.

CONCLUSION

For the foregoing reasons, MSU respectfully requests that this Court affirm the District Court's judgment.

Respectfully submitted this 12th day of February, 2024.

MOORE, COCKRELL,
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Summary Response is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is 9,867 words, excluding the caption, signature block, certificate of service, certificate of compliance, table of contents and table of authorities.

Respectfully submitted this 12th day of February, 2024.

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/s/ Dale R. Cockrell
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CERTIFICATE OF SERVICE

I, Breanne Pritchett, a paralegal of the law firm, MOORE, COCKRELL, GOICOECHEA & JOHNSON, P.C., do hereby certify that the Defendants/ Appellees Answer Brief was electronically filed with the Clerk of the Montana Supreme Court on February 12, 2024, at approximately 4:15 p.m. I also certify that I served a copy of the Defendants/Appellees Answer Brief by mailing (first class postage prepaid) and emailing a copy thereof, to the following:

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