IN THE SUPREME COURT OF OHIO

BROOKE SMITH, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. THE OHIO STATE UNIVERSITY, Defendant-Appellant.	Supreme Court Case No.: 2023-0009 On Appeal from the Tenth District Court of Appeals, Case No.: 22AP-125

BRIEF OF PLAINTIFF-APPELLEE BROOKE SMITH

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TABLE OF CONTENTS

PAGE(S)

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 5

I. SOVEREIGN IMMUNITY IN OHIO HAS ALWAYS BEEN AN AFFIRMATIVE DEFENSE, NOT A JURISDICTIONAL ISSUE 6

II. DISCRETIONARY IMMUNITY IS AN AFFIRMATIVE DEFENSE AND CANNOT BE DECIDED BASED ON THE PLEADINGS 7

III. TREATING DISCRETIONARY IMMUNITY AS AN AFFIRMATIVE DEFENSE IS SOUND PUBLIC POLICY 12

IV. THIS COURT DECLINED TO ACCEPT PROPOSITION OF LAW NO. I, AND OSU CANNOT DEMONSTRATE DISCRETIONARY IMMUNITY APPLIES IN ANY EVENT 13

CONCLUSION 16

TABLE OF AUTHORITIES

PAGE(S)

CASES

Allen v. Dep't of Admin. Servs. Off. of Risk Mgmt.,
10th Dist. No. 19AP-729, 2020-Ohio-1138 ..... 8, 10, 12

Argabrite v. Neer,
2016-Ohio-8374 7

Conley v. Shearer,
1992-Ohio-133 10

Cramer v. Auglaize Acres,
2007-Ohio-1946 9

Cristino v. Bur. of Workers' Comp.,
10th Dist. No. 12AP-60, 2012-Ohio-4420 ..... 8, 10, 12

Enghauser Mfg. Co. v. City of Lebanon,
12th Dist. No. 474, 1982 WL 6081 7

Evans v. Ohio Dep't of Rehab. & Correction,
10th Dist. No. 19AP-743, 2020-Ohio-3191 16

Foster v. Dep't of Rehab. & Corr.,
10th Dist. No. 12AP-503, 2013-Ohio-912 15

Goad v. Cuyahoga Cty. Bd. of Commrs.,
79 Ohio App. 3d 521 (1992) 7

Hall v. Ft. Frye Loc. Sch. Dist. Bd. of Edn.,
111 Ohio App. 3d 690 (1996) 10

Holbrook v. Brandenburg,
2d Dist. No. 2007 CA 106, 2009-Ohio-2320 9

Jones v. Cleveland Clinic Found.,
2020-Ohio-3780 14

Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.,
8th Dist. No. 72095, 128 Ohio App. 3d 33 (1999) 7

Ne. Ohio Reg'l Sewer Dist. v. Bath Twp.,
2015-Ohio-3705 14

Oliver v. Wagner,
9th Dist. No. 2832-M, 1999 WL 1215131 7

Pottenger v. Ohio Dep't of Transp.,
10th Dist. No. 88AP-832, 1989 WL 147998 8

Reasoner v. City of Columbus,
10th Dist. No. 02AP-831, 2003-Ohio-670 10

Reynolds v. State, Div. of Parole & Cmty. Servs.,
14 Ohio St. 3d 68 (1984) 9, 15

Risner v. ODOT,
145 Ohio St.3d 55 (2015) 12, 16

Roe v. Hamilton Cty. Dept. of Human Serv.,
53 Ohio App.3d 120 (1988) 10

Smith v. Ohio State Univ.,
2022-Ohio-4101 12

Spence v. Liberty Twp. Trustees,
4th Dist. No. 94CA581, 109 Ohio App. 3d 357 (1996) 7

State Auto. Mut. Ins. Co. v. Titanium Metals Corp.,
2006-Ohio-1713 10

State ex rel. Koren v. Grogan,
68 Ohio St. 3d 590 (1994) 6

State ex rel. Vanni v. McMonagle,
137 Ohio St. 3d 568 (2013) 8

State ex rel. Walgate v. Kasich,
2016-Ohio-1176 15

Thomas Vending, Inc. v. Slagle,
3d Dist. No. 9-99-16, 2000-Ohio-1623 9

Turner v. Cent. Loc. Sch. Dist.,
3d Dist. No. 4-97-13, 1997 WL 563297 7

Wallace v. Ohio Dep't of Com.,
2002-Ohio-4210 ..... 10, 12

Wassenaar v. Ohio Dep't of Rehab. & Corr.,
10th Dist. No. 10AP–395, 2010-Ohio-6125 16

OTHER AUTHORITIES

BALDWIN'S OH. PRAC. CIV. PRAC. 7

RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS (2022) 6, 12, 14

INTRODUCTION

The Tenth District Court of Appeals correctly held that discretionary immunity is an affirmative defense that cannot be raised for the first time on appeal. This holding is in line with all other Ohio courts that have addressed the question and is based on sound reasoning. Whether discretionary immunity applies in a given case is an inherently factual question that cannot be determined on the pleadings alone. In this case, for example, there is nothing in the Complaint that would enable a court to determine whether Defendant-Appellant The Ohio State University's ("Defendant" or "Appellant" or "OSU" or the "University") decision not to refund students for the transition to online classes involved an exercise of a high degree of official judgment or discretion. Indeed, OSU's arguments in favor of applying discretionary immunity in this case are all based on record evidence obtained through discovery. And, as OSU admits, discretionary immunity is a vestige of sovereign immunity which Ohio has not waived. But sovereign immunity is also an affirmative defense rather than an issue of subject matter jurisdiction. Accordingly, the same holds true for discretionary immunity.

For these reasons, and as explained in more detail below, the Court should affirm the Court of Appeals' holding.

STATEMENT OF THE CASE AND FACTS

The Ohio State University was founded in 1870. R. 103 (Ex. 48) at 84:8-9. In the 149 years that followed, two things were always true: OSU had always provided its students with in-person classes and OSU had always provided its students with access to the OSU campus. *Id.* at 44:23-45:12. The course of dealing between OSU and its students, as well as the way that OSU markets itself to prospective students, leaves little doubt that access to these services was an indispensable part of the bargain between the school and students who paid the costs of attendance.

Indeed, OSU has always made it clear that in-person classes are part of the service that it provides to students. Its course search website enabled students to search for classes that were specifically listed as "In Person." R. 101 (Ex. 16). During the Spring 2020 semester, the vast majority of OSU undergraduate students signed up for in-person classes. R. 102 (Ex. 36). In its overview of available majors, OSU told students that they would be able to "[p]articipate in hands-on laboratory experiments and frontier research." R. 104 (Ex. 74). Likewise, OSU's descriptions for specific majors indicated that classes would be taught in-person and/or that they would involve in-person laboratories or other in-person experiences. R. 103 (Ex. 53-73). On top of these representations, the OSU webpages for numerous departments showed engaged students in physical classrooms and laboratories. R. 104 (Ex. 76-79). In stark contrast, OSU has an entirely separate section of its website for Ohio State Online, with a picture of a student in front of her laptop computer. R. 104 (Ex. 80).

Notably, OSU has now largely transitioned back to in-person classes because it recognizes that they are core part of what it offers as a "residential university":

> Q. Well, I guess my question's really why is the school moving towards offering more in person sections at all?
>
> A. Well, we are a residential university. Our -- our history – you've asked questions about the -- the nature of our offerings in the 150-year history, and I can't -- I can't give you specifics. But the fact is that our history has been a focus on the residential experience of -- of education. . . .
>
> Q. You referred to -- or used the phrase "residential university." What does that mean?
>
> A. Well, we have classrooms and our faculty come to work and -- and -- and, you know, meet students in their offices and work on -- on campus with their teaching opportunities. We have residence halls that accommodate our first and second-year students, as we've talked about. That's a -- a common term when people talk about different kinds of university experiences. The University of Phoenix, for

example, is not a residential university.

R. 103 (Ex. 48) at 101:5-13, 102:1-12; *id.* at 104:1-05:4 (adding that the return to in-person classes represented a "reactivation of the campus" that revitalized laboratories, enabled students to connect "outside of their class experience" and for the "development of new ideas," which "is part of what a university like the Ohio State University is all about.").

Separately, OSU made it clear that access to the campus and its facilities were part of the services that it would provide as part of its bargain with students. OSU's website touted the beauty of the campus, its residence halls, dining options, libraries and numerous recreational facilities. R. 101 (Exs. 2-8, 81); R. 104 (Ex. 75).

In Spring 2020, in OSU's 150th year, things suddenly changed. On March 9, 2020, in light of the emerging COVID-19 pandemic, President Michael V. Drake announced that OSU was "suspending face-to-face instruction in lectures, discussion sections, seminars and other similar classroom settings and moving to virtual instruction, effective immediately and through at least Monday, March 30." R. 101 (Ex. 10). Then, on March 12, 2020, just three days later, President Drake announced that the transition to virtual learning would remain in place for the rest of the Spring semester and that students would have to move out of residence halls. R. 101 (Ex. 12). OSU extended spring break by an extra week to assist with the transition. *Id.* Accordingly, from March 9, 2020 through to the end of the semester, OSU did not provide students with any in-person classes. R. 103 (Ex. 50) at 46:16-19.

OSU made it clear that the transition to online classes and denying students access to the campus was something out of the ordinary that neither the University nor students had anticipated. R. 101 (Ex. 19); R. 103 (Ex. 48) at 85:20-21, 88:3-21. The transition to online-only classes represented a major change for OSU. R. 102 (Ex. 24) at 1166; R. 102 (Ex. 25); R. 103 (Ex. 48) at 111:4-17. It also represented a significant change for students who had signed up for

and anticipated taking in-person classes. R. 103 (Ex. 48) at 117:22-118:3; Ex. 26. In other words, prior to the pandemic, it had been the tacit understanding of both the University and its students that OSU would provide in-person classes for the entirety of the Spring 2020 semester.

OSU has also acknowledged the online classes it provided were not equivalent to in-person classes and the transition to online classes had "a major impact on the remainder of the spring semester." R. 103 (Ex. 48) at 51:11-17; *id.* at 45:13-46:21, 47:14-15; R. 101 (Ex. 10); R. 102 (Ex. 27); R. 102 (Ex. 28); R. 102 (Ex. 29).

Despite the fact that it failed to provide these services for the entirety of the Spring 2020 semester, OSU only provided pro-rata refunds for room and board and the Recreational Fee. R. 103 (Ex. 47); R. 103 (Ex. 52) at 30:6-16). OSU did not issue any refunds for any of the other fees that it charged, including the Instructional Fee, the Non-Resident Surcharge, the General Fee, the Student Activity Fee, the Student Union Facility Fee, the Learning Technology Fee, Course Fees, Program Fees or the COTA Bus Fee. R. 103 (Ex. 48) at 152:6-22; R. 103 (Ex. 51) at 49:25-50:1; R. 103 (Ex. 52) at 14:24-15:1, 15:22-24, 18:5-7, 19:4-6, 25:22-25, 26:21-23, 30:2-5, 57:2-4. In addition, OSU did not provide any refunds for missed days despite losing four days from an extended Spring Break. R. 101 (Exs. 12, 14-15); R. 103 (Ex. 48) at 66:4-13.

Ms. Smith filed the original Complaint in this case on May 21, 2020, bringing claims for breach of contract, unjust enrichment and conversion. R. 1. Ms. Smith alleged that she paid for a full-semester of in-person classes with access to the OSU campus, but that, for approximately half the semester, OSU instead provided her with online classes without access to the campus, which was worth less. *Id.*

OSU moved to dismiss on June 30, 2020 without mentioning discretionary immunity. R. 13. On September 9, 2020, the Court of Claims denied that motion. R. 25. On September 23, 2020, OSU filed an Answer, listing discretionary immunity as an affirmative defense. R. 26.

When it moved for summary judgment on November 5, 2021, however, it did not raise the issue. That motion remains pending.

On December 13, 2021, the Court of Claims issued an order certifying a class defined as:

> [A]ll undergraduate students enrolled in classes at the Columbus campus of The Ohio State University during the Spring 2020 semester who paid tuition, the general fee, student activity fee, learning technology fee, course fees, program fees, and/or the COTA bus fee.

R. 117. OSU appealed the class certification order. In a single paragraph at the end of its appellate brief, Appellant raised the issue of discretionary immunity for the first time in this case. On November 17, 2022, the Court of Appeals for the Tenth District reversed the trial court's order certifying the class and remanded the case for further proceedings. App'x at 4-25. The Court of Appeals, however, rejected OSU's discretionary immunity argument on the ground that it is an affirmative defense that cannot be raised for the first time on appeal. *Id.* at 17-18. On March 14, 2023, this Court accepted an appeal of that decision limited to Proposition of Law No. II, which addresses whether discretionary immunity is an affirmative defense. It declined to accept jurisdiction over Proposition of Law No. I, which asked the Court to decide whether discretionary immunity applies in this case in particular.

ARGUMENT

Proposition Of Law No. II:

> **Discretionary immunity is an affirmative defense, not an issue of subject matter jurisdiction that can be raised for the first time on appeal. That is true of every statutory and common law immunity under Ohio law, including sovereign immunity in all its forms. As such, discretionary immunity cannot be decided on the pleadings, but is instead an issue of fact that must be decided on summary judgment by the trial court in the first instance.**

The Tenth District Court of Appeals properly construed Ohio law in holding that discretionary immunity is an affirmative defense that it could not decide in the first instance. Discretionary immunity is a form of sovereign immunity, which courts in this state have

consistently held is also an affirmative defense. Accordingly, discretionary immunity is an issue that a trial court must decide based on the factual record in the first instance.

I. SOVEREIGN IMMUNITY IN OHIO HAS ALWAYS BEEN AN AFFIRMATIVE DEFENSE, NOT A JURISDICTIONAL ISSUE

OSU argues that discretionary immunity is a jurisdictional issue because it is a residual form of sovereign immunity that Ohio has not waived. Br. at 22. But sovereign immunity in Ohio has always been an affirmative defense, not an issue of subject matter jurisdiction. Accordingly, following OSU's own reasoning, discretionary immunity—an offshoot of sovereign immunity—must also be an affirmative defense.

The Restatement (Third) of Torts explains that "[c]ourts are quite evenly divided as to whether state sovereign immunity operates as an affirmative defense or, alternatively, operates to divest the court of subject-matter jurisdiction." RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 9 (2022). Ohio courts, however, have always been in the former camp, consistently holding that all forms of immunity—and sovereign immunity in particular—are affirmative defenses. *See, e.g.*, *State ex rel. Koren v. Grogan*, 68 Ohio St. 3d 590, 594 (1994) ("[I]mmunity is an affirmative defense, which must be raised and proven, *i.e.*, it usually does not affect the jurisdiction of the court."); *Argabrite v. Neer*, 2016-Ohio-8374, ¶ 35, (Kennedy, J., concurring in judgment) ("Sovereign immunity is an affirmative defense."); *Goad v. Cuyahoga Cty. Bd. of Commrs.*, 79 Ohio App. 3d 521, 524, 607 N.E.2d 878, 880 (1992) (discussing the "affirmative defense of sovereign immunity"); *Oliver v. Wagner*, 9th Dist. No. 2832-M, 1999 WL 1215131, at *2 ("Sovereign immunity is an affirmative defense."); *Enghauser Mfg. Co. v. City of Lebanon*, 12th Dist. No. 474, 1982 WL 6081, at *2 ("[S]overeign immunity, even though not specifically enumerated in Civ. R. 8(C), is an affirmative defense."); 1 BALDWIN'S OH. PRAC. CIV. PRAC. § 8:14 (listing "sovereign immunity" as an affirmative defense); 57 Am. Jur. 2d § 559 (citing Ohio as an example of a jurisdiction in which "sovereign immunity is an affirmative

defense," and where "the burden is upon government-defendants to establish all elements of the defense as a matter of law by a preponderance of the evidence at trial.").

Further demonstrating that sovereign immunity is an affirmative defense and not a question of subject matter jurisdiction, courts in this state have consistently held that it is a defense that can be waived if not timely raised. *See, e.g.*, *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 8th Dist. No. 72095, 128 Ohio App. 3d 33, 46 (1999) ("Recent cases in the sovereign immunity area plainly suggest that where the sovereign fails to plead or raise an affirmative defense, it will be deemed to have waived it even though the public treasury will have to foot the bill resulting from the waiver."); *Spence v. Liberty Twp. Trustees*, 4th Dist. No. 94CA581, 109 Ohio App. 3d 357, 360-61 (1996) ("There are several reported and unreported cases where a governmental entity has neglected to plead "immunity" in an action against it despite the fairly obvious availability of that defense."); *Turner v. Cent. Loc. Sch. Dist.*, 3d Dist. No. 4-97-13, 1997 WL 563297, at *2 ("[C]ase law suggest[s] that if sovereign immunity was not raised in the answer, then it was deemed waived.").

This case law undercuts OSU's entire analysis. The University's argument is premised on its contention that discretionary immunity is a vestige of sovereign immunity, and that because the latter is a question of jurisdiction, the former must be as well. But this argument suffers from a fatal flaw: sovereign immunity in Ohio is an affirmative defense, not a question of jurisdiction. Accordingly, following OSU's own logic, discretionary immunity must also be an affirmative defense rather than a jurisdictional bar.

II. DISCRETIONARY IMMUNITY IS AN AFFIRMATIVE DEFENSE AND CANNOT BE DECIDED BASED ON THE PLEADINGS

Just like all other forms of sovereign immunity, discretionary immunity is an affirmative defense. *See, e.g.*, *Pottenger v. Ohio Dep't of Transp.*, 10th Dist. No. 88AP-832, 1989 WL

147998, at *2 ("the defense of discretionary immunity is an affirmative defense"); *Allen v. Dep't of Admin. Servs. Off. of Risk Mgmt.*, 10th Dist. No. 19AP-729, 2020-Ohio-1138, ¶ 9 (same); *Cristino v. Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 21 (same).

OSU argues these decisions, along with the Court of Appeals' decision in this case, are flawed because they conflate discretionary immunity and public duty immunity. Br. at 22-23. Specifically, OSU argues that while public duty immunity is a statutory defense that can be waived, discretionary immunity is rooted in common law sovereign immunity. But, as described in the previous section, common law sovereign immunity is also an affirmative defense. This Court has also held that both statutory and common law immunities are considered affirmative defenses. *State ex rel. Vanni v. McMonagle*, 137 Ohio St. 3d 568, 570 (2013) (the principle that immunity is an affirmative defense rather than a jurisdictional issue is one that "Ohio courts have applied . . . to a host of statutory and common-law immunities . . . .") (emphasis added). In any event, the Court of Appeals here did not cite cases involving public duty immunity for the proposition that discretionary immunity is an affirmative defense, but merely to show that affirmative defenses cannot be raised for the first time on appeal. App'x at 18. And neither *Pottenger*, *Allen* nor *Cristino* even address public duty immunity.

The Court of Appeals' decision also makes sense as a logistical matter because determining whether an immunity applies is an inherently fact-based inquiry. *See, e.g.*, *Cramer v. Auglaize Acres*, 2007-Ohio-1946, ¶ 33 (agreeing that there was "a material issue of fact" as to whether political subdivision immunity applied); *Thomas Vending, Inc. v. Slagle*, 3d Dist. No. 9-99-16, 2000-Ohio-1623, *3 ("legal issues surrounding an immunity claim are often difficult to separate from the factual issues," and "material issues of fact must first be resolved to determine whether immunity is applicable"); *Holbrook v. Brandenburg*, 2d Dist. No. 2007 CA 106, 2009-Ohio-2320, ¶ 18 ("Whether the township's decision to ignore years of complaints and requests

for help to stem the flooding constituted the exercise of 'judgment or discretion' is a question of fact."). OSU itself recognized this fact when it chose not to raise discretionary immunity in its motion to dismiss, but then listed discretionary immunity as an affirmative defense in its Answer. R. 26 at ¶ 64.

Here, this Court has described discretionary immunity as follows:

> The language in R.C. 2743.02 that "the state" shall "have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties . . ." means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision *which is characterized by the exercise of a high degree of official judgment or discretion*. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.

Reynolds v. State, Div. of Parole & Cmty. Servs., 14 Ohio St. 3d 68, 70 (1984) (emphasis added). Accordingly, in determining whether discretionary immunity applies, a court needs to determine whether the conduct at issue involved "the exercise of a high degree of official judgment or discretion," or if that conduct involved merely carrying out directives stemming from such a decision.

These are questions that generally cannot be answered from the pleadings alone. Rather, discretionary immunity, like other affirmative defenses, "typically rel[ies] on matters outside the complaint," and so "they normally cannot be raised in a Civ.R. 12(B)(6) motion. . . ." *Cristino*, 2012-Ohio-4420, ¶ 22; *Reasoner v. City of Columbus*, 10th Dist. No. 02AP-831, 2003-Ohio-670, ¶ 12 ("Generally, affirmative defenses, such as judicial immunity, cannot be raised in a Civ.R. 12(B)(6) motion because they normally cannot be proved without reliance upon evidentiary materials outside the complaint."); *Allen*, 2020-Ohio-1138, ¶ 22 (affirmative defense of discretionary immunity is "properly raised" in a "motion for summary judgment"); *Wallace v.*

Ohio Dep't of Com., 2002-Ohio-4210, ¶ 10 (describing a four-day trial on whether a decision not inspect a fireworks facility involved a high degree of discretion); *Conley v. Shearer*, 1992-Ohio-133 (the issue of immunity is "properly determined by the court prior to trial, and preferably on a motion for summary judgment.") (citing *Roe v. Hamilton Cty. Dept. of Human Serv.* 53 Ohio App.3d 120 (1988)); *Hall v. Ft. Frye Loc. Sch. Dist. Bd. of Edn.*, 111 Ohio App. 3d 690, 694-95 (1996) ("Generally, the party asserting immunity as an affirmative defense has the burden of proving that defense by a preponderance of the evidence at trial" and "a party raising an immunity defense must present evidence tending to prove the underlying facts upon which the defense is based").

This Court's decision in *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 2006-Ohio-1713, illustrates this point. There, State Auto filed suit against Titanium Metals alleging that it caused a fire. Ohio Briquetting, a tenant in the building at issue, then filed a third-party complaint against the Oakwood Village Fire Department and its fire chief, alleging that they had used an improper fire suppressant that caused explosions and exacerbated the fire. The Village filed a motion to dismiss under Civ.R. 12(B)(6) asserting political subdivision immunity. The trial court denied the motion and the Court of Appeals affirmed. This Court held that the issue of immunity should not have been adjudicated at all by the appellate court because it was a fact-based issue that had not been fully adjudicated and was therefore premature:

> At this juncture, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than Ohio Briquetting's third-party complaint and Oakwood's Civ.R. 12(B)(6) motion to dismiss. No fact-finding or discovery has occurred. The trial court's denial of the motion to dismiss merely determined that the complaint asserted sufficient facts to state a cause of action. . . . The court of appeals considered the issue of immunity prematurely. The record below must be developed in order to reach this issue.

Id. at ¶¶ 11-12.

This case is no different. Whether OSU's decision not to refund students after its transition to online classes was an "exercise of a high degree of official judgment or discretion" is not one that can be answered from the pleadings alone. Indeed, the Complaint says nothing about whether that decision involved a meaningful exercise of judgment or discretion as opposed to merely carrying out the directives of the Governor or state agencies. Likewise, OSU's arguments for the application of discretionary immunity are not based on the pleadings but instead depend on record evidence. *See, e.g.*, Br. at 4 (citing Governor DeWine's March 9, 2020 declaration of a State of Emergency); *id.* at 5-6 (citing the thought processes of OSU administrators); *id.* (referencing OSU's creation of a "task force"); *id.* at 7 (citing orders from the Ohio Department of Health); *id.* at 26 (asking this Court to rule on the application of discretionary immunity based on "relevant discovery into the character of the March 9 decision [that] was completed below," and citing "[t]he extensive testimony of Dr. McPheron" in particular). None of these facts were in the Complaint. This reliance on evidence from outside of the pleadings reinforces the view of Ohio courts finding that discretionary immunity is an affirmative defense requiring a developed factual record and not a question of subject matter jurisdiction that can be determined from the pleadings alone.

OSU argues precedent from this Court confirms discretionary immunity is a jurisdictional issue. That is incorrect. Specifically, OSU cites to language in *Reynolds* stating that "the state cannot be sued,"—which was then quoted in *Risner v. ODOT*, 145 Ohio St.3d 55 (2015) and *Wallace v. Ohio DOC*, 96 Ohio St.3d 266 (2002)—but those cases did not address the issue at hand. That is, these cases simply stated the general principle of sovereign immunity (*i.e.*, that the state cannot be sued), but did not resolve whether it is a jurisdictional issue or an affirmative defense. *See* RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 9 (addressing the split view). Indeed, courts often simultaneously refer to discretionary immunity as an

affirmative defense while noting that, when it applies, it means "the state cannot be sued." *Smith v. Ohio State Univ.*, 2022-Ohio-4101, ¶ 28 (noting simultaneously that the "state cannot be sued" when discretionary immunity applies, and that discretionary immunity is an affirmative defense); *Cristino*, 2012-Ohio-4420, ¶ 22 (same); *Allen*, 2020-Ohio-1138, ¶¶ 9, 18 (same).

III. TREATING DISCRETIONARY IMMUNITY AS AN AFFIRMATIVE DEFENSE IS SOUND PUBLIC POLICY

OSU suggests policy considerations also counsel in favor of treating discretionary immunity as a jurisdictional issue. Br. at 14 (warning of "far-reaching implications" if the Court decides otherwise); *id.* at 14-15 (arguing "the 10th District Court of Appeals' Decision strips these universities of a threshold, jurisdictional defense"); *id.* at 25 (arguing that affirming the decision below "would effectively eliminate discretionary immunity as a viable jurisdictional defense in Ohio"). These statements are highly exaggerated.

In this case, as well as those pending against other public Ohio universities, the stakes of this decision are quite limited. If this Court confirms that discretionary immunity is an affirmative defense, all that means is OSU will need to assert that defense (assuming it is timely and has not been waived) with a motion for summary judgment in the Court of Claims instead of the Court of Appeals. Meanwhile, the Court of Claims, as factfinder, will be able to rightfully decide the relevant factual issues in the first instance, which will provide a more detailed record for any appeal.

Nor should this Court give credence to OSU's warning that affirming would somehow expand liability for "other key decisions by State officials and instrumentalities who were forced to adjust quickly to COVID-19's crippling impact." *Id.* at 15. As noted above, the implications of this decision are simply when or in what venue OSU may raise its defense of discretionary immunity, not whether OSU can make use of that defense in the first instance. Regardless, the

Court of Appeals' decision in this case did not break new ground—it has long viewed discretionary immunity as an affirmative defense. Affirming that decision would not change anything. Regardless, the breach of contract at issue in this case does not apply to the closure of "all K-12 School buildings in the State." *Id.* And, other than OSU's bald speculation, there is no reason to believe that a decision in this case will impact the likelihood of other lawsuits against the State related to COVID-19.

Notably, the Restatement states that public policy counsels in favor of treating sovereign immunity as an affirmative defense rather than a jurisdictional issue:

> This Section takes this tack for two reasons. First, treating state sovereign immunity as an affirmative defense is consistent with the general treatment of common-law immunities. *See, e.g.*, § 10, Comment m (explaining that the immunity of local government entities operates as an affirmative defense). Second, this treatment has several other, more practical, benefits. First, deeming sovereign immunity an affirmative defense promotes judicial economy. The alternative approach requires courts to inquire into sovereign immunity in every case involving a state defendant, instead of focusing their energy on the subset of cases in which sovereign immunity presents a bona fide issue. Arguably worse, courts might inquire into sovereign immunity late in the case's development after devoting significant energy to the resolution of other subsidiary (and ultimately inconsequential) matters, wasting valuable time and effort. Second, treating state sovereign immunity as an affirmative defense protects litigant autonomy and promotes accurate decisionmaking, since, otherwise, a court, left to resolve the matter sua sponte, may be deprived of full adversarial ventilation. And third, treating state sovereign immunity as an affirmative defense prevents sandbagging, since, otherwise, state defendants could wait and raise a sovereign immunity argument at the 11th hour.

RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 9.

IV. THIS COURT DECLINED TO ACCEPT PROPOSITION OF LAW NO. I, AND OSU CANNOT DEMONSTRATE DISCRETIONARY IMMUNITY APPLIES IN ANY EVENT

OSU urges this Court to rule on its Proposition of Law No. I, which addresses the merits

of its discretionary immunity defense. Br. at 25. But this Court has already declined to accept jurisdiction of that issue and OSU provides no compelling reason for the Court to reconsider that decision.

OSU initiated the appeal before this Court as a "jurisdictional appeal," as that term is defined by S.Ct.Prac.R. 5.02. Therein, OSU urged this Court to accept two propositions of law. Proposition of Law No. I addressed whether discretionary immunity applies in this matter, while Proposition of Law No. II addressed whether discretionary immunity is a question of subject matter jurisdiction. On March 13, 2023, this Court issued an Entry stating that it accepted "the appeal on proposition of law No. II only." In other words, the Court had the opportunity to accept jurisdiction over Proposition of Law No. I, but chose not to do so.

In such instances, this Court routinely declines invitations to address propositions of law over which it has not accepted jurisdiction. *See, e.g.*, *Jones v. Cleveland Clinic Found.*, 2020-Ohio-3780, ¶ 35 ("Because we declined to accept a proposition of law on that issue, we have no occasion to revisit the court of appeals' decision on it in this proceeding."); *Ne. Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705, ¶ 31 (French, J., concurring in part and dissenting in part) ("Having declined jurisdiction over that proposition of law, the question whether the stormwater fees are an unlawful tax is not before the court."); *State ex rel. Walgate v. Kasich*, 2016-Ohio-1176, ¶ 17 ("This court generally declines to address issues associated with propositions of law that we have declined to review . . . .").

Now, despite never raising the issue with the trial court, and limiting its arguments before the Court of Appeals to a single paragraph in its brief, OSU asks this Court to rule on the merits of its discretionary immunity defense in the first instance. Even if that were appropriate to rule on Proposition of Law No. I (and it is not), OSU has failed to demonstrate that discretionary immunity applies in this case.

Discretionary immunity does not apply to every action of the state. Far from it:

> Were we to find that discretionary immunity applies every time a state employee exercises discretion in performing his or her job, we would be vastly expanding the scope of the discretionary immunity doctrine while simultaneously limiting the scope of the state's waiver of sovereign immunity from liability as established by the Court of Claims Act. R.C. 2723.02(A)(1). Accordingly, application of the discretionary immunity doctrine requires more than a finding that a state employee . . . made a decision that required the exercise of a high degree of discretion-it requires a finding of the exercise of a high degree of official judgment or discretion as to an executive or planning function involving the making of a basic policy decision.

Foster v. Dep't of Rehab. & Corr., 10th Dist. No. 12AP-503, 2013-Ohio-912, ¶ 23. In addition, while discretionary immunity applies to some policy decisions themselves, "once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of [that activity or function]." *Reynolds*, 14 Ohio St. 3d at 68. Accordingly, discretionary immunity must be narrowly tailored lest it swallow the general rule waiving sovereign immunity.

Here, the challenged conduct falls squarely into the category of implementation as opposed to decision making. Ms. Smith does not challenge OSU's shift to online-only classes, but rather its refusal to provide a partial refund thereafter. R. 4 ("Even if Defendants did not have a choice in cancelling in-person classes, they nevertheless have improperly retained funds for services they are not providing."). Accordingly, this case is about what followed the shift to online classes, and the implementation of that decision, not the shift itself. *Risner*, 2015-Ohio-4443, ¶ 23 ("[W]hile ODOT is immune from any liability arising from the decisions made pursuant to its discretionary function, immunity does not extend beyond that discretionary function to acts of implementation.").

In addition, the conduct at issue does not involve the kind of government decision making that discretionary immunity was designed to cover. As *Reynolds* explains, the essence of R.C. 2743.02 is that state entities may be held liable "in the same manner as private parties" when they act like private parties. That perfectly characterizes OSU's role here. This is not a case about second-guessing policy decisions or public health directives. Rather, in failing to refund students, OSU assumed the role of a private entity. Just like a private university, it entered into a contract to provide a service (in-person classes) to students, then breached that contract when it failed to refund students after moving classes online. It was operating just like any other private actor in the market. If discretionary immunity applies to such a scenario, it becomes difficult to imagine any case involving a governmental entity in which it would not apply.

Finally, while discretionary immunity can apply to negligence claims, OSU cites no case demonstrating that it can be used to defeat a breach of contract claim like the one at issue here. *See, e.g.*, *Evans v. Ohio Dep't of Rehab. & Correction*, 10th Dist. No. 19AP-743, 2020-Ohio-3191, ¶ 18 ("ODRC generally is immune from tort liability"); *Wassenaar v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. No. 10AP–395, 2010-Ohio-6125, ¶ 16 ("This court has clarified that this discretionary immunity precludes *tort* liability against the state, including ODRC.") (original emphasis).

CONCLUSION

For all the reasons set forth above, this Court should affirm the decision of the Court of Appeals.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on, May 23, 2023, a true and accurate copy of the foregoing Brief of Plaintiff-Appellant was served by emailing to Defendant-Appellee's attorneys at these email addresses:

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