SC23-1470

In the Supreme Court of Florida

THE FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES,
Appellant/Cross-Appellee,

v.

HARBOR BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION, INC.,
Appellee/Cross-Appellant.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
NO. 4D22-0313

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES

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IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

Attorney General Ashley Moody submits this brief as amicus curiae in support of Appellant Florida Atlantic University Board of Trustees.

This case involves two Contracts Clause challenges raised by Appellee Harbor Branch Oceanographic Institute Foundation. *See* Art. I, § 10, Fla. Const. Harbor Branch has asserted that Section 1004.28(3), Florida Statutes, unconstitutionally impairs its contract with FAU in violation of the Contracts Clause. Setting aside the merits of the parties' disputes, the Attorney General submits this brief to address a threshold issue: whether one of Harbor Branch's constitutional challenges is barred for failure to notify the Attorney General as required by Florida Rule of Civil Procedure 1.071.[1] It is. As Florida's "chief state legal officer," Art. IV, § 4(b), Fla. Const., the Attorney General routinely represents the people of Florida when she intervenes in the trial courts to defend the constitutionality of state

[1] The other Contracts Clause challenge, the subject of Harbor Branch's cross-appeal, does not implicate Rule 1.071 because it involves FAU's internal regulations. *See* App'x 12–15. So it does not "draw[] into question the constitutionality of a state *statute*." Fla. R. Civ. P. 1.071 (emphasis added).

statutes. But she is deprived of the opportunity to lodge a timely defense when a party fails to comply with Rule 1.071. This brief seeks to vindicate the important interests served by that rule.

SUMMARY OF ARGUMENT

This appeal comes to the Court from the Fourth District's opinion affirming a final judgment for Appellee Harbor Branch Oceanographic Institute Foundation on one of its Contracts Clause challenges. To save its crumbling endowment, Harbor Branch agreed to reorganize as a direct-support organization for Appellant Florida Atlantic University Board of Trustees. R. 6719; Tr. 183:19–21. Direct-support organizations—as their name implies—assist state universities by holding, investing, and expending money for an affiliate university's benefit. § 1004.28(1)(a), Fla. Stat. In December 2007, the parties finalized a contract reflecting their agreement and thus subjected Harbor Branch both to oversight by FAU and to a host of regulations for direct-support organizations found in Chapter 1004, Florida Statutes (and in FAU's internal regulations). R. 6720; *see also* R. 7253–65 (copy of the contract).

Below, the parties disputed the power of FAU to approve appointments to Harbor Branch's board. Harbor Branch contended

that, under the parties' 2007 contract, it had unilateral authority to make appointments to its own board. R. 2295–309. That contract reflected the statutory requirements at the time, § 1004.28(3), Fla. Stat. (2007), stating that FAU was entitled to "have two (2) appointees" on Harbor Branch's board. R. 7255. By Harbor Branch's lights, that language impliedly granted it the right to appoint the rest of its directors without university oversight. Harbor Branch also argued that amended Section 1004.28(3), Florida Statutes (2018)—which now gives state universities the power to approve *all* directors of their direct-support organizations, beyond the two appointed by the universities themselves—unconstitutionally impaired Harbor Branch's rights under the 2007 contract. The trial court agreed, and the Fourth District affirmed. R. 2295–309.

The district court's decision should be reversed because Harbor Branch never notified the Attorney General of its constitutional challenges at the trial level, as required by Florida Rule of Civil Procedure 1.071. That rule establishes an ironclad notice requirement before a party may challenge the constitutionality of a state statute, preserving the role of the Attorney General in defending legislative enactments.

"The Attorney General is in many ways no ordinary litigant." *Bondi v. Tucker*, 93 So. 3d 1106, 1109 (Fla. 1st DCA 2012). As the State's chief legal officer, she has an "inescapable historic duty . . . to institute, defend or intervene in" any lawsuit that "involves a legal matter of compelling public interest." *State ex rel. Shevin v. Yarborough*, 257 So. 2d 891, 894 (Fla. 1972) (Ervin, J., specially concurring); *see also* § 16.01(4), Fla. Stat. (stating that the Attorney General "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state").

Because constitutional challenges to state statutes present legal questions in which the public and the State have an especially compelling interest, the Attorney General "is a critical stakeholder in defending the validity and constitutionality of the state's laws." *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 989 (Fla. 1st DCA 2013) (Makar, J., concurring). But the Attorney General cannot defend a constitutional challenge that she learns of too late to intervene. Nor can she defend a challenge that she never learns of at all.

To avoid the unacceptable outcome of "constitutional issues important to state government" being "litigated throughout the . . . courts in Florida (and sometimes beyond) without [the Attorney General] being aware of them until it [is] too late to intervene or otherwise be heard," *id.* at 990, the Florida Rules of Civil Procedure require parties challenging the constitutionality of state statutes in the trial courts to "promptly" serve notice of such challenges on either the Attorney General or the local state attorney. Fla. R. Civ. P. 1.071. And to ensure that parties do not simply ignore the rule, failure to comply "bars consideration of a claim that would result in the striking of a state statute as unconstitutional." *Lee Mem'l Health Sys. v. Progressive Select Ins.*, 260 So. 3d 1038, 1042 (Fla. 2018).

Although FAU raised this issue on appeal, the Fourth District affirmed without mentioning Rule 1.071. *See* App'x 6–16. That was error. Harbor Branch did not dispute that *Lee Memorial* calls for "bar[ring] consideration of [its constitutional] claim"; it instead defended its violation of Rule 1.071 by arguing that FAU's omission of this issue at the trial level constitutes invited error. But Rule 1.071 places a burden on the party challenging the constitutionality of a state statute, not on anyone else. And because the notice

requirement protects the *public's* interest, a private party cannot waive compliance with the rule. Only the Attorney General can do that.

Harbor Branch's failure to notify the Attorney General of its constitutional challenge in the trial court forecloses the challenge.

ARGUMENT

Harbor Branch's violation of Rule 1.071 bars consideration of its constitutional challenge.

Harbor Branch violated Rule 1.071 by failing to "promptly" notify the Attorney General of its pending constitutional challenge in the trial court. Under this Court's decision in *Lee Memorial*, that should have been fatal to the constitutional challenge at the trial-court level. *See* 260 So. 3d at 1042 ("Failure to comply with rule 1.071 bars consideration of a claim that would result in the striking of a state statute as unconstitutional."); *Shelton v. Bank of N.Y. Mellon*, 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016) (holding, *sua sponte*, that failure to comply with Rule 1.071 barred the appellate court from "consider[ing] the constitutional issue"). And contrary to Harbor Branch's argument in the district court, the doctrine of invited error

does not excuse its dereliction in notifying the Attorney General. The Court should reverse the Fourth District's decision.

1. Harbor Branch violated Rule 1.071. That rule provides that "[a] party that files a pleading, written motion, or other document drawing into question the constitutionality of a state statute . . . must promptly" do two things. Fla. R. Civ. P. 1.071. First, the party must "file a notice of constitutional question stating the question and identifying the document that raises it." Fla. R. Civ. P. 1.071(a). Second, it must "serve the notice and the pleading, written motion, or other document drawing into question the constitutionality of a state statute . . . on the Attorney General or the state attorney of the judicial circuit in which the action is pending, by either certified or registered mail." Fla. R. Civ. P. 1.071(b).

Harbor Branch did neither. It did not provide the Attorney General any notice until it filed its answer brief in the Fourth District—more than three years after Harbor Branch challenged the validity of Section 1004.28(3) in trial court. *See* R. 2295 ("Answer and Defenses" filed July 10, 2019); Answer Brief and Notice of Constitutional Issue,

Fla. Atlantic Univ. Bd. of Trustees v. Harbor Branch, No. 4D22-0313 (Fla. 4th DCA) (both filed October 4, 2022).[2]

This Court has held in no uncertain terms that a violation of Rule 1.071 "bars consideration of a claim that would result in the striking of a state statute as unconstitutional." *Lee Mem'l Health Sys.*, 260 So. 3d at 1042. That rule makes sense.

The Attorney General is the "chief state legal officer," Art. IV, § 4(b), Fla. Const., meaning she has the duty to determine whether to intervene to defend state law against constitutional challenge. *Bondi*, 93 So. 3d at 1109; *Yarborough*, 257 So. 2d at 894 (Ervin, J., specially concurring); *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976); *see also* § 16.01(4)–(5), Fla. Stat. In doing so, the Attorney General represents the public's interest in protecting exercises of the State's sovereign authority. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."

[2] The Fourth District docket can be accessed at: http://tinyurl.com/4cm8ewkc.

(quotations omitted)). But the Attorney General cannot defend against constitutional challenges of which she is unaware. To effectively perform her constitutional duties, she must be timely informed of such challenges. *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 838 (Fla. 1973). The need and understanding that "notification to the Attorney General on such important legal issues should be a matter of course, not a matter of chance," *Florida Carry*, 133 So. 3d at 990 (Makar, J., concurring), is reflected in general law, which requires parties raising constitutional challenges to serve a copy of the complaint on either the Attorney General or the local state attorney. § 86.091, Fla. Stat.

Rule 1.071 implements this statutory requirement in reticulated terms. The rule dictates (1) *whom the requirement applies to*: any "party that files a pleading, written motion, or other document drawing into question the constitutionality of a state statute"; (2) *what the party must file with the court*: "a notice of constitutional question stating the question and identifying the document that raises it"; (3) *what they must serve on the Attorney General*: a copy of the notice and "the pleading, written motion, or other document" raising the constitutional challenge; (4) *how the notice must be*

served: "by either certified or registered mail"; and (5) *when the notice must be filed and served*: "promptly" after filing the triggering document.

Underscoring the importance of the rule's notice requirement, this Court has insisted on strict compliance.[3] In *Lee Memorial*, this Court held that a party's failure to comply with Rule 1.071 "bars consideration of" an unnoticed constitutional challenge that would "result in the striking of a state statute as unconstitutional." 260 So. 3d at 1042.[4] It reached that result despite two considerations that might otherwise have "cured this non-compliance." *Id.* For one, the party had promptly notified the Attorney General of a *different* constitutional attack on the statute, predicated on another section of the

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[3] In doing so, Florida joined several other states with similar strict-compliance rules. *See, e.g.*, *Weinert v. City of Great Falls*, 97 P.3d 1079, 1082 (Mont. 2004) (failure to notify Attorney General under Montana Supreme Court rule waived constitutional challenge); *State v. Denton*, 949 N.W.2d 344, 347 (Neb. 2020) (requiring "strict compliance" with Nebraska Supreme Court rule on notifications to the Attorney General); *Craft v. Commonwealth*, 483 S.W.3d 837, 840 (Ky. 2016) (explaining that the Kentucky Supreme Court's "ironclad adherence" to procedural rules requiring notice to the Attorney General demanded "strict compliance").

[4] *See also Shelton v. Bank of New York Mellon*, 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016); *Diaz v. Lopez*, 167 So. 3d 455, 460 n.10 (Fla. 3d DCA 2015).

Florida Constitution. *Id.* The trial court nevertheless ruled during a summary judgment hearing that the unnoticed challenge was "not ripe for decision," an outcome this Court's holding appeared to endorse. *Id.* For another, after the trial court made that initial ruling, the party amended its original notice to alert the Attorney General to the other constitutional challenge. *Id.* In upholding the trial court's decision still not to entertain the late-noticed challenge, this Court wrote that "[t]he trial court was not required to conduct further proceedings and possibly delay the case pending a decision by the State as to whether to participate." *Id.*

In short, a party wishing to challenge a state statute must notify the Attorney General "promptly," and the failure to do so bars the challenge.[5]

2. Harbor Branch did not contend otherwise below. Instead, it asserted that FAU invited the trial court to err by considering Harbor Branch's constitutional challenge to Section 1004.28(3), despite

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[5] We note, however, that it would suffice to resolve this case were the Court to conclude that noncompliance bars consideration when notice to the Attorney General comes so late as to "possibly delay the case pending a decision by the State as to whether to participate," *Lee Mem'l Health Sys.*, 260 So. 3d at 1042—as occurred here.

Harbor Branch's failure to notify the Attorney General. Answer/Cross-Initial Brief at 73–81, *Fla. Atl. Univ. Bd. of Trs. v. Harbor Branch Oceanographic Inst. Found.*, 372 So. 3d 302 (Fla. 4th DCA 2023) (No. 4D22-0313) (filed October 4, 2022). It pointed to FAU's requests for rulings on the merits (in motions for summary judgment and motions *in limine*) that Florida's law did not violate the Contracts Clause, and FAU's pre-trial stipulation that an issue for trial was whether the director-approval statute "unconstitutionally impair[ed]" the parties' contract. R. 2583, 2598-99, 4708-15, 5766, 6237, 6721. By doing so, Harbor Branch says, FAU invited the trial court to skip over the Rule 1.071 issue that should have precluded consideration of the merits altogether.

That does not work at all. The right to notice under Rule 1.071 was the Attorney General's, not FAU's. While a party can waive or invite error for its *own* legal rights, *Gilman v. Butzloff*, 22 So. 2d 263, 265 (Fla. 1945), it cannot do so for someone else's rights, *Weaver v. Myers*, 229 So. 3d 1118, 1127 (Fla. 2017) ("[O]ne cannot waive a right he or she does not have."); *see also, e.g.*, *United States v. Alvarez-Perez*, 629 F.3d 1053, 1062 (9th Cir. 2010) (invited error does not apply to non-waivable rights); *Raithel v. State*, 226 So. 3d 1028, 1032

(Fla. 4th DCA 2017) (rejecting invited error argument as to competency hearings because such hearings may not be waived). And so too when the public's rights are concerned, an "individual cannot waive [that] right." *Chames v. DeMayo*, 972 So. 2d 850, 860 (Fla. 2007) (homestead rights); *see also James v. Leigh*, 145 So. 3d 1006, 1008–09 (Fla. 1st DCA 2014) (absolute litigation privilege); *Zedner v. United States*, 547 U.S. 489, 500–03 (2006) (defendant cannot "prospectively waive" the protections of the Speedy Trial Act because it "was designed with the public interest firmly in mind"); *In re Gov't Investigation*, 607 F. Supp. 3d 762, 779 (S.D. Ohio 2022) ("[i]ndividuals cannot waive" the public's "right to an effectively functioning grand jury investigation").

Rule 1.071 creates a "right designed to protect both the individual and the public" by notifying the Attorney General so that she can participate in legal matters of the utmost importance. *Chames*, 972 So. 2d at 860. That interest would "become virtually meaningless if it could be overcome by the mutual interest of the parties." *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 338 (S.D.N.Y. 2012) (right of access to judicial records).

Principles of inter-branch comity reinforce this conclusion. Respect for the Attorney General's role as "critical stakeholder in defending the validity and constitutionality of the state's laws" demands no less. *Fla. Carry*, 133 So. 3d at 989 (Makar, J., concurring). Her ability to effectively exercise that authority should not turn on an "element of serendipity" associated with private litigation. *Id.* at 991. Such notice is "beneficial to the swift and proper running of justice and to the interests of the State," by allowing the Attorney General to be "fully prepared to intervene" if necessary. *Kerwin*, 279 So. 2d at 838 (holding that the Attorney General is a proper party to constitutional challenges to state statutes). And the Legislature too is owed a fair opportunity to have the constitutionality of its enactments defended by the chief legal officer of the state. *See Wright v. City of Miami Gardens*, 200 So. 3d 765, 781 (Fla. 2016) (Canady, J., concurring in result) (citing Rule 1.071). Compliance with Rule 1.071 promotes comity with the coordinate branches.[6]

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[6] In *State Farm Mutual Automobile Insurance v. Warren*, 805 So. 2d 1074, 1076 (Fla. 5th DCA 2002), the Fifth District held that the lack of joinder of the Attorney General under Section 86.091, Fla. Stat. (1999), was invited error of the parties who asked the trial court to "determine [the] constitutionality [of a state statute] in its joint pretrial statement." *Id.* But that court did not consider the fact that

Below, Harbor Branch complained that, absent application of invited error, defendants would have an incentive to "sandbag"—that is, to strategically avoid raising the defense of lack of notice until late in the litigation. It seems implausible, however, that defendants would deliberately avoid raising a meritorious defense simply to spring it on their opponents later. In any event, the risk is insubstantial. "It was [Harbor Branch's] job—and [its] alone—to preserve [its constitutional challenge] under Rule [1.071]." *United States v. Dubin*, 27 F.4th 1021, 1034–35 (5th Cir. 2022) (en banc) (Oldham, J., concurring).[7] The law appropriately requires a litigant who seeks to

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invited error does not apply because these rules protect the interests of the Attorney General and of the public. In any event, the court noted that its determination of that issue was inconsequential because it found the statute "constitutionally valid." *Id.* at 1076–77.

[7] Nor can Harbor Branch rely on its compliance with Florida Rule of Appellate Procedure 9.425, which requires notice to the Attorney General of constitutional challenges raised on appeal. Rule 1.071 exists to ensure that the Attorney General learns of constitutional attacks at the appropriate stage, when the case is initially being litigated in the trial court. Rule 1.071 existed for a decade when this Court adopted Rule 9.425 in 2020. *See In re Amends. to Fla. R. App. P.—2020 Regular-Cycle Rep.*, 345 So. 3d 30 (Fla. 2020). The Court's decision to adopt a new rule would be meaningless if parties could comply with one rule simply by complying with the other. *See City of Bartow v. Fiores*, 301 So. 3d 1091, 1097 (Fla. 1st DCA 2020) (canon against surplusage). Notice for the first time on appeal also does not cure prejudice resulting from the missed opportunity to develop a record in trial court.

invalidate a sovereign legislative act to shoulder the minimal burden of notifying the sovereign itself.

Because Harbor Branch violated Rule 1.071, the trial court and the district court should not have reached the Contracts Clause issue about director approval. The Court should reverse.

CONCLUSION

For the reasons discussed above, the Court should reverse the district court's opinion to the extent it affirms the trial court's determination that Section 1004.28(3) violates the Contracts Clause.

Date: December 26, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served by the Florida Courts E-Filing Portal, or by email, on December 26, 2023, to all counsel of record, including:

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CERTIFICATE OF COMPLIANCE

I certify, under Florida Rule of Appellate Procedure 9.045(e), that this brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 3,276 words.

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