

**IN THE SUPREME COURT OF FLORIDA**

No. SC23-1470

THE FLORIDA ATLANTIC UNIVERSITY  
BOARD OF TRUSTEES,

*Appellant/Cross-Appellee,*

v.

HARBOR BRANCH OCEANOGRAPHIC  
INSTITUTE FOUNDATION, INC.,

*Appellee/Cross-Appellant.*

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On Appeal from the Fourth District Court of Appeal  
L.T. Case No. 4D22-0313

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**ANSWER/CROSS-INITIAL BRIEF OF HARBOR  
BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION, INC.**

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## INTRODUCTION

In 2007, after thirty years as an independent not-for-profit, the Harbor Branch Oceanographic Institute Foundation, Inc. (the “Foundation”) agreed to become a University Direct-Support Organization (“DSO”) of Florida Atlantic University (“FAU”). The Foundation only agreed to do so because the parties’ contract included express language preserving important aspects of the Foundation’s self-governance. This dispute arose when FAU attempted to assert control of the Foundation under a 2018 amendment to the Florida DSO statute and a 2009 amendment to a Florida Board of Governors (“BOG”) regulation, claiming, respectively: (1) a new right to approve or veto every member of the Foundation’s board; and (2) a new right to approve or veto the Foundation’s budget.

These new amendments directly conflict with the parties’ contract, which provided that FAU would appoint **two members** of the Foundation’s board, thus guaranteeing the Foundation a majority of its board appointments. And although the Foundation agreed to spend its endowment only to or for the benefit of FAU by becoming a DSO, the parties’ contract guaranteed that the

Foundation would retain “sole discretion” over the manner, means, and amounts in which it would provide those funds.

Both the appeal and cross-appeal are controlled by *Citrus County Hospital Board v. Citrus Memorial Health Foundation, Inc.*, where this Court held that Florida’s strong protection against nearly any impairment of a contract is violated when a new law effectively rewrites a contract by granting one party rights that it did not have or for which it did not bargain. [150 So. 3d 1102, 1108 \(Fla. 2014\)](#). That includes where, as here, a new law alters a contractual right to make appointments to a governing board. *Id.* Both the trial court and the Fourth DCA correctly held under *Citrus County* that the 2018 amended DSO statute is unconstitutional as applied to the parties’ 2007 contract.

On the other hand, both lower courts erred by not recognizing that granting FAU plenary power over the Foundation’s budget under the new BOG regulation is necessarily inconsistent with the Foundation’s sole discretion over distributions as provided in the parties’ contract. As such, this new power of budget control is an impairment of contract. See *Citrus Cnty.*, [150 So. 3d at 1108 & n.6](#).

Alternatively, this Court can, and should, avoid ruling on the foregoing constitutional questions because the amendments to the DSO statute and BOG regulation do not apply retroactively to the parties' 2007 contract, and thus cannot have any effect on those rights. *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 877 (Fla. 2010). An interpretation of a statute that avoids an unconstitutional application is favored by this Court. See *Tyne v. Time Warner Ent. Co., L.P.*, 901 So. 2d 802, 810 (Fla. 2005) (quoting *Corn v. State*, 332 So. 2d 4, 8 (Fla. 1976); other citations omitted).

The Rule 1.017 notice argument does not support reversal on FAU's appeal of the board-appointment issue. The invited error doctrine bars FAU from raising the argument because FAU repeatedly and directly requested that the trial court adjudicate the constitutional question. Moreover, while this Court has not specifically addressed the question, it should hold, as other federal and state courts have done with similar notice statutes, that Rule 1.017 only applies to facial challenges that seek to strike down a law entirely, not to this as-applied challenge to one contract. Because the Attorney General declined to file a brief in the Fourth DCA despite receiving prompt notice, she should be deemed to have waived this

argument. Finally, as the Attorney General has taken no position on the merits here, any failure to provide notice in the trial court was harmless.

### **STATEMENT OF FACTS**

The following describes how this dispute developed from a 2007 contractual arrangement that benefited all involved until Florida Atlantic University (“FAU”) attempted to transform it into a decidedly one-sided deal.<sup>1</sup>

#### **A. 1974-2006: The Foundation’s endowment fund and long history as a non-profit charitable organization.**

The early history of the Harbor Branch Oceanographic Institute Foundation, Inc. (the “Foundation”) is not in dispute: it was established in the early 1970s as an independent, non-profit organization. R. 6719 ¶ 2. For three decades, the Foundation independently operated the Harbor Branch Oceanographic

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<sup>1</sup> The discussion of the facts as relevant to FAU’s appeal is taken from the decisions below and from undisputed facts in the record. With respect to the Foundation’s cross-appeal, we also rely on undisputed facts in the record except as to one specific factual issue. See Section I(B) of the Foundation’s Cross-Appeal, *infra*. If this issue is even relevant, we expressly argue that the record does not provide support for the trial court’s finding.

Institution (the “Harbor Branch Institute”) and employed its own faculty, scientists, and researchers to fulfill its mission to support oceanographic research and exploration. R. 378 ¶ 33.

The Foundation’s endowment fund was originally established in 1994 by a \$5.7 million grant from the John Seward Johnson 1963 Charitable Trust (the “Johnson Trust”). R. 6853; *see also* R. 8271 ¶ 4. Under the Johnson Trust instrument, the Foundation has an obligation to ensure that its endowment only funds the scientific or educational activities of the Institute. R. 6855.

Since 1998, the Foundation has also received millions of dollars of annual funding from the proceeds of four Florida Specialty License Plates. R. 379 ¶ 35. By statute, the Foundation must ensure that these proceeds fund marine and aquaculture-related research and education. *See* §§ 320.08058 (19), (33), (43), (44), Fla. Stat.

By 2006, Harbor Branch was renowned as an “international brand[,]” R. 6940–41, described by then-Florida Senator Ken Pruitt as “one of those jewels of our state and of our nation.” Tr. 427:2–5. It also owned a total of approximately 516 acres of unique real estate along the Indian River Lagoon valued at \$86 million. *See* R. 6878–84 (Appraisal). The Institute’s 138-acre campus and related real,

personal, and intellectual property—which the Foundation eventually donated to FAU as part of its transition to DSO status—was valued by FAU at \$92 million. Tr. 171:3-6, 12–15, 224:12–17; R. 7253, pp. 1–2, §§ 1(A) (real property), 1(B) (personal property), 1(C) (intellectual property).

**B. 2006-2007: The Foundation and FAU begin discussions, and the Foundation steadfastly rejects FAU’s efforts to obtain control of the Foundation or its endowment.**

Around 2006, the Institute’s operational expenses and overhead grew to the point that funding future operations would reduce the principal fund balance in its endowment over time. *See* R. 11676. The Foundation engaged in discussions with Senator Pruitt and FAU’s then-President Frank Brogan. *Id.* Ultimately, FAU proposed: that FAU take over the Institute’s operations as an FAU campus, that the Foundation sell other real estate to the State for repayment of the Foundation’s debt, that the Foundation retain ownership of its endowment fund, and that the Foundation become a University Direct-Support Organization (“DSO”) of FAU. *See id.*; *see also* Tr. 124:15–127:2 (Foundation attorney outlining initial discussions with FAU and listing pros and cons of entering a relationship with FAU).

Under Florida law, a DSO is a not-for-profit operated exclusively for the benefit of a university. § 1004.28, Fla. Stat. The Foundation knew that if it became a DSO, it would be subject to this statutory restriction. See R. 11676. However, during negotiations, the Foundation’s primary concern was that “if it elected to become a DSO of FAU, its discretion to expend funds ‘to or for the benefit’ of FAU may be **impeded by FAU** and/or the FAU Foundation.” R. 11676–77 (emphasis added). As the trial court found, “[the Foundation] was assured by FAU that [it] would maintain the **sole discretion to expend it funds** ‘to or for the benefit’ of FAU.” *Id.* (emphasis added).

Specifically, at a March 2, 2007, meeting in which the Foundation relayed its concerns about becoming a DSO, President Brogan promised the Foundation that if it became a DSO, it would retain a certain level of independence. See *id.*; R. 6464. He expressly reassured the Foundation that:

- While the Foundation’s endowment would be placed in a DSO, the Foundation would “**remain independent.**”
- While FAU expected seats on the Foundation’s board of directors, FAU “**does not seek control** of the [F]oundation.”
- The Foundation’s board “**will have discretion** regarding funding the FAU/HBOI Institute.”

R. 6934–35 (emphasis added); *see also* Tr.137:7–139:24; 202:8–203:19. So reassured, the Foundation decided to become a DSO of FAU. R. 11676–77.

The parties’ subsequent efforts to document their agreement in a Memorandum of Understanding (“MOU”) are not in dispute. FAU’s initial drafts attempted to limit the Foundation’s discretion over its endowment. R. 6991 (proposing in July 2007 that at least 50% of the Foundation’s distributions must be made for “general, undesignated FAUHBOI operations”); R. 7140 (proposing in an October 2007 draft that the Foundation’s distributions be made in the “reasonable discretion” of its board). The Foundation rejected these proposals. *See* R. 7255, p. 3, § 4.

Instead, the Foundation insisted that the MOU grant it the “sole discretion” FAU originally agreed the Foundation could retain. R.11679. On November 13, 2007, the Foundation sent FAU a letter that included the following proposed language, which became part of Section 4 in the final MOU:

[Foundation] distributions shall be made in the ***sole discretion*** of the HBOI Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU.

R. 7213–14 (language as proposed in the letter) (emphasis added); Tr. 163:17–164:25.

**C. December 2007: The parties sign the MOU with full awareness of the laws in effect at the time regarding the appointment of directors and budget review.**

The Foundation and FAU signed the final version of the MOU in December 2007. *See* R. 11672. Section 4 mirrored the Foundation’s proposed language:

HBOI will amend its Articles of Incorporation and By-Laws to . . . become a separate, standalone direct-support organization . . . . The HBOI Foundation’s **board of directors will have (2) appointees** from FAU. The current Harbor Branch endowment will remain with the Foundation. . . . HBOI Foundation distributions shall be made in the **sole discretion** of the HBOI Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU.

R. 7255, p. 3, § 4 (emphasis added). The MOU also contains an integration clause, R. 11681, which the Foundation included to ensure that the MOU would **not** be subject to future changes in the law. *See id.*; *see also* Tr. 149:4–8; 170:17–23.

The trial court explained that “[t]he MOU in essence incorporated the DSO board of director requirements contained within [Fla. Stat. § 1004.28\(3\) \(2007\)](#), which specifically limited FAU’s

involvement with the Foundation’s board of directors to 2 appointees.” R. 11684–85; *see also* Tr. 192:7–20; 243:8–245:3. That law provided, in relevant part:

(3) BOARD OF DIRECTORS. ***The chair of the university board of trustees may appoint a representative to the board of directors*** and executive committee of any direct-support organization established under this section. ***The president of the university for which the direct-support organization is established, or his or her designee, shall also serve on the board of directors*** and the executive committee of any direct-support organization established to benefit that university.

§ 1004.28(3), Fla. Stat. (2007) (emphasis added); *see* R. 11674.

The trial court also found that the Foundation’s corporate documents—specifically, the Restated Articles of Incorporation and Bylaws, R. 7148–84; Tr. 540:12–22—expressly laid out how the Foundation intended to govern itself and ensured the **Foundation** would appoint a majority of its directors. *See* R. 11682–83. Article VI, entitled “Board of Directors,” provided that the number of Foundation directors shall be “not less than five,” and that FAU could appoint two members to the Foundation’s board. *Id.* (quoting R. 7150). The Foundation’s bylaws provided the same. *Id.* (citing R. 7156–57).

FAU knew that the MOU ensured that FAU’s appointment rights would only be for a minority of the board (two out of at least five

members). *See id.* (“Per the Foundation’s articles of incorporation and bylaws, which FAU knew about and approved, Foundation board appointees would remain in the majority and were not subject to approval by FAU.”).

Regarding the budget, the operative 2007 Board of Governors (“BOG”) Regulation 9.011 provided DSOs—not universities—with the authority to prepare and approve their budgets:

(3) Operating budgets of direct support organizations shall be prepared at least annually, ***approved by the organization’s governing board*** and recommended by the university president to the Board of Regents for review.

R. 11674 (emphasis added).

After the parties signed the MOU, the Foundation, managed by its board, retained control of its endowment and exercised sole discretion over how distributions from that endowment would be spent for the benefit of FAU to support oceanographic research, consistent with its obligation to the Johnson Trust. *See Fla. Atl. Univ. Bd. of Trustees v. Harbor Branch Oceanographic Inst. Found., Inc.* (“FAU”), 372 So. 3d 302, 308 (Fla. 4th DCA 2023).

**D. 2009-2017: The parties' course of dealing confirms the Foundation's interpretation of the MOU regarding the budget-approval issue.**

Effective August 6, 2009, the BOG amended Regulation 9.011(3) to, for the first time, provide a university with the power to approve a DSO's budget:

Operating budgets of support organizations shall be prepared at least annually, and approved by the organization's governing board **and the university** board of trustees or designee.

R. 11673 (emphasis added).<sup>2</sup>

The Foundation, however, continued to operate pursuant to the regulation in place at the time it executed the agreement with FAU. For years, it continued to create and finalize its own budget—including paying for and employing its own executives, support staff, independent accountants, and legal counsel. This occurred without **any** input or approval by FAU. *See* R. 11678; *see also* Tr. 43:12–20; 46:7–11; 232:18–233:15; 271:3–6. By contrast, during that same period, FAU routinely approved the annual budgets of its **other** DSOs. *See* R. 11678; *see also* R. 7542–43; R. 7583; R. 7719–20; R.

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<sup>2</sup> This Regulation has since been renumbered to BOG Regulation 9.011(4).

7730–31; R. 10372–75 (Russell Depo. Tr. 22-26 (referring to the FAU Foundation)).

On October 3, 2012, the parties signed a Second Addendum to the MOU “to further memorialize the roles and responsibilities of each party in the DSO relationship.” R. 7673; *see also* R. 11673. The evidence at trial shows that during negotiations, FAU requested deletion of the “sole discretion” provision and inclusion of a new provision that would bind the Foundation to the DSO laws in effect as of 2012—which would have included the new budget-approval power granted by the 2009 amendment to Regulation 9.011(3). R. 7590–94; Tr. 561:24–562:16; 587:1–588:1; *see also* R. 7563–67 (contemporaneous MOU signed by FAU and another DSO without the “sole discretion” provision); R. 7569–74 (same); R. 7576–79 (same). The Foundation rejected FAU’s proposals. R. 7675. Instead, the Second Addendum “expressly references and reaffirms [Section] 4 of the MOU.” R. 11673. As noted by the trial court, this resulted in an addendum that made “**no substantive changes** to the MOU[.]” *Id.* at \*2 (emphasis added); R. 6721 ¶ 19.

The Foundation also established at trial that, in 2015, FAU tried unsuccessfully to gain access to the Foundation’s multi-million-

dollar endowment and other resources to cover general university expenses, including expenses entirely unrelated to the Foundation. R. 7814–15; R. 8032 (documenting FAU’s request that the Foundation provide \$50,000 to fund football stadium); Tr. 59:18–62:5; 66:8–67:2; 70:22–72:10.

The trial court found that FAU approved the Foundation budget for the first time in 2015—six years after the regulation was amended to include budget-approval power. *See* R. 11678 (finding that “from 2008-2014, the full and complete budgets of the Foundation . . . were not separately reviewed by the FAU [B]oard”). It approved the budget in 2016 as well. R. 11679. However, the Foundation established at trial that it was unaware of these purported approvals. *See* Tr. 94:22–95:5 (Foundation President testifying that she believed she was presenting the budget to the FAU Board for “informational purposes”).

In 2017, having been rebuffed in prior attempts to gain control over the Foundation’s funds, FAU attempted for the first time to actually change the Foundation’s budget. R. 11678. FAU’s Vice President of Research, Daniel Flynn, demanded that the Foundation transfer its accounting, auditing, administrative, and legal functions

to FAU—ostensibly to save money. *See id.*; *see also* R. 7919–20; R. 7939–40; Tr. 353:8–355:9. Specifically, the Foundation established that Flynn’s proposed budget: (1) increased the Foundation’s payments to FAU for facilities, utilities, and equipment from \$10,600 to \$250,000, R. 7980 (Line 82000); Tr. 385:18–86:15; (2) **eliminated entirely** the funds for the Foundation’s CEO Katha Kissman, R. 7979; and (3) made Flynn himself the President and CEO of the Foundation, *id.*

As one current and one former FAU employee testified, Flynn’s expressed intention was to (1) eliminate Katha Kissman’s role as CEO of the Foundation and personally replace her; (2) absorb the Foundation into the FAU Division of Research; and (3) use some of the funds within the Foundation to sponsor other, non-Foundation related activities at FAU. R. 9359; R. 9385–86; R. 9416–17; R. 9423 (Boles Depo. Tr. 58:8-24; 86:19-87:24; 126:9-127:4; 133:9-17); R. 9416–17; R. 9423 (Boles Depo. Tr. 126:9-127:4; 133:3-17); *see also*. R. 9256–59 (Wilkie Depo. Tr. 62:1-65:8); R. 9425 (Boles Depo. Tr. 137:9-19).

The Foundation correctly interpreted FAU’s demands as an effort to control the Foundation in violation of the MOU, and refused

to revise the budget. R. 7919. Given FAU’s hostility to the terms of the MOU, one board member moved to initiate the decertification process. R. 7919. However, the board unanimously voted to table the motion. *Id.* Instead, the board adopted the less drastic approach of seeking judicial review of FAU’s actions. R. 58–73. But the stalemate over budgetary control continued to threaten the Foundation’s ability to distribute its endowment in its sole discretion—as guaranteed in the MOU and as required to discharge its duty under the Johnson Trust.

**E. 2019: FAU seeks to impose new board veto power under the 2018 amendment to the DSO statute.**

After becoming a DSO, the Foundation appointed all but two of its board members—consistent with the MOU, corporate documents, and the law at the time—and continued to do so for several years with no interference from FAU.

In 2018, while the budget-approval issue was pending in the trial court, the Florida Legislature passed the Florida Excellence in Higher Education Act of 2018 (the “Act”) to address various aspects of Florida higher education. Ch. 2018-4, Laws of Fla. Section 7 of the Act amended the “BOARD OF DIRECTORS” provision in [Section](#)

1004.28(3). The new language provided, for the first time: “[t]he university board of trustees shall approve **all appointments** to any direct-support organization not authorized by this section.” § 1004.28(3), Fla. Stat. (emphasis added). The Florida BOG amended Regulation 9.011(9) to track the language of the amended statute.

In May 2019, FAU emailed the Foundation claiming that the Foundation was now required to submit its appointees to its board to FAU for approval under the revised Section 1004.28(3). R. 8257–58. The Foundation refused because the new law was inconsistent with the MOU. *Id.*

### **STATEMENT OF THE CASE**

The Foundation first filed suit in March 2017, seeking a declaratory judgment that FAU does not have the power to approve (or veto) the Foundation’s budget. R. 58–73. In its October 2019 Second Amended Complaint, the Foundation sought, in relevant part, the same relief (Count I).<sup>3</sup> R. 2432–67.

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<sup>3</sup> The amended complaint also included a claim for FAU’s anticipatory breach of the MOU (Count II), but this count is not at issue on appeal.

In June 2019, FAU filed a counterclaim against the Foundation, which it amended in January 2021. R. 2031–60; R. 4049–68. FAU sought a declaratory judgment that it has approval power over the Foundation’s board appointments under the 2018 amendment, and that it has statutory authority to approve (or veto) the Foundation’s budget. R. 4065. The Foundation raised affirmative defenses to the counterclaim. R. 2295–309. The parties conducted substantial document and deposition discovery.

The parties filed three motions for summary judgment.<sup>4</sup> With respect to FAU’s alleged right to approve all Foundation board appointments, the trial court ruled as follows:

- The 2018 amendment gave universities new board approval rights not provided in the 2007 DSO statute. R. 6014–19.
- The MOU contained a latent ambiguity as to whether the parties intended to limit FAU’s involvement in the Foundation’s board to its two appointees, R. 6019–21, so the trial court could not rule on the impairment issue until it resolved the ambiguity at trial. *Id.*

With respect to the budget-approval issue, the court held on summary judgment:

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<sup>4</sup> R. 4362–74, 4700–5107 (motions); R. 5116–76 (declaration); 5482–603, 5715–21 (responses and replies).

- The unambiguous language of the 2007 version of BOG Regulation 9.011(3) vested budget-approval power solely with the DSO’s governing board, whereas the amended 2009 Regulation required the university board of trustees or its designee to approve a DSO’s governing budget as well. R. 5944–49.
- The MOU contained a latent ambiguity as to whether the parties agreed that the Foundation would maintain sole approval power over its operating budget, R. 5950–52, so the trial court could not rule on whether amended BOG Regulation 9.011(3) impaired the MOU until it resolved the ambiguity at trial.
- The DSO statute—Section 1004.28(2), Florida Statutes—did not grant FAU the power to approve the Foundation’s budget at the time of the hearing, R. 5940–43, because the “budget oversight” provision of the statute only applies to a DSO that uses “property, equipment, or facilities” of the university, which the Foundation did not do as of summer 2018. *Id.*

Prior to trial, FAU filed a ***unilateral*** stipulation that the trial judge should decide the Foundation’s unconstitutional-impairment claim and defense. R. 6342 ¶¶ 4, 5. The parties subsequently filed a joint pretrial stipulation to the same effect. R. 6721–22. FAU also asked the trial court to decide the constitutional issues in multiple pre- and post-trial briefs without raising an objection under Rule 1.071. *See* R. 2583; R. 2598–99; R. 4708–15; R. 5766 (motions for summary judgment); R. 6237 (motion in limine); R. 6400–10 (pre-

trial brief); R. 11640–42 (post-trial proposed findings of fact and conclusions of law).

The trial court held a four-day bench trial in November 2021. It issued a final judgment and amended final judgment (to correct a scrivener’s error) in December 2021. *See generally* R. 11668–90. On the board-appointment issue, the trial court reiterated its earlier ruling that the MOU contained a latent ambiguity, and then resolved the latent ambiguity in the Foundation’s favor. *See* R. 11671, R. 11680. After considering the MOU, substantial parol evidence, and the parties’ respective interests, the trial court concluded that FAU did not have the right to approve all Foundation board appointments. *See* R. 11686–89.

It reasoned that according to the Foundation’s corporate documents, which FAU knew about and approved, “Foundation board appointees would remain in the majority and were not subject to approval by FAU.” R. 11683. The trial court found that when entering the MOU, both parties “clearly understood and agreed that FAU would not be entitled to have any other ‘say-so’ in the Foundation board membership other than the 2 appointees noted in the MOU.” *Id.* Therefore, the trial court held that the 2018

amendment to Section 1004.28(3) unconstitutionally impaired the Foundation's contractual rights under the MOU, and "FAU failed to present evidence showing that Florida's actual interest [in the amendment] outweighs this severe impairment[.]" R. 11688.

On the issue of budget approval, the trial court reiterated its earlier ruling that the MOU contained a latent ambiguity, then resolved that ambiguity in FAU's favor. *See* R. 11671; 11679. Specifically, it found that the MOU did not address the Foundation's sole discretion to approve its own budget. R. 11680. According to the trial court, the "sole discretion" language in the MOU was intended to "memorialize the agreement between the parties that the Foundation had sole discretion to expend/distribute its funds 'to and for the benefit' of FAU" versus "FAU having the ability to 'weigh in' on such DSO expenditure decisions." R. 11680–81. Because the MOU "did not address the Foundation's budget approval," the court in turn held that the changes to Regulation 9.011(3) did not rewrite any term of the MOU or materially impair it. *Id.*

FAU timely appealed as to board approval, and the Foundation timely cross-appealed as to budget approval. R. 11785–810. Pursuant to Rule 9.425 of Appellate Procedure, the Foundation

notified the Attorney General and supplied it with a copy of the answer brief the same day it was filed, October 4, 2022. IB at 24 n.2; AG Br. at 15 n.7.

The Fourth DCA affirmed. *See FAU*, 372 So. 3d 302 . Regarding FAU’s appeal on board appointments, the appellate court found no error in the trial court’s determination that Section 1004.28(3) unconstitutionally impaired the MOU. *See id.* at 308. It agreed that the MOU restricted FAU’s influence on the board to its selection of two members, and the 2018 amendment to the DSO statute “effectively rewrote” this contract by requiring that **all** of the Foundation’s appointments be approved by FAU. *See id.* The Fourth DCA further adopted the trial court’s factual conclusion that FAU failed to establish an interest outweighing the substantial impairment to the MOU. *See id.*

Regarding the Foundation’s cross-appeal, the Fourth DCA agreed with the trial court that the MOU did not expressly address budget approval, so the amended regulation did not impair any provision of the MOU by requiring university approval. *See id.* at 311. But the Fourth DCA also stated that its holding “does not affect the

Foundation’s exclusive discretion to make distributions as provided in the MOU.” *Id.* at 310–11.

### **STANDARD OF REVIEW**

Whether ambiguity exists in a contract is a question of law, as is the interpretation of a non-ambiguous contract. See *Summitbridge Credit Invs. III, LLC v. Carlyle Beach, LLC*, 218 So. 3d 486, 488 (Fla. 4th DCA 2017). However, resolution of a latent ambiguity is a question of fact. See *Land O’Sun Realty Ltd. v. REWJB Gas Invs.*, 685 So. 2d 870, 872 n.3 (Fla. 3d DCA 1996). The Court may consider “parol and other extrinsic evidence” to determine “the true intent of the parties.” *Bd. of Trustees of the Internal Improvement Tr. Fund v. Lost Tree Vill. Corp.*, 805 So. 2d 22, 26 (Fla. 4th DCA 2001).

A statute’s constitutionality is a question of law reviewed de novo. See *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013) (citing *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010)). When the question involves both factual and legal issues, the Court defers to the trial court’s factual findings if supported by competent, substantial evidence and reviews the legal questions de novo. See *id.* (citing *N. Florida Women’s Health and Counseling Serv., Inc. v. State*, 866 So. 2d 612, 626–27 (Fla. 2003)).

## **SUMMARY OF ARGUMENT**

### **A. FAU's appeal on the board-appointment issue.**

Rule 1.071's notice requirement does not require reversal because FAU repeatedly asked the trial court to decide the constitutional question before it, without ever invoking Rule 1.071. The invited error doctrine thus bars FAU from raising the notice issue on appeal. Likewise, the Attorney General declined to raise the issue at the Fourth DCA after receiving notice of the appeal. She has thus waived any objection here. Moreover, the better reading of Rule 1.071 is that it only requires notice of facial challenges to statutes, not an as-applied challenge to a single discrete contract like the one presented here. And finally, even if the trial court erred in deciding the constitutional question prior to the Attorney General receiving notice, that error was harmless because if the constitutional issue were genuinely important or dispositive, the Attorney General would have taken a position on the merits—and thus, earlier notice would not impact the outcome of this case.

The Fourth DCA's decision on the merits of FAU's appeal should be affirmed. The trial court found, and the Fourth DCA affirmed, that the MOU specifically limited FAU's involvement with the

Foundation's board to its selection of *two* directors. This holding is supported by both the language of the MOU and the substantial parol evidence that the trial court considered. Therefore, if Section 1004.28(3) is applied retroactively, it would substantially impair the Foundation's rights under the MOU in violation of Florida's Contracts Clause. See *Citrus Cnty.*, 150 So. 3d at 1108.

Finally, the judgment may be affirmed on the alternative ground argued—but not reached—below, which would avoid deciding a constitutional issue. The 2018 amendment to Section 1004.28(3) should be read to only apply prospectively, leaving undisturbed the Foundation's unqualified authority in the MOU to appoint all but two directors. FAU does not explain why this statute should apply retroactively to the rights that vested in the 2007 MOU, and nothing in the plain text of the statute supports that view.

**B. The Foundation's cross-appeal on the budget-approval issue.**

On the Foundation's cross-appeal regarding budget approval, this Court should reverse. First, the Fourth DCA erred as a matter of law in interpreting FAU's budget-approval right as compatible with the MOU's "sole discretion" provision. Because FAU insists that the

Foundation may not distribute its endowment to pay for expenses outside of the FAU-approved budget, FAU's budget-approval right plainly limits the Foundation's discretion to distribute its endowment, flatly contradicting the plain language of the MOU. The Fourth DCA also erred as a matter of law in its impairment analysis. Under Florida law, the disputed amendment unconstitutionally impairs the Foundation's contractual rights by granting FAU a right—approval of budgets—which it did not bargain for, and which is entirely incompatible with the right the Foundation did bargain for: sole discretion over distributions from its endowment. This follows from this Court's decision in *Citrus County*. The trial court—and in turn the Fourth DCA—only reached a contrary conclusion by erroneously applying the more burdensome federal standard.

Furthermore, the lower courts erred in applying the amendment retroactively to the Foundation. They should have avoided consideration of the constitutional question altogether and found that the amendment did not apply retroactively to the vested rights contained in the MOU, which was signed in 2007.

## **ARGUMENT ON THE FAU APPEAL**

### **I. RULE 1.071 DOES NOT REQUIRE REVERSAL.**

At the Fourth DCA, FAU argued—for the first time—that [Florida Rule of Civil Procedure 1.071](#) requires reversal because the Attorney General was not notified of the pendency of the suit at the trial level. The Attorney General herself declined to make this argument at the Fourth DCA—indeed, she failed to appear **at all** despite notice and an opportunity to do so—but now contends this procedural requirement should render void years of litigation and the decisions of two courts. Both FAU and the Attorney General are wrong for four independently sufficient reasons.

#### **A. The Court need not reach this issue once the proper interpretation of Section 1004.28(3) is applied.**

As an initial matter, this Court may affirm without reaching the Rule 1.071 issue. As explained below in Section IV of the FAU Appeal, *infra*, the 2018 amendment to Section 1004.28(3) does not apply retroactively to grant FAU new approval rights over the Foundation’s board appointments. As such, there is no constitutional issue for the Court to adjudicate, and Rule 1.071 is not implicated.

**B. The Fourth DCA did not err when it decided the Foundation’s constitutional impairment defense.**

Assuming that Section 1004.28(3) even applies retroactively (which it does not), the Fourth DCA properly reached the constitutional question notwithstanding lack of notice in the trial court under Rule 1.017.

**1. FAU invited the trial court to decide the constitutional question; the invited error doctrine thus bars FAU from invoking Rule 1.071.**

FAU—an instrumentality of the State of Florida—engaged in over five years of expensive and time-consuming litigation without mentioning Rule 1.071. Moreover, FAU repeatedly and affirmatively stipulated that the trial court should address constitutionality. Then, after receiving an adverse ruling, FAU faulted the trial court for deciding the very question it asked the court to decide. The invited error doctrine protects the judiciary and litigants from such conduct.

This was not a casual invitation of error, but an express request by FAU in pretrial stipulations, summary judgment motions, and at trial itself. Before trial, FAU twice and unequivocally stipulated that the trial judge should decide the constitutionality of Section 1004.28(3) as applied to the Foundation. R. 6342 ¶ 5 (“Whether

application of the 2018 amendments to [section 1004.28\(3\) of the Florida Statutes](#) unconstitutionally impairs the MOU”); R. 6721 ¶ 4 (same). “Pretrial stipulations prescribing the issues on which a case is to be tried **are binding upon the parties and the court**, and should be strictly enforced.” [Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.](#), 174 So. 3d 1037, 1039 (Fla. 4th DCA 2015) (citation omitted) (emphasis added).

FAU also asked the trial judge to rule on the merits of the Foundation’s defense in multiple motions for summary judgment, R. 2583; R. 2598–99; R. 4708–15; R. 5766, a motion in limine, R. 6237, and its Pretrial Brief, R. 6400–10. FAU then participated in a full trial on the merits of this defense without ever raising a Rule 1.071 objection. Tr. 25:10–13, 835:12–839:7. It then submitted post-trial proposed Findings of Fact and Conclusions of Law to the trial judge that squarely addressed these constitutional issues. R. 11640–42.

Under the invited error doctrine, “a party may not make or invite error at trial and then take advantage of the error on appeal.” [Goodwin v. State](#), 751 So. 2d 537, 544 n.8 (Fla. 1999) (citations omitted). This doctrine prohibits counsel from “sandbag[ging] [a] trial judge by requesting and approving

[something] they know . . . will result in an automatic reversal, if given.” *Rosen v. State*, 940 So. 2d 1155, 1161 (Fla. 5th DCA 2006) (quoting *Weber v. State*, 602 So. 2d 1316, 1319 (Fla. 5th DCA 1992)); accord *Baker v. R.J. Reynolds Tobacco Co.*, 158 So. 3d 732, 737 (Fla. 4th DCA 2015). FAU’s conduct falls squarely within the doctrine, and its counsel’s knowledge or reason for inviting the error is irrelevant. See *Bender v. Shatz*, 300 So. 3d 193, 195 (Fla. 4th DCA 2020) (emphasizing that the “doctrine holds true” regardless of knowledge of error) (citation omitted).

The Fifth DCA applied this doctrine to the issue of not providing notice to the Attorney General in *State Farm Mutual Automobile Insurance v. Warren*, 805 So. 2d 1074 (Fla. 5th DCA 2002), holding that Section 86.091 (the statutory corollary and predecessor to Rule 1.071) did not require reversal because State Farm “invited the county court to determine constitutionality in its joint pre-trial statement” and only on appeal raised the issue of non-joinder of the Attorney General. Therefore, State Farm “waived the right” to assert that challenge. *Id.* at 1076. This Court affirmed that decision. See *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005). While this Court did not expressly discuss notice to the

Attorney General, it did address the constitutional question, indicating that it did not view the failure to provide notice to the Attorney General as a bar to considering the constitutional question. *Id.* The fact that the Fifth DCA and this Court ultimately found the State Farm statute to be constitutional is immaterial; the point is that the appellate court determined that it properly **could** address the constitutional question because the appellant invited the error, and this Court subsequently addressed the constitutional question as well.

Neither FAU nor the Attorney General has identified a **single** case that used Rule 1.071 to invalidate a trial court decision on constitutionality where the party seeking reversal expressly invited the trial court to decide the issue—as occurred here. FAU’s lead case, *Lee Memorial Health System v. Progressive Select Insurance Company*, 260 So. 3d 1038 (Fla. 2018), addressed whether the Second DCA erred in considering a contractual impairment claim **for the first time on appeal** where the Attorney General received no notice. Additionally, Rule 9.425, requiring notice to the Attorney General on appeal, was passed after *Lee Memorial*. Therefore, it is not clear whether this Court would decide *Lee Memorial* the same way if, as

here, the Attorney General both received notice on appeal **and** the parties fully briefed the issue before the trial court. *Shelton v. Bank of New York Mellon*, 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016) is inapposite for the same reason.

FAU's other cases are also inapplicable. In *Ramle Int'l Corp. v. Miami-Dade Cnty.*, No. 3D2020-0114, 2023 WL 6852519, at \*3 (Fla. 3d DCA 2023), the appellant did not invite the trial court to commit error, as FAU did here. Similarly, in *State Farm Fire and Casualty Insurance Company v. Wilson*, 330 So. 3d 67 (Fla. 2d DCA 2021), the trial court sua sponte considered a constitutional question that neither party raised in its pleadings. And in three of FAU's cases, the appellate courts declined to reach the constitutional question because the trial court had not decided it in the first instance. See e.g., *McGovern v. Clark*, 298 So. 3d 1244 (Fla. 5th DCA 2020) (declining to consider equal protection challenge on appeal where trial court resolved the case as a matter of statutory interpretation); *R.J. Reynolds Tobacco Co. v. Grossman*, 250 So. 3d 91, 94 (Fla. 4th DCA 2018) ("Having failed to obtain a ruling on the constitutionality of section 569.23, he should not be permitted to present arguments regarding his constitutional challenge on appeal."). In *Diaz v. Lopez*,

167 So. 3d 455, 460 n.10 (Fla. 3d DCA 2015), the trial and appellate courts construed the provisions to avoid offending Florida's constitution, so they did not need to construe [Rule 1.071](#).

**2. The Attorney General received notice of the DCA proceedings under Rule 9.425 and made no objection.**

Pursuant to Rule 9.425 of Appellate Procedure, the Foundation notified the Attorney General and supplied it with a copy of the answer brief on October 4, 2022, the same day it was filed—nearly nine months before oral argument occurred, and nearly a year before the Fourth DCA issued its decision. IB at 24 n.2; AG Br. at 15 n.7. The Foundation's brief squarely presented the impairment question and argued that FAU was barred from raising the notice issue. Yet the Attorney General **did not object** to the Fourth DCA considering the constitutional question.

The Attorney General waives her right to appear at the trial court when she receives notice under Rule 1.071 and does not appear; in such circumstances, the court and litigants may proceed with the litigation without her. See [Brinkmann v. Francois](#), 184 So. 3d 504, 507 (Fla. 2016) (“[T]he State was afforded a meaningful opportunity to intervene and be heard. That it did not actually

participate in litigation does not preclude us, nor did it preclude the lower courts, from considering [the constitutional] claim.”); *Latino Pol. Action Comm., Inc. v. City of Bos.*, 716 F.2d 68, 70 (1st Cir. 1983) (holding that late notice to the Attorney General at the district court did not preclude consideration of the constitutional question where the Attorney General did not ask the district court to delay its decision to allow him to be heard, and was able to submit a post-judgment motion for the district court’s consideration).

Failure to object after receiving notice under Rule 9.425 should be treated the same. Both rules provide that a party who files a document drawing into question the constitutionality of a state statute shall notify the Attorney General. Nothing in the appellate rule suggests that the Attorney General cannot waive her right to appear at the appellate court after receiving such notice, or that the court and litigants may not proceed without her. See *S.J. Bus. Enters., Inc. v. Colorall Techs., Inc.*, 755 So. 2d 769, 771 (Fla. 4th DCA 2000) (holding that, for a statutory right to be interpreted as

nonwaivable, the Legislature must have stated such intent expressly).<sup>5</sup>

This is consistent with the pragmatic approach taken by the First DCA in *Latino Pol. Action Comm., Inc.*, 716 F.2d at 70, which considered the constitutional issue presented even though Florida’s Attorney General received late notice at the trial level, because he was ultimately given an opportunity to be heard (albeit late) and made no objection. Here the Attorney General was given an opportunity to be heard at the Fourth DCA, but she made no appearance or objection, so the Fourth DCA proceeded. This pragmatic approach is correct. FAU’s position—that the trial court’s judgment is always void and unreviewable on appeal due to lack of notice to the Attorney General at the trial level—would undermine the power of Florida’s appellate

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<sup>5</sup> None of the waiver cases advanced by the Attorney General are to the contrary. The criminal waiver cases—*In re Gov’t Investigation*, 607 F. Supp. 3d 762, 778 (S.D. Ohio 2022), *United States v. Alvarez-Perez*, 629 F.3d 1053, 1053 (9th Cir. 2010), *Zedner v. United States*, 547 U.S. 489, 503 (2006), and *Raithel v. State*, 226 So. 3d 1028, 1032 (Fla. 4th DCA 2017)—involve a unique risk that the public’s interest will get lost under the pressure of criminal proceedings. The civil cases involve non-waiver of fundamental individual rights. See *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007) (homestead exemption); *James v. Leigh*, 145 So. 3d 1006 (Fla. 1st DCA 2014) (absolute litigation privilege).

courts to rule on constitutional controversies even where the Attorney General later receives notice and **does not object**.

The Attorney General also argues that FAU could not have waived her right to notice under Rule 1.071. AG Br. at 12–13. That is not the question presented here. This Court need only hold that the Attorney General waived her own right to object to consideration of the constitutional question when she did not appear in the Fourth DCA. In other words, FAU did not waive her rights; the Attorney General herself did.

**C. Rule 1.071 only requires notice of facial challenges to statutes, not of as-applied challenges that do not threaten the validity of statute.**

The Fourth DCA’s decision may also be affirmed on an independent basis: notice was not required under Rule 1.071 because the constitutional question presented in this case did not threaten the validity of the statute. The trial court was not asked to, and did not, strike down the statute; it merely decided that the statute was unconstitutional **as applied** to the parties’ specific MOU.

This Court has not yet been called on to decide whether Rule 1.071 ought to apply in cases like this one, and Florida’s courts of appeal have not squarely addressed it. However, the Foundation’s

interpretation is supported by analogous precedent from other jurisdictions.

This Court’s decision in *Lee Memorial* addressed Rule 1.071 in connection with a constitutional impairment question, but the impairment challenge in that case was fundamentally different than the impairment challenge here. The claim in *Lee Memorial* “would result in the **striking of a state statute** as unconstitutional” because it was a special law that only related to the two contracting parties. [260 So. 3d 1038](#) (emphasis added). Three appellate courts in Florida have held that Rule 1.071 required notice of an as-applied challenge, but they provide no reasoning, and the as-applied challenges were fundamentally different than the one here. In *Ramle*, the claims included both as-applied challenges and per se challenges to the law in question, and the Third DCA reasoned that the challenges would, as in *Lee Memorial*, “result in the **striking** of a state statute as unconstitutional.” [2023 WL 6852519](#), at \*1, \*4 (emphasis added). In two other cases, the constitutional challenge would have precluded application of a state statute to extensive statewide groups other than just the litigants. See *McGovern*, [298 So. 3d at 1250](#) (litigant argued that state statute concerning parentage

of children born before a marriage denies all “same-sex parties equal protection”); *State Farm Fire & Cas. Ins. Co. v. Wilson*, 330 So. 3d 67, 75 (Fla. 2d DCA 2021) (trial court held that statutory presumption in the context of auto insurance resulted in an “unconstitutional denial of access to the courts” for insureds). None of these Florida courts expressly consider the question presented here: whether Rule 1.071 requires notice of an as-applied challenge that would **not** result in striking down a state statute.

Courts in other jurisdictions have expressly considered this question and persuasively concluded that as-applied challenges do not require notice.

Federal cases interpreting [Federal Rule of Civil Procedure 5.1\(a\)](#)—the federal corollary to Florida’s Rule 1.071—are persuasive authority because the state rule copies the federal language that the notice requirement is triggered when a party files a pleading or other document “drawing into question the constitutionality of” a statute. See *Bawtinheimer v. D.R. Horton, Inc.*, 161 So. 3d 539, 540 (Fla. 4th DCA 2014) (finding the federal class action rule to be persuasive authority in interpreting the Florida class action rule because the latter was based on the former); *Adams v. Freel*, 409 So. 2d 1176,

1177 (Fla. 5th DCA 1982) (“Since Florida Rule of Civil Procedure 1.370 is based on Federal Rule of Civil Procedure 37, federal cases interpreting the federal rule dealing with requests for admissions are highly persuasive.” (citation omitted)).<sup>6</sup>

In *United States v. Zadeh*, 820 F.3d 746 (5th Cir. 2016), the Fifth Circuit held that Rule 5.1 only applies to facial preemption challenges and does **not** require notice in an as-applied challenge, that leaves the statute largely in force. *Id.* at 755 (“Nothing in today’s holding undermines the substantive constitutional legitimacy of the Texas Occupations Code.”); see also *Peruta v. Cnty. of San Diego*, 771 F.3d 570, 575 (9th Cir. 2014) (holding that Rule 5.1 did not require notice to the Attorney General because the district court “opinion never ‘dr[ew] into question’ the ‘constitutionality’ of any California statute—it only question[ed] San Diego County’s exercise of regulatory

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<sup>6</sup> The fact that Federal Rule of Civil Procedure 5.1(d) contains a non-forfeiture provision, whereas Rule 1.071 does not, is irrelevant. The cases the Foundation cites simply interpret the meaning of the overlapping language, “drawing into question the constitutionality of” a statute.

authority under such state statutes”);<sup>7</sup> *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 769 (M.D. Tenn. 2016) (holding that Rule 5.1 did not apply in a case where “the constitutional challenges stem[med] not from Tennessee law qua Tennessee law but from Defendants’ failure to abide by the Constitution when effectuating state law”).

Several states have applied these federal cases to their own similarly-worded rules to conclude that the notice requirement is not triggered unless there is a challenge to “all applications” of the statutes at issue—i.e., a facial challenge. See, e.g., *Merrill v. Merrill*, 238 Ariz. 467, 470 (2015), judgment vacated on other grounds, 581 U.S. 989 (2017); *Kepple v. Fairman Drilling Co.*, 532 Pa. 304, 313 n.3 (1992) (“If Appellant's argument was confined only to application,

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<sup>7</sup> The Ninth Circuit later ordered rehearing and stated that the *Peruta* opinion shall not be cited as precedent by or to any court of the Ninth Circuit, *Peruta v. Cnty. of San Diego*, 781 F.3d 1106, 1107 (9th Cir. 2015), but never published a subsequent decision following rehearing, and district courts within the Ninth Circuit have continued to apply *Peruta*’s well-reasoned holding limiting the application of the Rule 5.1. See, e.g., *Fernandez v. Kang*, No. CV221981MWFMRWX, 2022 WL 2903148, at \*6 (C.D. Cal. Apr. 15, 2022) ([T]he Court’s supplemental jurisdiction analysis does not ‘draw into question’ the constitutionality of California’s high-frequency litigant statute on an ‘as applied’ or any other basis.”).

notice to the Attorney General would not be required.”); *Campbell v. Larson*, No. A20-1068, 2021 WL 1733371, at \*3 (Minn. Ct. App. May 3, 2021). The court in *Merrill* explained that the purpose of Arizona’s notice requirement is “to protect the state and its citizens should the parties be indifferent to the outcome of the litigation,” but in an as-applied challenge, “there is *no risk* that a statute will be declared unconstitutional for all applications.” 238 Ariz. at 470 (emphasis added). In contrast, the non-Florida cases relied on by FAU and the Attorney General involved facial challenges to a statute’s validity. See, e.g., *Weinert v. City of Great Falls*, 97 P.3d 1079, 1082 (Mont. 2004); *Craft v. Commonwealth*, 483 S.W.3d 837, 840 (Ky. 2016).

The Attorney General argues that prompt notice is necessary because “the Attorney General ‘is a critical stakeholder in defending the **validity** and **constitutionality** of the state’s laws.’” AG Br. at 4 (quoting *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 989 (Fla. 1st DCA 2013) (Makar, J., concurring)). True, but the facial validity of the statute is not at issue here. Section 1004.28(3) will remain on the books and valid notwithstanding the Fourth DCA’s decision that it cannot apply to the Foundation.

The Attorney General also suggests that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” AG Br. at 8 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). While this may be true in the very specific and limited case of the State **itself** seeking certiorari review of a lower court decision striking a law as unconstitutional, see *Maryland*, 567 U.S. at 1301–02, the reasoning does not apply to cases where, as here, the constitutional question arises in a private litigation, the Attorney General has taken no position on the merits, and the Attorney General has expressed no state interest in how the merits of the as-applied challenge should be resolved.

**D. Any error by the trial court in considering the constitutional question was harmless or, at most, warrants remand to the trial court.**

Similarly, the Attorney General has taken no position on the merits, either at the Fourth DCA or in this appeal. This means the error **must** be harmless, because if the constitutional question were genuinely important or dispositive, the Attorney General would have explained the position she would have taken in the trial court. *Cf. Brinkmann*, 184 So. 3d at 507 (holding that the trial court could

consider a constitutional claim where the State received notice and chose not to appear). Accordingly, the Foundation’s failure to notify the Attorney General was, on these facts, harmless, and does not require reversal.

Florida’s harmless error rule provides that “[n]o judgment shall be set aside or reversed” for “**any** matter of . . . procedure” unless, “after an examination of the entire case,” it appears “that the error complained of has resulted in a miscarriage of justice.” § 59.041, Fla. Stat. (emphasis added). Rule 1.071 establishes a “procedural requirement[.]” See *Brinkmann*, 184 So. 3d at 507; see also *Yanes v. OC Food & Beverage LLC.*, 300 So. 3d 798, 802 (Fla. 5th 2020) (implicitly concluding that Rule 1.071 is procedural by holding that a different substantive statutory requirement did not supplant the Rule). “[A]ppellate courts must evaluate harmless error on a case-by-case basis.” *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1255 (Fla. 2014).

Applying the harmless error rule, Florida courts have long held that when the record as a whole indicates that the judgment is plainly right on the merits, the courts should not reverse. See *Hooker v. Johnson*, 10 Fla. 198, 203 (1860); *Kane v. Harris & Co. Advert.*, 161

So. 2d 670, 672 (Fla. 3d DCA 1964) (finding that any error associated with denial of petition for intervention was harmless); *Garson v. State*, 338 So. 3d 301, 303 (Fla. 4th DCA 2022) (finding any failure of procedural due process that resulted from court's denial of pro se plaintiff's response to show cause order was harmless under Florida's harmless error statute). The Court should reach the same conclusion here.

Even if the Court determines that the notice issue precludes reaching the constitutional issue, here the appropriate remedy would be—at most—a remand to the trial court to give the Attorney General an opportunity to be heard on the merits. See *Seminole Cnty. v. Braden*, 48 Fla. L. Weekly D2350 (Fla. 1st DCA Dec. 13, 2023), (remedy for failing to notify the Attorney General under Rule 9.425 is giving the Attorney General an opportunity to appear at oral argument and file briefs on the constitutional issue). That is especially sensible in this case since dismissal on procedural grounds would not be a merits determination, and FAU could simply refile for a declaratory judgment. A remand avoids such unnecessary steps, although for the reasons argued above, no remand or other remedy is warranted here.

## **II. THE FOURTH DCA CORRECTLY HELD THAT THE MOU LIMITED FAU'S INVOLVEMENT WITH THE FOUNDATION'S BOARD OF DIRECTORS TO ITS SELECTION OF TWO APPOINTEES.**

The starting point for FAU's appeal must be to determine, as the Fourth DCA did, the meaning of the MOU's appointments provision: "The HBOI Foundation's board of directors will have two . . . appointees from FAU." *FAU*, 372 So. 3d at 305, 307 (quoting R. 7255, p. 3, § 4). The Fourth DCA agreed with the trial court that this provision "specifically limited FAU's involvement with the Foundation's board of directors to 2 appointees." *Id.* at 307. This holding should be affirmed. The plain text requires this reading. But even if the text is held to be ambiguous, the parol evidence also conclusively favors the Foundation's interpretation.

### **A. The plain language of the MOU requires affirmance.**

Although the Fourth DCA based its holding on resolution of a supposed latent ambiguity, the plain language of the MOU resolves this case and the Court should decide it on that basis. The MOU unambiguously restricts FAU's participation in the board appointment process to its selection of two members. This is true for two reasons.

**1. The laws in effect in 2007 limited FAU’s influence over the board to two appointees.**

At the time the parties’ executed the MOU, the Foundation was governed by Florida’s not-for-profit law, which required that a not-for-profit’s articles of incorporation “set forth . . . [a] statement of the manner in which the directors are to be elected or appointed.” § 617.0202(1)(d), Fla. Stat. (2007). The Foundation’s amended articles of incorporation, in turn, provided that (1) the number of Foundation directors may never be “less than five”; (2) FAU may appoint two of these members; and (3) the Foundation appoints the remaining members. R. 11683 (quoting R. 7150). The Foundation’s bylaws provided the same. *See id.* (citing R. 7156–57). FAU reviewed and approved these governing documents prior to entering the MOU. R. 7148–84; Tr. 540:12–2. Accordingly, this background law, which “exist[ed] at the time and place of the making of a contract[,]” entered into and became a part of the MOU “as if [it were] expressly referred to and incorporated in its terms.” *Brandt v. Brandt*, 525 So. 2d 1017, 1020 (Fla. 4th DCA 1988) (quoting *S. Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 772 (Fla. 1st DCA 1983)).

The natural reading of this language is that all **other** appointees (of which there would be at least three under the bylaws) would **not** be “from FAU.” In other words, FAU may not be involved in three, or four, or five appointees “from FAU” because the plain text limits FAU’s involvement in the board appointment process to **two** selections.

This reading is compelled by the negative-implication canon, which holds that the expression of one thing implies the exclusion of others. See *Palma v. S. Fla. Pulmonary & Critical Care, LLC*, 307 So. 3d 860, 867 (Fla. 3d DCA 2020) (applying negative-implication canon to contractual terms); cf. *S & J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965) (“The well-recognized rule of construction found in the maxim ‘expressio unius est exclusio alterius’ requires that where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways.”). For example, “[w]hen a car dealer promises a low financing rate to ‘purchasers with good credit,’ it is entirely clear that the rate is **not** available to purchasers with spotty credit.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). Indeed, in a classic application of the doctrine cited by Scalia and Garner, a court held

that when a legal text declares a specific mode of appointment, it “necessarily impl[ies] a prohibition to all other modes.” *Id.* at 109–10 (quoting *State v. Hunt*, 20 S.C.L. 1,230 (S.C. App. L & Eq. 1834) (per Johnson, J.)); see also *S. Crane Rentals Inc.*, 429 So. 2d at 773 (rejecting the argument that the absence of a provision on cancellation rights created a latent ambiguity, because existing Florida law regarding cancellation rights was “unambiguously annexed to the parties’ contract”); cf. *Scott v. Hinkle*, 259 So. 3d 982, 985 (Fla. 1st DCA 2018) (“When the Florida Constitution prescribes the manner of doing something, doing it in a different manner is prohibited.”). Just so here. The MOU expressly dictated that two board members would be “from FAU” and therefore creates “a prohibition to all other modes” of director appointment that would permit approval or rejection “from FAU” as to the other members. See, e.g., *Cox v. Bos. Consol. Gas Co.*, 67 F. Supp. 742, 744 (D. Mass. 1946), aff’d, 161 F.2d 680 (1st Cir. 1947) (“The extension of time for a veteran who entered a hospital for one year or less seems, under the familiar statutory principle of *expressio unius, exclusio alterius*, to imply that Congress did not intend an extension of time for a

veteran who entered an essential war industry for an indefinite number of years.”).

**2. FAU seeks to evade the contract’s plain meaning, but its arguments are unavailing.**

**First**, FAU criticizes the trial court for “engraft[ing]” the Foundation’s articles of incorporation and bylaws onto the MOU, claiming that it erred in treating them as extrinsic evidence of the meaning of the MOU. Initial Brief (“IB”) at 36–38. But these corporate documents were not extrinsic evidence at all; rather, they were the essential, fully incorporated, legal backdrop to the contract.

Put differently, the laws at the time of contract execution required that the Foundation’s corporate documents set the method of selecting directors—[Section 617.0202\(1\)\(d\)](#)—and provided for no more than two university appointments in that process—[Section 1004.28\(3\)](#). Such laws must be treated as an “express[]” part of the MOU. [Brandt, 525 So. 2d at 1020](#) (citation omitted). And where “no evidence is presented” that a party “gave consideration” to alter respective rights under existing law in its favor, those existing rights are “established by operation of law.” *Id.*

Even if there were **no** preexisting, incorporated law on this issue, no plain reading of the MOU provision grants FAU the right to more involvement in the board appointment process than its two allotted appointments. The contract says FAU “will have (2).” Not “at least two.” Not “two now and maybe more in the future.” Not “two with possible future approval/veto rights over additional appointments.” Just two. ***Expressio unius est exclusio alterius.***

**Second**, FAU claims the negative-implication canon does not apply here. IB at 30. Most of FAU’s cases, IB at 30–33, on the negative-implication canon merely hold that the canon may not imply an unspoken right where it would contradict other, ***explicit*** provisions. See [Alachua Cnty. v. Watson](#), 333 So. 3d 162, 168–72 (2022) (a new provision could not imply a broad right where the statute as a whole contained multiple provisions limiting that right); [Crews v. Fla. Pub. Emps. Council 79, AFSCME](#), 113 So. 3d 1063, 1072 (Fla. 1st DCA 2013) (statutory caps on one type of funding did not limit funding for others because the statute granted broad discretion); [City of Pompano Beach v. Beatty](#), 222 So. 3d 598, 600–01 (Fla. 4th DCA 2017) (lease expressly limited the right to reappraisal to specific dates, foreclosing any implied right at other times);

*Seaside Town Council, Inc. v. Seaside Cmty. Dev. Corp.*, 2021 WL 6135078, \*1, \*4 (Fla. 1st DCA Dec. 29, 2021) (amended declaration could not restrict rights by implication where the original declaration explicitly granted them). FAU fails to identify **any** provision of the MOU providing it a right to veto the Foundation’s board appointments.

FAU also cites several cases for the general proposition that in the face of contractual silence, courts are reluctant to find rights by implication because there is a “clear danger” of rewriting the contract. IB at 32–33. But here, as discussed in Section II(A) of the FAU Appeal, *supra*, there is no contractual silence: the plain terms of the MOU and the laws in force at the time dictate both parties’ rights regarding board composition. Applying the negative-implication canon to a **specific** provision to interpret its meaning is not conjuring a right out of thin air. Here, applying the canon to the appointments provision—and concluding that by granting FAU the right to appoint **two** board members, the MOU necessarily excludes a right to reject other appointments to the board—represents a proper use of the canon, and does not invite any of the dangers espoused by FAU. See *Azalea Park Utilities, Inc. v. Knox-Fla. Dev. Corp.*, 127 So. 2d 121, 123

(Fla. 2d DCA 1961) (holding that a company could not add a brand-new service charge to a contract where the agreement never contemplated such charges); *Advanzeon Sols., Inc. v. State ex rel. Fla. Dep't of Fin. Servs.*, 321 So. 3d 911, 915 (Fla. 1st DCA 2021) (holding that a company could not impose administrative fees on a customer where nothing in the parties' contract "expressly or impliedly addressed [these] payments").

Indeed, *S. Crane Rentals*—also cited by FAU—**supports** the Foundation. See 429 So. 2d 771. FAU failed to contract around the legal status quo in 2007, therefore it became part of the MOU. *S. Crane Rentals* confirms that a right under existing law will be “unambiguously annexed” to the contract unless the parties negotiate around it. *Id.* at 773. The Foundation's reading of the MOU comports with the statutory scheme in place in 2007. FAU's defies it.

**Third**, FAU emphasizes that the Foundation did not attempt to include a provision in the MOU reserving exclusive authority over those board members not appointed by FAU. IB at 35–36. But that only underscores the Foundation's argument: both parties **meant** for the appointments clause to cover this issue. Specifically, both parties

intended for it to dictate the **outer** bounds of FAU's influence over the board: two seats on the board.

**B. Substantial extrinsic evidence supports the lower courts' resolution of the latent ambiguity.**

The trial court and Fourth DCA held that the appointments provision of the MOU is ambiguous and thus turned to extrinsic evidence to interpret the contract. As explained above, this was unnecessary because the plain meaning is unambiguous. But to the extent this Court also determines that examination of extrinsic evidence is necessary, such evidence leads to the same result because the extrinsic evidence strongly favors the Foundation's interpretation of the MOU.

The trial concluded from the parol evidence that “[b]oth FAU and the Foundation clearly understood and agreed that FAU would not be entitled to have any other ‘say-so’ in the Foundation board membership other than the 2 appointees noted in the MOU.” R. 11685. The Fourth DCA affirmed. *See FAU*, 372 So. 3d at 307. As a resolution of a latent ambiguity, this finding is entitled to deference. *See Land O'Sun Realty Ltd.*, 685 So. 2d at 872 n.3; *Scott v. Williams*,

107 So. 3d 379, 384 (Fla. 2013) (trial court’s factual findings are reviewed for “competent, substantial evidence”).

Where the plain text is not dispositive, parol evidence may be used to fill contractual silence. See *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 336 (Fla. 5th DCA 2013); *Morton v. Morton*, 307 So. 2d 835, 839 (Fla. 3d DCA 1975) (“Where, under a latent ambiguity which is presented the intent may have been for one of two things, it is permissible, and is the duty of the court to receive and consider extrinsic evidence bearing thereon.”). Contrary to FAU’s argument, IB at 37, the integration clause is no bar to the consideration of extrinsic evidence where the trial court has identified a latent ambiguity. See *Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So. 2d 564, 565 (Fla. 4th DCA 2000) (identifying the “modern trend” to consider parol evidence to explain latent ambiguities in a contract regardless of whether the contract has an integration clause).

The trial court correctly found that the negotiations leading up to the MOU made clear that the intent of both parties was to “specifically limit[] FAU’s involvement with the Foundation’s board of directors to 2 appointees.” R. 11685; see also *FAU*, 372 So. 3d at 307. FAU’s President promised the Foundation’s board that FAU “**does**

**not seek control** of [F]oundation.” R. 6934 (emphasis added). FAU’s interpretation of the MOU is flatly inconsistent with this history and its own President’s promise.

The parol evidence identified by FAU, IB at 34–38, is not to the contrary. FAU relies heavily on the fact that during negotiations, FAU proposed the appointments clause and the Foundation never tried to revise it. IB at 34–36. This merely shows that the Foundation agreed with FAU’s right to appoint a **minority** of board members, but not control the majority. See Tr. 259:7–22 (Chair of the Foundation’s board testifying that the Foundation “didn’t have a problem with [FAU] having representatives on our board . . . as long as they weren’t the majority of the board”).

FAU is wrong that the Foundation’s corporate documents adopt all future amendments to Florida law. IB at 63. A party to a contract is not bound by future law unless that party “**expressly** ‘agreed to be bound by all future amendments[.]’” *Ass’n of Golden Glades Condo. Club, Inc. v. Security Mgmt Corp.*, 557 So. 2d 1350, 1354 (Fla. 1990) (emphasis added) (quoting *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass’n*, 361 So. 2d 128, 133 (Fla. 1978)). The parties here evinced no such agreement. As the trial court found,

“[t]he MOU does not contain language that the parties expressly agreed to be bound by future changes in applicable law.” R. 11685. The absence of express language is determinative. See *Cohn v. Grand Condo. Ass’n, Inc.*, 62 So. 3d 1120, 1121–22 (Fla. 2011); *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass’n*, 169 So. 3d 145, 149 (Fla. 4th DCA 2015).

Contrary to FAU’s claim, the requirement for express language is not satisfied by Article III of the restated articles of incorporation (and similar text from the restated bylaws), which states that the Foundation will **operate** “so far as is or may be permitted by the laws of the State of Florida[.]” IB at 63 (citation omitted). That language is in a different section of the Articles, entitled “Purpose,” which addresses how the Foundation is “permitted” to operate under Florida law and the IRS Code, R. 7284, and is unrelated to board composition.

This provision appeared in the Foundation’s articles and bylaws for years before the Foundation agreed to become a DSO, Tr. 154:8–55:22, and thus could not reflect an express agreement between the parties to be bound by future laws. The testimony of both parties’ attorneys confirmed that this phrase was not the result of a

negotiated agreement to be bound by future laws. Tr. 150:16–51:18; 153:11–54:7; Tr. 527:4-528:2.

Because there is no express incorporation of future law in the MOU, FAU’s authorities are all inapplicable. See *Century Village, Inc.*, 361 So. 2d at 133 (addressing a condominium declaration that unambiguously “incorporated by reference and included herein” the provisions of the Condominium Act, and defined “the Act” to mean the Act “[a]s the same **may be amended** from time to time”); see also *McKesson Corp. v. Schieffelin & Co.*, 499 So. 2d 6, 7 (Fla. 3d DCA 1986) (per curiam) (addressing an agreement that contracted for an expansion of rights **if** existing legal constraints were altered by a repeal of the restrictive Brand Withdrawal Law).<sup>8</sup>

### **III. RETROACTIVE APPLICATION OF SECTION 1004.28(3) WOULD SUBSTANTIALLY IMPAIR THE FOUNDATION’S RIGHTS UNDER THE MOU IN VIOLATION OF FLORIDA’S CONTRACTS CLAUSE.**

As the Fourth DCA and trial court held, the amended version of Section 1004.28(3), if applied to the Foundation’s board, would

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<sup>8</sup> *McKesson* is a one-page per curiam opinion. For a full regulatory and factual background, see *Florida Beverage Corporation v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation*, 503 So. 2d 396, 397 (Fla. 1st DCA 1987).

substantially impair an obligation of the MOU—namely, its limitation of FAU’s involvement in the board appointment process to two members—in violation of Florida’s Contracts Clause, with no countervailing state interest to justify the impairment. If the Court reaches this issue, notwithstanding the fact that the amendment to Section 1004.28(3) does not have retroactive application, it should affirm.

**A. Section 1004.28(3) impairs the Foundation’s rights under the MOU by granting board control to FAU.**

The Florida Constitution prohibits any law “impairing the obligation of contracts.” [Art. I, § 10, Fla. Const.](#) To “impair” means “to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken.” [Pomponio v. Claridge of Pompano Condo., Inc.](#), 378 So. 2d 774, 781 n.41 (Fla. 1979) (citation omitted). Any law that has the effect of “rewriting” a contract will be deemed an impairment, *see Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (citation omitted), as will any law that detracts from the value of a contract, *see Citrus County*, 50 So. 3d at 1108.

The trial court held that Section 1004.28(3) impaired the Foundation's rights under the MOU because requiring university approval for **all** board members "lessened or weakened the Foundation's right to control its [board] appointments emanating from the MOU contract." R. 11687. The Fourth DCA agreed that the amendment "effectively rewrote" the MOU. *FAU*, 372 So. 3d at 308 (citation omitted).

This Court should affirm, as this change clearly "diminish[ed]," "lessen[ed], and "weaken[ed]" the Foundation's ability to appoint a majority of the board. *Pomponio*, 378 So. 2d at 781 n.41 (citation omitted). It also "made worse" the Foundation's relative rights on board composition, compared to FAU, by creating for FAU—out of whole cloth—a new right it never negotiated for: the ability to reject the Foundation's board's chosen members. And, of course, such a change necessarily detracts from the value of the contract for the Foundation. See *Citrus County*, 150 So. 3d at 1108 (detraction of value is impairment). Section 1004.28(3), therefore, necessarily impairs the Foundation's rights in the MOU.

*Citrus County* controls this case. There, a nonprofit hospital foundation signed a lease with a county hospital board agreeing to

“operate exclusively for the benefit of and to carry out the purposes of but not in any way as an agency of the Citrus County Hospital Board.” *Id.* Several years later, the Legislature passed a law requiring, among other things, that the state Hospital Board “approve all Foundation directors, including current directors.” *Id. at 1105.* This Court held that the new law unconstitutionally impaired the nonprofit’s rights under the lease because it “eliminate[d] the Foundation’s ability to operate and manage the hospital . . . in disregard of the Foundation’s status as a separate legal entity.” *Id. at 1108.* Precisely the same thing would occur if FAU were given new power to veto the Foundation’s board appointments under Section 1004.28(3).

The cases FAU relies on, IB at 29, are inapplicable. In *Snyder v. Florida Prepaid College Board*, the plaintiff agreed to be subject to future changes of law and there was no contract provision relevant to the change in law that occurred. *See 269 So. 3d 586, 590, 595 (Fla. 1st DCA 2019).* In *Hahamovitch v. Hahamovitch*, the statute at issue merely codified existing law and, as in *Snyder*, the disputed prenuptial agreement failed to address the issue set out in that law. *See 133 So. 3d 1008 (Fla. 4th DCA 2014).* These cases are distinct:

as the Fourth DCA recognized, the new law here did nothing short of rewriting a specific provision—the appointments clause—of the MOU.

FAU primarily argues that the MOU is silent on the selection of directors not appointed by FAU, and the Contracts Clause does not protect a contract’s silence from impairment. IB at 26–30. This argument is factually and legally wrong.

The Foundation does not rely on “silence” in the MOU to find an impairment. Rather, the Foundation submits that Section 1004.28(3) impairs the parties’ specific agreement in the MOU to “limit[] FAU’s involvement with the Foundation’s board of directors to 2 appointees.” R. 11685; *see also FAU*, 372 So. 3d at 307. The trial court relied on competent and substantial extrinsic evidence to conclude that this right existed in the MOU, therefore its decision should not be disturbed. *See Scott*, 107 So. 3d at 384 (competent and substantial evidence is required).

FAU’s “silence” argument is legally wrong. *Citrus County* is squarely on point. There, the lease did not explicitly reserve to the nonprofit the powers that the new law provided to the hospital board. Yet this Court found impairment because the new law required the nonprofit “to comply with public accountability and financial

responsibility measures ***that are mentioned nowhere in the parties' agreements and that are in addition to the requirements***" under existing law. [150 So. 3d at 1108](#) (emphasis added). This Court should reach the same conclusion.

FAU seeks to avoid *Citrus County* in several ways, but none are compelling. **First**, FAU contends that *Citrus County* is inapplicable because the Court did not apply the balancing test it applied in *Searcy* three years later. IB at 59–60. But *Searcy* cited *Citrus County* with approval before applying the balancing test from *Pomponio*, confirming that *Citrus County* remains good law on impairment. See [Searcy](#), [209 So. 3d at 1190–92](#); see also [Purveyar v. State](#), [810 So. 2d 901, 905 \(Fla. 2002\)](#) (“[The Court] does not intentionally reverse itself sub silentio[.]” (emphasis added)).

**Second**, the fact that *Citrus County* addressed a special law has no bearing on the case. IB at 58–62. The specificity of the law did not factor into the Court’s constitutional impairment analysis. See [Citrus Cnty.](#), [150 So. 3d at 1108](#) (addressing the law’s effect on obligations under prior contracts). A law that applies generally, like Section 1004.28(3), is just as capable of impairing a contractual right as a specific law. See *id.* (citing [Cohn](#), [62 So. 3d at 1122](#)).

And the fact that *Citrus County*'s law modified the parties' contract in a number of ways, while here Section 1004.28(3) only changed the MOU in one way, is equally irrelevant. The *Citrus County* Court found impairment based on two **consequences** of the law: the nonprofit's loss of control over its governing board, and the nonprofit's new obligation to comply with state measures that "are mentioned nowhere in the parties' agreements." 150 So. 3d at 1108. The trial court here found that the Foundation would suffer the exact same consequences. "**Total** destruction of contractual expectations is not necessary for a finding of substantial impairment" in Florida; whether the loss of control was a complete, wholesale transfer of power from one entity to another—as in *Citrus County*—or an erosion of one party's ability to shape its board—as in this case—the result is the same, because any diminishment in value or strength constitutes a substantial impairment under Florida law. *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017).

**Third**, FAU points out that in *Citrus County*, the Court identified no state interest whatsoever, and argues that when the Legislature seeks to further a legitimate public purpose, courts hesitate to

second-guess its actions. IB at 61–62. FAU also fails to identify a persuasive state interest in this case. See Section III(C) of the FAU Appeal, *infra*. *Citrus County* is thus controlling and establishes that Section 1004.28(3) impaired the Foundation’s rights.

**Fourth**, in Florida, impairment can be established “by imposing conditions **not expressed** in the contract.” *Pudlit 2 Joint Venture, LLP*, 169 So. 3d at 150 (emphasis added) (citation omitted). FAU’s various cases addressing impairment under the federal contracts clause, IB at 27–29, are thus unhelpful. “The Florida Constitution offers greater protection for the rights derived from the Contract[s] Clause than the United States Constitution.” *Sears, Roebuck & Co.*, 223 So. 3d at 299 (citations omitted). Therefore, federal precedent is neither controlling nor persuasive. *Id.* (quoting *Pomponio*, 378 So. 2d at 779).

To be clear, the MOU was not “silent” on the issue of board appointments; but even if it was, the purported silence supports finding an impairment under Florida law, not the other way around.

**B. Section 1004.28(3)'s impairment of the Foundation's rights is severe.**

Once this Court identifies an impairment, it first considers the “actual effect of the provision on the contract,” then balances the “party’s interest in not having the contract impaired against the State’s source of authority and the evil sought to be remedied.” *Id.* (quoting *Scott*, 107 So. 3d at 385). To pass constitutional muster, a regulation that severely impairs a contract must be supported by a “significant and legitimate public purpose.” *Id.* (quoting *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)). The balancing must be done in recognition that “virtually no degree of contract impairment is tolerable” in Florida. *Searcy*, 209 So. 3d at 1192 (quoting *Pomponio*, 378 So. 2d at 780).

The trial court correctly determined that the impairment in this case is severe. Permitting FAU to control the Foundation’s appointments through Section 1004.28(3) would effectively give FAU control of the Foundation’s board—thus upending the parties’ carefully negotiated relationship and eviscerating the sole discretion and independence promised to the Foundation in the MOU.

FAU argues that any impairment to the MOU is minimal because amended Section 1004.28(3) confers only a secondary approval power, not an original power of appointment. IB at 41, 44–45. But this Court has held that a subsequent law purporting to grant a party new approval rights is sufficient to constitute an unconstitutional impairment. See *Sears, Roebuck & Co.*, 223 So. 3d at 300 (holding that where a tenant had the right to sublet under his lease, a subsequent law requiring tenants to obtain approval to sublease unconstitutionally impaired the lease agreement).

FAU’s analogy to the Senate having confirmation power over presidential appointments only illustrates the severity of the impairment here. The Senate’s confirmation authority has been held fundamental to separation-of-powers principles, under which each branch of government acts as a check on the authority of the other. See e.g., *Edmond v. United States*, 520 U.S. 651, 659 (1997) (explaining this concept). The power to confirm includes the power to reject appointments, and thereby exercise a complete veto over the Foundation’s board. It is hard to imagine a more fundamental impairment.

**C. Section 1004.28(3)'s severe impairment is not justified by a substantial state interest.**

After determining that Section 1004.28(3) severely impaired the MOU, the trial court balanced this “significant and severe impairment” to the Foundation’s rights against the asserted state interest, to determine whether Section 1004.28(3) “unreasonably intrude[d] into the parties’ bargain to a degree greater than is necessary to achieve that objective.” R. 11664–65 (quoting *Searcy*, 209 So. 3d at 1192; *Pomponio*, 378 So. 2d at 780). The court properly held that it did.

**1. FAU failed to show any state interest whatsoever in applying Section 1004.28(3) to the Foundation, let alone an important interest.**

Although “virtually no” impairment of contract is permitted under the Florida Constitution, the standard is even higher where, as here, the legislation alters contractual obligations of a state or state entity. See *Coastal Petroleum Co. v. Chiles*, 672 So. 2d 571, 573 (Fla. 1st DCA 1996). This is because the State is essentially and unilaterally rewriting its own contract. FAU does not come close to meeting this heightened standard.

The trial court was not persuaded by FAU's efforts to show a countervailing state interest, R. 7863-7; R. 11486; R. 11615-16; instead, it found that FAU "failed to establish" the provision of the Amendment concerning board appointments "was 'enacted to deal with a broad, generalized economic or social problem' sufficient to outweigh the significant and severe impairment to the MOU." R.11688. Indeed, the trial court held that FAU did not present **any** evidence regarding the purpose behind or justification for the 2018 amendment to § 1004.28, Florida Statutes. *Id.* The Fourth DCA affirmed and found no error in the trial court's impairment analysis. *FAU*, 372 So. 3d at 308. FAU has not shown any error in that holding.

Rather, the state interests identified by FAU, IB at 42-44, simply relate to the **general** need for regulation of DSO activities. FAU claims that the Florida Excellence in Higher Education Act of 2018 "sought to enhance accountability," IB at 56, yet it cites no evidence of a problem with DSO board appointments, specifically. Most provisions of the Act address transparency and accountability in areas unrelated to DSOs. See Chapter 2018-4, Committee Substitute for Senate Bill No. 4, <http://laws.flrules.org/2018/4>. Of those provisions that affect DSOs, all but the board provision at issue

address transparency around funding and spending. See § 1004.28(5)(b), Fla. Stat. (confidentiality provisions for records of spendings); § 2(b) (audits of financial transactions); *id.* § (2)(c) (tying funding to compliance with equal opportunity laws); *id.* § (4) (banning gifts to political committees).

Similarly, the staff analysis, IB at 56, addresses enhanced transparency and accountability related to expenditures. See R. 11269 (prohibiting DSOs from using state funds for travel expenses and personal services, narrowing scope of exemption from public record requirements related to expenditures, and eliminating exception for certain gifts by DSOs to political committees). The hearing from the Florida House Representatives' Appropriations Committee makes no mention of university participation in selecting DSO boards. Compare IB at 56 with Fla. H.R. Comm. on Approp., recording of proceedings, at 24:003:08:29 (Mar. 8, 2017), <https://thefloridachannel.org/videos/3817-house-appropriationscommittee>.

Because the state interests identified by FAU are not particular to the specific amendment in Section 1004.28(3), FAU fails to show a specific problem addressed by Section 1004.28(3). In turn, it fails

both parts of the *Pomponio* test, which requires (1) a balancing of the importance of the state interest against the degree of impairment and (2) an analysis of whether the impairment is not greater than necessary to achieve the state objective. See [378 So. 2d at 781](#). FAU has failed to identify any state objective whatsoever, let alone an important one that outweighs the severe impairment to the Foundation. And it has failed to show that the statute reasonably intrudes into the MOU to a degree no “greater than necessary to achieve” FAU’s objectives. [Searcy, 209 So. 3d at 1192](#) (quoting [Pomponio, 378 So.2d at 780](#)). Indeed, when a new law truly eviscerates a contractual agreement—as in *Citrus County* and the instant action—such a significant impairment can **never** survive this balancing test, if such a test is even required in every case.

The insufficient state interest is particularly apparent here, where the challenge is only to the statute as applied to the Foundation, and the statute would remain fully intact for other MOUs. Moreover, as the trial court found, the MOU **already** set forth a degree of oversight that complied with prior versions of the statute. See [Sears, Roebuck & Co., 223 So. 3d at 300](#) (justification not

significant where existing rule “***already*** sets forth aesthetic standards” and a process to protect the same interest).

**2. The Foundation’s DSO status does not justify the severe impairment.**

FAU contends that the trial court erroneously failed to recognize the “unique state-created and state-regulated relationship between universities and DSOs,” and had it properly weighed those factors, it would not have found impairment. IB at 38–41. Neither argument has merit.

**First**, FAU cites no caselaw or authority for the proposition that the Foundation, an independent not-for-profit, forfeited its constitutional right to be free from state impairment of its contracts when it agreed to become a university-affiliated DSO. Indeed, to claim that the Foundation had a diminished “expectancy interest in the preservation of its contractual rights,” IB at 53, disincentivizes private entities from entering contracts like this one that confer a substantial benefit on the university and the state. R. 11619 (unrebutted argument that Foundation has acted “consistent with its DSO status by providing in excess of \$45 million to or for the benefit

of HBOI/FAU since the MOU was signed”); R. 10306; R. 10185–86 (Flynn Depo. Tr. 28:23–29:24); R. 9752–54 (Asseff Depo. Tr. 141–43).

**Second**, FAU argues that the Foundation has a diminished interest in its contractual rights because DSOs have long been subject to state regulation. IB at 46–53. But the mere existence of state regulation in a field has never rendered private parties without constitutional protection, and courts have confirmed that a law can unconstitutionally impair a contract even in heavily regulated industries. See e.g., *Cohn*, 62 So. 3d at 1122 (condominium laws); *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So. 2d 1037, 1038 (Fla. 2d DCA 1979) (insurance laws). It is the degree of impairment to the contract, not whether the industry is regulated, that controls. And here, even accepting that DSOs are “heavily” regulated, this only highlights the severity of the impairment. The Foundation negotiated for—and obtained—protections in its MOU that other DSOs do not enjoy, reflecting its valuable assets. The resulting MOU thus gave the Foundation unique rights (as compared to other DSOs), which were significantly impaired by a law that allows FAU to control the board.

Relatedly, FAU misleadingly insinuates that the Foundation benefited—and continues to benefit—from significant state

appropriations. IB at 9–10. But the record makes clear that all such funds went to FAU itself. Tr. 535:21–537:3. In the case of the \$8.6 million in annual appropriations, that funding was “subsumed” into FAU’s general budget to fund FAU’s general operations. *Id.* The **only** funds the **Foundation** has ever received from the State that it was not already entitled to before the transaction (i.e., the Specialty License Plate funds) was a one-time payment for the valuable land the Foundation **sold** to the State. R. 10691–92 (explaining the sale). FAU has never provided **any** funds to the Foundation, and it does not dispute this fact. The Foundation, on the other hand, through 2020, has provided more than \$45 million to FAU in discretionary grants and Specialty License Plate funds. R. 10306; R. 10185–86 (Flynn Depo. Tr. 28:23-29:24); R. 9752–54 (Asseff Depo. Tr. 141-43). And the instant action notwithstanding, the Foundation continues to provide funding as it promised to do under the MOU—in fact, the Foundation has never turned down a request to fund the Institute. Tr. 55:6-9.

FAU also mischaracterizes the Foundation as an “affiliated state instrumentality,” IB at 41, and cites *Plancher v. UCF Athletics Ass’n, Inc.*, 175 So. 3d 724, 725–29 (Fla. 2015), for the proposition that

DSOs are so closely related to the state that they “enjoy the protection of the State’s sovereign.” IB at 51. The Foundation has never conceded that it is a state instrumentality, and the issue of sovereign immunity has **never** been litigated, therefore it has no bearing on this case. The *Plancher* Court determined, after a highly fact-specific inquiry, that a **particular** DSO’s bylaws subjected it to the university’s day-to-day control, therefore it was protected by sovereign immunity. The Foundation has nothing comparable in its bylaws and has never sought the protection of sovereign immunity. If this issue were ever litigated (which it was not), the Foundation would not be a state instrumentality under the *Plancher* test.

**IV. SECTION 1004.28(3) IS NOT RETROACTIVE AND THEREFORE CANNOT BE APPLIED TO AFFECT THE FOUNDATION’S VESTED RIGHTS IN THE MOU.**

Neither of the lower courts addressed whether the 2018 amendments to Section 1004.28(3) could apply retroactively to affect the Foundation’s vested rights in the 2007 MOU. This Court need only address the challenged statute’s constitutionality if it applies retroactively to the MOU. See *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873, 877 (Fla. 2010) (describing this “two-pronged test” in a contract impairment case as the “dispositive issue”).

Accordingly, this Court may resolve FAU’s appeal by answering a single threshold question: does Section 1004.28(3) apply retroactively to the 2007 MOU? The Foundation contends that it does not. The Court may affirm on this basis alone without reaching constitutionality or the Attorney General notice issues.

**A. Section 1004.28(3) contains no text applying the amendment retroactively.**

Substantive statutes are “presumed to apply prospectively absent clear legislative intent to the contrary.” *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011). Section 1004.28(3) is a substantive statute because it both prescribes a university’s “right” to approve DSO directors and imposes a “duty” on DSOs to submit directors for university approval. See *Massey v. David*, 979 So. 2d 931, 936–37 (Fla. 2008) (explaining that a right is “substantive” if it “creates, defines, and regulates rights” (quotation omitted)); see also *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (concluding a statutory amendment altering the right to sue was a substantive legislative decision); *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) (holding private whistleblower statute created substantive rights for employee). FAU does not argue otherwise.

Therefore, Section 1004.28(3) may not be applied retroactively unless that application is supported by “clear legislative intent.” *Bionetics Corp.*, 69 So. 3d at 948. As this Court has explained, the “paramount” indicator of legislative intent is the actual words of the statute. *Advisory Opinion to the Governor re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020). And Section 1004.28(3) contains no text indicating retroactive application. Compare § 163.3167, Fla. Stat. (specifying that a prohibition was “remedial in nature and applies retroactively”). Quite the opposite, the Legislature specified that the statute “shall take effect upon becoming law.” R. 8187 (Ch. 2018-4, § 7, Laws of Fla § 28). Florida courts have interpreted this phrase to require prospective application. See *Pondella Hall for Hire, Inc. v. Lamar*, 866 So. 2d 719, 722 (Fla. 5th DCA 2004) (statement that provision “shall take effect upon becoming law” expresses intent for prospective application); see also *Hahn v. Hahn*, 42 So. 3d 945, 947 (Fla. 4th DCA 2010) (inclusion of effective date “rebutts any argument that retroactive application of [the statute] was intended”). FAU has submitted no evidence to the contrary.

**B. FAU’s interpretation of Section 1004.28(3) would require retroactive application.**

In the Fourth DCA, FAU tried to skirt the retroactivity question altogether by implying that, because FAU is only using the statute to approve *future* board appointments, FAU is not applying the statute retroactively. However, the Foundation’s right to appoint a majority of its board without interference from FAU—as determined by the trial court—vested in 2007 when it entered the MOU. A prospective statute impermissibly acts retroactively where, as here, the future conduct at issue springs from rights and obligations settled in an earlier contract. See *Hahn*, 42 So. 3d 945–47 (amendment to child custody statute could not be applied retroactively to modify wife’s custody rights in earlier marital settlement agreement, even though statutory amendment only would have changed her rights to her children in the future); *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So. 2d 1037, 1038 (Fla. 2d DCA 1979) (prospective law did not apply to obligations under insurance contract entered into before statutory change “even though the act which triggers the obligation occurs after the statute is enacted”). By using Section 1004.28(3) to negate

a right that vested in 2007, FAU is, by definition, seeking a retroactive application of Section 1004.28(3).

Finding that Section 1004.28(3) applies prospectively does not render the statute meaningless, nor prevent its application to other DSOs. Most DSOs did not come to their universities with substantial real estate and endowments or through a highly negotiated MOU, and therefore they did not negotiate for the contractual vested rights to control its board like the Foundation did. R. 7542–43; R. 9596–9600, 9625–27; (Minton Depo. Tr. 67:9–68:5; 69:7–25; 70:2–71:2; 98:8–22; 99:7–100:2). Applying amended Section 1004.28(3) to the board appointment process of these other DSOs would be a prospective application that does not reach backwards in time to impact any vested right.<sup>9</sup>

#### **V. FAU SEEKS THE WRONG REMEDY ON APPEAL.**

Even were FAU to prevail in its other arguments, it seeks the wrong remedy. If amended Section 1004.28(3) is ruled to apply

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<sup>9</sup> FAU's argument, IB at 62–65, that the Foundation agreed to be bound by future changes in the laws is addressed above. See Section II(B) of the FAU Appeal, *supra*. In any event, it does not shed light on whether the Legislature intended the statute to be applied retroactively: it clearly did not.

retroactively to the Foundation, and that application does not unconstitutionally impair the MOU, then remand to the trial court is required. This is because the trial court—at a minimum—still needs to rule on the **other** defenses the Foundation preserved in the Joint Pretrial Stipulation and presented at trial. R. 6721–29. The trial court declined to reach these defenses because it found in favor of the Foundation on the unconstitutional impairment defense on the board-appointment issue.<sup>10</sup> The trial court would need to resolve these defenses; therefore, a remand, not outright dismissal, would be appropriate.

### **ARGUMENT ON THE FOUNDATION’S CROSS-APPEAL**

Though the trial court and Fourth DCA reached the correct conclusion on the appointments clause, they erred in reaching the opposite conclusion on the parties’ dispute over budget approval.

Amended Board of Governors Regulation 9.011(3) (“Regulation 9.011”),<sup>11</sup> granting universities the right to approve DSO budgets,

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<sup>10</sup> The trial court’s findings on the applicability of the defenses in the context of budget approval addressed neither the facts nor the rationale that would be relevant in determining whether they preclude judgment in favor of FAU on the board-appointment issue.

<sup>11</sup> This subsection was later renumbered to BOG Regulation 9.011(4).

and Section 4 of the MOU, granting the Foundation sole discretion to distribute its endowment as provided in the MOU, are inherently in conflict. FAU claims that, under Regulation 9.011, the Foundation may not spend one dollar unless the expense is included in an FAU-approved budget. Tr. 306:14–308:19 (former FAU CFO Jeff Atwater testifying that it was “FAU’s view” that “the [Foundation] would need the approval of the board prior to expenditures[,]” and “disapproval of the budget meant, in FAU’s view, that **no** money could be spent” (emphasis added)). But this necessarily limits the Foundation’s **sole discretion** to distribute its own endowment—a right guaranteed by the plain language of Section 4 of the MOU, and which the Fourth DCA recognized in its decision.

Therefore, the judgment granting FAU approval rights over the Foundation’s budget must be reversed on two independent grounds: First, pursuant to *Citrus County*, amended Regulation 9.011 unconstitutionally impairs the MOU, with no compelling public interest to justify the impairment. Second, as a threshold matter, the Regulation cannot be applied retroactively to alter the Foundation’s vested rights in the MOU.

The Attorney General concedes that the Foundation’s cross-appeal does not implicate the Rule 1.071 notice issue as “the challenge involves FAU’s internal regulations,” and therefore it does not draw into question the constitutionality of a state **statute**. AG Br. at 1 n.1.

**I. FAU’S BUDGET-APPROVAL POWER IN REGULATION 9.011 CONFLICTS WITH THE “SOLE DISCRETION” PROVISION IN THE MOU.**

The Fourth DCA premised its holding on the following statement: “Our holding does not affect the Foundation’s exclusive discretion to make distributions as provided in the MOU.” *FAU*, 372 So. 3d at 310–11. But an examination of the plain language of the MOU and Regulation 9.011 shows that this premise is wrong, and the provisions are in irreconcilable conflict. An organization like the Foundation spends according to its budget. So, the power to control the Foundation’s budget necessarily impinges upon the Foundation’s “sole discretion” over the manner, means, and amounts of funding it provides to or for the benefit of FAU.

**A. The plain language of the MOU protects the Foundation’s sole discretion to make distributions of its endowment to defray its expenses.**

In Section 4 of the MOU, the Foundation negotiated for, and obtained, the clear and unambiguous right to “**sole discretion**” over distributions of its endowment:

HBOI Foundation distributions **shall** be made in the **sole discretion** of the HBO/Foundation Board of Directors to **defray the expenses of its operations**, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU.

R. 7255, p. 3, § 4 (emphasis added).

Each of these terms carries a straightforward meaning:

- “Shall” makes the provision mandatory.
- “Sole discretion” is a legal term that means: “An individual’s power to make decisions **without anyone else’s advice or consent.**” Black’s Law Dict. (11th ed. 2019). This is consistent with the common meaning of the word “sole,” which is: “being the **only one.**” *Id.*; see also [Moore v. Palm Coast Cmty. Serv.](#), 701 So. 2d 115, 116–17 (Fla. 5th DCA 1997) (the term “sole discretion” is clear and unambiguous).
- “Defray” means to “bear the expense of.” Black’s Law Dict. (11th ed. 2019).
- “Expense” means “a business expenditure chargeable against revenue for a specific period.” *Id.*

The MOU thus unambiguously requires that the **Foundation**—not FAU—be the “**only one**” with the “power to make decisions” about

distributions of its endowment to “bear the expense of” the Foundation’s operations. The **only** limitation contemplated by the MOU is those expenses must be “to or for the benefit of FAU HBOI or FAU.” This is all entirely consistent with the DSO laws in effect in 2007 when the MOU was signed.

After giving the Foundation sole discretion over distribution of its endowment to defray expenses, the MOU enumerates non-exclusive examples of the types of distributions that the Foundation could decide to make, in its **sole discretion**, for the benefit of FAU:

Distributions made to or for the benefit of FAUHBOI or FAU may include, without limitation: (i) providing funds for research activities conducted by the faculty and staff of FAUHBOI or FAU; (ii) providing, maintaining and improving the libraries, programs and activities of FAUHBOI or FAU; (iii) providing funds to acquire or purchase real or personal property or services and construction for the benefit of FAUHBOI or FAU; (iv) providing students of FAUHBOI or FAU with funds to pursue their education; and (v) providing funds and resources to carry on any proper activities of FAUHBOI or FAU in furtherance of its mission and purposes.

R. 7255, p. 3, § 4. Many of these examples are classic operating expenses that would be provided for in an organization’s operating budget, and the MOU guarantees the Foundation the right to “sole

discretion” to make such distributions. These examples confirm the plain meaning of the provision.

**B. Even if extrinsic evidence could be considered, it does not support the lower courts’ interpretation of the MOU.**

Because the plain language of the MOU’s “sole discretion” provision does not limit the Foundation’s discretion to pay **only** those expenses included in an FAU-approved budget, the courts below should not have considered extrinsic evidence to read that limitation into the agreement. See *SCG Harbourwood, LLC*, 93 So. 3d at 1200. Even if extrinsic evidence could be considered, however, that evidence does not support the lower courts’ interpretation.

The trial court erroneously held that in negotiating the MOU, the Foundation’s focus “was on independence from the existing FAU Foundation and not on independence from FAU,” therefore the “sole discretion” provision was not tied to or intended to exclude **FAU’s** approval of the Foundation’s budget. R. 11677. This Court should reverse because the record evidence cited by the trial court actually supports the Foundation’s interpretation.

Indeed, the trial court’s own factual findings support the Foundation’s reading of the MOU. The trial court found that, during

negotiations, the Foundation’s “**primary concern**” was that “if it elected to become a DSO of FAU, its discretion to expend funds ‘to or for the benefit’ of FAU **may be impeded by FAU . . . .**” R. 11676 (emphasis added). The trial court also found that FAU “assured” the Foundation that the Foundation “would maintain the sole discretion to expend [its] funds ‘to or for the benefit’ of FAU.” R. 11677.

The result of this concern and assurance was the “sole discretion” provision. The “intent” of the “sole discretion” provision, according to the trial court, “was to memorialize the agreement between the parties that the Foundation had **sole discretion** to expend/distribute its funds ‘to or for the benefit’ of FAU (the MOU statutory requirement) **versus . . . FAU having the ability to ‘weigh in’ on such DSO expenditure decisions.**” R. 11679–80 (emphasis added). Furthermore, the undisputed record evidence is that the Foundation steadfastly rejected **any** contract term that might confine or narrow its discretion over distribution of its endowment. See R. 7140; see also Tr. 246:20–247:4 (intent of drafting attorney was to use simple language “to make it absolutely clear” that “sole discretion” meant only the Foundation “could effectuate the expenditure of [its] endowment”).

Yet it was exactly this concern by the Foundation—that FAU would “impede” its discretion to expend funds to or for the benefit of FAU—that became a reality when FAU sought to exercise the budget-approval power, and thereby “impede” the Foundation from paying any expenses outside of the FAU-approved budget. FAU’s exercise of the budget-approval right violated the entire premise upon which the Foundation agreed to become a DSO. Given this, the lower court’s conclusion—that the evidence does not reflect an intent that the “sole discretion” provision “was tied to the development of the Foundation budget or approval of such budget”—is wholly unsupported. *FAU*, 372 So. 3d at 310.

The parties need not have specifically negotiated a budget-approval right for it to be covered by the MOU. Because the Foundation negotiated for “sole discretion” to pay its expenses for the benefit of FAU, and Regulation 9.011(3) at the time the parties signed the MOU gave DSOs the sole right to approve their budget, the Foundation had no reason to negotiate for language expressly stating that its “sole discretion” over expenses was not limited to those expenses that were in the FAU-approved budget. It would have been redundant of the rights the Foundation already had.

In contrast, if FAU wanted to alter the existing state of affairs, it should have carved out budget-approval rights from the plain language of the “sole discretion” provision and existing regulations. The undisputed evidence is that FAU knew it did not have budget-approval power at the time the MOU was signed. R. 7198–203 (FAU’s attorney emailing the Foundation’s attorney a copy of the Chancellor’s Memorandum, CM-F-01.00-08/96, which addressed budget approval power under the operative regulations). Further, FAU knew how to contract for budget control, but chose **not to** in the case of the Foundation. FAU specifically included budget-control provisions in other DSO contracts. R. 7542–43 (FAU Trustees committee notes identifying provision in DSO by-laws and discussing approval by FAU of the FAU Finance Corporation and FAU Research Corporation).

Nor is the lower courts’ interpretation supported by the parties’ course of dealing after they entered the MOU. FAU proffered no evidence at trial that it even attempted to approve the Foundation’s annual budget from 2007 to 2014 (well after the Legislature amended the regulation in 2009 to provide for university approval of budgets). In contrast, during this same period, FAU affirmatively approved the

annual budgets of two of its other DSOs (the FAU Research Corporation and the FAU Finance Corporation)—both of which provided for FAU budget approval in their by-laws. *See e.g.*, R. 7540–50.

The trial court relied on the fact that from 2015 to 2016, “the FAU board of trustees voted to approve the Foundation’s budget,” and no one from the Foundation objected to these “budget approvals.” R. 11679. But the trial court’s conclusion that no one from the Foundation objected to these “budget approvals” is not competent evidence of the Foundation’s intent because the only record evidence is that the Foundation was unaware of the supposed approvals. The trial court found that Foundation President Katha Kissman’s attended a meeting in 2015 in which such approval was given (mistakenly referred to as an FAU board meeting). R. 11679. But Kissman testified that she only understood the committee to be making a “pro forma” recommendation, and the Foundation was only presenting its budget to the FAU Board for “informational purposes.” Tr. 94:22–95:5. The Foundation’s board could not have objected to something (i.e., FAU Trustees’ budget approval) of which it was not aware.

Even if the record evidence supported the trial court’s finding—that in the negotiations over the Foundation’s “independence,” the Foundation’s focus “was on independence from the existing FAU Foundation and not on independence from FAU,” R. 11677—this finding is not material to the interpretation of the “sole discretion” provision. The trial court ultimately held that the intent behind the provision was to memorialize the agreement that the Foundation had sole discretion “versus the FAU Foundation **or FAU** having the ability to ‘weigh in’ on such DSO expenditure decisions.” R. 11679–80 (emphasis added). Similarly, the trial court found that the Foundation’s “primary concern” was that its discretion to expend funds would be “impeded **by FAU** and/or the FAU Foundation.” R. 11677 (emphasis added). Thus, while independence from the FAU Foundation was a priority for the Foundation, the trial court also found that the intent of the “sole discretion” provision was to protect the Foundation’s rights when it became a DSO vis-a-vis both the FAU Foundation **and** FAU. *Id.* Indeed, nothing in the plain language of the MOU tethers the Foundation’s right to “sole discretion” to the FAU Foundation instead of FAU itself.

In sum, the extrinsic evidence cited by the trial court is neither competent nor substantial support for its holding regarding the meaning of the “sole discretion” provision. In any event, even if there were record evidence to support this holding, it does not affect the proper legal conclusion, therefore it should not be given any weight. The plain language of the MOU guaranteed the Foundation the right to “sole discretion” over distributions from its endowment. That right cannot exist with the budget-approval right claimed by FAU under Regulation 9.011. All extrinsic evidence supports this reading. The Court should reverse the lower courts’ finding to the contrary.

**C. The budget-approval power granted by Regulation 9.011 conflicts with the Foundation’s “sole discretion” to distribute its endowment as granted by the MOU.**

Both lower courts recognized that the plain language of Section 4 of the MOU, as set forth above, gives the Foundation sole discretion over distribution of its endowment. *See FAU*, 372 So. 3d at 310–11. But the lower courts erred in failing to recognize the conflict between that contractual right and the budget-approval right granted in Regulation 9.011.

The 2009 Amendment to Regulation 9.011 required, for the first time, that DSO operating budgets be “approved by the organization’s

governing board **and** the university board of trustees or designee.” Fla. Bd. of Govs. Reg. (“BOG Reg.”) 9.011 (as noticed for amendment on June 25, 2009). FAU’s position is that, under Regulation 9.011, the Foundation may **only** make distributions of its endowment for expenses that are included in the budget approved by FAU. In other words, according to FAU, the Foundation **may not** exercise its sole discretion to distribute its endowment to defray an expense that was **not** previously approved by FAU. R. 839, 841.

FAU can only avoid the conflict between its position and the plain language of the MOU by adding words to the MOU. Therefore, per FAU, the MOU **really** means that the Foundation has the “sole discretion” to “make expenditures **within the confines of the approved budget.**” R. 841 (FAU’s motion for partial summary judgment) (emphasis added). But that is not what the plain language of the MOU says. FAU’s interpretation is “at war with the English language” because it is flatly inconsistent with the definition of the words “sole discretion.” [\*United States v. Castleman\*, 572 U.S. 157, 179 \(2014\)](#) (Scalia, J., concurring).

FAU adopted this strained reading for a reason: without adding a qualifier—“within the confines of the approved budget”—to the

MOU, the conflict between the amended regulation and the plain meaning of the MOU is unavoidable. An example illustrates the conflict: Suppose the Foundation, in its sole discretion, chose to use its endowment to pay for the salary of a Chief Executive Officer to run its affairs, and therefore included the officer's salary in its proposed budget. Now, suppose that FAU wanted one of its own executives to run the Foundation instead, and therefore exercised its new budget-approval right to veto any budget that included a salary for the Foundation's chosen Chief Executive. (Precisely what FAU in fact attempted to do. *See supra*, p. 15.) According to FAU, this would result in a stalemate, and the Foundation would be prohibited from using its endowment to pay for the expense of its Chief Executive's salary. *See* R. 5177–85; *see also* Tr. 306:14–08:19 (discussing potential stalemate). In other words, the Foundation would no longer have *any* discretion to use its endowment to pay for the expense of the salary of its Chief Executive, much less “sole discretion.”

FAU's interpretation is wrong as a matter of law because it ignores the plain meaning of “sole discretion”—essentially rendering the term meaningless. *See City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (“contracts should be interpreted to give effect to

all provisions” (citation omitted)). If the parties had intended to limit the Foundation’s sole discretion to make distributions to pay for its expenses to those expenses that were in an FAU-approved budget, they would have said that.

Because this meaning is plain, the lower courts should not have resorted to extrinsic evidence to alter it. See *Summitbridge Credit Investments LLC*, 218 So. 3d at 488–89; *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012) (citing *Jenkins v. Eckerd Corp.*, 913 So.2d 43, 52 (Fla. 1st DCA 2005)) (“If a contract provision is clear and unambiguous, a court may not consider extrinsic or parol evidence to change the plain meaning set forth in the contract.”).

**D. The statutory scheme in 2007 supports the Foundation’s reading of the MOU because the operative laws and regulations did not give FAU the unfettered right to budget approval that it now claims.**

The Foundation’s interpretation of the MOU is further supported by the laws and regulations in effect at the time the parties entered the MOU, under which the Foundation, not FAU, had the right to approve its budget. “The laws which exist at the time and place of the making of a contract enter into and become a part of the

contract made, **as if they were expressly referred to** and incorporated in its terms . . . .” *Brandt*, 525 So. 2d at 1020 (quoting *S. Crane Rentals, Inc.*, 429 So. 2d. at 773) (emphasis added). This rule applies equally to “applicable or relevant . . . regulations.” *Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Servs., Inc.*, 765 So. 2d 836, 839 (Fla. 4th DCA 2000) (citation omitted). And, where “no evidence is presented” that a party “gave consideration” to alter respective rights under existing law in its favor, those existing rights are “established by operation of law.” *Brandt*, 525 So. 2d at 1020; see also *S. Crane Rentals Inc.*, 429 So. 2d at 773 (rejecting argument that absence of provision on cancellation right created latent ambiguity because existing Florida law regarding cancellation rights “unambiguously annexed to the parties’ contract”).

The operative 2007 versions of BOG Regulation 9.011 and Section 1004.28(2), Florida Statutes, both support the Foundation on the budget-approval issue. The lower courts correctly interpreted the regulation as not granting FAU budget-approval rights, but both erred in their interpretation of the statute. Each provision is addressed in turn.

**1. The version of Regulation 9.011 in force in 2007 did not give FAU budget-approval rights.**

In 2007, the operative BOG regulation provided that DSO operating budgets shall be “**approved** by the organization’s governing board [i.e., the DSO] and **recommended** by the university president to the Board of Regents for review.” R. 11673 (emphasis added). Thus, the **approval** was by the DSO’s board, and the **recommendation** was by the university. If the BOG had wanted to grant **universities** the right to approve a budget, it would have done so expressly. *Gay v. Singletary*, 700 So. 2d 1220, 1221 (Fla. 1997) (“[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded” (citation omitted)).

The terms “recommend” and “review” in the 2007 regulation were not toothless. If review of a DSO’s budget revealed that the DSO was not “operating in a manner consistent with the goals of the university and in the best interests of the state,” as required by the DSO Statute, the BOG Regulations provided a remedy in the form of DSO decertification. See BOG Reg. 9.011(6); see also R. 5949.

In 2009, the BOG passed the regulation at issue here, which added a new express right for universities to approve DSO budgets. The regulation states that budgets “shall be prepared at least annually, and approved by the organization’s governing board **and the university** board of trustees or designee.” *FAU*, 372 So. 3d at 309 (citing BOG Reg. 9.011(3) (as noticed for amendment on June 25, 2009)) (emphasis added); R. 11673. When a regulation is amended, “it is presumed . . . to have a meaning different from that accorded to it before the amendment.” *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968). To hold otherwise “would impute to the [BOG] an intention to do a useless act in amending.” *See id.*; *Jackson v. State*, 289 So. 3d 967, 969 (Fla. 4th DCA 2020) (holding that a change in a statute necessarily meant there was a change in meaning). So, to give the 2009 amendment any meaning, it must be read as adding a **new** right—university approval power over DSO budgets—that was absent from the 2007 BOG Regulation.

Therefore, under the regulation in force in 2007, the Foundation had the sole right to “approve” its budget. The lower courts correctly interpreted this regulation. *See* R. 11673–76; *FAU*, 372 So. 3d at 309.

**2. The DSO statute in force in 2007 did not give FAU budget-approval rights.**

Conversely, the lower courts' conclusion that FAU had approval rights under the operative 2007 DSO **statute** was misguided and wrong as a matter of law. [Section 1004.28\(2\), Florida Statutes](#), provides (and provided in 2007), the following:

The board of trustees, ***in accordance with regulations and guidelines of the Board of Governors***, shall prescribe by rule conditions with which a university [DSO] must comply to use property, facilities, or personal services at a state university. ***Such regulations shall provide for budget and audit review and oversight by the board of trustees.***

§ 1004.28(2), Fla. Stat. (emphasis added). The lower courts noted that the Foundation used university property until 2018, when it left FAU's campus, and therefore, concluded that, "at the time the MOU was executed . . . FAU indeed had the authority to engage in budget and audit review and oversight of the Foundation's budget." R. 11680.

This reasoning does not survive scrutiny. The statute simply gives the university's board of trustee's the right to ***prescribe conditions*** that ***accord*** with the Board of Governor regulations providing for "budget and audit review and oversight by the board of

trustees.” R. 11673. In 2007, the mode of budget “review and oversight” selected by the BOG was that the budget be “**recommended**” by the university president to the Board of Regents for **review**—which was less than the right of approval implemented two years later. R. 11673 (emphasis added). In 2007, no regulations gave universities the right to budget approval. Thus, the lower courts erred when they construed the 2007 DSO statute as granting universities a budget-approval right that was (1) not stated on the face of the statute, and (2) flatly contrary to the 2007 regulation the statute expressly referenced and incorporated.

## **II. IF REGULATION 9.011 APPLIES TO THE FOUNDATION, IT IMPAIRS THE FOUNDATION’S RIGHTS UNDER THE MOU.**

Applying amended Regulation 9.011 to the Foundation—which would give FAU the right to veto the Foundation’s budget—unconstitutionally impairs the Foundation’s rights under the MOU in two independent respects. First, it grants FAU a substantial new right that FAU did not have at the time of contracting, and did not bargain for. Second, it wholly rewrites the “sole discretion” provision by enabling FAU to limit the Foundation’s ability to spend its endowment to cover expenses simply by refusing to approve the

Foundation's budget. No countervailing state interest justifies this severe impairment. The lower courts erred in coming to the opposite conclusion, and this Court should reverse.

**A. The trial court incorrectly applied the more onerous federal impairment test rather than Florida's impairment test.**

As an initial matter, both lower courts applied the wrong impairment test. Citing a federal case, the trial court held that, to contravene the contracts clause, the “law must modify an *identifiable provision* of the contract.” R. 11681 (emphasis added; citation omitted). From this, the trial court then concluded: “Because this court has found that the MOU did not address the Foundation’s budget approval, the changes that occurred with the [regulations], post-MOU execution, did not rewrite the MOU or materially impair it.” R. 11680. The Fourth DCA followed suit, stating: “We agree with the trial court that the MOU’s section 4 does not address budget approval, and that, consequently, the Amended Regulation does not rewrite or materially impair the MOU by requiring both a DSO and the related university to approve the DSO budget.” *FAU*, 372 So. 3d at 310.

This is the wrong legal standard. Unlike the federal case the trial court cited, and other federal Contracts Clause cases, *see supra*, FAU Appeal Section III(A), this Court has not required that the “law modify an **identifiable provision** of the contract” to establish impairment. Rather, this Court has found impairment where a law added rights “that are mentioned nowhere in the parties’ agreement” (i.e., “not address[ed],” R. 11681; *FAU*, 372 So. 3d at 310–11) and where those rights were “in addition to the requirements” of laws that existed at the time of contracting. *See Citrus County*, 150 So. 3d at 1108; *see also Sears, Roebuck & Co.*, 223 So. 3d at 298–99 (explaining that the “Florida Constitution offers greater protection for the rights derived from the Contract[s] Clause than the United States Constitution,” therefore federal precedent does not control (citations omitted)).

**B. Applying the correct legal standard, Regulation 9.011 severely impairs the Foundation’s rights.**

Applying the correct legal standard, the amended Regulation impairs the MOU. *Citrus County* controls here, as it does on the board-appointment issue in FAU’s appeal. In *Citrus County*, this Court held that a non-profit’s contract rights were impaired by a new law requiring hospital board approval for “certain borrowing,

indebtedness, policies, budgets, capital projects, and expenditures” and for the Foundation’s “annual and operating capital budget” not otherwise required under existing contracts, articles, or bylaws. 150 So. 3d at 1105, 1108. Here, too, imposing a budgetary veto on the Foundation “eliminates the Foundation’s ability to operate and manage the [HBOI Foundation] as it [] contracted to do” while at the same time shifting to FAU rights that contravene the terms of the MOU. *Id.* at 1108.

The impairment of the MOU is even more severe than in *Citrus County* because the Foundation and FAU negotiated for the Foundation’s sole discretion. In *Citrus County*, the foundation did not bargain for that control. *Id.* at 1104. Here, the Foundation’s “sole discretion” was a central tenant of the MOU. By granting FAU veto power over the Foundation’s annual budget, the amended BOG Regulation re-assigned this control to FAU. Because this reassignment works a “severe, permanent, and immediate change” in the parties’ contractual relationship, it impairs the Foundation’s contractual rights. *Tropicana Condo Ass’n, Inc. v. Tropical Condo., LLC*, 208 So. 3d 755, 758 (Fla. 3d DCA 2016) (citation omitted). It certainly “changes the substantive rights of the parties,” and as a

result “ma[d]e worse,” “diminish[ed]” in strength,” and “weaken[ed]” the Foundation’s rights under the MOU. *Sears, Roebuck & Co.*, 223 So. 3d at 299.

The impairment in this case is not speculative or conjectural. As demonstrated by its takeover attempt in 2017, *see supra*, p. 15, FAU has shown it will use any plenary budget-approval power to **completely eliminate** the Foundation’s discretion over its spending to or for the benefit of FAU or the Institute.

**C. FAU has not established any state interest to justify the severe impairment.**

Throughout these proceedings, FAU has not identified significant and legitimate state interests that justify this severe impairment. As the Florida Supreme Court has held, “virtually no degree of contract impairment is tolerable[.]” *Pomponio*, 378 So. 2d at 780. And, as mentioned above, this Court holds the State’s proffered justifications for an impairment to a heightened standard where the legislation alters contractual obligations of a state or state entity. *See Coastal Petroleum Co.*, 672 So. 2d at 573. As an instrument of the State, FAU is held to this higher standard.

As discussed extensively in Section III(C) of the FAU Appeal, *supra*, the issue is not justifications for DSO regulation *in general*; the question is whether FAU has shown a significant or legitimate justification for controlling, specifically, the Foundation's budget. See [Sears, Roebuck & Co., 223 So. 3d at 300](#) (interrogating and rejecting asserted interest); [Pomponio, 378 So. 2d at 780–82](#) (same).

It has failed to do so. While FAU argued before the trial court that DSOs collectively are trustees of immense state resources, that fact alone does not show that the Foundation's continued control over its budget is antagonistic to any state interest. Nor can it. The Foundation has always acted "consistent with its DSO status by providing in excess of \$45 million to or for the benefit of HBOI/FAU since the MOU was signed." R. 10306; R. 10185–86 (Flynn Depo. Tr. 28:23-29:24); R. 9752–54 (Asseff Depo. Tr. 141-43). It is beyond reasonable dispute that the Foundation brought a unique set of resources to the university, including valuable land and a sizeable independent endowment. See Tr. 171:12–15, 224:12–17 (FAU's valuation of the Institute campus at \$92 million).

FAU also ignores other oversight mechanisms related to budgets that protect any state interest. For example, Section

1004.28(7) , Florida Statutes, requires that the DSO “shall submit to the university president and the Board of Governors its federal Internal Revenue Service” Forms. [§ 1004.28\(7\), Fla. Stat.](#) And, under the Board of Governor’s Regulations, the university board of trustees can decertify a DSO where certain standards are not met. *See* BOG Reg. 9.011(6). So, theoretically, should FAU review the Foundation’s budget and conclude that the Foundation is no longer serving the best interest of the university, the remedy is decertification as a DSO. *Id.* FAU has never shown why this protection is insufficient to protect state interests. *See* [Sears, Roebuck & Co., 223 So. 3d at 300](#) (justification not significant where existing rule “**already** sets forth aesthetic standards” and a process to protect the same interest).

Finally, and as discussed in Section III(C)(2) of the FAU Appeal, *supra*, the state has countervailing interests in protecting the Foundation’s contractual rights. If the generalized interest in regulation is held sufficient to impair DSO contracts, parties will be wary of entering into valuable agreements with the State. As one example, had the Foundation known that FAU would be able to evade the express terms of the MOU, the Foundation would not have

transferred \$92 million in assets and provided a great deal of financial support in subsequent years. R. 379.

### **III. THE 2009 AMENDMENT TO REGULATION 9.011 DOES NOT APPLY RETROACTIVELY TO THE MOU.**

The trial court also erred when it failed to reach the threshold issue of whether the 2009 amendment to Regulation 9.011 may be applied retroactively. *Menendez*, 35 So. 3d at 877. The trial court should be reversed because it does not apply retroactively, and therefore, FAU does not have the budget-approval right it claimed to have.

As explained in Section IV(B) of the FAU Appeal, *supra*, the 2007 MOU gave both parties vested contractual rights that carried into the future. *See Hahn*, 42 So. 3d 945–47. One of those negotiated rights was the Foundation’s sole discretion over distributions from its endowment. Because FAU is trying to use the 2009 amendment to Regulation 9.011 to reach backwards in time and negate a right that vested in 2007 (with the signing of the MOU), by definition it attempts to apply a law retroactively. *See id.* (amendment to a child custody statute could not retroactively modify a marital settlement agreement, even though the amendment would only change future

visitations); *see also Hausler*, 374 So. 2d at 1038 (a prospective insurance law did not apply to a contract entered into before the statutory change “even though the act which triggers the obligation occurs after the statute is enacted”). This cannot occur unless the Legislature clearly intended for retroactive application. *Bionetics Corp.*, 69 So. 3d at 948.

As discussed above, the 2009 amendment to the BOG regulations is a substantive regulation that creates a new, express right for universities: that budgets “shall be prepared at least annually, and approved by the organization’s governing board **and the university** board of trustees or designee.” *See* R. 7393 (BOG Reg. 9.011(3) (2009) (emphasis added)); *see also* R. 5948. And it contains no language whatsoever to indicate that the Board of Governors intended to reach **back** in time and negate vested contractual rights from prior transactions.

Thus, for the same reasons that the 2018 amendment to board appointments does not apply retroactively to the MOU, Section IV of the FAU Appeal, *supra*, so too should this Court find that the 2009 amendment does not apply retroactively, and that FAU does not have the budget-approval rights it claims to have.

Although the Foundation has diligently raised this argument at every stage of the proceedings, neither the trial court nor the Fourth DCA reached this issue. *See FAU*, 372 So. 3d at 305 (“We write to address the ultimate issues of whether the Amended Statute unconstitutionally impaired the MOU and whether the MOU addressed budget approval. We do not address the remaining issues.”).

This Court should therefore rely on this independent basis for reversal, and find that the budget-approval amendment applies only prospectively, and that FAU does not have the right of budget approval.

### **CONCLUSION**

Accordingly, this Court should (1) affirm the Fourth DCA’s decision on direct appeal; and (2) reverse the Fourth DCA’s decision on cross-appeal.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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I HEREBY CERTIFY that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman Old Style font and contains **21,461** words.

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