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.

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

CROSS-REPLY BRIEF OF HARBOR BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PREFACE

Appellant/Cross-Appellee, The Florida Atlantic University Board of Trustees will be referred to as "FAU" and the Appellee/Cross-Appellant, Harbor Branch Oceanographic Institute Foundation, Inc. will be referred to as "the Foundation."

Citations to the Appellant/Cross-Appellee's cross-answer brief will be noted as "FAU C-AB" or "C-AB." Appellee/Cross-Appellant's cross-initial brief will be noted as "Foundation C-IB" or "C-IB."

CROSS-REPLY BRIEF

FAU's response hinges on a false premise: that the Foundation claims "unchecked independence to establish its budgets without any oversight" under the MOU. FAU C-AB 42. The Foundation, in agreeing to become a DSO, has always acknowledged and accepted the restrictions set forth in the MOU and required by law when it signed the MOU. The Foundation did not accept that FAU could be granted new powers impairing the Foundation's "sole discretion" over distributions from its endowment. Yet this is exactly what the 2009 amendment to BOG Regulation 9.011(3) did when it empowered FAU to veto the Foundation's budget and prevent the Foundation from distributing any funds from its endowment—the very opposite of "sole discretion."

I. FAU DISREGARDS THE PLAIN MEANING OF "SOLE DISCRETION" AND THE PRACTICAL REALITY THAT BUDGETS LIMIT EXPENDITURES.

A. FAU asks the Court to add words to the MOU.

FAU and the lower courts' interpretation of the MOU relies heavily on the fact that the MOU does not use the word "budget." FAU C-AB 43-45. But that term was unnecessary because the

meaning of "sole discretion" is unambiguous. Foundation C-IB 91-93.

Under FAU's interpretation, the Foundation only would have "sole discretion" to "make expenditures ***within the confines of the approved budget***." R. 841 (emphasis added). Yet FAU can only arrive at this meaning by inserting the bolded phrase into the MOU, as they implicitly conceded in their motion for summary judgment. *Id.* In contrast, the Court need not add new words to the MOU to accept the Foundation's interpretation of the MOU: "sole discretion" means what it says. Foundation C-IB 91-93.

FAU argues that there is a "basic distinction" between the expenditure of funds and adoption of budgets. FAU C-AB 44. The Fourth DCA based its affirmance on the same faulty premise: that FAU's budget approval right did not limit the Foundation's sole discretion to distribute its funds. This is plainly wrong—budgets necessarily limit expenditures. Foundation C-IB 90-93. FAU's CFO confirmed this self-evident fact when he testified that if FAU disapproved a budget, "the Foundation would not be allowed to spend any money at all, unless and until FAU … approved a revised budget." Tr. 306:14–22. When asked by the trial court if budget approval

meant that "it is FAU and not the Foundation that is making the decision on whether the expenditure is appropriate or not," FAU's prior counsel frankly answered "Yes." R. 964 at 18:11–23. FAU has not refuted that it can hold the Foundation's spending hostage through its budget-approval rights, in direct violation of the MOU.

B. FAU's government spending analogy fails because the Foundation spends its own money.

To inject new requirements into the MOU, FAU argues that the Legislature adopts the state budget, while "the executive branch has sole discretion to decide how to spend budgeted funds." FAU C-AB 44. But the government analogy is inapt and the cited authority inapposite. They are undergirded by separation-of-powers principles, which are not implicated by this purely contractual relationship between a university and a private foundation. Executive agencies may only spend state funds appropriated for and budgeted to them by the Legislature. *See* *Graham v. Haridopolos*, 75 So. 3d 315, 318 (Fla. 1st DCA 2011). Here, the Foundation spends its own funds from its own substantial endowment.

C. FAU's reliance on the 2007 Regulation is misplaced.

According to FAU, the 2007 DSO Regulation is "incompatible" with the Foundation's plain-meaning interpretation of "sole discretion". FAU C-AB 46-47. Not so. The statutory budget oversight that existed in 2007 was the law at the time and was thus part of the contract. *See* *Brandt v. Brandt*, 525 So. 2d 1017, 1020 (Fla. 4th DCA 1988). The budget approval right granted in 2009 enjoys no such privilege.

To avoid this problem, FAU draws (C-AB 46-47, 59-63) a false equivalency between the limited oversight it had in 2007—that DSO operating budgets shall be "approved by the organization's governing board and recommended by the university president to the Board of Regents for review"—and the 2009 regulation—which provides that budgets shall be "approved by the organization's governing board and the university board of trustees or designee". R. 11673. FAU claims these are essentially the same because "the university president had discretion to grant or withhold his or her recommendation." FAU C-AB 60. Both lower courts correctly rejected FAU's position.

FAU's argument ignores that the president only "recommends" the budget for the purposes of BOG "review"—***not*** approval. The

consequence of withholding the "recommendation" is that the BOG, in its "review," knows the university disagrees with the budget. At that point, the BOG can threaten to decertify the DSO if it will not revise its position. This is not the same as the plenary veto power granted in 2009.

FAU has conceded this distinction in other contexts. The DSO statute authorizes FAU to "review" a DSO's annual audit. § 1004.28(2)(b), Fla. Stat.; R. 7561. But FAU does not claim it has the power to "approve" annual audits. R. 3372. There is no logical reason to treat budgets differently.

FAU argues that the BOG amended the regulation merely to remove itself from the process and substitute the university trustees for the president. FAU C-AB 62. But such speculation fails to address why, if both statutes conferred the same substantive approval rights, the BOG replaced the words "recommend" and "review" with a new word: "approve." If the 2007 Regulation already gave budget-approval power to anyone other than the DSO, the BOG would not have amended the Regulation in this way. Foundation C-IB 96; *Jackson v. State*, 289 So. 3d 967, 969 (Fla. 4th DCA 2020) (a change in a statute necessarily reflects a change in meaning).

FAU's authorities (C-AB 61) are not to the contrary. Both cases concern the exercise of a statutory executive power that was already explicitly vested in a state official, and the recommendation was the trigger to exercise that existing power. *See Harden v. State*, 932 So. 2d 1152, 1154 (Fla. 3d DCA 2006) (addressing a statute under which the state attorney could not petition for involuntary commitment unless there was a "recommendation" that the person be designated a sexual predator); *State v. Joughin*, 138 So. 392, 396 (Fla. 1931) (addressing an independent condition precedent to the executive's express authority to suspend officers). The 2007 Regulation did not grant budget-approval power to FAU or the BOG subject to a recommendation: it merely provided for the university to recommend the budget "for review."

D. FAU's reliance on the DSO statute is misplaced.

FAU speculates (C-AB 47) that the Foundation must have accepted FAU's plenary budget power because the 2007 DSO statute subjected on-campus DSOs to the university's "budget and audit review and oversight." § 1004.28(2)(b), Fla. Stat. (2007). FAU ignores that the only "oversight" for an on-campus DSO in 2007 was that the budget would be "recommended" by the university to the BOG "for

review," reserving approval power to the DSO. Foundation C-IB 97-98. This is what the Foundation accepted, no more.

FAU's reliance on *Alachua County v. Watson*, 333 So. 3d 162 (Fla. 2022), is misplaced. There, a statute gave sheriffs the discretion to spend money within a budget dictated and allocated to them by the commission. *Id.* at 165. Here, it is undisputed that the Foundation spends its own money from its own endowment and does not rely on FAU for funding.

II. EVEN IF THE MOU IS AMBIGUOUS, UNREFUTED EVIDENCE PROVES THE PARTIES UNDERSTOOD THE FOUNDATION CONTROLLED DISTRIBUTIONS TO FAU.

Even if the MOU were ambiguous, the lower courts' holdings regarding budget approval power are not supported by competent and substantial parol evidence.

A. The Foundation's "primary concern" was maintaining sole discretion to spend its own funds.

The trial court's key factual findings—adopted by the Fourth DCA—were: (1) that the Foundation's "primary concern" during negotiations was that "its discretion to expend funds … may be impeded ***by FAU***" and (2) that the "intent" of the sole discretion clause was to memorialize the agreement "that the Foundation had sole

discretion to expend/distribute its funds … versus … ***FAU*** having the ability to 'weigh in' on such DSO expenditure decisions." R. 11676-77, 11679–80 (emphasis added). These findings squarely contradict the lower courts' conclusion: that FAU may receive a new power to "weigh in" on spending through budget approval without contravening the MOU. That conclusion thus cannot have been supported by competent and substantial evidence.

B. None of FAU's parol evidence provides substantial and competent evidence that the Foundation failed to negotiate for budget independence from FAU.

FAU stresses that the parties never specifically discussed budgets. FAU C-AB 50-51. But the Foundation did not need to raise the budgeting process specifically. The Foundation successfully negotiated for sole discretion over its distributions, which would be meaningless if FAU could limit distributions through vetoing the budget. *See* Section I(A), *supra*. And during negotiations, FAU's lawyer provided the Foundation's lawyer with the 2007 Regulation, which (as discussed) kept budget approval power with the DSO. R. 7198-7203.

FAU's argument that the Foundation was not opposed to budget control cannot be reconciled with the Foundation's repeated rejection

of proposals to limit the Foundation's discretion over its endowment. Foundation C-IB 6-9. Further, contrary to FAU's argument (C-AB 51-52), the Foundation's use of FAU's office space simply shows the Foundation's willingness to accept the budget "oversight" provided at the time—***not*** the budget veto right granted in 2009. *See* Section I(D), *supra*.

Nor does the parties' post-execution conduct support the lower courts' conclusion. FAU C-AB 54-55. FAU relies on a 2012 email from the Foundation's counsel, but the email shows he rejected potential revisions to the MOU because they restricted the Foundation's discretion over funds. R. 7597-98. FAU's counsel reassured him that FAU was "NOT proposing any changes in the existing relationship." R. 7596. This email chain contradicts the Fourth DCA's holding because it (1) affirms that the Foundation steadfastly refused to cede the financial independence it negotiated for in 2007 to FAU and (2) confirms that, in 2012, FAU did not think the 2009 amendment changed its relationship with the Foundation in any way.

FAU also cites its purported budget "approvals" in 2015 and 2016. FAU C-AB 55. But this was eight years after the MOU was signed, six years after the 2009 regulation was passed, and the only

record evidence is that the Foundation's representative at the meetings where the "approvals" occurred did not know FAU was purporting to exercise this right. Tr. 95:2-5.

More telling is what happened in 2017 when FAU clearly and unambiguously presented the budget-approval issue to the Foundation. FAU demanded (for the first time) that the Foundation change its budget. The Foundation made its understanding of the original intent of the MOU clear when it refused. Foundation C-IB 14-16. FAU fails to explain why it never requested the Foundation change its budget until its attempted takeover in 2017. R. 11678.

III. APPLYING THE 2009 AMENDMENT NEGATES THE DISTRIBUTIONS PROVISION OF THE MOU.

The Fourth DCA erred in adopting the trial court and FAU's incorrect legal premise: that impairment cannot be found when an agreement is silent on the word "budget." FAU C-AB 58.

First, the MOU is not silent on budgets, because the provision granting the Foundation sole discretion over expenditures to or for the benefit of FAU necessarily precludes granting FAU plenary budget-approval power. *See* Section I(A), *supra*.

Second, in Florida, impairment can be established by imposing new conditions not expressed in the contract. Foundation C-IB 61-64. This is devastating for FAU on both the director and budget issues, so FAU tries to argue that the *Citrus County* agreements were not actually silent, but specifically authorized the non-profit foundation to appoint its directors without hospital approval. This is wrong. FAU's only support is the plaintiff's argument at summary judgment. But a review of the actual agreement reveals that its provision regarding director appointments confers the same substantive rights as the MOU—that is, it does not address county ***approval*** of board members—making *Citrus County*'s application inescapable here. *See* Complaint at 57-59, *Citrus Mem'l Health Found., Inc. v. Citrus Cnty. Hosp. Bd.*, 2011-CA-001653 (Fla. 2d Cir. Ct. June 27, 2011).

More importantly, whatever the underlying agreement in *Citrus County* said about budgets, what mattered to the Florida Supreme Court was that the contract did ***not*** address budget ***approval*** power. *Citrus County*, 150 So. 3d 1102, 1108, n.6 (Fla. 2014). Therefore, this Court's holding is that a new law impairs a contract where, as here,

it provides one party a new power not mentioned in the contract. The Court should thus reach the same result here.

IV. THE FOUNDATION'S ARTICLES DOES NOT IMPORT ALL FUTURE LAW INTO THE MOU.

FAU adopts, without elaboration, its argument from the director issue that Article III of the Foundation's Articles of Incorporation adopted all future changes of law into the MOU simply by stating that the "purpose" of the Foundation is to operate as a non-profit "so far as is or may be permitted by [applicable] laws." FAU C-AB 59.

The Foundation likewise reasserts its argument from its answer brief. Foundation C-IB 55-57. FAU does not address the Florida caselaw requiring that the adoption of future amendments must be express and unambiguous. *Id.* A description of the Foundation's original purpose in the 1970s cannot reasonably be interpreted as an express adoption of future law. *Cf. Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n*, 361 So. 2d 128, 132–33 (Fla. 1978) (contract expressly subjected itself to applicable law "[a]s it may be amended from time to time"). Nor can FAU produce any parol evidence that the parties intended to incorporate future state-law amendments.

V. THE 2007 REGULATIONS DID NOT ALREADY GIVE FAU A BUDGET APPROVAL POWER.

FAU argues as an "alternative" basis for affirmance that the laws in 2007 already required university consent to adopt a DSO budget. FAU C-AB 59-60. This is incorrect for the same reasons negating FAU's attempt to alter the meaning of the MOU. *See* Sections I(C)-(D), *supra*. Budget veto power is different from a university's ability to "recommend" or "review" a budget under the 2007 Regulation. The BOG would not have amended the Regulation to provide universities with budget-approval power if they already had it under the 2007 Regulation. Thus, the amendment was not a mere codification of existing law. *Id.*

VI. FAU FAILS TO IDENTIFY A LEGITIMATE AND SIGNIFICANT STATE INTEREST TO JUSTIFY THE SEVERE IMPAIRMENT.

A. FAU's reliance on a generalized interest in DSO regulation is insufficient.

FAU argues that the impairment is justified because DSOs are not private enterprises and therefore subject to increased regulation. FAU C-AB 63-65. This goes too far: the fact that an organization is regulated does not, without more, justify the imposition of dramatically stricter regulations impairing its contractual rights. The

State must identify an interest in the specific regulation causing the impairment. Foundation C-IB 102-104.

FAU's alleged interest in preventing mismanagement of state funds is insufficient. Before 2009, universities and the BOG could protect this interest through its review of DSO-approved budgets, with the threat of decertification as its enforcement mechanism. FAU contends that decertification is a "sledgehammer," while a budget veto power is more "practical." FAU C-AB 65-66. Maybe. But both serve the same purpose—preventing a DSO from spending funds the university does not want it to spend. FAU has "failed to show how the [power to veto a budget] accomplishes anything to further its supposed purpose beyond what the [threat of decertification or decertification itself] already accomplishes." *See* *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P.*, 223 So. 3d 292, 300 (Fla. 4th DCA 2017).

It is a gross overstatement to say (C-AB 65) that the new budget veto right is an "essential safeguard of the public interest." Surely the State believed it had sufficient oversight of DSO spending for the decades prior to the 2009 amendment. At the very least, granting FAU unbridled discretion to veto any budget "unreasonably intrudes

into the parties' bargain to a degree greater than is necessary to achieve that objective." *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1192 (Fla. 2017); *see also Sears*, 223 So. 3d at 300 (finding a city resolution to unconstitutionally impair contracts where it granted one party plenary power to deny subleases). FAU had "alternative means" of achieving this goal, like the decertification process, that avoided "altering [the Foundation's] contract rights." *Scott v. Williams*, 107 So. 3d 379, 385–86 (Fla. 2013).

Contrary to FAU's claim (C-AB 66), the Foundation is not arguing that the "only relevant state interest in an impairment analysis [is] the state interest in the law's application to a single plaintiff." That the Foundation acted in the state's interest even without FAU budget approval merely shows that rejecting application of the 2009 amendment to the Foundation because of the MOU is not inimical to the broader state interest.

But more importantly, FAU has failed to show a legitimate and significant state interest in plenary control over—that is, complete discretion to approve or reject—***any*** DSO budget. It cannot identify any record evidence of a specific state interest animating the 2009

amendment, nor does it cite any legislative history illuminating an interest in that power.

The only state interests FAU can muster are those purportedly behind the 2018 amendments to the DSO statute. FAU C-AB 63-66. Those are irrelevant to the impairment analysis of the 2009 amendment to the budget regulation. Absent a legitimate state interest in plenary control over DSO budgets, specifically, the 2009 amendment unconstitutionally impairs the MOU.

FAU (C-AB 65) attempts to minimize application of the long-stated rule that tolerance for impairment is at its lowest when the State is a party to the impaired contract. But FAU does not meaningfully distinguish *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). Contrary to FAU's argument, the critical fact was not that the applicable law was amended shortly after the contract was signed; the critical fact is that the State was a party to the contract. As this Court has explained, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Scott*, 107 So. 3d at 385. This Court will not take an asserted state interest at face value, but rather will interrogate that interest and reject it if

unsupported. *See* *Sears*, 223 So. 3d at 300; *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780–82 (Fla. 1979).

B. The impairment is severe because FAU can prevent the Foundation from spending its own endowment.

FAU's attempts to minimize the impairment (C-AB 67-70) are unpersuasive. While FAU tries to characterize the 2009 amended regulation as a "limited" check, it does not meaningfully dispute that its power to approve the Foundation's budget is functionally an unqualified power to ***veto*** any Foundation budget. Nor does FAU really dispute that its new veto power allows FAU to grind the Foundation's spending—and operations—to a halt.

FAU claims (C-AB 68) that the Foundation agreed to become a DSO and operate in a regulated environment, and that it agreed to use FAU office space (necessarily accepting some budget oversight). Again, this proves too much. That the Foundation agreed to some regulation does not make the impairment caused by obliterating its sole discretion over spending any less severe. Foundation C-IB 71-74.

That the DSO statute limits the Foundation's spending to the benefit of FAU is irrelevant. FAU C-AB 69. The Foundation agreed to

become a DSO subject to this restriction in exchange for sole discretion over how and how much money to provide for the benefit of FAU, so that it could ensure its endowment was only used to support research, as required by the Johnson Trust instrument and Florida law. Foundation C-IB 5.

Further, that the Foundation did not specifically bargain for "budget" independence, FAU C-AB 69, does not make impairment of the "sole discretion" provision any less severe. The "sole discretion" provision was an essential deal term that cannot be reconciled with an FAU budget veto right. *See* Section I(A), *supra*.

And contrary to FAU's argument (C-AB 69-70), the Foundation's opposition to becoming a DSO shows how important the "sole-discretion" provision is—and how severe an impairment it would be—because the Foundation only set aside its extreme reservations when it negotiated for and obtained that protection. Foundation C-IB 84-86.

VII. APPLYING THE 2009 AMENDMENT TO THE FOUNDATION'S BUDGET IS AN IMPROPER RETROACTIVE APPLICATION BECAUSE IT ALTERS VESTED CONTRACT RIGHTS.

As the Foundation has argued, this Court need not address any of the foregoing constitutional issues to reverse because the 2009

Regulation is prospective, meaning that its changes to budget approval cannot be applied to the Foundation. Foundation C-IB 105-107. FAU does not dispute that the Legislature intended the amended regulation to apply prospectively, but rather claims that application of the regulation to the Foundation's future budgets is prospective. FAU C-AB 71.

Yet FAU fails to contend with analogous Florida cases—including *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010), *Hahn v. Hahn*, 42 So. 3d 945 (Fla. 4th DCA 2010), and *Hausler v. State Farm Mut. Auto. Ins. Co.*, 374 So. 2d 1037 (Fla. 2d DCA 1979)—holding that application of statutes to alter vested contractual rights was retroactive, even when the statutes affected future events. Foundation C-IB 105-106. Even if FAU vetoes a future budget, FAU is nonetheless reaching backwards in time to negate a vested right—"sole discretion" over distributions—that the Foundation acquired in 2007. *Id.*

FAU relies (C-AB 25-26) on cases that are inapposite because the laws in question did not affect vested contractual rights. Neither *Love v. State*, 286 So. 3d 177 (Fla. 2019) nor *County of Volusia v. DeSantis*, 302 So. 3d 1001, 1004–05 (Fla. 1st DCA 2020) dealt with

the impact of a law on a vested contractual right. Nor did the federal case *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270–71 (1994) (distinguishing tax and zoning laws from contractual expectations). FAU's remaining cases are factually distinguishable. *See Polone v. Comm'r*, 505 F.3d 966, 972–73 (9th Cir. 2007) (settlement agreements at issue were "nowhere near complete" as of the effective date of the disputed law); *Diamond Glue Co. v. United States Glue Co.*, 187 U.S. 611, 612 (1903) (disputed statute was already enacted by the time the contract was signed).

FAU next avers (C-AB 27) that under the Foundation's position, "scores" of laws would be nullified because the "Legislature was not required to ferret out the MOU's existence." This is nonsense. If the Legislature intended to impose the new amendment on every DSO, regardless of negotiated contractual rights, it would have been sufficient to state that the amendment applied retroactively. However, such retroactive application would be subject to an impairment analysis.

Finally, FAU emphasizes (C-AB 27) that every DSO has operating procedures. This is irrelevant. The point is not that the Foundation outlined a process in its governing documents. The

Foundation's argument is that it negotiated for a contractual right with FAU: sole discretion over expenditures from its endowment. That contractual right forms the basis of the Foundation's claim. Accordingly, the same result would only accrue for other DSOs that specifically negotiated a contractual right with their respective universities. But FAU can point to no other DSO that has such a contract or vested right.

CONCLUSION

Accordingly, this Court should reverse the Fourth DCA's decision on cross-appeal.

Dated: July 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court and electronically served pursuant to Rule 9.420 to the following on July 12, 2024:

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CERTIFICATE OF COMPLIANCE

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 3,931 words.

By: /s/ Stuart H. Singer
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