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

INITIAL BRIEF OF THE FAU BOARD OF TRUSTEES

Jack R. Reiter
GrayRobinson, P.A.
333 Southeast Second Avenue
Suite 3200
Miami, Florida 33131
jack.reiter@gray-robinson.com

Andy Bardos
Ashley H. Lukis
GRAYROBINSON, P.A.
301 South Bronough Street
Suite 600
Tallahassee, Florida 32301
andy.bardos@gray-robinson.com
ashley.lukis@gray-robinson.com

Attorneys for FAU Board of Trustees

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Laws of Florida

Rules

Regulations

Other Authorities

INTRODUCTION

In Florida, university direct-support organizations serve as trustees of immense resources administered by law solely for the benefit of Florida's state universities and the hundreds of thousands of students who attend them. Accordingly, Florida law has long required DSOs to operate in harmony with the missions of their affiliated state universities and the best interest of the State.

In 2018, to promote accountability and a harmony of missions between these instrumentalities of the State and their affiliated state universities, the Florida Legislature and the Florida Board of Governors amended state law to require appointments to a DSO's board of directors—besides those made by the university itself—to be approved by the university's board of trustees.

The Fourth District erred in concluding that this reasonable oversight measure unconstitutionally impairs the obligation of a contract between Florida Atlantic University ("FAU") and one of its DSOs. The contract is silent about the selection of directors not appointed by FAU and therefore is not impaired. To identify the precise contractual right that was impaired, the Fourth District went well beyond the four corners of a heavily negotiated document

and inserted terms neither addressed by the contract nor agreed upon by the parties.

The Fourth District also failed to consider the unique public function of DSOs in assessing whether the public interest justified any minor impairment of contractual rights. It did not account for the critical fact that DSOs are embedded in the State University System for the sole purpose of promoting the public interest and the university's goals. Because it overlooked the weighty public interest in DSO oversight and the important role of DSOs within the State University System, the Fourth District erred in concluding that this reasonable oversight measure unconstitutionally impairs a contractual obligation.

The Contracts Clause does not prohibit the adoption of reasonable regulations to enhance oversight of entities that perform an exclusively public function. This Court should reverse the portion of the Fourth District's decision that rejected FAU's authority to approve appointments to a DSO's board.

STATEMENT OF THE CASE AND FACTS

A. Florida Atlantic University.

FAU is one of twelve state universities in Florida's State University System. § 1000.21(6)(e), Fla. Stat. It is governed by a Board of Trustees. Art. IX, § 7(b), (c), Fla. Const. Florida's State University System is governed by a Board of Governors—also called the BOG—which is empowered to "operate, regulate, control, and be fully responsible for the management of the whole university system." Art. IX, § 7(d), Fla. Const. The BOG's authority to adopt regulations "flows directly from the Florida Constitution" and "is not dependent on any delegation from the Florida Legislature." *NAACP, Inc. v. Fla. Bd. of Regents*, 876 So. 2d 636, 640 (Fla. 1st DCA 2004).

B. Direct-Support Organizations.

A university direct-support organization, or DSO, is a statutorily authorized, university-certified, and state-regulated affiliate of a state university. § 1004.28, Fla. Stat.; R. 11318; BOG Regul. 9.011; FAU Regul. 6.013.[1] A DSO's only lawful function is

[1] The record in this appeal includes BOG Regulation 9.011 as most recently amended in 2018, R. 8195–97, as well as a redline that identifies the amendments made in 2018, R. 8199–8201.

to "receive, hold, invest, and administer property and to make expenditures to or for the benefit" of its affiliated state university. § 1004.28(1)(a)2., Fla. Stat. By law, a DSO must operate "in a manner consistent with the goals of the university and in the best interest of the state." *Id.* § 1004.28(1)(a)3. Since 1975, the Florida Legislature has authorized state universities to certify DSOs to generate financial and community support for their university missions. *See* Ch. 75-302, § 9, Laws of Fla.; R. 11335, 11386–87.

Today, no fewer than 70 DSOs—all certified by their affiliated state universities—promote university purposes as diverse as the administration of research grants and scholarships, the operation of athletic programs, and the construction of student housing and on-campus facilities. R. 7865–72. All told, these DSOs hold more than $8 billion in assets for the benefit of their affiliated universities, R. 11486, 11615–16, and have contributed another $2.2 billion in debt financing, R. 7863. Eighteen DSOs support the University of Florida alone. R. 7864. One of them (the University of Florida Foundation), reports total assets in excess of $2.15 billion. R. 11486, 11615–16.

Given their important and exclusively public functions, DSOs have been subject to extensive statutory and regulatory oversight

for more than five decades. *See* Ch. 75-302, § 10, Laws of Fla.; Fla. Admin. Code R. 6C-3.12 (1970). DSOs are regulated by statute, BOG regulation, and university regulations. §§ 1004.28, 1010.62, Fla. Stat.; BOG Regul. 9.011; FAU Regul. 6.013; R. 11450–81. In fact, DSO activities are so intertwined with public functions and so heavily regulated that DSOs are subject to the Public Records Act and the Sunshine Law and enjoy both sovereign immunity and, in federal court, Eleventh Amendment immunity. *See infra* Part IV.B.

C. The Foundation.

Appellee, Harbor Branch Oceanographic Institute Foundation, Inc. (the "Foundation"), was organized in 1971 as a not-for-profit corporation unaffiliated with FAU to promote marine sciences and coastal and oceanographic research. R. 6719 ¶ 2. By 2006, the Foundation—then called Harbor Branch Oceanographic Institution, Inc.—managed a $44-million endowment and operated a research institute. R. 6719 ¶ 3; Tr. 117:24–118:5, 185:3–5. But the Foundation's financial path was unsustainable. Tr. 183:19–21. The Foundation was unable to pay the expenses of its research institute. Tr. 182:21–183:2. It had borrowed $17 million to sustain the institute, while the value of the endowment had decreased by

$7 or $8 million annually. Tr. 185:3–186:12. Without changes to the Foundation's operations, the endowment would evaporate, Tr. 183:6–9, and the Foundation would cease to exist, Tr. 185:15–18.

D. The Memorandum of Understanding (MOU).

Senator Ken Pruitt, then President of the Florida Senate, learned of the Foundation's financial predicament, Tr. 431:3–432:16, and called Frank Brogan, then President of FAU, to rescue the Foundation and bring the Foundation, including its endowment and the research institute, "under the umbrella of FAU," Tr. 434:7–25, 441:10–442:12. FAU and the Foundation began negotiations in September 2006, when FAU proposed to acquire the Foundation and incorporate its endowment into an existing DSO of FAU, the FAU Foundation. Tr. 132:15–133:25, 187:23–188:20; R. 6896–98. When the Foundation objected to its endowment's merger into the FAU Foundation, FAU proposed to certify the Foundation as a DSO separate from the FAU Foundation. Tr. 188:12–190:3; R. 6902–04. From that point, FAU insisted on DSO status for the Foundation as an essential component of any agreement between the parties and consistently expressed to the Foundation that, as a DSO, it would

be subject to the rules and policies that apply to DSOs in the State University System. Tr. 189:25–196:6; R. 10699 at 70:23–71:4.

FAU's proposal that the Foundation become a DSO was not a "popular suggestion" with the Foundation's board. Tr. 196:16–19. The board was "uncomfortable with the DSO concept" because it considered the State's DSO rules and policies "too restrictive." Tr. 196:20–197:1, 197:24–198:2. The Foundation preferred not to become a DSO at all. Tr. 198:3–199:6, 242:19–243:4; R. 10699–702 at 71:8–73:7, 75:14–77:15, 81:10–23. FAU made clear, however, that no agreement to bring the research institute into FAU would be made unless the Foundation agreed to become a DSO. Tr. 190:4–10.

In February 2007, President Brogan provided FAU's official offer to the Foundation. R. 6924–25. In its offer, FAU proposed to acquire the Foundation's research institute, while the Foundation, together with its endowment, would operate as a "separate, stand-alone DSO" of FAU, "independent of the existing FAU Foundation." R. 6925. The offer also stated that the Foundation's board "would have 2 appointees from FAU." *Id.* This provision reflected then-existing Florida law, which stated that the "chair of the university

board of trustees may appoint a representative to [a DSO's] board," and that the "president of the university . . . or his or her designee, shall also serve on the [DSO's] board." § 1004.28(3), Fla. Stat. (2007). The offer did not mention the Foundation's other directors or the method by which those directors would be selected. R. 6925.

The Foundation considered FAU's offer sufficiently inviting to warrant further discussion. Tr. 201:13–16. Two months later, both parties signed a letter of intent that outlined non-binding terms for future discussion. R. 6947–48; Tr. 206:21–207:13. Like FAU's offer, the letter of intent proposed to transfer the research institute to FAU and to establish the Foundation as a "separate, stand-alone DSO of FAU." R. 6948. By this time, the Foundation recognized that its acquiescence to DSO status was "inevitable." Tr. 207:14–20. And like FAU's offer, the letter of intent provided that the Foundation's board "would have 2 appointees from FAU," but did not mention the other directors or their selection. R. 6948.

In July 2007, Elizabeth Rubin, associate general counsel for FAU, forwarded to the Foundation the first draft of a Memorandum of Understanding. R. 6988–96; Tr. 157:6–13, 509:15–17, 588:12–15. Ms. Rubin was the MOU's primary drafter. Tr. 506:9–507:16.

The first draft of the MOU contained the following provision, which in this brief is sometimes called the MOU's Appointment Provision:

> The HBOI Foundation's board of directors shall have two (2) appointees from FAU.

R. 6990. FAU, rather than the Foundation, requested this provision and inserted it into the draft MOU. Tr. 533:3–9. The Appointment Provision was important to FAU because it confirmed FAU's statutory right to make two appointments to the DSO board. Tr. 532:1–16, 533:10–18; *see also* § 1004.28(3), Fla. Stat. (2007).

While the parties heavily negotiated and revised many other provisions of the MOU, the Appointment Provision remained unchanged throughout the drafting process. R. 7139, 7222, 7255. In November 2007, when the Foundation's counsel, *ex-officio* board member, and chief negotiator, William Stewart, substantially rewrote the section of the MOU that included the Appointment Provision, the Appointment Provision itself remained unaltered. R. 7214; Tr. 509:9–14, 516:22–517:24. Mr. Stewart did not propose language to address the selection of directors not appointed by FAU.

Senate President Pruitt, meanwhile, had secured significant funding from the Legislature to facilitate the transaction: a one-time

appropriation of $44.6 million to fund the construction of a new research laboratory building and the restoration and maintenance of existing facilities that FAU was about to acquire, and $8.6 million in annually recurring appropriations for FAU's continued operation of the research institute. Tr. 428:20–430:23, 535:21–537:3. To secure public funds and assure transparency and accountability, President Pruitt considered it critical that the Foundation become a DSO of FAU. Tr. 437:2–438:6, 448:10–450:11, 453:25–454:16.

The parties executed their MOU in December 2007. Tr. 145:18–21. Despite its reservations over the restrictions that DSO status would impose, the Foundation agreed to become a DSO. R. 7255; Tr. 218:25–219:3. FAU acquired the Foundation's research institute, R. 7253, which relieved the Foundation of the financial burden of the institute's operation and preserved the institute for its employees and for future scientific research, Tr. 219:10–220:15. The MOU included an integration clause that declared the MOU to be the "entire agreement of the parties with respect to the subject matter covered herein" and disclaimed all "other representations, promises, agreements, conditions or understandings, either oral or written," between the parties. R. 7259. The FAU Board of Trustees

certified the Foundation as a DSO effective July 1, 2008, R. 7360–61; Tr. 542:21–24, and the Foundation accepted and acknowledged that certification by a board resolution, R. 7351–58; Tr. 221:1–4.

The final MOU included the Appointment Provision, which confirmed FAU's statutory right to make two appointments to the Foundation's board. R. 7255. The MOU did not specify how the Foundation's other directors would be selected. R. 7253–65. To Ms. Rubin's knowledge, in the drafting and negotiation of the MOU, the Foundation never suggested that it sought exclusive authority over the selection of directors not appointed by FAU, or said anything about how those directors would or should be selected. Tr. 580:14–581:1.

Rather, consistent with state law, § 617.0202(1)(d), Fla. Stat. (2007), the selection of directors was addressed in the Foundation's articles of incorporation and bylaws, R. 7285, 7289, which were amended in December 2007, and which FAU reviewed as the MOU required, R. 7148–87, 7255. The articles and bylaws provided that the Foundation would be "operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of [FAU and the research institute], *so far as is or may*

be permitted by the laws of the State of Florida." R. 7284, 7299 (emphasis added).

E. This Litigation.

Soon after FAU rescued the Foundation, two leading figures on the Foundation's board became resentful of the restrictions applicable to the Foundation as a DSO and initiated efforts to "decertify" the Foundation. R. 7623–26. In 2012, then-Chair Joseph Duke, with the support of Director Michael O'Reilly, Tr. 391:14–393:1, requested that FAU decertify the Foundation as a DSO—a request that FAU's President rejected, R. 7676–82, 7703–08. Duke never wanted the Foundation to be a DSO in the first place, but only "tolerated" its DSO status. R. 9093–94 at 74:20–75:4; R. 9116 at 117:2–14. Then, in January 2017, when the Foundation resisted FAU's efforts to exercise oversight of the Foundation's budget, O'Reilly made a motion—which he was forced to table—to initiate actions to decertify the Foundation. R. 7919; Tr. 365:1–366:10.

The Foundation sued FAU two months later, challenging FAU's right to exercise oversight of the Foundation's budget. R. 58–87. The Foundation alleged that state laws that authorized FAU to

oversee the Foundation's budget impaired the MOU's obligation in violation of the Florida Constitution's Contracts Clause. R. 1885.

While the litigation was pending, the Florida Legislature passed and the Governor signed the Florida Excellence in Higher Education Act of 2018. Ch. 2018-4, Laws of Fla. One section of this far-reaching education bill enhanced the accountability measures that regulate DSOs. Enacted after an in-depth legislative inquiry into the revenues, expenditures, and operations of DSOs, R. 7897–98, 7974, 7992–93, 7995–97, these reforms sought to "enhance transparency and strengthen accountability for state university DSOs," Fla. S. Comm. on Approp., CS/SB 4 (2017) Staff Analysis 10 (Dec. 7, 2017). For example, the bill limited compensation for personal services rendered to DSOs, required university approval of certain purchases and debt issuances, prohibited transfers of state appropriations to DSOs for purposes other than capital projects, prohibited the use of state funds for travel expenses incurred by DSOs, eliminated an exception that permitted DSOs to make gifts to political committees, and curtailed a public-records exemption that shielded DSO records related to the use of private funds for travel and the expenditure of public funds. Ch. 2018-4, § 7, Laws of Fla.

The same bill amended section 1004.28(3), effective March 11, 2018, to require university approval of all appointments to a DSO board, other than the university's own appointees. Ch. 2018-4, § 7, Laws of Fla. ("The university board of trustees shall approve all appointments . . . not authorized by this section."). Eight months later, on November 8, 2018, the BOG amended BOG Regulation 9.011(9) to provide in part that the "university board of trustees shall approve all appointments to any DSO board other than the chair's representative(s) or the president or president's designee." R. 8196. To the same end, FAU amended its DSO regulation—FAU Regulation 6.013—to reflect its statutory and regulatory obligation to approve appointments to DSO boards. R. 8191.

In May 2019, FAU requested that the Foundation submit to FAU's consideration all appointments to the Foundation's board since the 2018 amendments took effect. R. 8255. In response, the Foundation claimed an "unfettered contractual right to the selection and appointment of its own board members (except for the two members appointed by FAU)" and insisted that FAU's exercise of an approval power "would constitute an illegal and unconstitutional impairment of the Foundation's long-standing contractual rights."

R. 8257. To date, the Foundation has never submitted to FAU any of its board appointments. R. 10726 at 178:2–5; Tr. 234:24–235:6.

In June 2019, FAU filed a counterclaim that sought not only a declaration confirming FAU's budget-oversight authority, but also a declaration that appointments to the Foundation's board require FAU's approval. R. 2031–60. The Foundation's answer asserted, as an affirmative defense, that the laws on which FAU relied to support its authority to approve board appointments impair the parties' MOU in violation of the Florida Constitution's Contracts Clause. R. 2306–07. The Foundation did not notify the Attorney General or the State Attorney of its constitutional challenge to section 1004.28(3), Florida Statutes, as Florida Rule of Civil Procedure 1.071 requires.

On July 26, 2021, the trial court denied the parties' dueling motions for summary judgment. R. 6014–21. While it recognized that "the MOU did not state that the Foundation had the right to appoint all other . . . directors" besides the two appointed by FAU, the court concluded that the MOU was ambiguous and that extrinsic evidence was necessary to determine whether the MOU "contains a provision that was intended to address an agreement

. . . that FAU's involvement with the Foundation's board of directors was limited to [its own] two appointments." R. 6019–20.

The court conducted a four-day trial and then issued a final judgment and an amended final judgment. R. 11645–90. As to the Foundation's budget, the court concluded that the MOU does not grant the Foundation an exclusive right to establish its budget and that adoption of the Foundation's budget requires both FAU's and the Foundation's approval. App. 29–30. With respect to board appointments, the court concluded that the MOU's Appointment Provision not only protects FAU's right to appoint two directors, but also reflects an intent to exclude FAU from any participation in the selection of the other directors. App. 34–36. Without citing any trial testimony, any documents created in negotiating the MOU, or any discussions between the negotiating parties, the court found that 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." App. 35. Finally, the court concluded that any exercise of the approval power would severely impair the MOU and that the public purpose of the challenged laws was "unclear" because the record did not

disclose the State's "actual interest." App. 38. Because, according to the trial court, the state objective was "neither 'significant' or 'legitimate,'" that objective did not outweigh the magnitude of the impairment, and the challenged laws violated the Contracts Clause. *Id.*

FAU appealed, R. 11725–54, the Foundation cross-appealed, R. 11785–810, and the Fourth District affirmed. As to board appointments, the court reasoned that the Appointment Provision entitled FAU to appoint two directors and that the challenged laws granted FAU a new approval power over the other directors. App. 11. It therefore held that the challenged laws rewrote the MOU. *Id.* Then, in one sentence, and without addressing the public function of DSOs, the Fourth District approved the trial court's finding that the public interest behind the challenged laws did not outweigh the impairment. App. 12.

SUMMARY OF ARGUMENT

Because the Foundation failed to carry its heavy burden to establish beyond a reasonable doubt that the challenged laws unconstitutionally impair the MOU, this Court should reverse the Fourth District's decision as to the appointment of DSO directors.

First, at no time over the 29 months that its constitutional challenge was pending did the Foundation notify the Attorney General or the State Attorney of that challenge. The constitutional challenge was therefore barred and not properly before the court.

Second, the challenged laws do not impair the MOU because the MOU is silent about the selection of directors to whom FAU's statutory approval power applies. The only provision that addresses directors is one that FAU drafted to protect its own right to appoint two directors to each DSO's board. The MOU is otherwise silent as to directors, and the Contracts Clause does not protect a contract's *silence* from impairment. The Foundation could have negotiated for a contractual right to select the other directors. A right for which the Foundation did not bargain should not be conferred years later in litigation.

Even if the challenged laws impaired the MOU, however, they would still be constitutional because the public interest in the challenged laws outweighs the magnitude of any impairment. The State has a weighty interest in overseeing DSOs, which exist solely to promote the missions of state universities and, to that end, administer immense resources as trustees for state universities. In

contrast, any impairment is minimal because the challenged laws confer only a secondary power to *approve* appointments—not an appointment power—and because DSOs, as instrumentalities of the State, have been subject to intense regulation for more than five decades. This long history of regulation diminishes any expectation that a DSO's contractual arrangements will remain undisturbed.

The Fourth District found a contractual right where none exists, accorded no weight to the State's significant interest in university oversight of their affiliated DSOs, and, in finding a severe contract impairment, overlooked the nature and public purpose of DSOs and the 53-year history of intense public regulation of DSOs.

Finally, the Foundation's articles of incorporation and bylaws expressly bound the Foundation to abide by future amendments to Florida law. The Foundation cannot complain that state-law amendments it agreed to honor impaired its rights under the MOU.

LEGAL STANDARD

Whether a statute is constitutional is a pure question of law reviewed de novo. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013). "When the question involves both factual and legal issues, the Court will review a trial court's factual findings for competent,

substantial evidence, while the legal question is reviewed de novo." *Id.* The interpretation of a contract—and whether the contract is ambiguous—are questions of law reviewed de novo. *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013); *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001).

Finally, state statutes and regulations are presumed to be constitutional. *Goodman v. Fla. Dep't of Law Enf't*, 238 So. 3d 102, 108 (Fla. 2018); *Searcy, Denney, Scarola, Barnhart, & Shipley, P.A. v. State*, 209 So. 3d 1181, 1188 (Fla. 2017). A challenger who seeks to overcome that presumption bears a heavy burden to establish invalidity beyond a "reasonable doubt." *Searcy*, 209 So. 3d at 1188.

ARGUMENT

I. THE FOUNDATION'S FAILURE TO PROVIDE NOTICE TO THE ATTORNEY GENERAL OR STATE ATTORNEY BARRED ITS CONSTITUTIONAL CHALLENGE.

The lower courts should never have even considered the Foundation's constitutional challenge. That challenge was barred because the Foundation failed to demonstrate that it provided notice of the constitutional question to the Attorney General or the State Attorney, as Florida Rule of Civil Procedure 1.071 requires.

Florida Rule of Civil Procedure 1.071 requires a party that "files a pleading . . . drawing into question the constitutionality of a state statute" to "promptly" file a "notice of constitutional question stating the question and identifying the document that raises it." The challenger must "promptly" serve the notice and the document that raises the challenge on the Attorney General or the State Attorney. Fla. R. Civ. P. 1.071(b). A party's failure to provide notice as required by Rule 1.071 bars the court's consideration of a constitutional challenge. *R.J. Reynolds Tobacco Co. v. Grossman*, 250 So. 3d 91, 94 (Fla. 4th DCA 2018) (explaining that a trial court "could not have properly considered the constitutionality of the statute" where Rule 1.071's notice requirements were not observed).

For example, in *Lee Memorial Health System v. Progressive Select Insurance Co.*, 260 So. 3d 1038, 1042 (Fla. 2018), this Court concluded that the Second District erred in addressing a challenge to a state statute under Florida's Contracts Clause. The insurance company that challenged the statute served notice only after the trial court delivered its oral summary-judgment ruling. The notice was not provided "promptly," as the rule requires, and the failure to

provide notice denied the Attorney General or the State Attorney a "sufficient opportunity to participate in the trial court proceedings."

Similarly, in *Shelton v. Bank of New York Mellon*, 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016), the court *sua sponte* refused to consider a constitutional challenge because, although the parties had not raised the notice issue, nothing in the record demonstrated compliance with Rule 1.071. *See also State Farm Fire & Cas. Ins. Co. v. Wilson*, 330 So. 3d 67, 75 (Fla. 2d DCA 2021) (reversing a trial court's determination of a constitutional issue where notice was not provided, since "the issue was not properly before the court and is not properly before this court"); *McGovern v. Clark*, 298 So. 3d 1244, 1250 (Fla. 5th DCA 2020) (refusing to consider a challenge to a state statute where Rule 1.071 was not satisfied); *Diaz v. Lopez*, 167 So. 3d 455, 460 n.10 (Fla. 3d DCA 2015) (concluding that a constitutional challenge was not properly before the court because the "specific requisites" of Rule 1.071 "were not invoked below").

Just recently, the Third District affirmed a trial court's post-trial order granting an *ore-tenus* motion for involuntary dismissal on the ground that the plaintiff had not demonstrated its compliance with Rule 1.071. *Ramle Int'l Corp. v. Miami-Dade Cnty.*, --- So.

3d ----, No. 3D20-0114, 2023 WL 6852519, at *1, *3–4 (Fla. 3d DCA Oct. 18, 2023). The court explained that the plaintiff "did not provide any evidence demonstrating" its compliance with the notice requirement, *id.* at *3, and that, absent proper notice, "a court is precluded from considering the constitutional challenge," *id.* at *4.

Rule 1.071 is more than a meaningless formality. It enables the Attorney General, as "the chief state legal officer," to defend the public policy of the State. Art. IV, § 4(b), Fla. Const. Judge Makar, a former Florida Solicitor General, explained that, during his tenure in that office, "it was a ceaseless worry—and a constant reality—that constitutional issues important to state government were being litigated throughout the state and federal courts . . . without our office being aware of them until it was too late to intervene or otherwise be heard on the matter." *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 990 (Fla. 1st DCA 2013) (Makar, J., concurring). Courts have strictly enforced the rule to further its important ends.

The Foundation has not shown that it provided notice of its constitutional challenge. When FAU by counterclaim sought a declaration that section 1004.28(3) subjects appointments to the Foundation's board to FAU's approval, R. 2057–59, 4065–67, the

Foundation asserted, as an affirmative defense, that the statute unconstitutionally impairs the MOU's obligation, R. 2306–07, 4350–51. At no point, however, during the 29 months while its constitutional challenge was pending did the Foundation provide notice—not "promptly," as the rule requires, or indeed ever.[2]

Because the Foundation did not afford the Attorney General a "meaningful opportunity to intervene and be heard," *Brinkmann v. Francois*, 184 So. 3d 504, 507 (Fla. 2016), its challenge to section 1004.28(3) was not properly before the lower courts. Those courts should have granted declaratory relief to FAU without regard to the affirmative defense that raised the constitutional challenge. This Court should disregard that affirmative defense and reverse to the extent the Fourth District's decision concerns board appointments.

II. APPOINTMENTS TO DSO BOARDS REQUIRE UNIVERSITY APPROVAL.

Since 2018, Florida law has required all appointments of DSO directors not appointed by the university itself to be approved by

[2] The Foundation finally filed a belated notice of constitutional question on the same day it filed its answer brief in the Fourth District—when it was too late to serve a purpose.

the university board of trustees. § 1004.28(3), Fla. Stat.; BOG Regul. 9.011(9).

Specifically, section 1004.28(3) directs the chair of the university board of trustees to appoint at least one member of each affiliated DSO's board and establishes the university president (or the president's designee) as a director *ex officio*. It then provides that the "university board of trustees shall approve all appointments . . . not authorized by this subsection." Likewise, BOG Regulation 9.011(9) provides that the "university board of trustees shall approve all appointments to any DSO board other than the chair's representative(s) or the president or president's designee." R. 8196. Thus, all appointments to a DSO's board—other than the university's own—legally require the approval of the university board of trustees.

The Foundation has never denied that these unambiguous provisions mean what they say. Rather, the Foundation argues—and the court below found—that the parties' MOU guaranteed the Foundation exclusive control over the appointment of all directors not appointed by FAU, and that section 1004.28(3) and BOG

Regulation 9.011(9) unconstitutionally impair that contractual right. That argument is mistaken for the reasons explained below.

III. THE CHALLENGED LAWS DO NOT IMPAIR THE MOU.

A. The MOU Is Silent As to the Selection of Directors Not Appointed by FAU.

In declaring the challenged laws unconstitutional, the Fourth District erred because the MOU says *nothing* about the directors whose appointments require FAU's approval. As to those directors, the MOU is silent. Because the Contracts Clause protects only a contract's bargained-for terms—not its silence—and does not guarantee that the law will never change, the Foundation failed to carry its burden to establish that the challenged laws impaired the MOU.

The Fourth District's finding of an impairment hinged on a single sentence of the MOU that secures *to FAU* an absolute right to appoint two members of the Foundation's board: "The HBOI Foundation's board of directors will have two (2) appointees from FAU." R. 7255. The court inferred that the parties also mutually intended the same provision to secure *to the Foundation* an absolute right to exclusive control over the selection of all other directors,

and to exclude FAU from any participation in the selection of those directors. App. 34–36. But the MOU does not say that or imply it.

The MOU plainly addresses the appointment of two directors, but it stops there. It does not say how the other directors will be selected. It secures a specific but important right to FAU and leaves the selection of all other directors to be determined. The Foundation could have proposed language for the selection of all directors, but it did not.

To violate the Contracts Clause, a law must "impair[] the *obligation*" of a contract. Art. I, § 10, Fla. Const. (emphasis added). As the Contracts Clause's text makes clear, a law that impairs the *value* of a contract or the *expectations* of the parties, but none of the contract's *obligations*, does not offend the Contracts Clause. *See id.*; *Searcy*, *Denney*, *Scarola*, *Barnhart*, *& Shipley*, *P.A. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (explaining that, to violate the Contracts Clause, "a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties" (internal marks omitted)). That is, the law must have the effect of rewriting an identifiable contract provision. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186–87 (1992)

(finding no violation where "there was no contractual agreement regarding the specific . . . terms allegedly at issue"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1987) (explaining that a Contracts Clause analysis must "begin by identifying the precise contractual right that has been impaired"); *State of Louisiana ex rel. Nelson v. Police Jury of the Par. of St. Martin*, 111 U.S. 716, 720 (1884) ("As the contract clause of the constitution was intended to secure the observance of good faith in the stipulation of parties against state action, it could not be invoked when no such stipulation existed . . . ."); *Providence Bank v. Billings*, 29 U.S. 514, 559–60 (1830) (concluding that a state law taxing banks did not impair a bank charter that "contain[ed] no stipulation promising an exemption from taxation"). It is not enough that the contract and the challenged law concern the same general subject matter; contracting parties may not categorically exempt themselves from an entire domain of regulation. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." (quoting *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908))).

Thus, in *Snyder v. Florida Prepaid College Board*, 269 So. 3d 586, 595 (Fla. 1st DCA 2019), the court found no impairment where the plaintiff failed to identify "any specific provision" of a prepaid college plan that entitled her to coverage of certain fees charged to university students. And in *Hahamovitch v. Hahamovitch*, 133 So. 3d 1008, 1013 (Fla. 4th DCA 2014), the court explained that a statute that treats as marital assets any enhancements in the value of non-marital assets cannot impair a prenuptial agreement that "is *silent* on the issue of enhancement value." (emphasis in original).

While the MOU protects FAU's right to appoint two directors, it does not address the selection of the other directors. Where, as here, "a contract is silent as to a particular matter, courts should not, under the guise of construction, impose on parties contractual rights and duties which they themselves omitted." *BMW of N. Am., Inc. v. Krathen*, 471 So. 2d 585, 587 (Fla. 4th DCA 1985). Because the MOU is silent as to the selection of directors not appointed by FAU, the challenged laws did not impair any obligation of the MOU.

B. The MOU's Appointment Provision Does Not Grant the Foundation Exclusive Rights by Negative Implication.

The Fourth District appears to have applied the negative-implication canon—which holds that the expression of one thing implies another's exclusion—and inferred that the MOU's *protection* of FAU's right to appoint two directors was intended to imply FAU's *exclusion* from any participation in the selection of the other directors. But the Fourth District stretched the implication too far.

The negative-implication canon "must be applied with great caution, since its application depends so much on context." *Alachua Cnty. v. Watson*, 333 So. 3d 162, 172 (Fla. 2022) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012)). For example, a sign that reads "no dogs allowed" clearly does not imply that all other animals are welcome. *Fedance v. Harris*, 1 F.3d 1278, 1286 (11th Cir. 2021). The canon is thus a "valuable servant, but a dangerous master." *Crews v. Fla. Pub. Emps. Council 79*, 113 So. 3d 1063, 1072 (Fla. 1st DCA 2013).

To determine whether a negative implication is warranted, a court must assess whether the omitted term—here, an approval power over appointments—was not only omitted, but "excluded by

deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *accord id.* ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and *meant* to say no to it." (emphasis added)). Where the "better inference" is that an omission is "nothing more than a case unprovided for," the negative-implication canon does not apply. *Id.* at 169; *accord Crews*, 113 So. 3d at 1072 ("In fact, this maxim properly applies only when the . . . the matters expressly mentioned are intended to be exclusive.").

For example, in *Elonis v. United States*, 575 U.S. 723 (2015), the Court considered the reach of a negative implication in a federal criminal statute. *Id.* at 733–34. Two of the statute's provisions contained an "intent to extort" element, while a third contained no "intent" element whatsoever. *Id.* at 733. The Court concluded that the omission of the "intent to extort" element supported a negative implication that the third provision was not limited to crimes of extortion. *Id.* It did not, however, support a negative implication that the third provision contained no mental-state requirement at all. *Id.* at 733–34. That inference simply went "too far." *Id.* at 733.

Here, the MOU does not support an implication that the parties considered and deliberately denied FAU approval power over board appointments. That the MOU expressly secures to FAU an absolute right to directly appoint two directors does not suggest that the parties made a deliberate choice to exclude FAU from any role at all—even a secondary approval role—in the selection of the other board members. Indeed, if that were the parties' mutual intent and understanding, then they could and would have said so.

Courts are especially reluctant to find contract rights by implication because "there is a clear danger that, in so doing, the court will remake the contract." *Azalea Park Utils., Inc. v. Knox-Fla. Dev. Corp.*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961). After all, the "court's task is to apply the parties' contract as written, not 'rewrite' it under the guise of judicial construction." *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017). The parties to a contract bear the burden to express their intent, and not leave it to implication. *Advanzeon Sols., Inc. v. State ex rel. Fla. Dep't of Fin. Servs.*, 321 So. 3d 911, 915 (Fla. 1st DCA 2021) ("Contracting parties have the right, the opportunity, and the obligation to memorialize the terms of their agreement, and they omit terms at

their peril."); *S. Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 773–74 (Fla. 1st DCA 1983) ("However, if a party desires a provision as important as the right to unilaterally cancel a contract, such a provision must be expressly provided for in the contract.").

Rather than speak by implication, the MOU simply made no provision for the selection of the other board members—a *casus omissus*—and left that subject to be determined elsewhere, outside the MOU. *See* § 617.0202(1)(d), Fla. Stat. (2007) (requiring a not-for-profit corporation's articles of incorporation or bylaws to prescribe "the manner in which the directors are to be elected or appointed"). The MOU's silence on the selection of directors not appointed by FAU is just that: silence. This Court should decline to find a contract right that the MOU neither expresses nor necessarily implies. *See Seaside Town Council, Inc. v. Seaside Cmty. Dev. Corp.*, 347 So. 3d 89, 95 (Fla. 1st DCA 2021) (holding that a contract provision that authorized a corporation to sue for assessments did not, by negative implication, deprive it of the right to initiate other suits); *Fallang Fam. Ltd. P'ship v. Privcap Cos., LLC*, 316 So. 3d 344, 347 (Fla. 4th DCA 2021) ("Intent unexpressed will be unavailing.").

C. Extrinsic Evidence of Intent Is Unnecessary—But Supports FAU's Position.

Because the MOU is unambiguous and does not address the selection of directors to whom FAU's approval power applies, this Court need not consider extrinsic evidence. But even if the MOU provision is deemed ambiguous, thus requiring consideration of extrinsic evidence to determine the parties' intent, the Court should reverse. There is no evidence—let alone competent, substantial evidence—to support the trial court's finding that the parties mutually intended to grant the Foundation a contractual right in the MOU to exclusive control over all board appointments (apart from FAU's two appointments) in perpetuity. In fact, the evidence supports just the opposite finding.

Elizabeth Rubin, associate general counsel for FAU, was the MOU's primary drafter. Tr. 506:9–507:16. Ms. Rubin testified at trial that FAU—not the Foundation—requested the Appointment Provision and inserted it into the draft MOU. Tr. 533:3–9. This provision was important to FAU because it confirmed FAU's statutory right to make two appointments to a DSO board. Tr. 532:1–16, 533:10–18; *see also* § 1004.28(3), Fla. Stat. (2007).

From the very outset of the parties' negotiations, FAU sought to protect its participation in the selection of directors to the Foundation's board, and it did so by leaning on its statutory rights, without any objection from the Foundation. The substance of the Appointment Provision appeared in FAU's initial written offer to the Foundation on February 26, 2007, and in the parties' letter of intent on April 25, 2007. R. 6925, 6948. Neither of these documents mentioned the other directors. *Id.* The Appointment Provision then appeared in the first draft of the MOU, which Ms. Rubin prepared and, on July 25, 2007, provided to the Foundation. R. 6990; Tr. 157:6–13, 509:15–17, 588:12–15. It remained unchanged during the drafting process, R. 7139, 7222—even after the Foundation's counsel substantially rewrote the paragraph in which that provision appears, R. 7214—and was unchanged in the final MOU, R. 7255.

The Appointment Provision was drafted by FAU to protect FAU's rights. There is absolutely no evidence—and certainly not competent, substantial evidence—that it was ever intended to confer rights on the Foundation and deny any participation to FAU.

As the MOU's primary drafter and the FAU point of contact during the drafting process, Tr. 159:13–16, 506:9–507:16, 509:9–

14, Ms. Rubin testified that, to her knowledge, during the drafting and negotiation of the MOU, no Foundation representative ever suggested that the Foundation sought exclusive authority over the selection of directors not appointed by FAU, or said a word about how those directors would or should be selected. Tr. 580:14–581:1.

Despite its heavy burden to overcome the presumption of constitutionality and to establish invalidity beyond any reasonable doubt, the Foundation offered no evidence of *any* such discussions. Its witnesses included its attorney, *ex-officio* board member, and chief negotiator, William Stewart, Tr. 115–249; its chair when the MOU was negotiated, James Seitz, Tr. 251–72; and the chair of its Governance Committee when the MOU was negotiated, Joseph Duke, R. 9041–9215. The parties also introduced more than 200 exhibits—many of them contemporaneous with the MOU's drafting. Still, the record reveals no evidence of any discussions that reflect any intent to address in the MOU the selection of directors not appointed by FAU.

To be sure, the Foundation's articles of incorporation and bylaws established a method for the selection of directors who are not appointed by FAU. R. 7285, 7289. But the Foundation has

never argued that its articles and bylaws were impaired, R. 4350–51, 5718, and the trial court erred in treating the articles and bylaws as extrinsic evidence of the meaning of the MOU, App. 35.

The articles and bylaws are separate corporate governance documents that simply address a subject that the MOU does not: the selection of directors not appointed by FAU. In fact, it is precisely in the articles and bylaws that Florida law required the selection of directors to be addressed. § 617.0202(1)(d), Fla. Stat. (2007) (requiring the articles or bylaws to prescribe the manner in which directors were to be appointed). It does not follow that, because the Foundation's articles and bylaws address the selection of *all* directors, the MOU does too. Indeed, the MOU contains an integration clause that disavows any representations, promises, agreements, and understandings outside the MOU "with respect to the subject matter covered" by the MOU. R. 7259. The logical conclusion is that, far from evidencing an unstated intent behind the MOU, the articles and bylaws were simply drafted to comply with Florida law's requirements for corporate documents. And even if the articles and bylaws were extrinsic evidence of the MOU's intent, they would not support an impairment claim because the

same documents adopted all future amendments to Florida law. *See infra* Part V. The trial court erred when it engrafted the articles and bylaws onto the MOU.

IV. EVEN IF THE CHALLENGED LAWS IMPAIR THE MOU, THEY ARE CONSTITUTIONAL.

Even if the Foundation proved that the challenged laws impair the MOU, those laws are still valid because the State's interests outweigh the nature and extent of the impairment. In concluding otherwise, the Fourth District misapplied the balancing test articulated in *Searcy*.

The principal flaw in the Fourth District's balancing analysis (as in the trial court's) is its failure to recognize the unique state-created and state-regulated relationship between universities and DSOs and the public function that, as state instrumentalities and trustees of vast resources dedicated to the public, DSOs exist to serve. The Fourth District's analysis treated the Foundation like a garden-variety corporate entity and failed to recognize that a DSO's public mission both elevates the public's oversight interest and lessens any expectation that its contracts will remain undisturbed.

This Court once interpreted Florida's Contracts Clause as a nearly absolute prohibition against contract impairments—without regard to the importance of the State's objective or the magnitude of the impairment. *See Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1079–80 (Fla. 1978). The finding of a contract impairment was alone enough to end the inquiry and doom the challenged law.

That has changed. In *Searcy*, after some uncertainty in its precedents, this Court revived the balancing test first announced decades earlier in *Pomponio v. Claridge of Pomponio Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). Under *Searcy*, a court must first determine whether the challenged law impairs a contractual obligation. 209 So. 3d at 1192; *accord Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P.*, 223 So. 3d 292, 300 (Fla. 4th DCA 2018). If it does, then the court must balance the "importance of the State's objective" against the "nature and extent of the impairment." *Searcy*, 209 So. 3d at 1192; *see also U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984) ("This method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power."). The severity of the impairment dictates the degree of scrutiny that

the challenged law must sustain. *Searcy*, 209 So. 3d at 1192. Florida's standard, though "perhaps" less tolerant of impairments, is similar to the federal standard. *Pomponio*, 378 So. 2d at 779–80.

The Fourth District's analysis accorded no significance to the singular, state-created and state-regulated relationship between DSOs and their affiliated state universities—a relationship that both magnifies the importance of the State's objective and diminishes the severity of any impairment. It treated DSOs like unaffiliated private corporations engaged in commerce and pursuing private ends, rather than heavily regulated state instrumentalities and trustees of immense resources dedicated to the public. The Fourth District, moreover, approved the trial court's balancing analysis, which erred in insisting on evidence of the *actual* objective that animated the minds of lawmakers who adopted the challenged laws—a weighty and sometimes impossible burden that the Contracts Clause does not impose. That legal error was especially grievous here because the Foundation failed to notify the one state official whose unique charge is to defend Florida's laws and public policy, and who is best positioned to address the State's objective. *See infra* Part I.

Correctly applied, the *Searcy* balancing test establishes that the challenged laws are constitutional. DSOs are not autonomous private ventures, but rather trustees of significant funds dedicated to Florida's State University System. By law, DSOs exist solely for the benefit of state universities and are bound to operate in the best interest of the State and to advance the goals of their affiliated state universities. § 1004.28(1)(a), Fla. Stat. The State has a legitimate and significant interest in measures that secure accountability and oversight in the administration of DSO funds and a congruence of missions and interests among DSOs and their affiliated universities.

In contrast, any impairment here is minimal because the challenged laws confer on universities only a secondary approval power—not an original power of appointment—and because the intensity of regulation to which DSOs have long been subject diminishes the reasonableness of any expectation that DSOs could ever be exempt from future state regulation. Because the State's interest in the faithful administration of significant funds dedicated to the State University System outweighs any interest of an affiliated state instrumentality in freedom from state oversight, the challenged laws are constitutional as applied to the Foundation.

A. The State Interest in the Challenged Laws Is Legitimate and Significant.

The importance of the State's interest in the challenged laws cannot be overstated. By definition, DSOs exist solely to receive, hold, invest, and administer property and make expenditures to or for the benefit of a state university. § 1004.28(1)(a)2., Fla. Stat. A DSO is therefore a trustee of funds and other property dedicated exclusively to public purposes. *See* Black's Law Dictionary (11th ed. 2019) (defining "trust" to mean "a property interest held by one person . . . at the request of another . . . for the benefit of a third party"). A DSO may not serve its own interests, but instead must operate "in a manner consistent with the goals of the university and in the best interest of the state." § 1004.28(1)(a)3., Fla. Stat.

Today, approximately 70 DSOs serve Florida's twelve state universities and the hundreds of thousands of students who attend them. R. 7864; Tr. 465:15–21. These DSOs together hold more than $8 billion in total assets for the benefit of their affiliated state universities, R. 11486, 11615–16, and have contributed another $2.2 billion in debt financing for university purposes, R. 7863. A single DSO—the University of Florida Foundation—alone has total

assets of more than $2.15 billion. *Id.* DSOs support a broad range of state university activities as diverse as the operation of athletic programs, the administration of grants and scholarships, and the construction of student housing and campus facilities. R. 7865–72.

DSOs are an integral part of the system of higher-education funding in Florida. In contrast to state universities, which may not expend any funds without legislative direction and authorization, *Graham v. Haridopolos*, 108 So. 3d 597, 606 (Fla. 2013), DSOs are uniquely situated to expend funds outside the state budget process, R. 11319, 11332–33, 11390–91. The superior control and flexibility that DSOs enjoy with respect to funds they administer enhance their appeal to potential donors and reinforce their ability to raise funds from private sources. *Id.* State universities rely on DSOs to supplement state funding for university programs, and sometimes even to operate those programs. R. 7866–72, 11334. Importantly, the resources that DSOs furnish alleviate the burden that the State University System imposes on the State's taxpayers. *Palm Beach Cmty. Coll. Found., Inc. v. WFTV, Inc.*, 611 So. 2d 588, 589 (Fla. 4th DCA 1993) (explaining that a community-college DSO "raises and administers funds on behalf of the community college, and does

many things in this regard that the college would otherwise have to do").

Given that DSOs administer immense resources donated for critically important public purposes, it is hardly a mystery why the Legislature and the BOG gave universities a say in the selection of DSO directors whom they do not appoint. The secondary power to approve DSO directors enhances accountability in the governance of DSOs and in the administration of DSO funds and promotes a harmony of interests and missions between DSOs and their affiliated state universities. Like the United States Senate's power to confirm the President's appointments to executive and judicial offices, a state university's power to approve appointments to DSO boards secures the fidelity and qualifications of individuals appointed to perform an important public trust—and thus safeguards the public interest. *See* THE FEDERALIST NO. 76 (Alexander Hamilton) (describing the Senate's confirmation power as an "excellent check" on the President's power of appointment). Nothing in the Florida Contracts Clause prohibits the enactment of reasonable safeguards intended to assure the proper performance of public functions. *Cf. Manning v. Travelers Ins. Co.*, 250 So. 2d

872, 874 (Fla. 1971) ("The guaranty of liberty of contract was never intended to withdraw from legislative supervision the making of contracts or deny to the government the power to provide restrictive safeguards.").

B. The Importance of the State's Interest Outweighs the Magnitude of Any Impairment.

The public interest easily outweighs the nature and extent of any impairment. *First*, the challenged laws do not confer a primary power to appoint directors, but only a secondary power to approve appointments made by another. The challenged laws do not therefore transfer control of the DSO to the university. As noted above, a state university's approval power is comparable to the United States Senate's authority to confirm the President's appointments to the courts or the cabinet, *see* U.S. Const. Art. II § 2, or the Florida Senate's power to confirm certain appointments made by Florida's Governor, *see* Art. IV, § 6, Fla. Const.; § 114.05, Fla. Stat. Just as the confirmation power does not vest a legislative body with control over executive appointments, a state university's approval power is a limited but valuable check on a public function. And any university's abuse of the approval power can be challenged

as arbitrary or capricious, so DSOs are not without a remedy. *Cf*. *Pinellas Cnty. v. Nelson*, 362 So. 2d 279, 281 (Fla. 1978) (concluding that a county commission's discretionary decisions as to budget requests may be challenged as arbitrary or capricious).

Second, where, as here, the allegedly impaired contractual right is not even expressly stated in the contract, and hinges on a negative implication drawn from a provision that grants a right to the *other* party, the complaining party's interest in the preservation of that contractual right is less significant. If the contractual right were truly important, then the complaining party would not have left it to implication, but would have taken care to state it explicitly.

Third, because they have been intensely regulated for more than fifty years, DSOs have a diminished interest in the unimpaired maintenance of their contractual rights. As entities that have voluntarily accepted a state-created support relationship to state universities in Florida—and that exist solely to administer funds as trustees for universities in the State's best interest—DSOs should easily foresee future state regulation. No DSO could reasonably expect that its contractual rights will remain forever undisturbed.

In measuring the extent of an impairment, courts ask whether the complaining party operates in a field that the State has heavily regulated. If so, then future regulation is foreseeable, and the impairment is not severe. As the Second Circuit recently explained:

> The substantiality of an impairment depends upon the extent to which reasonable expectations under the contract have been disrupted. And the reasonableness of expectations depends, in part, on whether legislative action was foreseeable, and this, in turn, is affected by whether the relevant party operates in a heavily regulated industry.

Sullivan v. Nassau Cnty. Interim Fin. Auth., 959 F.3d 54, 64 (2d Cir. 2020).

Thus, in *U.S. Fidelity*, this Court upheld a state statute that required automobile insurers to return "excess profits" to their customers. 453 So. 2d at 1357. The Court held that the extent of impairment was "minimal" in part because insurers operated "in a heavily regulated industry." *Id.* at 1361 (noting that the Legislature had "regulated the contents of insurance policies" for years). Likewise, in *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395 (Fla. 3d DCA 1982), the court upheld an ordinance that prohibited any contract that granted a taxicab company an exclusive right to convey passengers from a hotel. The court noted

that "taxi-cabs have for a long time been the subject of regulation" and that the regulation of cab companies was a "proper subject for exercise of the police power." *Id.* at 397; *see also Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–16 (1983) (explaining that, in measuring an impairment, "we must consider whether the industry . . . has been regulated in the past," and that, because state supervision was "extensive and intrusive," a State's regulation of natural-gas prices caused little or no impairment); *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 18 So. 3d 676, 687–88 (Fla. 1st DCA 2009) (upholding a state-law requirement that medical providers disclose records of adverse incidents, despite their confidentiality agreements, since the "medical profession is heavily regulated," and providers cannot "seek shelter" from state regulation under private contracts).

State regulation of DSOs in the State University System is even more foreseeable than state regulation of private commercial enterprises such as automobile insurers and cab companies. Indeed, the State has pervasively regulated DSOs for more than fifty years. *See* Ch. 75-302, § 10, Laws of Fla.; Fla. Admin. Code R. 6C-3.12 (1970). DSOs are regulated both by statute and by BOG

regulation. §§ 1010.62, 1004.28, Fla. Stat.; BOG Regul. 9.011. By 2007, when the MOU was signed, each state university besides FAU had adopted its own DSO regulations. R. 11306–07, 11469–81. FAU foreseeably adopted its DSO regulation in 2011. R. 11286–88.

These regulations are comprehensive. By law, DSOs may perform only one function: to receive, hold, invest, and administer property, and make expenditures, to or for a university's benefit. § 1004.28(1)(a)2., Fla. Stat. Unlike private ventures, DSOs must operate in the State's best interest and consistently with the goals of their affiliated state universities. *Id.* § 1004.28(1)(a)3. A DSO's very existence as a DSO depends on the pleasure of the university, which may certify or decertify the DSO. *Id.*; BOG Regul. 9.011(10).

A DSO's chief executive officer reports to the university's president, or the president's designee, BOG Regul. 9.011(3), and the university makes at least two appointments to a DSO's board of directors, § 1004.28(3), Fla. Stat.; BOG Regul. 9.011(9). State law regulates the adoption of a DSO's operating budget, § 1004.28(2)(b), Fla. Stat.; BOG Regul. 9.011(4), a DSO's purchases, acquisitions, and issuances of debt, which sometimes require university or even BOG approval, §§ 1010.62, 1004.28(2)(b), Fla. Stat.; BOG Regul.

9.011(2), and a DSO's use of a university's personal services and state funds, § 1004.28(2)(b), (d), Fla. Stat.; BOG Regul. 9.011(2).

Because a DSO acts "on behalf of [a] public agency," § 119.011(2), Fla. Stat., it is subject to Florida's Public Records Act, *id.* § 1004.28(5)(b); *see also Palm Beach Cmty. Coll. Found., Inc. v. WFTV, Inc.*, 611 So. 2d 588, 589 (Fla. 4th DCA 1993) (community-college DSOs). Like public entities, DSOs must also comply with the Sunshine Law's open-meeting requirements. § 1004.28(5)(c), Fla. Stat.; Op. Att'y Gen. Fla. 2005-27 (2005) (community-college DSOs).

Each DSO must submit to a financial audit conducted each year by an independent auditor under rules adopted by the Auditor General and the university board of trustees. § 1004.28(5)(a), Fla. Stat. The DSO must then provide the final audit report to oversight authorities. *Id.* The BOG, the Auditor General, and the university board of trustees have an unfettered right of access to all records of the DSO relative to its operation. *Id.* A DSO must even disclose to the university the forms it files with the Internal Revenue Service to secure its tax-exempt status. *Id.* § 1004.28(7); BOG Regul. 9.011(6).

In addition to these statewide regulations, each university imposes a separate set of detailed regulations on its own affiliated

DSOs. R. 11306–07 (FAU's current DSO regulation); R. 11469–81 (university regulations in effect when the MOU was signed); BOG, STATE UNIV. SYS. OF FLA., UNIV. REGULS., https://www.flbog.edu/regulations/university-regulations (current university regulations).[3]

State control of DSOs is so pervasive that, though they are private entities, DSOs enjoy the protection of the State's sovereign immunity, *Plancher v. UCF Athletics Ass'n, Inc.*, 175 So. 3d 724, 725–29 (Fla. 2015)—a privilege that private entities may claim only when "primarily acting as instrumentalities or agencies of the state, counties, or municipalities," *id.* at 726 (quoting § 768.28(2), Fla. Stat. (2008)); *see also City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015) ("Sovereign immunity is the privilege of the sovereign not to be sued without its consent." (internal marks omitted)). For similar reasons, federal courts characterize DSOs as

[3] These university regulations are Florida A&M University Regulation 11.001, FAU Regulation 6.013, Florida Gulf Coast University Regulation 1.005, Florida International University Regulation 1502, Florida Polytechnic University Regulation 10.002, Florida State University Regulation 2.025, New College of Florida Regulation 6C11-5.004, University of Central Florida Regulation 4.034, University of Florida Regulation 6C1-1.300, University of North Florida Regulation 3.0010R, University of South Florida Regulation 13.002, and University of West Florida Regulation 5.016.

"arms of the state" and recognize their immunity from suit under the Eleventh Amendment. *Souto v. Fla. Int'l Univ. Found., Inc.*, 446 F. Supp. 3d 983, 990–93 (S.D. Fla. 2020); *Baker v. Univ. Med. Serv. Ass'n, Inc.*, No. 8:16-cv-02978, 2016 WL 7385811, at *2–4 (M.D. Fla. Dec. 21, 2016); *Univ. of Fla. Rsch. Found., Inc. v. Medtronic PLC, Medtronic, Inc.*, No. 1:16-cv-00183, 2016 WL 3869877, at *2–4 (N.D. Fla. July 15, 2016); *Elend v. Sun Dome, Inc.*, No. 8:03-cv-01657, 2005 WL 8145752, at *4–8 (M.D. Fla. Dec. 22, 2005) (Wilson, Mag.).

Even before it agreed to become a DSO, the Foundation was aware of Florida's DSO statutes and regulations and knew that DSOs were intensely regulated. Tr. 192:18–20, 195:2–11, 209:8–11. For this reason, FAU's proposal that the Foundation become a DSO was not a "popular suggestion" on the Foundation's board. Tr. 196:16–19. The board was "uncomfortable with the DSO concept" because it considered Florida's DSO policies "too restrictive." Tr. 196:20–197:1, 197:24–198:2. The Foundation thus preferred not to become a DSO at all. R. 10699–702 at 71:8–73:7, 75:14–77:15, 81:10–23; Tr. 198:3–199:6, 242:19–243:4. Still, the Foundation acquiesced and agreed to become a DSO. Tr. 128:16–21, 199:10–12.

Future regulation of these state instrumentalities was therefore foreseeable, and the foreseeability of future regulation diminished the Foundation's expectancy interest in the preservation of its contractual rights. Any impairment was at most minimal. The notion that a DSO—which exists solely for another's benefit—can assert an independent and antagonistic interest in its contracts in opposition to the university it exists to serve is incongruous.

The trial court's analysis (which the Fourth District approved), treats DSOs like run-of-the-mill, autonomous private entities. App. 12, 37–38. The court failed to accord appropriate weight—or *any* weight—to the public-oversight interest that justifies the challenged laws, or to recognize that heavy regulation of DSOs mitigates the severity of any impairment. In fact, the courts below failed even to mention the extent of regulation to which DSOs, as arms of the State, have historically been subject, and therefore entirely omitted this crucial consideration from their assessment of the extent of any impairment.

Unlike private actors that enjoy wide latitude to pursue their self-interest, a DSO exists solely to further a university's mission. A regulation that permits DSOs to appoint their own directors, but

merely requires university approval as a precaution to protect the public interest, at most minimally impairs contractual rights. The Foundation failed to overcome the presumption of validity and prove that the challenged laws are invalid beyond any reasonable doubt.

C. The Fourth District Misapplied the *Searcy* Balancing Test.

The Fourth District approved the trial court's balancing analysis without elaboration. App. 12. But that analysis reveals two fatal flaws. *First*, as explained above, it takes no account of the nature and purposes of DSOs and the unique state-created relationship between DSOs and their affiliated public universities.

Second, the trial court imposed on FAU an unprecedented burden to prove the "actual interest" that subjectively motivated lawmakers to adopt the challenged laws. App. 38. Finding no such evidence, the court concluded that the purpose of the challenged laws is "unclear" and placed no weight in the scale on the side of the state objectives that support the validity of the challenged laws.

The trial court's insistence on proof of the actual motivations of lawmakers was error. Under the Contracts Clause, courts do not invalidate statutes merely because the legislative record does not

contain detailed legislative findings or statements of purpose. After all, many bills do not contain explanatory preambles at all, and few state laws are rooted in robust and illuminating legislative records. When, therefore, a legislative act contains no statement of findings or purposes, courts turn to the design, structure, and operation of the legislation itself to discern the State's probable objectives. *Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727, 731, 733 (8th Cir. 2019).

For example, in *Pomponio*, this Court noted that the "specific objectives" of the challenged law were "neither expressly articulated nor plainly evident from a reading of the statute," but nevertheless proceeded to balance the statute's "probable objectives" against the nature and extent of the impairment. 378 So. 2d at 781. Similarly, in *Searcy*, this Court asked whether it could "discern" a justification for the challenged law, and did not insist on evidence of the actual interest that motivated the law's enactment. 209 So. 3d at 1192–93.

The trial court erred when it declared the challenged laws' actual purposes "unclear" and accorded no weight to the State's probable objectives. App. 38. The State's probable objectives are abundantly clear from the text, design, structure, and operation of the challenged laws. The State relies on DSOs to serve as trustees

of vast resources held for the public benefit. It requires DSOs to operate in the State's best interest and in harmony with the goals of the universities they exist to serve. § 1004.28(1)(a)3., Fla. Stat. It takes little discernment to see that a power vested in universities to approve appointments to the boards of their DSOs is designed to assure accountability and oversight of the delicate and important functions that DSOs perform and a harmony of interests and missions between DSOs and their affiliated state universities. In refusing to consider these objectives and finding that the statute serves no legitimate purpose, the lower courts failed as a matter of law to properly perform the balancing analysis that *Searcy* requires.

The available record also confirms the State's objectives. The challenged provision was included in a far-reaching education bill—the Florida Excellence in Higher Education Act of 2018—that sought to enhance accountability measures applicable to DSOs. *See supra* p.13. The staff analysis that accompanied the bill explained that the bill's reforms sought to "enhance transparency and strengthen accountability for state-university DSOs." R. 11269; *see also* R. 4704, 5648–49, 5910–11. The record also reveals that the Florida House of Representatives' Appropriations Committee

collected data and information about DSO revenues, expenditures, and operations—and even held a public hearing on the subject. R. 7897–98, 7974, 7992–93, 7995–97; *see also* Fla. H.R. Comm. on Approp., recording of proceedings, at 24:00–3:08:29 (Mar. 8, 2017), https://thefloridachannel.org/videos/3817-house-appropriations-committee.

Finally, to the extent the record does not establish the State's interest in the challenged laws, it only highlights the Foundation's failure to notify the Attorney General of its constitutional challenge. *See infra* Part I. The Foundation's non-compliance with the notice requirement denied the single state official peculiarly charged with the defense of Florida's laws and public policy a meaningful opportunity to be heard. *See Bondi v. Tucker*, 93 So. 3d 1106, 1109 (Fla. 1st DCA 2012) (describing the Attorney General's "inescapable historic duty" to "defend . . . any litigation" that she determines "involves a matter of compelling public interest" (quoting *State ex rel. Shevin v. Yarborough*, 257 So. 2d 891, 894 (Fla. 1972) (Ervin, J., specially concurring))); *Fla. Carry, Inc.*, 133 So. 3d at 989 (Makar, J., concurring) (explaining that the Attorney General is a "critical stakeholder in defending the validity and constitutionality of the

state's laws"). Because it failed to notify the Attorney General of its constitutional challenge, the Foundation should not benefit from any insufficiency in the record with respect to the State's objectives.

D. The Fourth District's Reliance on *Citrus County* Is Misplaced.

The Fourth District's reliance on *Citrus County Hospital Board v. Citrus Memorial Health Foundation, Inc.*, 150 So. 3d 1102 (Fla. 2014), to support its analysis is misplaced. In *Citrus County*, a state statute authorized private entities to lease and operate public hospitals. A public hospital in Citrus County utilized the statute to transfer its operations to a private foundation. *Id.* at 1104. When disputes later arose between the parties, the Legislature intervened. *Id.* at 1104–05. Rather than amend the existing statute to impose new regulations even-handedly on all public-hospital leases, the Legislature enacted a special law pointedly aimed at the contractual relationship between the hospital and the foundation. *Id.* at 1105. This Court invalidated the special law under the Contracts Clause.

Citrus County is distinguishable for several reasons. *First*, the special law at issue there included fifteen subsections that made a series of changes that together fundamentally rearranged the

foundation's operations, finances, and governance. *Id.* at 1105, 1108 & nn.5 & 6. For example, in addition to requiring hospital approval of appointments to the foundation's board, the special law:

- Made the hospital board's members *ex-officio* members of the foundation board, giving the hospital majority control of the foundation board;
- Required the foundation to submit its articles of incorporation and bylaws—present and future—to the hospital for approval;
- Subjected the foundation's budgets and certain borrowing, indebtedness, policies, capital projects, and expenditures to the hospital's approval;
- Authorized the hospital to order independent audits of the foundation's management of the hospital; and
- Compelled the foundation to submit disputes with the hospital to a statutory dispute-resolution process.

Id. The Legislature thus singled out one contractual relationship and mandated a wholesale transfer of control from one party to another. It was not the power to approve appointments, specifically and in isolation, that impaired the contract. Rather, this Court considered all fifteen modifications collectively and concluded that the special law impaired the foundation's contracts. *Id.* at 1107–08.

Second, in *Citrus County*, this Court did not conduct the balancing analysis that now governs the Contracts Clause analysis.

Rather, it found an impairment and, on that basis alone, found a violation of the Contracts Clause, without weighing the State's objectives against the extent of impairment. *Citrus County* was decided three years before this Court, after a period of uncertainty, revived the *Pomponio* balancing test in *Searcy*. Because the Court in *Citrus County* invalidated the law on a mere finding of impairment and did not (as *Searcy* now requires) weigh the State's interest against the severity of the impairment, *Citrus County* affords limited guidance.

Third, a balancing analysis in *Citrus County* would have revealed that the impairment was far more substantial there than here. The Court invalidated fifteen subsections that collectively effected a drastic change to one party's finances, operations, and governance. For example, the special law packed the foundation's board with new, *ex-officio* members to transfer majority control of the foundation's board to the hospital. These alterations extended far beyond the mere approval of board appointments.

Fourth, this Court identified no state interest whatsoever in *Citrus County*, and the evidence suggests that any state interest was at best negligible. The Legislature could have amended the general

law that governed hospital leases and applied the new restrictions even-handedly, but instead passed a special law laser-focused specifically and exclusively on the contractual relationship of the parties at issue—and only after disputes had arisen between them.

The enactment of new restrictions by special law applicable to only two parties in the entire State indicates the absence of a broad and legitimate state interest calling for regulatory measures. Indeed, the reason the Contracts Clause demands a legitimate public purpose is to assure that "the State is exercising its police power, rather than providing a benefit to special interests." *U.S. Fid. & Guar. Co.*, 453 So. 2d at 1360 (quoting *Energy Reserves*, 459 U.S. at 412). Courts have thus applied the Contracts Clause with greater stringency where the challenged law did not establish generally applicable regulatory measures, but, as in *Citrus County*, targeted a small number of identifiable contracts. *See*, *e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (invalidating a state law that appeared to target one employer that was about to terminate its retirement plan); *Searcy*, 209 So. 3d at 1192–93 (invalidating a provision of a claims bill that prohibited a single family from paying its lobbyists more than two-thirds of one percent of a $15 million

award); *Sears*, 223 So. 3d at 296, 301 (invalidating a city ordinance personally procured by one of the two parties to a contract dispute).

In contrast to *Citrus County*, the Legislature here enacted a general law broadly applicable to all 70 DSOs and twelve state universities in Florida. The Foundation stands on the same footing as all other university DSOs. The enactment of a general law and adoption of a BOG regulation that equally affect all DSOs and the universities they support demonstrate that the Legislature and the BOG sought to achieve a public purpose and not, as in *Citrus County*, to alter one contractual relationship. And where the Legislature seeks to further a legitimate public purpose, courts hesitate to second-guess its choice of the means that best promote that public purpose. *U.S. Fid. & Guar. Co.*, 453 So. 2d at 1361 (noting that, under the Contracts Clause, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure" (quoting *Energy Reserves*, 459 U.S. at 22–23)).

V. THE FOUNDATION'S ARTICLES OF INCORPORATION AND BYLAWS EXPRESSLY BIND THE FOUNDATION TO HONOR FUTURE AMENDMENTS TO FLORIDA LAW.

Finally, the Foundation's governing corporate documents expressly adopt future amendments to Florida law. Because the

Foundation bound itself through its articles of incorporation and bylaws to honor future state-law amendments in all of its operations as a corporate entity, the Foundation cannot complain that the same state-law amendments impair its contractual rights.

In its articles and bylaws, the Foundation expressly bound itself to honor the limitations that state law *then* imposed or *might* impose in the future. Article III of the Foundation's articles sets forth the Foundation's mission. It provides that the Foundation is:

> operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of [FAU], *so far as is or may be permitted by the laws of the State of Florida* . . . .

R. 7284, 7737 (emphasis added). Accordingly, under the articles' plain language, the Foundation may pursue its mission *only* to the extent and in the manner that state law permits *at the time*. The conjunction "so far as" introduces a limitation on the Foundation's activities, *see* Merriam-Webster Dictionary, https://www.merriam-webster.com (defining "so far as" to mean "to the extent or degree that"), while the words "is or may be permitted by the laws of the State of Florida" adopt all then-existing laws (what "is" permitted) and future laws (what "may be" permitted). The articles require the

Foundation's activities to conform to all future Florida laws, and so do the bylaws, which contain the same restriction, R. 7299, 7792.

When a party agrees to be limited by future laws, those laws automatically become part of the contract and of course cannot impair its obligation. In *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association*, 361 So. 2d 128 (Fla. 1978), the Court concluded that a statute requiring condominium unit owners to deposit rents into the court registry during litigation over their lease agreements did not impair a contractual obligation. Because the condominium declaration incorporated state law "as the same may be amended from time to time," future changes to state law became part of the declaration by agreement. *Id.* at 133.

Similarly, in *McKesson Corp. v. Schieffelin & Co.*, 499 So. 2d 6 (Fla. 3d DCA 1986), the court rejected a Contracts Clause challenge to a statute that regulated the distribution of alcoholic beverages. The contract, a distributorship agreement, stated that its provisions would prevail over "inconsistent or more restrictive provisions" of state law—but only "when permitted." *Id.* at 7. The court held that the phrase "when permitted" incorporated both present and future

laws. *Id*. Because the contract incorporated a later-enacted statute that authorized its termination without cause, it was not impaired.

Here, the Foundation's articles of incorporation and bylaws provide that the Foundation will operate for specified purposes, "so far as is or may be permitted by the laws of the State of Florida." R. 7284, 7737. These corporate documents bind the Foundation in *every* exercise of its corporate powers. § 617.0801, Fla. Stat. ("All corporate powers must be exercised by . . . its board of directors, *subject to any limitation set forth in the articles of incorporation*." (emphasis added)); *Word of Life Ministry, Inc. v. Miller*, 778 So. 2d 360, 363 (Fla. 1st DCA 2001) ("A corporation must act in accordance with its articles of incorporation and duly adopted by-laws."); *S & T Anchorage, Inc. v. Lewis*, 575 So. 2d 696, 698 (Fla. 3d DCA 1991) ("[A corporation] may not act in any way not authorized in its articles of incorporation or bylaws."). Because it adopted the very laws it challenges, the Foundation cannot maintain that those laws impair the rights for which it now claims to have contracted.

CONCLUSION

This Court should therefore reverse the portion of the Fourth District's decision that concerns the authority of the FAU Board

of Trustees to approve appointments to the Foundation's board. It should conclude that appointments to the Foundation's board of directors (other than those made by FAU) require the FAU Board's approval.

/s/ Andy Bardos
Andy Bardos (FBN 822671)
Ashley H. Lukis (FBN 106391)
GRAYROBINSON, P.A.
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301
Telephone: 850-577-9090
andy.bardos@gray-robinson.com
ashley.lukis@gray-robinson.com
vanessa.reichel@gray-robinson.com

Jack R. Reiter, Esq. (FBN 0028304)
GRAYROBINSON, P.A.
333 Southeast Second Avenue, Suite 3200
Miami, Florida 33131
Telephone: 305-416-6880
jack.reiter@gray-robinson.com

Attorneys for FAU Board of Trustees

CERTIFICATE OF SERVICE

I certify that, on December 13, 2023, this brief was furnished by email to:

Joseph G. Galardi
Scott W. Atherton
Alaina B. Karsten
Atherton Galardi Mullen & Reeder PLLC
1641 Worthington Road
Suite 100
West Palm Beach, FL 33409
jgalardi@athertonlg.com
scott@athertonlg.com
akarsten@athertonlg.com
kendall@athertonlg.com
e-service@athertonlg.com
Counsel for Appellee / Cross-Appellant

Stuart H. Singer
Sashi C. Bach
Jesse Panuccio
401 East Las Olas Boulevard
Suite 1200
Fort Lauderdale, FL 33301
ssinger@bsfllp.com
sbach@bsfllp.com
ftleserve@bsfllp.com
Counsel for Appellee / Cross-Appellant

/s/ Andy Bardos
Andy Bardos (FBN 822671)
GRAYROBINSON, P.A.

CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains 12,975 words, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

/s/ Andy Bardos
Andy Bardos (FBN 822671)
GRAYROBINSON, P.A.