

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

**REPLY/CROSS-ANSWER BRIEF
OF THE FAU BOARD OF TRUSTEES**

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REPLY BRIEF

I. THE FOUNDATION’S VIOLATION OF RULE 1.071 BARRED ITS CONSTITUTIONAL CHALLENGE.

The Foundation asks the Court to excuse its violation of Rule 1.071 because FAU did not alert the Foundation to its obligations. But Rule 1.071 imposes a notice obligation on the party that *asserts* the constitutional challenge—here, the Foundation—and confers rights on the Attorney General, a non-party. The action or inaction of the *defending* party neither forfeits nor stipulates away the public’s right to the Attorney General’s participation. Att’y Gen.’s Br. 12–13.

The Foundation suggests that the Attorney General’s rights evaporated when FAU opposed its constitutional challenge on the merits and recited in a pretrial stipulation the issues framed by the pleadings, including the constitutional challenge. But the litigation decisions of the defending party cannot undermine the Attorney General’s right to defend Florida’s public policy. Far from making FAU’s defense the measure of the Attorney General’s rights, Rule 1.071 placed an exclusive burden on the Foundation. The right to notice belonged to the Attorney General, not FAU, and protected the

public's interest, not FAU's. To hold otherwise would invert the rule and impose on the defending party an unwritten obligation contrary to the rule's plain language and the policy behind it.

The Foundation's reliance on *State Farm Mutual Automobile Insurance v. Warren*, 805 So. 2d 1074, 1076–77 (Fla. 5th DCA 2002), is misplaced. While the court there erroneously concluded that a private insurer had waived the Attorney General's rights under the notice requirement, it upheld the challenged law and explained that “we have ignored the requirement since we find the statute to be constitutionally valid.” *Id.* The violation was harmless because the court upheld the statute.

Moreover, the invited-error doctrine does not apply because FAU did not invite the court to invalidate the challenged law. A party invites error only when it invites “the specific ruling at issue.” *Universal Prop. & Cas. Ins. Co. v. Motie*, 335 So. 3d 205, 207 (Fla. 5th DCA 2022); accord *Lally Orange Buick Pontiac GMC, Inc. v. Sandhu*, 207 So. 3d 981, 985 n.5 (Fla. 5th DCA 2016) (finding no invited error where a party urged rejection of all proposed valuations, but the court's valuation was unsupported by evidence); *S & I Invs. v. Payless Flea Mkt., Inc.*, 36 So. 3d 909, 914 (Fla. 4th

DCA 2010) (same where a party invited the court to decide, as a matter of law, whether a lease was a new lease or a renewal, but the court decided against the party).

Here, despite the Foundation's claims that FAU "asked" the trial court to decide the constitutional question, FAU did no more than oppose the *Foundation's* constitutional challenge. FAU did not assert that challenge—or invite the court to invalidate the challenged laws without notice to the Attorney General. Had the court upheld the statute, as FAU argued it should, then, as in *Warren*, the court would not have committed error.

Nor did the Attorney General waive her rights when she declined to participate in the Fourth District appeal. While the Foundation finally provided notice to the Attorney General when it filed its answer brief, its compliance with Florida Rule of Appellate Procedure 9.425 did not cure its violation of Rule 1.071. The two rules are distinct, apply at different times, and confer distinct rights to participate at different stages of a proceeding. Att'y Gen.'s Br. 15 n.7. The Foundation's non-compliance with Rule 1.071 denied the Attorney General any opportunity to shape the trial record.

The Foundation’s assertion that Rule 1.071 applies only to facial challenges is equally mistaken. Rule 1.071’s expansive language does not distinguish between facial and as-applied challenges, and as-applied challenges can affect the public interest as critically as facial challenges. The Foundation concedes that the Second, Third, and Fifth Districts have all applied the notice requirement to as-applied challenges. Br.37–38. And by analogy, this Court has construed its jurisdiction to hear appeals from decisions that declare state statutes “invalid,” Art. V, § 3(b), Fla. Const., to extend to decisions that declare state statutes invalid as applied, *Fla. Dep’t of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 911 (Fla. 2016); *State v. Robinson*, 873 So. 2d 1205, 1207 (Fla. 2004).

The Foundation mischaracterizes federal precedent to support its assertion that federal courts do not require notice of as-applied challenges. *United States v. Zadah*, 820 F.3d 746, 752–54 (5th Cir. 2016), and *Peruta v. County of San Diego*, 771 F.3d 570, 574 (9th Cir. 2014), had nothing to do with the distinction between facial and as-applied challenges. *Zadah* concerned notice of preemption claims, while the plaintiffs in *Peruta* did not challenge a state

statute, but a county policy. Federal courts routinely require notice of as-applied challenges to the United States Attorney General, who often intervenes in those cases. *See, e.g., King v. Marion Cir. Ct.*, 868 F.3d 589, 593 (7th Cir. 2017); *In re Carter*, 553 F.3d 979, 983 (6th Cir. 2009); *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807, 826 n.1 (N.D. Ga. 1982). The state cases that the Foundation cherry-picks are no more persuasive. Br.40–41. The reasoning in *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298, 1303 n.3 (Pa. 1992), consists of uncited dicta in a footnote, while *Merrill v. Merrill*, 362 P.3d 1034, 1037 (Ariz. 2015), cites only the Pennsylvania dicta.

The Foundation’s argument that the constitutional question here is not “genuinely important”—and that any error is therefore harmless—is implausible. Br.42. Harmless-error review is inapt in this context because invalidation of any state statute without notice to the Attorney General necessarily causes harm and denies the public’s right to notice under Rule 1.071. *See Lee Mem’l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1041–42 (Fla. 2018) (conducting no harmless-error review). But even under the familiar harmless-error standard, the error was not harmless: the trial

court’s invalidation of the challenged laws was the sole basis for its conclusion that FAU may not exercise its approval power. The trial court’s erroneous consideration of the constitutional question therefore clearly “contributed” to the judgment. *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). This Court, moreover, recently rejected the Foundation’s argument that an error is harmless absent a “miscarriage of justice.” *Seadler v. Marina Bay Resort Condo. Ass’n, Inc.*, 376 So. 3d 659, 666 (Fla. 2023).

Finally, the proper remedy is to remand with instructions to enter judgment for FAU—not to award the Foundation a do-over. Unlike a violation of Rule 9.425, which might be cured by supplemental briefing, a violation of Rule 1.071 denies the Attorney General an opportunity to shape the record and cannot be cured absent renewed discovery and another trial. The Foundation is not entitled to a redo after it violated Rule 1.071.

II. THE MOU CONTAINS NO AGREEMENT TO EXCLUDE FAU FROM “INVOLVEMENT” IN BOARD APPOINTMENTS.

No provision of the MOU unambiguously excludes FAU from “involvement” in the selection of directors it does not appoint. Br.47. The Foundation’s suggestion that the parties mutually

intended the Appointments Provision—which confirms FAU’s statutory right to “two (2) appointees,” R.6990—to include an agreement to bar FAU from any participation in the selection of the other directors strains the logic and language of that provision.

Unable to find express contract language to support its position, the Foundation relies on the negative-implication canon to interpolate rights into the MOU. But the Foundation fails to show that the MOU’s silence reflects an affirmative, mutual, “deliberate choice” to exclude FAU from any involvement in the selection of any other directors. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Its insistence that “two (2) appointees” means *only* two appointees simply does not address FAU’s role—such as an approval role—in the selection of other directors besides FAU’s “two (2) appointees.” Br.50. Any negative implication that arises from the Appointments Provision does not stretch that far.

The Foundation seems to suggest that the negative-implication canon allows courts to create new contractual rights willy-nilly unless the “unspoken right” would contradict an express contract provision. Br.50–51. That position is untenable. Any negative inference must be logically compelling—strong and reasonable

enough to evince a deliberate choice as to the unexpressed term. That is not the case here.

In fact, the Foundation’s “classic application” of the negative-implication canon does not support its position. Br.47–48. In that example, a state constitution authorized the state legislature to appoint judges of the superior court, while a statute conferred the same power to appoint the same judges on the Governor. Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 109–10 (2012). The negative-implication canon confirmed that the mode of appointment set forth in the state constitution excludes all others. *Id.* There was no suggestion, however, that the state legislature’s right to appoint judges of the superior court excluded it from *any* involvement in the selection of *other* judges. Yet the Foundation asks this Court to draw the analogous—and equally unnatural—inference here.

The negative-implication canon must be applied with “great caution.” *Id.* at 107. The Foundation had every opportunity to negotiate the MOU’s express terms. It should not be permitted years later to rely on negative implications to unilaterally enlarge its contractual rights and alter the bargain it struck.

The Foundation next invokes the axiom that laws in existence when a contract is formed enter into and become part of the contract. Br.46, 49. It claims that its articles of incorporation are part of the “background law” that was incorporated into the MOU by operation of law. This argument fails for three reasons.

First, the Foundation’s articles of incorporation are not “laws.” The Foundation cites no support for the proposition that corporate-governance documents—or any other private documents—are “laws” that enter into contracts by operation of law. Moreover, if its articles were part of the MOU, then the provision of the articles that adopts all future state-law amendments would be part of the MOU as well, and defeat the Foundation’s impairment claim. *See* FAU’s I.B. 62–65.

Second, to the extent the Foundation argues that sections 617.0202(1)(d) and 1004.28(3) of the Florida Statutes entered into and became part of the MOU, this is irrelevant. Br.49. Those statutes did not provide that a university “may not be involved” in the selection of directors it does not appoint. Br.47. Indeed, if a university’s right under section 1004.28(3) to appoint two directors implied a prohibition against *any* university participation in the

selection of the other directors, then the statute would prohibit that participation even by voluntary agreement between DSOs and their affiliated universities.

Third, the Contracts Clause protects from impairment only a contract's bargained-for terms—not unbargained-for terms incorporated into contracts by operation of law. In *General Motors Corporation v. Romein*, 503 U.S. 181 (1992), two employers argued that a state law requiring the payment of benefits to employees impaired their contracts with their employees. *Id.* at 186–88. Since those contracts were silent on the subject, the employers argued that the contracts incorporated contemporaneous state laws, which prohibited payment of the benefits. *Id.* at 188.

The Court disagreed and unanimously held that the Contracts Clause protects only a contract's "bargained-for terms." *Id.* at 189–91. Otherwise, all workplace regulations would become contractual entitlements subject to constitutional protection, and the Contracts Clause would "protect against all changes in legislation" and "severely limit the ability of state legislatures to amend their regulatory legislation." *Id.* at 190. That was *not* the purpose of the Contracts Clause. The Contracts Clause was intended to enable

individuals to order their personal and business affairs, and the protection of unbargained-for terms does not serve that purpose. *Id.*

In a related context, this Court has also recognized that the Contracts Clause protects only bargained-for terms. It has explained that the Contracts Clause does “not apply to obligations implied by the law without the assent of the party bound,” and thus does not protect quasi-contracts, which the law implies regardless of assent. *Fla. Sheriffs Ass’n v. Dep’t of Admin., Div. of Ret.*, 408 So. 2d 1033, 1035 (Fla. 1981) (quoting *Anders v. Nicholson*, 150 So. 639, 642 (Fla. 1933)). Applying that principle, the Court held in *Scott v. Williams*, 107 So. 3d 379, 386–89 (Fla. 2013), that prospective changes to Florida’s state retirement system do not implicate the Contracts Clause, even as applied to current state employees. Of course, if the Foundation were correct, then each state employment contract would incorporate the statutes that, at the time of contract formation, governed the State’s retirement system, and the Contracts Clause would protect those statutes from future amendments.

The Contracts Clause does not freeze all laws and guarantee that laws will not change. If the Foundation wished to protect

certain rights from impairment, then it should have included them in the MOU as bargained-for contractual obligations.

III. THE APPOINTMENTS PROVISION CONTAINS NO LATENT AMBIGUITY.

Neither the trial court nor the Fourth District concluded that the MOU unambiguously supports the Foundation's position. Instead, the Fourth District affirmed the trial court's conclusion that the Appointments Provision contains a latent ambiguity that justifies consideration of extrinsic evidence. That conclusion—reviewed here *de novo*—was incorrect.

A latent ambiguity exists when, in the course of performance, an unanticipated occurrence reveals an omission or insufficiency in the contract language and creates a need for construction in order to carry out the contract. *Kirschner v. Kirschner*, 244 So. 3d 1105, 1112 (Fla. 2d DCA 2018); *Clayton v. Poggendorf*, 237 So. 3d 1041, 1047 (Fla. 4th DCA 2018); *Nationstar Mortg. Co. v. Levin*, 216 So. 3d 711, 715 (Fla. 4th DCA 2017). When a will names a devisee but two people share the same name, the will contains a latent ambiguity and cannot be fulfilled without extrinsic evidence. And when a settlement agreement contemplates a payment from the proceeds of

a sale that never occurs, extrinsic evidence is needed to reveal how the parties intended to proceed. *Kirschner*, 244 So. 3d at 1112.

No such ambiguity exists here. The parties did not encounter a new situation that defeats their performance of the MOU and renders construction necessary to performance. No extrinsic circumstance has revealed an omission or insufficiency in the MOU's language that only extrinsic evidence can overcome. See *Morris v. MGZ Props., LLC*, 251 So. 3d 929, 930–31 (Fla. 4th DCA 2018) (finding no latent ambiguity where no extrinsic fact “changed the parties’ understanding of the contract”).

Rather, the Foundation invoked extrinsic evidence to create an ambiguity where none exists. That goes too far. *J.C. Penney Co. v. Koff*, 345 So. 2d 732, 735 (Fla. 4th DCA 1977) (explaining that courts “are barred from using [extrinsic] evidence to create an ambiguity”). Absent a genuine ambiguity, recourse to extrinsic evidence can undermine reliance on contract language and nullify a contract's integration clause, casting “a long shadow of uncertainty over all transactions.” *EcoVirux, LLC v. BioPledge, LLC*, 357 So. 3d 182, 187 (Fla. 3d DCA 2022).

The Appointments Provision is simple: “The HBOI Foundation’s board of directors shall have two (2) appointees from FAU.” R.6990. Because this simply-worded provision contains no latent ambiguity that requires clarification before the parties can proceed to perform the MOU, this Court need not explore extrinsic evidence.

IV. EXTRINSIC EVIDENCE REVEALS NO AGREEMENT TO EXCLUDE FAU FROM “INVOLVEMENT” IN BOARD APPOINTMENTS.

Extrinsic evidence does not establish, but refutes the Foundation’s position. It is undisputed that FAU—not the Foundation—drafted and proposed the Appointments Provision to protect its right to appoint two directors, that the draft provision was never modified, and that the Foundation never said a word in negotiations with FAU about the selection of directors not appointed by FAU. FAU’s I.B. 34–36.

The only extrinsic evidence the trial court identified to support its reading was the Foundation’s articles of incorporation and bylaws, R.11661–63, and the Fourth District simply adopted that reasoning, Op.5–6. But the Foundation now concedes—as FAU has argued, FAU’s I.B. 36–38—that “these corporate documents were

not extrinsic evidence at all,” Br.49. That concession undermines the very bedrock of the trial court’s conclusions.

To prove that “both parties” agreed to exclude FAU from any involvement in the selection of directors it does not appoint, Br.54–55, the Foundation cites only President Brogan’s comment on March 2, 2007—nine months before execution of the heavily negotiated MOU—that FAU “does not seek control of the foundation.” R.6932–34. But without more, this single remark is not competent, substantial evidence sufficient to support the Foundation’s position. President Brogan’s statement was true then and remains true today, but cannot rationally be construed as a promise of zero oversight and unfettered independence. While FAU has never sought to “control” the Foundation, it does not follow that FAU cannot exercise oversight of its affiliated DSOs—or that it contractually agreed not to. Indeed, Florida law has long subjected all DSOs to extensive oversight. The Foundation negotiated the terms of the MOU and cannot now rely on a comment that is found in meeting minutes—not in the MOU—and that does not address any specific contract provision.

In fact, the Foundation agreed to an integration clause that declared the MOU 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.” R.7259. The Foundation thus relinquished the argument it now makes: that one comment during a 16-month negotiation, never integrated into the parties’ agreement, constitutes a binding contractual obligation.

Notably, neither the trial court nor the Fourth District relied on President Brogan’s remark, R.11661–63; Op.5–6, which was made nearly five months before the first draft of the MOU was exchanged, R.6988. Indeed, the trial court rejected as not “credible” the evidence offered by the Foundation to prove that the Foundation had negotiated “independence from FAU.” R.11654 n.8.

The extrinsic evidence powerfully refutes the Foundation’s contention that the Appointments Provision embodies a mutual agreement to prohibit any participation by FAU in the Foundation’s selection of directors. Thus, even if this Court considers extrinsic evidence, it should reverse.

V. THE CONTRACTS CLAUSE DOES NOT PROTECT A CONTRACT'S SILENCE.

The Florida Constitution's plain language proscribes laws "impairing the *obligation* of contracts." Art. I, § 10, Fla. Const. (emphasis added). The Foundation argues, however, that the Contracts Clause also prohibits laws that impair a contract's *value* or *strength*, even if the contract is silent on the subject. Br.64. The Foundation's interpretation reads the direct object "obligation" out of the Constitution. Absent a contractual obligation—which silence cannot establish—the Contracts Clause has no work to do. FAU's I.B. 27–29.

The Foundation's cases do not support its position. In *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association*, 169 So. 3d 145, 148 (Fla. 4th DCA 2015), a statute imposed liability on purchasers of property for assessments unpaid at the time of transfer. The homeowners' declaration, however, expressly shielded purchasers from liability. The statute interfered with an identifiable contract provision—not mere silence.

In *Citrus County Hospital Board v. Citrus Memorial Health Foundation, Inc.*, 150 So. 3d 1102 (Fla. 2014), the challenged law

imposed new obligations on a hospital foundation. While the *new* obligations were “mentioned nowhere in the parties’ agreements,” those agreements were not silent on the subject. *Id.* The evidence filed in the circuit court reveals that those agreements specifically authorized the foundation to appoint its directors without hospital approval. Pl.’s Mot. for Partial Summ. J. at 7 (Sept. 2, 2011), *Citrus Mem. Health Found., Inc. v. Citrus Cnty. Hosp. Bd.*, No. 2011-CA-001653 (Fla. 2d Cir. Ct.).

Finally, the Foundation discounts federal precedent as “neither controlling nor persuasive,” Br.64, but this Court has found federal precedent “helpful and persuasive” and “obviously entitled to great weight,” *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla. 1979). Here, federal precedent echoes the Florida Constitution’s plain language: the Contracts Clause protects only contractual *obligations* from impairment.

VI. THE STATE’S INTEREST IS LEGITIMATE AND SIGNIFICANT.

Even if the Foundation had carried its burden to establish an impairment, the challenged laws would be constitutional because the importance of the State’s interest outweighs the extent of any impairment.

Like the courts below, the Foundation fails to account for the unique state-created relationship between DSOs and state universities and the public function that, as trustees of vast resources dedicated to the public, DSOs exist to perform. The Foundation treats DSOs like private commercial ventures and fails to appreciate the significant public interest in DSO oversight and in a harmony of missions between DSOs and their affiliate universities.

The Foundation endorses the trial court's error in insisting on proof of the actual interest that subjectively motivated lawmakers to adopt the challenged laws, rejecting any state interest not spelled out with crystalline precision in the legislative record. Br.68. Because it never attempts to discern the State's probable objectives from the text, design, structure, and operation of the challenged laws, the Foundation presents a stunted analysis that ignores the State's obvious regulatory interests.

It is undisputed that, in 2017, a legislative committee gathered extensive information about DSO expenditures and examined university officials and other witnesses about questionable DSO expenditures. FAU's I.B. 56–57. The Foundation acknowledges the

Legislature’s concerns regarding DSO “funding and spending,” but ignores the obvious connection between a university’s approval power and increased accountability in expenditure decisions. Br.69. And while the Foundation insists that the record does not establish a “broad, generalized economic or social problem,” Br.68, the existence of a widespread “problem” is only one of multiple “factors to be considered.” *Pomponio*, 378 So. 2d at 779.

The Foundation’s argument that the state interest is minimal because the statute would “remain fully intact” for other DSOs fails for two reasons. Br.70. *First*, the Foundation points to no evidence that its contractual arrangement is unique. *Second*, the balancing analysis considers the State’s interest in the challenged law at large—not in the law’s application to one plaintiff. Thus, in *Columbia Hospital Corporation of South Broward v. Fain*, 16 So. 3d 236, 244 (Fla. 4th DCA 2009), the court considered the “public’s interest in providing for broad discoverability of adverse medical incident reports”—not its interest in overcoming one hospital’s confidentiality agreements.

Finally, the Foundation’s demand for a “heightened standard,” Br.67, misapplies the rule announced in *Chiles v. United Faculty of*

Florida, 615 So. 2d 671 (Fla. 1993). *Chiles* applied heightened scrutiny because (1) it concerned the constitutional right to bargain collectively; and (2) the same entity that had negotiated the agreement impaired it one year later, raising the specter of manipulation. *Id.* at 672–73. That scenario is not present here: FAU executed the contract, and the Legislature and the BOG adopted the challenged laws more than a decade later, without any evidence that they targeted the MOU or even knew of its existence.

VII. ANY CONTRACT IMPAIRMENT IS MINIMAL.

The Foundation’s efforts to maximize any alleged impairment are equally futile. Most fundamentally, like the courts below, the Foundation never accounts for the long history of intense state regulation of DSOs or the precedents that make that history relevant. Rather, the Foundation hyperbolically asserts that heavy regulation does not strip parties of all constitutional protection. Br.71–74. It errs, however, when it ignores the integral role that a history of intense state regulation plays in measuring the severity of an impairment.

The Foundation’s claim that, unlike other DSOs, it is not a state instrumentality wholly ignores its public mission and the

many indicia of state control that apply to all DSOs, which exist solely to support the State University System. Br.73.

The Foundation claims that an approval power transfers control of its board to FAU and eviscerates the independence it negotiated. Br.65. But as the trial court found, the Foundation did not—and, as a DSO, could not—negotiate a blanket “independence” from FAU. R.11675–77. Nor would FAU, through its approval power, “control” the board. FAU’s I.B. 45.

The Foundation cannot deny that *Citrus County* does not discuss the balancing analysis or identify any state interest. Br.62–64. The point is not necessarily that *Citrus County* is no longer “good law,” *id.*, but that it provides limited guidance in resolving this appeal, which involves different state interests and different degrees of impairment. And far from being “irrelevant,” Br.63, the fact that the law challenged in *Citrus County* made a series of changes that went far beyond an approval power is directly relevant to the severity of the impairment and differentiates this case from *Citrus County*.

Nor does *Sears, Roebuck & Co. v. Forbes/Cohen Florida Properties, L.P.*, 223 So. 3d 292 (Fla. 4th DCA 2017), suggest that

all laws that confer approval powers are unconstitutional. Br.66.

Sears presented singular facts: a transparent legislative attempt to decide a private contract dispute at one disputant’s behest, and the absence of any legitimate interest in the challenged law. 223 So. 3d at 300. It certainly did not involve even-handed public oversight of state instrumentalities. Far from declaring a constitutional ban on all approval requirements, *Sears* was fact- and context-sensitive, as the balancing analysis requires.

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

The Foundation does not dispute that a corporation must adhere to its articles of incorporation in every exercise of its corporate powers. Instead, it denies that its articles mean what they say. It argues, for example, that the automatic-amendment provision in its articles—which requires the Foundation to operate “so far as is or may be permitted by the laws of the State of Florida,” R.7284, 7737—appeared there “for years” before the Foundation became a DSO, Br.56, as though the provision somehow expired. And it suggests that the word “operated” does not include the

selection of directors, *id.*, even though the selection of directors is central to the operation of any corporate entity.

The Foundation argues that the automatic-amendment provision “was not the result of a negotiated agreement to be bound by future laws.” Br.56–57. But whether it was “negotiated” is irrelevant to whether it binds the Foundation. And none of the trial testimony cited by the Foundation overcomes the plain meaning of the provision. Mr. Stewart’s testimony that the articles were not intended to incorporate future state-law amendments was self-serving and conclusory, contrary to the plain language of the automatic-amendment provision, and, because that provision is unambiguous, irrelevant. And notably absent from Ms. Rubin’s testimony is any suggestion that the automatic-amendment provision does not mean what it says and incorporate future state-law amendments.

IX. THE CHALLENGED LAWS’ APPLICATION TO FUTURE APPOINTMENTS IS PROSPECTIVE.

The Foundation did not plead and does not assert a due-process violation. Rather, it contends, as a matter of interpretation, that university approval of *future* appointments is a retroactive

application of the 2018 amendments, and that the Legislature and BOG did not intend a retroactive application. Br.74–79. The mere existence of the MOU does not, however, support the counterintuitive position that the challenged laws’ application to future appointments is retroactive.

A statute that governs future conduct is generally prospective even if that conduct has contractual underpinnings. A law is not retroactive merely because the case arises “from conduct antedating the statute’s enactment,” but only when it “attaches new legal consequences to events completed before its enactment.” *Love v. State*, 286 So. 3d 177, 187 (Fla. 2019) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994)).

Accordingly, a change to tax laws or zoning regulations after a person purchases property—or a prohibition upon gambling after a person has begun to build a casino—is “uncontroversially prospective,” despite the contractual roots of the regulated activity. *Landgraf*, 511 U.S. at 269 & n.24. A law that bars foreign corporations from doing business in a State is prospective, even when applied to a corporation already engaged in business in the State “in pursuance of an earlier contract.” *Diamond Glue Co. v. U.S.*

Glue Co., 187 U.S. 611, 614–15 (1903). And a change to the tax treatment of future settlement payments is prospective, even if the payments are made under a settlement agreement executed before the change. *Polone v. Comm’r*, 505 F.3d 966, 972–73 (9th Cir. 2007).

County of Volusia v. DeSantis, 302 So. 3d 1001 (Fla. 1st DCA 2020), illustrates these principles. There, a county charter provided for the appointment of a tax collector. *Id.* at 1002–03. State law was later amended to require the tax collector to be elected—not appointed. *Id.* at 1003–04. The county alleged that the amendment was retroactive as applied to future elections because its charter predated the amendment. The court disagreed. It explained that the amendment was prospective since it modified only the “future structure for county constitutional officers” and attached no new legal consequences to past appointments. *Id.* at 1004–05.

Here too, the MOU’s existence does not transform a patently prospective application into a retroactive one. The 2018 amendments do not reopen past appointments and attach new legal consequences to completed events. Rather, they regulate only future appointments.

In the insurance cases the Foundation cites, the Legislature directly regulated insurance contracts. It was essential to determine which contracts the Legislature intended to regulate. Here, a regulation of board appointments regulates a function that all corporate entities perform—with or without an MOU—and is not a regulation of the MOU at all, but of future events not completed before the challenged laws took effect. *See Landgraf*, 511 U.S. at 270 (explaining that whether a law is retroactive depends in part on “the degree of connection between the operation of the new rule and a relevant past event”).

If the Foundation were right, then scores of laws would be nullified as a matter of statutory interpretation by the fortuitous existence of contracts unknown to the Legislature. The Legislature was not required to ferret out the MOU’s existence and expressly state its intent to apply the 2018 amendments to the Foundation. Indeed, under the Foundation’s theory, the 2018 amendments would be retroactive in their application to all DSOs—and apply to none—since *all* DSOs had adopted some method for the selection of their directors before 2018. *See, e.g.*, R.6869, 6872 (establishing in bylaws the method by which the FAU Foundation selects directors).

Finally, even if the approval of future appointments is considered to be retroactive, the Legislature’s intent to apply the approval power to those appointments is clear. The Legislature provided that its enactment “shall take effect upon becoming law”—*i.e.*, on March 11, 2018. Ch. 2018-4, § 28, Laws of Fla. It thus made plain its intent that the approval power apply to all appointments made on or after that date.

CROSS-ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

FAU incorporates the Statement of the Case and Facts in its initial brief and supplements that statement below.

A. Early Negotiations.

In 2006, at the outset of the parties’ negotiations, FAU proposed to merge the Foundation’s endowment into an existing DSO, the FAU Foundation. R.6897. After the Foundation objected to that proposal, FAU proposed that the Foundation become a DSO instead. R.6903–04. FAU Provost John Pritchett assured the Foundation that, as a DSO, the Foundation “would not be merged with the existing FAU Foundation but would be subject to the rules and policies of a DSO within the State University System.” *Id.*

During the parties' negotiations, the Foundation and its counsel were well aware of the state statutes and regulations that governed DSOs, including those that governed the review and oversight of DSO budgets. Tr.192:18–193:1, 195:2–11, 209:8–24. The Foundation board's "initial reaction" was that DSO status "would be too restrictive." R.6908. Because DSOs were subject to a regulatory framework that it considered needlessly restrictive, the Foundation was opposed to certification as a DSO. Tr.196:16–199:6, 242:19–243:4; R.10699–702 at 71:8–73:7, 75:14–77:15, 81:10–23. For FAU, however, the Foundation's DSO status was indispensable to any agreement, and the Foundation agreed to become a DSO. Tr.128:16–21, 190:7–10, 199:10–12, 218:25–219:3, 466:25–467:19.

In fact, the legislative funding that was needed to rescue the Foundation from its grave financial predicament was contingent on the Foundation's agreement to a status that assured future public oversight. Tr.435:11–438:6. The State relied on that assurance and, in the first year alone, appropriated nearly \$80 million to finance the Foundation's bailout. Tr.225:3–8, 535:21–537:3.

FAU's official offer to the Foundation in February 2007

included the following provision:

[The Foundation] would become a separate, stand-alone DSO of FAU It would thus remain independent of the existing FAU Foundation, Inc., and as such would retain sole discretion for its funding or support of [the research institute] in terms of grants, endowments etc.

R.6925. Two months later, after a presentation by FAU President Frank Brogan to the Foundation's board, the parties executed a letter of intent that contained the same provision. R.6948.

At his presentation, President Brogan explained that the Foundation's endowment would be held under a DSO model.

R.6934. He explained that, as a DSO, the Foundation "would have the same discretion with the expenditure of its funds as [the FAU Foundation] has with the expenditure of its funds." *Id.* To the Foundation's counsel, "same" meant "no less," but also "no more."

Tr.205:9-18. President Brogan added that the Foundation "will have discretion regarding funding the [research institute]." R.6935.

One month after the parties signed the letter of intent, the Foundation sought clarification of its proposed "latitude" in the "expenditure" of funds. R.6921. In a letter from its counsel, Mr. Stewart, the Foundation asked FAU whether Florida's DSO

statute would prevent the Foundation from distributing specialty license plate funds in accordance with the Foundation’s preexisting obligations under Florida law, or making expenditures to entities “outside the FAU umbrella.” *Id.* In November, FAU responded that it would not. R.7232–33. Mr. Stewart’s letter did not mention budgets or their adoption. R.6921–22.

B. Negotiation of the Distributions Provision.

The parties began to exchange drafts of the MOU in July 2007. R.6988–96. One provision the parties negotiated was the Distributions Provision—which, in the executed MOU, provides as follows:

[The Foundation’s] distributions shall be made in the sole discretion of the [Foundation’s board] to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of [the research institute] or FAU.

R.7255. FAU’s initial drafts proposed (1) that a percentage of all distributions be set aside for the research institute’s operating expenses (since appropriations to cover those expenses had fallen short of expectations); and (2) that distributions be made in the “reasonable discretion” of the Foundation’s board. Tr.509:25–515:7. The Foundation did not agree to these provisions and, on November

13, 2007, by letter from Mr. Stewart, proposed a revised paragraph 4 that contained the language that appears in the executed MOU's Distributions Provision. R.7212-17; Tr.515:22-518:5.

Mr. Stewart's letter explained that his revised paragraph 4 was "motivated in part" by (1) the Foundation's tax-exempt status; (2) the fact that the Foundation had not yet received a response to its request for clarification of the Foundation's "latitude" in the expenditure of funds; and (3) the Foundation's need to restore its endowment and retire debt before it makes "significant distributions." R.7214. The letter did not mention budgets or state that the revisions were needed to grant the Foundation exclusive control over its budgets. R.7213-17.

C. Negotiation of the Office-Space Provision.

Meanwhile, in October 2007, the Foundation requested an MOU provision that entitled the Foundation to maintain its offices on property that the Foundation was about to transfer to FAU. Tr.217:23-218:20, 514:16-516:16. The Office-Space Provision was retained in the executed MOU:

FAU agrees to provide the [Foundation] with mutually agreeable temporary space in the real property facilities until such time as the [Foundation] obtains a permanent home.

R.7255. Thus, during the parties' negotiations, the Foundation anticipated its use of FAU property and even provided for it in the MOU.

The Office-Space Provision was significant because then, as now, state law subjected all DSOs that use university property to "budget and audit review and oversight." § 1004.28(2)(b), Fla. Stat. (2007).

When it negotiated for office space on FAU property, the Foundation and its counsel were familiar with section 1004.28(2)(b) and Florida's other DSO laws. Tr.192:18–193:1, 195:2–9, 209:8–24. The Foundation knew that it would be bound by those laws and that FAU could not exempt it from those laws. Tr.195:22–196:1, 491:15–492:9.

In December 2007, days before the MOU was fully executed, Provost Pritchett welcomed the Foundation's decision to maintain its offices on FAU property and designated an office suite in the library building for the Foundation's use. R.7282; Tr.537:4–23. The

Foundation maintained its offices on FAU property for more than a decade until 2019, and for more than two years after it filed this litigation. Tr.218:21–24, 537:24–538:23.

D. Negotiations Regarding the Foundation’s Budgets.

The MOU does not mention budgets. R.7253–65. Nor did the Foundation mention budgets during the parties’ negotiations. Tr.212:5–23, 581:2–6, 473:13–16, 579:3–580:7. Mr. Stewart conceded that “the word ‘budget’ [n]ever came up, no.” Tr.212:5–23.

Ms. Rubin was unaware of any discussion between the two parties regarding the Foundation’s adoption of budgets. Tr.581:2–6. To her knowledge, no Foundation representative ever discussed with FAU how the Foundation’s budgets would be adopted, or mentioned Florida law’s budget-oversight provisions, or claimed that the MOU granted the Foundation exclusive authority to establish its budgets. Tr.579:3–580:7. Nor did the Foundation express to President Brogan that it sought budget autonomy. Tr.473:13–16. The word “budget” was not mentioned in discussions among the Foundation’s directors either. Tr.212:5–23.

E. The Parties' Performance.

In 2012, five years after the parties executed the MOU and three years after the BOG amended Regulation 9.011 to subject all DSO budgets to the approval of university boards of trustees, Mr. Stewart confirmed to Ms. Rubin that the Foundation “is a DSO of the University and subject to all that a DSO relationship entails.” R.7596. Mr. Stewart also confirmed to the Foundation’s board that the Foundation “is a DSO of FAU and by reason of that fact is subject to statutory and regulatory restrictions with respect to the expenditure of its funds.” R.7597.

Since at least 2012, however, prominent members of the Foundation’s board have resisted oversight under Florida law and advocated the Foundation’s decertification as a DSO of FAU. Tr.365:1–6, 391:14–393:2; R.7676–72, 7704–08, 7919, 8673, 9079–80, 9116, 9139, 10724 at 172:23–173:22, 10726 at 178:2–179:2, 10892.

Since the MOU’s execution, FAU has exercised the same oversight of the Foundation’s and the FAU Foundation’s budgets. Until 2014, partial budgets of both DSOs were rolled into the university budget and presented to the FAU Board of Trustees for

approval. R.10371–74, 10390, 10394–95. In 2015, FAU began separately to present the full budgets of both DSOs to its Board of Trustees for approval. R.10479–80. In 2015 and 2016, the FAU Board of Trustees reviewed and approved the Foundation’s budgets, R.7761–75, 7843–50, 7856–61, 10449, without any objection by the Foundation, R.10716 at 139:22–140:8; R.10717 at 141:5–24.

In 2015, the Foundation’s executive director, Katha Kissman, appeared before and addressed an FAU committee when the Foundation’s budget was under review, and raised no objection. R.7764; Tr.91:15–92:11. At the meeting, upon five separate motions, the committee voted to recommend “approval” by the FAU Board of Trustees of the budgets of all five DSOs of FAU, including the Foundation. R.7762–64.

In December 2016, FAU Vice President of Research Daniel Flynn proposed to the Foundation that FAU assume responsibility for some of the Foundation’s administrative support functions—such as legal services, accounting, and public relations—to save the Foundation, by his calculations, between \$150,000 and \$200,000 annually. Tr.615:3–14, 625:10–626:2. Dr. Flynn’s proposal coincided with increased scrutiny of DSO expenditures by the

Legislature. R.7897–98, 7974, 7991–97. Dr. Flynn was well aware of this close legislative oversight, which informed his concerns regarding DSO expenditures. Tr.624:7–625:9. Dr. Flynn did not propose to take over or manage the Foundation’s endowment. Tr.629:24–630:1.

Dr. Flynn presented his proposal to the Foundation’s board in January 2017. Tr.619:11–17. In response, Foundation board members made and seconded a motion—which was later tabled—to initiate measures to decertify the Foundation as a DSO, R.7919, five years after board members first sought decertification, *see supra* p. 35. When the Foundation’s board met again in March, it passed a resolution authorizing its counsel to sue FAU. R.8033–35.

While FAU had approved the Foundation’s budgets in 2015 and 2016, before this dispute arose in 2017 the Foundation had never asserted that FAU had no authority to approve the Foundation’s budgets. Tr.232:3–20; R.10716 at 139:22–140:8; R.10717 at 141:5–24. Mr. Stewart could not recall any meeting before 2017 at which the Foundation’s board ever discussed FAU’s authority to approve the Foundation’s budgets. Tr.234:7–13.

F. The Trial Court's Findings.

The trial court considered the MOU's language and the extrinsic evidence and found that the parties did not intend to grant the Foundation an exclusive right to establish its budget. R.11679. Rather, the Distributions Provision memorialized the parties' agreement to grant the Foundation control over "expenditure decisions." R.11679–80. The trial court relied on the "credible" evidence of the parties' negotiations to find that the Distributions Provision was not "tied to the development of the Foundation budget" and that the "budget was not the negotiated issue." R.11680. The trial court observed that the parties "always contemplated establishing the Foundation's offices on FAU's campus, which occurred soon after the transaction closed." *Id.* It found the Foundation witnesses' testimony that the Foundation bargained for "independence" from FAU itself—rather than from the FAU Foundation—not "credible." R.11677 n.8, 11680. The trial court concluded that BOG Regulation 9.011(4) does not impair any MOU obligation. R.11680–81.

SUMMARY OF THE ARGUMENT

The trial court correctly found that the parties did not grant the Foundation a contractual right to budget autonomy.

First, the MOU is unambiguous. It does not mention budgets. It grants the Foundation sole discretion in the distribution of funds from its endowment—not to establish its budgets. The MOU itself confirms that the Foundation’s sole discretion does not extend to budgets: it provides for the Foundation’s use of FAU’s property, which in turn subjected the Foundation to budget oversight under Florida law. Plainly, the parties did not agree that the Foundation would enjoy unchecked discretion to establish its budgets.

Second, the Distributions Provision contains no latent ambiguity. The parties did not encounter a previously undetected insufficiency in the contract language that rendered extrinsic evidence necessary to the contract’s performance. But even if the Distributions Provision were ambiguous, competent, substantial evidence supports the finding that the parties did not intend to insulate the Foundation from budget oversight. The parties never discussed budgets in their negotiations; their focus was on the Foundation’s discretion to make expenditure decisions. Meanwhile,

the Foundation bargained for the right to use FAU's property and in fact used FAU's property, surrendering to budget oversight under Florida law.

Because the MOU does not grant the Foundation unfettered control over its budget, the BOG regulation does not impair the MOU.

This Court can affirm on two alternative grounds as well:

First, the challenged law does not impair the Foundation's contractual rights because the Foundation's governing documents—its articles of incorporation and bylaws—expressly adopt future amendments to state law. Because the Foundation has bound itself to honor future state-law amendments in every exercise of its corporate powers, those amendments cannot impair its contractual rights.

Second, state law in effect when the MOU was executed already required university consent to DSO budgets in the form of the university president's "recommendation" of the budget to the BOG. While the university's budget-oversight authority was later transferred to the board of trustees, a university's exercise of budget oversight is not new. Because the law has not materially

changed since the MOU was executed, current law cannot impair the MOU.

Finally, even if the MOU is impaired, the challenged law is constitutional. The State's interest in the law is especially weighty. DSOs perform a single function: they support state universities. They are trustees of immense resources on which the State University System depends, and which alleviate the burdens the State University System imposes on taxpayers. The proper and productive use of DSO resources is a public interest of compelling importance.

Any impairment, in contrast, is minimal. The challenged law grants only a concurrent right of approval—not a unilateral power. As arms of the State, DSOs have long been subject to intense regulation—including regulation of their budgets. The Foundation knew as much and could not reasonably have expected to elude future state regulation. And if the Foundation expected a right to exclusive control of its budget, then, rather than leave its rights to implication, it should have attempted to bargain for express protection (which it would not and could not have obtained).

This Court should affirm FAU's explicit right under Florida law to approve the budgets of its DSO.

LEGAL STANDARD

FAU incorporates the statement of the standard of review in FAU's initial brief on appeal.

ARGUMENT ON CROSS APPEAL

I. CURRENT FLORIDA LAW REQUIRES UNIVERSITY APPROVAL OF DSO BUDGETS.

To take effect, a DSO's budget must be approved *both* by the DSO's board of directors *and* by the university board of trustees:

Operating budgets of [DSOs] shall be prepared at least annually, and *approved by the organization's governing board and the university board of trustees.*

BOG Reg'n 9.011(4) (emphasis added). Enacted in 2012 under the BOG's constitutional authority to govern the State University System, Art. IX, § 7(d), Fla. Const., the regulation is clear: a DSO's budget cannot take effect without *two approvals*.

The Foundation does not dispute that the BOG regulation means what it says. Rather, it claims the regulation is unconstitutional as applied because the MOU grants it unchecked independence to establish its budgets without any oversight by

the state university it exists to support. The MOU does no such thing.

II. THE MOU IS UNAMBIGUOUS—AND DOES NOT GRANT THE FOUNDATION AN EXCLUSIVE RIGHT TO ESTABLISH ITS BUDGET.

The BOG regulation applies unless the Foundation establishes, beyond a reasonable doubt, that it unconstitutionally impairs a contractual obligation. The courts below correctly concluded that the Foundation failed to carry that heavy burden.

When it comes to budgets, the MOU is unambiguous by its silence. Because it does not address the adoption of budgets, the MOU does not grant the Foundation a contractual right to adopt its budgets without any university participation. And because the MOU confers no contractual right to budget autonomy, BOG Regulation 9.011(4) does not impair a contractual obligation.

A. The MOU Is Silent As to the Foundation’s Budget.

The Foundation pins its hopes on a single sentence of the MOU—the Distributions Provision. That sentence states that the Foundation’s:

distributions shall be made in the sole discretion of the [Foundation's board] to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of [the research institute] or FAU.

R.7255 ¶ 4. The Foundation insists that “sole discretion” to make distributions—for example, to select grant recipients—necessarily *implies* sole discretion to adopt its budgets. The Foundation stretches the Distributions Provision too far, and the courts below correctly rejected this construction.

The Foundation overlooks the basic distinction between the expenditure of funds and the adoption of budgets. These functions are distinct. To illustrate, it is axiomatic that only the Florida Legislature—not the executive branch—may adopt a budget for the State. *Chiles v. Child. A, B, C, D, E, & F*, 589 So. 2d 260, 267 (Fla. 1991); *Graham v. Haridopolos*, 76 So. 3d 315, 318 (Fla. 1st DCA 2011). Yet it is equally clear that the executive branch has sole discretion to decide how to spend budgeted funds. *Fla. Dep't of Child. & Fams. v. J.B.*, 154 So. 3d 479, 481 (Fla. 3d DCA 2015); *Sharrard v. State*, 998 So. 2d 1188, 1192 (Fla. 4th DCA 2009). The Legislature's budget authority does not destroy an agency's discretion to expend budgeted funds, and an agency's discretion

over expenditures does not preclude the Legislature’s adoption of a budget. The two powers are separate in theory and practice.

The same distinction applies here. The MOU addresses the board’s discretion to make “distributions” for stated purposes. The Foundation, for example, has sole discretion to select grant recipients or the research projects the Foundation will support. The MOU does not, however, address the Foundation’s budget or budget process—or even use the word “budget.” Any interpretation that confers on the Foundation “sole discretion” not only to select among expenditures, but also to adopt its budgets without oversight, would expand beyond recognition the limited meaning of such words as “distributions,” “defray,” and “expenses,” and rewrite the Distributions Provision. *See* MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com> (defining “distribution” to mean “something distributed,” such as “a sum of money withdrawn from a fund,” and “defray” to mean “provide for the payment of : PAY”). If the parties intended to grant the Foundation sole discretion to establish its budgets, then they would have said so plainly.

B. The Foundation Reads the MOU’s Distributions Provision in Isolation.

The Foundation’s interpretation is flawed in part because it reads the Distributions Provision in isolation. To support its conclusion that its “sole discretion” to make distributions includes an exclusive right to adopt budgets, the Foundation erroneously ignores other provisions of law and contract that refute that interpretation. *See Allstate Ins. Co. v. Revival Chiropractic, LLC*, No. SC2022-0735, at 15 (Apr. 25, 2024) (“Provisions in the texts of statutes and contracts cannot be viewed in isolation from the full textual context of which they are a part.”).

First, the BOG regulations in effect when the MOU was executed are incompatible with the Foundation’s purported “sole discretion” to establish its budgets. Those regulations required *all* DSO budgets to be “recommended by the university president to the Board of Governors for review.” R.6867; Tr.573:15–574:6. Both the FAU president and the BOG participated in the budget process: one in a *recommendatory*, and the other in a *review* capacity. Plainly, the parties could not have granted the Foundation “sole discretion” to adopt budgets without violating Florida law. The Foundation’s

asserted right to budget independence is not “entirely consistent,” but entirely inconsistent, “with the DSO laws in effect in 2007.”

Br.83.

Second, the MOU’s Office-Space Provision confirms that the parties did not grant the Foundation “sole discretion” to establish its budget. In that provision, the Foundation secured for itself a contractual right to locate its offices on FAU’s property. R.7255 ¶ 4. That matters because, as the Foundation was well aware, DSOs that used university property were plainly subject to the university’s “budget and audit review and oversight.” § 1004.28(2)(b), Fla. Stat. (2007).

The parties thus anticipated that the Foundation’s budgets would be subject to FAU’s review and oversight. They perceived no inconsistency between the Distributions Provision, which granted the Foundation sole discretion to make distributions, and the Office-Space Provision, which subjected the Foundation’s budgets to FAU’s review and oversight. Clearly, the parties never intended to grant the Foundation the budget independence it now claims. *See Allen v. Nunez*, 258 So. 3d 1207, 1217 (Fla. 2018) (noting the “well-established principle that the intention of the parties must be

determined from an examination of the entire contract and not from separate phrases or paragraphs” (internal marks omitted)).

The Foundation’s attempts to reconcile the Office-Space Provision with an alleged contractual right to budget autonomy are painfully unpersuasive. The Foundation claims that “budget and audit review and oversight” does not necessarily include a power to *approve* budgets. Br.97–98. But whatever “budget and audit review and oversight” means, it is wholly incompatible with the Foundation’s purported “sole discretion” to adopt budgets. The mere existence of oversight authority—whatever form it takes—refutes any claim that the Foundation negotiated for budget independence.

The Foundation also argues that, under the trial court and Fourth District’s interpretation, “the Foundation may not spend one dollar unless the expense is included in an FAU-approved budget.” Br.80. But a budget does not—and need not—itemize each individual expenditure. The Foundation’s budget is a four-page document that sets forth object-level categories. R.8248–53. Thus, in *Alachua County v. Watson*, 333 So. 3d 162 (Fla. 2022), this Court found no inconsistency between the county commission’s authority

to establish the sheriff's budget, *id.* at 169–71, and a statute that secured the “independence” of sheriffs “concerning the purchase of supplies and equipment” and the hiring of personnel and “setting of salaries,” *id.* at 167 (quoting § 30.53, Fla. Stat.). A sheriff's sole discretion to make distributions for supplies, equipment, and salaries did not confer budget autonomy on the sheriff and strip the county commission of its authority.

Because the MOU does not grant the Foundation a contractual right to establish its budgets without oversight, the courts below correctly determined that BOG Regulation 9.011(4) did not impair the MOU. And because the Distributions Provision is unambiguous, there is no need to consider extrinsic evidence. The regulation applies to the Foundation, as to all DSOs.

III. THE MOU CONTAINS NO LATENT AMBIGUITY REGARDING BUDGETS.

Like the Appointments Provision, *see supra* pp. 12–14, the Distributions Provision contains no latent ambiguity. The parties did not encounter an unanticipated situation that prevents their performance of the MOU and renders construction essential to continued performance. Rather, the Foundation invokes extrinsic

evidence to create an ambiguity where none exists. Absent a latent ambiguity, this Court need not consider extrinsic evidence.

IV. IF THE MOU IS AMBIGUOUS, THEN EXTRINSIC EVIDENCE REFUTES THE FOUNDATION'S POSITION.

Even if the Distributions Provision were ambiguous, however, the extrinsic evidence provides competent, substantial evidence to support the trial court's factual finding that the parties did not mutually agree to insulate the Foundation's budgets from university oversight.

First, the parties never discussed budgets in their negotiations. Ms. Rubin was unaware of any discussion between the parties regarding the adoption of budgets. Tr.581:2–6. To her knowledge, no Foundation representative ever discussed with FAU the process by which the Foundation's budgets would be adopted, or mentioned Florida law's budget-oversight provisions, or claimed that the MOU guaranteed the Foundation exclusive authority to establish its budget. Tr.579:3–580:7. The Foundation never expressed to President Brogan that it sought budget independence. Tr.473:13–16. The word “budget” was never even mentioned in discussions among the Foundation's directors. Tr.212:5–23. While

Mr. Stewart testified in a conclusory way—14 years after the fact—that the Foundation intended to secure budget autonomy, the trial court did not find that testimony “credible.” R.11677 n.8, 11680. And despite the massive volume of contemporaneous records in evidence, the Foundation did not produce a single document from 2006 or 2007 to indicate any discussion of budgets. Without that discussion, the parties could not and did not form any mutual intent and understanding to confer on the Foundation a contractual right to adopt budgets without university oversight.

Second, the Foundation intended all along to use FAU’s property. Its decision to use FAU’s property subjected the Foundation to budget oversight and demonstrates that the parties never intended to insulate the Foundation from budget oversight.

The parties added the Office-Space Provision to the MOU at the Foundation’s request. Tr.217:23–218:20, 514:16–516:16. Days before the MOU was fully executed, FAU welcomed the Foundation’s decision and designated available office space for the Foundation’s use. R.7282, Tr.537:4–23. The Foundation continuously maintained its offices on FAU property until 2019. Tr.218:21–24, 537:24–538:23. When it requested the Office-Space Provision, the

Foundation and its legal counsel, Mr. Stewart, were familiar with Florida's DSO laws, including section 1004.28(2)(b), which expressly subjected DSOs that use university property to budget oversight. Tr.192:18–193:1, 195:2–9, 209:8–24.

That the Foundation bargained for the Office-Space Provision and then used FAU's property for more than a decade—with full knowledge of the consequences—proves that the parties never intended to grant the Foundation budget autonomy and provides competent, substantial evidence to support the trial court's findings. The Foundation knew it would be bound by existing DSO laws. Tr.195:22–196:1, 491:15–492:9. Any intent to allow the Foundation to use FAU's property while granting it budget autonomy would have clearly contradicted the laws that governed DSOs at the time.

Third, negotiations surrounding the Distributions Provision concerned the Foundation's discretion over its expenditures—not the adoption of budgets.

When negotiations began, FAU proposed to incorporate the Foundation's endowment into the FAU Foundation—an existing DSO. Tr.132:15–133:25, 187:23–188:20; R.6897–98. When the

Foundation refused, FAU offered to certify the Foundation as a DSO distinct from the FAU Foundation. Tr.188:12–190:3; R.6903–04.

Thus, FAU’s first written offer proposed that the Foundation would “remain independent of the existing FAU Foundation, Inc., and *as such* would retain *sole discretion for its funding or support of [the research institute] in terms of grants, endowments etc.*” R.6925 (emphasis added). In other words, because of its independence from a separate DSO (the FAU Foundation), the Foundation would have “sole discretion” to support the research institute “in terms of grants, endowments etc.”—*i.e.*, in the selection of grants and endowments, rather than the adoption of budgets. The same provision appeared soon after in a letter of intent executed by both parties. R.6948. President Brogan reinforced the same point when he assured the Foundation that it would enjoy the “same discretion” to distribute funds as the FAU Foundation had. R.6934. Mr. Stewart understood “same” to mean “no more, no less,” Tr.205:9–18—and it is undisputed that FAU approves the FAU Foundation’s budgets.

In November 2007, when Mr. Stewart proposed the language that ultimately became the Distributions Provision, he explained

what “motivated” his proposal. R.7214. His reasons concerned the Foundation’s tax-exempt status, his outstanding letter regarding the Foundation’s “latitude . . . in distributing funds” (which concerned only expenditures and not the adoption of budgets), and the Foundation’s need to restore its endowment and retire debt. *Id.* Nowhere in his explanation did Mr. Stewart mention budgets or suggest that the purpose of the Distributions Provision was to give the Foundation sole authority to adopt budgets without university oversight.

The trial court correctly found that, throughout the parties’ negotiations, discussions surrounding the Foundation’s “sole discretion” consistently revolved around “expenditure decisions.” R.11679–80.

Fourth, the parties’ conduct and representations after the MOU’s execution confirms that the Distributions Provision was never intended to insulate the Foundation from budget oversight. In 2012, three years after the BOG amended Regulation 9.011 to subject DSO budgets to the approval of university boards of trustees, Mr. Stewart confirmed to Ms. Rubin that the Foundation “is a DSO of the University and subject to all that a DSO

relationship entails,” and to the Foundation’s own board that the Foundation “is a DSO of FAU and by reason of that fact is subject to statutory and regulatory restrictions with respect to the expenditure of its funds.” R.7596–97.

Since the MOU was executed, FAU has exercised the same oversight of the Foundation’s and the FAU Foundation’s budgets. Until 2014, partial budgets of both DSOs were rolled into the FAU budget and presented to the FAU Board of Trustees for approval. R.10371–74, 10390, 10394–95. In 2015, FAU began separately to present the full budgets of both DSOs to the Board of Trustees for approval. R.10479–80. The Board of Trustees approved the Foundation’s full budgets in 2015 and 2016, R.7761–75, 7843–50, 7856–61, 10449, without any objection by the Foundation, R.10716 at 139:22–140:8; R.10717 at 141:5–24.

The Foundation’s claim that it was “unaware of the supposed approvals” is patently incorrect. Br.88. Ms. Kissman addressed an FAU committee in 2015 when the Foundation’s budget was under review and raised no objection, even as the committee voted to recommend approval of the budget by the FAU Board of Trustees. R.7762–64; Tr.91:15–92:11. Ms. Kissman conceded that she

attended the meeting, and the meeting minutes plainly state that the committee, upon five separate motions, recommended “approval” by the FAU Board of Trustees of the budgets of FAU’s five DSOs. R.7762–64.

Before 2017, the Foundation never expressed to FAU that FAU had no authority to approve the Foundation’s budgets. Tr.232:3–20; R.10716 at 139:22–140:8; R.10717 at 141:5–24. At trial, Mr. Stewart could not recall any meeting before 2017 at which the Foundation’s board even discussed FAU’s power to approve the Foundation’s budgets. Tr.234:7–13.

The Foundation simply disregards the competent, substantial evidence that supports the trial court’s factual findings. Instead, it tries to fashion its own narrative with snippets of evidence that it believes support its position. But this Court’s inquiry is whether competent, substantial evidence supports the trial court’s findings—not whether any evidence in the record could have supported a different outcome or alternative inferences. An appellate court’s task is not to reweigh the evidence or retry the case. *Hastie v. Ekholm*, 199 So. 3d 461, 465 (Fla. 4th DCA 2016). Moreover, the extrinsic evidence cited by the Foundation only

echoes what the parties agree the MOU says: that the Foundation has sole discretion to make distributions. It does not suggest that the Foundation’s “sole discretion” includes sole discretion to adopt budgets.

The Foundation argues that, if FAU sought a right to approve the Foundation’s budgets, then it should have negotiated for that right. Br.87. But the question is not whether the MOU grants FAU an approval power—the BOG regulation does that. Rather, the question is whether the BOG regulation impairs a contractual right that the MOU expressly confers on the MOU. It does not.

The trial court reviewed the MOU’s language and the extrinsic evidence and found that the parties did not intend to confer on the Foundation an exclusive right to establish its budget. R.11679. The trial court concluded that the Distributions Provision concerned “expenditure decisions,” R.11679–80, and was never “tied to the development of the Foundation budget,” and that the “budget was not the negotiated issue.” R.11680. In making these findings, the court noted the Foundation’s telling use of FAU property. *Id.*

Because competent, substantial evidence supports the trial court’s well-considered factual findings regarding the intent of the

parties reflected in the Distributions Provision, this Court should affirm its conclusion that BOG Regulation 9.011(4) did not impair any obligation of the MOU.

V. THE CONTRACTS CLAUSE DOES NOT PROTECT A CONTRACT'S SILENCE.

The Foundation argues that, even if the MOU does not speak to budgets, the BOG regulation impairs the MOU. Br.98–100. In effect, it argues that whenever state law confers a right not contained in a contract, the contract is impaired. *Id.* As discussed in FAU's initial brief, however, the Contracts Clause does not protect a contract's silence or its unbargained-for terms—or perpetuate a status quo rooted in contractual silence. FAU's I.B. 27–29; *see also supra* pp. 10–12. Rather, it protects from impairment “the obligation of contracts.” Art. I, § 10, Fla. Const. Because the parties did not negotiate any contractual obligation with respect to the adoption of budgets, the BOG regulation does not impair the MOU.

VI. THE RECORD PROVIDES TWO ADDITIONAL, ALTERNATIVE BASES FOR AFFIRMATIVE.

This Court can affirm the lower courts' resolution of the budget-approval issue on two independent, alternative grounds as well.

A. The Foundation's Governing Documents Adopt Future Amendments to State Law.

First, as discussed in FAU's initial brief on appeal, the Foundation's articles of incorporation and bylaws expressly adopt all future state-law amendments. FAU's I.B. 62–65. These documents bind the Foundation in every exercise of its corporate powers. Because it bound itself to operate in conformity with future state-law amendments, the Foundation cannot complain that those amendments impair the MOU.

B. BOG Regulations in Effect When the Parties Executed the MOU Already Required University Oversight of DSO Budgets.

Second, even when the MOU was executed in December 2007, BOG regulations already made the university president's recommendation essential to the adoption of a DSO's budget. Because that requirement predates the MOU, the approval power in the current BOG regulation cannot impair the MOU.

When the MOU was executed in 2007, and until the BOG regulation was amended in 2009, the regulation provided as follows:

Operating budgets of support organizations shall be prepared at least annually, approved by the organization's governing board *and recommended by the university president to the Board of Governors for review.*

R.6867 (emphasis added); Tr.573:25–574:6. Thus, the pre-2009 regulation attached *two* prerequisites to the adoption of a DSO budget: the DSO board's approval and the university president's recommendation.

To “recommend” means “to present as worthy of acceptance or trial” or “to endorse as fit, worthy, or competent.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com>. Thus, before a DSO budget could take effect, the university president was required to present the budget to the BOG as worthy of acceptance, or to endorse the budget as fit, worthy, or competent. And just as a DSO board had discretion to grant or withhold its approval of a budget, the university president had discretion to grant or withhold his or her recommendation. Nothing in the pre-2009 regulation suggests that the university president's recommendation was a ceremonial, perfunctory, or legally inconsequential act.

Precedents confirm that understanding. In *Harden v. State*, 932 So. 2d 1152 (Fla. 3d DCA 2006), the court examined a statute that authorized a state attorney, upon receipt of a “written assessment and recommendation,” to petition for civil commitment of a “sexually violent predator.” *Id.* at 1154 & n.2 (quoting § 394.914, Fla. Stat. (2004)). The court rejected the contention that the “recommendation” was a “non-binding advisory opinion” and held that an affirmative recommendation was an essential prerequisite to any civil-commitment action. *Id.* at 1157. The word “recommendation” meant “advocacy, endorsement, blessing, and approval,” and its “antonyms include words such as rejection, disapproval, and veto.” *Id.* The power to recommend was an essential and operative part of the statute, not a ministerial task.

Similarly, in *State v. Joughin*, 138 So. 392 (Fla. 1931), this Court construed a constitutional provision that authorized the Florida Senate, “upon the recommendation of the Governor,” to remove a suspended public official from office. *Id.* at 396. To “recommend,” the Court explained, “means to advise or attract favor to it, to make acceptable, to commend to favorable notice, or to commit to another’s care, confidence, or acceptance with favorable

representation.” *Id.* An expression in some form of the Governor’s “recommendation” was essential to the Senate’s removal authority.

Likewise, the university president’s power to recommend was not mere surplusage, but an essential part of the budget process and a condition precedent to a budget’s adoption. Without the DSO board’s approval and university president’s recommendation, a DSO’s budget could not take effect. And because the requirement predated the MOU, the later BOG regulation—which replaced the president’s power to recommend with the board of trustees’ power to approve—did not impair the MOU. *See Hahamovitch v.*

Hahamovitch, 133 So. 3d 1008, 1012–13 (Fla. 4th DCA 2014) (concluding that a statute enacted in 1988 did not impair a contract executed in 1986 because the statute was “largely a codification of existing case law” and “not a change in the law”).

The Foundation argues that the 2009 amendment was meaningless if universities already had budget-approval authority before 2009. Br.96. But the effect of the 2009 amendment is quite clear. The 2009 amendment removed the BOG from the DSO budget process and substituted the university board of trustees for the president. To give meaning to the 2009 amendment, it is not

necessary to deny the word “recommended” its plain meaning—as the Foundation’s interpretation does.

The 2009 amendment to the regulation did not, therefore, create from whole cloth the requirement of university consent to DSO budgets. That requirement had existed for years. And because that requirement predates the MOU, the 2009 amendment did not impair the MOU.

VII. EVEN IF THE BOG REGULATION IMPAIRS THE MOU, IT IS CONSTITUTIONAL.

Because the trial court found that the parties did not intend to confer on the Foundation an exclusive right to adopt budgets without university participation, it did not proceed to balance the public purpose that supports the challenged law against the degree of impairment. Accordingly, if this Court disagrees with the trial court’s threshold determination of the MOU’s meaning, and finds no other basis for affirmance, then it should hold that the State’s interest more than justifies any minimal impairment of the MOU.

A. The State’s Interest Is Legitimate and Significant.

The public interest that supports university oversight of DSO budgets is compelling. As explained more fully elsewhere, FAU’s I.B.

42–44, DSOs are certified and operated for one reason: to receive, hold, invest, and administer property and make expenditures to or for the benefit of state universities. § 1004.28(1)(a)2., Fla. Stat. In performing that plainly public function, DSOs are statutorily barred from pursuing any independent, private, or commercial interest. *Id.* § 1004.28(1)(a)3. Unlike private actors that enjoy broad latitude to pursue their self-interest, a DSO agrees to operate “in a manner consistent with the goals of the university and the best interest of the state.” *Id.*

DSOs thus serve exclusively as trustees of vast resources dedicated to Florida’s State University System. More than 70 DSOs together hold more than \$8 billion in total assets for the benefit of Florida’s twelve state universities and their students. R.7864, 11486, 11615–16; Tr.465:15–21. These funds—plus another \$2.2 billion in debt financing that DSOs have dedicated to university purposes—support a broad range of university activities. R.7863, 7865–72. By supplementing public funding for university programs, the flexible DSO funding vehicle alleviates the burdens that the State University System imposes on Florida’s taxpayers. *Palm Beach*

Cnty. Coll. Found., Inc. v. WFTV, Inc., 611 So. 2d 588, 589 (Fla. 4th DCA 1993); R.7866–72, 11319, 11332–34, 11390–91.

A state university’s right to approve the annual budgets of its DSOs is an essential safeguard of the public interest in the immense resources that DSOs administer. It ensures that DSOs expend those resources as Florida law requires: to advance the goals of their affiliate state universities and in the State’s best interest. The approval power is calculated both to prevent misuse of funds—funds that many DSOs raise from private donors—and to promote their productive use in alignment with the university’s goals and missions. An approval power is also a more moderate and practical means of oversight than decertification—a sledgehammer that terminates the DSO relationship, and which a university is unlikely to exercise before a DSO has committed irreparable malfeasance.¹

Thus, the Foundation errs when it asserts that the approval power is superfluous because other forms of oversight exist.

¹ The Foundation again asserts that the Contracts Clause imposes a “heightened standard” whenever a state entity is a party to the contract. Br.102. FAU addressed that mistaken assertion above. *See supra* pp. 20–21.

Br.103–04. The disclosure of annual tax forms is no substitute for budget oversight. And while universities may decertify DSOs, decertification is not oversight, but termination—a nuclear penalty that is reserved for the most extreme cases, and is too blunt an instrument to provide effective oversight of a DSO’s ongoing administration.

The Foundation argues that the challenged law’s application to it serves no state interest because the Foundation has faithfully provided value to FAU and its research institute. Br.103. But the question is not whether the law’s application to the Foundation furthers a state interest, but whether the law in its full scope and general application furthers a state interest. *See supra* p. 20. If the only relevant state interest in an impairment analysis were the state interest in the law’s application to a single plaintiff, then the state interest would invariably be trivialized.

Finally, the Foundation claims the State has a countervailing interest in the preservation of contracts, Br.104–05—as though the State’s interest weighs *against* the validity of its own laws and in favor of their *invalidation*. It does not. The balancing analysis weighs the State’s interest in the *validity* of its laws against the

nature and extent of any impairment. The public interest in the preservation of contracts is fully accounted for in the existence of the Contracts Clause.

B. Any Contract Impairment Is Minimal.

The State's interest in effective oversight of DSO resources outweighs the Foundation's interest in a purported contractual right to exclusive control over its budget. The degree of any contract impairment is minimal for several reasons.

First, the BOG regulation does not grant FAU a primary power to establish the Foundation's budget, but only a concurrent power to approve a budget that the Foundation also approves. The need for joint action recognizes that DSOs are separate entities, but hold significant funds in trust for state universities. Just as two branches of a bicameral legislature must both agree to a state budget, and neither may impose a budget absent the other's concurrence, a university has no authority unilaterally to impose a budget on a DSO. The approval power is therefore a limited, valuable check.

Second, when the Foundation agreed to be certified as a DSO, it knew that DSOs were heavily regulated in the public interest. In

fact, as detailed in FAU's initial brief on appeal, DSOs have been intensely regulated for more than five decades. FAU's I.B. 48–52. During its negotiations with FAU, the Foundation knew that the State intensely regulated all aspects of DSO activities. Tr.192:18–20, 195:2–11, 209:8–11. For that reason, the Foundation was opposed to becoming a DSO, Tr.196:16–199:6, 242:19–243:4; R.10699–702 at 71:8–73:7, 75:14–77:15, 81:10–23, and accepted DSO status only grudgingly, because it was essential to FAU, Tr.128:16–21, 199:10–12. Because future regulation was clearly foreseeable, the Foundation had no reasonable expectation of exemption from future regulation.

Third, not only had DSOs been heavily regulated for decades when the Foundation accepted DSO status, but the adoption of DSO budgets was a particular topic of heavy regulation. The law in 2007 required university review and oversight of the budgets of all DSOs that used university property. § 1004.28(2)(b), Fla. Stat. (2007). And all DSO budgets required the university president's recommendation to and review by the BOG. R.6867; Tr.573:15–574:6. The Foundation accordingly knew that DSO budgets were

heavily regulated and even opted into the most intense budget regulations when it negotiated to use and then used FAU's property.

Fourth, all funds and other property of the Foundation are restricted by law to the benefit of a state university. § 1004.28(1)(a), Fla. Stat. The Foundation has no lawful discretion to employ its property in any other way. The Foundation's interest in budget autonomy is thus diminished in comparison with a private venture.

Fifth, if the Foundation truly sought budget independence, then it would have attempted to bargain for a contractual provision that expressly secures that right. *See 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."). The Foundation never mentioned budgets during the parties' negotiations, nor does the MOU mention budgets. The impairment of a right can hardly be severe when the party that asserts impairment left the matter entirely to implication.

The Foundation signed up to be a DSO. It knew what a DSO was and what a DSO relationship entails. It knew that it was about to dedicate itself to support a state university. It knew that with

that public mission comes public oversight. FAU insisted that the Foundation become a DSO because the legislative funding needed to rescue the Foundation was contingent on future oversight. Tr.435:11–438:6. With that assurance, the State invested in the Foundation, appropriating nearly \$80 million in the first year alone to finance the Foundation’s bailout. Tr.225:3–8, 535:21–537:3.

It took the Foundation little time to attempt to elude the bargain it struck. Since 2012, the Foundation has angled for decertification and chafed at university oversight. *See supra* p. 35. But the Foundation is a DSO like all other DSOs. It accepted the burdens and benefits of that status. It did not prove beyond a reasonable doubt that basic oversight measures unlawfully impair its rights under a contract with the university it exists to serve.

VIII. THE CHALLENGED LAW’S APPLICATION TO FUTURE BUDGETS IS PROSPECTIVE.

Despite its references to “vested” rights, Br.105–06, the Foundation did not plead or argue a due-process claim. Instead, it incorrectly argues, as a matter of *interpretation*, that the BOG did not intend the 2009 amendment to operate retroactively, and that FAU’s approval of *future* budgets would be a *retroactive* application.

FAU adopts here the arguments offered in Part IX of its reply brief relative to board appointments. The approval of *future* DSO budgets is a *prospective* application of the BOG regulation, regardless of the existence of a contract between the DSO and its affiliate university. The 2009 amendment did not undo any completed budgets, but required approval of future budgets only. That is a prospective application.

CONCLUSION

This Court should therefore reverse the portion of the Fourth District's decision that concerns FAU's authority to approve board appointments and affirm the portion of the Fourth District's decision that concerns FAU's authority to approve the Foundation's budgets.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains 12,990 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).

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