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IN THE SUPREME COURT
STATE OF FLORIDA

CITRUS COUNTY HOSPITAL BOARD and the STATE OF FLORIDA,

Appellants,

vs.

CITRUS MEMORIAL HEALTH FOUNDATION, INC., a Florida not-for-profit corporation,

Appellee.
_____/

Case No. SC13-411

L.T. Case Nos. 1D12-0858 and 2011-CA-1653

ANSWER BRIEF ON THE MERITS

On Appeal from a Decision of the First District Court of Appeal

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PRELIMINARY STATEMENT

Appellee, Citrus Memorial Health Foundation, Inc., was the plaintiff below and is referred to as "the Foundation." Appellant Citrus County Hospital Board was a defendant below and is referred to as "CCHB." Appellant the State of Florida was a defendant below and is referred to as "the State." Appellants will be jointly referred to as "Defendants." Citrus Memorial Hospital is referred to as "the Hospital."

The record citations used in this brief are references to the record in the First District that was transmitted to this Court. References to CCHB's Initial Brief will be cited as (IB at ___), and references to the State's Initial Brief will be cited as (SIB at ___). All emphasis is added unless otherwise indicated.

STATEMENT OF CASE AND FACTS

The issue in this appeal is whether the First District correctly held that the Legislature could not retroactively alter the Articles of Incorporation and other contracts of the Foundation, a not-for-profit corporation incorporated under chapter 617, Florida Statutes (1985). Under those contracts, the Foundation has been operating a public hospital on behalf of CCHB, a public entity, for more than 20 years. This arrangement was authorized under section 155.40, Florida Statutes (1989), which permits public entities to contract out the operation of public hospitals to chapter 617 corporations in order to secure competitive advantages legally unavailable to public entities. The following facts are material to this issue.

A. The Foundation's Articles of Incorporation and contracts with CCHB.

CCHB is an independent special district of the State of Florida established in 1949 to operate hospitals in Citrus County, Florida. (R1:14; R8:1505). It was created as a "public nonprofit corporation" by the Legislature in chapter 25728, section 3, Laws of Florida (1949). The Legislature never has granted CCHB the right to create another public entity, nor granted any general reservation of powers to it. See, e.g., ch. 65-1371, Laws of Fla. (1965).

Although CCHB states at page 1 that it "created" the Foundation, it did not do so in the way the Legislature created CCHB. Rather, at CCHB's instigation (R2:232), the Foundation was incorporated in 1987 as a not-for-profit corporation

under chapter 617, the general law governing incorporation of not-for-profit corporations. (R1:52-61). The "Incorporator" was Charles A. Blasband (R1:58), who signed the certificate of incorporation "in the name of the Citrus County Health Foundation, Inc." (R1:59).

The Foundation's Articles of Incorporation were filed with the Secretary of State. (R1:52-61). It is a tax exempt corporation under 26 United States Code § 501(c)(3) (1986). (R2:233). It always has observed corporate formalities, including filing its own tax returns as a not-for-profit corporation. Id.

The Foundation was not created for the "sole purpose of conducting a public function," as CCHB states at page 1. To the contrary, it was created to engage in joint ventures that a public entity could not do and to fundraise by soliciting charitable contributions. (R2:232). Moreover, it has "all the powers and privileges granted by Chapters 607 and 617 of the Florida Statutes. . . ." (R1:54).

In 1989, CCHB decided to privatize the Hospital, and thereby avoid the legal constraints on its operation of the Hospital as a public entity, by leasing it to the Foundation pursuant to section 155.40.[1] (R2:301-02). CCHB concluded this would provide the Hospital greater flexibility to compete with private hospitals by

[1] In section 155.40, the Legislature authorized public entities to contract for not-for-profit corporations to operate public hospitals, finding this would allow those hospitals to be more competitive. Indian River County Hosp. Dist. v. Indian River Mem'l Hosp., Inc., 766 So. 2d 233, 235-38 (Fla. 4th DCA 2000). Unless otherwise stated, all references herein to section 155.40 are to the 1989 version.

permitting "an array of services through joint ventures" that CCHB, as a public entity, could not provide, and also would enable the Hospital to achieve cost savings by opting out of the public retirement program. Id. Having elected previously to participate in that program, id., CCHB was precluded from opting out of it. § 122.061(1), Fla. Stat. (1989).

The Foundation's original Articles specified that CCHB trustees must constitute a majority of the Foundation's Board. (R1:55-56). In anticipation of contracting with the Foundation to operate the Hospital pursuant to section 155.40, the Foundation amended its Articles in November 1989 to eliminate CCHB's right to control the Foundation's Board. (R1:64-66; R2:233-34). Under those amended Articles, CCHB trustees held only two seats as a matter of right and the Foundation now had the right to elect a majority of its Board. (R1:64-66). The Articles also were amended to remove the provision (quoted by CCHB at pages 4 and 20) that the Foundation was created to "operate exclusively for the benefit of and to carry out the purposes of" CCHB. Compare (R1:52-53) with (R1:63-64).

CCHB unanimously approved these amendments. (R2:311). It determined that this "[r]eorganizing" of the Foundation and transfer of governance control would allow the Hospital to "take advantage" of opportunities foreclosed to CCHB as a public entity. (R2:301-02). On March 1, 1990, CCHB leased the Hospital to the Foundation (R1:79-104) and executed an Agreement for Hospital Care

transferring responsibility for the Hospital's operations to the Foundation. (R1:142-56). After their execution, the Hospital opted out of the public retirement program and entered into joint ventures foreclosed to public entities. (R7:1368).

The contracts transferring the operation of the Hospital from CCHB to the Foundation expressly state they are "binding." (R1:100, 153). They expressly say they may be amended only by mutual signed written agreement. (R1:100, 155). The Agreement provides that "together with the Lease Agreement, [it] constitutes the entire agreement between the parties hereto with respect to the subject matter hereof." (R1:155). It also states that it should not be construed "as creating the relationship of joint venturers or partners" between the parties. (R1:154).

The Agreement was amended and restated in 1992, but remained the same in all material respects. (R1:160-74; IB at 6 n.4). The Lease was amended in 2002 to extend its term until 2033. (R1:130). The Agreement is coterminous. (R1:163).

At the time the Lease and Agreement were executed, the Foundation's Articles did not grant CCHB the right to hold a majority position on the Foundation's Board. (R1:64-66). Instead, CCHB trustees constituted a majority only because the Foundation had voluntarily elected them directors. (R1:64-66; R8:1577). The Foundation's existing Articles, as amended in 2006, now specify the mechanism for selecting the majority of directors. (R1:72-74). They confer that right upon the Foundation and preclude CCHB from holding a majority. Id.

It is not true that CCHB is "obligated" to "appropriate and pay to the Foundation the money necessary to fund" the Foundation's annual operating and capital budget, as CCHB states at page 6. To the contrary, CCHB is required only to appropriate and pay an amount "determined in its sole discretion." (R1:165). In 2009 and 2010, CCHB refused to pay the Foundation what it had appropriated. (R2:236). Even in the immediately preceding three years, CCHB tax funds constituted less than seven percent of the Foundation's revenues. Id.

The parties have operated under their Lease and Agreement, as amended, for more than 20 years. (R2:235-36). In recent years, the parties' relationship has become strained and various lawsuits regarding those contracts are now pending between them. (R2:236). CCHB subsequently sought to take control of the Foundation through legislative intervention. (R8:1508).

B. The Special Law's modification of the Foundation's Articles and contracts with CCHB.

Section 16 of chapter 2011-256, Laws of Florida (the "Special Law"), alters numerous provisions of the Foundation's Articles and its Lease and Agreement with CCHB. (R1:46-49). Most fundamentally, section 16(5) requires the Foundation to amend its Articles to provide that CCHB trustees must "constitute a majority of the voting directors of the not-for-profit corporation. . . ." (R1:47). The current Articles expressly preclude that. (R1:72-74). In addition, and also contrary to the Foundation's existing Articles, sections 16(2), (6), and (7) require

CCHB to approve amendments to the Foundation's Articles and Bylaws, all Foundation directors, and the Foundation's CEO. (R1:47-48). All of these matters presently are prerogatives of the Foundation alone. (R1:72-76).

Furthermore, the Special Law imposes new operational and financial requirements on the Foundation that are absent from, and directly at odds with, the parties' Agreement that comprehensively covers such matters. (R1:46-49). For example, the Agreement does not limit the Foundation's use of funds generated from sources other than CCHB tax funding and gives CCHB no control over those separate funds. (R1:164-65). It simply requires the Foundation to use the appropriations from CCHB "solely in accordance with and for the purposes set forth in [its] Operating and Capital Budgets and th[e] Agreement." (R1:165).

In contrast, sections 16(8)-(10) of the Special Law grant CCHB control over all of the Foundation's revenues, not just CCHB's appropriations. (R1:48). Among other things, sections 16(8) and 16(10) require CCHB to approve borrowing over $100,000, loan indebtedness or leases over $1.25 million, capital expenditures over $250,000, and non-budgeted operating expenditures over $125,000 in the per annum aggregate. Id. Likewise, section 16(9) provides that the Foundation's budget shall not be effective until approved by CCHB, id., while the Agreement requires only that the Foundation "furnish" its budget to CCHB and does not require CCHB's approval. (R1:169-70).

The retroactive nature of the Special Law is confirmed by its express statement that it applies to "existing" leases and agreements. (R1:49-50).

C. The Foundation's constitutional challenge to the Special Law.

Contrary to CCHB's assertion at page 12, the Foundation challenged the constitutionality of all of the provisions of section 16 of the Special Law. (R1:19-22; R4:740-44). It articulated specific grounds for challenging subsections (2), (5)-(11), and (15) of section 16. Id. It further alleged "[t]hese and other provisions of section 16 that grant new and greater rights to CCHB or take away rights from the Foundation unconstitutionally impair the Foundation's contracts." (R1:22).

The Foundation immediately sought a temporary injunction. (R1:182-R2:212). Following briefing and a hearing, the circuit court granted a temporary injunction. (R4:644-54). The court found that the Special Law "substantially increases CCHB's rights under agreements now governing the parties' rights and relationship, turning over the Foundation's very governance and operational control to CCHB." (R4:650). It further found the impairment was "severe," id., and the "legislative goal . . . is . . . neither broad nor generalized. . . ." (R4:651).

Once the case was at issue, the parties filed cross-motions for summary judgment on the Foundation's constitutional claims. (R4:735-86). Neither Defendant asserted that the Foundation was making a "facial challenge" to the constitutionality of the Special Law, thereby requiring a heightened standard of

review. Nor did either of them argue the Special Law was permissible under the Legislature's "power of the purse" under article III, section 1. Further, although CCHB initially raised affirmative defenses asserting that the parties' contracts would be invalid but for the changes required by the Special Law, CCHB later withdrew those defenses when it filed an amended answer. Compare (R4:677-78) with (R8:1512-13). Thereafter, neither Defendant advanced this argument.

Following briefing and a hearing, the circuit court granted summary judgment for CCHB and vacated its temporary injunction, now ruling that the Special Law is constitutional, does not impair the Foundation's contracts (R9:1644-58), and was "enacted to deal with a broad, generalized economic or social problem." (R9:1653). It also concluded that the Foundation was a public entity, and relied on O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9, 11 (Fla. 1971), in which this Court held that a public entity created by the Legislature through enabling legislation was a "public or quasi-public corporation" and thus not subject to article III, section 11(a)(12), precluding special laws pertaining to any "grant of privilege to a private corporation." (R9:1648-51).

That provision is not at issue in this case. At CCHB's urging (R4:766), the trial court mistakenly stated that the Foundation had asserted a claim under that provision and faulted the Foundation for denying it did so in its briefing. (R9:1656). A cursory reading of the Complaint reveals that the Foundation in fact

asserted no such claim. (R1:12-32). Rather, the Foundation asserted (but has not pressed) a claim under an entirely different provision, article III, section 11(a)(7), which was not at issue in O'Malley. (R1:22).

In ruling the Special Law's requirement that CCHB be granted majority control of the Board did not impair the Foundation's Articles, the court stated that the Foundation's existing Articles do not specify "how a majority of the Foundation Board shall be composed" and do not preclude CCHB from holding "majority" control. (R9:1651). That is inaccurate. (R1:72-74). CCHB acknowledges in its brief that the Articles in effect at the time of the Special Law preclude CCHB from holding a majority of the Foundation's Board. (IB at 7, 40).

The "governmental reports" that CCHB references at pages 10-11 are not in the record. The language that CCHB quotes on those pages is not from those reports, nor from the legislative staff analysis CCHB cites (R5:876-82), but rather from an affidavit of CCHB's lawyer. (R5:873). The Legislature's findings in the Special Law do not mention those reports. (R1:34-36). The original version of the Special Law contained proposed findings critical of the Foundation's operations, but the Legislature eliminated them. Compare (R7:1340-46) with (R1:34-36).

D. The District Court's decision that the Special Law is unconstitutional.

The First District reversed, concluding that the Special Law "significantly alters the parties' contractual rights and is an unconstitutional impairment of their

contracts. . . ." Citrus Mem'l Health Found., Inc. v. Citrus County Hosp. Bd., 108 So. 3d 675, 676 (Fla. 1st DCA 2013). "[U]nlike the public corporation in O'Malley, the Foundation was not created by the legislature and was used by [CCHB] for the express purpose of avoiding statutory and constitutional limitations which would pertain to [it] as a public entity." Id. at 677. "Thus, O'Malley does not apply here and the circuit court's ruling disregards the true nature of the relationship between [CCHB] and the Foundation." Id.

Specifically, CCHB's "transfer of control and operation of Citrus Memorial Hospital resulted from a decision by [CCHB's] trustees to contract out that function to reduce expenditures by removing employees from the state retirement plan, and to create joint venture opportunities for the hospital." Id. As the First District explained:

> [CCHB's] trustees determined that while those actions would financially benefit the hospital, as a public entity [CCHB] was precluded by section 122.061, Florida Statutes, and Article VII, section 10, of the Florida Constitution, from undertaking such actions. Upon that determination [CCHB] then contracted with the Foundation. The circuit court's characterization of the Foundation as a public entity disregards the purpose of the contractual agreements, which was to transfer the operational control of the hospital from [CCHB's] status as a public entity with such restrictions, to the private Foundation where such restrictions would not apply.

Id.

The First District went on to say that the circuit court erroneously failed to consider this Court's decision in Dewberry v. Auto-Owners Insurance Co., 363

So.2d 1077 (Fla. 1978), and instead relied only on Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979). Id. It explained that the Dewberry Court "cautioned that any legislation that detracts from the value of a contract is subject to the constitutional proscription, referring to Yamaha Parts Distributors Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), which likewise indicates that virtually no degree of impairment is tolerated under Article I, Section 10." Id. The First District further observed that the Pomponio Court specifically referred to Yamaha and "did not disavow or recede from Dewberry," and that this Court has continued to apply Dewberry in later decisions. Id. at 678.

Finally, the First District rejected the circuit court's conclusion that there was no impairment of the parties' contracts "because it was not shown that the taxpayers and residents of Citrus County were harmed" by the Special Law. Id. Pointing to decisions of this Court, the First District explained that the circuit court ignored the impact of the Special Law on the Foundation itself. Id. The legislatively-mandated changes alter the Foundation's governance rights under its existing Articles, and the Foundation's current agreements with CCHB are impaired by the imposition of additional obligations on the Foundation. Id.

In the end, the First District declared that the changes mandated by the Special Law constituted an impermissible "rewrite of the parties' contractual agreements and the imposition of further obligations on the Foundation, while

permitting [CCHB's] privatization of hospital management functions as described in Indian River County Hospital District v. Indian River Memorial Hospital, Inc., 766 So.2d 233 (Fla. 4th DCA 2000)." Id. at 678. Although a "public benefit might ensue from that privatization" by avoiding the restrictions on CCHB's operation of the Hospital as a public entity, that did not permit impairment of the very contracts CCHB entered into in order to privatize the Hospital. Id. Judge Ray dissented, concluding that O'Malley controlled. Id. at 678-81 (Ray, J., dissenting).

SUMMARY OF ARGUMENT

Faithfully following this Court's decisions enforcing the Florida Constitution's prohibition of impairment of contracts, the First District held that the Special Law impermissibly impaired the Foundation's Articles of Incorporation, long-term Lease, and Hospital Care Agreement. The First District's decision is demonstrably correct and should be affirmed.

At a time when CCHB had control of the Foundation's Board as a matter of right under the Foundation's Articles, CCHB deliberately gave up that right in order to take advantage of the statutory scheme established in section 155.40. The Legislature enacted section 155.40 to empower public entities to privatize public hospitals by leasing them to not-for-profit corporations, subject to the conditions set forth in that statute, so as to deliver quality health care to the public and to compete more effectively with private hospitals.

CCHB pursued this course because it wanted to attain the significant cost savings that would come from moving Hospital employees out of the public retirement system and into a private sector chapter 617 not-for-profit corporation that fell outside of the State retirement system. CCHB also wanted to enable the Hospital to enter into private sector joint ventures foreclosed to a public entity like CCHB. In contracting out the operation of the Hospital to the Foundation, CCHB succeeded in obtaining those substantial benefits for more than 20 years. Yet, CCHB now seeks to undermine the very purpose of section 155.40 by taking control of the Foundation (and therefore the Hospital) in derogation of the Foundation's existing Articles and long-term contracts with CCHB.

To that end, the Special Law requires the Foundation to amend its existing Articles to give CCHB the right to determine who controls the Foundation's Board of Directors, a right that CCHB last enjoyed more than 20 years ago, before it very purposefully contracted out the operation of the Hospital to the Foundation. Under settled Florida law, however, the Foundation's Articles are a contract with the State, and the Special Law unconstitutionally impairs the Foundation's contractual governance rights. So too, the Special Law's directive that the Foundation's contracts with CCHB be amended retroactively to impose greater obligations and fewer rights upon the Foundation is an unconstitutional impairment of contract.

In ruling that the Foundation is a public entity whose contracts could be legislatively impaired, the circuit court mistakenly relied on cases involving very different entities that were created directly by the Legislature through enabling legislation and therefore were subject to the Legislature's plenary control. By contrast, the Foundation is a lawfully created not-for-profit corporation, incorporated through Articles of Incorporation under chapter 617. That is why it can operate the Hospital without the constraints that must be observed by a public entity, and that was the whole reason why CCHB opted to contract out the operation of the Hospital to the Foundation in the first place.

The Foundation is entitled to the same protection against legislative impairment as any other chapter 617 not-for-profit corporation. Florida's constitutional prohibition of impairment of contracts thus was properly enforced by the First District. The Special Law also is invalid as a matter of due process, as it retroactively impairs the Foundation's vested contract rights by creating new contractual rights for CCHB and new contractual obligations for the Foundation.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THE SPECIAL LAW UNCONSTITUTIONALLY IMPAIRS THE FOUNDATION'S CONTRACTS.

A. Standard of Review.

The Foundation agrees that this Court reviews constitutional issues de novo.

B. The Foundation is a duly incorporated not-for-profit corporation under chapter 617, not a public entity established by enabling legislation.

The First District correctly concluded that the Foundation is not a public entity whose contracts may be impaired by the Legislature, explaining that "the Foundation was not created by the legislature and was used by [CCHB] for the express purpose of avoiding statutory and constitutional limitations which would pertain to [CCHB] as a public entity." Id. at 677.

Specifically, CCHB decided to "contract out" the operation of the Hospital in order "to reduce expenditures by removing employees from the state retirement plan, and to create joint venture opportunities for the hospital." Id. Although CCHB had determined "those actions would financially benefit the hospital," CCHB was precluded by Florida law from "undertaking such actions" since it is a public entity. Id. CCHB accordingly contracted with the Foundation – a duly incorporated not-for-profit corporation – to operate the Hospital. Id.

Thus, characterizing "the Foundation as a public entity disregards the purpose of the contractual agreements," which was to transfer the operation of the Hospital from a public entity to an entity that was not a public entity. Id. If CCHB wanted the Hospital to be operated by a public entity, it could have continued to operate the Hospital itself. Instead, CCHB wanted the Hospital to operate without the legal constraints on a public entity, just as section 155.40 authorizes.

The whole point of section 155.40 is to allow public hospitals to operate without the constraints on public entities that hinder their competitiveness. Indian River, 766 So. 2d at 235-38. The Legislature enacted section 155.40 specifically to empower public entities to privatize public hospitals by leasing them to not-for-profit corporations, subject to the conditions set forth in that statute, so as to deliver "quality health care" to the public on a more competitive basis. Id.

As the First District correctly recognized, Defendants' effort to characterize the Foundation as a public entity whose contracts may be impaired at will by the Legislature misapprehends the legal difference between (1) a public corporation created by the Legislature in enabling legislation, whose rights are established in that legislation and (2) a not-for-profit corporation created by the filing of Articles of Incorporation under chapter 617, whose rights are established in those Articles.

The Legislature created CCHB, not the Foundation, as a "public nonprofit corporation" in special enabling legislation establishing CCHB's governance rights. See ch. 25728, § 3, Laws of Fla. (1949). In contrast, the Foundation is a not-for-profit corporation created decades later through the filing by an "Incorporator" of Articles of Incorporation under chapter 617 (R1:58), and the method of selecting its Board is specified in those Articles.

This distinction is fundamental and dispositive. Although the Legislature may amend its own enabling legislation creating a public entity and alter the rights

granted to the public entity in that legislation, the Legislature here did not amend any enabling legislation creating the Foundation. Rather, the Legislature amended the enabling legislation creating CCHB – which nowhere mentioned the Foundation – and therein directed the Foundation to amend its chapter 617 Articles to give CCHB control of the Foundation's Board.

Contrary to CCHB's suggestion, this Court's decision in O'Malley does not allow impairment of the contracts of an entity incorporated under chapter 617. The sole issue there was whether Florida Insurance Guaranty Association, Inc. ("FIGA") was a "private corporation" within the prohibition under article III, section 11(a)(12) of special laws granting privileges to private corporations. O'Malley, 257 So. 2d at 11. FIGA was incorporated by the Legislature. Ch. 70-20, §6, Laws of Fla. (1970). Based on FIGA's enabling legislation, this Court held that FIGA was a "public or quasi-public corporation." O'Malley, 257 So. 2d at 11. Consequently, the special law did not grant privileges to a private corporation. Id.

O'Malley has no bearing on this case, as it dealt with a public corporation created directly by the Legislature. In fact, the O'Malley Court compared FIGA to a host of other "public corporations," id., all of which were created by enabling legislation, not by the filing of articles of incorporation. See, e.g., ch. 26614, § 1, Laws of Fla. (1951) (creating Inter-American Center Authority "as an agency of the State of Florida"); ch. 29996, § 3, Laws of Fla. (1955) (creating Jacksonville

Expressway Authority as an "agency of the State of Florida"). In short, O'Malley did not deal with a corporation created by Articles filed under chapter 617, and the Court did not list any entity incorporated under chapter 617 as the kind of "public corporation" within the purview its analysis. 257 So. 2d at 11.

CCHB quotes the statement in Judge Ray's dissent that there would have been no need in O'Malley to discuss the "attributes of public and private corporations" if the manner of incorporation were dispositive. (IB at 18). The fact is, however, in arriving at its holding in O'Malley, this Court relied directly upon FIGA's enabling legislation, which was the very source of FIGA's creation, and then squarely placed FIGA in the same class as other "public corporations" that likewise were created by the Legislature itself. 257 So. 2d at 11. In the same way, the First District here properly considered the absence of any such enabling legislation, and the Foundation's incorporation instead under chapter 617, in determining the nature of the Foundation's very different relationship with the State. CCHB cites no case holding a chapter 617 corporation is a public corporation unable to protect its contracts from impairment.

CCHB further argues that since the Foundation has no shareholders who could benefit financially by its operations it cannot be a "private corporation" under the "definitions" discussed in O'Malley. (IB at 16-20). The Court's discussion of a private corporation's primary objective of personal emolument for

its shareholders must be viewed, however, in the context of the issue the Court was addressing. The Court was not addressing whether a not-for-profit corporation's contracts could be legislatively impaired. It was addressing the very different issue of whether private interests were being advantaged by a special law under article III, section 11(a)(12). See O'Malley, 257 So. 2d at 11. The fact that FIGA had no shareholders was directly relevant to that issue.

Under CCHB's argument, because a chapter 617 not-for-profit corporation never has shareholders who could receive personal gain, it never could be a private corporation. That would defeat the whole purpose of section 155.40's authorization for a public entity to lease a public hospital to a not-for-profit corporation in order to avoid the legal constraints on the public entity. CCHB's argument is directly at odds with its decision to contract out the operation of the Hospital to the Foundation for that very purpose. In fact, CCHB's argument would necessarily, but wrongly, mean that all not-for-profit corporations are public entities since none of them has shareholders.

In sum, the key distinction is that the O'Malley Court was dealing with a creature of legislation, while the Foundation is a creature of contract – its Articles of Incorporation. This difference is dispositive. The Legislature may amend its own enabling legislation creating a public entity. But, the Legislature may not by

special law impair the contract rights of this lone chapter 617 corporation. Defendants have not cited any decision allowing that.

Instead, the State cites a host of cases where executive branch agencies and subdivisions like the Department of Education, the Parole and Probation Commission, the Public Service Commission, Miami-Dade County, and county property appraisers were unable to challenge legislative amendments affecting their rights and duties, which were prescribed directly by the Legislature in enabling legislation. (SIB at 11-16). Those cases stand only for the unremarkable proposition that the State generally is able to direct the actions of its own agencies and subdivisions through legislative amendments. That principle does not apply to a chapter 617 not-for-profit corporation.

Indeed, the assertion that the Foundation is a public entity akin to the Department of Education is a suggestion that CCHB impermissibly allowed the Hospital to operate for decades in ways that CCHB is precluded from doing. If the Foundation is a public entity, the Hospital's employees should not have been removed from the public retirement program, and the Hospital should not have entered into joint ventures foreclosed to public entities. After accepting all of the benefits of privatization it achieved by contracting for the Foundation to operate the Hospital, CCHB cannot be heard to say the Foundation is a public entity.

CCHB effectively asks this Court to pierce the Foundation's corporate veil and disregard its lawful not-for-profit corporate status under chapter 617. This Court will not disregard a corporation's status as a separate legal entity, however, except upon a showing that it was used to perpetrate a fraud on innocent third parties. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1116-21 (Fla. 1984). CCHB has neither alleged nor proven any such fraud. Instead, it is CCHB itself that seeks to repudiate its own actions in relying over the years upon the Foundation's status as a private corporation in order to allow the Hospital to move its employees out of the state retirement system and engage in joint ventures.

In point of fact, the Foundation is, and has been at all times, a lawfully incorporated not-for-profit corporation under chapter 617 fully capable of entering into and enforcing binding contracts. That is exactly why CCHB contracted for the Foundation to operate the Hospital.

C. The Foundation's assertion of sovereign immunity does not convert it into a public entity.

In arguing that the Foundation is a public entity that has no constitutional protection against impairment of its contracts, CCHB points to statements by the Foundation regarding the public purpose of its Hospital operations. As the First District explained, the fact that "some public benefit" flowed from the Foundation's operation of the Hospital does not mean the Foundation is a public entity such that its contracts may be impaired. Citrus Mem'l, 108 So. 3d at 678.

Furthermore, context is crucially important to any legal analysis. The Foundation's statements were made in the context of seeking sovereign immunity (R5:837-39, 846-61) or increased Medicaid reimbursement for operating the Hospital (R5:927-30), which is consistent with the legislative purpose of granting sovereign immunity to protect the financial integrity of corporations contracting to perform a public function. A private corporation's assertion of entitlement to sovereign immunity by virtue of its contractual relationship with a public entity does not mean that the corporation itself becomes a public entity.

This Court recently made that clear in Keck v. Eminisor, 104 So. 3d 359 (Fla. 2012). There, the First District had held that a "private corporation" operating under a contract with a public entity was not entitled to sovereign immunity, because, among other things, it was "inconsistent" for that corporation to use its "private status in labor relations matters while claiming [it] is a state agency for sovereign immunity purposes." Id. at 368. This Court disagreed, explaining that the requirements for being a "public employer for labor relations purposes" are different from the requirements for sovereign immunity. Id.

Just as in Keck, the Foundation's statements simply meant – in context – that it was an agency of the State in the broad sense contemplated by the sovereign immunity statute. That does not convert the Foundation into a public entity. Nor

does it mean that the Foundation may not legally enforce the very contracts giving rise to its status as an agent of CCHB in the first place.

Indeed, in Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson, 648 So. 2d 778, 781 (Fla. 1st DCA 1994), the First District expressly rejected the proposition that a private corporation qualifying as a "state agency" for sovereign immunity purposes must be deemed a state "agency" for other purposes. Although the private corporation qualified as a "state agency" entitled to sovereign immunity, it was not a state "agency" as that term is used in the statutes describing public entities within the Executive Branch. Id. at 779-81. The latter term has a very narrow meaning, whereas the statute governing sovereign immunity "defines 'state agency' in much broader terms for the purpose of identifying entities entitled to sovereign immunity protection." Id.

Specifically, Florida's sovereign immunity statute extends to private corporations acting as "instrumentalities or agencies of the state, counties, or municipalities." [2] § 768.28(2), Fla. Stat. (2010). This status typically arises by virtue of binding and enforceable contracts. Of particular relevance to the Foundation's claim of sovereign immunity in operating the Hospital, section

[2] The State's reliance on Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999) is misplaced. (SIB at 3-4). That case involved open meetings and records laws, which apply to public entities and "persons acting on their behalf." Art. I, § 24(a), Fla. Const. The Agreement states that the Foundation is "acting on behalf of" CCHB (R1:176), and thus the Foundation has sought to comply with these laws. (R5:850). That does not make it a public entity.

155.40 was amended in 1999 to provide that a section 155.40 hospital lease may include a statement that there has been a "transfer of a governmental function . . . to the private . . . lessee," § 155.40(6), Fla. Stat. (2010), or that the private lessee is "acting on behalf of" the public entity. § 155.40(7), Fla. Stat. (2010).

That such a transfer has been made and such an agency relationship exists does not convert the Foundation into a public entity, frustrating the very purposes of section 155.40 in permitting these transactions to give a public hospital competitive advantages otherwise off limits to it. The Foundation never could have obtained sovereign immunity or favorable Medicaid reimbursement rates if it was not authorized under binding and enforceable contracts to act on CCHB's behalf. Where the Legislature has "authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties." Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 5 (Fla. 1984). If the State were free to override such contracts unilaterally, that would render the contracts unenforceable, and thus illusory for want of mutuality, which this Court has refused to condone. See id.

It is absurd, then, to argue that the existence of an agency relationship between a public body and a not-for-profit corporation under contract to act on behalf of that public entity renders the very contracts giving rise to that relationship

illusory and unenforceable by the not-for-profit corporation against unilateral impairment by the State. If those contracts were illusory, that would belie the basis for the Foundation's assertion of sovereign immunity and favorable Medicaid rates, which arose from those very contracts.

The contracts governing the relationship between these two entities, however, are not illusory. Rather, CCHB entered into these solemn contracts, which were made expressly "binding" (R1:100, 153), to seek benefits that could be procured only by leasing the Hospital to a private corporation. The Foundation in turn relied upon the binding nature of those very contracts to seek protections such as sovereign immunity that are available only to agents of the State.

CCHB could have continued to operate the Hospital itself, sacrificing the benefits of privatization. But it did not do so, and its choice has legal consequences. Neither CCHB nor the Legislature at its urging is free to abridge the contracts that have formed the basis for the parties' relationship for so long.

D. Florida law tolerates virtually no degree of impairment of contracts.

The First District correctly enforced the Florida Constitution's provision that "[n]o . . . law impairing the obligation of contracts shall be passed." Art. I, § 10, Fla. Const. Stressing the "sanctity of contracts," this Court long ago declared that "[v]irtually no degree of contract impairment has been tolerated in this state." Yamaha, 316 So. 2d at 559. As it explained:

> To justify retroactive application it is not enough to show that this legislation is a valid exercise of the state's police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts.

Id. In fact, any law that "detracts in any way from the value of the contract" must be invalidated, without further analysis. Dewberry, 363 So. 2d at 1080.

Without receding from Dewberry, this Court set forth a balancing test in Pomponio, 378 So. 2d at 779-80, identifying factors relevant to its impairment analysis there. As CCHB concedes on page 32, where legislation immediately diminishes the value of contract rights, courts still follow Dewberry to invalidate the legislation without further analysis. See, e.g., Lee County v. Brown, 929 So. 2d 1202, 1208-09 (Fla. 2d DCA 2006); State v. Leavins, 599 So. 2d 1326, 1332 (Fla. 1st DCA 1992). Shortly after deciding Pomponio, this Court invalidated a statute without analyzing it under the Pomponio factors, saying that, despite its "noble" purpose, the statute "flies into the wall of absolute prohibition" of impairment of contracts. State v. Chadbourne, 382 So. 2d 293, 297 (Fla. 1980).

Since Chadbourne, this Court has invalidated every law impairing contracts except in United States Fidelity & Guaranty Co. v. Department of Insurance, 453 So. 2d 1355, 1357-61 (Fla. 1984), where it upheld a statute authorizing regulators to order insurers to return excess profits to policyholders. Because insurers were on notice from an earlier law that the Legislature intended to authorize that, they

had no "vested right to those funds" and there was no "substantial impairment. . . ." Id. at 1361. No such extraordinary circumstances are present here.

CCHB did not point in its brief to a single decision whose actual holding supports its contention that this legislative impairment of the Foundation's contracts is permissible. All it did was try to distinguish the legions of cases in which this Court has enforced the constitutional prohibition against impairment of contracts, regardless of how "noble" the Legislature's purpose was. Chadbourne, 382 So. 2d at 297. As will be shown, CCHB's efforts to avoid the constitutional "wall of absolute prohibition" of impairment of contracts are meritless. Id.

1. The Special Law fundamentally impairs the Foundation's Lease and Agreement.

To begin with, the Special Law impermissibly impairs the Foundation's existing Lease and Agreement with CCHB, which govern all material aspects of the parties' relationship. Those contracts expressly provide that they are binding, are exclusive of any other agreements, and cannot be amended except by mutual agreement in writing. The Special Law shoves aside these rights and enacts in their stead a whole new set of CCHB rights and Foundation obligations on matters covered by the parties' existing contracts, none of which the Foundation agreed to. The Special Law robs the Foundation of the core value of these contracts.

CCHB attempts to trivialize the contractual changes ordered by the Legislature, but the very substantial nature of those changes, discussed at pages 5-

7, supra, speaks for itself. As just one example, the Special Law alters section 6.2 of the Agreement, which requires only that the Foundation use tax funds received from CCHB "in accordance with" its budget and does not limit the Foundation's ability to use other funds. (R1:165). Under the Special Law, the Foundation would have to obtain CCHB's pre-approval for a wide variety of expenditures, irrespective of whether it is spending tax funds received from CCHB or funds from its operations. That substantially alters the Foundation's rights and obligations.

It strains credulity for CCHB to suggest it went to the extraordinary length of obtaining the Special Law only to make minimal changes in the parties' contracts. Although it ridicules the importance of the new audit requirements imposed by section 16(11) of the Special Law and says (without record support) that any Foundation expenses associated with the required audits would be negligible (IB at 38), CCHB obviously thought it was important to force this new obligation on the Foundation via the Special Law. Indeed, if these were inconsequential changes in the Foundation's rights and obligations, they hardly were needed to solve a broad and general social or economic problem, as CCHB suggests elsewhere in its brief. (IB at 35-36).

The First District correctly concluded that this legislative "rewrite of the parties' contractual agreements" to impose "further obligations on the Foundation" should not be "countenanced under Article I, Section 10, of the Constitution."

Citrus Mem'l, 108 So. 3d at 678. Legislation that "creates a new obligation" offends the Florida Constitution just as certainly as legislation that alters a specific contract provision. Menendez v. Progressive Express Ins. Co., 35 So. 3d 873, 877 (Fla. 2010). This Court has broadly defined "impairment" as meaning "to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken." Pomponio, 378 So. 2d at 781 n.41. Granting CCHB new rights and creating new obligations of the Foundation not in the parties' existing contracts makes those contracts "worse" for the Foundation. Id.

2. The Special Law fundamentally impairs the Foundation's Articles of Incorporation, which are a contract with the State.

Under its existing Articles, the Foundation has the absolute right to elect a majority of its Board, and CCHB is barred from controlling a majority of the Foundation's Board. The Special Law requires the Foundation to amend its Articles to give CCHB majority control. That unconstitutionally impairs the Foundation's contractual governance rights.

It is black letter law that articles of incorporation are a contract with the State. See, e.g., 1A Fletcher Cyclopedia of the Law of Corporations § 165 (2012); 18A Am. Jur. 2d Corporations § 261 (2013); 18 C.J.S. Corporations § 48 (2013). This Court itself long has recognized that articles of incorporation are a contract with the State, "which contract cannot be impaired by the Legislature or the courts.

. . ." Marion Mortgage Co. v. State, 145 So. 222, 223-24 (Fla. 1932). More recently, in Hopkins v. The Vizcayans, 582 So. 2d 689, 692 (Fla. 3d DCA 1991), the Third District acknowledged that articles of incorporation are a "corporate 'contract'" with the State. It cited this Court's declaration in Aztec Motel, Inc. v. State, 251 So. 2d 849, 852 (Fla. 1971), that "once a charter is granted a corporation, the charter becomes a contract. . . ." Id.

Although these pronouncements hardly could be clearer, CCHB dismisses them as "casual." (IB at 27). To the contrary, this Court held in Marion Mortgage that "[t]he proposition . . . that a charter is a contract, and the law in force at the time enters into it, is a sound proposition of law that has been recognized in Florida for many years." 145 So. at 224. That is not a "casual" statement.

Indeed, this Court therein recognized that this proposition dates back to Justice Marshall's opinion in Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819). Marion Mortgage, 145 So. at 223-24. In Woodward, the United States Supreme Court held that a corporate charter is "a contract, the obligation of which cannot be impaired. . . ." 17 U.S. at 650. Thus, CCHB is inviting this Court not only to countenance an impairment of the Foundation's contract rights, but to renounce retroactively for all who have relied upon them substantive rights conferred by a long-established body of jurisprudence. Yet, CCHB cites no case holding that a chapter 617 corporation's articles are not a contract.

Furthermore, far from being "casual" statements, the precise issue in Aztec, Marion Mortgage, and Hopkins was whether there was an unconstitutional impairment of vested contract rights under articles of incorporation. There would have been no need to reach the question of impairment if the courts had not concluded such articles are a contract, exactly as they said. Although CCHB argues that corporate articles are subject to the legitimate exercise of police power (IB at 25-27), these cases in no way establish that the State may invoke its police power to override the settled contract rights of just two parties by special law.

In Aztec, this Court struck down a statute permitting forfeiture of a corporate charter if a director was involved in organized crime, holding the statute was "too vague, indefinite and uncertain to constitute notice of the acts which may result in the forfeiture of the charter of a corporation or the enjoining of the operation of a business." 251 So. 2d at 854. The Court struck down the statute precisely because it treaded unconstitutionally upon the corporation's vested, contractual right to conduct business under its corporate charter – a right protected by the Due Process Clause as well as the Contracts Clause. See id. at 852-54. In so holding, this Court specifically stated that "once a charter is granted a corporation, the charter becomes a contract . . ." and that "[a corporate] franchise is property within the meaning of the Constitution, and in respect of its enjoyment and protection it is regarded by the law precisely as any other property." Id. at 852.

CCHB gives short shrift to the actual holding in Aztec, and instead focuses on a statement that the State may not divest itself of its police power merely by entering into a contract. (IB at 26). What CCHB ignores is that the Aztec Court went on to hold that, notwithstanding the State's police power and no matter how "commendable" the purpose, "when the means employed clash with our Constitution, this Court is compelled to follow organic law." 251 So. 2d at 854.

This Court's decision in Marion Mortgage likewise does not support CCHB's position. There, a corporation failed to comply with the laws governing all trust companies in the State and, when the State took action, the corporation argued its articles of incorporation authorized its conduct. 145 So. at 223-24. While confirming the threshold principle that the articles were a contract with the State, the Court held that the corporation's articles incorporated legal obligations extant when the corporation was formed, which the corporation failed to observe. Id. The corporation could not effectively repeal those legal obligations by asserting its right to do so in its articles. Id. In this case, by contrast, the State has undertaken to force changes to the Foundation's Articles retroactively to comply with rules applicable to only a single section 155.40 hospital lessee.

Finally, in Hopkins, the Third District simply recognized that the Legislature reserved in chapter 617 a right to amend that chapter consistently for all chapter 617 corporations. 582 So. 2d at 692. The court did not suggest the Legislature

could alter the governance rights of one lone corporation by special law, leaving all other chapter 617 corporations untouched. To the contrary, it acknowledged that chapter 617 articles of incorporation are a "corporate 'contract'," and the provisions of chapter 617 are part of that contract, which "renders the corporation subject to the provisions of the chapter as amended." Id.

The Foundation has never disputed that its Articles are subject to the State's right to regulate all not-for-profit corporations through amendments to chapter 617, as in Hopkins. But no such amendment is at issue here. Nor did the Legislature reserve the right in chapter 617 to single out the articles of one lone not-for-profit corporation for disparate treatment by special law, as here. Therefore, no such reservation has been incorporated by reference or by operation of law into the Foundation's corporate contract with the State.

In sum, none of these cases allows the Foundation's Articles to be impaired by the Special Law. Rather, they all make absolutely clear that those Articles are a contract. As such, they are fully protected by Florida's Contracts Clause.

CCHB also seeks to avoid that constitutional prohibition by arguing that this Court's decisions invalidating statutes impairing contracts all involved bilateral contracts (IB at 27-28), and that articles of incorporation are not bilateral since the State is required to accept any such articles that satisfy the statutory requirements. (IB at 28-30). CCHB misapprehends how the corporate contract is formed.

It is settled law that "[t]he offer is the statute authorizing incorporation, which is accepted . . . by the filing of articles of incorporation," and this "closes the contract." 1A Fletcher Cyclopedia § 265 (citing Glymont Improvement & Excursion Co. v. Toler, 30 A. 651 (Md. 1894)); see also Gordon v. Lake, 356 S.W.2d 138, 141 (Tex. 1962) ("General incorporation statutes have been said to be standing offers to the public which are accepted when a charter in compliance therewith is received by the Secretary of State.").

That is why the Foundation may file amendments to its Articles without seeking "permission from the State" to do so. (IB at 40). The State already has made a standing offer in its statutes as to what may be filed, and the filing of amended articles in accordance with those statutes constitutes an "acceptance" of the State's "offer." Opdyke v. Sec. Sav. & Loan Co., 105 N.E.2d 9, 17 (Ohio 1952) (statutes authorizing corporate formation "represented an offer" and "amended articles of incorporation . . . clearly represented . . . an acceptance. . . .").

Thus, a contract is formed in this manner between the corporation and the State, and that contract is fully protected by the Contracts Clause:

> The substance of the situation is that through this statute the state offered certain corporate privileges and immunities to those who accepted its terms, which offer was accepted in this instance by the filing of articles of incorporation and organization of the defendant. . . . It is a compact which is within the protection of section 10, art. 1, of the national Constitution forbidding any state to pass any law impairing the obligation of contracts, and of section 21, art. 1, of our state Constitution, containing the same prohibition.

Lorntsen v. Union Fishermen's Co-Op. Packing Co., 143 P. 621, 622-23 (Or. 1914).

Indeed, in Cohn v. Grand Condominium Association, Inc., 62 So. 3d 1120, 1121-22 (Fla. 2011), this Court invalidated a law that sought, as here, to alter rights of control under corporate governance documents. Specifically, the Court invalidated a statute that supplanted existing governance documents of condominium associations and altered the balance of control specified in them. Id. The Special Law at issue here similarly alters the balance of control conferred in the Foundation's existing Articles: it requires the Foundation to amend those Articles – which expressly preclude CCHB from holding majority control of the Foundation's Board – to grant CCHB the absolute right to do that.

CCHB attempts to avoid Cohn on the ground that the governance rights impaired there were set forth in a Declaration of Condominium, which is a bilateral contract between the unit owners and the condominium association. (IB at 27-28). But, as established above, the Foundation's Articles are a bilateral contract with the State. Under CCHB's argument, any individual corporation's articles could be altered retroactively by special law in any way the Legislature wished, without regard for the constitutional prohibition against impairment of contracts. That is not the law, and CCHB has not cited a single case saying it is.

CCHB also attempts to avoid Cohn by arguing that there is no immediate diminution in the value of the Foundation's governance rights under its existing Articles and that Dewberry accordingly does not apply in this case. (IB at 33). CCHB ignores the fact that, in addition to citing Pomponio in Cohn, this Court expressly relied on Dewberry in invalidating the legislation there. Cohn, 62 So. 3d at 1122. The Court would not have relied on Dewberry if altering those governance rights did not immediately diminish their value.

Just as in Cohn, the value of the Foundation's governance rights has been impermissibly diminished by the Special Law. Indeed, nothing could more substantially deprive a party of the value of its existing contract rights than this law, which forces the Foundation to transfer its right to governance control to CCHB. As in Cohn, the right to control the direction of the Foundation subsumes virtually every other decision of economic or other consequence.

It remains only to note that CCHB cites State v. Knowles, 16 Fla. 577 (1878), another case involving a public entity created directly by the Legislature, for the proposition that individual directors do not have a protected right to sit on the Foundation's Board. (IB at 41-42). The Foundation never said they did. CCHB ignores that the Foundation presently enjoys the absolute right to choose who controls its Board, and it is that right the Special Law vitiated. CCHB's observation that the Foundation voluntarily elected CCHB trustees as a majority of

its Board in the past only confirms that point – the Foundation chose who would comprise a majority of its Board. (IB at 39). Under the Special Law, it may not.

The fact that in 2007 and 2008 "all material actions" of the Foundation were "referred to [CCHB] for ratification" (IB at 25, 37, 41), such that it "answers to [CCHB] regarding key operational, capital and financial decisions" (IB at 9, 37), confirms the same point. There was no requirement to do that in the Articles or contracts with CCHB. Rather, the Foundation chose to pursue this practice. Under the Special Law, it now has no choice but to cede Board control to CCHB.

E. The impairment of the Foundation's contracts is unconstitutional under both Dewberry and Pomponio.

Without the Special Law, the Foundation enjoys the right to operate the Hospital consistent with the terms of its existing contracts. Under the Special Law, CCHB would gain operational and financial control far beyond its existing contract rights. Because the changes in the Foundation's existing Articles and contracts with CCHB mandated by the Special Law immediately diminish the value of the Foundation's contract rights, the Special Law is invalid under Dewberry, without the need for further analysis.

Even under Pomponio, the Special Law cannot pass constitutional muster. Given the requirements of the Special Law discussed at pages 5-7, supra, its impairment of the Foundation's contracts is severe. In fact, it fundamentally alters the Foundation's core governance, operational, and financial rights. This is not a

"minimal" impairment, as was found to be the case in USF&G, the only Florida Supreme Court case since Pomponio to allow a legislative impairment of contracts. USF&G, 453 So. 2d at 1361. Moreover, even if the degree of impairment were constitutionally tolerable – and it is not – the Special Law still would have to be justified by a broad and general public purpose sufficient to overcome Florida's strong constitutional prohibition of impairment of contracts. See id. at 1360.

This Court has specifically rejected the contention that retroactive legislation is constitutionally permissible so long as it is "part of a valid regulatory scheme adopted under the state's 'police power,'" saying "that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts." Yamaha, 316 So. 2d at 559. In fact, "even greater scrutiny should be applied to legislation impairing public contracts (those involving the State)," Leavins, 599 So. 2d at 1332, and no deference is afforded to the public purpose asserted by the Legislature when such contracts are involved. USF&G, 453 So. 2d at 1361. In all events, the purpose of the Special Law is not sufficiently broad and compelling to overcome the severe impairment it imposes.

To the contrary, its stated goal is focused laser-like on altering the contracts of only two specific parties and thereby legislatively resolving parochial disputes between those parties currently pending in lower state court. It offers no reason

why the newly imposed controls on the Foundation are necessary for this one hospital but not for others, and none exists.

For example, the Special Law states that it seeks to promote "the ability of [CCHB] to continue to act in the public interest" and to assure the Foundation's "performance of its responsibilities to the public and to the taxpayers. . . ." (R1:36). But all public lessors operating under section 155.40 should act in the public interest, and all hospital lessees should carry out their responsibilities to the public. Section 155.40 establishes the appropriate balance of oversight required to assure that proper accountability occurs, while still allowing the hospital to enjoy sufficient latitude to operate competitively. No broad, important public policy is served by upsetting that statutory scheme for one individual hospital.

The Special Law also states that it is granting CCHB greater control to ensure the Foundation's status as an "instrumentality" of CCHB, for purposes of assuring sovereign immunity for the Hospital's operations. Id. But once again, that stated purpose is narrowly targeted and not of great public interest. At no time has section 155.40 required a leased hospital to have sovereign immunity. If that were of great public importance, the Legislature would have amended that statute to require such status for every hospital leased under it, not just this one.

In fact, this was not even important enough to CCHB to require such status in its contracts with the Foundation or to make its absence a condition of default.

Nor can CCHB point to any reason why this is suddenly a matter of importance. As it states elsewhere in its brief, the Foundation already has been found to have sovereign immunity for its operation of this public hospital. (IB at 7-9).

CCHB argues that the Legislature's impairment of the Foundation's contracts is justified by the matters set forth in reports of the State Auditor General and the Agency for Health Care Administration ("AHCA"), reports provided to the legislative committees that considered the bills resulting in the Special Law. (IB at 10-11). But the Legislature's findings in the Special Law do not even mention those reports, nor do they characterize the Foundation's financial or operational performance at all. (R1:35-36). Although the original version of the Special Law contained findings doing that, the Legislature specifically removed them. Compare (R7:1340-46) with (R1:35-36).

On its face, then, the purposes for the Special Law, which were expressly and unambiguously stated by the Legislature, do not include addressing any supposed operational deficiencies of the Foundation. (R1:35-36). "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent. . . ." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005). This Court should not read an "unstated purpose" into the Special Law. See In re Tennyson, 611 F.3d 873, 877 (11th Cir. 2010) (where statute is "unambiguous," court will not read "an unstated purpose" into it).

Furthermore, even had the Legislature identified concerns about the Foundation's operation of the Hospital as a statutory purpose, it still would not justify the drastic action of impairing the Foundation's contracts by special law. In Lloyd v. Lawnwood Medical Center, Inc., No. 99-CA-1180BC, 2000 WL 309305, at *3 (Fla. Cir. Ct. Feb. 16, 2000), the hospital's management and AHCA found that the hospital's medical staff had failed to comply with the law and ignored serious patient care issues. Yet, when the Legislature enacted a special law to transfer control of the hospital to a parent corporation, the First District held it was an unconstitutional impairment of governance rights under contracts, as well as an unconstitutional special law granting privileges to a private corporation. Lawnwood Med. Ctr., Inc. v. Seeger, 959 So. 2d 1222, 1223-25 (Fla. 1st DCA 2007). This Court affirmed on the latter ground and thus did not reach the former. Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 508-18 (Fla. 2008). CCHB's remedy for any concerns about the Foundation's management of the Hospital lies in the other litigation pending between these parties or in regulatory action by AHCA, not in legislative impairment of the Foundation's contracts.

CCHB finally argues that the Special Law serves a broad, generalized public purpose because its subject matter is to benefit the citizens of Citrus County, thereby rendering its limited geographic scope irrelevant. (IB at 36). CCHB improperly conflates the type of purpose sufficient for the ordinary exercise of the

Legislature's police power with the very different type of purpose required for legislative impairment of contracts. Again, this Court has specifically rejected the contention that retroactive legislation is constitutionally permissible so long as it is "part of a valid regulatory scheme adopted under the state's 'police power,'" saying "that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts." Yamaha, 316 So. 2d at 559.

The narrowness of the Special Law demonstrates that it was not enacted for a broad, generalized public purpose. This Court cited the seminal United States Supreme Court decision in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), in arriving at its balancing test in Pomponio, while stressing that the federal standard for impairment of contracts is more permissive than the Florida standard.[3] Pomponio, 378 So. 2d at 779-80. The Special Law is far narrower than the "extremely narrow" statute in Spannaus that was invalidated even under the more permissive federal standard. 438 U.S. at 248.

In Spannaus, the Court invalidated a state statute requiring all Minnesota employers with pension plans for 100 or more employees to fund future benefits when they closed manufacturing facilities. Id. at 241-51. The Court stated that the

[3] On pages 35-39, CCHB cites a litany of federal cases. The Foundation has made no claim under the United States Constitution, only under the more protective Florida constitutional provision. See Geary Distrib. Co. v. All Brand Imps., Inc., 931 F.2d 1431, 1434-35 (11th Cir. 1991) (invalidating law under Florida Contracts Clause, although law had been upheld below under federal standard).

statute had an "extremely narrow focus," id. at 248, as its "narrow aim was leveled, not at every Minnesota employer," but only at those with 100 or more employees that had pension plans and left the state. Id. at 250. Hence, it was not "enacted to protect a broad societal interest rather than a narrow class." Id. at 249.

The Special Law is impermissibly directed at an even narrower class – one single hospital. It leaves all other similarly situated hospitals outside its scope. Not surprisingly, CCHB has cited no Florida decision upholding a special law that impairs the contract rights of only one party. It is precisely in such circumstances where the risk of overreaching by the Legislature is the most acute.

The remaining Pomponio factor – whether the retroactive law invades an area not previously subject to regulation – also requires invalidation of the Special Law. See 378 So. 2d at 779. In section 155.40, the Legislature purposely chose to encourage a degree of independence for – not regulatory suffocation of – hospitals under this statutory scheme to ensure that they can compete effectively in the economic marketplace. Indian River, 766 So. 2d at 235-38. In fact, the Legislature amended the statute in 1996 to state expressly:

> It is the intent of the Legislature that this section does not impose any further requirements with respect to the formation of any for-profit or not-for-profit Florida corporation, the composition of the board of directors of any Florida corporation, or the manner in which control of the hospital is transferred to the Florida corporation.

§ 155.40(3), Fla. Stat. (2010).

The Legislature thus made plain its intent not to regulate the manner in which a public entity "transferred" "control of the hospital" to a corporation leasing a hospital, and expressly left the "composition of the board of directors of any Florida corporation" leasing a hospital unregulated. Id. Clearly it is not the policy of this State to require the public entity to have control of the contracting corporation's board of directors. By dictating that CCHB must seize control of the Foundation's Board, the Special Law inappropriately invades the province left open by the Legislature under section 155.40 to the contracting parties themselves.

The fact that the Legislature regulates health care in other ways for truly broad and important public purposes in no way justifies the impairment of the Foundation's contracts with CCHB. The Legislature specifically found that the requirements for control over the hospitals that it specified under section 155.40 were appropriate to assure "quality health care." § 155.40(1), Fla. Stat. Other hospitals are still operating under those controls, and nothing in the Special Law suggests that this Hospital is any different from those hospitals with regard to its interest in providing competitive, "quality health care" to the public. Id.

In each case we cite where a Florida court invalidated a retroactive impairment of contracts, the law involved a regulated industry. Several of these decisions expressly cited Pomponio and then proceeded to invalidate retroactive laws in regulated industries. Pomponio itself and Cohn involved the condominium

industry. Lawnwood involved the health care industry. The fact that a contracting party is in a regulated industry does not mean its contracts may be impaired.

CCHB wrongly asserts that the laws at issue in USF&G and West Florida Regional Medical Center, Inc. v. See, 18 So. 3d 676 (Fla. 1st DCA 2009), were upheld solely because they involved regulated industries. (IB at 36-37). To the contrary, both cases turned primarily on the insubstantiality of the impairments of contracts and the broad, generalized public purposes supporting the statewide laws at issue. USF&G, 453 So. 2d at 1359-61; See, 18 So. 3d at 687-88.

Finally, the Foundation stresses that it does not claim the Legislature may not amend or enact statutes in appropriate circumstances to impose requirements that may affect contracts. It simply asserts its contracts, which were entered into in accordance with section 155.40, are unconstitutionally impaired by this Special Law, while all other corporations operating public hospitals under section 155.40 remain free from such constraints. The First District correctly invalidated the Special Law as a violation of Florida's Contracts Clause.

F. The Special Law also violates due process by retroactively impairing the Foundation's vested contract rights.

Retroactive application of the Special Law also is prohibited by the Florida Due Process Clause. Art. I, § 9, Fla. Const. This Court consistently has invalidated laws that retroactively impair vested rights. See, e.g., Menendez, 35 So. 3d at 876-80. A vested right has been defined as "an immediate, fixed right of

present or future enjoyment." Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 490 (Fla. 2008). Vested rights include rights fixed by contract, and a statute is impermissibly retroactive when it imposes new legal consequences to the detriment of a party's vested rights. Menendez, 35 So. 3d at 876-80.

The Foundation's rights vested at the time they were entered into, and they provide an "immediate, fixed right" of "future enjoyment" until terminated or amended according to their terms. See Buster, 984 So. 2d at 490. The parties stated expressly that their contracts could be altered only by a mutual, signed writing, but the Special Law imposes new obligations on the Foundation and grants CCHB new rights. This retroactively impairs the Foundation's vested rights.

G. Defendants' arguments made for the first time in this Court are without merit.

Both Defendants make arguments in their briefs that were not asserted below. These eleventh hour arguments are meritless.

First, CCHB now asserts that the Foundation was making a "facial challenge" to the constitutionality of the Special Law, such that it must show "that no set of circumstances exists under which the statute would be valid." (IB at 15). The Foundation made no such challenge. Nor did the First District hold the Special Law facially unconstitutional.

By design, the Special Law's provisions regarding public hospital leases in Citrus County impair the existing contract rights of only one entity – the

Foundation. As CCHB concedes elsewhere in its brief, the Hospital is "the only public hospital in Citrus County, Florida." (IB at 1). The First District simply held that "chapter 2011-256 significantly alters the parties' contractual rights and is an unconstitutional impairment of their contracts. . . ." Citrus Mem'l, 108 So. 3d at 676. There is no issue of facial constitutionality here.

CCHB further asserts that the First District ignored the Special Law's severance clause and erroneously invalidated the Special Law in its entirety, not just the new provisions impairing the Foundation's contracts. (IB at 42-43). The First District did no such thing – it addressed only the "legislative changes" to the Foundation's contracts. Citrus Mem'l, 108 So. 3d at 678. The Foundation challenged only the provisions in section 16, and the First District did not address the unchallenged provisions, much less invalidate them. Indeed, neither Defendant filed a motion for rehearing asserting that the First District erred in this way.

Next, the State (but not CCHB) now argues that the Special Law is a valid use of the Legislature's "power of the purse" under article III, section 1. (SIB at 4-8). No such argument was made below. In fact, other than summarily joining in CCHB's position, the State did not affirmatively argue for the constitutionality of the Special Law in the trial court, but instead successfully sought to be dismissed. (R4:655-69; R8:1443-67; R9:1659-70).

In all events, the State's argument that the "power of the purse" trumps the Contracts Clause in cases involving public funds is wholly inconsistent with Florida law on the subject. In fact, when the State retroactively alters contracts to protect its own financial interests, its motives for doing so are subject to "greater scrutiny," not less. Leavins, 599 So. 2d at 1332.

It is unsurprising, then, that none of the "power of the purse" cases cited by the State upheld a retroactive law impairing a contract. To the contrary, in Chiles v. United Faculty of Florida, 615 So. 2d 671, 673 (Fla. 1993), this Court held that even in the "sensitive area of a continuing appropriation obligation," a statute retroactively altering contractual terms of public employment violated the Contracts Clause. In that case, this Court specifically distinguished State v. Florida Police Benevolent Association, Inc., 613 So. 2d 415 (Fla. 1992), and Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991), relied upon by the State here, because neither of those cases involved a binding contract. Id. at 672-73.

Finally, the State (but again not CCHB) argues that, without the Special Law, the Foundation's contracts with CCHB would be invalid for failure to grant CCHB sufficient control over public funds. (SIB at 8-9). The State did not make this argument below. Although CCHB initially raised this issue in two affirmative defenses, it then withdrew them. Compare (R4:677-78) with (R8:1512-13).

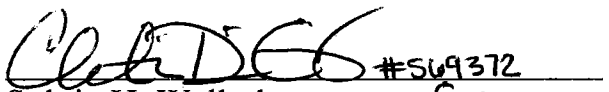
In all events, these withdrawn defenses lack merit. Section 155.40 does not impose the requirements of the Special Law for the contracts of other hospitals operating under section 155.40, and in fact the Legislature therein expressed its intent not to impose "any further requirements" on such contracts. § 155.40(3), Fla. Stat. (2010). CCHB acted pursuant to its contracts with the Foundation for many years, clearly understanding it had sufficient oversight over the Foundation to allow the Foundation to operate the Hospital lawfully on CCHB's behalf.

Moreover, the Legislature did not make any finding that the parties' contracts were invalid and that it was therefore necessary to "save" them by legislatively overriding them. (R1:35-36). Nor is that the province of the Legislature; it is the province of the courts. These longstanding contracts are fully enforceable and cannot be impaired by the Special Law.

CONCLUSION

The decision of the First District precluding the Special Law's retroactive impairment of the Foundation's contracts should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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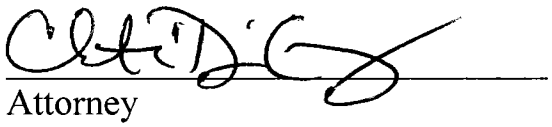

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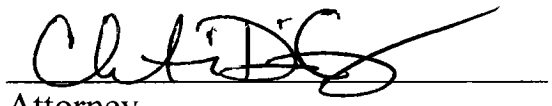

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