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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-411

CITRUS COUNTY HOSPITAL BOARD
and the STATE of FLORIDA,
Petitioners,

v.

CITRUS MEMORIAL HEALTH FOUNDATION, INC.,
Respondent.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
Case No. 1D12-0858

INITIAL BRIEF OF THE STATE OF FLORIDA ON THE MERITS

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PRELIMINARY STATEMENT

Because the State shares many of the same concerns as the Citrus County Hospital Board ("CCHB" or "Board"), it will occasionally herein refer to the Board's Initial Brief filed with this Court on April 29, 2013. References to the Board's initial brief will appear as CCHB Init. Br. at #, where # refers to the particular page number referenced within the brief.

References to the record on appeal in the District Court of Appeal will be indicated by "Record" followed by the volume and page number(s).

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts and adopts the statement of the case and facts set forth in Citrus County Hospital Board's initial brief.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Chapter 2011-256, Laws of Florida, unconstitutionally impairs the contract between the Citrus County Hospital Board and the Citrus Memorial Health Foundation for the operation of the public hospital in Citrus County. The Contract Clause does not prohibit the Legislature from enacting fiscal oversight measures applicable to a public corporation like the Foundation, which is carrying out a public governmental function (the operation of Citrus County's only public hospital) and using public funds. In fact, the Legislature possesses not only the power but the *duty* to act in the public's best

interest and protect public funds from mismanagement, which is especially important in the costly area of public health.

Further, the First District erroneously set aside the balancing test for contract impairment that this Court followed in *Pomponio v. The Claridge of Pompano Condominium, Inc*., 378 So. 2d 774 (Fla. 1979), in favor of an earlier and seemingly more restrictive test announced in *Dewberry v. Auto-Owners Insurance Co.*, 363 So. 2d 1077 (Fla. 1978). Under *Pomponio*, the fact that this case involves public health and the operation of a public hospital, an already highly regulated area, is nearly dispositive as to whether the Legislature acted within its authority in requiring fiscal oversight and accountability of the Foundation. The Legislature's legitimate interest in protecting public health care funds from mismanagement outweighs any inconvenience to the Foundation of being subject to fiscal accountability and oversight.

Finally, the Foundation is a public entity. As such, it lacks standing to challenge the constitutionality of Chapter 2011-256, Laws of Florida.

STANDARD OF REVIEW

The Supreme Court "review[s] de novo a district court decision declaring a statute unconstitutional." *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012); *see also*

Scott v. Williams, 107 So. 3d 379, 384 (Fla. 2013) (whether a state law unconstitutionally impairs a contract is reviewed de novo).[1]

ARGUMENT

The State of Florida supports and adopts the arguments set forth in Citrus County Hospital Board's initial brief and makes the following few points.

I. The Legislature Can Lawfully Exercise Fiscal Oversight per Chapter 2011-256 Because the Foundation is a Public Corporation That Operates a Public Hospital With Public Funds.

The Foundation's status as the public operator of a public hospital funded by public monies is dispositive of whether chapter 2011-256 is constitutionally valid.

As the Board's brief recounts, the Foundation is a "public corporation" that was charged from its inception to carry out public functions with public money as the Board's instrumentality. CCHB Init. Br. at 18; *see also Citrus Mem'l Health Found. v. Citrus Cnty. Hosp. Bd.*, 108 So. 3d 675, 679 (Fla. 1st DCA 2013) (Ray, J., dissenting); *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 927 So. 2d

[1] Of course statutes come to this Court with a strong presumption of validity. To defeat the presumption, "the invalidity must appear *beyond reasonable doubt*." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008) (emphasis added) (internal quotation marks omitted) (citing *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)). "Should any doubt exist," the presumption survives, and this Court must uphold the State law. *Id.* That is because this Court must assume that "the legislature intended to enact a valid law." *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011). This strong presumption applies generally to all legislative enactments, and courts should be "reticent in declaring statutory provisions unconstitutional." *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 209 (Fla. 1st DCA 1983) (citing *Jetton v. Jacksonville Elec. Auth.*, 399 So. 2d 396, 398 (Fla. 1st DCA 1981)).

961, 963 (Fla. 5th DCA 2006) (holding that Memorial Hospital was a public entity so long as it *leased* the hospital from the West Volusia Hospital Authority, but was treated as a private entity when it purchased same), *see also Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999) (detailing factors for determining whether a hospital is a public entity). Nothing in the statute leading to the Foundation's creation suggested that it was "private" or that its functions were meant to be "privatized." *See* §155.40 Fla. Stat. (1989). And in fact, the Foundation has consistently represented itself to be, and has been treated by courts, administrative agencies, and laws of this state as, a public entity performing the governmental function of operating a public hospital in Citrus County on behalf of the Board. *See Citrus Mem'l Health Found.*, 108 So. 3d at 681 (Ray, J. dissenting).

These facts are important because the Contracts Clause has never been applied to bar legislative action directed to improve the fiscal oversight of a public entity funded with public monies. And for good reason. It is beyond question in Florida that legislative power is fully vested in the Legislature. *See* Art. III, §1, Fla. Const. That power includes exclusive control over the public purse. *See State v. Fla. Police Benevolent Ass'n*, 653 So. 2d 1124, 1126 (Fla. 1st DCA 1995). As this Court has recognized, "[t]he Florida Constitution vests the 'power of the purse' in the Legislature by granting it exclusive and plenary power to raise and appropriate state funds." *Graham v. Haridopolos*, 75 So. 3d 315, 318 (Fla. 1st DCA 2011)

(citing *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 267 (Fla. 1991) ("Under any working system of government, one of the branches must be able to exercise the power of the purse, and in our system it is the legislature, as representative of the people and maker of laws, including laws pertaining to appropriations, to whom that power is constitutionally assigned.")), approved, 108 So. 3d 597 (Fla. 2013). The power of the purse is not limited to raising and distributing funds. Instead, the Constitution vests the Legislature with the "exclusive power of deciding how, when, and for what purpose" public funds will be used. *Id*. (quoting *State ex. rel Kurz v. Lee*, 163 So. 859, 868 (Fla. 1935)). And public funds include not just those in the State Treasury, but rather "any funds from whatever source by a public agency or official for a public purpose." *Graham*, 108 So. 3d at 606 (citing *Advisory Op. to the Governor*, 200 So. 2d 534, 536 (Fla. 1967)).

To that end, the Legislature has "the authority to attach contingencies" to the way such funds are used. *Graham*, 75 So. 3d at 318 (citing *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 948 (Fla. 1993)). That is so because "[t]he Legislature represents the people and speaks with the voice of the people. Thus, only the legislature, as the voice of the people may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. [It is its] constitutional duty to establish fiscal priorities in light of [State resources]." *Chiles v. United Faculty of*

Fla., 615 So. 2d 671, 677 (Fla. 1993). In sum, as long as the Legislature acts with lawful purpose, a legislative decision concerning the oversight and protection of public funds cannot be overturned. *See State ex rel. Caldwell v. Lee*, 27 So. 2d 84 (Fla. 1946). Arguments that the Legislature's funding prerogative can be usurped by negotiated agreements have almost universally "been rejected as contrary to the legislature's exclusive control over public funds." *State v. Fla. Police Benevolent Ass'n, Inc.*, 613 So. 2d 415, 420 (Fla. 1992).

The Legislature's power of the purse extends particularly over the funding of public entities like the Foundation in this case. While the District Court labeled the Foundation as "private," this Court settled the "private" versus "public" question in *O'Malley v. Florida Insurance Guaranty Ass'n., Inc*., 257 So. 2d 9 (Fla. 1971).

> Private corporations are those which have no official duties or concern with the affairs of government, are voluntarily organized and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument of its stockholders.
>
> [Whereas public entities] fill a public need without private profit to any organizers or stockholders. Their function is to promote the public welfare and often they implement governmental regulations within the state's police power. In a word, they are organized for the benefit of the public.

257 So. 2d at 11. The district court's decision gave little attention to this Court's discussion of what separates "public" and "private" entities, a point thoroughly (and correctly) elaborated in the Board's brief. *See* CCHB Init. Br. at 17-20.

In the present case, the Foundation's status as a public entity and the Legislature's duty as caretaker of public funds are dispositive. The Legislature was specifically prompted to act in this case by Auditor General findings that the Foundation lacked appropriate accountability (to the Board or anyone else) in using public funds; it used public funds for travel expenses and to pay bonuses that were never approved by the Board; it entered contracts outside of its expenditure authority; and failed to disclose apparent conflicts of interest. *See* Fla. H.R. CS/CS/HB 1043 Staff Analysis/Final Bill Analysis at 4 (Jun. 29, 2011) (*available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc. aspx?FileName =h1043z1.HHSC. DOCX&DocumentType=Analysis&BillNumber =1043 &Session=2011). Furthermore, the Foundation was not operating subject to any financial industry standards, which likely led to incurring "cumulative financial operative losses from patient services exceeding $50 million." CCHB Init. Br. at 9-10. Consistent losses led to substantially increased burdens on the taxpayers of Citrus County. *Id*. And the Hospital's executive committee, by a super majority vote, expressed "no confidence" in the Foundation's president and CEO. *Id.*

Into this fiscal breach, the Legislature responded in order to protect public funds and, in its words, "[t]o ensure public oversight, accountability, and public benefit." Ch. 2011-256 §16, Laws of Fla. The special act requires additional oversight of the Foundation by the Board without diminishing the Foundation's

ability to operate the hospital (it was already subject to sunshine laws, state audits, and ACHA reporting requirements). And it comported entirely with the Legislature's authority in exercising the legislative power of this state. It is beyond debate that the Legislature is free to enact special laws requiring reasonable accountability of the expenditure and whereabouts of public funds, given the Legislature's "exclusive power of deciding how, when, and for what purpose" public funds are used. *See also Citrus Mem'l Health Found.*, 108 So. 3d at 680 (Ray, J., dissenting) ("Whether a corporation is created directly by the State or by an arm of the State, seems to be a distinction without a difference when, as here, the sole and exclusive purpose of the corporation is to carry out a public function for the benefit of the public.").

Furthermore, the Board's contract with the Foundation could not divest or remove public oversight over the operation of the hospital to the extent claimed by the Foundation. *See*, *e.g.*, *Palm Beach Cnty. Health Care Dist. v. Everglades Mem'l Hosp.*, 658 So. 2d 577, 580 (Fla. 4th DCA 1995) (holding that section 155.40 "does not authorize relinquishing ... unfettered control over public property, powers, taxing authority, and money, including expenditure of ad valorem taxes without public oversight or accountability"). In *Palm Beach County*, the Fourth District rejected a hospital's similar assertions of contract-based autonomy where a District determined the hospital had been operating inefficiently and that it was in

the public interest to alter its existing operations. In analyzing the contract, the Court concluded that "if the legislature intended to authorize such a radical and complete divesture of public assets, control oversight, and authority, it would be clearly stated." *Id*.

In view of these things the State concurs with the dissent below that the Foundation has "no greater interest in self-governance than any other state agency, as it exists only to fulfill the delegated duty to meet Citrus County's public health needs in accordance with the Legislature's mandate for the Hospital Board. [Accordingly,] the Foundation should be required to presume the legislation affecting its duties is constitutional and focus on carrying out those duties." *Citrus Mem'l Health Found*, 108 So. 3d at 681 (Ray, J. dissenting). Regardless of the status of other corporations involved in leases under section 155.40, the Foundation's specific relationship with the Board "requires a holding that the Foundation is a public entity that cannot be removed from legislative oversight." *Id.* As such, the Contract Clause does not prohibit the oversight exercised by the Legislature in this case.

II. The State's Interest in Regulating a Public Hospital and Public Funds Outweighs the Foundation's Interest in Avoiding Fiscal Oversight.

Even where this Court has applied the Contracts Clause, it has permitted a degree of impairment of contracts by the state. *See Pomponio v. Claridge of*

Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979).[2] That is especially true when, as here, the Legislature attempts to regulate the operation of a public hospital by a public corporation that is supported with public funds. Whatever impairment the Foundation may claim because of new fiscal oversight is outweighed by the State's interest in public accountability and combating mismanagement of public funds.

In *U.S. Fidelity & Guar. Co. v. Dep't. of Ins.*, 453 So. 2d 1355 (Fla. 1984), this Court reiterated its adoption of the balancing test used by the United States Supreme Court (citing *Pomponio*, 378 So. 2d 774). That is, when determining whether a state law impairs a party's right to contract, the Court will weigh a person's interest in not having his contract impaired against the State's interest in exercising its legitimate police power. *U.S. Fidelity*, 453 So. 2d at 1360.

The first factor considered under *Pomponio* is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id*. In determining whether any impairment is substantial, the court first must resolve "whether the industry the complaining party has entered has been regulated in the past." *Id*. Past regulation is important to this analysis because when an entity operates in an industry that is subject to state restrictions or highly regulated, it "cannot remove [itself] from the power of the State by making a contract." *Id*.

[2] The State agrees with the Board's argument that the test in *Pomponio*, and not *Dewberry*, is applicable in this case. *See* CCHB Init. Br. at 30 *et seq*.

In this case, the Foundation is operating in the area of public health using public funds, where almost every facet of the work is heavily regulated and ever changing. *See, e.g.*, ch. 155, 381-408, Fla. Stat. (regulating hospitals and public health); *West Fla. Reg'l Med. Ctr., Inc. v. See*, 18 So. 3d 676, 688 (Fla. 1st DCA 2009) (noting that "[t]he medical profession is heavily regulated by the State of Florida"); *cf. Nat'l Federation of Indpt. Bus. v. Sebelius*, 132 S. Ct 2566 (2012) ("In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to … decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions."). As such, the Foundation can be expected to have to adjust its business practices from time to time as new laws and regulations are implemented.

Yet the Foundation's position below seems to be that by entering into a contract to operate a public hospital on behalf of the Board, it can somehow isolate itself from government intervention. That is illogical and contravenes public policy. To contend that the Board's oversight responsibilities over the public hospital cannot be altered by the Legislature comes close "to admit[ing] that the government is beyond the control of the people—that an administrative Frankenstein, once created, is beyond the control of its Legislative creator." *City of Cape Coral v. GAC Utilities, Inc., of Fla.*, 281 So. 2d 493, 496 (Fla 1973). The Legislature created the Board over 60 years ago; it regulated the Board and its

powers and duties. It did not "simply call its creature into existence and leave it to operate according to its own inscrutable wisdom." *Turner v. Wainwright*, 379 So. 2d 148, 154 (Fla. 1st DCA 1980). And the Legislature must continue to regulate the Board (which necessarily will affect the public entity with whom it has contracted to operate the public hospital) because the public interest demands it.

Even if this Court were to find that chapter 2011-256 somehow impairs the Foundation's contract, it should still uphold the State law because any impairment is outweighed by the State's legitimate, customary, and expected interest in overseeing the public hospital and protecting public funds. *See U.S. Fidelity*, 453 So. 2d at 1360 (a statute will be upheld when there is "a significant and legitimate public purpose behind the regulation … such as the remedying of a broad and general social or economic problem").

Here, the Hospital Board was created "for the purpose of acquiring, building, constructing, maintaining, and operating a *public* hospital in Citrus County." Ch. 2011-256, Laws of Fla. (emphasis added). More than 20 years ago, the Board leased the *public* hospital, including all of its *public* assets to the Foundation. *Id*. As set forth in the Board's initial brief at pages 10-11, the Foundation has not proven to be a successful caretaker of the public's funds. Briefly, the Foundation incurred financial losses of over $50 million between 2003 and 2008. CCHB Init. Br. at 10. Over time, these consistent operative losses

caused a substantial increase in the ad valorem tax burden faced by the citizens of Citrus County. *Id*. at 10. The Foundation "consistently underperformed AHCA statistically similar hospital group operating margin financial benchmarks and consistently underperformed the AHCA not-for-profit hospital group." *Id*. The long term lease agreement does not provide for any good business practices to ensure that the Foundation operates efficiently; and the Foundation's president and CEO was the subject of a super-majority vote of no confidence. *Id*.

Chapter 2011-256 was enacted to remedy these past performance deficiencies. As the act itself states, "the ability of the hospital board to continue to act in the public interest on behalf of the taxpayers of Citrus County requires mechanisms to ensure adherence to the hospital board's public responsibilities [and] this Act provides an appropriate and effective means of addressing the [Foundation's] performance of its responsibilities to the public and to the taxpayers if Citrus County." Ch. 2011-256, Laws of Fla. Clearly, the State has established an interest here in protecting public funds.

Once the State's legitimate interest has been identified, the Court must consider "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *U.S. Fidelity*, 453 So. 2d at 1361. On that point, "courts properly defer to legislative judgment as to the

necessity and reasonableness of a particular measure." *Id*.; *see also Robinson v. Fla. Dry Cleaning & Laundry Bd.*, 194 So. 269, 274 (Fla. 1940) ("[I]f public necessity requires [certain regulations] it would be contrary to every concept of social justice to hold that the legislature could not grant relief."). The Foundation, as public operator of the public hospital, "cannot purport to regulate [itself] through private contracts and then seek shelter from state laws under those contracts." *See*, 18 So. 3d at 688. Indeed, "public hospitals [remain] subject to reasonable regulation and control by the governing authorities" when, as here, public necessity or social justice so requires. *West Coast Hosp. Ass'n v. Hoare*, 64 So. 2d 293, 298 (Fla. 1953).

Accordingly, this Court should recognize that the special act is valid.

III. Because the Foundation is a Public Entity, it Lacks Standing to Challenge the Constitutionality of Chapter 2011-256.

Finally, because "the Foundation serves no purpose other than to fulfill the Hospital Board's public function of operating hospitals in Citrus County" [Record, Vol. 3, pp. 770-71] the Circuit Court correctly held that the Foundation—as an instrumentality of the State or a quasi-public corporation—did not have standing to initiate the suit to challenge the constitutionality of Chapter 2011-256.

In *Florida Department of Agriculture and Consumer Services, v. Miami-Dade County*, 790 So. 2d 555 (Fla. 3rd DCA 2001), for example, the Third District Court of Appeal held that Miami-Dade County and the City of North Miami, *a*

municipal corporation, lacked standing to bring an action challenging the constitutionality of section 581.031(15)(a), Florida Statutes, which provided authority for the Florida Department of Agriculture to enter into any place and take possession of any material determined by that Department to pose a threat to the public interests of the State. In support of that determination, the court stated, "[i]n Florida, it is clear that state officers and agencies must presume legislation affecting their duties to be valid, and *do not have standing to initiate litigation for the purpose of determining otherwise*." *Fla. Dep't of Agric.*, 790 So. 2d at 557-58 (internal quotes omitted). The opinion then explains that the constitutionality of a statute may only be raised by a public agency in a defensive manner. (citing *Dep't of Education v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982) ("In fact, the case law is clear that the *only* time that a public officer or agency may raise the constitutionality of a state statute is in a defensive posture. … Accordingly, we find that neither the County nor City had standing to initiate a constitutional challenge to [the statute].)"

This Court has left no doubt that a public official may not seek a declaratory judgment action questioning a law the official is duty-bound to apply. *See Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 802 (Fla. 2008); *Dept. of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981). "Disagreement with a constitutional or statutory duty, or the means by which it is

to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion." *Markham*, 396 So. 2d at 1121 (citing *Askew v. City of Ocala*, 348 So. 2d 308 (Fla. 1977)).[3] Accordingly, the Foundation, as a public entity, lacks standing to challenge the constitutionality of Chapter 2011-256, Laws of Florida.

CONCLUSION

For the reasons expressed above, the decision of the First District Court of Appeal should be reversed.

Respectfully Submitted,

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[3] *Markham* was partially superseded on other grounds but remains good law on this point. *See Crossings*, 991 So. 2d at 802.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with Rule 9.210(a), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished this 2 day of May, 2013, by electronic mail to:

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