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Case No. SC14-69

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

DORTHY SCHWEFRINGHAUS AND CSX TRANSPORTATION, INC.,

Respondents.

Appeal from the Second District Court of Appeal,
Case No. 2D12-1097

ANSWER BRIEF OF RESPONDENT CSX TRANSPORTATION, INC.

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INTRODUCTION

This is a straightforward breach-of-contract case. Petitioner Florida Department of Transportation ("FDOT") and respondent CSX Transportation, Inc. ("CSXT") are parties to an agreement that grants FDOT a license to maintain a highway across tracks owned by CSXT. In exchange for that license, the crossing agreement requires FDOT to indemnify CSXT for damages caused by the condition of the road. After holes in the road caused a fatal accident, FDOT refused to honor its contractual commitment.

FDOT seeks to evade liability for that breach by contending that the indemnity clause cannot be enforced unless FDOT's predecessor in interest had specific legislative authority to agree to the clause. That contention is wrong. All agree that a state agency may be sued for the breach of a contract the agency was fairly authorized to enter into. This Court's prior decisions, to say nothing of basic logic, also compel the conclusion that, when a state agency has statutory authority to enter into a contract, it can agree to indemnify a private party as part of that contract even absent specific authorization for the indemnity clause. Thus, because it is undisputed that FDOT's predecessor in interest was authorized to sign the crossing agreement, FDOT is bound by the entire agreement, including the indemnity clause, and should not be permitted to get out of it.

FDOT argues in the alternative that its liability under the crossing agreement

is limited by the damages cap in Florida Statutes § 768.28(5). The text of the statute makes clear, however, that the cap applies only to tort suits. As this Court has previously recognized, an action for contractual indemnification is one for breach of contract. The damages cap in § 768.28(5) accordingly cannot limit FDOT's liability.

STATEMENT OF FACTS AND OF THE CASE

A. Statement Of Facts

In 1936, the Florida State Road Department entered into a contract with receivers of the Seaboard Air Line Railway Company. *See* A11-13.[1] That agreement "grant[ed]" the Road Department "the right and privilege *** to locate and continue" a road crossing "over and upon [the railroad's] right of way and property" outside the town of Fivay in Pasco County. A11.

The crossing agreement specified that the Road Department would "construct and maintain the *** highway" and "bear" the "expense[s]" associated with the road. A11. The agreement also provided that the state would "indemnify and save harmless the Receivers from and against all loss, damage or expense arising or growing out of the construction, condition, maintenance, alteration or removal of the highway." A13. The parties further agreed that, if the state "default[ed] in

[1] We use "R___" to refer to the record, "A__" to refer to the appendix filed by FDOT containing the district court of appeal opinions, "FB__" to refer to FDOT's brief, and "AB__" to refer to the *amicus curiae* brief of the Florida Association of County Attorneys ("FACA").

any of its undertakings" under the crossing agreement, the receivers could "cancel [the] agreement by written notification *** at any time." A12.

CSXT is the successor to the receivers under the crossing agreement, and FDOT is the successor to the Road Department. *See* R634, 676, 1903; *see also* A13 (providing that the agreement "shall inure to the benefit of" the receivers' "successors"). In both 1969 and the 1990s, FDOT honored the provisions of the crossing agreement requiring it to maintain and repair the road. *See, e.g.*, R1907.

In 2002, an accident occurred at the crossing. As a truck towing a trailer filled with lumber traversed the crossing, the trailer became detached. R53; *see also* R946, 1076-77. The trailer struck a car being driven by Robert Schwefringhaus. R53; *see also* R780-81. Mr. Schwefringhaus died in the accident; his wife Dorthy Schwefringhaus, a passenger in the car, suffered severe injuries. *See, e.g.*, R53-54, 781-83. The truck drove on, and the driver of the truck was never definitively identified. *See, e.g.*, R964, 990-91, 1080-81.

B. Statement Of The Case

1. Following the accident, Dorthy Schwefringhaus brought a negligence action against both CSXT and the lumber yard that had sold lumber to the driver of the truck. R52-58. Ms. Schwefringhaus alleged, and provided evidence, both that there were "holes in the asphalt" where the road "joins" the "[c]rossing surface pad" at the time of the accident (R671; *see also* R744-45) and that the holes caused

the accident (*see*, *e.g.*, R1831-32, 1854-56). James Andrews, a district railroad administrator for FDOT (R647) and the FDOT representative "with the most knowledge concerning the maintenance, inspection and repairs of the *** crossing in question" (R624), conceded that it is FDOT's "responsib[ility] to maintain[] the asphalt" at the crossing. R670; *see also* R700-03, 705-06, 717. Andrews also conceded that it would be FDOT's responsibility to "fill[]" the "holes" that existed at the time of the accident. R671.[2] Following mediation in which FDOT participated, CSXT settled the first-party claims against it for $125,000. R3257; *see also* R2877 (voluntarily dismissing those claims).[3]

2. After Ms. Schwefringhaus filed the first-party complaint, CSXT sought indemnification from FDOT. *See* R758. When FDOT refused it, CSXT filed a third-party complaint alleging, among other things, that FDOT had "breached its contractual obligations with [CSXT] by failing to honor the indemnity provisions contained" in the 1936 crossing agreement. R323. CSXT ultimately sought to recover the amount of the settlement plus $377,462.22 in fees and costs incurred in defending against the first-party claims. *See*, *e.g.*, R3270.

The circuit court granted CSXT partial summary judgment against FDOT, holding that "the 'indemnity provision' of the *** 1936 [crossing] agreement is

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[2] FDOT eventually paid to have the holes repaired. *See* R693-94, 746-56.

[3] The lumber yard reached a separate settlement with Ms. Schwefringhaus. *See* R1465-66.

*** valid and enforceable." R2517. After a bench trial (*see* R3223-72), the circuit court then found that the indemnity provision applied to the first-party claims arising out of the 2002 accident, because those claims "ar[ose] or gr[ew] out of the maintenance or poor condition of the roadway." R3270. The court awarded CSXT $502,462.22, the full amount it had sought. *See* R3211-12.

3. FDOT appealed, arguing that "the indemnity clause is void because the State Road Department never had authority to enter into an indemnity agreement" and in the alternative that Florida Statutes § 768.28(5) limits the state's liability. A4.[4] A divided panel of the Second District Court of Appeal affirmed. A1-23.

a. The majority first held that the State Road Department "had the authority to enter into" the crossing agreement and that FDOT was therefore "bound by" the agreement. A8. In so holding, the majority reasoned that "the State Road Department could have purchased the land or paid an annual fee for its use" and that the state instead "obtained the right-of-way through a license that was apparently free of charge for its first sixty-five years." A6-7. The majority further reasoned that the issue in this case "is similar to the issue addressed" by this Court "in *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005)," which enforced "a comparable agreement negotiated by a [mu-

[4] FDOT did not challenge the circuit court's finding that the condition of the roadway caused the accident.

nicipal] utility authority." A4.

The majority found support for its holding in the fact that FDOT was attempting to invalidate an agreement "under which the railroad has fully performed for sixty-five years" and that FDOT had "[n]ever" challenged until CSXT "asked [FDOT] to pay" indemnification for the first time. A7-8. Acknowledging that this statement "relies on a concept of estoppel," the majority "conclude[d]" that estoppel could be applied against FDOT "in this limited context." A8 n.5.

The majority further noted the "ramifications of [FDOT's] position"—that, if the indemnity provision were void, the crossing agreement "arguably would be an 'illusory contract'" that CSXT "would have the right to treat *** as void" and that, because "similar indemnity agreements were common both for crossing agreements and sidetrack agreements," the "immediate impact on Florida" of FDOT's position "is impossible to calculate." A5-6 (quoting *Pan-Am Tobacco Corp. v. Dep't of Corrs.*, 471 So. 2d 4, 5 (Fla. 1985)). The majority also recognized that "[t]he nature of the risk involved in" the crossing agreement means that CSXT "will be the defendant of first choice when the other option is a government entity," even when damages occur in whole or in part because of FDOT's "failure to maintain the road." A7.

The majority then rejected FDOT's alternative theory that its liability is limited by the statutory cap in Florida Statutes § 768.28(5). The majority did so be-

cause the statute "appl[ies] only to judgments recovering damages for tort," while FDOT's "liability *** to [CSXT] was based on an express written contract." A9.

b. The dissenting opinion agreed with FDOT that the indemnity clause is void, on the theory that there is no "specific statutory authorization for the indemnity clause in the crossing agreement." A14 (Wallace, J., dissenting). The dissent characterized the majority opinion as resting "entirely on an estoppel against FDOT" and argued that estoppel could not apply here, because FDOT is a "state agency" that can be estopped only in "exceptional" circumstances. A21. The dissent also disagreed with the majority's view of the ramifications of FDOT's position, expressing the view that the "court lack[ed] sufficient information to predict the impact" of that position. A20.

The dissent did not disagree with the majority's conclusion that the statutory limit on liability in § 768.28(5) cannot apply to CSXT's suit against FDOT.

4. Both the majority and the dissent in the district court of appeal certified the questions in issue—whether the indemnity clause is enforceable, and whether § 768.28(5) limits FDOT's liability—as questions of great public importance. A9, 23. This Court accepted jurisdiction. *FDOT v. Schwefringhaus*, 2014 WL 1654458 (Fla. Apr. 3, 2014).

SUMMARY OF ARGUMENT

I. A. The indemnity clause is enforceable against FDOT. This Court held in

Pan-Am that, although sovereign immunity typically protects the state from being sued, the state has waived sovereign immunity for suits to enforce written contracts that state agencies have statutory authority to enter. That rule precludes any argument that the indemnity clause is unenforceable. It is undisputed that this case involves a written contract, that the contract covers the parties' dispute, and that FDOT's predecessor had express statutory authority to enter into it. FDOT is thus subject to suit for breach of the contract—including breach of the indemnity clause.

FDOT's argument that the indemnity provision is enforceable only if the Legislature specifically authorized indemnification cannot be reconciled with *Pan-Am*, which asks only whether the *contract*, not each provision of the contract, is authorized. FDOT's argument is also precluded by this Court's decision in *American Home*, which held that, where there is specific authorization for a contract, an indemnity clause that is "part and parcel" of the authorized contract is enforceable. 908 So. 2d at 476. That holding, in turn, finds support in other decisions making clear that *Pan-Am* broadly abrogates the state's sovereign immunity from suit for breaches of authorized contracts. It finds further support in the fact that indemnity clauses represent contractual consideration that is materially indistinguishable from other types of consideration that the Legislature necessarily authorizes when it grants a state agency permission to enter into a contract.

FDOT makes numerous arguments in an effort to avoid the application of these principles, but none of its arguments is plausible. FDOT claims that the Legislature "hyper-specifically" authorizes contracts, but that is true only as to their *subject matter*, not the types of consideration they contain. FDOT cites the rule that appropriations must be authorized, but *American Home* makes clear that authorization to enter into a contract satisfies that requirement. FDOT relies on opinions of the Attorney General suggesting that specific authorization for indemnity provisions is required, but those opinions rest on the erroneous premise that the state has not waived its sovereign immunity in *any* contract action. And while FDOT asserts that, because a handful of statutes specifically authorize indemnity clauses, indemnity is unauthorized in all other cases under the interpretive canon *inclusio unius est exclusio alterius*, that canon does not apply here, both because this case involves constitutional principles rather than statutory interpretation and because application of the canon in this context would stretch it beyond recognition.

B. FDOT contends that the district court of appeal rested its decision entirely on principles of estoppel. That contention is mistaken. The court cited estoppel only in noting that FDOT is seeking to repudiate a contract under which CSXT and its predecessors have performed for 65 years. Its core holding—that FDOT is bound by the contract because its predecessor had authority to enter into it—does not rest on estoppel.

In any event, the district court of appeal was correct to conclude that FDOT could be estopped. It is undisputed that the general elements of estoppel—a representation, reliance on the representation, and a detrimental change in position—are satisfied in this case. And although the state may only be estopped in extraordinary circumstances, such circumstances are present where, as here, a private party relies on an affirmative and intentional representation of a state agency and the agency then seeks to repudiate that representation. The rule that unauthorized representations will not bind the state does not apply, because FDOT's predecessor had express authority to enter into the crossing agreement.

C. As the district court of appeal recognized, releasing FDOT from its contractual promise to indemnify CSXT would have far-reaching and highly undesirable consequences. It is undisputed that, if the indemnity clause is unenforceable, CSXT may treat the entire crossing agreement as void. That result follows both from the express language of the contract and from the rule that a contract is illusory if it is not mutually enforceable.

The crossing agreement is not the only contract that FDOT's position would render invalid. The district court of appeal recognized that numerous crossing agreements contain indemnity clauses that run in favor of the railroad. That conclusion is unsurprising, given that every railroad crossing gives rise to a new risk of accidents that railroads would have to bear in the absence of such a provision.

Although FDOT attempts to resist that conclusion, it provides no competent evidence suggesting that indemnity provisions are rare.

In any event, the implications of FDOT's position extend far beyond crossing agreements. FDOT's contention that indemnity clauses cannot be enforced absent specific legislative authorization would invalidate almost every contract in which a state agency indemnifies a private party. Worse still, because the logical implication of FDOT's position is that a state agency cannot provide *any* type of consideration not authorized by statute, FDOT's argument could render invalid almost every contract between the state and a private party and bring public-private partnerships throughout the state to a standstill. This Court should not countenance a result that has these consequences.

II. A. FDOT's alternative argument—that its liability is limited by Florida Statutes § 768.28(5)—fares no better. The text of the statute makes clear that the limitation applies only to "tort claims." Fla. Stat. § 768.28(5). It does not apply here, because CSXT has sued FDOT for breach of contract, not for a tort.

This Court's decision in *American Home* compels this conclusion. That case held that § 768.28 did not apply to a suit for breach of an indemnity clause in a crossing agreement even though the railroad sought indemnification for an underlying negligence claim. The holding in *American Home* is supported both by the fact that indemnification actions are governed by principles of contract law and by

the Legislature's recognition that allowing agencies to be sued under contractual indemnity clauses does not affect the state's liability in tort actions.

B. FDOT's contrary contentions are unpersuasive. It argues that state agencies may not contract to increase the damages cap in § 768.28—but that argument erroneously presumes that the cap applies here. FDOT also argues that *American Home* is not controlling on this issue, because that case involved a suit against a municipality rather than a state agency. But the relevant holding in *American Home* did not depend upon the identity of the defendant. And while FDOT appeals to interpretive canons and opinions of the Florida Attorney General suggesting that § 768.28 applies to contractual actions, those authorities cannot trump the unambiguous text of the statute. Finally, there is no plausible basis for FDOT's assertion that CSXT's claim sounds in tort.

STANDARD OF REVIEW

This Court "conduct[s] a de novo review" of the trial court's entry of summary judgment. *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1268 (Fla. 2013).

ARGUMENT

I. FDOT IS BOUND BY THE INDEMNITY CLAUSE IN THE CROSSING AGREEMENT

A. The Entire Crossing Agreement, Including The Indemnity Clause, Is Enforceable

The district court of appeal held that FDOT is "bound by [the] crossing

agreement," including the indemnity clause, because FDOT's "predecessor had the authority to enter into" the contract. A8. That holding is correct.

1. The state has waived sovereign immunity for suits for breach of any contract authorized by statute

In *Pan-Am*, this Court held that, "where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of contract." 471 So. 2d at 5. Thus, a state agency cannot rely on sovereign immunity to bar enforcement of an "express, written contract[] into which [the] agency has authority to enter." *Id.* at 6. An agency also cannot rely on sovereign immunity to bar enforcement when the Legislature has authorized the agency to "undertake *** activities which, as a matter of practicality, require entering into contract." *Id.* at 6.

"This Court has repeatedly followed the principles of *Pan-Am*." *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1269 n.9 (2008). The crossing agreement is therefore enforceable against FDOT if it represents an express, written agreement that FDOT's predecessor had statutory "authority to enter." *Pan-Am*, 471 So. 2d at 6.

2. FDOT's predecessor was expressly authorized to enter into the crossing agreement

FDOT is bound by the crossing agreement, because the test in *Pan-Am* is satisfied: there is an express, written contract, and the Legislature authorized

FDOT's predecessor to enter into that contract.

a. It is undisputed that the crossing agreement is an "express, written contract[]." *Pan-Am*, 471 So. 2d at 6. It is equally clear that the agreement governs the parties' dispute. It was signed by the "predecessors in interest" of, and is binding on, FDOT and CSXT. FB1. And CSXT has sued FDOT to enforce the provision of the crossing agreement requiring FDOT to indemnify CSXT "against all loss, damage or expense arising or growing out of the construction, maintenance, alteration or removal of the highway" crossing. A13.

The indemnity clause would, if enforceable, require FDOT to indemnify CSXT for the costs and damages arising from the 2002 accident at the crossing. As the district court of appeal recognized—and contrary to FACA's contention (*see* AB9)—the crossing agreement does "*not* indemnify[CSXT] for negligent acts of [CSXT] or others," but only for "losses arising *** in connection with" FDOT's own "obligation[] to perform under th[e] agreement." A6. The contract, in other words, indemnifies CSXT only for the consequences of FDOT's negligence. *See also Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627, 629 (Fla. 1992) (indemnity provision will be construed to cover the indemnitee's own negligence only if the contract "express[es]" that "intent" in "clear and unequivocal terms") (quotation marks omitted).

FDOT does not and cannot dispute that its own negligence caused the 2002

accident. At the time of the accident, there were holes in the road at the crossing. *See, e.g.*, R671, 744-45. The circuit court found, and FDOT does not deny, that the holes caused the trailer that killed Robert Schwefringhaus to detach from the truck that was towing it. *See* R3270; *see also* R1831-32, 1854-56. And FDOT's representative repeatedly conceded during his deposition that it was FDOT's general responsibility to maintain the road and its specific responsibility to ensure that the holes were fixed. *See* R670-71, 700-03, 705-06, 717. Thus, as FDOT admits, *Pan-Am* "applies to the crossing agreement." FB25.

b. The State Road Department was also "fairly authorized" to enter into the crossing agreement. *Pan-Am*, 471 So. 2d at 5. In fact, that conclusion is undisputed, for the good reason that the Road Department had *express* statutory authority to enter into the agreement. As this Court recognized in *Treadway v. Terrell*, 158 So. 512, 518 (Fla. 1935), the Legislature provided the Road Department with both the general statutory authority to "'contract for work done'" (*id.* (quoting Acts 1931, c. 15022, § 1)) and the specific statutory authority "'to contract for,'" among other things, "'the construction and maintenance of roads'" (*id.* (quoting § 1635 (1195) Comp. Gen. Laws)).

Those statutes cover the crossing agreement. FDOT's corporate representative testified that FDOT performs work under the contract (*see* R700-04), and FDOT's counsel conceded in the circuit court that the crossing agreement is a

"contract" for "work done" (R3215). The crossing agreement itself, moreover, demonstrates that it is a contract that permits FDOT to "construct and maintain" a road "over and upon [the railroad's] right of way and property." A11. Thus, as the court below held, there is "no question that the State Road Department had" the authority both "to build [a] road" and "to obtain the right-of-way to build the road" by entering into a crossing agreement with CSXT's predecessor. A6.[5] The test in *Pan-Am* is therefore satisfied, with the result that the agreement is enforceable and "the defense of sovereign immunity will not protect" FDOT from this "action arising from [FDOT's] breach of [the] contract." *Pan-Am*, 471 So. 2d at 5.

3. The crossing agreement is enforceable despite the absence of specific legislative authorization for the indemnity clause

a. Nothing more is necessary to show that FDOT is bound by the indemnity clause. In particular, although FDOT argues that "[t]here was no specific statutory authority" permitting it to "agree to indemnify [CSXT] as *** consideration for the crossing agreement" (FB15; *see also* AB8, 11), no such authority is required. *Pan-Am* held that only the "contract"—not each individual provision of the contract—must be "fairly authorized" before the state can be sued for a breach. 471 So. 2d at 5; *see, e.g.*, *Crews v. Fla. Pub. Emps. Council 79*, 113 So. 3d 1063,

[5] The statute allowing the Road Department to contract for work done also specified that the Road Department could be "'su[ed] at law and in equity'" under such contracts. *Treadway*, 158 So. at 518 (quoting Acts 1931, c. 15022, § 1). The statute thus expressly authorizes not only the crossing agreement but CSXT's suit to enforce the agreement.

1069 (Fla. 1st DCA 2013) (holding that, once an agency is authorized to enter into a type of contract, a particular contract of that type is "valid absent a legislative directive to the contrary").[6]

b. Even if it were not foreclosed by *Pan-Am*, FDOT's argument that the indemnity clause "is unenforceable" because "[t]here was no specific statutory authority" for the provision (FB15) would be foreclosed by this Court's decision in *American Home*, 908 So. 2d 459. In *American Home*, as in this case, there was a crossing agreement with a provision obligating a public entity—there, a municipal authority—to indemnify a railroad. *See id.* at 463. In *American Home*, as in this case, the railroad sued the public entity to enforce the indemnity clause. *See id.* at 464. And in *American Home*, as in this case, the public entity argued that the indemnification clause was unenforceable, because, although the entity "had the authority *** to enter into" the crossing agreement, it did not have "specific legislative authority" to agree to the indemnity provision. *Id.* at 466, 476.

This Court rejected that argument. It recognized that "[t]he indemnification provision was" simply "part and parcel of the Crossing Agreement." *Id.* at 476. It further recognized that the agreement itself was "'fairly authorized' by Florida

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[6] FDOT contends that *County of Brevard v. Miorelli Engineering*, 703 So. 2d 1049 (Fla. 1997), supports its contrary view (*see* FB26-27). But *Miorelli*, which simply "declined to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of a contract" (703 So. 2d at 1051), has no bearing on this case.

law." *Id.* The Court thus held that, as part of an authorized contract, the indemnity provision was "binding and enforceable," and that the municipality therefore could "not invoke sovereign immunity to defeat its obligations under the contract." *Id*.

The same reasoning applies here. As demonstrated above (at 15-16), the crossing agreement in this case, like that in *American Home*, was authorized by statute. And even a cursory reading of the crossing agreement here demonstrates that all of its provisions relate to the "construction and maintenance" of the road across CSXT's tracks. A11. The indemnity clause—which requires FDOT to indemnify CSXT for "all loss, damage or expense arising or growing out of the construction, condition, maintenance, alteration or removal of the highway"—is no exception. A13. Thus, as in *American Home*, the indemnity clause is simply "part and parcel" of a larger agreement that was authorized by law. *Am. Home*, 908 So. 2d at 476. It follows that the indemnity provision is "binding and enforceable" and that FDOT cannot "invoke sovereign immunity to defeat its obligations under the contract." *Id.*

FDOT seeks to resist that conclusion on the ground that *American Home* involved a municipal authority rather than a state agency, and that the Court therefore did not decide whether "specific statutory authorization to enter into indemnification" clauses is required under *Pan-Am. Am. Home*, 908 So. 2d at 467 (capitalization omitted); *see* FB24-26. But the distinction between a state agency and a

municipal agency is one without a difference as far as this issue is concerned.

To be sure, FDOT's status as a state agency means that the test in *Pan-Am* governs here, even though it did "not control" the outcome in *American Home*. 908 So. 2d at 474. As a result, the crossing agreement in issue is enforceable only if FDOT was "fairly authorized" to enter into the agreement (*Pan-Am*, 471 So. 2d at 5), even though the municipal authority in *American Home* "did not need an express grant of authority to execute the crossing agreement" (908 So. 2d at 475). But the importance of the distinction between states and municipalities ends there.

FDOT cannot dispute that, where statutory authority for a contract exists, the state has waived its sovereign immunity under *Pan-Am*. And once the cloak of sovereign immunity has been lifted, the state stands in the same position as the municipality in *American Home*—and indeed as any other party that signs and then breaches an enforceable contract. The inescapable conclusion is thus that state agencies can be sued for breach of *any* provision of an authorized contract, even if the provision was not itself specifically authorized by statute. *Am. Home*, 908 So. 2d at 476.[7]

There can be no doubt that that conclusion is correct. It finds support not on-

[7] Contrary to FDOT's suggestion (*see* FB25-26), the concurring opinion in *American Home*, which explored the question whether the municipal authority's liability would be limited by § 768.28 "if" that statute "appl[ied]" to an action for contractual indemnity (*Am. Home*, 908 So. 2d at 479 (Cantero, J., concurring)), provides no support for the position that the indemnity clause is unenforceable.

ly in *American Home* but also in other decisions recognizing that *Pan-Am* prevents the state from raising a sovereign-immunity defense in suits for breach of statutorily authorized contracts.[8]

c. The indemnity clause is also enforceable under basic principles of contract law. As a general rule, every contract must contain some type of consideration. *See, e.g.*, *Frissell v. Nichols*, 114 So. 431, 434 (Fla. 1927); *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. 4th DCA 1982). Thus, when the Legislature authorizes an agency to enter into a contract, it necessarily authorizes the agency to provide consideration for the contract.

It is undisputed that, as this Court recognized in *American Home*, an indemnity clause is "'consideration'"—in a crossing agreement, consideration for the "license" to build a right-of-way across the railroad's tracks. 908 So. 2d at 476; *see also* FB13, 36-37 (implying that the indemnity provision is consideration); AB18-19 (same); A19-20 (Wallace, J., dissenting) (same). It thus follows that the Legislature authorizes indemnity clauses when it authorizes a contract, unless indemnity

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[8] *See, e.g.*, *Broward Cnty. v. Finlayson*, 555 So. 2d 1211, 1213 (Fla. 1990) (holding that, although the waiver of sovereign immunity in *Pan-Am* does not expressly extend to prejudgment interest, public entities may be required to pay such interest as a "general rule"); *White Constr. Co. v. State, Dep't of Transp.*, 860 So. 2d 1064, 1067 (Fla. 1st DCA 2003) (applying *Pan-Am* to conclude that the statutory limitations period for requests to arbitrate construction contracts with the state does not give FDOT a "sovereign immunity" defense); *Pub. Health Trust of Dade Cnty. v. Dep't of Mgmt. Servs.*, 629 So. 2d 189, 190 (Fla. 3d DCA 1993) (awarding prejudgment interest against the state even though such an award was "not expressly provided for by statute or in the contract").

clauses differ from other types of consideration in a way that suggests that specific legislative authorization should be required. FDOT, however, does not even attempt to point to any such difference, and none exists.

FDOT's core contention is that indemnification triggers sovereign-immunity concerns because state agencies may "expend funds *** only to the extent authorized by" statute. FB14; *see Am. Home*, 908 So. 2d at 474 (stating this rule). But *any* type of consideration provided by a state agency to a private party must "constitute" either "a benefit to the [private party] or a detriment to the [agency]" (*Mangus v. Present*, 135 So. 2d 417, 418 (Fla. 1961)) that the agency was not "already under obligation" to undertake (*Hogan v. Supreme Camp of Am. Woodmen*, 1 So. 2d 256, 258 (Fla. 1941)). As a consequence, almost every type of consideration in a contract will directly or indirectly require a state agency to "expend funds."

In the contract at issue, for example, CSXT's predecessor could have sought various types of consideration from the state. It might have asked the state to pay a lump sum of money—be it $10,000, or $100,000, or $1 million—in exchange for the license to build the crossing. As the court below recognized, the railroad might also have sought "an annual fee sufficient to insure the risk" of accidents created by the crossing. A8.[9] Either type of consideration would require the state to "ex-

[9] FDOT contests the district court of appeal's separate statement that the

pend funds." FB14. Furthermore, assuming *arguendo* that FDOT is correct to characterize the provisions of the crossing agreement requiring the state to pay for "'maintenance'" and for "'watchmen or gates'" as consideration (FB37 (quoting A11); *but see infra* n. 16), those provisions would also constitute contractual obligations to expend funds. Authorization to enter into a contract thus entails authorization to enter into an indemnity clause no less than it entails authorization to provide other types of consideration.

4. FDOT's arguments lack merit

FDOT advances a number of arguments intended to support its view that the indemnity clause is unenforceable absent specific statutory authorization. Each of those arguments is unpersuasive.

a. As an initial matter, FDOT contends that "[t]he statutory authority to contract is hyper-specific." FB15. But FDOT does not even attempt to cite statutes showing that the Legislature "hyper-specifically" regulates the *type of consideration* agencies can include in contracts. Instead, it cites statutes demonstrating that the Legislature tightly controls the *subject matter* of the contracts into which state agencies may enter. *See* FB14-15 (citing statutes concerning "road construction

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agency "could have taken the land" for the crossing "by eminent domain." A6. That statement, however, is a *dictum* not relevant to the outcome of this case. In any event, FDOT's argument—that the use of eminent domain would have been "preempted by the federal Interstate Commerce Commission Termination Act" (FB39 n.5)—is mistaken, because that statute, which was enacted in 1995, could not have barred an exercise of eminent domain in 1936.

and maintenance," "right-of-way services," "surplus property," "transportation planning services," "the purchase of commodities," and "memorials to military veterans at rest areas"). The Legislature's practice of specifically defining the substantive areas in which agencies may contract cannot help FDOT, because—as demonstrated above (at 15-16)—the State Road Department had specific statutory authority to enter into the crossing agreement.[10]

FDOT's argument is also contrary to *Pan-Am*. That case recognized that the Legislature can give an agency *implied* authority to enter into contracts by authorizing the agency to "undertake *** activities which, as a matter of practicality, require entering into contract." 471 So. 2d at 6; *see also Am. Home*, 908 So. 2d at 475 (enumerating statutes that "implicitly grant state agencies the power to contract for necessary goods and services"). Given that an agency can have implied authority to enter into a contract, it follows *a fortiori* that an agency can have implied authority to enter into specific contractual provisions. *Pan-Am* thus necessitates the conclusion—contrary to FDOT's position—that state agencies can provide contractual consideration even without specific statutory authorization to do

[10] In an apparent attempt to elide the distinction between different types of *contracts* and different types of *consideration*, FACA characterizes the crossing agreement as "an indemnity agreement." AB8. That attempt must be rejected, because, as shown above (at 18), the purpose of the agreement is not to indemnify CSXT. Its purpose is to provide a license to the state to build a crossing—and the indemnity clause is "part and parcel" of that broader agreement. *Am. Home*, 908 So. 2d at 476.

so.

b. FDOT also seeks to rely (FB14) on the provision of Florida's constitution stating that "[n]o money shall be drawn from the treasury except in pursuance of appropriations made by law" (Fla. Const. art. VII, § 1(c)) and on the statute similarly providing that "[n]o agency *** shall contract to spend *** any moneys in excess of the amount appropriated *** unless specifically authorized by law" (Fla. Stat. § 216.311(1)). FDOT argues that these provisions "mean that [FDOT], like all state agencies, may expend funds and enter into contracts only to the extent authorized by specific statutory authority." FB14.

It does not follow, however, that there must be specific statutory authority for each type of *consideration* in a contract—and any attempt to draw that conclusion would be inconsistent with *American Home*. That decision makes clear that, although "Florida's Constitution expressly limits the state's ability to expend funds and enter contracts by requiring specific statutory authority," this limitation is satisfied where a "law[] *** grant[s]" the "agenc[y] the express authority to execute contracts." *American Home*, 908 So. 2d at 475. And the constitutional and statutory provisions on which FDOT relies do not suggest that indemnity provisions somehow require specific authorization even though other types of contractual consideration do not. To the contrary, the legislative history related to the SunRail project on which FDOT relies (*see* FB18) makes clear that "indemnification provi-

sions" in contracts between the state and railroads "do *not* require any appropriation from the Legislature." Fla. S. Comm. on Judiciary, SB 1212 Staff Analysis 14 (Mar. 13, 2009).[11]

c. FDOT cites (FB15-17) a 1978 opinion of the Florida Attorney General (*see* FB15-17) suggesting that "[s]tate agencies are without statutory power to enter into [indemnity] agreements" absent legislation specifically authorizing the agency to indemnify another party (Op. Att'y Gen. Fla. 78-20). That opinion, however, "is not binding on a court." *Am. Home*, 908 So. 2d at 473. And although the opinion is "entitled to careful consideration," it cannot be seen as "'highly persuasive'"—or in fact persuasive at all—on the question before the Court here. *Id.*

The Attorney General's conclusion that specific legislative authorization is needed for indemnity clauses rests almost entirely on the premise that, as a general matter, "courts are without jurisdiction over actions against the state for breach of contract." Op. Att'y Gen. Fla. 78-20. Whatever the merits of that premise in 1978, it cannot survive this Court's holding in *Pan-Am* that "the defense of sovereign immunity will not protect the state from action arising from the state's breach of [a] contract" the agency had authority to enter into. 471 So. 2d at 5. Indeed, *Pan-*

[11] FACA, meanwhile, asserts that FDOT lacks authority to "violate the Florida Constitution." AB11. But that assertion assumes the conclusion that FDOT and FACA are attempting to prove—that requiring FDOT to honor its contractual commitments would violate the Florida Constitution. For the reasons above (at 13-22), it would not.

Am expressly "recede[d] from" the very authority on which the Attorney General relied. *Id.; see* Op. Att'y Gen. Fla. 78-20.[12] And to the extent that the Attorney General's opinion can be construed as suggesting that a specific "appropriat[ion]" of "funds" for an indemnity provision is required (Op. Att'y Gen. Fla. 78-20), it is unpersuasive for the reasons above (at 13-22).

d. FDOT also relies on a handful of statutes in which "the Legislature[]" provided "specific authorization for state agencies *** to indemnify" another party. FB18.[13] FDOT argues that, under the interpretive canon *inclusio unius est exclusio alterius*, these statutes give rise to the negative implication that "the Legislature did not authorize state agencies to agree to indemnify" private parties in any other situation. FB19. That argument should be rejected.

To begin with, the *inclusio unius* canon does not apply here, because FDOT's underlying argument is about constitutional principles, not about the meaning of a particular statute. FDOT's basic contention is that "Florida's Constitution" limits a state agency's ability to enter into indemnity clauses by requiring

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[12] FACA also cites Attorney General Opinions 80-77 and 90-21. *See* AB13. Opinion 80-77, however, rests on the same erroneous premise as Opinion 78-20. *See* Fla. Att'y Gen. Op. 80-77. Opinion 90-21, meanwhile, concludes that contractual indemnity clauses somehow "alter" the "waiver of sovereign immunity" for "tort" claims in Florida Statutes § 768.28. Op. Att'y Gen. 90-21. As we explain below (at 42-50), that conclusion is equally erroneous.

[13] FACA attempts to supplement FDOT's list (*see* AB14-15), but one of those statutes—Florida Statutes § 365.171(14)—does not exist.

specific statutory authority for them. *E.g.*, FB9-10, 12, 14, 17. The statutes FDOT cites cannot advance that argument, because the fact that the Legislature enacted *statutes* that authorize contractual indemnification in some circumstances has no bearing on the requirements of the Florida *Constitution*. And even assuming *arguendo* that the statutes reflect the Legislature's implicit and sporadic interpretation of the Constitution, that interpretation—unlike the Legislature's intent in passing a statute—is not binding on this Court. *See, e.g.*, *In re Senate Join Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 621 (Fla. 2012) ("recogniz[ing]" this Court's "independent constitutional obligation to interpret *** state constitutional provisions").[14]

While FDOT seeks support for its *inclusio unius* argument in *Florida Election Commission v. Davis*, 44 So. 3d 1211 (Fla. 1st DCA 2010) (*see* FB19-20), *Davis* in fact illustrates why the canon is inapplicable here. *Davis* concerned whether administrative law judges ("ALJs") could assess civil penalties for election-code violations. *See* 44 So. 3d at 1212. The parties agreed that ALJs could do so only if they had "statutory authority to impose sanctions." *Id.* at 1214. Thus, the only question in *Davis* was whether the statutes governing proceedings for election-code violations provided that authority. The First District determined that no

[14] As noted above (at 24), the Legislature codified the constitutional rule that agencies cannot contract to spend unappropriated funds in Florida Statutes § 216.311, but that statute—which was first enacted in 1969—could not have governed the actions of the State Road Department in 1936.

statute did so. In reaching that conclusion, it noted that other statutes expressly provide ALJs with authority to impose sanctions, meaning that "[t]he Legislature well knows how to confer" that "power" when it wishes to do so. *Id.* at 1215.

Here, by contrast, the question is *not* whether a particular statute provides FDOT with the specific authorization to enter into indemnity clauses. The question is the logically prior one that was undisputed in *Davis*: whether specific statutory authority must exist under Florida's Constitution. That is not a question of statutory interpretation or legislative intent, and thus it is not a question as to which the Legislature's actions are relevant.

Even if this case did present a question of statutory interpretation, *inclusio unius* would "not apply 'unless it is fair to suppose that'" the Legislature "'considered [an] unnamed possibility and meant to say no to it.'" *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)); *see also Crews*, 113 So. 3d at 1072 (recognizing that the *inclusio unius* principle is limited by "common sense"). FDOT provides no reason to believe that, when the Legislature authorized indemnity clauses in certain circumstances, it was expressing the view that state agencies should *not* be allowed to indemnify private parties in *other* circumstances.

In fact, the available evidence is to the contrary. As an initial matter, all of the statutes that FDOT and FACA cite were enacted decades after the execution of

the 1936 crossing agreement—and the Legislature's decision to specifically address indemnification in detailed contemporary statutes cannot speak to its intentions 75 years ago. Furthermore, most of those statutes do not simply state that agencies have authority to indemnify private parties. They also expressly limit the types of indemnity clauses to which the agency can agree. *See* Fla. Stat. § 215.245; *id.* § 255.559(1); *id.* § 337.108(2)-(3); *id.*§ 341.302(17)(a); *id.* § 725.06(1) & (3). Particularly when they are read in light of this Court's decisions and basic contract law, therefore, the natural inference from these statutes is not that indemnity provisions are forbidden in other circumstances. It is that, in the situations addressed by the statutes, the Legislature wanted to place clear limits on state agencies' ability to agree to indemnity clauses in authorized contracts—limits that would not exist but for the statutes.

Florida Statutes § 341.302, which FDOT argues is especially "pertinent" to this case (FB18), confirms that the Legislature addresses indemnity provisions only when highly context-specific concerns call for express statutory guidance. Section 341.302 authorized the state to indemnify freight rail operators from which FDOT acquired a real-property interest in rail corridors for the purpose of providing commuter rail service. *See* Fla. Stat. § 341.302(17)(a). It is true, as FDOT notes, that the parties decided to make their "'agreement'" to share tracks "'contingent on the passage of certain indemnification provisions.'" FB18 (quoting SB 1212 Staff

Analysis 4). But that decision does not help FDOT, because it does not reflect a decision by the Legislature. Rather, as FDOT later concedes (*see* FB20-21), it reflects a decision by the *parties* to the contract, who apparently wished to eliminate any doubt about the validity of the agreement.

The reason for the parties' caution is clear. Unlike the crossing agreement in this case, the SunRail contracts require the state to indemnify both railroads and their "agents" for damages, including "punitive damages," arising out of the acts of "*any* person," no matter whether the damages arise from "negligence" or from "the willful misconduct of the freight rail operator." Fla. Stat. §§ 341.301 & 341.302(17)(a) (emphasis added); *accord* SB 1212 Staff Analysis 14. And unlike the crossing agreement here, the contracts underpinning the SunRail projects are not limited to one specific road crossing. As a consequence, the SunRail contracts, again unlike the indemnity clause in this case, carried the inherent potential to expose the state to almost boundless liability. Recognizing that possibility, the Legislature limited the state's liability under the indemnity clauses to $200 million (Fla. Stat. § 341.302(17)(a)(6)) and required the state to "purchase" up to $200 million in "liability insurance" and to "establish a self-insurance retention fund for the purpose of paying the deductible limit" (*id.* § 341.302(17)(b); *accord* SB 1212 Staff Analysis 14).

Thus, when it passed the SunRail statute, the Legislature approved uniquely

far-reaching indemnity clauses at the express request of the contracting parties. It also expressly limited the state's liability under those clauses. Fla. Stat. § 341.302(17)(a). The statute cannot be read to imply that basic indemnity clauses are somehow unauthorized "in all other cases." FB19.[15]

e. The remaining arguments of FDOT and FACA fare no better. FDOT challenges (FB36-38; *see also* AB18-20) the statement in the decision below that the indemnity clause represents the "sole consideration that the State *** provided" in the crossing agreement (A5). The correctness of that characterization, however, makes no difference to the outcome of this appeal. As demonstrated above (at 16-22), the statutory authority to enter into the crossing agreement entails the authority to provide consideration in the contract—including consideration in the form of an indemnity clause. The crucial—and undisputed—fact is thus that the indemnity provision provides *some* consideration for the state's "long-standing license to use" the crossing. A5. As in *American Home*, the indemnity provision is "binding and enforceable" because it constitutes at least "part of the 'consideration' for receiving this license." 908 So. 2d at 476.[16]

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[15] FACA suggests that the statutes authorizing indemnity provisions demonstrate that "an indemnity provision is a separate provision of a contract in and of itself." AB15. But the suggestion that an indemnity clause is separate from the contract of which it is a part is inconsistent with *American Home*'s holding that such a provision can be "part and parcel" of a larger agreement. 908 So. 2d at 476.

[16] In any event, FDOT has not shown that the district court of appeal's charac-

FDOT also claims that it would violate the separation of powers for an agency to "pay a claim on an indemnity clause the Legislature did not authorize," because it is "the Legislature" that "is vested with exclusive authority over the power of the purse." FB40-41. That argument rests on the assumptions that the Legislature must approve every specific clause of a contract and that an indemnity clause requires specific appropriations. As shown above (at 16-22), both assumptions are wrong. FDOT's appeal to the separation of powers should therefore be rejected.

Finally, FACA argues that "waive[rs of] sovereign immunity *** must be strictly construed." AB6. That argument is irrelevant, because, in the context of breach-of-contract actions, the state has waived its sovereign immunity if the test in *Pan-Am* is satisfied. For the reasons above (at 13-16), that test is satisfied here.

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terization of the indemnity provision as the "sole consideration" in the agreement is incorrect. A contractual promise constitutes consideration if the party was not "already under obligation" to perform the promised act. *Hogan*, 1 So. 2d at 258. FDOT contends that other provisions of the crossing agreement satisfy that condition, because the agreement altered the "allocation of costs" in the "default statutory scheme" concerning the costs of maintaining and upgrading the crossing. FB38. But that statutory scheme was not enacted until decades after the crossing agreement was signed and thus does not speak to the default allocation of burdens in 1936. *See* Fla. Stat. §§ 335.141, 337.401. The common-law rule, which would have governed before the statutes were enacted, was that, "once a governmental entity builds *** an improvement," it must "maintain and operate the property." *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 921 (Fla. 1985); *accord Dep't of Transp. v. Webb*, 438 So. 2d 780, 781 (Fla. 1983). That is the same rule enunciated in the contract (*see* A11-12), meaning that FDOT's promise to cover maintenance and operational costs was an obligation it already had and thus cannot qualify as consideration.

B. Estoppel Provides An Additional Basis For Holding FDOT To Its Promise

FDOT contends that the district court of appeal based its analysis "'entirely on an estoppel against [FDOT]'" and that the court erred by doing so. FB5 (quoting A21 (Wallace, J., dissenting)). FDOT is wrong on both counts. Although the court cited the concept of estoppel in a footnote, its conclusion that the indemnity clause is enforceable does not rest on that principle. The court was also correct in its belief that the state can be estopped when, as here, it refuses to honor an express representation in a written contract.

1. In concluding that FDOT is bound by the crossing agreement, the district court of appeal noted that FDOT is attempting to invalidate a "written agreement under which [CSXT] has fully performed for sixty-five years" and that CSXT did so in exchange for FDOT's promise to "indemnify [CSXT] for all loss" caused by FDOT's negligent construction or maintenance of the road. A8. As the court made clear, that *specific* statement "relies on a concept of estoppel." A8 n.5. But neither the statement that CSXT had fully performed for 65 years nor the principles of estoppel that underlie that statement was necessary to the court's holding that the indemnity provision is enforceable.

The court held that FDOT is bound by the entire crossing agreement, including the indemnity provision, because FDOT's "predecessor had the authority to enter into contracts necessary to build and maintain this road, and the use of a limited

indemnity agreement as the sole consideration for the contract to obtain right-of-way did not render [the contract] unenforceable." A8. As demonstrated above (at 13-22), that holding is correct. As further demonstrated above, the holding is not grounded in principles of estoppel; rather, it rests on a straightforward application of this Court's decisions in *Pan-Am* and *American Home*.

Thus, the court did *not*—as FDOT contends—ask whether FDOT "is bound by the [crossing] agreement" (A8) in order to "find" that FDOT "is estopped from arguing that the indemnity clause is not binding" (FB35). It did so because, if FDOT is bound by the crossing agreement, it is also bound by the indemnity clause within the agreement. *See* A8. This Court therefore does not need to reach the estoppel issue in order to affirm the district court of appeal's conclusion that the indemnity clause is valid and enforceable.

2. In any event, the district court of appeal was correct to "conclude that the case law permits the application of estoppel in this limited context." A8 n.5. FDOT's conduct in this case satisfies both the general requirements for estoppel and the additional requirements that apply before a state agency can be estopped.

As a general matter, estoppel requires three elements: "a representation as to a material fact that is contrary to a later-asserted position," "reliance on that representation," and "a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State Dep't of Revenue v. An-*

derson, 403 So. 2d 397, 400 (Fla. 1981); *accord, e.g.*, *State v. Harris*, 881 So. 2d 1079, 1084 (Fla. 2004). Here, FDOT made an express representation in the crossing agreement that it would indemnify CSXT for losses caused by the construction and maintenance of the road. A13. As the court below noted, CSXT relied on that promise by "perform[ing]" under the crossing agreement "for sixty-five years" by "giv[ing FDOT] access to [CSXT's] property for [the] purpose[]" of building and maintaining a crossing. A7-8. When CSXT then "ask[ed]" FDOT to honor the "ongoing agreement" following the 2002 accident (A7), FDOT "change[d] its position" (*Anderson*, 403 So. 2d at 400), claiming that it need not honor the contract. Nor can there be any doubt that FDOT's new position is detrimental to CSXT, because it would force CSXT to pay all damages, fees, and costs caused by FDOT's negligence in maintaining and repairing the crossing. *See* A7.

FDOT disputes none of this. *See* FB34-36. Instead, it invokes the rule that "the state can *** be estopped" only in "'exceptional circumstances.'" FB35 (quoting *N. Am. Co. v. Green*, 120 So. 2d 603, 610 (Fla. 1959)). Such circumstances, however, exist here.

This Court has recognized that the exceptional-circumstances requirement is satisfied when estoppel "is necessary to prevent manifest injustice and wrongs to private individuals." *Trs. of Internal Imp. Fund v. Claughton*, 86 So. 2d 775, 789 (Fla. 1956); *accord, e.g.*, *Trs. of Internal Imp. Fund v. Lobean*, 127 So. 2d 98, 101-

02 (Fla. 1961); *see also Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). Both this Court and the district courts of appeal have thus applied estoppel against the state when a private party has relied on an "affirmative representation[]" made by a state agency rather than on the state's "mere negligence." *Ass'd Indus. Ins. Co. v. Dep't of Labor & Emp.*, 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006).[17]

That, of course, is the case here. FDOT affirmatively represented that it would indemnify CSXT as part of the crossing agreement and now, 75 years later, seeks to renege on that promise. There can accordingly be no doubt that FDOT's attempt to upend the parties' contractual agreement would, if successful, result in "manifest injustice" and a "wrong[] to" CSXT. *Claughton*, 86 So. 2d at 789.[18]

3. FDOT contends that estoppel nevertheless cannot be applied in this

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[17] *See, e.g., Trs. of Internal Imp. Fund v. Bass*, 67 So. 2d 433, 433 (Fla. 1953) (estopping state from challenging a land deed it issued to a private party that then improved the land); *Tri-State Sys., Inc. v. Dep't of Transp.*, 500 So. 2d 212, 216 (Fla. 1st DCA 1986) (estopping FDOT from arguing that signs lacked a legal permit after it induced a private party to purchase the signs by representing that such a permit existed); *Kuge v. Dep't of Admin.*, 449 So. 2d 389, 391 (Fla. 3d DCA 1984) (applying estoppel to prevent state from altering calculation of retirement benefits on which a former employee relied in deciding when to retire).

[18] Assuming the district courts of appeal are correct to require private parties seeking to estop the state to show "serious injustice" (*e.g., Council Bros.*, 634 So. 2d at 266)), that requirement is satisfied for the reasons above. Any requirement that estoppel "not unduly harm the public interest" (*id.*) is also satisfied, because CSXT is seeking to enforce an authorized contract. In fact, the public interest would be harmed by *declining* to apply estoppel under the circumstances, because "estoppel is necessary *** to assure fair dealing by" FDOT. *Id.* at 267.

case because the state may not "'be estopped by the unauthorized acts or representations of its officers.'" FB35 (quoting *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 524 (Fla. 1st DCA 1971)); *see also* AB15-18 (making the same argument). But that rule could apply here only if FDOT's predecessor lacked authority to enter into a crossing agreement with an indemnity clause. As shown above (at 13-22), it had such authority. This is therefore not a case in which "'an unscrupulous or careless government employee *** alter[ed] or waive[d] the terms of a written agreement'" or made an *ultra vires* promise (AB17 (quoting *Miorelli Eng'g*, 703 So. 2d at 1051)), but rather one in which the state had express "statutory authority" to make the representation it now seeks to repudiate (*Branca v. City of Miramar*, 634 So. 2d 604, 6078 (Fla. 1994)). As a result, FDOT can—and should—be estopped from repudiating the indemnity clause.[19]

C. Adopting FDOT's Position Would Have Severe Consequences

The district court of appeal found further support for its holding that the indemnity provision is enforceable in "the ramifications of [FDOT's] position" and the "practical reasons" for rejecting it. A4, 6. The court concluded that, if the provision were *un*enforceable, the crossing agreement could "be an illusory contract"

[19] FACA suggests (AB18) that estoppel is inappropriate because this Court held in *Hillsborough County v. Kensett*, 144 So. 393, 394 (Fla. 1932), that a county "may not be sued *** for [tort] damages *** resulting from construction on a public highway." As *American Home* makes clear, however, a county *can* be sued under a contractual indemnity provision even when indemnity is sought for an underlying tort claim. *Kensett* thus cannot bar the application of estoppel here.

that CSXT "would have the right to treat *** as void" in its entirety. A5 (quotation marks omitted). It also concluded that, because the crossing agreement "is obviously *** standardized," and because prior cases show that "similar indemnity agreements were common both for crossing agreements and sidetrack agreements," allowing FDOT to invalidate *this* contract would have an "immediate impact" that is "impossible to calculate." A5-6. Both conclusions are correct.

1. FDOT does not challenge the district court of appeal's determination that CSXT could treat the entire crossing agreement as void if FDOT prevailed in this lawsuit. Any such challenge to that determination would fail. The crossing agreement expressly provides that, "in the event [FDOT] shall default in any of its undertakings" under the agreement, CSXT "may at any time thereafter, at [its] option, cancel [the] agreement." A12. Because FDOT is seeking to default on its promise to indemnify CSXT, that provision would give CSXT the express right to cancel the agreement if FDOT succeeded.

The same result would follow even without the express contractual language. "It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract." *Pan-Am*, 471 So. 2d at 5. In particular, absent "[t]he ability to sue for damages" for breach of contract, a contract "is void for mutuality of remedy." *ContractPoint*, 986 So. 2d at 1270. The entire crossing agreement would be invalid under that rule if FDOT prevailed, because CSXT would be unable to

sue for damages under the indemnity clause.

2. That result, as the district court of appeal concluded, would not be restricted to this particular contract or this particular crossing. FDOT does not and cannot dispute that the court identified numerous other cases concerning agreements with indemnity clauses that run in favor of railroads. *See* A5 n.3. That such clauses are widespread is unsurprising: every road built across railroad tracks entails a new and substantial risk of accidents. Moreover, because railroads will—as the court below recognized—"be the defendant of first choice" when an accident occurs and the other possible defendant "is a governmental entity" protected by sovereign immunity (A7), railroads have strong incentives to seek indemnification against that risk in exchange for allowing public access across their tracks. There is thus every reason to believe that numerous agreements between railroads and the state contain indemnity clauses.

FDOT argues that indemnity clauses are not in fact widespread. FB38-39. But it has not pointed to any competent evidence to support that view. FDOT cites an affidavit claiming that it has agreed to indemnify CSXT in only a small number of crossing agreements. *See* FB39. That affidavit, however, is not part of the trial-court record, the district court of appeal expressly struck the affidavit after FDOT attempted to file it in that court (*see* 11/30/12 Order, *Fla. Dep't of Transp. v. Schwefringhaus*, 2d DCA No. 2D12-1097), and FDOT has not challenged the dis-

trict court of appeal's ruling. The affidavit accordingly should not be considered by this Court.

In any event, the implications of FDOT's position extend far beyond crossing agreements. FDOT's argument that indemnity provisions are unenforceable unless specifically authorized by legislation would apply to almost *every* contract between a state agency and a private party that includes an indemnity clause running in the private party's favor. Thus, if FDOT prevailed, almost every such contract could be voided at the option of the private party for want of mutual enforceability.

In fact, FDOT's position sweeps even more broadly. As shown above (at 20-22), there is no basis for distinguishing indemnity provisions from other types of contractual consideration. FDOT's position that indemnity clauses are void unless specifically authorized by statute thus leads naturally and logically to the conclusion that *any* clause in which a state agency provides consideration to a private party is void unless the consideration has been specifically authorized by statute. FDOT itself implicitly concedes as much by arguing that legislative authorization must be "hyper-specific." FB15. But as demonstrated by the statutes permitting FDOT to enter into various types of contracts (*see* FB14-15), the Legislature does *not* typically list the types of consideration an agency may provide (*see* Fla. Stat. § 337.02; *id.* § 337.03; *id.* § 337.11(1); *id.* § 337.026; *id.* § 337.107; *id.* § 337.111;

id. § 337.1075).[20] FDOT's position would thus render illusory almost "all the express written contracts entered into by" state "agencies pursuant to legislatively granted general contracted authority." *ContractPoint*, 986 So. 2d at 1270.

As this Court recognized in *ContractPoint*, the mass invalidation of contracts between the state and private parties would be an "unreasonable, harsh, [and] absurd" consequence that is to be avoided. *Id.* As the Court further recognized, that result would "creat[e] a chilling effect on business between the State and the private sector." *Id.* at 1272. It would do so in two respects. First, the invalidation of countless existing contracts with state agencies would introduce extraordinary uncertainty into the finality of public-private agreements. Second, FDOT's position would "require" private entities that contract with the state "to seek a specific legislative appropriation" for each type of consideration in every future agreement with a state agency. *Id.* FDOT's position should thus be rejected both because it is legally untenable and because it would have far-reaching and enormously undesirable consequences.

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[20] To the contrary, the Legislature has often specified the types of consideration that an agency may *not* provide. *See, e.g.*, Fla. Stat. § 337.03(1) (forbidding FDOT from purchasing supplies from the federal government at prices above market rates); *id.* § 337.026(2) (regulating the length of lease FDOT may enter into related to construction aggregate materials); *id.* § 337.111(3) (requiring groups proposing veterans' memorials at rest areas to bear "all costs of the monument").

II. THE LIMIT ON LIABILITY IN FLORIDA STATUTES § 768.28(5) DOES NOT APPLY

The district court of appeal also rejected FDOT's alternative argument that "any judgment entered for breach of the crossing agreement must be limited to $200,000, the amount authorized by section 768.28(5), Florida Statutes." A2. The court held that § 768.28(5) does not apply, because FDOT's "liability *** to [CSXT] was based on an express written contract." A9. That holding is also correct.

A. The Statutory Limit Applies Only To Tort Claims, Not To Suits For Breach Of A Contractual Indemnity Provision

1. Section 768.28 delineates the situations in which "the state" and its "agencies and subdivisions" have "waive[d] sovereign immunity for torts." Fla. Stat. § 768.28(1). Among other things, the statute provides that the liability of state agencies "for tort claims" is limited to $200,000 for each "claim or *** judgment" owed to "any one person" for a given "incident or occurrence." *Id.* § 768.28(5). The text of the statute thus makes clear that the limit on liability "applies only when the governmental entity is being sued in tort." *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 486 (Fla. 2001); *accord Am. Home*, 908 So. 2d at 474; *see also ContractPoint*, 986 So. 2d at 1268 (describing § 768.28 as "the specific statutory scheme relating to tort suits and judgments against the State"). Thus, when the state is *not* being sued in tort—for example, when it is being sued

in contract (*see Am. Home*, 908 So. 2d at 474)—the statutory limit "do[es] not apply" (*Provident Mgmt. Corp.*, 796 So. 2d at 486).

The damages cap in § 768.28(5) cannot apply to this case, because CSXT has not sued FDOT in tort. As CSXT's third-party complaint demonstrates, its suit is for the "breach[]" of FDOT's "contractual obligations." R323. CSXT alleged that the crossing agreement "obligate[s]" FDOT "to indemnify and hold [CSXT] harmless with respect to" the first-party claims arising from the 2002 accident and that FDOT breached the agreement "by failing to honor [those] indemnity provisions." *Id.* The procedural history of this case makes clear, moreover, that those allegations are not a mere facade for a tort claim. After Dorthy Schwefringhaus filed suit, CSXT asked FDOT for indemnity under the contract (*see* R758)—and FDOT refused to provide it. FDOT has conceded that the duty it seeks to evade is a *contractual* one imposed by "the indemnity clause" in "the crossing agreement." FB2; *see also* FB15-17. The liability cap in § 768.28(5) therefore does not apply.

2. This Court's decision in *American Home* compels the same conclusion. As noted above (at 17), *American Home* involved a crossing agreement with a provision obligating a municipal authority to indemnify a railroad. *See also Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233, 1269 (11th Cir. 2002) (certifying the questions this Court considered in *American Home*). The railroad sought to enforce that indemnity provision when it was sued

for alleged "negligence." *Am. Home*, 908 So. 2d at 462. The municipality then raised the same argument that FDOT raises in this case—that § 768.28(5) prevents it from "be[ing] compelled, based on an indemnification agreement, to pay out funds that it could not be compelled to pay in a torts damages suit." *Rountree*, 286 F.3d at 1266; *see also Am. Home*, 908 So. 2d at 473.

This Court unequivocally rejected that argument as precluded by the "plain language" of § 768.28. *Am. Home*, 908 So. 2d at 474. The Court reasoned that the railroad's indemnity claim was "based on a *contract*" with the municipality, while § 768.28 applies only to "'actions *** *to recover damages in tort.*'" *Id.* The Court therefore held that the limit in § 768.28(5) was "not applicable." *Id.*

That holding applies with full force here. This case, like *American Home*, involves a crossing agreement with language requiring a public agency to indemnify a railroad for incidents at the crossing. In this case, as in *American Home*, the railroad was sued in tort and then turned to the public agency for contractual indemnification. And the "plain language" of § 768.28 continues to make clear that the limit applies only to tort actions. *Am. Home*, 908 So. 2d at 474. *American Home* thus leaves no room for the argument that FDOT's liability under the contract is limited by § 768.28(5).

3. There can be no doubt that *American Home* was correct in holding that a suit for breach of an indemnity clause is not a suit to recover damages in tort.

Indemnity is not grounded in principles of tort. It is "founded on express or implied contract, upon the breach of some duty owed the party seeking indemnity." *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427, 428 (Fla. 1978). More specifically, express indemnity provisions like the clause in issue represent contractual "agreement[s] by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party." *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 643 (Fla. 1999). Such provisions "are subject to the general rules of contractual construction" (*id.*), and "the terms of the agreement *** determine whether the indemnitor is obligated to reimburse the indemnitee" (*Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072, 1077 (Fla. 5th DCA 2003)). Thus, under Florida law, claims for contractual indemnity cannot be seen as "tort claims." Fla. Stat. § 768.28(5).

The Legislature has implicitly recognized as much. Florida Statutes § 341.302(17)(a) allows the state to "indemnify" freight railroads in connection with FDOT's acquisition of a rail corridor. In particular, the Legislature stated that FDOT could contractually indemnify railroads for "the fault, failure, negligence, misconduct, nonfeasance, or misfeasance" of "any person." Fla. Stat. § 341.302(17)(a). When the Legislature passed that provision, it added the proviso that any "assumption by contract to protect, defend, indemnify, and hold harmless" a railroad will not "be deemed a waiver of any defense of sovereign immunity for

torts nor deemed to increase the limits of [FDOT's] *** liability for torts as provided in" § 768.28(5). Fla. Stat. § 341.302(17)(c). If a contractual indemnity action brought after a railroad was sued for negligence could be seen as an action in tort, § 341.302 would be self-contradictory: it would first authorize FDOT to contractually indemnify railroads for negligence suits but then deny that the state could be sued for breach of such an indemnity provision. That "absurd" result cannot be what the Legislature intended when it enacted the statute. *E.g.*, *City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950).

B. FDOT's Arguments Lack Merit

In an attempt to circumvent this authority, FDOT argues that it cannot contractually "'extend the government's liability beyond the limits established in section 768.28.'" FB29 (quoting *Am. Home*, 908 So. 2d at 481 (Quince, J., dissenting in part)). That is a *non sequitur*. CSXT has never argued that state agencies can contractually agree to evade the statutory damages cap—for the very good reason that neither the indemnity clause nor any other provision of the crossing agreement allows CSXT to sue FDOT in tort, much less to do so for an unlimited amount of damages. The indemnity clause simply means that CSXT can sue FDOT for breach of contract if FDOT fails to honor its promise. Thus, as both the majority and dissent in the district court of appeal recognized, the issue here is whether § 768.28(5) applies to limit FDOT's "liability under the crossing agreement" (A9 (capitaliza-

tion omitted); *accord* A23 (Wallace, J. dissenting)), *not* whether FDOT can evade the statutory limit on tort liability by contract.

FDOT also contends that *American Home* does not speak to whether the liability limits in § 768.28 apply here. *See* FB28-29. FDOT primarily bases that contention on the statement in the concurring opinion in *American Home* that the Court was not "'decid[ing] *** whether the state may *** contractually waive its sovereign immunity.'" FB28 (quoting *Am. Home*, 908 So. 2d at 477 (Cantero, J., concurring)). That statement is literally true, because *American Home* involved a municipal agency rather than a state agency. But the logic of *American Home* cannot be confined to cases involving municipalities. As both the majority and concurrence in *American Home* expressly recognized, the reason § 768.28 did not apply in that case had nothing to do with the nature of the defendant. Rather, "section 768.28 d[id] not apply because [the] indemnification was contained in a contract, which is outside the parameters of section 768.28." 908 So. 2d at 479 (Cantero, J., concurring); *accord id.* at 474 (majority op.). As demonstrated above (at 42-46), that holding precludes FDOT's argument that its liability for breach of the contractual indemnity provision is limited by § 768.28(5).[21]

[21] FDOT also relies on the statement in the concurring opinion that § 768.28 "'waived'" the state's "'sovereign immunity up to specified limits'" but "'granted'" municipalities "'immunity from judgments above those limits.'" FB28, 30 (quoting *Am. Home*, 908 So. 2d at 478-79 (Cantero, J., concurring)); *see also* FB31. The concurrence made clear, however, that those considerations simply

FDOT next appeals to the canon of construction that statutes "in derogation of common law *** must be construed strictly." FB31. But that canon does not help FDOT. When "the language of a statute is 'clear and unambiguous and conveys a clear and definite meaning[,]' there is no need to resort to statutory construction." *ContractPoint*, 986 So 2d at 1265 (quoting *Holly v. Auld*, 450 So. 2d 717, 719 (Fla. 1984)). Here, it is "plain and obvious" (*Holly*, 450 So. 2d at 219) from the text of the statute that § 768.28 applies only to "tort claims" (Fla. Stat. § 768.28(5)). Reading the statute to cover a breach-of-contract action thus would not amount to a narrow construction; it would contravene the "'express terms'" of the statute. *Hopkins v. State*, 105 So. 3d 470, 473 (Fla. 2012) (quoting *Holly*, 450 So. 2d at 219). The courts are "'without power to construe'" the statute in that way (*id.* (quoting *Holly*, 450 So. 2d at 219)), and FDOT's reliance on the strict-construction canon must accordingly be rejected.[22]

FDOT also cites various opinions of the Florida Attorney General. *See* FB32-33. Those opinions do "conclude[] that a state agency or subdivision of the

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demonstrated why, "[e]ven if [§] 768.28 [did] apply" to actions for breach of contract, it would have to "be strictly construed against a finding of immunity as applied to municipalities." 908 So. 2d at 479 (Cantero, J., concurring). Because the statute does *not* apply here, those considerations do not enter the analysis. *See id.*

[22] Because it would rewrite the text of § 768.28, FDOT's reading of the statute would also effect an impermissible "'abrogation of legislative power.'" *Hopkins*, 105 So. 3d at 473 (quoting *Holly*, 450 So. 2d at 219). Thus, contrary to FDOT's argument (FB39-41), separation-of-powers concerns weigh heavily *against* a holding that § 768.28(5) limits the state's liability in this case.

state may not enter a contract agreeing to indemnify another party that would extend the government's liability beyond the limits established in section 768.28." *Am. Home*, 908 So. 2d at 473. Nevertheless, the opinions cannot help FDOT. As this Court held when considering the same opinions in *American Home*, they "ignore the plain language of section 768.28," which "applies only to" tort claims. *Id*. The opinions thus cannot and should not be followed to the extent that they suggest that § 768.28 applies to breach-of-contract actions. *See also Kimball v. State*, 933 So. 2d 1285, 1286 (Fla. 2d DCA 2006) (declining to follow an Attorney General opinion at odds with "[a] plain reading of" a statute). And although FDOT suggests that the opinions apply here "[b]ecause this case involves a state agency" (FB33), it again fails to provide any reason to conclude that the application of § 768.28 turns on the identity of the defendant.[23]

Finally, unable to mount a plausible argument that § 768.28 applies to actions for breach of contract, FDOT contends that CSXT's claim in fact is "grounded in tort." FB34. That contention is equally implausible. While it is certainly true that § 768.28(5) would apply had "Ms. Schwefringhaus sued [FDOT] for negligent maintenance of the crossing" (FB34), FDOT does not even attempt to explain how a claim for breach of a contractual indemnity provision can be construed as a tort

[23] It is therefore FDOT's position, not CSXT's, that "elevates *** form *** over *** substance" (FB34), because, under FDOT's view, whether a claim sounds in tort turns not on the nature of the claim but on whether the defendant is the state or a municipality.

claim. As demonstrated above (at 44-46), it cannot.

Instead, FDOT again tries to distinguish *American Home*, suggesting that this Court's decision rested on either "the fact that" the case involved "a municipality" or on the specific language of the contract at issue. FB33. It did not. The relevant holding in *American Home* rested *solely* on the straightforward facts that a claim for breach of a contractual indemnity clause is one for breach of contract and that § 768.28 applies only to tort claims. *See* 908 So. 2d at 474. FDOT has thus provided no colorable basis for distinguishing the holding of *American Home*—or for concluding that the limitation on liability in § 768.28(5) applies to this case.[24]

CONCLUSION

The judgment of the district court of appeal should be affirmed.

[24] FDOT suggests that its damages are limited to $100,000, the statutory limit at the time of the 2002 accident. *See* FB27 & n.4. This Court should not consider that suggestion even if it believes that § 768.28 can apply here. FDOT neither provides any support for this view nor directly challenges the district court of appeal's statement that the relevant limit is $200,000—the cap in the current version of the statute. *See* A2; *see also* 2010 Fla. Sess. Law. ch. 2010-26 § 1 (raising the cap to $200,000 as of Oct. 1, 2011). FDOT, in other words, has "'fail[ed] to fully brief and argue [this] point[]'" and that failure "'constitutes a waiver.'" *Wyatt v. State*, 71 So. 3d 86, 107 n.17 (Fla. 2011) (quoting *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface and type-style requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it has been prepared using Microsoft Office Word 2007 and is set in Times New Roman font in a size equivalent to 14 points or larger.

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