Electronically Filed 12/16/2013 09:09:36 PM ET

RECEIVED, 12/16/2013 21:13:34, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1934

FLORIDA VIRTUALSCHOOL,

Plaintiff-Appellant,

v.

K12 INC. AND K12 FLORIDA LLC,

Defendants-Appellees.

ON REVIEW OF A CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No. 12-14271-A

ANSWER BRIEF FOR APPELLEES K12 INC. AND K12 FLORIDA LLC

Stephanie L. Carman
Hogan Lovells US LLP
600 Brickell Avenue
Suite 2700
Miami, Florida 33131
Telephone: 305-459-6500
stephanie.carman@hoganlovells.com

Steven P. Hollman, *Pro Hac Vice*
Catherine E. Stetson, *Pro Hac Vice*
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: 202-637-5600
steven.hollman@hoganlovells.com

Attorneys for Defendants/Appellees

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In 2003, K12 Inc. and K12 Florida LLC (collectively, "K12") entered into a contract with the Florida Department of Education to provide public online teaching services in the State of Florida. Consistent with its national naming convention—and with the knowledge and consent of the Florida Department of Education—K12 adopted the mark FLORIDA VIRTUAL ACADEMY, with the corresponding acronym FLVA, in connection with its services in Florida. As a result of a change in Florida state law—and also with the knowledge and consent of the Florida Department of Education—K12 also began using the mark FLORIDA VIRTUAL PROGRAM, with the corresponding acronym FLVP, in connection with its services in Florida.

Appellant Florida VirtualSchool ("FLVS") is a state agency, originally housed within the Florida Department of Education, charged with developing and delivering on-line and distance learning education. As a state agency, FLVS has only those powers specifically granted to it by the state legislature. And FLVS's governing statute is clear on the limited scope of those powers: "Ownership of all * * * patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state, with [FLVS's] board of trustees having full right of use and full right to retain the revenues derived therefrom." § 1002.37(2)(c), Fla. Stat. (2013). FLVS thus has the power to use trademarks; it may even retain

revenue derived in connection with the use of those marks. See id. But FLVS itself does not own those marks; the State of Florida does. And because FLVS does not own those marks, it cannot file suit based on them. Those rights belong exclusively by statute to another agency, the Florida Department of State, which by statute functions as a trustee for intellectual property owned by the State.

Despite that express division of responsibility, FLVS filed this lawsuit in 2011 challenging K12's use of the service marks FLORIDA VIRTUAL ACADEMY and FLORIDA VIRTUAL PROGRAM and the corresponding acronyms FLVA and FLVP (collectively, the "K12 Marks and Acronyms"). FLVS maintained that K12's use of its marks infringed its claimed rights in the service marks FLORIDA VIRTUALSCHOOL and FLVS.

Determining that FLVS lacked authority to enforce the service marks, the District Court dismissed FLVS's claims. FLVS appealed.

The Eleventh Circuit has now certified a question of state law to this Court. In its certification order, the Court of Appeals observed that "Florida VirtualSchool's enabling statute does not specifically provide for a general right to sue or, more specifically, the authority to take necessary legal action to protect against improper or unlawful use or infringement of trademarks." Certification Order 7. And the Eleventh Circuit also observed that "The Department of State—

not Florida VirtualSchool—has been given such express authority by § 286.031." Id.

But recognizing that "when we write to a state law issue, we write in faint and disappearing ink," id. at 8 (citation & quotation omitted), the Eleventh Circuit certified to this Court the following question:

> Does Florida VirtualSchool's statutory authority to "acquire, enjoy, use, and dispose of * * * trademarks and any licenses and other rights or interests thereunder or therein" necessarily include the authority to bring suit to protect those trademarks, or is that authority vested only in the Department of State?

Id. at 9.

STATEMENT OF THE CASE AND FACTS

I. COURSE OF PROCEEDINGS

Appellant Florida VirtualSchool ("FLVS") filed its Complaint against K12 Inc., K12 Florida LLC, and Name Administration, Inc. in federal district court in May 2011, alleging federal claims for infringement of federally registered service marks and false designation of origin and common law service mark infringement and unfair competition. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1338 (2013).

K12 Inc. and K12 Florida LLC subsequently sought summary judgment or to dismiss for lack of standing. R 30. After full briefing, the District Court granted the Motion and dismissed the case without prejudice and "directed the Clerk to

close the file." R 56.[1] FLVS appealed to the Eleventh Circuit, which had jurisdiction over the District Court's final judgment pursuant to 28 U.S.C. § 1291 (2013).

After briefing and oral argument, the Eleventh Circuit issued an order on October 10, 2013, certifying the following question to this Court:

> Does Florida VirtualSchool's statutory authority to "acquire, enjoy, use, and dispose of * * * trademarks and any licenses and other rights or interests thereunder or therein" necessarily include the authority to bring suit to protect those trademarks, or is that authority vested only in the Department of State?

II. STATEMENT OF FACTS

The following is a brief summary of the facts pertinent to this appeal.[2]

A. K12, Its Work, And Its Marks

For well over a decade, K12 has provided, among other services, public online teaching services in states throughout the country. R 30-5, pp. 19-20. K12 Inc. first began providing public online teaching services to students in 2001 through its Colorado Virtual Academy. See R 13 ¶ 3. K12 Inc.'s Arkansas Virtual

[1] The District Court earlier had dismissed FLVS's claims against Name Administration with prejudice. R 16.

[2] The allegations recounted in FLVS's Statement of the Case and Facts—several of which are mistaken or taken out of context—have little bearing on the question pending before this Court. In fact, the vast majority of FLVS's factual allegations are lifted from a motion for summary judgment filed one business day before the District Court issued its opinion, and never briefed or ruled upon. See FLVS Sup. Ct. Br. 1-4 (citing that motion).

Academy, California Virtual Academy, Idaho Virtual Academy, Minnesota Virtual Academy, and Ohio Virtual Academy followed in 2002. R 30-5, p. 18.

In 2003, K12 entered into a contract with the Florida Department of Education to provide online teaching services in the State of Florida. R 30-5, p. 8, 20; R 30-6, pp. K12_0001512-34. Consistent with its national naming convention, K12 adopted the mark FLORIDA VIRTUAL ACADEMY, with the corresponding acronym FLVA, for its new services in Florida and disclosed this fact to the State in its contract. K12 also began using the mark FLORIDA VIRTUAL PROGRAM, with the corresponding acronym FLVP, as a result of a change in Florida state law, which caused K12 to offer services as "Virtual instruction programs," as described in Section 1002.45 of the Florida Statutes, at the county level instead of statewide. The phrase Florida Virtual Program was intended to refer to all of K12's various county-level offerings within the State of Florida. See R 30-5, p. 18.

The Florida Department of Education expressly approved K12's use of these marks and acronyms. The original contract executed by K12 Florida LLC and the Florida Department of Education in 2003 indicated that K12 would be using the mark FLORIDA VIRTUAL ACADEMY and employing the acronym FLVA. See R 30-6, pp. K12_0001532-34. Similarly, an application K12 Florida LLC submitted to the Florida Department of Education in 2009—the terms of which again were approved by the Florida Department of Education—indicated that K12

would be using the mark FLORIDA VIRTUAL PROGRAM. See R 30-6, pp. K12_0014097, K12_0014097, K12_0014143-148, K12_0014155-202. The Florida Department of Education's website also specifically acknowledges K12's use of the same marks and acronyms. See, e.g., R 30-10.

B. FLVS

K12 operates in Florida under authorization of the State. There are, of course, other on-line educational programs that operate within the State as well. One of them is the appellant, FLVS. Originally named "Florida On-Line High School," FLVS was created by state law in June 2000, pursuant to Section 228.082 of the Florida Statutes. The statute explained the purpose of the entity: "The Florida On-Line High School is established for the development and delivery of on-line and distance learning education." R 30-2 (§ 228.082(1), Fla. Stat. (2000)). The statute also dictated the nature and governance of the entity: "The Florida On-Line High School shall be governed by a board of trustees comprised of seven members appointed by the Governor * * * * The board shall be a public agency entitled to sovereign immunity pursuant to s. 768.28, and board members shall be public officers who shall bear fiduciary responsibility for the Florida On-Line High School." Id. (§ 228.082(2), Fla. Stat. (2000)). The statute proceeded to enumerate the "powers and duties" of that board, including its intellectual property rights. In particular, the statute explained that while the board could use and retain revenues

derived from "patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein," ownership of any such intellectual property "shall vest" in the State:

> The board of trustees * * * may acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein. Ownership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state, with the board having full right of use and full right to retain the revenues derived therefrom. Any funds realized from patents, copyrights, trademarks, or licenses shall be used to support the school's research and development activities in order to improve courseware and services to its students.

Id. (§ 228.082(2)(d), Fla. Stat. (2000)) (emphasis added). FLVS thus has the right to "use" and "retain the revenues" from the marks. But nowhere does that provision—or any other provision or statute—invest FLVS with the authority to police, protect, enforce, or file suit over intellectual property rights and interests that belong to the State.

The statute's emphasis on the State's role as owner of the intellectual property used by FLVS was not an accident. The original bill proposed as FLVS's enabling statute made no mention of the State when describing FLVS's intellectual property rights:

> The board of trustees * * * may acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder, or therein. Any funds realized from patents, copyrights, trademarks, or licenses shall be used to support the

> school's research and development activities in order to improve courseware and services to its students.

R 30-14 (H.B. 2063(2)(b) (2000)). But the legislature amended that language before passing the bill in order to "[c]larif[y] that ownership of all patents, copyrights, trademarks, licenses, and rights or incentives thereunder and therein must vest in the state, with the board having full right of use and full right to retain the revenues derived therefrom." R 30-15 (House Comm. On Education Innovation, Final Analysis for CS/HB 2063) § VI (emphasis added); see also id. § I ("Although the ownership of patents, copyrights, and trademarks and any licenses remains with the state, the board has the full right of use and full right to retain any revenues derived[.]").

Since its enactment in June 2000, FLVS's enabling statute has been renumbered as Section 1002.37 of the Florida Statutes. It also has been amended on several occasions. These amendments changed FLVS's name to "Florida Virtual School." See § 1002.37(1)(a), Fla. Stat. (2013). They elaborated on FLVS's purpose: "The mission of the Florida Virtual School is to provide students with technology-based educational opportunities to gain the knowledge and skills necessary to succeed." § 1002.37(1)(b), Fla. Stat. (2013). And they expanded the manner in which FLVS could use "funds realized from [the] patents, copyrights, trademarks, or licenses"—enabling FLVS to use those funds for marketing

activities, as well as "to support the school's * * * research and development activities." § 1002.37(2)(c), Fla. Stat. (2013). But in all other pertinent respects described above, the nature, governance, and powers of FLVS remain the same. While FLVS retains "full right of use and full right to retain the revenues derived" from intellectual property, the State continues to own all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein. § 1002.37(2)(c), Fla. Stat. (2013). And, as before, FLVS has no authority to police, protect, enforce, or file suit in regard to intellectual property rights and interests that belong to the State. See id.

Instead, it falls to Florida's Department of State ("DOS")—not FLVS, and not any other of the myriad Florida agencies—to manage the intellectual-property rights and assets that the State owns. Florida Statute Section 286.021 explains that DOS is charged by statute with managing the State's assets, including its intellectual-property assets. § 286.021, Fla. Stat. (2013). Section 286.021 explains that "[t]he legal title and every right, interest, claim or demand of any kind in and to any patent, trademark or copyright, or application for the same, now owned or held, or as may hereafter be acquired, owned and held by the state * * * is hereby granted to and vested in the Department of State for the use and benefit of the state[.]" § 286.021, Fla. Stat. (2013) (emphasis added). DOS is expressly authorized "to take any and all action necessary, including legal actions, to protect

the same against improper or unlawful use or infringement[.]" § 286.031, Fla. Stat. (2013).

C. FLVS's Service Mark Registrations

FLVS thus does not own the intellectual property it uses; the State does. And the Department of State, not FLVS, may sue to protect and enforce those marks. But FLVS itself nonetheless applied to register the service marks FLORIDA VIRTUALSCHOOL and FLVS with the U.S. Patent & Trademark Office ("PTO"). See R 30-3, R 30-4. Pursuant to 15 U.S.C. § 1051, applicants are required to file a verification that they are "the owner of the mark sought to be registered." 15 U.S.C. §1051(a)(3). FLVS filed these verifications—specifically acknowledging in each that "willful false statements and the like so made are punishable by fine or imprisonment, or both" and "may jeopardize the validity of the application or any resulting registration." R 30-3 (verification on last page); R 30-4 (verification on last page). Presumably having—at the time—no reason to question FLVS's verifications, the PTO issued registrations for the two marks in August and November 2010. See R 1, Exs. A & B.

D. FLVS's Lawsuit

FLVS has been aware of K12's use of the K12 Marks and Acronyms since their earliest adoption. For example, in the summer of 2003, before K12 finalized its choice of a name and included that name in its contract with the State

Department of Education, a lobbyist representing K12 called an officer of FLVS[3] and left a voicemail indicating K12's intent to use the name FLORIDA VIRTUAL ACADEMY in the State of Florida. R 30-11 (S. Brown Dep. Tr. Excerpts) at 157:16-161:5. Several weeks after that voicemail—and after K12 finalized the name and contract—FLVS's officer finally called back, asking why K12 had selected the name. Id. K12's lobbyist explained that the name was consistent with K12's national naming convention, which combines the name of the state in which the services were provided with the words "Virtual Academy." Id. at 70:4-71:17, 159:25-160:3.[4]

Over six years passed. Then, in early December 2009, an attorney purporting to act on behalf of FLVS left a voicemail for one of K12's employees regarding K12's use of certain of the K12 Marks and Acronyms. K12 replied promptly with a letter from K12 Inc.'s deputy general counsel, explaining the basis for its rights in the marks FLORIDA VIRTUAL ACADEMY and FLORIDA VIRTUAL PROGRAM and asserting its belief that the matter was closed. See R 30-13. FLVS did not respond.

A year and a half later, FLVS sued K12.

---

[3] R 30-12 (M. Maxwell Dep. Tr. Excerpts) at 75:11-76:1.

[4] Although Mr. Maxwell has testified that he does not recall the conversation, he acknowledged that it may have occurred and testified that Mr. Brown, the K12 lobbyist, "is an honest person." R 30-12 (M. Maxwell Dep. Tr. Excerpts) at 111:24-112:11.

E. FLVS's Lobbying Efforts

Nine months after filing its lawsuit against K12, FLVS embarked on a lobbying campaign to amend FLVS's enabling statute. See R 30-1. FLVS proposed an amendment to Section 1002.37(c) that would have given FLVS (rather than the State) ownership rights in the intellectual property it uses—i.e., the very ownership rights that FLVS swore it already possessed when submitting its trademark registration applications to the PTO. The proposed amendment also would have given FLVS the right to "take any action necessary, including legal action, to protect the same against improper or unlawful use or infringement." Id. FLVS proposed the following amendments to Section 1002.37(c)—with additions underlined and deletions ~~stricken~~:

> Any other law to the contrary notwithstanding, the Florida Virtual School is, and has since its formation been, authorized, in its own name, to:
>
> 1. ~~The board of trustees may~~ Perform all things necessary to acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein. Ownership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the Florida Virtual School ~~state~~, with the board of trustees, on behalf of the Florida Virtual School, having full right of use and full right to retain the revenues derived therefrom. Any funds realized from patents, copyrights, trademarks, or licenses shall be considered internal funds as provided in s. 1011.07. Such funds shall be used to support the school's marketing and research and development activities in order to improve courseware and services to its students.

> 2. Take any action necessary, including legal action, to protect the same against improper or unlawful use or infringement.
>
> 3. Enforce the collection of any sums due the Florida Virtual School for the use thereof by any other party.
>
> 4. Sell any of the same and execute all instruments necessary to consummate any such sale.
>
> 5. Do all other acts necessary and proper for the execution of the powers and duties herein conferred upon the Florida Virtual School.

Id. FLVS explained that it was concerned that "other entities would misinterpret the current version of this provision by claiming FLVS cannot possess or enforce trademark or copyright rights." Id. The 2012 legislative session terminated without action on FLVS's proposed amendment. [5]

SUMMARY OF ARGUMENT

FLVS is an agency of the State of Florida. FLVS therefore has no inherent or common law powers; it possesses only those powers granted to it by the Florida legislature in its enabling statute. The enabling statute provides that FLVS will function as a licensee of the State of Florida with regard to the intellectual property that it uses. Accordingly, under its enabling statute, FLVS has limited, enumerated powers—typical of a licensee—involving that intellectual property. In particular,

[5] See R 30, p. 7 n.1 (citing http://www.flsenate.gov/Media/PressRelease/Show/953).

pursuant to its enabling statute, FLVS "may acquire" new intellectual property on behalf of the State; it also may "enjoy, use, and dispose" of intellectual property "and any licenses and other rights or interests thereunder and therein." § 1002.37(2)(c), Fla. Stat. (2013).

But "[o]wnership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state[.]" Id. These rights and roles govern FLVS's relationship with the marks it asserts. DOS, not FLVS, is charged by statute with managing those assets on behalf of the State. § 286.021, Fla. Stat. (2013). And DOS, not FLVS, is expressly authorized by statute to enforce marks or any other intellectual property owned by the State.

This interpretation of FLVS's authority regarding the asserted marks is apparent from the face of the enabling statute. It also is confirmed by reference to the canons of statutory construction, the greater statutory context, and the legislative history of the enabling statute. FLVS's arguments to the contrary are meritless.

For these reasons, and as explained in greater detail below, the Court should hold that the only agency with the statutory authority to bring suit to protect the marks at issue in this case is DOS—not FLVS.

ARGUMENT

I. FLVS LACKS THE STATUTORY AUTHORITY TO PURSUE THIS LAWSUIT

FLVS is an agency of the State of Florida. See FLVS Cir. Br. 1; R 56, pp. 1, 3. Under Florida law, state agencies like FLVS have no inherent or common-law powers. R 56, p. 3 (citing St. Regis Paper Co. v. State, 237 So. 2d 797, 799 (Fla. 1st DCA 1970)); State ex rel. Greenberg v. Fla. State Bd. of Dentistry, 297 So. 2d 628, 636 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974). Instead, they have only those powers specifically granted to them by the legislature. See St. Regis Paper, 237 So. 2d at 799; see also Peck Plaza Condo. v. Div. of Fla. Land Sales and Condo., Dept. of Bus. Reg., 371 So. 2d 152, 154 (Fla. 1st DCA 1979) ("It is a generally accepted principle of administrative law that an agency, being a creature of statute, has only those powers given to it by the legislature[.]") (citation & quotation omitted).

Therefore, FLVS may only litigate trademarks, service marks, and other intellectual property if its enabling statute grants FLVS authority to do so.[6] It does not.

[6] FLVS misses this point by arguing that "no provisions anywhere in the FLVS statute affirmatively *depriv[e]* FLVS of standing to litigate." FLVS Sup. Ct. Br. 10 (emphasis added). Statutes are not presumed implicitly to *give* authority unless they expressly take it away; just the opposite is true.

A. The Statutes Are Clear: FLVS Has No Authority To Litigate Intellectual Property

As this Court has explained, "We endeavor to construe statutes to effectuate the intent of the Legislature. To discern legislative intent, we look primarily to the actual language used in the statute." Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006) (citations & quotation omitted). In general, the terms used in statutes "must be construed according to their common and ordinary meanings." Univ. of Fla. Bd. of Tr. v. Andrew, 961 So. 2d 375, 376 (Fla. 1st DCA 2007) (citing Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000)).

The starting point for this analysis is the general rule: Florida's DOS is charged by statute with managing the State's intellectual-property assets "for the use and benefit of the state" and is expressly authorized "to take any and all action necessary, including legal actions, to protect the same against improper or unlawful use or infringement[.]" § 286.031, Fla. Stat. (2013); §286.021, Fla. Stat. (2013). The next question, then, is whether FLVS's enabling statute creates any exception to that general rule, such that FLVS would be vested with powers DOS otherwise by statute would solely possess.

The answer is no. In enacting Section 1002.37—and its predecessor, Section 228.082—the Florida legislature intended for FLVS to function as a licensee with respect to the intellectual property that it uses. Accordingly, the legislature granted FLVS certain limited intellectual property rights, consistent

with those often found in trademark license agreements. See infra at 25-29. In particular, FLVS "may acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein." § 1002.37(2)(c), Fla. Stat. (2013). The statute proceeds to define precisely what this means and to clarify FLVS's role as a licensee of the State: FLVS has the "full right of use and full right to retain the revenues derived" from intellectual property, but "[o]wnership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state[.]" Id.

Nowhere does Section 1002.37—or any other statute, for that matter—indicate that FLVS should have the powers to police, protect, enforce, or file suit in regard to such intellectual property. Quite the opposite: FLVS's enabling statute specifically provides that "[o]wnership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state[.]" § 1002.37(2)(c), Fla. Stat. (2013). And Section 286.021 of the Florida Statutes explains that DOS is charged with managing those assets on behalf of the State. See also 55 Fla. Jur. 2d Trademarks & Unfair Competition § 7 (same);[7] Op. Att'y Gen. Fla. 2000-13, 2000 WL 202137, *3 (Feb. 22, 2000) (noting that Section

[7] DOS is not simply a random "political subdivision of Florida," as FLVS suggests. FLVS Sup. Ct. Br. 37-38. It is the agency hand-picked by the Florida Legislature to take responsibility for managing and enforcing intellectual property owned by the State. See Op. Att'y Gen. Fla. 2000-13, 2000 WL 202137, *3 (Feb. 22, 2000).

286.021 makes clear that "'all action necessary * * * to protect the [State-owned intellectual property] against improper or unlawful use * * *' resides in the Department of State 'for the use and benefit of the state.'") (quoting Op. Att'y Gen. Fla. 71-298 (1971)).[8]

In sum, DOS is specifically authorized to bring legal actions to protect intellectual property owned by the State. DOS therefore has the statutory authority to bring the claims asserted against K12 in this proceeding—each of which seeks to enforce marks owned by the State. FLVS has no such authority, and nothing in FLVS's enabling statute confers that authority on FLVS.

B. Other Interpretative Canons Confirm That FLVS Does Not Possess The Right To Enforce The Marks

The canons of statutory construction, the broader statutory context, and the legislative history of FLVS's enabling statute only serve to confirm that FLVS has no statutory authority to enforce the marks asserted here.

1. The interpretative canon of *expressio unius est exclusio alterius* makes clear that the Florida legislature did not intend to invest FLVS with the power to pursue this proceeding. "The principle of *expressio unius* simply says that when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list."

[8] Opinions by Florida's Attorney General are "entitled to careful consideration and should be regarded as highly persuasive." State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993).

Christian Coalition of Fla., Inc. v. United States, 662 F.3d 1182, 1193 (11th Cir. 2011); see also United Auto. Ins. Co. v. Salgado, 22 So. 3d 594, 600 (Fla. 3d DCA 2009) (same). In FLVS's enabling statute, the Florida legislature specifically enumerated the rights it wished FLVS to have: the authority to "acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein." § 1002.37(2)(c), Fla. Stat. (2013). That list does not include the right to enforce, or to sue to protect, the intellectual-property rights FLVS uses; that right expressly rests with DOS. The legislature's failure to include in this list the rights to police, protect, enforce, or file suit in regard to any intellectual property confirms that the Florida legislature intended to withhold those powers from FLVS and leave them in the hands of DOS.

2. The statutory context further confirms that the legislature did not intend to vest FLVS with the right to enforce the asserted marks.

Three other agencies besides FLVS have been granted the express authority to "[a]cquire, enjoy, use, and dispose of patents, copyrights, and trademarks[.]" See § 288.9015, Fla. Stat. (2013); § 331.305, Fla. Stat. (2013); § 1001.451, Fla. Stat. (2013). The legislature has granted two of those agencies the authority to litigate intellectual property rights, by including clear language to that effect in the agencies' enabling statutes. See § 288.9015(2), Fla. Stat. (2013). ("The board of directors of Enterprise Florida, Inc., may: * * * * *Sue and be sued, and appear and*

defend in all actions and proceedings, in its corporate name to the same extent as a natural person [and] * * * * Acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses, royalties, and other rights or interests thereunder or therein.") (emphasis added),[9] § 331.305, Fla. Stat. (2013) ("Space Florida may: * * * *Sue and be sued by its name in any court of law or in equity* [and] * * * * Acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests under or in such licenses."), § 331.355, Fla. Stat. (2013) ("Notwithstanding any provision of chapter 286, the legal title and *every right, interest, claim, or demand of any kind* in and to any patent, trademark, copyright, certification mark, * * * is vested in Space Florida for the use, benefit, and purposes provided in this part.").[10]

Several other statutes feature language specifically exempting certain agencies from some or all of DOS's authority and control under Florida Statutes Sections 286.021 and 286.031. See § 601.101, Fla. Stat. (2013) ("Notwithstanding chapter 286, the legal title and every right, interest, claim, or demand of any kind in and to any patent, trademark, copyright, certification mark, or other right * * * developed by the [Department of Citrus] under this chapter, is

[9] This language was enacted in 1996, four years before the Florida legislature passed FLVS's original enabling statute. See 1996 Fla. Sess. Law Serv., Ch. 96-320 (1996).

[10] Nearly all of the language in that statute was enacted in 1992, eight years before the Florida legislature passed FLVS's original enabling statute. See 1992 Fla. Sess. Law Serv., Ch. 92-93 (1992).

vested in the department for the use, benefit, and purposes provided in this chapter."), § 24.105(10), Fla. Stat. (2013) ("Notwithstanding the provisions of chapter 286, [the Department of the Lottery shall] have the authority to hold patents, copyrights, trademarks, and service marks and enforce its rights with respect thereto. The department shall notify the Department of State in writing whenever property rights by patent, copyright, or trademark are secured by the department."); see also § 334.049, Fla. Stat. (2013) (providing the Department of Transportation with authority to enforce intellectual property rights "[n]otwithstanding any other provision of law to the contrary"), § 1004.23, Fla. Stat. (2013) (providing each state university with authority to enforce intellectual property rights "[a]ny other law to the contrary notwithstanding").

As the Florida Attorney General has explained, these are special situations in which "the Legislature considered it necessary to grant specific statutory authority to these state agencies to hold and enforce trademarks." Op. Att'y Gen. Fla. 2000-13, 2000 WL 202137, at *2 (Feb. 22, 2000). These exceptions are created when the legislature provides agencies "*specific* statutory authority to hold and enforce trademarks."[11] Id. (emphasis added).[12] In sum, the Florida legislature knows how

[11] Contrary to FLVS's repeated assertions—and as illustrated above—the "specific" wording used to create these exceptions may differ from statute to statute and need not feature the words "sue or be sued." See FLVS Sup. Ct. Br. 7, 10-12, 22. Indeed, even if the words "sue or be sued" grant *some* limited litigation rights, see infra at 32-38, they do not grant authority to litigate *all* matters—much

to write a statute with clear and specific language granting an agency the power to enforce intellectual property rights. The Florida legislature chose not to do so when drafting (and amending) FLVS's enabling statute. Where, as here, the legislature "knows how to say something but chooses not to, its silence is controlling." Delgado v. U.S. Att'y Gen., 487 F.3d 855, 862 (11th Cir. 2007) (citations & quotation omitted); see also Dep't of Envtl. Prot. v. Landmark Enter., Inc., 3 So. 3d 434, 436 (Fla. 2d DCA 2009) ("If the legislature desired the [Department of Environmental Protection] to act as a receiver, it knew how to do so, as illustrated by instances where it empowered other state agencies to so act when needed."); Andrew, 961 So. 2d at 377 ("[A]s Appellees point out, the legislature used the term 'branch campus' in other statutes, including five provisions that were passed in the same legislative session as the language in

---

less matters involving intellectual property owned by the State. Section 288.9015(2), for example, is careful to clarify that Enterprise Florida may "[s]ue and be sued, *and appear and defend in all actions and proceedings*[.]" § 288.9015(2), Fla. Stat. (2013) (emphasis added). If the power to "sue and be sued" were sufficient to convey the right to litigate all types of matters, the language "appear and defend in all actions and proceedings" would be rendered superfluous. "'[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" Kozak v. Hillsborough Cnty., Fla., 644 F.3d 1347, 1349-50 (11th Cir. 2011) (quoting Corley v. United States, 556 U.S. 303 (2009)); see also Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992) (same).

[12] FLVS attempts to distinguish this opinion by arguing that FLVS has "specific statutory authority to own trademarks." That is incorrect. As explained below, FLVS does not have any authority—much less specific statutory authority—that would enable it to own the marks. See infra at 25-32.

question * * * * There is no question the legislature could have chosen that particular term again if it wanted to.").

3. The legislative history of FLVS's enabling statute still further confirms that the state legislature had no intention of investing FLVS with complete authority over the licensed intellectual property rights and interests. See Massey v. David, 979 So.2d 931, 942 (Fla. 2008) ("[T]his Court has specifically stated that [legislative] history is an 'invaluable tool' in construing the provisions of a statute * * * * Consistent with this precedent, this Court has utilized legislative history on numerous occasions in attempting to discern the intent of the Legislature.") (citations omitted). As noted above, the original bill proposed in 2000 as FLVS's enabling law made no mention of the State when describing FLVS's intellectual property rights. R 30-14 (H.B. 2063(2)(b) (2000)). But the legislature amended the proposed language before passing the bill specifically in order to "[c]larif[y] that *ownership of all patents, copyrights, trademarks, licenses, and rights* or incentives thereunder and therein *must vest in the state*, with the board having full right of use and full right to retain the revenues derived therefrom." R 30-15 (House Comm. On Education Innovation, Final Analysis for CS/HB 2063) § VI (emphasis added); see also id. § I ("*Although the ownership of patents, copyrights, and trademarks and any licenses remains with the state*, the board has the full right of use and full right to retain any revenues derived[.]")

(emphasis added). Thus, the legislature plainly distinguished the appointed FLVS board from the State, and it took pains to emphasize that the intellectual property used by FLVS—including the asserted marks—would belong to the State, vesting DOS with the exclusive authority to police, protect, enforce, or file suit in regard to such property.

It therefore should come as no surprise that the legislature recently declined to adopt FLVS's proposed amendments to the statute. As explained above, the amendments FLVS proposed—after it filed the underlying lawsuit here—would have granted *it* (rather than the State) the very ownership rights withheld in the original enactment and would have granted *it* (rather than DOS) the right to sue to enforce those rights. See supra at 12-13. The Florida legislature declined[13] FLVS's invitation to amend the statute to retroactively confer on FLVS ownership and authority it lacked, and continues to lack. See Nikolits v. Nicosia, 682 So. 2d 663, 665 (Fla. 4th DCA 1996) ("[B]y virtue of the failure to amend the general ballot statute, [the legislature] demonstrated its intent that that same discretion or authority not be given to the Supervisor of Elections in general elections.").

[13] Tellingly, FLVS has not resumed its lobbying campaign since then. In fact, this campaign—which took place during the course of the district court litigation—marked FLVS's only attempt to amend its enabling statute to acquire the authority to own and enforce intellectual property.

II. THE STATE OF FLORIDA OWNS THE ASSERTED MARKS

FLVS insists that it owns the marks asserted in this proceeding and cites a variety of phrases in the enabling statute in support of that contention. See, e.g., FLVS Sup. Ct. Br. 33-39. But FLVS is merely a licensee of marks owned by the State—and a non-exclusive licensee at that. Its arguments to the contrary are meritless.

1. FLVS cites its rights to "acquire, enjoy, use, and dispose of" to support its contention that it is the owner rather than merely a licensee of the marks. FLVS Sup. Ct. Br. 34-35. But contrary to FLVS's contention, those are the rights of a liensee, not an owner.

The relevant provision of the enabling statute states as follows:

> [FLVS's] board of trustees may acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein. Ownership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state, with the board of trustees having full right of use and full right to retain the revenues derived therefrom.

§ 1002.37(2)(c), Fla. Stat. (2013) (emphasis added). That second sentence specifically identifies "the state" as the "owner[]" of any marks, while clarifying that FLVS nevertheless is entitled to certain benefits involving those marks—namely, "full right of use" and "full right to retain revenues derived therefrom." § 1002.37(2)(c), Fla. Stat. (2013). In order to accept FLVS's argument, then, the

Court would have to ignore these clear, unambiguous statements differentating the role and rights of "the state" from those of FLVS. But as described above, "'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" Kozak, 644 F.3d at 1349-50 (11th Cir. 2011) (quoting Corley, 556 U.S. 303 (2009)); see also Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d at 456 (same). FLVS's construction thus fails at the outset.

FLVS soldiers on, however, analogizing its trademark rights to the "bundle of rights" associated with traditional property ownership. But that argument has no basis in law. Trademark law and traditional property law have little in common. As the leading trademark treatise explains, "the 'property' parameters of a trademark are defined very differently from any other kind of 'property.'" 1 McCarthy on Trademarks and Unfair Competition § 2:14 (4th ed.). Therefore, "[a]nalogies to other forms of 'property,' from real estate to patents and copyrights, falter on the basic definition of scope of trademark 'property.'" Id. And under trademark law, all of the various rights on which FLVS bases its theories—the rights to "acquire, enjoy, use, and dispose of"—are perfectly consistent with FLVS's role as a licensee.

As to the right to "use" and "acquire" trademarks or service marks, the leading trademark treatise explains that a licensor—here, the State, acting through

DOS—may acquire and maintain ownership rights in a mark "through the use of the mark by a controlled licensee even when the first and only use of the mark was made, and is being made, by the licensee. This is because use of a designation as a mark by a qualified licensee inures to the benefit of the licensor, who as a result becomes owner of the trademark or service mark rights in the designation." 3 McCarthy on Trademarks and Unfair Competition § 18:46 (4th ed.). This practice has been established in this jurisdiction for over forty years, see Turner v. HMH Publ'g Co., 380 F.2d 224, 229 (5th Cir. 1967); in fact, it was codified in the Lanham Act over a decade before FLVS even was created. See 15 U.S.C. § 1055.

Along the same lines, the word "enjoy"—a right granted to FLVS under the enabling statute—frequently is used to describe the fact that a licensee is entitled to certain benefits from its use of a mark or other intellectual property. See, e.g., B & F Sys., Inc. v. LeBlanc, No. 7:07–CV–192, 2011 WL 4103576, *2, *11 n.10 (M.D. Ga. Sept. 14, 2011) (referencing a license providing that the licensee may "enjoy the goodwill associated with said mark").

Similarly, the right to sublicense is a right frequently granted to licensees. See, e.g., 3 McCarthy on Trademarks and Unfair Competition § 18:43 (4th ed.) ("The right of a licensee to sub-license others must be determined by whether the license clearly grants such a power."); c.f. 1 Eckstrom's Licensing in Foreign and

Domestic Operations § 3.20 (2012) (noting that "a license agreement may include the right to sublicense").

Finally, FLVS's right to "dispose" is perfectly consistent with its position as a licensee. For while the State has granted FLVS the "full right of use" of certain marks belonging to the State, § 1002.37(2)(c), Fla. Stat. (2013), the State will not micro-manage FLVS marketing or branding strategy, Compare 6 Callmann on Unfair Comp., Tr. & Mono. Appendix 50 § 50:1 (4th Ed.) (featuring a sample trademark license agreement that provides, "Licensee shall not sell, transfer, assign or otherwise dispose of the license herein granted *without the prior written consent of Licensor*") (emphasis added). Put another way, FLVS may choose to use certain marks belonging to the State, but it also has the authority to terminate its use (i.e., dispose) of those marks.[14] Therefore, if FLVS were to decide one day to dispose

[14] FLVS has suggested that the authority to "dispose" also may include the ability to sell or assign intellectual property rights. As a general matter—and as indicated above in the sample license provided by the Callmann treatise—licensors can grant licensees the authority to sell or assign intellectual property rights. Accordingly, this issue has no bearing on FLVS's status as a licensee. If anything, it confirms the limited nature of FLVS's rights: Even assuming arguendo that FLVS has *some* authority to sell or assign, that authority is contingent upon the actions of other Florida agencies. For example, FLVS could not assign to another the right to use marks in the same manner as FLVS (i.e., as an online public or charter school) unless the Department of Education (or another education-related arm of the state) authorized the assignee to operate an online public or charter school in the first instance. In any event, the Court need not decide whether FLVS has the authority to sell or assign intellectual property as part of its right to "dispose," as FLVS is not presently attempting to engage in any such transactions.

of the mark "FLVS" that it uses and replace that mark with the mark "FVS," for example, it would have the right to do so.[15]

2. FLVS also claims "ownership" of the relevant marks based on the provision in its enabling statute granting it "full right of use and full right to retain the revenues derived." FLVS Sup. Ct. Br. 33, 37-38. That cannot be. The provision states in full, "Ownership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state, with the [FLVS] board of trustees having full right of use and full right to retain the revenues derived therefrom." § 1002.37(2)(c), Fla. Stat. (2013) (emphasis added). Ownership therefore vests in the "state." And contrary to FLVS's assertion, the term "state" in that sentence does not refer to FLVS. FLVS Sup. Ct. Br. 37-38. "Where, as here, a legislature uses different terms in the very same statutory provision, we take cognizance of that choice by presuming the legislature intended the different words to carry with them * * * different meanings." Reg'l Air, Inc. v. Canal Ins. Co., 639 F.3d 1229, 1238 (10th Cir. 2011) (citing Russello v. United States, 464 U.S. 16, 23 (1983); other citation omitted).

Moreover, despite FLVS's contentions to the contrary, FLVS's "full right of use" does not grant FLRS exclusive right of use. The dictionary definitions previously cited by FLVS for the term "full" confirm this fact. Those definitions

[15] Naturally, the new mark would belong to the State, to be held and enforced, where appropriate, by DOS.

refer, for example, to "enjoying all *authorized* rights and privileges." FLVS Cir. Br. 19-20 (quotation omitted; emphasis added). They do not refer to *being the only one entitled to* "enjoy[] all *authorized* rights and privileges." Id. (quotation omitted; emphasis added). "Exclusive," by contrast, means precisely this: "excluding others from participation." Merriam-Webster's Collegiate Dictionary 404 (10th ed. 1998).[16] In any event, even if FLVS had the exclusive right to use—which it does not—that would not make FLVS owner of the marks.

Similarly, the fact that FLVS has the "full right to retain the revenues" does not make FLVS owner of the marks. That is merely how the State chose to allocate its revenue. See, e.g., Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 79 (2008) ("[T]he law normally gives legislatures broad authority to decide how to spend the people's money."); R.R. Co. v. County of Otoe, 83 U.S. 667, 675 (1872) ("[I]n the absence of some constitutional inhibition the power of a State to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature.").

[16] The reality bears this out. FLVS itself has admitted, under oath, that it "has licensed a number of entities to use its FLVS or FLORIDA VIRTUALSCHOOL trademarks where those entities are offering FLVS courses or other FLVS services to their students." R 30-16 (FLVS's Supplemental Interrog. Responses, Redacted to Eliminate Attorneys' Eyes Only Material) at Answer to Interrog. No. 21. FLVS reiterated this concession in its brief submitted to the District Court. R 40, p. 19. The existence of these other licenses should come as no surprise. As the District Court correctly concluded, FLVS's enabling statute itself "specifically contemplates the existence of multiple licenses." R 56, p. 6.

3. FLVS previously argued that its right to license gives it a right to "exclude." FLVS Cir. Br. 20. Quite the contrary. FLVS has, at most, a right to *include*. By determining which individuals or entities may receive a license, FLVS can expand the scope of those entitled to use the marks—as it already has. See supra at 30 n.16. While FLVS may indeed terminate some or all of these licenses, it has no power to enforce that termination. Similarly, if other entities use the asserted marks without a license, FLVS has no authority to stop them. In short, FLVS has no actual power to exclude. That power belongs to DOS, which unlike FLVS, is statutorily empowered "to take any and all action necessary, including legal actions, to protect the [the State's intellectual property] against improper or unlawful use or infringement[.]" § 286.031, Fla. Stat. (2013).

4. FLVS also contends that it must own the asserted marks because of the words "other rights or interests thereunder or therein" in the following provision: "[FLVS's] board of trustees may acquire, enjoy, use, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein." § 1002.37(2)(c), Fla. Stat. (2013). It is true that FLVS "may acquire, enjoy, use, and dispose of" such "rights or interests." But nothing in the statute gives FLVS authority to *own* those "rights or interests," much less the intellectual property to which those "rights or interests" relate. "[O]ther rights or interests thereunder or therein" merely refers to discrete right or interests—e.g., the

right to develop derivative works in any copyrighted works—that FLVS "may acquire, enjoy, use, and dispose of," while "[o]wnership of all such * * * rights or interests * * * shall vest in the state[.]" § 1002.37(2)(c), Fla. Stat. (2013).

III. FLVS'S ARGUMENTS REGARDING THE "BODY CORPORATE" PROVISION ARE MERITLESS

FLVS argues, at some length, that it has the authority to litigate trademark actions by virtue of the "body corporate" provision in its enabling statute: "[t]he board of trustees shall be a body corporate with all the powers of a body corporate and such authority as is needed for the proper operation and improvement of the Florida Virtual School." § 1002.37(2), Fla. Stat. (2013). This argument fails at the outset because it falls outside the scope of the certified question. See Certification Order 9.[17] The Court therefore need proceed no further. But even if the Court were to consider the merits of FLVS's arguments, the outcome would be the same.

FLVS's "body corporate" language suffers from a number of serious flaws.

1. "The burden of proof of standing is always on the party seeking the standing." Fraser v. Department of Highway Safety and Motor Vehicles, 727 So.2d 1021, 1024 (Fla. 4th DCA 1999). And as the party that bears the burden

[17] The Eleventh Circuit had every opportunity to certify a question about the "body corporate" language. The issue had been briefed at length before the Eleventh Circuit and in the district court. See R 40 at 11-14; R 48 at 7-9; K12 Cir. Br. 35-37; FLVS Cir. Reply 19-21.

here, FLVS fails to identify one single authority holding that the "body corporate" language vests an agency with the authority to bring suit to protect intellectual property—much less the authority to enforce intellectual property *owned by the State*. The few cases cited by FLVS (FLVS Sup. Ct. Br. 11-12) interpret the "body corporate" language narrowly—as providing an agency with a carefully circumscribed right to sue or be sued in connection with "appropriate" *contract* actions.[18] Bd. of Pub. Instruction v. Knight & Wall, 132 So. 644, 646 (Fla. 1931); see also First Nat. Bank v. Bd. of Pub. Instruction, 111 So. 521, 525 (Fla. 1927) (agency created as a "body corporate" had the authority to enforce its contracts); Roberts v. Bd. of Pub. Instruction, 112 F.2d 459, 460 (5th Cir. 1940) (Board may pursue its "petition for composition of [the board's] debts").[19]

This should come as no surprise. Florida courts long have recognized that contracts necessarily imply certain rights and remedies: "It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be

[18] FLVS's reliance on Klemm v. Special Road & Bridge District is misplaced because the entities at issue in that proceeding had the benefit of a statute authorizing them to "sue and be sued." 190 So. 594, 595 (Fla. 1939).

[19] "[A] composition is in its essence a contract, proposed by the debtor and agreed to by those of the creditors who give consent, and they in the requisite majority bind all." American United Life Ins. Co. v. Haines City, Fla., 117 F.2d 574, 576 (5th Cir. 1941).

bound." Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 5 (Fla. 1984) (holding that sovereign immunity will not apply in contract actions) (citations omitted).[20] But this has absolutely no bearing on this proceeding, which involves tort claims[21] concerning marks owned by the State.

2. Second, as FLVS itself points out, the "legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute." Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue, 903 So. 2d 913, 918 (Fla. 2005) (citation & quotation omitted). The legislature therefore would have known that Florida courts interpret the "body corporate" language narrowly, as authorizing agencies to sue or be sued in connection with *contract* actions. For these reasons, it strains credulity to suggest, as FLVS does, that the Florida legislature inserted the "body corporate" language in FLVS's enabling statute with the intent and expectation of authorizing anything other than certain forms of contract litigation.

---

[20] Contrary to FLVS's contention, K12 does not contend that FLVS "has no authority to litigate in general." FLVS Sup. Ct. Br. 14 n.19. It may be that FLVS—like the agencies in the "body corporate" cases—has some authority to litigate certain types of contract claims (e.g., those that do not involve the State's intellectual property, which would be enforced exclusively by DOS). That particular question is beyond the scope of this case. But the point is this: standing to sue on one issue does not mean that one has standing to sue on all issues.

[21] Health Sci. Distribs., Co. v. Usher-Sparks, No. 6:10–cv–1797, 2012 WL 921338, *4 (M.D. Fla. Feb. 29, 2012) ("Trademark infringement is a tort[.]"), adopted 2012 WL 919812 (M.D. Fla. Mar 19, 2012).

3. Third, as described above, where the legislature wishes to authorize intellectual-property litigation, it does so with clear and specific language relating to intellectual-property litigation. See supra at 19-23. FLVS's enabling statute lacks that language, and no amount of argument regarding FLVS's status as a "body corporate" alters that fact.

Tellingly, the statutes of Enterprise Florida and Space Florida—two of the entities cited above (at 19-20)—feature *both* a provision identifying them as bodies corporate,[22] *and* a separate provision authorizing them to litigate intellectual property matters.[23] If, as FLVS contends, the "body corporate" provision were sufficient in itself to authorize intellectual property litigation, the separate litigation provision would be rendered superfluous. That cannot be. As indicated above, "'one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" Kozak, 644 F.3d at 1349-50 (quoting Corley v. United States, 556 U.S. 303 (2009)); see also Forsythe, 604 So. 2d at 456 (Fla. 1992) (same).

[22] § 331.302(1), Fla. Stat (2013) (creating Space Florida as a "body * * * corporate"), § 288.901(1)(a), Fla. Stat. (2013) (creating Enterprise Florida, Inc. as "a nonprofit corporation"), §288.9015(2)(j), Fla. Stat. (2013) (referring to Enterprise Florida's "corporate powers"),

[23] See supra at 19-20.

4. Fourth, it is established that "a more specific statutory provision governs over a more general provision." R.C. v. State, 948 So. 2d 48, 51 n.2 (Fla. 1st DCA 2007); Katherine's Bay, LLC v. Fagan, 52 So. 3d 19, 28 (Fla. 1st DCA 2010). As explained above, the Florida legislature was very precise in determining which limited intellectual property rights should be granted to Plaintiff and which should be retained by the State. See § 1002.37(2)(c), Fla. Stat. (2013). The language of that specific provision, Section 1002.37(2)(c), defines the full scope of FLVS's intellectual property rights and trumps whatever interpretation FLVS's counsel might now attempt to force onto the more generalized "body corporate" provision.[24]

5. Finally, although FLVS suggests that the "body corporate" provision clearly and unambiguously grants it the authority to litigate intellectual property matters, FLVS Sup. Ct. Br. 16, those words are belied by FLVS's attempt to amend its enabling statute. See supra at 12-13. If FLVS truly believed that it already possessed those rights under the "body corporate" language, its proposed (and unsuccessful) amendments would have been unnecessary.

[24] Contrary to FLVS's contention, K12 is not arguing that the "omission of a specific right to 'sue or be sued' * * * trumps the general grant of "all the powers of a body corporate[.]" Instead, K12, like the Eleventh Circuit, observes that Paragraph (2)(c) of FLVS's enabling statute—granting FLVS the authority to "acquire, enjoy, use, and dispose of * * * trademarks and any licenses and other rights or interests thereunder or therein"—identifies the full scope of FLVS's intellectual property rights. That specific provision trumps the more general provision regarding FLVS's status as a "body corporate."

FLVS's remaining arguments in support of its "body corporate" theory arise, in part, from misunderstanding K12's arguments and the certified question. The issue here is not whether FLVS might have *some* limited right to litigate but rather whether FLVS's has the authority to *enforce intellectual property owned by the State*.

FLVS observes, for instance, that its enabling statute grants its board of trustees "sovereign immunity." FLVS Sup. Ct. Br. 18. FLVS holds this up as proof of the legislature's expectation that FLVS might be involved in litigation: "There is no need for sovereign immunity if FLVS cannot be sued." Id. But sovereign immunity is specifically intended to *protect* FLVS from being sued. See Am. Home Assur. Co. v. National Railroad Passenger Corp., 908 So.2d 459, 471 (Fla. 2005). And the fact that FLVS *might* be named as a defendant in *some* type of complaint says nothing about FLVS's specific ability to enforce service marks owned by the State. See supra 34 n.20.

FLVS also argues that comparing different statutes can be misleading. FLVS Sup. Ct. Br. 19-21 (citation & quotation omitted). K12 does not disagree. As explained above, the words used to grant a specific form of authority may differ somewhat from statute to statute. See supra at 21 n.11. Thus, the FLVS enabling statute need not feature the exact same words as the enabling statutes of the Department of Citrus, Department of the Lottery, or the Department of

Transportation in order for FLVS to determine employee benefits and conditions of employment, conduct audits, or employ and train staff.

IV. THERE ARE NO CONFLICTS BETWEEN FLVS'S RIGHTS AND THOSE OF DOS

FLVS also insists that if DOS had the right to enforce the marks, numerous irreconciliable conflicts would arise between FLVS's intellectual property rights and those of DOS. That is not so.

FLVS gets off to a rocky start by arguing that for DOS to enforce the FLVS marks, DOS must both own the marks and be the entity described as the "state" in FLVS's enabling statute. That is incorrect. FLVS's enabling statute provides that "[o]wnership of all such patents, copyrights, trademarks, licenses, and rights or interests thereunder or therein shall vest in the state[.]" § 1002.37(2)(c), Fla. Stat. (2013). The term "state" plainly refers to the State of Florida as the owner of the intellectual property, not DOS—nor any other agency or department, for that matter. § 1002.37(2)(c), Fla. Stat. (2013) (emphasis added). Pursuant to Sections 286.021 and 286.031, DOS is merely charged with managing and enforcing those assets *on behalf of* the State. See supra at 17-18.

Once these issues are clarified, it becomes clear that there are no conflicts between FLVS's intellectual property rights and those of DOS.[25]

[25] Despite FLVS's contentions to the contrary, K12 explained as much in comprehensive detail in its Eleventh Circuit brief. See K12 Cir. Br. 38-42.

FLVS first contends that its right to "acquire, enjoy, use, and dispose of * * * trademarks and any licenses and other rights or interests thereunder or therein," § 1002.37(2)(c), Fla. Stat. (2013), conflicts with the statute stating, "[t]he legal title and every right, interest, claim or demand of any kind in and to any patent, trademark or copyright, or application for the same, now owned or held, or as may hereafter be acquired, owned and held by the state * * * is hereby granted to and vested in the Department of State for the use and benefit of the state," § 286.021, Fla. Stat. (2013). Not in the least. As described in greater detail elsewhere in this brief, the State owns the marks used by FLVS, including the marks acquired by FLVS. DOS manages that intellectual property on behalf of the State. Nothing in this standard statutory arrangement constrains FLVS's ability to "acquire, enjoy, use, and dispose of" its licenses and other interests.

FLVS also expresses concern about the licensing rights of DOS and FLVS. In particular, DOS and FLVS are both statutorily empowered to issue licenses, and "no person, firm or corporation shall be entitled to use" State-owned intellectual property "without the written consent" of DOS. § 1002.37(2)(c), Fla. Stat. (2013); §286.021, Fla. Stat. (2013); §286.031, Fla. Stat. (2013). That is no conflict. For example, according to FLVS's enabling statute, FLVS may "acquire, enjoy, use, and dispose of * * * any licenses and other rights or interests thereunder or therein." § 1002.37(2)(c), Fla. Stat. (2013). If FLVS acquires "any" license, id.;

DOS can issue written consent to the licensee, § 286.021, Fla. Stat. (2013); and, as described above, ownership of the license will then accrue to the State, see supra at 26-27. FLVS may then "enjoy, use, and dispose of" the license. See § 1002.37(2)(c), Fla. Stat. (2013). Similarly, should DOS ever issue a license to the FLVS marks,[26] ownership will accrue to the State, but FLVS will be free to "enjoy, use, and dispose" of the license.

FLVS also homes in on the provision authorizing DOS "to do and perform any and all things necessary to secure letters patent, copyright and trademark on any invention or otherwise, and to enforce the rights of the state therein." § 286.031, Fla. Stat. (2013), and insists that this provision is at odds with FLVS's rights to acquire intellectual property. FLVS again is mistaken. FLVS can acquire new intellectual property.[27] DOS may then "secure" that intellectual property—for example, by registering it with the U.S Patent & Trademark Office in the name of its owner, the State.

FLVS also points to DOS's authority to collect royalties or "such other consideration" as it "shall deem proper" in exchange for use of the State's intellectual property. § 286.031, Fla. Stat. (2013). FLVS insists that it is the only

[26] Needless to say, the fact that DOS is "authorized to" license does not mean it necessarily will choose to do so. § 286.031, Fla. Stat. (2013).

[27] It is simply not truthful to suggest that FLVS is the only state agency with the ability to create new intellectual property for the State. See FLVS Cir. Br. 28 ("Both entities cannot have the right to bring trademarks into existence at the same time.").

agency with the right to derive revenues from use of the asserted marks. FLVS Sup. Ct. Br. 28. Wrong again. DOS is not *required* to collect money in exchange for use of the State's intellectual property; it merely has authority to do so. *If* DOS deemed it proper to collect money in connection with a license it issued for use of the asserted marks, and *if* FLVS thought itself entitled to that money, and *if* DOS refused to transfer the money to FLVS, FLVS could take that matter up with DOS. That hypothetical scenario certainly is not before the Court. And there is no indication that the situation has occurred or ever will occur. There certainly is no facial conflict between DOS's statute and FLVS's statute.

FLVS expresses concern about DOS's authority "to assign" and "to sell [the State's intellectual property] and to execute any and all instruments on behalf of the state necessary to consummate any such sale." § 286.031, Fla. Stat. (2013). FLVS insists that it has exclusive authority to "dispose" of the intellectual property it uses. But while FLVS's enabling statute provides that FLVS "may * * * dispose of" intellectual property owned by the State, nothing in that statute gives FLVS any *exclusive* right to dispose of that property. Further, as explained above, the full scope of FLVS's right to "dispose" is not before the Court here; it may not include the right to sell or assign intellectual property.[28] See supra at 28 n.14.

[28] FLVS's attempts to rely on a 1971 Florida Attorney General Opinion are inapposite. See Op. Att'y Gen. Fla. 71-298 (1971). That opinion provides that DOS may not "assign" patents to other state agencies, where "assign[ment]" is

FLVS also argues that DOS's statute granting it "every right, interest, claim or demand of any kind in and to any * * * trademark," Section 286.021, conflicts with FLVS's enabling statute, which specifically grants FLVS certain trademark rights. Not at all. The fact that DOS has "*every* right" does not mean that it has *exclusive* rights.

Finally, FLVS insists that it must have the authority to enforce the asserted marks because "where two statutory provisions would otherwise conflict, the earlier enacted one yields to the later one to the extent necessary to prevent the conflict." ConArt, Inc. v. Hellmuth, Obata & Kassabaum, Inc., 504 F.3d 1208, 1210 (11th Cir. 2007)). But this argument is tautological; it presumes the conflict that FLVS fails to prove.[29]

V. DOS CAN AND WILL ENFORCE THE MARKS, TO THE EXTENT NECESSARY

Assuming arguendo that FLVS believes it needs trademark protection, FLVS Sup. Ct. Br. 13-14, 39-42, FLVS may request assistance from DOS. DOS is

---

described as transferring all of DOS's title and interest. As indicated above, the full scope of FLVS's right to "dispose" is not before the Court. There is no reason to believe it necessarily would entail transferring title and interest to another state agency or, for that matter, transferring title and interest to any third party.

[29] FLVS makes much of the case of Punta Gorda v. McSmith, Inc., 294 So. 2d 27, 29 (Fla. 2d DCA 1974). But in McSmith, the later-enacted statute and earlier-enacted statute actually awarded similar rights of enforcement to two separate entities. Id. The same cannot be said here, where the statutes are clear and distinct: DOS has the statutory authority to enforce the asserted marks and to possess them on behalf of the State. FLVS does not.

more than capable of undertaking appropriate measures, if it concludes the mark needs protection.

There is nothing unusual about centralizing state enforcement authority in an agency like DOS. As the Florida Attorney General explained in a 1969 opinion, "the legislature intended that [DOS's predecessor] initiate and have full control over any patent policy with respect to every right, interest, claim or demand of any kind concerning a patent now owned or held, or one which may hereafter be acquired, owned, or held by the state." Op. Att'y Gen. Fla. 69-81 (1969). This approach makes sense as a policy matter, enabling DOS to take a broad view of the State's interests and needs—and potentially avoiding the sort of conflicts triggered by this lawsuit, where one state agency seeks to challenge conduct already expressly approved by the State.

FLVS closes by arguing that the marks it uses should not be deemed abandoned, lest a parade of horribles befall the State. But as FLVS concedes, FLVS Sup. Ct. Br. 5-6, the abandonment argument was not argued to the District Court, is not an issue on appeal, and most certainly is not within the scope of the question certified to this Court. For FLVS to resort to that last-ditch argument is telling.

CONCLUSION

For all of the foregoing reasons, the Court should hold that Florida VirtualSchool's enabling statute does not grant the authority to bring suit to protect the asserted trademarks; only the Department of State has that authority.

Respectfully submitted,

HOGAN LOVELLS US LLP

By: /s/ Steven P. Hollman
Steven P. Hollman, *Pro hac vice*
Florida Bar PHV No. 107442
Catherine E. Stetson, *Pro hac vice*
Florida Bar PHV No. 54799

555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: 202-637-5600
Facsimile: 202-637-5910
steven.hollman@hoganlovells.com
cate.stetson@hoganlovells.com

By:/s/ Stephanie L. Carman
Stephanie L. Carman
Florida Bar No. 499463

600 Brickell Avenue
Suite 2700
Miami, Florida 33131
Telephone: 305-459-6500
Facsimile: 305-459-6550
stephanie.carman@hoganlovells.com

Attorneys for Defendants/Appellees
K12 Inc. and K12 Florida LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I electronically transmitted the foregoing Brief to the Clerk of Court using the Florida Supreme Court's electronic filing system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Steven P. Hollman
Steven P. Hollman

CERTIFICATE OF COMPLIANCE

This Brief complies with the font requirements of the Florida Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point type.

/s/ Steven P. Hollman
Steven P. Hollman