

>> HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION AND YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.

LADIES AND GENTLEMEN, SUPREME
COURT OF FLORIDA.
PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA
SUPREME COURT.

FIRST CASE OF THE DAY IS FLORIDA
VIRTUAL SCHOOL VERSUS K12.
YOU MAY BEGIN.

>> MR. CHIEF JUSTICE, MAY IT
PLEASE THE COURT, WE ARE HERE
TODAY ON A QUESTION CERTIFIED
FROM THE UNITED STATES COURT OF
APPEALS FOR THE 11th
CIRCUIT.

THE CERTIFIED QUESTION CONCERNS
WHETHER MY CLIENT, FLVS, HAS THE
POWER TO PROTECT ITS INTERESTS
IN COURT.

THE, THERE IS NO PROVISION IN
OUR ENABLING STATUTE THAT
AFFIRMATIVELY DEPRIVES IT OF THE
RIGHT TO BE IN COURT.

INSTEAD, THE DEFENDANTS IN THIS
CASE REFER TO AS K12, CONTEND
THAT THERE MUST BE AN EXPRESS
GRANT OF THE RIGHT TO SUE OR BE
SUED IN ITS ENABLING STATUTE AND
ONLY IF SUCH PROVISION EXISTS
WILL IT HAVE THE ABILITY TO
LITIGATE TORT CLAIMS IN COURT.

THIS ARGUMENT HAS BEEN
REPEATEDLY MADE AND REPEATEDLY
REJECTED BY THIS COURT AND OTHER
COURTS AND LINE OF AUTHORITY
STRETCHING BACK TO THE FIRST
NATIONAL BANK CASE IN 1927.

THOSE DIVISIONS EACH HELD AND
THEY'RE CITED IN OUR BRIEFS,
THOSE DECISIONS EACH HELD THAT
AN ENTITY THAT IS GIVEN BROAD
RIGHTS TO DEAL WITH THE BUSINESS
WORLD NECESSARILY HAS THE RIGHT
TO PROTECT ITS COMMERCIAL
INTERESTS IN COURT AS WELL.

>> LET ME ASK YOU JUST A
PRACTICAL QUESTION.
THE DEPARTMENT OF STATE, IF THE
DEPARTMENT OF STATE HAD BEEN
ADDED IN AS A PARTY PLAINTIFF,
WOULD THAT HAVE SOLVED THE

PROBLEM?

IN OTHER WORDS IN OTHER WORDS,
IS IT AN ISSUE WHETHER YOUR
ENTITY CREATED BY THE STATE OR
THE DEPARTMENT OF STATE IS THE
PROPER PERSON TO PROTECT THE
TRADEMARK?

THERE IS NO QUESTION THERE'S A
TRADEMARK, CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> SO IF THERE, WHAT IS, IS THAT
THE, I UNDERSTAND THE SPECIFIC
ISSUE BUT, AND IT'S A PRACTICAL
MATTER IF THEY HAD BEEN JOINED
AS A PARTY WOULD THAT HAVE
SOLVED THE PROBLEM?

>> IF THE DEPARTMENT OF STATE
HAD BEEN JOINED AS A PARTY IT
MIGHT HAVE SOLVED SOME OF THE
PROBLEMS.

THERE WOULD STILL BE A SERIES OF
ARGUMENTS THAT THE DEFENDANTS,
THE K12 DEFENDANTS ARE MAKING
THAT IT WOULD NOT HAVE SOLVED.
FOR EXAMPLE, THE FLORIDA VIRTUAL
SCHOOL IS THE REGISTRANT ON THE
FEDERALLY REGISTERED TRADEMARKS
IN THIS CASE, NOT THE DEPARTMENT
OF STATE.

SO THEY WOULD STILL BE LEFT
ARGUE, WELL YOU HAVE THE WRONG
REGISTRANT FOR OUR FIRST COUNT
OF INFRINGEMENT AFTER REGISTERED
MARK ACCORDING TO THEM COULD BE
A CLAIM WE COULD NO LONGER
ASSERT.

>> SEEMS TO ME THAT IS AN
IMPORTANT ISSUE, WHICH WHAT
YOU'RE SUING FOR IS DIRECTLY
BASED ON SOMETHING THAT HAS BEEN
REGISTERED UNDER, WITH YOU, WITH
YOUR ENTITY AS THE REGISTERED
OWNER, CORRECT?

>> THAT IS CORRECT, YOUR HONOR.

IT IS A VERY IMPORTANT AND
HIGHLY VALUABLE PROPERTY RIGHT
AND I BELIEVE WE'VE CITED IN OUR
PAPERS THAT THE DEFENDANTS
CONTEND ALL THOSE REGISTRATIONS
ARE INVALID BECAUSE THEY WERE
REGISTERED IN THE WRONG ENTITY
AND BECAUSE THE DEPARTMENT OF
STATE, ACCORDING TO THE
DEFENDANTS, HAS NOT TAKEN
SUFFICIENT EFFORTS TO POLICE AND
PROTECT THOSE TRADEMARKS.

WHICH WOULD BE AN ADDITIONAL
ISSUE WOULD NOT BE SOLVED WITH
THE DOS WERE ADDED AS AN ADDITIONAL

PLAINTIFF.

>> DEPARTMENT OF STATE WAS PROVIDED THE OPPORTUNITY TO PARTICIPATE THROUGH THE FILING OF A BRIEF, WERE THEY NOT?

>> WE DID INVITE THE DEPARTMENT OF STATE TO SUBMIT AN AMICUS BRIEF BEFORE THE 11th CIRCUIT.

>> AND THEY DID NOT FEEL IT NECESSARY TO THRUST THEMSELVES INTO THE LITIGATION?

>> WE, WE'RE NOT SURE WHY THEY DECIDED --

>> IF YOU HAD NOT BEEN PROTECTING WHAT THEY CONSIDERED TO BE INTERESTS OF THE STATE I'M SURE THAT SOMEBODY WOULD HAVE STEPPED IN.

THIS IS NOT AN ADVERSE QUESTION. I MEAN TO ME IT SEEMS LIKE IT'S PRETTY CLEAR THAT IF THE DEPARTMENT OF STATE HAD CONSIDERED ITSELF TO BE THE OWNER INSTEAD OF YOU, THAT THEY WOULD HAVE RESPONDED TO THIS AND WOULD HAVE FILED SOMETHING, MAKING THAT KIND OF CLAIM.

>> YES, YOUR HONOR.

I BELIEVE THAT IS AN EXCELLENT POINT.

>> ARE THERE OTHER ENTITIES, SUCH AS VIRTUAL SCHOOL IN THE STATE OF FLORIDA WITH, THAT HAS GIVEN THIS KIND OF BROAD POWERS AND IF WE KNOW THERE IS SUCH ANOTHER ENTITY, WHETHER THEY HAVE THE RIGHTS THAT YOU ARE ASSERTING?

>> IT IS, IT IS DIFFICULT TO COMPARE OUR ENABLING STATUTES TO THOSE OF OTHER ENTITIES IN THE STATE OF FLORIDA BECAUSE THERE ARE SOME DIFFERENCES BETWEEN THEM.

THERE ARE DEFINITELY SOME ENTITIES THAT ARE SOMEWHAT SIMILARLY SITUATED THAT ARE GRANTED, FOR EXAMPLE ALL THE POWERS OF THE BODY CORPORATE BUT MAY NOT ALSO BE GRANTED AN EXPRESS SEPARATE RIGHT TO SUE OR BE SUED.

>> WHY WOULD YOU NEED THAT?

>> I DON'T BELIEVE THAT YOU WOULD.

IF YOU'RE GRANTED ALL THE POWERS OF A BODY CORPORATE AND THIS COURT HAS PREVIOUSLY HELD THAT THE CAPACITY OF SUIT IS ONE OF

THE NECESSARY AND ORDINARY INCIDENTS OF A CORPORATION, THAT GRANT FROM OUR POSITION IS DISPOSITIVE OF THE ISSUE IN THIS CASE.

>> WELL, THERE IS NO QUESTION THERE IS SOME TENSION BETWEEN THE TWO STATUTES, CORRECT.

>> I BELIEVE THAT'S CORRECT, YOUR HONOR.

>> CALL IT CONFLICT, CALL IT TENSIONS, CALL IT AMBIGUITIES BECAUSE AS WE LOOK AT STATUTES, AS TRADITIONALLY BEEN THE CASE, IS THAT THE OWNERSHIP OF STATE THINGS HAVE TO HAVE FIND A PLACE AND DEPARTMENT OF STATE HAS OVER THE YEARS HAS DEVELOPED INTO THAT IS THE NOMINAL OWNER OF THINGS.

BUT THEN WE HAVE THE STATUTE COME ALONG FOR YOUR ENTITY, AND HOW SHOULD WE RESOLVE THIS? BECAUSE YOU CAN LOOK AT THE STATUTE THAT SAYS THE DEPARTMENT OF STATE IS THE OWNER OF STATE PROPERTY.

BUT THEN WE HAVE A HYBRID WITH YOUR STATUTE.

SO HOW DO WE RESOLVE THAT CONFLICT?

>> YOUR HONOR, IT'S OUR POSITION THAT APPLICATION OF THE CANNON OF CONSTRUCTION OF THE SPECIFIC CONTROLS OVER THE GENERAL, IS A WAY TO RESOLVE WHAT WE, CLEARLY IS A CLEAR AND UNMISTAKABLE CONFLICT BETWEEN THE DOS STATUTE AND THE FLVS STATUTE IF THE DOS STATUTE IS CONSTRUED TO GRANT IT CONTROL OVER FLVS'S PROPERTY.

>> THIS ALL GOES BACK TO, I TAKE IT, THE RIGHT OF YOUR ENTITY TO FILE FOR A TRADEMARK?

>> THAT IS CORRECT, YOUR HONOR.

>> IS THERE A PROCESS THAT HAS NOT BEEN BROUGHT TO OUR ATTENTION WITH REGARD TO THE DEPARTMENT OF STATE APPLYING FOR TRADEMARKS FOR GOVERNMENTAL AGENCIES OR GOVERNMENTAL ENTITIES?

>> FOR ASSETS OF THE STATE OF FLORIDA THAT ARE ENTRUSTED TO THE DEPARTMENT OF STATE --

>> IT'S NOT AN ASSET AT THE BEGINNING.

IT IS NOTHING UNTIL IT IS APPLIED FOR AND GRANTED BUT FOR

THE PROCESS OF DOING THAT TYPE
OF THING FOR OTHER AGENCIES?
>> THE DEPARTMENT OF STATE CAN
CERTAINLY APPLY FOR AND REGISTER
INTELLECTUAL PROPERTY THAT IS
ENTRUSTED TO IT.
>> WELL IT CAN'T BE ENTRUSTED TO
IT UNTIL IT EXISTS.
YOU KEEP GOING BACK TO THAT, I'M
TRYING TO UNDERSTAND, NOTHING
EXISTS.
WE'RE WRITING ON A CLEAN SLATE
OF PAPER AND A TRADEMARK IS
NEEDED, OTHER AGENCIES MAYBE
FACE THIS, I DON'T KNOW.
ANY OTHER AGENCIES HAVE
TRADEMARKS?
>> YES, YOUR HONOR.
THERE ARE MANY OTHER STATE
AGENCIES AND DEPARTMENTS WITH --
>> ANYTHING SIMILAR TO YOUR
ENTITY THAT HAS A TRADEMARK?
>> THERE ARE A HOST OF STATE
ENTITIES --
>> THAT HAVE SIMILAR TRADEMARKS.
>> YES.
>> WHO APPLIED FOR THOSE?
>> I'M SORRY, YOUR HONOR?
>> WHO APPLIED FOR THOSE?
DOES OUR RECORD TELL US WHO
APPLIED FOR THOSE?
>> FOR EXAMPLE THE SEAL OF THE
HOUSE OF REPRESENTATIVES IS A
FEDERALLY REGISTERED TRADEMARK
AND THAT WAS APPLIED FOR BY THE
HOUSE OF REPRESENTATIVES.
>> I GUESS THEORETICALLY DOESN'T
BELONG TO THEM, HUH?
THAT IS PROBABLY A FALSE FILING
IF IT -- IS THAT YOUR
DISTINCTION?
WE HAVE TO BE CAREFUL HERE
THAT --
>> LOGIC ADVANCED BY THE
DEFENDANTS, THE SAME ANALYSIS
WOULD BE USED TO DEPRIVE THE
HOUSE OF REPRESENTATIVES OF
OWNERSHIP OF ITS TRADEMARK.
>> I'M TRYING TO SEE HOW THIS
WORKS.
WE HAVE TO HAVE SOME COMMON
SENSE IN THIS SOMEWHERE.
WHAT OTHER ENTITY HE OTHER THAN
THE DEPARTMENT OF STATE OR THE
AGENCY ITSELF OR THE BODY
ITSELF, USE THAT WORD, NOT
AGENCY, I WOULD ASSUME THERE ARE
ALL TYPES OF ENTITIES IN THE
STATE OF FLORIDA THAT ARE

ENTITIES OF THE STATE THAT
COULD, OR MAYBE THEY CAN'T FILE
FOR THESE KIND OF THINGS.
THAT'S WHAT I'M TRYING TO
UNDERSTAND.

>> IN EVERY SITUATION THAT I'M
AWARE OF IT IS THE ENTITY THAT
USE THE MARK THAT IS REGISTERING
IT AMONG FLORIDA STATE ENTITIES.
>> THEN I MEAN, IF THE, IF THE
OPPOSITION'S ARGUMENT IS
CORRECT, NONE OF THOSE ARE
VALID?

I MEAN THAT'S WHERE WE ARE.

>> I BELIEVE, YES, A VERY LARGE
NUMBER OF THEM WOULD BE INVALID.
>> SEEMS TO ME, EVEN WORSE THE
TRADEMARKS MIGHT BE VALID BUT
THE ENTITY WHO OWNS THE
TRADEMARK COULDN'T SUE TO
ENFORCE INFRINGEMENT ON THE
TRADEMARK.

NOW I MEAN BECAUSE HERE IT IS,
IS NO QUESTION THAT THE FLORIDA
LEGISLATURE GAVE, I THINK UNDER
THE STATUTE, GAVE YOUR ENTITY
THE AUTHORITY TO ACQUIRE
TRADEMARKS?

>> THAT IS CORRECT, YOUR HONOR.

>> OKAY.

SO THE ONLY ISSUE IS, THAT WE'RE
BEING ASKED TO DECIDE IS
WHETHER, BECAUSE THERE ARE TWO
CONFLICTING STATUTES, IS, WOULD
THE FLORIDA LEGISLATURE HAVE
CREATED A LEGISLATIVE SCHEME
WHERE THEY GAVE THE TRADEMARK TO
ONE, THE RIGHT TO ACQUIRE THE
TRADEMARK TO ONE STATE AGENCY
BUT THEY DIDN'T WANT THAT STATE
AGENCY TO SUE TO PROTECT IT?
AND THAT'S, ISN'T THAT THE SORT
OF THE WHAT THIS AMBIGUITY IS
THAT THE 11th CIRCUIT IS
TALKING ABOUT?

>> THAT'S CORRECT, YOUR HONOR.

>> ALL RIGHT.

SO IT'S, THE STATUTE CREATING
YOUR AGENCY WAS ENACTED AFTER
THE GENERAL DEPARTMENT OF STATE
STATUTE?

>> THAT'S CORRECT, YOUR HONOR.

MANY YEARS AFTER.

>> IN TERMS OF THE AMBIGUITY
COULD YOU ADDRESS WHETHER THE
STATUTORY CONSTRUCTION RULE, IF
THERE'S AN AMBIGUITY YOU LOOK TO
THE LATER ENACTED STATUTE TO
RESOLVE THE AMBIGUITY?

>> THAT'S CORRECT, YOUR HONOR.
AS FAR AS I KNOW THERE IS NO
DISPUTE IN THIS CASE THAT THE
DEPARTMENT OF STATE STATUTE IS
MORE GENERAL IN THE SENSE THAT
IT TALKS ABOUT INTELLECTUAL
PROPERTY OF THE STATE GENERALLY
WHILE THE FLORIDA VIRTUAL
SCHOOLS STATUTE TALKS
SPECIFICALLY ABOUT FLORIDA
VIRTUAL SCHOOL INTELLECTUAL
PROPERTY.

THE DEPARTMENT OF STATE STATUTE
WAS ENACTED MANY DECADES AGO.
THE FLVS STATUTE WAS ENACTED A
LITTLE OVER 10 YEARS AGO.
SO IT WOULD BE THE LATER
ENACTED, MORE SPECIFIC STATUTE.
AND THE PROBLEM THAT I HAVE WITH
THE DEFENDANT'S ARGUMENT HERE IS
THAT THEY CONTEND THERE IS SOME
SORT OF COEXTENSIVE RIGHTS, WELL
THE DEPARTMENT OF STATE CAN USE
IT AND FLORIDA VIRTUAL SCHOOL
CAN USE IT BUT IF YOU READ THE
DOS STATUTE IT GRANTS NOT JUST
THE LEGAL TITLE, BUT THE LEGAL
TITLE AND EVERY RIGHT, INTEREST,
CLAIM OR DEMAND.

>> CERTAINLY SEEMS THAT YOUR
CLIENT HAS RIGHTS TO USE THIS IN
SOME WAY?

>> YES, YOUR HONOR.

>> AND YOU'RE ARGUING THAT YOU
HAVE THE RIGHT THEN TO ENFORCE
WHAT YOUR RIGHTS ARE, CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> BUT THE STATE IT SEEMS HAS
RETAINED SOME DEGREE OF
OWNERSHIP IN THIS TRADEMARK, DO
YOU AGREE WITH THAT?

>> WE DON'T DISPUTE AT ALL THAT
ALL OF THE ASSETS OF FLORIDA
VIRTUAL SCHOOL ARE ASSETS OF THE
STATE OF FLORIDA.

>> SO IT IS NOT AS IF YOU COULD
ON YOUR OWN DECIDE TO SELL OR
OTHERWISE TRANSFER THIS
INTELLECTUAL PROPERTY?

>> WHAT THE STATUTE DOES GRANT
FLORIDA VIRTUAL SCHOOL THE RIGHT
TO DISPOSE OF TRADEMARKS AND
LICENSES.

WE BELIEVE THAT WOULD GRANT
FLORIDA VIRTUAL SCHOOL --

>> WITHOUT THE PERMISSION OF THE
STATE.

>> TO SELL ASSETS WITHOUT
PERMISSION.

>> BY OPERATION OF THE STATUTE
YOU WOULD SAY YOU HAVE
PERMISSION TO DO THAT?

>> THAT'S CORRECT, YOUR HONOR.
I THINK THAT WOULD HIGHLY
UNLIKELY TO OCCUR WITHOUT
CONSULTING MANY ENTITIES IN THE
STATE.

>> THIS IS NOT A MUTUALLY
EXCLUSIVE TYPE OF ENFORCEMENT
MECHANISM, RIGHT?
THE STATUTES PROVIDE THE
SECRETARY OF STATE THE FULL
AUTHORITY AND ABILITY TO PROTECT
WHAT INTEREST IT HAS?

>> THAT'S CORRECT, YOUR HONOR.

>> I MEAN THE STATUTE
SAYS, THE BOARD OF TRUSTEES,
WHICH IS OF YOUR VIRTUAL SCHOOL,
MAY ACQUIRE, ENJOY, USE AND
DISPOSE OF PATENTS, COPYRIGHTS
AND TRADEMARKS IN ANY LICENSES
AND OTHER RIGHTS OR INTERESTS
THERE UNDER.

IS THAT THE EXPRESS GRANT THAT
YOU'RE TALKING ABOUT?

>> THAT'S CORRECT, YOUR HONOR.

>> AND THEN, THE BOARD OF
TRUSTEES SHALL BE A BODY
CORPORATE WITH ALL THE POWERS OF
A BODY CORPORATE AND SUCH
AUTHORITY AS NEEDED FOR THE
PROPER OPERATION AND IMPROVEMENT
IN THE FLORIDA VIRTUAL SCHOOLS.
SO ME THAT, THIS IS AGAIN, I'M
STILL TRYING TO FIGURE THIS OUT
BUT IT SEEMS THAT THIS GIVES YOU
THE RIGHT, NOT YOU, BUT THE
FLORIDA VIRTUAL SCHOOL, WHO OWNS
THE TRADEMARK TO ENFORCE FOR
VIOLATIONS OF IT AND BACK TO
THIS ISSUE IF THE DEPARTMENT OF
STATE HAD ANY INTEREST THEY
COULD COME IN AS A COPLAINTIFF
TO ENFORCE WHATEVER RIGHTS THEY
HAD?

>> THAT'S CORRECT, YOUR HONOR.
AND I BELIEVE THE ISSUE IS VERY
STRAIGHTFORWARD AND EASY TO
RESOLVE HERE.

I OFTEN PONDERED WHY THE
11th CIRCUIT DECIDED TO
CERTIFY A QUESTION TO THIS COURT
AND I BELIEVE IT IS MOSTLY
BECAUSE THE ISSUES HERE ARE SO
IMPORTANT FOR ENTITIES LIKE
FLORIDA VIRTUAL SCHOOL THEY
WOULD WANT --

>> THE DISTRICT COURT THOUGHT

THERE WAS A PROBLEM.
THEY DISMISSED YOUR CASE.
SO, IT MUST NOT HAVE BEEN SO
CLEAR, AT LEAST THE FEDERAL
DISTRICT COURT JUDGE.

>> THAT'S CORRECT, YOUR HONOR.
SO I BELIEVE ONCE THE ISSUES
HAVE BEEN FULLY FLESHED OUT IN
THE APPEAL BRIEFING THAT THE
ANSWER IS STRAIGHTFORWARD, FOR,
FOR A LONG HISTORY IN U.S.
JURISPRUDENCE THE RIGHT TO
ACQUIRE, ENJOY, AND DISPOSE OF
DEFINES WHAT IT MEANS TO BE AN
OWNER AND FLVS IS GRANTED THOSE
RIGHTS NOT JUST IN TRADEMARKS
BUT ALSO IN LICENSES AND IT IS
ALSO GRANTED OTHER RIGHTS OR
THEREUNDER.

THAT IS FROM OUR VIEW, A
COMPREHENSIVE GRANT OF
INTELLECTUAL PROPERTY RIGHTS AND
THAT ALONE SHOULD BE SUFFICIENT,
THAT IF IT HAS THOSE RIGHTS, IT
HAS THE RIGHT TO PROTECT THOSE
IN COURT, PARTICULARLY FOR
TRADEMARKS WHICH ARE AS THE
UNITED STATES SUPREME COURT HAS
NOTED, RIGHTS OF EXCLUSION.
THAT IS PRIMARILY WHAT THEY ARE.
THE RIGHT TO PREVENT OTHERS FROM
IDENTIFYING THEMSELVES AS THE
SOURCE OF GOODS BECAUSE THE
TRADEMARK OWNER MUST BE THE
SOLE-SOURCE OF --

>> ARE YOU SEEKING INJUNCTIVE
RELIEF AS WELL AS DAMAGES?
>> THAT'S CORRECT, YOUR HONOR.
>> SO AGAIN THE ISSUE AS TO
WHETHER YOU GET THE INJUNCTION
OR WHAT DAMAGES YOU GET STILL
HAVE TO BE DETERMINED?

IT MAY BE THAT SOME OF THESE
ISSUES REGARDING THE EXTENT OF
OWNERSHIP AFFECTS THE DAMAGES
YOU MIGHT GET, IS THAT -- THIS
IS JUST AN ISSUE, CAN YOU GET
INTO THE DOOR TO CLAIM THE
VIOLATION?

IS WHERE WE ARE AT THIS POINT?
>> THAT'S CORRECT, YOUR HONOR.
>> YOU'RE IN REBUTTAL.
>> OKAY.

IF I MAY, YOUR HONOR, MAY I
RESERVE THE REST OF MY TIME FOR
REBUTTAL?

>> CHIEF JUSTICE POLSTON AND
YOUR HONORS, MAY IT PLEASE
THE COURT. I'M

STEVE HOLMAN, THE HOGAN LOVELL
LAW FIRM AND I REPRESENT THE
APPELLEES, K12, INC., AND
K12 FLORIDA LLC.

FLVS IS WRONG IN CLAIMING
OWNERSHIP, AUTHORITY AND
STANDING FOR AT LEAST THREE
REASONS.

FIRST, THERE IS NO CLEAR
LANGUAGE IN THE ENABLING STATUTE
EVINCING A LEGISLATIVE INTENTION
TO ALTER THE NORMAL DEFAULT RULE
OF CHAPTER 286 UNDER WHICH THE
STATE OWNS TRADEMARKS AND OTHER
INTELLECTUAL PROPERTY WITH TITLE
VESTING IN THE DEPARTMENT OF
STATE WHICH HAS THE RIGHT TO
ENFORCE.

IN FACT, THE LANGUAGE USED IN
THE ENABLING STATUTE EVIDENCES A
CONTRARY INTENTION.

I'M SPEAKING SPECIFICALLY OF
SECTION 1002.37, 2-C OF THE
ENABLING STATUTE WHICH
SPECIFICALLY PROVIDES AFTER
ENUMERATING THE ACQUIRING ENJOY,
USE AND DISPOSE OF RIGHTS, THAT
OWNERSHIP OF ALL SUCH TRADEMARK,
LICENSES AND RIGHTS OR INTERESTS
THEREUNDER AND THEREIN SHALL
VEST IN THE STATE.

>> WHAT IS THE SECOND PART OF
THAT SENTENCE?

WITH THE --

>> WITH FULL RIGHT TO USE.

SO THERE IS DISTINCTION IN THE
STATUTORY LANGUAGE USED BY THE
LEGISLATURE WITH THE OWNERSHIP
RIGHTS AND RIGHTS TO USE THAT
ARE GIVEN TO FLVS.

SO --

>> LET ME ASK YOU THIS BEFORE
YOU GO FURTHER FROM THE USE.
DOESN'T THE EARLIER PART ALSO
TALK ABOUT DISPOSE OF?

SO HOW IS THAT SQUARE WITH THE
LANGUAGE AT THE BEGINNING, THAT
SAYS, ACQUIRE AND DISPOSE OF,
ET CETERA, AND THEN THE LANGUAGE
THAT JUST SAYS USE?

IT SEEMS TO ME THAT WE'VE GOT,
AT LEAST SOME INTERNAL
DISCREPANCY IN THE VERY STATUTE
THAT YOU'RE TALKING ABOUT.

>> THE ENTIRE STATUTORY SCHEME
OF SECTION 1002.37 GIVES FLVS
CERTAIN RIGHTS AND MAKES THOSE
RIGHTS SUBJECT TO OTHER STATE
AGENCIES.

NOW WHAT DO I MEAN BY THAT?
IF I MAY DIRECT THE --
>> WHO OWNS THIS TRADEMARK?
>> THE TRADEMARK IS OWNED BY THE
STATE THROUGH THE DEPARTMENT OF
STATE IN WHICH TITLE IS VESTED
AND THE DEPARTMENT OF STATE HAS
THE RIGHT TO ENFORCE.
AND --
>> YOUR VIEW IS THAT THE AGENCY
HAD NO POWER TO APPLY FOR AND
RECEIVE A TRADEMARK?
>> UNDER FEDERAL LAW --
>> JUST ASK YOU QUESTION.
>> YES, YOUR HONOR, THAT'S
CORRECT.
UNDER FEDERAL LAW ONLY THE OWNER
MAY APPLY FOR THE TRADEMARK.
>> SO THIS STATUTE THAT GIVES
THE ENTITY OF THE STATE,
WHATEVER YOU WANT TO CALL THE
ENTITY THAT HAS THE POWER BODY
CORPORATE, COULD NOT MAKE
APPLICATION FOR AND RECEIVE A
TRADEMARK?
>> I AGREE WITH THAT
PROPOSITION, YOUR HONOR.
>> I'M SAYING, THAT'S YOUR
POSITION.
AND THE STATUTE IS CONTRARY TO
THAT 100 --.
>> I DON'T THINK THAT IS CORRECT
STATEMENT, YOUR HONOR.
>> OKAY.
>> FIRST OF ALL WHEN THE STATE
WANTS TO GIVE A RIGHT TO SECURE
TRADEMARKS IT SAYS SECURE.
WE NOTED IN OUR BRIEF AT PAGES
19 TO 21 ANY NUMBER OF STATUTORY
ENACTMENTS BY THE LEGISLATURE
WHERE IT SPECIFICALLY USES THE
WORD SECURE.
SECOND, YOUR HONOR, IN THE
UNITED STATES, TRADEMARK RIGHTS
INHERENT NOT IN REGISTRATION BUT
IN USE.
SO ACTUALLY, YOUR HONOR, WITH
ALL DUE --
>> WHEN YOU SAY, OKAY, SO THEN
IT MAKES A DIFFERENCE WHO USES
IT, IS THAT WHAT YOU'RE SAYING?
>> YOU HAVE TO DEVISE --
>> IS THAT WHAT YOU'RE SAYING IT
MAKES A DIFFERENCE WHO USES IT
AS OPPOSES WHO OWNS IT, IS THAT
WHAT YOU'RE SAYING?
>> THERE IS DIFFERENCE, YOUR
HONOR --
>> I UNDERSTAND BUT AGAIN TO

REGISTER YOU HAVE TO BE AN
OWNER, NOT JUST A USER?
>> RIGHT AN OWNER CAN PROVIDE A
EXCLUSIVE LICENSE TO A LICENSEE
TO USE.
>> I UNDERSTAND.
>> AND THAT USE INURES TO THE
BENEFIT OF THE OWNER.
>> I'M JUST ASKING A QUESTION
ABOUT THE REGISTRATION
PROCESS.
>> YOU PROVIDE THE REGISTRATION
TRADEMARK AND ACQUIRE RIGHTS
THROUGH OF USE THROUGH THE
MARKETPLACE.
>> IT IS YOUR POSITION ONLY THE
DEPARTMENT OF STATE CAN DO THAT?
>> THE DEPARTMENT OF STATE
THROUGH, WELL, THE LEGISLATURE
THROUGH AN ENABLING GRANT CAN
GIVE THE --
>> BUT UNDER THE STATUTORY
FRAMEWORK THAT NOW EXISTS IS IT
YOUR POSITION THAT ONLY THE
DEPARTMENT OF STATE COULD HAVE
DONE THAT?
>> NOT, THAT ONLY THEY COULD USE
US BECAUSE THE STATUTE SAYS,
FLORIDA VIRTUAL SCHOOL CAN USE,
SUBJECT TO THE RIGHTS OF
OWNERSHIP THAT INURE TO THE
DEPARTMENT OF STATE.
>> WHAT DOES ACQUIRE MEAN?
DOES ACQUIRE OR SECURE
DIFFERENT?
>> ACQUIRE RIGHTS THROUGH USE IN
THE TRADEMARK, YOUR HONOR.
SO IN ORDER TO CREATE RIGHTS YOU
HAVE TO ESTABLISH SOURCE
IDENTIFICATION OF THE MARK AND
RELATE THE MARK --
>> YOU SAY MAY ACQUIRE DOESN'T
MEAN THEY MAY ACQUIRE A
TRADEMARK?
THAT DOESN'T MEAN THAT?
>> BY USING YOU ACQUIRE --
>> NO, I'M TALKING ABOUT
ACQUIRE?
>> ACQUIRE IS THROUGH USE, YOUR
HONOR, AND THE USE IS PERMITTED
TO BE DONE BY --
>> FOR TO SECURE, WHAT WOULD
THAT MEAN?
>> REGISTER.
>> BUT YOU, OKAY.
>> SO, THE ENABLING STATUTE SETS
FORTH A SCHEME UNDER WHICH THE
FLORIDA VIRTUAL SCHOOLS POWERS
ARE SUBJECT TO CONTROL BY OTHER

STATE AGENCIES.

>> THE STATUTE, DOES THE STATUTE ESTABLISHING THE FLORIDA VIRTUAL SCHOOL MAKE ANY REFERENCE TO THE DEPARTMENT OF STATE?

THE AUTHORITY OF THE DEPARTMENT OF STATE?

>> IT, DOES BY SAYING THAT, FIRST, THERE IS THE DEFAULT RULE AND THEN --

>> NO, NO.

MY QUESTION, I WILL MAKE SURE I'M STATING MY QUESTION CLEARLY. DOES THE STATUTE WHICH ESTABLISHED THE FLORIDA VIRTUAL SCHOOL MAKE REFERENCE TO THE DEPARTMENT OF STATE?

THE FLORIDA DEPARTMENT OF STATE? THAT IS A VERY SIMPLE QUESTION?

>> NO, YOUR HONOR.

THE STATUTE SPECIFICALLY SAYS, OWNERSHIP OF ALL SUCH TRADEMARKS, LICENSES AND RIGHTS OR INTERESTS THEREUNDER OR THEREIN SHALL VEST IN THE STATE. SO YOU HAVE TO GO TO CHAPTER 286.

>> IT MAKES NO REFERENCE TO THE DEPARTMENT OF STATE.

>> SORRY, YOUR HONOR?

>> IT MAKES NO REFERENCE TO THE DEPARTMENT OF STATE.

>> IT SAYS STATE, YOU HAVE TO UNDERSTAND THE STATE IS FOR THIS PURPOSE.

>> MY QUESTION IS, DOES IT MAKE SPECIFIC REFERENCE TO THE DEPARTMENT OF STATE IS ONLY ANSWER TO THAT NO.

>> NO, YOUR HONOR.

ONLY TO THE STATE.

>> OKAY.

>> SO, IF YOU READ THROUGH THE STATUTE AND ELSEWHERE, OTHER POWERS ARE GRANTED SUBJECT TO LIMITS IMPOSED BY OTHER STATE AGENCIES SO --

>> LET ME JUST ASK YOU THIS PRACTICAL QUESTION BECAUSE OBVIOUSLY YOU HAVE A GREAT KNOWLEDGE, SUPERIOR TO MINE IN TRADEMARKS AND PATENTS AND COPYRIGHTS.

BUT, WE'VE GOT A SITUATION WHERE TELL ME AGAIN, WHO REGISTERED THIS TRADEMARK?

>> IT WAS IN FACT REGISTERED BY FLORIDA VIRTUAL SCHOOL.

>> OKAY.

AND THERE, SOMEONE, THE
ASSERTION IS, AND IT MAY NOT BE
VALID, THAT YOUR ENTITIES THAT
REPRESENT ARE INFRINGING ON THAT
TRADEMARK?

THAT'S THE CLAIM.

>> THAT IS THEIR CLAIM, YOUR
HONOR.

>> WHO IN YOUR VIEW WOULD HAVE
THE RIGHT TO SUE YOUR CLIENTS
FOR INFRINGEMENT OF THAT
TRADEMARK?

>> THE DEPARTMENT OF STATE AS
THE OWNER, YOUR HONOR.

>> SO IF THE DEPARTMENT, SO
THERE WOULDN'T BE, SO IF THEY
HAD BEEN BROUGHT IN AS A
COPLAINTIFF, THAT WOULD, THERE
WOULD BE NO LEGAL ARGUMENT THAT
THEY REALLY DIDN'T USE IT, IT
WAS THE FLORIDA, AS THE STATE
AGENCY IT WAS THE FLORIDA
VIRTUAL SCHOOL THAT WAS USING
THE TRADEMARK?

>> THE ISSUE, THE ISSUE IS NOT
USE.

THEY CLEARLY HAVE THE RIGHT TO
USE.

THE ISSUE IS WHETHER THEY HAVE
THE RIGHT TO ENFORCE AS THE
OWNER AND THE ANSWER TO THAT
QUESTION IS NO.

SO YES --

>> WOULD THEY BE ENTITLED TO
DAMAGES FOR INFRINGEMENT?

>> THE DAMAGES FLOW TO THE
OWNER, YOUR HONOR.

THE OWNER CAN SUE FOR
INFRINGEMENT THAT FLVS HAS
CLAIMED THAT ENSUED --

>> IF THE FLORIDA LEGISLATURE
CREATING THIS SCHEME, THIS IS
WHERE WE INTENDED IT BE FLORIDA
VIRTUAL SCHOOL WAS ABLE TO SUE
TO ENFORCE IT, THAT, ISN'T THAT
THE LEGAL ISSUE THAT WE'RE HERE
TO DECIDE, WHETHER THIS
STATUTORY SCHEME MAYBE NOT
DRAFTED BY TRADEMARK PATENT AND
COPYRIGHT LAWYERS, WHETHER THE
INTENT WAS TO GIVE THEM THE
RIGHT TO SUE FOR INFRINGEMENT?
IS THAT THE LEGAL ISSUE THAT
WE'RE FACED WITH?

>> EXACTLY, YOUR HONOR AND, AS
WE, AS WE HAVE INDICATED THROUGH
THE OTHER FLORIDA STATUTES THAT
WE'VE CITED IN OUR BRIEF, THERE
IS A TEMPLATE THAT THE

LEGISLATURE USED WHEN IT WANTS TO PROVIDE THOSE RIGHTS TO THE STATE AGENCY INSTEAD TO THE DEPARTMENT OF STATE.

SO WHAT IT SAYS, NOTWITHSTANDING ANY OTHER LAWS, MEANING NOTWITHSTANDING CHAPTER 286 THAT GIVES THE RIGHT TO THE DEPARTMENT OF STATE, THIS AGENCY SPECIFICALLY WILL HAVE THE RIGHT TO SECURE AND TO ENFORCE AND TO TAKE ALL ACTIONS NECESSARY TO SECURE AND ENFORCE INCLUDING RIGHT TO SUE AN BE SUED.

THAT'S THE LANGUAGE THAT THE LEGISLATURE USES WHEN IT WANTS TO GIVE THAT AUTHORITY DIRECTLY TO THE STATE AGENCY, AND THEY KNOW THAT BECAUSE WHEN THEY KNEW TO AMEND THE ENABLING STATUTE IN THE 2012 SESSION OF THE LEGISLATURE, AFTER THIS CASE HAD ALREADY BEEN PENDING FOR NINE MONTHS, THEY USED THAT TEMPLATE IN THEIR PROPOSAL.

THEY USED THE VERY LANGUAGE --
>> WHERE IS THE PROPOSITION OF LAW THAT THE LEGISLATURE'S REJECTION OF A PROPOSED STATUTE IS AUTHORITY FOR THE PROPOSITION THAT YOU'RE ASSERTING?

I KNOW OF NO PRINCIPLE OF LAW THAT ALLOWS THE REJECTION, BECAUSE THE LEGISLATURE DIDN'T ACT, NOT ACT FOR MANY REASONS. THEY MAY NOT ACT BECAUSE THEY THINK THE ARGUMENT IS BS AND THEY DON'T THINK THEY NEED TO. WHY IS THAT?

>> CERTAINLY IT IS NOT A DISPOSITIVE POINT, YOUR HONOR.
>> OKAY.

>> BUT WHAT IS IMPORTANT FROM OUR POINT OF VIEW IS, WHEN THEY ACTED, WHY THEY ACTED, AND HOW THEY ACTED.

PARTICULARLY THE SPECIFIC LANGUAGE THAT FLORIDA VIRTUAL SCHOOL ITSELF CHOSE IN ORDER TO CONFER UPON IT THE VERY RIGHTS THAT IT NOW CLAIMS IT ALREADY HAS IS THE LANGUAGE THAT THE LEGISLATURE COMMONLY USES IN ALL THOSE OTHER STATUTES.

>> LET ME ASK YOU THIS QUESTION. WHAT UNDER FLORIDA LAW DOES THE BODY CORPORATE MEAN?

>> IT MEANS IT'S TREATED LIKE A PRIVATE CORPORATION.

>> AND DOES IT MEAN THAT THEY
HAVE, THAT THAT BODY OR ENTITY
HAS THE RIGHT TO SUE AND BE
SUED?

>> IT CAN MEAN GENERALLY SUE AND
BE SUED BUT THERE ARE
LIMITATIONS --

>> DOES A CORPORATE ENTITY UNDER
THE LAWS OF THE STATE OF
FLORIDA, AS SPECIFICALLY SET
FORTH IN CHAPTER, WHAT IS IT,
609?

GIVE A CORPORATE ENTITY THE
RIGHT TO SUE AND BE SUED?

>> IT GENERALLY DOES, YOUR
HONOR.

BUT NOT IN THIS INSTANCE PAUSE
IN THIS INSTANCE THAT RIGHT
SPECIFICALLY HAS BEEN GIVEN TO
ANOTHER STATE AGENCY.

>> OH, OKAY.

>> YOUR HONOR, IF YOU LOOK AT
THE, EVEN IF YOU LOOK AT THE ALL
POWERS OF A BODY CORPORATE
LANGUAGE UNDER SUBSECTION 2-L OF
THE STATUTE UPON WHICH FLORIDA
VIRTUAL SCHOOL PLACES PRINCIPLE
RELIANCE, THAT LANGUAGE IS MADE
SUBJECT TO THE LAW AND RULES OF
THE STATE BOARD OF EDUCATION ON
PERSONNEL, ON BUDGET AND
FINANCE.

ON ADMINISTRATION.

ON PROGRAMS, CURRICULUM AND
INSTRUCTION.

AND ON PROPERTY.

SO THERE IS A GENERAL BRAND OF
THE POWERS OF THE BODY
CORPORATE, AND THEN, THE
LEGISLATURE DEFINES WHAT IT
MEANS BY THAT GRANT.

AND SO YOU HAVE TO READ THAT
LANGUAGE IN THE CONTEXT OF THE
OTHER LANGUAGE.

THAT LANGUAGE ALSO, YOUR HONOR,
TELLINGLY DOES NOT APPEAR IN
THIS SECTION ON INTELLECTUAL
PROPERTY ENFORCEMENT.

>> WHAT KIND OF PROPERTY DOES
THAT REFER TO?

THAT SECTION?

IN THE STATUTE?

>> WELL IT DISTINGUISHES
PROPERTY AND THEN TANGIBLE
PROPERTY.

SO I WOULD TAKE THAT TO MEAN
THAT PROPERTY AS USED IN THE
BODY CORPORATE SECTION UNDER
SUBSECTION L COULD BE INTENDED

TO REFER TO OTHER PROPERTY
ENCOMPASSING INTANGIBLE
PROPERTY.

SO THE, THE POINT IS THAT THE
FLORIDA VIRTUAL SCHOOL RIGHTS
ARE SUBJECT, FIRST TO RIGHTS OF
THE STATE BOARD OF EDUCATION AND
THEN IN CONNECTION WITH THE
ENFORCEMENT OF THE INTELLECTUAL
PROPERTY TO THE RIGHTS OF THE
DEPARTMENT OF STATE.

THAT MAKES SENSE BECAUSE OF THE
STRUCTURE BEING CREATED BY THE
LEGISLATURE IN CONNECTION WITH
HOW FLORIDA VIRTUAL SCHOOL IS
EXPECTED TO USE ITS RIGHTS.

THE STATUTE DIRECTS IT TO ENTER
INTO AGREEMENTS WITH DISTANCE
LEARNING PROVIDERS INCLUDING
POTENTIALLY PRIVATE ENTITIES.

IT ALSO ALLOWS IT TO ENTER INTO
FRANCHISE AGREEMENTS WITH
FLORIDA DISTRICT SCHOOL BOARDS.

SO WHAT IF YOU HAD A
DISAGREEMENT BETWEEN THE FLORIDA
DISTRICT SCHOOL BOARD AND THE
FLORIDA VIRTUAL SCHOOL ABOUT HOW
A MARK IS BEING USED?

ULTIMATELY THE ARBITER OF THAT
DISPUTE IS THE STATE, THROUGH
THE DEPARTMENT OF STATE, NOT
FLORIDA VIRTUAL SCHOOL.

>> DOES SEEM TO ME THE STATE HAS
OWNERSHIP RIGHTS OF SOME TYPE.

OBVIOUSLY IT DOES.

BUT IT ALSO SEEMS TO ME THAT SO
DOES FLORIDA VIRTUAL SCHOOL.
THEY HAVE GOT RIGHTS TO THIS
TRADEMARK IN SOME WAY.

SO IT SEEMS LIKE THEY'RE NOT
MUTUALLY EXCLUSIVE IN SOME WAY
BUT EACH SHOULD HAVE THE ABILITY
TO ENFORCE THEIR RIGHTS AS THEY
EXIST.

WHY WOULDN'T THAT BE THE CASE?

>> WELL BECAUSE YOU CAN'T HAVE
TWO OWNERS OF A TRADEMARK.

THAT IS HORN BOOK TRADEMARK LAW,
YOUR HONOR.

>> THERE CAN ONLY BE ONE OWNER,
NOT MORE THAN ONE.

>> ONE OWNER AN GIVE EXCLUSIVE
RIGHTS TO A LICENSEE, IF IT SO
DESIRES.

THE LANGUAGE OF EXCLUSIVITY
DOESN'T APPEAR IN THE STATUTE.
IT SAYS WE GIVE YOU ALL RIGHTS
BUT IT DOESN'T SAY, ANY AND ALL
RIGHTS OR INTERESTS.

>> THIS IS GETTING INTO, WE'RE NOT BEING ASKED TO INTERPRET FEDERAL TRADEMARK LAW, CORRECT? >> WELL --

>> FEDERAL TRADEMARK LAW, THAT IS NOT WHY YOU SENT IT BACK TO A STATE COURT? WE'RE SUPPOSED TO INTERPRET THESE STATUTES.

>> IT IS THE STATUTE ABOUT OWNERSHIP OF TRADEMARKS.

>> LET ME ASK YOU THIS QUESTION, IF THE FLORIDA LEGISLATURE HAD BEEN, OR WAS, ILL-ADVISED IN THE MANNER WHICH THEY SET UP THE STATUTE, BUT IT IS, WE BELIEVE THAT THAT STATUTE SAYS X, Y AND Z, AND YOU SAY, WELL, UNDER THE FEDERAL TRADEMARK LAW THAT'S INVALID, WELL THAT MAY BE BUT THAT DOESN'T MEAN YOU CHANGE THE FLORIDA STATUTE.

WHAT IT SAYS, SIMPLY BECAUSE YOU MAKE AN ARGUMENT THAT'S INVALID UNDER TRADEMARK LAW, DO YOU?

>> I THINK --.

>> NOT GOING TO BE THE FIRST TIME THAT THE LEGISLATURE HAS BEEN WRONG ON SOMETHING. I MEAN YOU KNOW, NOT LIKE IT IS INFALLIBLE. THESE THINGS HAPPEN.

>> I THINK, FROM MY PERCH IN, IN WASHINGTON THE LEGISLATURE IS VERY SAVVY ABOUT HOW IT CONSTRUCTS ITS STATUTES AS SHOWN BY THE CITRUS DEPARTMENTS, SPACE FLORIDA AND OTHER STATUTES THAT CONTAIN THE REQUISITE LANGUAGE. I THINK THE POINT HERE IS THAT, THE RIGHTS OF FLORIDA VIRTUAL SCHOOL CAN BE HARMONIZED WITH THE STATE'S OWNERSHIP INTEREST IF FLORIDA VIRTUAL SCHOOL IS REGARDED AS A LICENSEE.

>> THAT'S NOT WHAT THE STATUTE -- IT DOESN'T, IT IS VERY EASY TO SAY THAT THE VIRTUAL SCHOOL SHALL BE A LICENSEE OF A TRADEMARK TO BE HELD BY THE STATE OF FLORIDA. SIMPLE SENTENCE. SIMPLE ENGLISH SENTENCE OR IS THAT TOO SIMPLE FOR A LEGISLATURE TO USE?

>> YES, YOUR HONOR. MY REJOINDER IT WOULD HAVE BEEN JUST AS SIMPLE TO SAY, WELL THE OWNERSHIP WILL BE IN FLORIDA

VIRTUAL SCHOOL, RATHER THAN SAYING IN THE STATE. AND IF YOU LOOK --

>> WELL THE STATUTE WE'RE LOOKING AT DOESN'T SAY THE OWNER, THAT THE TRADEMARK. IT CONFLICTS ON THAT ISSUE. THERE IS TENSION HERE BECAUSE THAT'S WHAT WE'RE ASKED TO LOOK AT ON THE OWNERSHIP BETWEEN THESE STATUTES AND WITHIN THE CHAPTER 100 THAT DEFINES IT BECAUSE IT HAS A PHRASE AND JUSTICE PERRY POINTED DIRECTLY TO IT, TO SECURE AND MAINTAIN. I MEAN, SEEMS TO ME THAT'S EXACTLY WHAT WE'RE BEING ASKED TO DO.

>> IT DOESN'T USE THE SECURE LANGUAGE, YOUR HONOR, WHICH IS USED IN OTHER STATUTES. AND IT --

>> ACQUIRE.

DOES IT SAY ACQUIRE?

>> IT SAYS ACQUIRE.

>> OKAY.

>> WHICH IS DONE BY USE IN THE MARKETPLACE AND BY DEVISING AND THEN APPLYING TO GOODS AND SERVICES IN THE MARKETPLACE AND IT -- I MISSED MY POINT, YOUR HONOR.

>> WHAT YOU'RE TRYING TO EXPLAIN TO ME IS THAT WE'RE INTERPRETING FLORIDA LAW AND IT MAY BE THAT THAT INTERPRETATION SOMEHOW DOESN'T FIT QUITE RIGHT WITH THE FEDERAL LAW.

AND THAT'S WHAT I'M ASKING. THAT WE HAVE TO LOOK AT THE WORDS OUR LEGISLATURE HAS UTILIZED AND USE OUR RULES OF CONSTRUCTION TO INTERPRET BETWEEN THE STATUTES IF WE SHOULD DECIDE THAT THERE IS SOME TENSION, SOME AMBIGUITY, WE HAVE RULES WE HAVE TO FOLLOW BUT THAT IS NOT CONTROLLED BY FEDERAL TRADEMARK LAW.

>> WELL, I THINK THE APPLICABLE RULE OF STATUTORY CONSTRUCTION IS THAT THE LEGISLATURE IS PRESUMED TO KNOW THE EXISTING STATUTORY LANDSCAPE.

SO WHEN IT TALKS ABOUT RIGHTS AND TRADEMARKS WHETHER, UNDER COMMON LAW OR UNDER FEDERAL LAW IT'S TALKING ABOUT THE RIGHTS AS THEY'RE DEFINED UNDER THOSE

APPLICABLE LAWS.

>> EVEN IF WE FIND THERE IS SOME CONFLICT OR TENSION BETWEEN THOSE TWO THINGS AND WE HAVE RULES OF CONSTRUCTION, WE CAN NOT APPLY THOSE?

THAT'S YOUR ARGUMENT?

>> NO, I WOULD SAY THE RULES OF CONSTRUCTION DO APPLY HERE AND THAT THE MOST SPECIFIC LANGUAGE ADDRESSING TRADEMARK OWNERSHIP IS THE LANGUAGE THAT SAYS, OWNERSHIP VESTS IN THE STATE. SO IF, IF YOU'RE APPLYING MR. LUTHER'S CANNON OF CONSTRUCTION THAT THE SPECIFIC CONTROLS OVER THE GENERAL, WE HAVE A DEFAULT STATUTE THAT SAYS DOS HAS TITLE FOR THE STATE. WE HAVE A GENERAL GRANT IN ANOTHER SECTION OF THE STATUTE, ALL POWERS OF A BODY CORPORATE. AND THEN THAT GRANT IS LIMITED BY THE LANGUAGE I CITED.

AND THEN WE HAVE A VERY SPECIFIC GRANT THAT SAYS, FOR THIS PURPOSE, THE STATE HAS THE VESTED OWNERSHIP IN THESE TRADEMARKS, NOT FLORIDA VIRTUAL SCHOOL WHICH HAS ALL RIGHTS OF USE. IN THAT CONTEXT I WOULD SAY THAT THE RIGHTS OF USE ARE --

>> LET ME ASK YOU THIS IN CONNECTION WITH, WHO OWNS FLORIDA VIRTUAL SCHOOL?

>> ITS CONSTITUTED AS A STATE AGENCY.

>> SO IT'S, IT IS AN ENTITY OF THE STATE?

>> IT IS OWNED BY THE PEOPLE OF THE STATE ULTIMATELY, YOUR HONOR.

>> THERE IS SOMETHING ABOUT THIS DISCUSSION THAT JUST STRIKES ME AS DETACHED FROM REALITY.

I MEAN OBVIOUSLY WHAT THE SCHOOL OWNS IS OWNED BY THE STATE. IT OWNS IT ON BEHALF OF THE STATE.

WOULD THAT BE RIGHT?

>> WELL, NO.

IN THIS CASE, IT DOESN'T OWN IT ON BEHALF OF THE STATE.

>> THE PROPERTY, IS THERE SOME PROPERTY THAT, NOT INTELLECTUAL PROPERTY, LET'S PUT THAT ASIDE, OTHER PROPERTY THEY OWN, THEY OWN ON BEHALF OF THE STATE,

WOULD THAT BE CORRECT?
TANGIBLE PROPERTY THAT THEY OWN?
>> SUBJECT TO THE LAWS AND RULES
OF THE STATE DEPARTMENT OF
EDUCATION AS I READ
SUBSECTION --
>> THEY OWN THAT ON BEHALF OF
THE STATE?
>> YES.
>> WHATEVER THEY HAVE, THEY HAVE
ON BEHALF OF THE STATE?
>> THE THINGS THAT THE STATUTE
GIVES THEM THEY HAVE ON BEHALF
OF THE STATE, YES, YOUR HONOR
AND SUBJECT TO CONTROL OF THE
STATE DEPARTMENT OF EDUCATION.
AND THE LAST POINT I WOULD LIKE
TO MAKE, YOUR HONORS, IS, THE
REASON THIS IS IMPORTANT IS THAT
MY CLIENT ENTERED INTO A
CONTRACT WITH THE STATE, THE
DEPARTMENT OF EDUCATION, AND MY
CLIENT'S TRADEMARK APPEARS ON
THE STATE'S WEBSITE.
>> BUT ISN'T THAT A DEFENSE TO
THE LAWSUIT?
IN OTHER WORDS, IF THERE IS NO
INFRINGEMENT BECAUSE OF THAT,
THAT SEEMS LIKE THAT'S A
SUBSTANTIVE DEFENSE.
IN OTHER WORDS, TO ME THE
PRACTICAL ISSUE WHICH IS WHY I
STARTED THE QUESTIONING WITH,
COULD THE DEPARTMENT OF STATE BE
A CO-OWNER, IN MOST SITUATIONS
AND WHAT JUSTICE POLSTON IS
ASKING, WHAT YOU WANT TO PREVENT
IS TWO ENTITIES THAT MIGHT HAVE
CONFLICTING INTERESTS SUING.
SO ALL OF SUDDEN THE DEPARTMENT
OF STATE SUES NEXT AND YOU DON'T
WANT THAT TO HAPPEN.
BUT WE'RE SORT OF STRUGGLING IS
WITH, IT IS ALL THE STATE.
SO AGAIN, IF YOUR DEFENSE,
IS THAT THE
DEPARTMENT OF EDUCATION GRANTED
US THIS RIGHT, THAT WOULD BE TO
ME, WHY WOULDN'T THAT BE A
DEFENSE TO THE LAWSUIT?
AS OPPOSED TO A QUESTION OF
WHETHER THEY HAVE STANDING TO
BRING THE ACTION TO BEGIN WITH?
>> IT SEEMS, YOUR HONOR, A
CURIOUS STATUTORY ARRANGEMENT TO
HAVE THE STATE DEPARTMENT OF
EDUCATION GRANTING RIGHTS IN A
MARK AND OTHER STATE AGENCY
SUING --

>> THAT IS THE ARGUMENT, THEN
WE'RE ASKING TO RESOLVE.
THIS IS ALWAYS WHEN WE GET ONE
PIECE OF A LEGAL CONUNDRUM, WITH
WHETHER 11th CIRCUIT
CERTIFIES, I THINK THAT'S VERY,
SEEMS LIKE AN EXCELLENT ARGUMENT
BUT THAT IS NOT THE ARGUMENT IS
HERE.

WHAT YOU'RE SAYING YOU'RE
GETTING WHIPSAWED BUT ONE AGENCY
IS DOING ONE THING BUT THAT
WOULDN'T CHANGE IF THE
DEPARTMENT OF STATE BROUGHT THE
ACTION.

YOU WOULD STILL BE SAYING THAT
THE DEPARTMENT OF EDUCATION
ALLOWED YOU TO DO THIS, WOULDN'T
YOU?

WOULDN'T THAT BE THE SAME
ARGUMENT IF IT WAS THE
DEPARTMENT OF STATE AS THE
PLAINTIFF?

>> WE WOULD SAY, YOU KNOW,
AREN'T THE STATE AGENCIES
TALKING TO ONE ANOTHER.

>> THAT'S WHAT I WOULD SAY TOO.
BUT WE KNOW HOW THE STATE OF
FLORIDA OPERATES AS MANY STATES
WHICH IS SOMETIMES AGENCIES
DON'T TALK TO ONE ANOTHER BUT
THAT IS NOT A LEGAL CONCERN.
SO WOULDN'T THAT, IS THAT TRUE,
THAT THE SAME ARGUMENT YOU JUST
MADE WHICH IS THAT THE
DEPARTMENT OF EDUCATION GRANTED
YOU RIGHTS, WOULD BE AN ARGUMENT
YOU'D LIKE IF IT WAS THE
DEPARTMENT OF STATE AS THE
PLAINTIFF?

>> WE WOULD CERTAINLY MAKE THE
ARGUMENT ABOUT OUR USE EITHER
WAY, YOUR HONOR.
SO I SEE THAT MY TIME HAS
EXPIRED.

FOR ALL THE FORGOING REASONS WE
BELIEVE THAT BOTH THE LANGUAGE
OF THE STATUTE, THE LEGISLATIVE
HISTORY, AND THE FRAMEWORK THAT
THE LEGISLATURE USES MILITATES
IN FAVOR OF A FINDING THAT IT'S
THE DEPARTMENT OF STATE THAT HAS
THE POWER TO ENFORCE.

THANK YOU, YOUR HONORS.

>> THANK YOU FOR YOUR ARGUMENTS.
REBUTTAL?

>> AS YOU START, I THINK THE
STRONGEST ARGUMENT, I, THIS IDEA
THAT THE STATE

KNOWS HOW TO SPECIFICALLY
PROVIDE FOR THIS RIGHT AND HAS
DONE IT IN NUMEROUS OTHER
STATUTES.

NOT WHETHER THEY FAILED TO AMEND
THE STATUTE.

WHAT'S THE ARGUMENT ABOUT THAT?
OTHER STATUTES IT IS VERY CLEAR
AND UNAMBIGUOUS WHEN THE
LEGISLATURE WANTS TO GRANT THESE
RIGHTS SPECIFICALLY TO THE STATE
STATE AGENCY?

>> OTHER STATUTES THAT GRANT THE
POWER TO POLICE, CONTRACT,
ENFORCE, SUE AND BE SUED DO NOT
ALSO INCLUDE A GENERAL GRANT OF
ALL THE POWERS OF A BODY
CORPORATE AND THE ARGUMENT THAT
THE K12 DEFENDANTS ARE MAKING
THAT IS SOMEHOW CIRCUMSCRIBED I
DON'T SEE IT IN THE LANGUAGE OF
THE STATUTE.

THERE IS A GRANT OF ALL THE
POWERS OF A BODY CORPORATE AND
IT GOES INTO A SEPARATE GRANT.
THIS IS DIFFERENT THAN, FOR
INSTANCE, WHICH, IN OTHER
STATUTES, THAT CONSTITUTE AN
ENTITY OF BODY CORPORATE TO
FOSTER GROWTH AND DEVELOPMENT
THIS IS FROM THE SPACE FLORIDA
STATUTE, RIGHT?

THERE ARE A NUMBER OF STATUTES
THAT INSTITUTE A BODY
CORPORATE.

THE FLVS STATUTE JUST GRANTS IT
ALL THE POWERS OF A BODY
CORPORATE AND I DON'T SEE ANY
ARGUMENT THAT IS SOMEHOW IN THAT
STATUTE LIMITED OR CIRCUMSCRIBED
AND MADE TO BE LESS THAN WHAT
THE RIGHTS OF ANY CORPORATION
GENERALLY WOULD BE.

AND WITH THAT --

>> IS THERE ANY PLACE IN THE
FLORIDA STATUTES WHERE THE
LEGISLATURE HAS EVER DEFINED A
BODY CORPORATE?

>> TO MY KNOWLEDGE THERE IS NOT,
YOUR HONOR.

I BELIEVE THE, THE DEFINITION
FOR THAT PHRASE HAS MOSTLY COME
FROM THE COURTS AND IN MANY
CASES THAT WE'VE CITED, FROM
THIS VERY COURT.

>> AND THOSE DEFINITIONS ARE
BASICALLY YOU'RE TALKING ABOUT
THE CREATION OF A CORPORATION?
WHEN YOU USE THE LANGUAGE BODY

CORPORATE, IT MEANS THIS ENTITY IS A CORPORATION?
>> IT IS, IT MEANS THAT IT HAS ALL THE RIGHTS THAT A CORPORATION WOULD HAVE, NOT NECESSARILY THAT IT IS, FLORIDA VIRTUAL SCHOOL IS NOT REGISTERED THROUGH THE SECRETARY OF STATE. IT IS NOT A CORPORATION IN THAT SENSE BUT IT HAS THE POWERS POWERS AFTER BODY CORPORATE. IF I COULD ADDRESS BRIEFLY THIS ISSUE CONCERNING THE APPROVAL BY THE DEPARTMENT OF EDUCATION. IT IS A VERY CURIOUS ARGUMENT THAT A K12 FEELS IT HAS BEEN HARMED BECAUSE IT WAS LICENSED BY THE D.O.E. THEIR VERY ARGUMENT THE ANOTHER ENTITY, THE DEPARTMENT OF STATE IS ONLY ONE THAT COULD GRANT THOSE RIGHTS. IT IS AN ODD ARGUMENT THEY FEEL THEY HAVE BEEN LICENSED BY THE D.O.E. BECAUSE THEIR ARGUMENT OTHERWISE THAT THE D.O.E. WOULDN'T HAVE ANY POWER TO GRANT LICENSES.

ALSO IF YOU LOOK WHAT WE CITED IN OUR BRIEF, THEIR OWN EMPLOYEES ASKED ABOUT THEY DIDN'T BELIEVE THE D.O.E. WAS IN THE BUSINESS OF LICENSING. THIS IS REALLY A NONISSUE. THEY COULD NOT HAVE GRANT AD LICENSE IF THEY WANTED TO AND NO ONE BELIEVES IN THIS CASE THAT THEY DID WHEN THE WITNESSES IN THIS CASE WERE QUESTIONED. IF I COULD TURN BRIEFLY TO THE 1002.37, C-2 LANGUAGE, THE KEY LANGUAGE WE'VE BEEN FIGHTING ABOUT IN THIS CASE.

THERE'S A SENTENCE THAT GRANTS FLVS THE RIGHT TO ACQUIRE, ENJOY, USE AND DISPOSE OF TRADEMARKS AND THE NEXT SENTENCE STATES, OWNERSHIP OF ALL SUCH RIGHTS SHALL VEST IN THE STATE.

WHEN WE'RE TALKING ABOUT OTHER STATE ENTITIES, K12 IS REFERENCED AS THE STANDARD STATUTORY ARRANGEMENT THERE. IS ALWAYS A DEPARTMENT, AGENCY OR SOME OTHER GOVERNMENTAL ENTITY THAT ESTABLISHES THE RIGHTS ON THE STATE'S BEHALF. WHEN THEY READ THE STATE IN THAT SENTENCE THEY JUMP TO THE

CONCLUSION IT IS THE DEPARTMENT OF STATE WHICH CREATES CONFLICTS IN STATE LAW WHEN IN REALITY IT IS VERY SIMPLE, STRAIGHTFORWARD CONCLUSION TO SEE THAT SENTENCE JUST CONFIRMS THAT THE ASSETS OF THIS STATE ENTITY, THAT IS ALLOWED TO DO MANY THINGS IN THE BUSINESS WORLD, THINGS THAT MIGHT RAISE QUESTIONS AS TO WHERE THOSE ASSETS PROPERLY BELONG, JUST RESOLVES THAT BY SAYING THAT ALL OF THOSE SAME RIGHTS GRANTED TO FLVS ARE ALSO ASSETS OF THE STATE.

VERY PLAUSIBLE, LOGICAL WAY TO CONSTRUE THE STATUTE AND ONE THAT ELIMINATES ALL OF THE CONFLICTS THAT K12 CREATES AND ALSO ELIMINATES THE GRAVE RISK OF LOSS OF STATE ASSETS IF THE ASSETS OF FLVS ARE FOUND TO BE ASSETS OF THE STATE.

>> IF THE STATE, OR THE DEPARTMENT OF STATE WAS THE ONLY ENTITY THAT COULD HAVE BROUGHT THIS LAWSUIT IS THERE ANYTIME LIMITATION PROBLEM HERE?

COULD THE DEPARTMENT OF STATE NOW TURN AROUND AND FILE THE SAME KIND OF LAWSUIT?

>> IF, FLVS'S ASSETS BELONG TO THE DEPARTMENT OF STATE, I BELIEVE THEY COULD.

THERE WOULD CERTAINLY BE MANY ARGUMENTS THE DEFENDANTS WOULD RAISE AGAINST THEM THAT THEY HAVE RAISED AGAINST US.

ADDRESS STATUTE OF LIMITATIONS LATCHES, OTHER RELATED ISSUES BUT I BELIEVE THE DEPARTMENT OF STATE COULD BRING THIS CASE, IF, IF THOSE ASSETS BELONG TO IT BUT UNFORTUNATELY FINDING THAT THOSE ASSETS WERE ENTRUSTED TO DEPARTMENT OF STATE CREATES IRRECONCILABLE CONFLICTS BETWEEN STATE STATUTES.

THANK YOU, YOUR HONOR.

>> THANK YOU FOR YOUR ARGUMENTS.