

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

KNIGHT NEWS, INC.,
Appellant,

Case No. 5D14-2951
L.T. Case No.: 2013-CA-2664-O

vs.

THE UNIVERSITY OF CENTRAL
FLORIDA BOARD OF TRUSTEES and
JOHN C. HITT.
Appellees.

**MOTION OF UNIVERSITY STUDENT GOVERNMENT SENATORS
JACOB R. MILICH, JOSHUA BOLOÑA, AND CHASE LITTLE
FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF
APPELLANT’S MOTION FOR REHEARING, REHEARING *EN BANC*,
CLARIFICATION AND CERTIFICATION**

Pursuant to Florida Rule of Appellate Procedure 9.370, Senators Jacob R. Milich, Joshua Boloña, and Chase Little, of the Student Government at the University of Central Florida, respectfully seek leave to file a brief as *amici curiae* in support of Appellant’s Motion for Rehearing, Rehearing *En Banc*, Clarification, and Certification of Questions of Great Public Importance, dated February 22, 2016. In support of this request, the proposed *amici* state:

1. The proposed *amici* are duly elected senators, and therefore public “officers of the student government” created by the legislature, *inter alia*, to expend funds and independently determine discipline of officers of the unit of “government ... maintained by students.” See §§ 1004.26, 1009.24(10)(b), Fla.

Stat. (2015). Each senator meets the definition of an “Agency” when carrying out duties prescribed by law, and is therefore subject to the Florida Open Records Act and the Florida Open Meeting Act (“Florida’s Sunshine Laws”). *See* §§119.011(2); 286.011, Fla. Stat. (2015).

2. This case is of paramount importance to the proposed *amici*, who chose to run for public office with the understanding that their statutorily mandated duties must be conducted in accordance with Florida’s Sunshine Laws. The student government where *amici* serve has long recognized its obligations for openness through its Student Government in the Sunshine Act. *See* Stu. Gov. Stat., Chapter 1200. Notably, Student Government has generally treated its “disciplinary records” -- as opposed to disciplinary records maintained by the university -- as open, “public records.”

3. However, the Court’s current opinion casts confusion and doubt on the legality of SGA’s entire internal open government framework. To the extent this Court’s opinion is interpreted to mean SGA records are FERPA education records, then SGA and its student senators are and have been violating FERPA through its open meeting and open government policies. *See* 34 CFR § 99.3 (defining “Disclosure” under FERPA to include oral transmission of personally identifiable information from an education record). The opinion places *student senators* in an

uncertain and impossible position, with the threat of violating FERPA on one side and Florida's Sunshine Laws on the other.

4. The *amici* propose to address SGA's long-standing practices with respect to open disciplinary proceedings of SGA officers, the legislative history of student government, an overview of conflicting guidance and regulations promulgated by the university, and the unclear consequences of the Court's decision, which could be interpreted to expand a complicated federal privacy law into a unit of state government that receives no federal funds and is operated by *students*.

5. The proposed *amici* can assist the Court in the disposition of this case with their unique vantage point and insights into the devastating impact FERPA would have on SGA's ability to function the way the legislature intended. "Briefs from amicus curiae . . . are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996). The proposed *amici* offer to serve the Court in that manner.

6. Florida courts have granted leave to amici to file briefs in support of or opposition to post-opinion motions for relief. See, e.g., *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1061 (Fla. 4th DCA 2011); *State Farm Mut. Auto. Ins. Co. v. Universal Med. Ctr. of S. Fla., Inc.*, 881 So. 2d 557, 558 (Fla. 3d DCA 2004); *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n, Inc.*, 625

So. 2d 1219, 1220 (Fla. 4th DCA 1993). Thus, the procedural posture of this case does not preclude the presentation of issues by amici, with leave of the Court.

7. Indeed, leave to file briefs in support of a post-opinion motion has been granted to amici curiae in similar cases that involve the application of FERPA. See Rhea, full citation. (granting leave to the University of Central Florida and other amici to file a brief in support of a motion for rehearing).

8. Counsel for the proposed amici has conferred with counsel for Appellant and counsel for Appellee. Appellant consents to the filing of a brief by the proposed amici. Appellee opposes the filing of a brief by the proposed amici..

WHEREFORE, the proposed amici respectfully request that the Court grant this motion and permit them to file the attached brief as amici curiae.

Respectfully submitted,

/s/ Alejandro Felce
Florida Bar. No. 106929
FELCE LAW, PLLC
37 N. Orange Ave, Suite 500
Orlando FL, 32837
Telephone: (407) 613-2420
Facsimile: (407) 613-2421
alejandro@felcelaw.com
Attorney for Amici Curiae
Jacob R. Milich
Joshua Boloña
Chase Little

CERTIFICATE OF SERVICE

I certify and that a true and correct copy of the foregoing was sent by the eDCA filing portal, and sent via electronic mail, this twenty third day of February 2016, to the following:

/s/ Alejandro Felce, Esq.

Carol J. LoCicero, Esq.
Mark R. Caramanica, Esq.
THOMAS & LOCICERO, P.L.
601 South Boulevard
Tampa, FL 33606
clocicero@tlolawfirm.com
mcaramanica@tlolawfirm.com
Attorneys for Amicus Curiae
The Student Press Law Center,
First Amendment Foundation,
Florida Press Association,
Reporters Committee for Freedom of
the Press, and
WKMG-TV

Charles T. Wells, Esq.
Richard E. Mitchell, Esq.
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, FL 32801
charles.wells@gray-robinson.com
rick.mitchell@gray-robinson.com
debi.robbins@gray-robinson.com
Attorneys for Appellees
John C. Hitt and
The UCF Board of Trustees

Justin S. Hemlepp, Esq.
J.S.HEMLEPP, P.A.
12157 West Linebauge Ave, No. 388401
Tampa FL, 33626
jhemlepp@hemlepplaw.com
Attorney for Appellant
Knight News, Inc.

Jeffrey T. Kuntz, Esq.
GRAYROBINSON, P.A.
East Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301
jkuntz@gray-robinson.com
daurand@gray-robinson.com
Attorney for Appellees
John C. Hitt and
The UCF Board of Trustees

Robert Rivas, Esq.
SACH SAX CAPLAN, P.L.
660 E. Jefferson Street, Ste. 102
Tallahassee, FL 32301-2547
rrivas@ssclawfirm.com
Attorney for Appellant

**THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT**

CASE NO. 5D14-2951
L.T. NO.: 2013-CA-2664-O

KNIGHT NEWS, INC.,
Appellant,

v.

THE UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES
And JOHN C. HITT,
Appellees.

ON REVIEW FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

**BRIEF *AMICI CURIAE* OF STUDENT GOVERNMENT SENATORS
JACOB R. MILICH, CHASE LITTLE, AND JOSHUA BOLOÑA**

Alejandro Felce
Florida Bar No. 106929
alejandro@felcelaw.com
FELCE LAW, PLLC
37 N. Orange Avenue, Suite 500
Orlando, FL 32801
Tel.: (407) 613-2420
Fax: (407) 613-2421
Attorney for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST..... 1

I. SUMMARY OF ARGUMENT 3

II. ARGUMENT 4

 A. SGA’s records must comply with Florida’s Sunshine Laws because SGA
 needs transparency in order to fulfill its statutory purpose. 4

 ii. SGA must comply with Florida’s Sunshine Laws. 4

 ii. Application of Florida’s Sunshine Laws to SGA, as public officers, is
 necessary to fulfill SGA’s statutory purpose..... 5

 B. SGA is an independent governmental body and should be free from
 encroachment of its statutorily provided powers by UCF..... 6

 i. An overview of Florida’s legislative history and overall statutory scheme
 reveals that the legislature intended for SGA to govern autonomously and
 independently of UCF’s administration. 7

 ii. Despite SGA’s independence, UCF encroaches on SGA’s autonomy through
 its regulations and administrative practices..... 11

C. SGA’s records are not subject to FERPA because SGA is not an educational agency and does not maintain SGA records on behalf of UCF.....15

 i. SGA is not subject to FERPA on its own because it is not an educational agency or institution.15

 ii. SGA’s records are not education records because they are not maintained on behalf of UCF.16

D. Whether SGA’s disciplinary record were disclosed in accordance with or in violation of FERPA cannot be resolved and litigated by UCF because the legislature prohibited such actions from being brought against UCF.17

III. CONCLUSION20

CERTIFICATE OF SERVICE21

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT23

TABLE OF AUTHORITIES

Cases

84 Lumber Co. v. Cooper,
656 So. 2d 1297, 1298 (Fla. 2d DCA 1994).....18

Booker v. State,
497 So. 2d 957, 958 (Fla. 1d DCA 1986).....18

Couchman v. University of Central Florida,
84 So.3d 445 (Fla. 5d DCA 2012).....9,10

Curls v. Florida Fish and Wildlife Conservation Commission,
935 So.2d 639 (Fla. 1d DCA 2006)..... 10, 19

Davis v. Michigan Dept. of Treasury,
489 U.S. 803, 809 (1989).....7

Florida Carry, Inc. v. University of North Florida,
133 So. 3d 966, 973 (Fla. 1d DCA 2013).....7

Hechtman v. Nations Title Ins. of N.Y.,
840 So.2d 993, 996 (Fla. 2003)7

Lightbourne v. McCollum,
969 So.2d 326 (Fla. 2007)15

Metellus v. State,
900 So.2d 491, 495 (Fla. 2005)18

<i>NCAA v. Associated Press</i> , 18 So.3d 1201, 1206 (Fla. 1d DCA 2009).....	15
<i>Owasso Independent School District No. I-011 v. Kristja J. Falvo</i> , 534 U.S. 426 (2002).....	16, 17
<i>Paladin Properties v. Family Inv. Enterprises</i> , 952 So. 2d 560, 564 (Fla. 2d DCA 2007).....	20
<i>Phenion Development Group Inc. v. Love</i> , 940 So. 2d 1179, 1182 (Fla. 5d DCA 2006).....	18
<i>State ex rel. Caraker v. Amidon</i> , 68 So. 2d 403, 405 (Fla. 1953)	18
<i>Students for Online Voting v. Student Government of the Student Body of the University of Florida</i> , 10 So.3d 709 (Fla. 1d DCA 2009).....	10, 19
<i>United States v. Miami University</i> , 294. F.3d 797 (6th Cir. 2002)	20
Statutes	
§ 1001.706, Fla. Stat. (2015).....	9
§ 1001.74 (10)(i), Fla. Stat. (2009) (<i>repealed in 2010</i>).....	8
§ 1002.225, Fla. Stat. (2015).....	2
§ 1004.22, Fla. Stat. (2015).....	15
§ 1004.26(5), Fla. Stat. (2002).....	8
§ 1004.26(5), Fla. Stat. (2010).....	8

§ 1004.26, Fla. Stat. (2004).....	8
§ 1004.26, Fla. Stat. (2015).....	passim
§ 1009.24(10)(b), Fla. Stat.(2015)	5, 9, 16
§ 11.062(2)(a), Fla. Stat. (2015)	10
§ 119.01, Fla. Stat. (2015).....	3, 4
§ 119.011, Fla. Stat. (2015).....	1, 5
§ 119.10, Fla. Stat. (2015).....	2
§ 119.12, Fla. Stat. (2015).....	2
§ 286.011, Fla. Stat. (2015).....	1, 2, 3
20 U.S.C. §1232g.....	3, 15, 16

Other Authorities

SG. Stat. § 305.3	12, 16
SG. Stat. § 605.17(D).....	13, 16
SG. Stat. § 702.7	3, 12, 13
SG. Stat. § 707.3(J)	12, 13
SG. Stat. § 709.4(E)	12
SG. Stat., Chapter 1200.....	2
UCF § 1.107	11
UCF § 5.0021(1)(c).....	11
UCF § 5.007(5)(a).....	12

UCF § 5.011(7)(a).....12

Regulations

34 CFR § 99.115

Constitutional Provisions

Art. I, § 24(a), Fla. Const.4, 15

Art. IX, § 7, Fla. Const.....9

Legislative Actions

H.R. 723, 112th Reg. Sess. (Fla. 2010) (enacted)18

PRELIMINARY STATEMENT

Reference to the record on appeal shall be by “R” followed by the page number(s), e.g., (R:30).

Reference to student government statutes shall be by “SG. Stat.” followed by the section number of the statute, e.g., (SG. Stat. § 702.7).

References to UCF regulations shall be by “UCF” followed by the regulation number. e.g., (UCF § 5.011).

IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

Amici curiae appear with a vested interest in ensuring the performance of their duties as officers of the University of Central Florida’s Student Government Association (“SGA”) complies with state and federal law and promotes Florida’s public policy of open government. *Amici* are SGA senators and each is an “Agency” subject to the Florida Open Records Act and the Florida Open Meeting Act (“Florida’s Sunshine Laws”). *See* §§119.011(2); 286.011, Fla. Stat. (2015).

This case is of paramount importance to the *amici* because the Court’s current opinion places *student senators* in an uncertain and impossible position, with the threat of violating Florida’s Sunshine Laws on one side and The Family Educational Rights and Privacy Act of 1974 (“FERPA”) on the other.

The gravity of the senators’ predicament is further exacerbated by the serious penalties that each statute carries for a violation of its provisions. Such

violations subject SGA to civil actions, attorney's fees and costs. *See* §§ 286.011(3); 119.12; 1002.225, Fla. Stat. (2015) Furthermore, SGA's individual *student senators* could face fines and criminal penalties for failure to adhere to Florida's Sunshine Laws. *See* §§ 286.011 (3); § 119.10, Fla. Stat. (2015)(1), Fla. Stat. (2015).

Within SGA, *amici* includes members of the Legislative, Judicial, and Rules Committee ("LJR") and the Governmental Affairs Committee (GAC) –together charged with the responsibility of protecting SGA's student members by ensuring that SGA complies with state and federal law. However, without further guidance, *amici's* only viable option is to *guess* and hope that it picks the correct interpretation of this Court's opinion.

At the state level, the impact of this Court's opinion on Florida's open government policy is of the utmost importance. If FERPA applies to SGA records, then student governments throughout Florida must close their meetings and records to the public. SGA recognized its obligations as a public records "Agency" through its Student Government in the Sunshine Act. *See* SG. Stat., Chapter 1200. SGA has generally treated its "disciplinary records", as opposed to records maintained by the University of Central Florida Board of Trustees and Dr. John C. Hitt (collectively referred to herein as "UCF"), as open, "public records." *Id.* Members of LJR conduct public preliminary disciplinary proceedings of SGA officers. SGA

senators, including *amici*, then vote on the final disposition of same at another public forum. *See* SG. Stat. § 702.7. Such proceedings and forums would need to be closed to the public if FERPA applies to SGA's records. Accordingly, this case impacts *amici's* interests immensely.

I. SUMMARY OF ARGUMENT

SGA is an independent government organization – charged with the purpose of expending funds to benefit the student body at large – and thus has a compelling interest in promoting transparency and open government.

Without a voice in this litigation prior to this brief, *amici* asserts that: A) Recognizing the real danger of corruption without public oversight, the legislature created SGA and made its records subject to Florida's Sunshine Laws; *see* §§ 1004.26; 119.01(1), 286.011, Fla. Stat. (2015). B) In doing so, Florida's legislature created a government that, albeit located within the university, would operate as a separate and distinct institution from UCF; however, despite the legislature's intent, UCF continues to encroach on SGA's autonomy and now advocates for an interpretation of FERPA which seeks to apply FERPA to SGA's records – a position that is contrary to that of SGA; C) By contrast, *amici's* position is that SGA's records are not subject to FERPA because SGA is not an educational agency and maintains records only for itself, not UCF; *see* 20 U.S.C. §1232g(a)(4)(A), D) Lastly, the application of FERPA, as it applies to SGA's

impeachment records, was improperly brought before this Court without lawfully invoking its jurisdiction. *See* § 1004.26(5), Fla. Stat. (2015).

II. ARGUMENT

A. SGA’s records must comply with Florida’s Sunshine Laws because SGA needs transparency in order to fulfill its statutory purpose.

SGA, like all other governmental entities, needs transparency in order to fulfill the purpose for which it was created. Florida’s Constitution establishes a fundamental right of access to “any public record made or received in connection with the official business of any public body ... or entity created pursuant to law[.]” Art. I, § 24(a), Fla. Const. SGA is an entity created pursuant to law. § 1004.26., Fla. Stat. (2015). Therefore, SGA is a public body that must comply with Florida’s Constitution.

ii. SGA must comply with Florida’s Sunshine Laws.

Further, “[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.” § 119.01(1), Fla. Stat. (2015). An “agency” is defined to mean any “separate unit of government created or established by law[.]” *Id.* at (2). SGA is a separate unit of government created or established by law. *See* § 1004.26, Fla. Stat. (2015). As such, SGA is subject to Florida’s Sunshine Laws.

Section 119.011(12) defines “public records” to include: “all documents ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” SGA is empowered by law, *inter alia*, to allocate and expend state funds and must do so in order to benefit the student body in general. *See* § 1009.24(10)(b), Fla. Stat.(2015).

ii. Application of Florida’s Sunshine Laws to SGA, as public officers, is necessary to fulfill SGA’s statutory purpose.

Albeit made up university students, SGA is a *de facto* government. SGA employs officers and pays them salaries,¹ retains a law firm for lobbying purposes,² sponsors student publications, *see* § 1009.24(10)(b), Fla. Stat. (2015), provides grants to student organizations at the university, *Id.*, and allocates money towards public transportation. Each of the above is SGA’s official business and creates a public record within the meaning of Florida’s Sunshine Laws. However, the expenditures must be allocated in order to benefit the student body at large. *Id.* Like other public agencies, SGA’s official actions and expenditures are not without controversies, scandals, and demands for accountability by the public.

By way of example, SGA and/or its officers have faced criticism for and accusations of: paying excessive salaries to its officers, expending too many

¹ In 2010, the SGA president enjoyed a \$19,500 salary per annum. (R:126).

² SGA expends \$56,500 towards a lobbying firm. (R: 135).

resources on lobbying firms,³ disbursing resources for improper or excessive expenditures, attempting to conceal questioned expenditures, improper or illegal conduct, violating election rules, and carrying out official business behind closed doors. The need for transparency is evident, as the impeachment process is invoked regularly to ensure propriety within SGA. Many of the circumstances, facts, and details surrounding the impeachment affidavits cannot be obtained without access to SGA's records, nor can the parties responsible for wrongdoing be ascertained if FERPA conceals their identities. Florida's policy of open government would suffer a great loss as such a result would eliminate transparency in student governments throughout the entire state, thereby teaching tolerance of secrecy, non-disclosure, and lack of accountability to Florida's future leaders who, by their actions, have demonstrated the most interest in pursuing politics and public service.⁴

B. SGA is an independent governmental body and should be free from encroachment of its statutorily provided powers by UCF.

³ See Salo Steinvortz, "UCF's SGA's \$17 Million Budget Approved for 2011-2012 Fiscal Year," *Orlando Sentinel*, April 11, 2011, available at http://articles.orlandosentinel.com/2011-04-21/community/orl-ucf-sga-budget-approved-2011-2012-year_1_activity-service-fee-student-body-president-student-agencies (last viewed Feb. 19, 2016).

⁴ By contrast, See Nasa Hassanein, "UCF SGA candidates contest transparency, lobbying," *Central Florida Future*, March 27, 2015, available at <http://www.centralfloridafuture.com/story/news/2015/03/27/ucf-sga-candidates-contest-transparency-lobbying/70529920/> (last viewed Feb. 19, 2016).

As elected officials, SGA's intended purpose is to carry out and promote the intent and will of the student body, not that of UCF's administration. As such, Florida's legislature created SGA as an independent organization whose main interaction with UCF would be limited to the final approval of SGA's allocation of state funds. However, the legislature *did not* provide UCF with the power to review and approve SGA's internal procedures, *including* the manner in which it conducts disciplinary proceedings or releases records related thereto. However, despite the legislature's intent, UCF continues to encroach on SGA's internal procedures.

i. An overview of Florida's legislative history and overall statutory scheme reveals that the legislature intended for SGA to govern autonomously and independently of UCF's administration.

When interpreting a statute, "significance and effect must be given to every word, phrase, sentence, and part of the statute." *Florida Carry, Inc. v. University of North Florida*, 133 So. 3d 966, 973 (Fla. 1d DCA 2013) (quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So.2d 993, 996 (Fla. 2003)). In order to do so, the words of a statute "must be read in their context and with a view to their place in the overall statutory scheme." See *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). SGA, like every student government at a university's main campus, is created by Florida's legislature. § 1004.26(1), Fla. Stat. (2015). This statute provides SGA with complete independence from UCF and *mandates* that the *student government*: i) maintain its own branches and records; ii) determine its

own internal procedures for election, operation, administration, and execution of duties prescribed by law; and iii) determine the qualifications, elections, appointments, removal, and internal procedure regarding the *discipline* of officers. §§ 1004.26(2),(3),(4)(a), Fla. Stat. (2015).

The aforementioned powers were not only given solely to SGA by the Florida legislature, but excluded UCF by purposeful legislative action. In the past, university presidents had the limited power to challenge the internal procedures of student government. § 1004.26(5), Fla. Stat. (2002). However, in 2004, this limited power was eliminated in its entirety. *See* § 1004.26, Fla. Stat. (2004). Likewise, in 2010, the power of the board of trustees to “approve the internal procedures of student government organizations” was also repealed. § 1001.74 (10)(i), Fla. Stat. (2009) (*repealed in 2010*). That very year, the legislature enacted a provision which provides that no cause of action could be brought against a state university for the actions of student government unless made final by the state university. § 1004.26(5), Fla. Stat. (2010). This statute reinforces the autonomy of student government by ensuring that, for purposes of liability to the public, SGA does not act as an agent of UCF. *Id.*

Tellingly, the principal matter in which the legislature has chosen to expressly grant a university the power to review and approve a decision by student

government is with regard to the allocation of public funds.⁵ § 1009.24(10)(b), Fla. Stat. (2015). However, there are virtually no other statutes in Title XLVIII, of the K-20 Education Code allowing state universities to meaningfully encroach on the autonomous powers granted to student government under section 1004.26.⁶

The legislature recognizes very broad and general powers of UCF's board of trustees. § 1001.706(2), Fla. Stat. (2015). Among these powers is the ability to establish a code of conduct and penalties for the violation thereof by students or student organizations. *Id.* at (3)(h). These powers are not without limitation, as the statute *does not* provide the board of trustees with the power to develop penalties or procedures for violations of *student government's* code of conduct.

SGA and UCF's distinct and separate character is further evidenced by how each institution is granted its power to implement disciplinary procedures. UCF's power is derived from Florida's Constitution. *See* Art. IX, § 7, Fla. Const.; *Couchman v. University of Central Florida*, 84 So.3d 445 (Fla. 5d DCA 2012). As such, review of final decisions taken by the university are brought before the circuit court. *Id.* By contrast, SGA receives its power to create rules and discipline

⁵ The only other instance in which approval of the university president must be acquired is wholly irrelevant to student government's autonomy and internal procedures. *See* § 1011.48, Fla. Stat. (2015) (allowing the student government association of a university to establish educational research centers for child development with the approval of the university president).

⁶ Florida Statutes not already covered in argument include §§ 1009.22(12)(a), 1009.23(18)(a), Fla. Stat. (2015) (requiring the student government of the College of Santa Fe's approval of a transportation access fee by referendum.)

its officers through statute. *See* § 1004.26, Fla. Stat. (2015). Thus, review of final actions taken by SGA are properly brought before the district court of appeals. *See Students for Online Voting v. Student Government of the Student Body of the University of Florida*, 10 So.3d 709 (Fla. 1d DCA 2009) (*citing Curls v. Florida Fish and Wildlife Conservation Commission*, 935 So.2d 639 (Fla. 1d DCA 2006)). SGA and UCF's distinct and separate nature is thus evidenced by the distinct relief granted to a party after each institution has made a final disposition.

SGA's independence is evidenced by the budgets approved by UCF. The budgets approved by the university include the portions that SGA has chosen to spend on GrayRobinson as SGA's lobbyists. (R: 135). However, neither the state university nor its departments may spend public funds to retain lobbyists. § 11.062(2)(a), Fla. Stat. (2015). Tellingly, the legislature has repeatedly allowed SGA to register as a lobbyist with its registry⁷. As such, this result is only permissible if SGA is recognized as an autonomous and independent institution.

When considering the entire statutory scheme in conjunction with its legislative history, these statutes demonstrate that SGA was created to act autonomously and unfettered by the university's president or its board of trustees.

⁷ Florida Lobbyist Registration and Compensation, Lobbyist Registration Office, *University of Central Florida Student Government Association – 2016 Legislative Principal Detail*, available at <https://floridalobbyist.gov/LobbyistInformation/PrincipalDetail/14666?year=2016&Branch=L>

While section 1004.26 provides that SGA is “a part” of UCF, to argue that SGA does not have a separate legal existence would render subsection (5) of the statute superfluous, as it contemplates legal action against SGA and not UCF. Similar to the basic manner that a city government is a part of county, a student government is part of a university. Indeed, SGA fully funds and maintains the facilities located at UCF’s student union within the university. (R:201, 207-08, 212-16). However, for purposes of its actions as a public agency, the legislature makes it clear that SGA is an independent unit of government, legally separate from UCF, capable of suing and being sued.

ii. Despite SGA’s independence, UCF encroaches on SGA’s autonomy through its regulations and administrative practices.

UCF’s regulations intrude upon the powers that the legislature sought to provide solely to SGA. UCF’s regulations provide that, subject to the president’s approval, SGA “may adopt a constitution and by-laws, establish appointed or elected offices and recommend employment of personnel required to carry out its functions.” UCF § 5.0021(1)(c). Similarly, subject to the president’s approval, SGA is self-governing under its own constitution and bylaws. UCF § 1.107(2), (3)(a). Both regulations appear to provide powers to SGA that have already been conferred upon it by the legislature through section 1004.26; however, UCF’s regulations include a reservation of final approval by the president of the university

in direct contradiction with section 1004.26 and its legislative history. Thus, the regulations are improper as they are preempted by the Florida legislature and seek to encroach on powers that were provided solely to SGA.

UCF's regulations provide specific rules and procedures for the discipline of students and student organizations, the records of which are maintained at the Office of Student Conduct. UCF §§ 5.011(7)(a), 5.007(5)(a). However, UCF's regulations do not address SGA's disciplinary proceedings nor do they require SGA to keep its disciplinary records at the Office of Student Conduct.⁸ Similarly, although UCF's regulations require that disclosure of UCF's records be made in accordance with state and federal law, UCF does not place any similar requirement on SGA or its records. UCF §§ 5.011(7)(a); 5.007(5)(a).

Rather, SGA has determined its internal procedures for how disciplinary proceedings will be carried out and how records will be kept through its enactment of Title VII of the Student Government Statutes. SGA's statutes establish the procedure for the impeachment and removal of an SGA member or officer. *Id.* Its procedures provide that SGA's LJR will conduct a preliminary hearing, SGA's senate will vote on the charge(s) and, if appealed, SGA's Judicial Council will make a final decision. *See* SG. Stat. §§ 702.7, 707.3(J), 709.4(E). Records of the votes are maintained by SGA's Senate Secretary. SG. Stat. § 305.3. Similarly,

⁸ Nor could they pass a regulation that sought to do so, as it would contradict § 1004.26, Fla. Stat. (2015).

SGA's Election Commission determines whether to sanction an election violation and, if the decision is appealed, SGA's Judicial Council makes a final decision. *See* SG. Stat. §§ 702.7, 707.3(J). The record of any sanction is maintained by SGA's Supervisor of Elections. SG. Stat. § 605.17(D). SGA's autonomy is thus evidenced by the fact that its disciplinary mechanisms are brought to finality by SGA without UCF involvement and that the records therefrom are maintained within SGA.

Despite the distinction between UCF's disciplinary records as opposed to SGA's disciplinary records, UCF attempts to impose the university's desired interpretations of Florida's Sunshine Laws and FERPA upon SGA on their release. In particular, UCF recognizes SGA as officers subject Florida's Sunshine Act and permits them to consult with the Office of General Counsel regarding the application of same.⁹ However, the Office of General Counsel provides its own interpretation of Florida's Sunshine Laws and emphasizes that a violation of same will result in "university sanctions."¹⁰ A similar result is logically implied as to SGA's compliance with FERPA in the eyes of the university. The unavoidable effect is that SGA, an institution meant to maintain its independence as public officers, has no choice but to follow UCF's interpretation of the law or face "university sanctions."

⁹ University of Central Florida, Office of the General Counsel, *About Us, available at* <http://generalcounsel.ucf.edu/legal-issues> (follow "Sunshine Laws Open Meetings Requirement" link) (last visited Feb. 19, 2016).

¹⁰ *Id.*

It is hardly surprising then that “SGA” public records request forms (“Request Form”) are used for public records requests received by SGA. The Request Form divests SGA of its final decision making power as to the requested record and transfers it to the university’s Office of General Counsel. (R:84). However, the Office of General Counsel makes it clear that it acts on behalf of UCF and does not advise student.¹¹ As such, the Office of General Counsel interprets all of FERPA’s ambiguities in favor of UCF’s interest, not those of SGA.

SGA must comply with Florida’s Sunshine Laws. This duty is recognized by SGA’s Student Government in the Sunshine Act. Significantly, SGA did not pass similar statutes requiring compliance with FERPA, to which UCF is bound. Nonetheless, SGA finds itself “freely” applying FERPA to its records as a safety net that protects them individually from “university sanctions.” Amici do not claim that UCF acted maliciously or intended this result, but rather assert that the aforementioned creates an unworkable model that hinders the legislature’s intent and SGA’s desire to be an independent and transparent body of government.

In the instant action, UCF argues that SGA’s records are subject to FERPA. This position is contrary to the intent of the legislature, Florida’s policy of open government, and SGA’s desire to provide more transparency for the benefit of the student body. Therefore, in order to promote an effective and cooperative

¹¹ University of Central Florida, Office of the General Counsel, *About Us*, available at <http://generalcounsel.ucf.edu/about-us/> (last visited Feb. 19, 2016).

relationship between SGA and UCF through the clear delineation of legal duties, SGA desires that this Court provide guidance as to the proper interpretation of FERPA as it pertains to SGA records.

C. SGA's records are not subject to FERPA because SGA is not an educational agency and does not maintain SGA records on behalf of UCF.

Access to public records is a fundamental right granted to the citizens of Florida. Art. I, § 24(a), Fla. Const.. Florida courts construe public record statutes liberally in favor of Florida's policy of open government. *See NCAA v. Associated Press*, 18 So.3d 1201, 1206 (Fla. 1d DCA 2009) (*citing Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007)). Any ambiguities regarding the application of the law should be resolved in favor of disclosure. *NCAA*, 18 So.3d at 1206. Florida exempts compliance for records that fall within FERPA. § 1004.22, Fla. Stat. (2015). In order to be deemed an education record under FERPA, a record must be "maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A).

i. SGA is not subject to FERPA on its own because it is not an educational agency or institution.

By definition, an educational agency or institution must receive funds under any program administered by the Secretary of the U.S. Department of Education. *See* 20 U.S.C. §1232g(a)(3); 34 CFR § 99.1. SGA does not receive any of the aforementioned funds. Rather, SGA allocates the student activity and service fee

funds, which are *state* funds. § 1009.24(10)(b), Fla. Stat. (2015). Consequently, SGA cannot be an educational agency or institution on its own because it only receives state funds.

ii. SGA’s records are not education records because they are not maintained on behalf of UCF.

In order for SGA’s records to be subject to FERPA, SGA must maintain said records on behalf of UCF. 20 U.S.C. §1232g(a)(4)(A). As discussed within heading B of this brief, SGA is a distinct entity acting on its own behalf.

Further, SGA’s disciplinary records are not subject to FERPA because they are not kept with one centralized custodian. In *Owasso Independent School District No. I-011 v. Kristja J. Falvo* the Supreme Court elaborated that education records under FERPA are kept by “a single, central custodian, such as a registrar.” 534 U.S. 426 (2002). SGA’s statutes dictate that SGA maintain the disciplinary records in question. SGA’s impeachment records and election violations records are not kept by one centralized custodian at UCF, they are kept by several different custodians within SGA. *See* §§ 305.3, 605.17(D), SG. Stat. Accordingly, the records were requested from *different* SGA custodians. (R:67-68, 78).

In *Owasso*, the Supreme Court of the United States reasoned that students who peer reviewed each other’s papers at the direction of their instructor were not maintaining the papers on behalf of their educational institution. 534 U.S. 426. As

such, the peer reviewed papers were not “education records” within the meaning of FERPA. *Id.* If the students in *Owasso* are not acting on behalf of an educational institution when directed by their instructor to review their peers’ papers, then it stands to reason that SGA members are not acting on behalf of UCF when they review a student’s impeachment affidavit and elections violation affidavit *without* any directive from UCF to do so.

Lastly, unlike *Owasso*, where the information from the records would eventually be submitted to the institution and kept by a centralized custodian, SGA does not submit the type of records in question to UCF. *Id.* Thus, because SGA is not an educational agency or institution and does not act on behalf of one, its disciplinary records cannot be “education records.” Since SGA’s records cannot be “education records”, the Court need not engage in whether these records directly relate to a student.¹²

D. Whether SGA’s disciplinary record were disclosed in accordance with or in violation of FERPA cannot be resolved and litigated by UCF because the legislature prohibited such actions from being brought against UCF.

It would be proper for this Court to modify its February 5th, 2016 opinion to exclude the question as to whether SGA’s disciplinary records fall within FERPA

¹² Such inquiry is more appropriate for an education agency or institution or person acting on behalf of one. *See Ellis v. Cleveland Municipal School District*, 309 F.Supp.2d 1019 (N.D. Ohio 2004); *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851 (Fla. 1d DCA 2013).

because there was no subject matter jurisdiction to hear such a cause *against UCF* and jurisdiction could not be granted to the Court by the parties' consent. *See Metellus v. State*, 900 So.2d 491, 495 (Fla. 2005) (“A jurisdictional rule cannot be altered by the court or by agreement of the parties.”).

Subject matter jurisdiction is conferred upon a court by constitutional or *statutory* authority. *See State ex rel. Caraker v. Amidon*, 68 So. 2d 403, 405 (Fla. 1953). Lack of subject matter jurisdiction is a fundamental error and may be raised at any time, “even after the entry of a final judgment or for the first time on appeal.” *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1298 (Fla. 2d DCA 1994); *see also Booker v. State*, 497 So. 2d 957, 958 (Fla. 1d DCA 1986). Subject matter jurisdiction is defined as i) the Court's power to hear a type of case as well as ii) the lawful invocation of same through the filing of a proper pleading. *See Phenion Development Group Inc. v. Love*, 940 So. 2d 1179, 1182 (Fla. 5d DCA 2006). A proper pleading is one which contains a viable cause of action. *Id.*

Section 1004.26(5) provides that there can be no cause of action against a university for the *actions* or *decisions* of the student government unless same are made final by the university. When adding this subsection to the statute, the legislature made clear that its purpose is to *prohibit* such actions from being brought. H.R. 723, 112th Reg. Sess. (Fla. 2010) (enacted). Indeed, the legislature's imposition of condition precedents before an action may be *maintained* are

regularly enforced by the courts. *See Students for Online Voting*, 10 So.3d 709 (Fla. 1d DCA 2009) (*citing Curls*, 935 So.2d at 639 (Fla. 1d DCA 2006)) (holding that an appeal of an administrative order was premature until the order was made final through filing with the agency clerk).

The Court lacks subject matter jurisdiction to resolve Count I, as a viable cause of action did not exist due to Knight News' failure to allege that UCF made final SGA's decisions to release redacted records. Knight News alleges that it requested impeachment affidavits and that it received redacted versions of same from SGA and UCF. (R: 13-14, ¶13-16). However, Exhibit "1" and "2" of Knight News' complaint contradicts and makes evident that the records were requested and received from solely SGA members and employees.¹³ (R: 61-70, 179). The exhibits of the complaint control over the allegations when the two contradict each other. *See Paladin Properties v. Family Inv. Enterprises*, 952 So. 2d 560, 564 (Fla. 2d DCA 2007). If the contradiction negates the cause of action, then the judgment may be set aside.¹⁴ *Id.* at 564. Consequently, Knight News failed to lawfully invoke the Court's jurisdiction because it failed to file a complaint that alleged a

¹³ These e-mails went to and were received from the SGA Senate Secretary, Courtney Paul. All emails were copied to Michael Preston, an Office of Student Life Employee paid entirely by SGA funds.

¹⁴ UCF's pleadings took the position that such requests were not made to the UCF office dealing with public records; (R: 506), however, because the defect in the pleadings negated the cause of action, its effect was to deprive the court of jurisdiction, not provide a defense.

viable cause of action – one in which UCF makes SGA’s decision as to the disclosure of disciplinary records final.

UCF should not be permitted to advocate on behalf of SGA because SGA is the only party that may be sued under Florida Law. As such, UCF has no legitimate interest in the cause. Rather, SGA should be permitted to advance its own interests should Knight News decide to pursue legal action against SGA.

III. CONCLUSION

This Court relies on the case of *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) in holding that both SGA and UCF’s disciplinary records are subject to FERPA. However, the holding in *Miami* only addresses the records of the university, not those of a student government. 294 F.3d at 812. As underscored throughout *amici’s* brief, SGA is a separate and distinct legal entity from UCF. This conclusion is further emphasized by the legislature’s recognition that certain lawsuits could be brought against SGA and not UCF.

The unclear yet sweeping repercussions of this Court’s opinion affect the future operations of student governments in all state universities. In particular it may result in the additional use of state funds to defend lawsuits against student government based on its unclear obligations. To prevent such consequences, *Amici* respectfully ask the Court to reconsider its decision or certify a question of great public importance to the Supreme Court.

CERTIFICATE OF SERVICE

I certify and that a true and correct copy of the foregoing was sent by the eDCA filing portal, and sent via electronic mail, this twenty third day of February 2016, to the following:

Carol J. LoCicero, Esq.
Mark R. Caramanica, Esq.
THOMAS & LOCICERO, P.L.
601 South Boulevard
Tampa, FL 33606
clocicero@tlolawfirm.com
mcaramanica@tlolawfirm.com
Attorneys for Amicus Curiae
The Student Press Law Center,
First Amendment Foundation,
Florida Press Association,
Reporters Committee for Freedom of
the Press, and
WKMG-TV

Justin S. Hemlepp, Esq.
J.S.HEMLEPP, P.A.
12157 West Linebaug Ave, No. 388401
Tampa FL, 33626
jhemlepp@hemlepplaw.com
Attorney for Appellant
Knight News, Inc.

Robert Rivas, Esq.
SACH SAX CAPLAN, P.L.
660 E. Jefferson Street, Ste. 102
Tallahassee, FL 32301-2547
rrivas@ssclawfirm.com
Attorney for Appellant

Charles T. Wells, Esq.
Richard E. Mitchell, Esq.
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, FL 32801
charles.wells@gray-robinson.com
rick.mitchell@gray-robinson.com
debi.robbins@gray-robinson.com
Attorneys for Appellees
John C. Hitt and
The UCF Board of Trustees

Jeffrey T. Kuntz, Esq.
GRAYROBINSON, P.A.
East Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301
jkuntz@gray-robinson.com
daurand@gray-robinson.com
Attorney for Appellees
John C. Hitt and
The UCF Board of Trustees

(continues on following page)

/s/ Alejandro Felce

Florida Bar. No. 106929

FELCE LAW, PLLC

37 N. Orange Ave, Suite 500

Orlando FL, 32837

Telephone: (407) 613-2420

Facsimile: (407) 613-2421

alejandro@felcelaw.com

Attorney for Amici Curiae

Jacob R. Milich

Joshua Boloña

Chase Little

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that the font used in this brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.240(a)(2).

/s/ Alejandro Felce
Florida Bar. No. 106929
FELCE LAW, PLLC
37 N. Orange Ave, Suite 500
Orlando FL, 32837
Telephone: (407) 613-2420
Facsimile: (407) 613-2421
alejandro@felcelaw.com
Attorney for Amici Curiae
Jacob R. Milich
Joshua Boloña
Chase Little