IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA,
FIFTH DISTRICT

KNIGHT NEWS, INC.,

Appellant,

vs.

THE UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES, ET AL.,

Appellee.

_____/

Appellate Case No.: 5D14-2951

L.T. Case No.: 2013-CA-002664-O

UCF'S MOTION FOR REHEARING,
REHEARING *EN BANC*, AND CERTIFICATION

Appellees, the University of Central Florida Board of Trustees and Dr. John Hitt (collectively, "UCF"), respectfully move this Honorable Court for rehearing, rehearing *en banc*, or for certification to the Supreme Court of Florida as to the portion of this Court's Opinion issued on April 8, 2016, ("Opinion II"), which judicially creates an "implied waiver" exception to a federal statute—the Family Educations Rights and Privacy Act ("FERPA")—which the United States Congress and the Secretary of Education have consistently refused to create.

I. Background

In its complaint below, Knight News, Inc. ("KNI") asserted seventeen claims against UCF spanning 53 pages and 315 paragraphs. [R. 10-310]. Under counts one and two, KNI sought the production of un-redacted copies of

"Impeachment Affidavits" filed against two student government members, and "Election Violation Affidavits" filed against student government candidates. [R. 13-14 at ¶¶ 13-18; R. 39-41 at ¶¶ 160-168 (count one); R. 14-15 at ¶¶ 19-32; R. 41-42 at ¶¶ 169-177 (count two)].

Nowhere do the words "implied" or "consent" appear in KNI's complaint, [R. 10-64], in KNI's motion for alternative writ of mandamus and response in opposition to UCF's motion to dismiss and alternative motion for summary judgment, [R. 399-428], in KNI's reply to UCF's affirmative defenses, [R. 702], in the transcripts of the evidentiary hearing on KNI's claims under Florida's Public Records Act (counts one through seven) [R. 954-1335, 1459-1489], or in KNI's post-trial written closing argument. [R. 1372-1382].

At close of UCF's case-in-chief below, UCF filed a Motion for Involuntary Dismissal and Partial Final Judgment on KNI's counts one through seven. [R. 1336-1369]. In relation to counts one and two, UCF's motion explained that:

> Florida law provides that a "student's education records, as defined in [FERPA], and the federal regulations issued pursuant thereto . . . are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." §1006.52(1), Fla. Stat. Accordingly, UCF "may not release a student's education records without the written consent of the student to any individual, agency, or organization, except in accordance with and as permitted by the FERPA." §1006.52(2), Fla. Stat.; *see Florida State Univ. v. Hatton*, 672 So. 2d 576, 579 (Fla. 1st DCA 1996) (We find that the formal orders regarding FSU students are confidential records and reports . . . because they contain identifying information about the subject student and other students who are accomplices, witnesses and victims.") (*cited with approval, WFTV, Inc. v. School Bd. of Seminole Cnty*., 874 So.

2d 48, 53 (Fla. 5th DCA 2004) ("In the instant case, the Requested Records are both confidential and exempt from section 119.07(1) and, hence, the School Board is prohibited from disclosing the Requested Records to WFTV.")). . . .

The records at issue under Counts [I and II] include:

· "Affidavits of Impeachment" containing information identifying students accusing other identified students with the "impeachable offense of Malfeasance as the willful disregard of the Student Body Constitution and Statutes," as well as information that is reasonably linkable or easily traceable to the involved students, such the identification of a specific university student committee, (Count I); [and]

· "Election Violations Affidavits" containing information identifying students accusing other identified students (running for student body president and vice-president) with violations of the university's elections statutes, including serious charges such as bribery, as well as information that is reasonably linkable or easily traceable to the involved students, such the identification of a specific student political party, (Count II); . . .

Hence, the records at issue under the Redacted Counts are "education records" as they contain "personally identifiable information" relating to university students, and are maintained by UCF, which is a public educational institution. § 1000.21(6)(g), Fla. Stat. As a result, the records are "confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." §1006.52(1), Fla. Stat.

At trial, the Court conducted an in camera review of un-redacted copies of the records at issue, and received the sworn testimony of UCF's Deputy General Counsel, Ms. Youndy Cook. As to the records at issue under Counts I, II, and VI, Ms. Cook's testimony established that UCF redacted "personally identifiable information" and "non-directory information" pursuant to FERPA. [R. 1341-1343, (emphases added)].

On June 24, 2014, the trial court rendered its "Order on Plaintiff's Petition for Alternative Writs of Mandamus and Defendants' Motion for Involuntary Dismissal and Partial Final Judgment." [R. 1603-1610]. As for counts one and two,

the trial court ruled that "[f]ollowing an in-camera inspection of the records, the court finds the Defendant's asserted exemption is applicable and accordingly, denies Plaintiff's petition for an alternative writ of mandamus and grants Defendant, UCF's Motion for Involuntary Dismissal" as to counts one and two. [R. 1603-1604].

KNI appealed the trial court's series of final orders, and nowhere in its Initial Brief or Reply Brief do the words "implied" or "consent" appear. On February 5, 2016, the panel released the first opinion in this appeal ("Opinion I"), concluding that "[a]though KNI has set forth valid public policy arguments as to why the type of records and information requested in this case should be subject to public disclosure, we believe that those arguments are more properly addressed to the appropriate legislative bodies." See Opinion I, pg. 4.

KNI moved for rehearing on Opinion I, and in support argued for the first time that members of student government "expressly consent" to the release of their education records:

> Even if student government records were "education records," the Court has already observed that FERPA only "limit[s] the dissemination of a student's education records without the student's consent." Here, the students' participation in extracurricular—i.e., outside of the educational curriculum—activities, particularly those individuals elected and appointed to administer the government's allocation of large amounts of public funds, is an express consent to the disclosure of their identities within the scope of those extracurricular activities. These officials submit themselves for election, perform their statutory and constitutional duties at noticed, public meetings and are subject to impeachment by public referendum. These

> officials know or should know of these open government laws and therefore have consented to the disclosure of their identities within the scope of their public duties. Public duties may not be performed in the shadow of anonymity. [KNI's Motion for Rehearing, Rehearing En Banc, Clarification, and Certification, pgs. 6-7 at ¶15 (Feb. 22, 2016 (emphasis supplied)].

In response, UCF explained that the "Florida Legislature specifically amended state law to "provide[] that '[a] public postsecondary educational institution may not release a student's education records without the written consent of the student to any individual ..., except in accordance with and as permitted by the FERPA.' *Rhea v. District Bd. of Trustees of Santa Fe College*, 109 So. 3d 851, 856 (Fla. 1st DCA 2013) (quoting § 1006.52(2), Fla. Stat. (2009)). The Court's focus in the Opinion was correctly on the federal statute and the federal statute clearly protects student disciplinary records from disclosure." [UCF's Response to KNI's Motion for Rehearing, pg. 9 (March 16, 2016) (emphasis supplied)].

In Opinion II, the panel reversed its prior acknowledgment that KNI's public policy arguments "are more properly addressed to the appropriate legislative bodies," see Opinion I, pg. 4, and held that:

> [W]e conclude that the names of student government officers charged with malfeasance in the performance of student government duties or alleged to have engaged in misconduct with regard to their election or appointment to their position, do not qualify as protected "personally identifiable information" under FERPA because student government officers have implicitly consented to the dissemination of that information given Florida's statutory scheme concerning university

> student governments. Section 1004.26, Florida Statutes (2012), provides that a university student government is required to adopt internal procedures governing "[t]he qualifications, elections, and returns, the appointments, and the suspension, removal, and discipline of officers of the student government[.]" § 1004.26(4)(a), Fla. Stat. (2012). Furthermore, section 1004.26(4)(b) authorizes the removal of student government officers for malfeasance and other enumerated causes by majority vote of students participating in a referendum held pursuant to the requirements set forth in the statute.
>
> Accordingly, under this statutory scheme, student government officers know or reasonably should know (given their voluntary decision to seek election or appointment as a student government officer) that they may be disciplined for misconduct in the performance of their student government duties or alleged misconduct related to their election or appointment, either by referendum vote of the university's students or by vote of other student government officers in a public meeting. We hold, therefore, that such information concerning misconduct by student government officers is not protected from disclosure under FERPA. See Opinion II, pgs. 4-6.

II. Legal Standard

"The purpose of a motion for rehearing is to direct the court to points of law or fact that, in the opinion of the movant, the court overlooked or misapprehended in its opinion." *McDonnell v. Sanford Airport Auth.*, 5D13-3850, 2015 WL 2260504 (Fla. 5th DCA May 15, 2015) (citing Fla. R. App. P. 9.330(a)). In Opinion II, the Court overlooked the plain terms of FERPA and its implementing regulations, and the Secretary of Education's consistent pronouncements that only in narrow circumstances (not present here) does a student impliedly waive their privacy rights under FERPA. In effect, Opinion II rewrites Florida and federal law.

III. Legal Argument and Application

UCF respectfully submits that rehearing, rehearing *en banc*, or certification is appropriate for the following reasons:

Opinion II correctly states that the Impeachment and Election Violation Affidavits at issue under counts one and two concern "students who were the subject of allegations of misconduct related to their performance, election, and/or appointment as student government officers," see Opinion II at pg. 2, and "FERPA permits the release of certain student disciplinary records and information where the alleged misconduct constitutes [1] a crime of violence or a [2] non-forcible sex offense." See Opinion II, pg. 4 (citing and agreeing with *United States v. Miami University*, 294 F.3d 797, 812 (6th Cir. 2002)).

In 2009, the Florida Legislature enacted § 1002.225, Fla. Stat., which provides that "[a]ll public postsecondary educational institutions shall comply with the FERPA with respect to the education records of students," and § 1006.52(2)(a), Fla. Stat., which provides that a "public postsecondary educational institution may not release a student's education records without the written consent of the student to any individual, agency, or organization, except in accordance with and as permitted by the FERPA." Under the principle of *expressio unius, exclusio alterius*, no other [release] exception may be inferred." *Morris v. Seely*, 541 So. 2d 659, 661 (Fla. 1st DCA 1989) ("Although the Legislature has created exceptions to

Section 116.111 for teachers hired by district school boards or community colleges and for the temporary employment of a relative in the event of an emergency, it has made no exception to Section 116.111 for the office of sheriff.") (*citing Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952) ("We have oft-times held that the rule '*Expressio unius est exclusio alterius*' is applicable in connection with statutory construction. This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.").

Thereafter, in 2010 the Legislature enacted § 1004.26, Fla. Stat., which created a student government at each state university and made each student government "part of the university at which it is established." § 1004.26(1), Fla. Stat. Section 1004.26 makes no mention of student "education records" or the express or implied waiver of student privacy rights under FERPA.

"Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so." *Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001); *see also Hawkins v. Ford Motor Co*., 748 So. 2d 993, 1000 (Fla. 1999) ("[T]his Court may not rewrite statutes contrary to their plain language."). Here, Opinion II violates fundamental separation of powers principles by re-writing §§ 1002.225 and 1006.52(2), Fla. Stat. to allow for the release of a student's education records based on their "written or implied consent," and by re-writing § 1004.26, Fla. Stat. to provide that a students participating in student government "impliedly consent" to the release of their education records.

Nor can an implied waiver of a student's privacy rights be found "in accordance with and as permitted by the FERPA." § 1006.52(2)(a), Fla. Stat. In enacting FERPA, Congress expressly directed the Secretary of the Department of Education to interpret and enforce the statute. See 20 U.S.C. § 1232(g); 20 U.S.C. § 1234 *et seq*. As required, the Secretary has duly undertaken this role by adopting regulations and enforcing the statute and regulations. 34 C.F.R. Pt. 99. Over the course of multiple administrations, the Department of Education has not wavered in its determination that the implied waiver of FERPA rights is only applicable in extremely narrow circumstances and only as specifically provided by the Secretary.

As recently as July 2015, the Secretary reaffirmed the position, held for nearly twenty years, that the waiver of FERPA rights, or implied consent, is limited to situations such as when the student's whose privacy rights are at issue takes legal action and the university is required to defend itself. See, e.g., Letter from Letter from U.S. Dep't Educ. ("DOE"), Family Policy Compliance Office ("FPCO"), to HON. Mark Herring, Att'y Gen., Commonwealth of Virginia (July 2, 2015) (the "UVa Letter"); Letter from DOE, FPCO, to Leslie Chambers-Strohm, Vice Chancellor and General Counsel, University of North Carolina at Chapel Hill (April 28, 2014) (the "UNC Letter"); Letter from DOE, FPCO, to Dr. Hunter Rawlings III, President, Cornell University (Feb. 28, 2000) (the "Cornell Letter"); Letter from DOE, FPCO, to Dr. Hoke Smith, President, Towson State University (June 22, 1998) (the "Towson State Letter").[1,2]

[1] The FERPA letters cited above from the DEO are included in an appendix being filed contemporaneously with this motion. All redactions shown on the letters were made by the DOE and not UCF. Furthermore, all of the FERPA letters from the DOE are available on the DOE's website, http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html (last visited April 25, 2016). To the extent the Court believes it necessary to take judicial notice of the DOE's legal conclusions, the DOE website is an official website of an agency of the United States, and the contents thereon cannot be reasonably questioned. "Many Florida appellate courts have taken judicial notice of internet materials," *Oken v. Williams*, 23 So. 3d 140, fn. 2 (Fla. 1st DCA 2009), and so have the federal courts. *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F. 3d 600, 607 (7th Cir. 2002) (taking judicial notice of information contained on the FDIC official web site); see also, *U.S. v. Behmanshah*, 49 Fed. Appx. 372 (3d Cir. 2002) (taking judicial notice of SEC filings readily available on Westlaw). Similarly, both the Florida and federal courts allow for the taking of judicial notice

As explained herein, this Court's holding in Opinion II is entirely inconsistent with the conclusion of the Secretary. The holding waives the privacy rights of persons that are not a party to this proceeding, and also fails to take into account the privacy rights of students who submitted the subject Election Violation and Impeachment Affidavits. Taken to its logical extreme, the Court's holding would mean that all disciplinary records are open to the public, because by law (Fla. Stat. § 1006.60) each state college and state university must have a code of conduct to discipline students, and all students must consent thereto: "Any person who accepts the privilege extended by the laws of this state of attendance at any public postsecondary educational institution shall, by attending such institution, be deemed to have given his or her consent to the policies of that institution, the State Board of Education, and the Board of Governors regarding the State University System, and the laws of this state. Such policies shall include prohibition against

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on appeal. *Gonzalez v. Chase Home Finance, LLC*, 37 So. 3d 955, 958 (Fla. 3d DCA 2010); *Denius v. Dunlap*, 330 F. 3d 919 (7th Cir. 2003) ("judicial notice may be taken at any time, including on appeal"); *In re Indian Palms Assocs., Ltd.*, 61 F. 3d 197, 205 (3d Cir. 1995). The Florida Supreme Court confirmed both conclusions in one opinion when it held that the trial court erred by not taking judicial notice of an official record of a federal agency and, further, that "the District Court [also] had the authority to take judicial notice of this" record. *Freimuth v. State*, 272 So. 2d 473, 475 (Fla. 1972).

[2] Each letter is signed by the then-director of the FPCO, the office within the Department of Education that administers FERPA. However, as clearly stated in the UVA letter, the letter is sent on behalf of and at the direction of the Secretary.

disruptive activities at public postsecondary educational institutions." Fla. Stat. § 1006.61.

In Opinion II, the Court crafted an exception to FERPA when the student knew or should have known that they may be disciplined for misconduct in the performance of their student government duties or alleged misconduct related to their election or appointment. See Opinion II, pg. 6. That holding is contrary to the federal statute as interpreted by the agency charged with its interpretation and enforcement. Because the holding is contrary to federal law, and requires UCF to violate FERPA, risk its federal funding, and disclose the protected information of students not even a party to this proceeding, the Court should grant rehearing or rehearing *en banc*, or should certify this issue to the Supreme Court of Florida as one of great public importance to the entire State University System.

As stated by the Secretary, "neither the statute nor the regulations specifically permit an educational agency or institution to infer an implied waiver of the right to consent." [App. 007 (Towson State Letter, pg. 4)]. In the Towson State Letter, the Secretary responded to a response from Towson State that the protected information was only released in order to allow the school to defend itself to a reporter. The Secretary used the letter to "set forth clearer guidelines" regarding the DOE policy on permitting an educational agency or institution to

infer an implied waiver" of FERPA. See Towson State Letter, pg. 4. In that regard, the Secretary stated as follows:

> The Department will support an educational agency or institution that has inferred an implied waiver of the student's right to consent to disclosure when:,
>
> 1. the student has taken an adversarial position against the educational agency or institution;
> 2. the student has initiated the involvement of the third party by contacting that party in writing, and, in so doing:
>   a) set forth specific allegations against the educational agency or institution; and,
>   b) requested that action be taken against the educational agency or institution or that the third party assist the student in circumventing decisions made about the student by the educational agency or institution;
> 3. the third party's special relationship with the educational agency or institution:
>   a) gives the third party authority to take specific action against the educational agency or institution; or,
>   b) reasonably could be significantly adversely affected if the educational agency or institution cannot refute the allegations; and
> 4. the disclosure is as limited as is necessary for the educational agency or institution adequately to defend itself from the student's charges or complaint. The third party should follow the procedures set forth in 34 CFR § 99.33 on limitations that apply to the redisclosure of information derived from education records.

[App. 007-008 (Towson State Letter, pgs. 4-5) (presented as in original)]. Based upon this framework for an implied waiver, the Secretary concluded that the

disclosure by Towson State in order to "defend itself" was impermissible as the disclosure to a reporter is very different than the disclosure when the student files a lawsuit against the school. [App. 008 (Towson State Letter, pg. 5)].

A few years later, the same conclusion was reached in the Cornell Letter. In the Cornell Letter, Cornell responded to a student's complaint to the Department of Education by stating that the "student published her own failing grade in a public forum," including a complaint filed in a court that contained the protected information. The Secretary responded by stating it was not relevant that the media, or anyone, could obtain the protected information by requesting a copy of the court filing (or downloading it). The fact that the information was publicly available did not make it permissible for the information to be released by the university. Specifically, the Secretary stated:

> A record does not lose its status as an education record because the information contained therein appears in a public record. Furthermore, there is no exception in FERPA that exempts information in public records from the definition of education records. In this case, Professor Sack gained access to [the Student's] education records from the University, not from the court. Therefore, notwithstanding the fact that the records were available to the public at the court, we find that a disclosure of information from [the Student's] education records by the University occurred.

[App. 019 (Cornell Letter, pg. 6)].

More recently, the Secretary responded to a request from the Attorney General of Virginia relating to information about an alleged sexual assault that was

described by the student and published in a magazine. The "article focused on a student named [redacted] … and her allegations of sexual assault that occurred at a University fraternity." [App. 024 (UVa Letter, pg. 1)]. The student spoke to the media and the magazine article became front page news on every paper throughout the country. Further, the magazine used the students real first name in the article and her last name was heavily publicized elsewhere.

The Secretary stated that the DOE "understand[s] that the University is facing extensive media scrutiny…," and that the student herself voluntarily provided her story to the media, but that did not change the analysis. The Secretary stated that the privacy provided by Congress in FERPA is unlike a judicial privilege which can be waived by disclosure. With regard to FERPA, it cannot and "the Department respectfully decline[d] to further extend the doctrine of implied waiver of the right to consent in this instance." [App. 032 (Attachment to UVa Letter, pg. 6)]. The Secretary found no considerations unique to FERPA that would lead it to conclude that FERPA had been waived when the person talks to the media about those same records. The Secretary continued by explaining that:

> [UVa] correctly notes that the Department has interpreted FERPA as allowing an educational agency or institution to infer a parent's or student's implied waiver of the right to consent to the disclosure of personally identifiable information from the student's education records to a court when the parent or student has sued the educational agency or institution…..[Further,] the Department indicated in the preamble discussion to the 1996 final regulations that FERPA permitted an educational agency or

> institution to infer the parent's or eligible student's implied waiver of the right to consent to the disclosure of information from education records to permit disclosure to a court if the parent or eligible student had sued the agency or institution.
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> In two letters of findings issued in 1997 and 1998, the Department provided a set of narrow criteria in which the Department extended the implied waiver doctrine to situations in which a student had taken a written, adversarial position against an educational agency or institution by contacting a third party in a "special relationship" to the educational agency or institution in a way that could adversely affect the educational agency or institution.

[App. 032-033 (Attachment to UVa Letter, pgs. 6-7 and fn. 10 (citing the Towson State Letter))]. It is what was said at the end of the Secretary's discussion that is most salient here: "***The Department has not issued any letters that extend the doctrine of implied consent beyond the criteria set forth in" the Towson State Letter***. [App. 034 (Attachment to UVa Letter, pg. 8) (emphasis supplied)].

The Secretary further explained in the UVa Letter the reasons why the protections could not be deemed waived, and also explained the distinction between the situation where the student sues the university and the entirely different situation when the media requests a record. [App. 033-034 (Attachment to UVa Letter, pgs. 7-8)].[3] The fact that "a student shares information with the

[3] Stating, in part, as follows:

> We also continue to believe that there are meaningful distinctions between

media" does not waive the protections afforded by FERPA and the university is still not permitted from providing the information. [App. 025 (UVa Letter, pg. 2)].

Similarly, in 2014 the Secretary responded to an inquiry from the University of North Carolina. See UNC Letter. In the UNC Letter, the Secretary stated that media outlets made requests to UNC for information relating to an alleged cheating scandal involving scholarship athletes. The Secretary stated that while a university is generally permitted to release non-identifiable information, it may not do so if the information is likely to be identified with a particular person. The Secretary concluded by stating that even the directory information could not be provided to the newspaper "even if the University removed the students' names and other direct identifiers from the spreadsheet and disclosed the other requested information, it appears based on the information you've provided that disclosing this information would be identifiable to some students." [App. 23 (UNC Letter,

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permitting disclosures to be made to a court and permitting disclosures to be made to the media in part because the ramifications to privacy that would result from a disclosure to a court can be managed effectively. We have allowed disclosures to be made to a court partly because parents and students have measures available in courts to protect their privacy interests, such as by moving to seal the court's record or for a protective order, as opposed to the widespread dissemination of personally identifiable information from education records that would result from a disclosure to the media. [App. 034 (Attachment to UVa Letter, pg. 8)].

pg. 4)]. It is the text following that statement that is more relevant for purposes of the instant matter. The Secretary continued by explaining that:

> A student's identity may be personally identifiable, even after removal or redaction of nominally identifying information from student-level records. ***This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student could be easily identified in the school community even after the record has been scrubbed of identifying data. In these circumstances, FERPA does not allow disclosure of the record in any form without consent*** because the irreducible presence of personal characteristics or other information makes the student's identity personally identifiable.

[App. 23 (UNC Letter, pg. 4) (emphasis supplied)].

These letters inform the educational institutions nationwide that there is no such thing as an implied waiver of FERPA's privacy rights other than in the extremely narrow set of circumstances described in the Towson State Letter and reaffirmed in the UVa Letter. Contrary to the holding in Opinion II, the fact that a student knows or should reasonably know they may be called before a disciplinary board is not relevant to their FERPA rights. It would not even be relevant when responding to a media request for information about the student if the student had given that exact information to a different media outlet. Nor would it be relevant if the information was publically-available from the clerk of court.

Allowing implied waiver fails to take into account the purposes of FERPA and the privacy protections that our nation's schools are required to provide to students. In this case, application of an unrecognized implied waiver exception

under FERPA fails to provide notice to the non-party students whose records are to be made public. It also fails to account for the protections due to an accuser who may make a complaint to the student government regarding student misconduct. Even more simply, allowing implied waiver in this context fails to take into account that the federal law at issue does not provide for such an exception under these circumstances. For all of these reasons, the Court should grant rehearing, rehearing *en banc*, or certification to the Florida Supreme Court.

IV. Conclusion

Students "have a federally protected right of privacy in their educational records (including student disciplinary records)." *School Bd. of Miami-Dade County v. Martinez-Oller*, 167 So. 3d 451, 455 (Fla. 3d DCA 2015) (parenthetical in original). This Court's Opinion II disregards that protection and engrafts an implied waiver exception in contravention of Florida and federal law. That is an exception that Congress and the Secretary of the Department of Education have not countenanced, and in fact, have rejected. When determining whether an implied waiver can be applied in the context of FERPA, the only applicable analysis is the one provided by the Secretary in the Townson Letter and reaffirmed as the exclusive method in the UVa Letter. In Opinion II, the Court neither satisfied that analysis nor did it acknowledge it. Had it done so, it would have been clear that no implied waiver can be found in the facts in this case. Instead, Opinion II compels

UCF to violate FERPA, a violation that would have substantial dire consequences for the University.

UCF respectfully requests this Court to grant rehearing or rehearing en banc because the Court's Opinion II compels UCF to act in a manner entirely inconsistent with the mandates of Florida and federal law under FERPA. Alternatively, UCF requests certification of the issue to the Florida Supreme Court as one of great public importance (which KNI itself acknowledged in its motion for rehearing),[4] for the Court's Opinion II places the state's entire State University System in a "catch 22," in that the universities must either (i) disclose education records related to student government, at the risk of losing their federal funding and exposure to litigation filed by effected students and their attorneys' fees, see § 1002.225(3), Fla. Stat., or (ii) refuse to disclose such records at the risk of litigation and attorneys' fees under Chapter 119. Specifically, UCF proposes certification of the following question:

> DOES A UNIVERSITY STUDENT, BY PARTICIPATING IN STUDENT GOVERNMENT, IMPLIEDLY WAIVE THEIR PRIVACY RIGHTS UNDER FERPA, THEREBY ALLOWING THE UNIVERSITY TO RELEASE TO THIRD-PARTIES THE STUDENT'S EDUCATION RECORDS RELATING TO THEIR STUDENT GOVERNMENT PARTICIPATION?

[4] See KNI's Motion for Rehearing, Rehearing *En Banc*, Clarification, and Certification, pgs. 10-12, filed with the Court on February 22, 2016.

STATEMENT OF COUNSEL

The undersigned express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

By: /s/ Charles T. Wells
Charles T. Wells, Fla. Bar No. 86265
E-mail: charles.wells@gray-robinson.com
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
Telephone: (407) 843-8880

By: /s/ Richard E. Mitchell
Richard E. Mitchell, Fla. Bar No. 0168092
E-mail: Rick.Mitchell@gray-robinson.com
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
Telephone: (407) 843-8880

By: Jeff Kuntz
Jeffrey T. Kuntz, Florida Bar No. 26345
E-mail: jkuntz@gray-robinson.com
GRAYROBINSON, P.A.
401 E. Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Telephone : (954)761-8111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 25th day of April, 2016, as follows:

Justin S. Hemlepp, Esq. jhemlepp@hemlepplaw.com J.S. Hemlepp, P.A. 10906 Sheldon Road Tampa, Florida 33602	Robert Rivas, Esq. rrivas@ssclawfirm.com Sachs Sax, Caplan, P.L. 660 E. Jefferson Street, Suite 102 Tallahassee, Florida 32301
Carol Jean Locicero, Esq. clocicero@tlolawfirm.com Mark R. Caramanica, Esq. mcaramanica@tlolaw.com 601 South Boulevard Tampa, Florida 33606	

By: /s/ Charles T. Wells
Charles T. Wells, Fla. Bar No. 86265
E-mail: charles.wells@gray-robinson.com
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
Telephone: (407) 843-8880

By: /s/ Richard E. Mitchell
Richard E. Mitchell, Fla. Bar No. 0168092
E-mail: Rick.Mitchell@gray-robinson.com
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
Telephone: (407) 843-8880

By: Jeff Kuntz
Jeffrey T. Kuntz, Florida Bar No. 26345
E-mail: jkuntz@gray-robinson.com
GRAYROBINSON, P.A.
401 E. Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Telephone : (954)761-8111