ADVISORY OPINION
Case No: 2023-SP-AO-01

CONCERNING THE PROSPECT OF UNILATERAL ADMINISTRATIVE REMOVAL OF A SITTING SENATOR

CHIEF JUSTICE LINSKY, joined by Justices D. GOBIN and A. CEVERE, delivered the opinion of the Court.

JURISDICTION

Pursuant to Article IV, Section 3(C)(5), of the Student Body Constitution, it is within the jurisdiction of this Court to issue advisory opinions "concerning student rights under the Student Body Constitution upon request of the Student Body President or any Senator."

On November 30, 2022, a student submitted a request for an advisory opinion concerning the prospect of an administrative removal of a senator. Having confirmed that the student in question is a current Senator representing the College of Business, the Court has jurisdiction to opine on the rights at the core of the Senator's request, which is as follows:

> "If a student has occupied a senate seat for more than half of their term and was inaugurated successfully, and they have outstanding sanctions from SCCS, can the SGA advisor remove them from office or would they have to be impeached and/or resign?"

ANALYSIS

First, we begin with the provision of the Student Body Constitution, which concerns eligibility to serve as a Senator stating that:

> "Any student … found guilty of any violation of the University Student Code of Conduct or Academic Honor Code … will not hold office in the Florida State University Student Government Association until the required sanctions are completed."

F.S.U. STUDENT CONST. art. V, § 4(c).

Specifically, Article V concerns "Elections and Qualifications" and the specific provision as rendered above concerns "Restrictions on Candidacy." Notably, Article V is separate and distinct from Article VII of our Constitution (titled "Recall of Student Body Officials"), the latter of which concerns the recall and impeachment of inaugurated and installed Student Body Officials. *See* F.S.U. STUDENT CONST. art. VII.

As a matter of first impression, any prospective administrative "removal" of a Senator, which conforms to our Student Body Constitution, would likewise be

separate and distinct from a recall or impeachment insofar as this "removal" would not be permanent, but rather, would last until the Senator has fulfilled any outstanding sanctions. Hence, this would not serve to fully divest any sitting Senator of the previously confirmed right to hold office but would instead function as a suspension from practicing the powers granted by the Office.

By this same token, impeachment and/or recall are improper under these circumstances given the language in Article V, § 4(c) which provides that students with outstanding Code of Conduct sanctions are unable to hold office "until the required sanctions are completed." Distinct from a temporary removal which does not vacate the office in question, the suggested remedies of impeachment and recall permanently remove the Officeholder with no prospect of reinstatement. Therefore, subjecting a Student Government Association Officeholder to impeachment or a recall for uncompleted disciplinary sanctions would ironically hazard a violation of Article V, § 4(c), which provides the opportunity for an administratively suspended Officeholder to regain their Office.

Having opined that any so-called administrative removal of a previously inaugurated and installed Student Government Association Officeholder pursuant to F.S.U. STUDENT CONST. art. V, § 4(c) would not be permanent, we now turn to the task of determining how an administrative suspension of a Senator can be effectuated according to our Constitution.

The additional bundle of rights provided to all students by the Family Educational Rights and Privacy Act ("FERPA") are of importance to this inquiry. *See* 20 U.S.C. § 1232g; 34 CFR Part 99. These rights include the University's obligation to maintain the privacy of student records, including their disciplinary histories. *United States v. Miami University*, 294 F.3d 797, 812 (6th Cir. 2002) ("Under a plain language interpretation of FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university").

As is with student disciplinary records, improper disclosure of a student's GPA is protected by FERPA. As with student disciplinary records, a university administrator may privately check the

GPA qualifications of a candidate for Student Government and ensure compliance with F.S.U. STUDENT CONST. art. V. As is with student disciplinary records, the status of a student's GPA can change after being elected, inaugurated, installed, and sworn into the Student Government.

Distinct from the language regarding the barriers to Student Government office as set forth in F.S.U. STUDENT CONST. art. V, § 4 ("Restrictions on Candidacy"), the GPA requirements of F.S.U. STUDENT CONST. art. V, § 3 ("Academic Qualifications") requires that major Student Government officeholders "maintain" a minimum threshold for GPA. Similarly, F.S.U. STUDENT CONST. art. V, § 4 contains language, which indicates a lasting temporal quality insofar as those in violation "will not hold any office in the Florida State University Student Government Association until the required sanctions are completed."

Hence, when limiting our view to the plain text of the FSU Student Body Constitution, it is clear that for Article V to have lasting meaning beyond being vetting criteria for the eligibility Student Government Office, FSU administrators such as the SGA Advisor, vis-à-vis the powers and duties of the FSU Vice President for Student Affairs, have the ability to enforce the eligibility provisions of the Constitution when applicable.

However, our Constitution does not provide any end-around to federal law or our state courts' application thereof. When incorporating the mandates of FERPA into the equation, the ability of an FSU administrator to effectuate the suspension of a Student Government Official pursuant to F.S.U. STUDENT CONST. art. V is not as cut and dry as the plain language of our Constitution makes it seem when analyzed in a vacuum.

It is true that FERPA contains explicit exceptions where the alleged misconduct constitutes a crime of violence or a non-forcible sex offense. U.S.C. § 1232g(a)(4)(A), (b)(1). In addition, at least one Florida appellate court has set forth that FERPA protections for members of State University Student Government Associations are different from other students because:

> "[S[tudent 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."

Knight News, Inc. v. University of Cent. Florida, 200 So.3d 125, 128 (5th DCA 2016) (citing § 1004.26(4)(a)-(b), Fla. Stat. (2016)).

According to *Knight*, the determination of whether certain disciplinary records of Student Government Association Officeholders at state universities are not protected by FERPA is made if the disciplinary records at issue resulted from either "malfeasance in the performance of student government duties" or having engaged in "misconduct with regard to their election or appointment to their position." *Id.* Hence, any disciplinary records which hold forth sanctions did not stem from the Student Government Association Officeholder's activities in the pursuit of their office or in the performance of the duties of their office. These records are protected from disclosure by FERPA, even though the student in question availed themselves to the heightened scrutiny of Student Government Office at a public University.

While this Court does not have the jurisdiction to enforce FERPA or the authority to prohibit University administrators from taking any action, we nonetheless take this opportunity to strongly caution any interested University administrators who may intend to disclose potentially protected student disciplinary records from doing so. This not only pertains to divulging the contents of any such records to Student Senators in an attempt to effectuate a removal by impeachment, but also to indicate the very existence of any such records. Unless the records in question are excepted from FERPA protection, we do not see how any University administrator can enforce the provisions of F.S.U. STUDENT CONST. art. V, §4(c) to a sitting senator without divulging the existence of disciplinary records that are protected.

To be sure, there are distinct opportunities in the candidacy and election process for an FSU administrator, such as the SGA Advisor, to privately inform a would-be candidate for Student Government office that they are not eligible to serve due to outstanding sanctions. In this case, the University administrator in question may notify the

Vice President for Student Affairs, who has the express authority to preclude a potential candidate from the ballot and can do so without publicly disclosing the reason why the candidate is ineligible for office.

However, after a Senator has been placed on the ballot, has been voted into office by their constituents, has been inaugurated, has been installed, has sworn an oath of office, and has served for over half of their term without issue, the window for the University administrator, vis-à-vis the Vice President for Student Affairs, to effectuate a suspension from office on the grounds of ineligibility based on F.S.U. STUDENT CONST. art. V, § 4(c) has long since closed due to the University administrator's failure to enforce the Constitutional provision at issue within a reasonable amount of time. In effect, the ability to privately enforce the candidacy and eligibility provisions of F.S.U. STUDENT CONST. art. V, § 4(c) has been waived.

Any world where the opposite is true is one where a nondescript University administrator can not only hold a Sword of Damocles over the head of a duly elected Student Government Association Official, but do so with the added threat of public humiliation of suspension from office by waiting until the student is elected, inaugurated, installed, and sworn in as a Senator before letting the sword drop edge-first.

On the other hand, if the sanctions at issue are the result of actions taken by the Senator subsequent to election, inauguration, installation, and swearing in, *Knight* nonetheless holds that unless the alleged misconduct constituted a violent crime, a non-forcible sexual offense, occurred during the performance of Student Government duties, or occurred with regard to the student's election or appointment as a Senator, the resulting disciplinary records are protected from unauthorized disclosure by FERPA. *See Knight*, 200 So.3d at 128.

Hence, despite our Constitution's implicit allowance for University administrators, vis-à-vis the approval of the Vice President for Student Affairs, to unilaterally suspend Student Government Association Officeholders from office for outstanding sanctions resulting from violations of the University Student Code of Conduct or Academic Honor Code, this Court does not understand how such an administrative suspension can be effectuated without confirming the

existence and nature of confidential student disciplinary records, absent an applicable FERPA exception.

CONCLUSION

After careful consideration of F.S.U. STUDENT CONST. art. V, § 4(c), and its surrounding provisions, we conclude that an FSU administrator can effectively suspend a Student Government Association Senator from office for having outstanding sanctions. However, we have a number of reservations as to whether an administrative suspension of this nature - effectuated after a Senator has been duly elected, inaugurated, installed, and sworn in - can be effectuated without violating FERPA through revealing the existence and nature of confidential educational records.

In issuing this Advisory Opinion, we do not render any decision as to the merits of a potential claim brought before the Court regarding any issues discussed herein.

LINSKY, C.J., delivered the opinion of the court, in which GOBIN, and CEVERE, JJ., joined. GARCIA MARRERO, J., filed a dissenting opinion, in which LAGO, J., joined.

JUSTICE GARCIA MARRERO, with whom JUSTICE LAGO joins, dissenting.

This Court is one of limited jurisdiction and scope. *See* F.S.U. STUDENT CONST. art. IV, § 3 (enumerating the limited jurisdiction of the Court). Today, the Majority ignores the constitutional restrictions on this Court's authority and issues an advisory opinion that opines on questions not presented to it, which will have consequences for years to come. *See Roberts v. Brown*, 43 So. 3d 673, 682 (Fla. 2010) (affirming the position that advisory opinions, although non-binding precedent, "produce[] significant consequences"). Keeping with the text of the Florida State University ("FSU") Student Constitution, the Student Body Statutes, the Florida Constitution, Florida statutes, and the U.S. Constitution, which do not provide for the advisory opinion the Majority issued today, I dissent.

I. THE QUESTION PRESENTED

On November 30, 2022, a Florida State University College of Business student senator (the "Senator") submitted a request for this Court to issue an advisory opinion concerning the following question:

> "If a student has occupied a senate seat for more than half of their term and was inaugurated successfully, and they have outstanding sanctions from SCCS, can the SGA advisor remove them from office or would they have to be impeached and/or resign?"

It seems, from the question presented and the petition filed with the Court, that the Senator may be facing some form of administrative removal due to sanctions acquired before having been elected as a student senator, which would trigger the language in article v, section 4(C) of the FSU student constitution. Section 4(C) states that:

> Any student found guilty by the Student Government Association Supreme Court of two or more violations of the Florida State University Constitution and/or Statutes, or found guilty of any violation of the University Student Code of Conduct or Academic Honor Code, ***will not hold any office in the Florida State University Student Government Association*** until the required sanctions are completed.

F.S.U. STUDENT CONST. art. V, § 4(C) (emphasis added).

II. THE COURT'S ADVISORY OPINION JURISDICTION

The first step this Court must take in determining whether it may address the Senator's question is to look at the enabling language that grants the Court the authority to issue such an advisory opinion. We begin with article IV, section 3(C) of the FSU Student Constitution, which states, in part, that this Court shall have the power "[t]o issue advisory opinions ***concerning student rights*** under the Student Body Constitution upon request of the Student Body President or any Senator." F.S.U. STUDENT CONST. art. IV, § 3, cl. 5 (emphasis added).

Thus, to determine whether the Senator's question merits an advisory opinion we must look at the question presented and whether it invokes a request to provide an opinion "concerning student rights under the Student Body Constitution." *Id.* Here, I agree with the Majority, it does; however, for a different "right" than the right invoked by the Majority in its discussion of the Family Educational Rights and Privacy Act ("FERPA").

The question presented can be condensed to highlight the alleged "right" being invoked by the Senator: "does a student senator, having been duly elected and sworn in, have a right to hold public office that cannot be superseded by some form of administrative removal due to a constitutional qualification eligibility

question"? I answer this question in the affirmative. To see why let us look at what rights ***are*** conferred by the FSU student constitution and statutes.

A. The FSU Student Constitution

We can begin with article 1, section 6, titled "Students Rights," which states that "[e]ach student shall be subject to the rules of the courts and the University [FSU] but these rules shall at no time and in no way abridge the student's rights as [a] citizen under the United States Constitution or the Constitution of the State of Florida." F.S.U. STUDENT CONST. art. I, § 6. Hence, we must look to the Florida and U.S. constitutions to determine if some right is conferred therein that would allow this Court to invoke its advisory opinion powers, based on the question presented.

B. The Florida Constitution

First, the Florida Constitution provides no express "right" to hold elected public office at a state university; however, it does provide that "[a]ll political power is inherent in the people [and] [t]he enunciation [therein] of certain rights shall not be construed to deny or impair others retained by the people." FLA. CONST. art. 1, § 1. Therefore, even if the "right" to hold public office is not expressly enumerated in the Florida constitution, a person in Florida may still have an inherent right to hold public office. Thus, we must look beyond the Florida Constitution to determine if the Senator has a valid "right" to trigger the Court's advisory opinion jurisdiction.

Luckily, the Florida Supreme Court has addressed a similar issue dealing with the constitutional right to seek or hold public office. In *Holley v. Adams*, the Florida Supreme Court held that "[t]he right to seek public office *is not a constitutional absolute*, but such privilege is subject to reasonable restraint and conditions." 238 So. 2d 401, 406 (Fla. 1970) (emphasis added). Similarly, other Florida courts have held that statutes may fill the void when the constitution is silent on constitutional qualification requirements to run for public office. *See Leon v. Carollo*, 246 So. 3d 490, 492–93 (Fla. 3d DCA 2018) (Luck, J.); *Shamburger v. Washington*, 332 So. 3d 1071, 1073 (Fla. 2d DCA 2021) (quoting *State ex rel. Askew v. Thomas*, 293 So. 2d 40, 42 (Fla. 1974)).

Therefore, some "right" to run for, and hold, public office is cognizable under the Florida Constitution. That right, however, is not absolute and is not a fundamental right

but nonetheless—the right does exist. In fact, such a right can be restricted by the enactment of statutes that provide qualification requirements for said public office positions. *See Leon*, 246 So. 3d at 492; *Shamburger*, 332 So. 3d at 1073.

C. The U.S. Constitution

Next, we can look to the federal constitution to determine if a clearer right to hold public office exists. Like in the Florida Constitution, the U.S. Constitution has no mention of the right to hold public office, however, it does have a similar clause that may allow for the inherent right to be retained by the people at large. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

When looking to the decisions of the federal courts to determine if the "right" to hold public office exists, we can stop at *Caron v. U.S.*, 524 U.S. 308, 316 (1998) (acknowledging that the restoration of civil rights includes the "right to hold office"); *see also id.* at 318 (Thomas, J., dissenting) (also acknowledging that the restoration of civil rights includes the "right to hold office"). Thus, a person, such as an FSU student senator, has the right to hold public office under the federal constitution.

Therefore, the Senator has presented a question that invokes the Court's advisory opinion jurisdiction concerning the Senator's right to hold office after having been duly elected.

III. ANALYSIS

The question, here, is whether the FSU student government administrator can remove a duly elected and sworn-in student senator that was elected after having acquired certain student code of conduct violation sanctions. I answer said question in the negative.

On this issue, the Majority concludes that a university administrator can remove a sitting senator, who was duly elected and sworn-in, from public office as a separate procedure from the impeachment and recall functions laid out in the FSU student constitution and Student Body Statutes. *See ante* at pp. 1–2. However, the Majority misses the mark on this issue.

Article V, section 4, of the FSU Student Constitution, does not provide the university administration with an avenue by

which to temporarily remove duly elected public officials in the student government association, rather the text of the constitution provides a constitutional eligibility restriction for any candidate running for office. *See* F.S.U. STUDENT CONST. art. V, § 4(C) (emphasis added) ("Any student found guilty by the Student Government Association Supreme Court of two or more violations of the Florida State University Constitution and/or Statutes . . . ***will not hold any office*** in the Florida State University Student Government Association ***until the required sanctions are completed.***").

However, instead of reading the constitutional language for what it is, an eligibility restriction to run for office—which is even in the name of the section, "Restrictions on Candidacy," *id.* at § 4, the Majority attempts to utilize the plain text of the constitution to unjustifiably invoke another right conferred under a federal statute but not the FSU Student Constitution, the Student Body Statutes, the Florida Constitution, or the U.S. Constitution. *See ante* at p. 2.

In the purest act of judicial activism, the Majority inserts an issue into the question presented that was not raised by the Senator—namely, whether his or her FERPA rights would be violated if the university administration was not able to remove the Senator for the pre- or post-election acquisition of sanctions. *See ante* at pp. 2–5. Such a question is ***not*** before the Court in a case at controversy, much less for an advisory opinion.

Moreover, the role of a court "is to interpret statutes as they are written and give effect to each word in the statute," *see Clines v. State*, 912 So. 2d 550, 558 (Fla. 2005), and not to create remedies or solutions not enacted by statute, *see Egbert v. Boule*, 142 S.Ct. 1793, 1799–80 (2022) (identifying eleven times in which the Supreme Court refused to expand a judicially created remedy to U.S. constitutional violation claims), as the Majority has done today—especially when a clear answer is evident in the plain text of a statute.

To answer the Senator's question, the Majority's willful deviation from the text of the student constitution is not needed. A thorough review of the student constitution shows that no text exists conferring on the FSU student government administrator the power to remove a duly elected public officer. *See generally* F.S.U. STUDENT

CONST. In fact, the student constitution provides several methods by which student government officers may be removed from their positions, *see* F.S.U. STUDENT CONST. art. II, § 5(A)5.; art. III, § 3(I); art. V, § 1(D); art. VII, § 1–4, none of which include the student government administrator.

To understand why the student government administrator plays no role in the issue before the Court we must look to the distinction between sections 4 and 5 of article V of the FSU student constitution.

Section 4(C), which is at issue here, provides a restriction on those students who wish to run for and hold public office at FSU, a constitutional eligibility of sorts. *See* F.S.U. STUDENT CONST. art. V, § 4(C). Whereas section 5 establishes the procedure by which a student may establish his or her candidacy, a qualification to run for office requirement. *See* F.S.U. STUDENT CONST. art. V, § 5. Such a distinction was established in *Burns v. Tondreau*, 139 So. 3d 481, 485 (Fla. 3d DCA 2014) (Lagoa, J.) (citing § 102.168(3)(b), Fla. Stat.; *McPherson v. Flynn*, 397 So.2d 665 (Fla.1981)).

This distinction between a constitutional eligibility requirement and a qualification requirement is further explained in *Leon v. Carollo*. There, the Third District Court of Appeal reaffirmed the legal conclusion that "at common law there was no right to a post-election challenge" to an elected official's position. *See Leon*, 246 So. 3d at 492 (Luck, J.). Moreover, the *Leon* court went on to reaffirm the *Burns* court's analysis under section 102.168(3)(b), Florida Statutes (2018), that the Florida legislature created a cause of action for the contesting of an election after the fact, premised on the ineligibility of a candidate. *See Id.* at 492–93.

Therefore, under Florida law, which this Court is bound to follow, *see* section 1004.26, Florida Statutes (2022) (establishing Florida state university student governments as a creation of Florida law), a student senator's position may be challenged or contested after the election is certified if he or she was ineligible for the office that they currently hold at the time the election took place. *See* § 102.168(3)(b), Fla. Stat. (2022).

Hence, the distinction between sections 4 and 5 of the student constitution is important here. To properly remove a duly elected student senator ***after*** a certified election, the election must be contested—which may only be done if the challenge is of

a constitutional ineligibility and not a mere qualifications violation. *See Burns*, 139 So. 3d at 484; *Leon*, 246 So. 3d at 493.

Here, we have a question presented, with a surrounding factual situation, in which a student senator acquired sanctions that would have made that student senator candidate constitutionally ineligible to run for the Student Senate. *See* F.S.U. STUDENT CONST. art. V, § 4(C); *see also* Senator Pet. for Adv. Op. (describing the factual situation for the request of the present advisory opinion). Thus, under section 102.168(3)(b), a challenge to a student senator's position may be raised in state circuit court. *See* 102.168(1), Fla. Stat. (2022).

However, section 102.168(1) does not confer this Court with the jurisdiction to adjudicate such a challenge to a student senator's elected position, nor does it confer the power to determine such a challenge to the FSU student government administrator. Again, I find no evidence that the Majority's position is valid—especially given that the Majority provided no textual support for the position it has adopted today.

Nevertheless, one may wonder if the Student Body Statutes may have similar language to section 102.168, Florida Statutes. It does; however, it makes the Majority's indefensible still.

Section 708.1 of the Student Body Statutes provides the procedure by which an election may be contested—which would include the election of a student senator who would have been constitutionally ineligible pursuant to article V, section 4(C) of the student constitution. It states, that "[s]tudents or political parties who show actual injury shall have standing to contest the results of any election on grounds within or outside the scope of the Election Code until 8 p.m. on the Friday following the election." § 708.1, Stu. Body Stat. (Jan. 2022).

The issue with section 708.1 is that it only confers standing to challenge the election of any public officer of the FSU student government until 8 p.m. on the Friday following any given election—which clearly serves as a statute of limitation for the contesting of any election. Thus, a challenge to a student senator, who is constitutionally ineligible to have won the office for which he or she ran, must be made by the deadline provided for by the Student Body Statutes, otherwise, any challenge to said

constitutional ineligibility is barred—at least before this Court.

IV. CONCLUSION

Having reviewed the binding, plain, ordinary text of the FSU Student Constitution—mainly article V, section 4(C); the pertinent Student Body Statutes; the Florida Constitution; Florida law; and the U.S. Constitution, the FSU student government administrator has no power to remove a duly elected student senator from his or her position.

Rather, an injured party may contest the election before the Election Commission or this Court of said student senator within the limitations provided for in section 708.1, Stu. Body Stat. But only if that senator was constitutionally ineligible to run for the public office position that was won. Likewise, an unsuccessful candidate or qualified elector may also contest said student senator's election in state circuit court pursuant to the limitations outlined in section 102.168, Fla. Stat.