ADVISORY OPINION 2019-

REVIEW OF PROPOSED CONSTITUTIONAL AMENDMENTS

Sills, J. and Nations, J. for the Court

Pursuant to the Student Body Statutes, the Supreme Court is required to review any proposed constitutional amendments for its adequacy and fairness to "ensure that the language of the statement adequately and fairly reflects the intent of the ballot proposal." SGA Stat. 506(B)2. The purpose of the Court's review is to, "ensure all that provisions voted on by students are fair and not deceptive in terms of the provision's language, and do not violate the Student Body Statutes, the Student Body Constitution, the Board of Governors Regulations, University Policy or Regulation, or any local, state, or federal law." SGA Stat. 506 (A)2.

On September 15, 2019, a petition to certify proposed amendments to the Student Body Constitution for the Fall 2019 election was properly submitted to the Court for review. The Amendment creates a Section 5 under Article VI of the Florida State University Student Constitution requiring all future amendments to the Constitution use "gender neutral" language.

REASONING

In coming to its advisory opinion, this Court looked to the language of the SGA Statute 506 ("Court Review Act") and the language of Article VI Section 1 of the Student Body Constitution. The Court Review Act requires that all proposed constitutional amendments and referenda ("provisions") be submitted to the Supreme Court for review. The Court's review is limited to an advisory opinion.

There is a distinct difference in the language used throughout the Court Review Act. The Title and Purpose Section emphasizes the importance of ensuring the provision's language is "fair and not deceptive language" for it to be placed on the ballot. While chapter 506(B)(2) requires that all Statements of Intent be reviewed by the Court to ensure that they adequately and fairly represent the accompanying proposed provision.

Proposed Amendment 5

Constitutional provisions are typically subject to some form of scrutiny. There are three forms of scrutiny— rational basis,

intermediate scrutiny, and strict scrutiny. Each tier of scrutiny is applied to different freedoms that may be at stake. In matters involving important rights of citizens, like the one at bar, strict scrutiny will apply. Typically, strict scrutiny requires a showing of a compelling government interest that is narrowly tailored and of the least restrictive means. *See generally*, *Planned Parenthood of Se. Pa., et al. v. Casey, et al.*, 505 U.S. 833 (1992).

Even if subjected to strict scrutiny, an argument could be made that Proposed Amendment Five is narrowly tailored and serves a compelling government interest.[1] Moreover, public schools have been found to be limited public forums. *See generally*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010). In doing so, the Supreme Court of the United States recognized the State's "right to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 679 (internal quotations marks omitted). In that specific instance, the Court held that access barriers must be reasonable and viewpoint neutral. *Id.* at 679. A fruitful argument could be made that the Proposed Amendment 5 could satisfy such requirement.

Notwithstanding the above analysis, there is arguably still a violation of the First Amendment that rests on the third prong of the strict scrutiny test. Proposed Amendment Five does serve a substantial government interest. However, this interest could arguably be served without any restriction on speech whatsoever. The Supreme Court weighs all three factors when it applies strict scrutiny. Saying, in part, that restriction of free speech "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). An argument could be made here that Proposed Amendment Five is the most restrictive means of serving the government interest. The argument could be made that the legislative process itself is a less restrictive and effective means of

[1] The governmental interest here would be preventing discrimination against students who do not associate with one of the binary gender pronouns. *See generally*, Fla. State Univ. Student Body Stat. Ch. 206.1 ("Discrimination will be defined as the differential treatment of a student based on, but not limited to . . . gender identity[.]").

serving the government interest that is already put in place to effect such changes.

However, it is very much unsettled law and, at that, a hot topic currently with no foreseeable resolution on the horizon. *See*, Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL OF RTS. J. 219, 222 (2017).

Further, advisory opinions are difficult here because this Court, like the Florida Supreme Court, "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *In re Advisory Op. to the Att'y Gen. re Fla. Minimum Wage Amend.*, 880 So. 2d 636, 639 (Fla. 2004). Moreover, "[the] Court has no authority to interject itself in the process, unless the laws governing the process have been 'clearly and conclusively' violated." *Id.* Without clear authority on this issue, this Court must be careful to not overstep its bounds. There are cognizable remedies that could be employed if some clarity is provided on the issue. *See generally Ray v. Mortham*, 742 So. 2d 1276, 1280-85 (Fla. 1999).

CONCLUSION

Nothing in this Advisory Opinion should be read or construed to favor a position either for or against the proposed amendments. The Court only advises that there are arguments on both sides of this unsettled area of the law as to whether there are conflicts with any known federal, state, or local law such that this Proposed Constitutional Amendment should be withheld from the ballot, and that the Statement of Intent accompanying the proposed amendment is fair and adequate.