IN THE STUDENT SUPREME COURT IN AND FOR FLORIDA STATE UNIVERSITY

SURGE FSU,

Appellant,

23-SP-SC-02

v.

OMER TURKOMER, in his official capacity as General Counsel for FORWARD FSU,

Appellee.

_____/

CHIEF JUSTICE LINSKY, joined by ASSOCIATE JUSTICES CEVERE, GOBIN, and LAGO delivers the majority opinion of the Court.

SYLLABUS

This action was brought before this court on appeal of *2023-EC-SPR-15* wherein the Elections Commission determined that the evidence presented clearly and convincingly demonstrated that Appellant was in violation of Florida State University Student Body Statutes § 709.1(B)(1) by posting materials on privately-owned property without the prior consent of the property owner or property manager.

FACTUAL BACKGROUND

On March 1, 2023, at about 5:00 pm, a member of Appellee's campus political party found several pamphlets advertising Appellant's campus political party strewn about her building of residence. At the same time and in the same building, multiple members of Appellant's campus political party were seen, photographed, and videotaped knocking on doors in an effort to solicit support in the election. These members of the Appellant's campus political party did not receive prior permission of the building's owner or property manager to post any campaign materials, despite at least one of them being a resident of an apartment in that building.

Though witness testimony was conflicting as to whether any member of Appellant's campus political party had these pamphlets on their person while canvassing the building, it was confirmed that Appellant's members had distributed so many of these pamphlets throughout the day that they ran out completely. Upon running out of their pamphlets designed for the March election, Appellants' canvassers resorted to using leftover pamphlets from the prior October election, which contained a QR code that nonetheless brought interested parties to the current election information. Pamphlets from the October and March elections were both found at the scene.

The building at issue, the Stadium Centre, is a privately owned apartment complex. Located about half a mile away from FSU's main campus, two miles from FAMU's main campus, and three miles from TCC's main campus, the Stadium Centre focuses its business on student housing in the form of short-term leases, but does not exclude renters who are not in college. It is owned by American Campus Communities, a privately owned real estate investment trust engaged in the acquisition, management, and development of properties near universities and colleges throughout the United States.

ISSUES

1. Was the case presented to the Elections Commission sufficiently persuasive so as to satisfy the clear and convincing evidentiary standard?

2. Is FSU Student Body Statute § 709.1(1)(B) constitutional under the First Amendment to the Constitution of the United States of America?

HOLDINGS

1. Yes, the Elections Commission was presented with sufficiently persuasive evidence to satisfy the clear and convincing standard.

2. No, FSU Student Body Statute § 709.1(1)(B) is not constitutional under the First Amendment.

OPINION

It is axiomatic that political speech occupies "the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 466 (1980). In relation to matters of public affairs, the freedom to engage in political speech is "more than self-expression; it is the essence of self-government." *Garrison v. State of La.*, 379 U.S. 64, 75 (1964); *see also* ALEXANDER MIEKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Above all else, the First Amendment reserves its "fullest and most urgent application" to political speech regarding elections. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Even so, the First Amendment is by no means an absolute bar to reasonable restrictions on speech – even political speech concerning elections. As long as a restriction on political speech "furthers a compelling government interest and is narrowly tailored to achieve that interest," it may be deemed constitutional under the First Amendment. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564

U.S. 721, 734 (2011).

Likewise, public universities are granted certain exceptions when it comes to the restriction of on-campus speech. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Specifically, public schools, colleges, and universities "have a special interest in regulating on-campus student speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2040 (2021) (quoting *Tinker*, 393 U.S. at 513).

As applied specifically to Student Government Association ("SGA") elections, relevant authorities indeed provide deference to University regulations restricting on-campus speech. *Alabama Student Party v. Student Gov't Ass'n of the Univ. of Alabama*, 867 F.2d 1344 (11th Cir. 1989). Notably, the court in *Alabama Student Party* held that the SGA at the University of Alabama was a "learning laboratory" intended to provide students "an opportunity to learn how to work within a democratic process." *Id.* at 1347. Hence, instead of being a state actor empowered by the laws of Alabama to do anything at all, the SGA at the University of Alabama was more correctly treated as a student club than an extension of any state function. *Id.*

However, there are three key reasons as to why the 11th Circuit's holding in *Alabama Student Party* does not apply squarely to the regulation at issue: 1) Florida's laws directly empower every SGA at public institutions of higher learning with governmental functions; 2) the regulation at issue in this case was not created by the University, but by the FSU Student Government Association itself; and 3) the majority opinion in *Alabama Student Party* dealt exclusively with on-campus political speech in terms of specific temporal and physical restrictions on political expression.

The first reason as to why *Alabama Student Party* is inapplicable in this case is that the laws of Alabama in 1989 may not have reserved any governmental functions for Student Government Associations, whereas the current laws of Florida most certainly do. *See* Fla. Stat. § 1004.26(3), (2022) (holding forth that the FSU SGA is charged with adopting procedures to govern its "operation and administration … including all other duties prescribed to the student government by law"); *see also* Fla. Stat. § 1009.24(10)(b) (2022) (requiring all Student Government

Associations at public universities to determine the "allocation and expenditure" of the Student & Activities Service Fee charged on a per credit basis to enrolled students).

While the first of the statutory provisions noted in the immediately preceding sentence empowers each Florida SGA to create and abide by governing texts such as a student body constitution or student body statutes, the latter inherently places each SGA in the state on much higher footing than any other club such as a newspaper or a yearbook. *Compare with Alabama Student Party*, 867 F.2d at 1347 ("[a]ccording to the depositions in this case, including the election campaigns, as a 'learning laboratory,' similar to the student newspaper or student yearbook").

Rather, in Florida, one of the most reliable ways for student-run clubs to obtain operational funding is by petitioning the campus SGA for a portion of the Student Activity and Service Fee. *See* Fla. Stat § 1009.24(10)(b) (2022). At Florida State University, which educates over 40,000 students each year, the Student Activity and Service Fee budget administered by the FSU SGA Senate is routinely over $14,000,000 per year. If any other student organization, even political ones as the FSU Republicans or the FSU Democrats – wants to use a red cent of that money for their own purposes, they must first petition the FSU Student Government Association.

To ameliorate any additional confusion about where any Florida SGA is placed on a hierarchy of organizations in respect to access of the tens of millions of dollars, which comprise the Activity & Service Fee Funds, for all applicable Florida institutions of higher learning, it is not only student clubs who must apply to the local SGA for funding but also the University administration. For example, the FSU SGA has allocated over $10,000,000 in funding for various units of the FSU administration for the upcoming academic year. As is the case with student organizations, in order to receive a red cent of these funds, these units of the FSU administration were first required to petition the FSU SGA.

This in mind, and as was the case in *Alabama Student Party,* it would be odd for an FSU administrator to testify in a deposition that the FSU SGA is on the same hierarchical level as a campus newspaper or yearbook – especially if that administrator were somebody who has applied to our SGA for funding in the past

in support of their own vanity project(s). *Alabama Student Party*, 867 F.2d at 1347. It would be even stranger if that person's salary were paid by funds allocated and administered by the FSU SGA.

In the academic year of 2021–22, the FSU SGA paid the salaries of over seventy-five (75) full and part time employees. These salaries totaled $3,153,713.25. The bulk of the recipients of these funds were employees of FSU's Campus Recreation Department – including $113,559.80 for the director of the department – and the Student Union personnel. Thankfully, and in consideration of the magnitude of FSU's annual operating budget, the FSU SGA appears to no longer be paying the $115,591 salary of the Director of the Oglesby Union.

Besides FSU's SGA, no other campus student organization – not the yearbook, the newspaper, nor any other – provides for the salary of any University employee. In order to receive these funds to pay these employees, the FSU administration must first petition the FSU SGA.

While the laws of Alabama in 1989 may not have distinguished a student government association from any other club, not only do our laws make such a distinction, but one so significant that the paychecks of many university administrators directly depend upon specific governmental decisions made by the FSU SGA.

A broader analysis of Florida's public university system likewise indicates a widespread reliance local Student Government Associations to pay employee salaries. Over the course of the 2021–22 academic year, local student government associations paid the salaries of over six-hundred-and-eighty (680) employees, totaling $29,135,039.82 in allocations and expenditures pursuant to Fla. Stat. § 1009.24(10)(b).

Hence, Student Government Associations in Florida, as empowered by state law and in practice, are much more than "learning laboratories" for playing "cops-and-robbers," or as the case is "politicians-and-bureaucrats." Accordingly, the Student Government Associations at all twelve of Florida's public universities are more correctly treated as governmental functionaries, all of whom are are prescribed ministerial obligations by the Florida legislature to expend and allocate student fees "for lawful purposes and to benefit the student body in general." *Compare Alabama Student Party*, 687 F.2d at 1347 *with* Fla. Stat. § 1009.24(10)(b)

(2022).

The second main reason as to why *Alabama Student Party* does not apply here is that section 709.1(B)(1) was not directly enacted by the FSU administration, but rather, by the FSU SGA Student Senate. To be sure, if this were a university-made regulation, this Court would not have jurisdiction over its application.

Likewise, if the statute sued upon here was not a provision of our FSU Student Body Statutes, but rather a part of FSU's official posting policy, this Court could might find *Alabama Students Party* applicable. However, and as empowered by Florida law, our Student Body Constitution grants the Court jurisdiction over "violations of the Student Body Constitution and Statutes." FLORIDA STATE UNIVERSITY STUDENT BODY CONST., art. IV, § 3(c)(2); *see also* Fla. Stat. § 1004.26(3) (2022) As the regulation sued upon is a provision of our Student Body Statutes, any threshold question presented by *Alabama Student Party* is inapplicable.

Thirdly, while *Alabama Student Party* may seem to have relevance to the second issue of this case – the interplay between the First Amendment and a University regulation restricting political speech in the context of student body elections – the Eleventh Circuit's holding "focused solely on the regulations' effect on the University's campus." *Alabama Student Party*, 867 F.2d at 1352. Here, the regulation at issue refers only to off-campus speech. Ergo, and despite its relevance to restrictions for *on-campus* political speech, the holding in *Alabama Student Party* bears no relevance to the regulation at issue here, which relates solely to *off-campus* speech. Hence, the correct test to apply is *Tinker's* "substantial disruption" test, which measures and analyzes the effects that certain expressions of off-campus speech have on the University's educational environment. *See Mahanoy*, 141 S.Ct. at 2045 (quoting *Tinker*, 393 U.S. at 513) (positing that public high schools "have a special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'")

The dissent in this case seems to believe that all private property *owners* and *managers* – but not the actual residents who live on private property – have a right to not be disturbed by canvassers which somehow trumps the First Amendment. No case law is cited to back up that

rationale, which is more akin to a half-baked personal belief that anything that resembles a textual analysis of the law.

Another quirk in the dissenting opinion is that, relying upon Judge Tjoflat's dissent in *Alabama Student Party*, it asserts that the statute at issue is indeed constitutional under the First Amendment. In this, our rogue Justice seems to miss the fact that Judge Tjoflat's dissent was motivated by his opinion that the regulation on campaigning at issue in *Alabama Student Party* represented "an infringement of appellants' right of free speech" which was "overbroad" and "unconstitutional" under the First Amendment. (Tjoflat, J., dissenting) *Alabama Student Party*, 867 F.2d 1354.

Likewise, Judge Tjoflat's dissent argued that one of the key reasons for his finding of unconstitutionality was that the regulation only applied to "only one topic of discussion: political speech regarding SGA elections." *Id.* This in mind, it is seemingly inexplicable as to why Part II of the dissent in this case relies upon reasoning and conclusions which are directly contradictory to the its ultimate argument regarding the purported constitutionality of § 709.1(B)(1). It is likewise perplexing as to why Part I of this dissent includes a robust discussion of § 701.1(E), which was neither included in the original complaint nor the subsequent appeal which form the issues of this case. On the other hand, the dissent's elaboration on why the Court unanimously found that the Election's Commission's determination was the correct one is much appreciated.

It so follows that as applied to the Court's first issue for consideration, though Court unanimously finds that the lower tribunal demonstrated no error in finding the Appellant responsible for violating § 709.1(B)(1). This in mind, the only remaining issues for the Court's analysis here is whether the regulation at issue is constitutional under the First Amendment. In order for § 709.1(B)(1) to be constitutional under the First Amendment, it must pass both a strict scrutiny review for political speech as well as the substantial disruption test for off-campus speech.

This Court holds that Student Body Statute § 709.1(B)(1) passes neither:

> "Campaign material is prohibited on **<u>any</u>** privately-owned property, except that candidates may post materials on private property should they obtain the consent of the property owner or manager."

See Fla. St. U. Student Body Stat. § 709.1(B)(1) (2022) (emphasis supplied).

STRICT SCRUTINY AND THE MODERNIZED TINKER TEST

Though *Tinker's* "substantial disruption" test explicitly excluded restrictions for off-campus speech, recent decisions, including that of the *Mahanoy* Court, leave room for public universities to regulate off-campus speech in extreme and urgent matters such as "serious or severe bullying or harassment targeting particular individuals" or "threats aimed at teachers or other students." *Mahanoy*, 141 S. Ct. at 2040.

It so follows that if campaigning on private property off-campus were even tangential to such disruptions and their ilk, the *Tinker* test as modernized by *Mahanoy* could indeed be met.

Of great importance to the viability of this statute is the word "any" as used in § 709.1(B)(1) in reference to which privately-owned properties this regulation applied towards. Taken literally, as all statutes should be, it could bar the posting of campaign materials on all privately-owned property everywhere in the world. If a member of Appellee's campus political party were vacationing in Key West and found one of Appellant's pamphlets in a tiki bar, that would be a violation of the Election Code unless Appellant's counsel could prove that somebody in their campus political party got permission from the tiki bar's owner or manager.

Clearly, this regulation is not "narrowly tailored" in any fashion – let alone to forward a compelling state interest. It is overbroad to the point where it extends to every corner of every privately-owned building. But perhaps even more striking, and directly applicable to this case, is that the member of Appellant's campus political party who was seen canvassing the Stadium Centre is, herself, a resident of that very building. In other words, enforcement of this statute would prevent her from posting campaign materials advertising her campus political party *in her own room* without the prior consent of the building owner or manager.

The dissent, in its misconstrual and misapplication of public forum doctrine, does not seem to grasp that even if the purpose of this regulation was indeed to save non-University affiliates from being bothered by the hullabaloo surrounding SGA elections, the text of the regulation, as accurately applied, reaches *into the bedrooms* of students, including those of

candidates for office, as long as they live off-campus and do not own the property on which they live. Likewise, the dissent makes no effort to consider if a regulation which prohibits a specific form of political speech on "any privately-owned property" might be overbroad. Rather, the dissent contains no discussion or analysis whatsoever, as if overbreadth was not one of the chief concerns motivating the majority's opinion.

If the regulation at issue were restricted to certain geographical areas within a half-mile radius of the University, perhaps this majority opinion would no longer be the majority opinion. But § 709.1(B)(1) is not restricted to any geographical area. Not a quarter-mile, not a half-mile, not a full mile, not even the 24,901 miles which comprise the circumference of the Earth's equator. As provided by § 709.1(B)(1) "any privately-owned property" means all privately-owned property – there are no exceptions included in the statutory language and it would be highly improper for the Court to insert them in attempt to make it constitutional.

Even if there were a geographic limitation within the statute, it would still prevent students from posting campaign materials in their own domiciles without the prior consent of the property's owner or manager. Far be it for this Court to compare our Student Body Statutes to the 1961 film "Breakfast at Tiffany's," the 1983 film "Scarface," or the currently running television show "RuPaul's Drag Race," but it is absurd to believe that a student would need such permission to have a poster of Holly Golightly,[1] Tony Montana,[2] or RuPaul[3] on a bedroom wall. That SBS § 709.1(B)(1) also seeks to impute any additional obligations upon the manager of the Stadium Centre – a person over whom the FSU SGA has no authority whatsoever – is likewise indicative of its spurious nature.

[1] The protagonist of *Breakfast at Tiffany's*, as played by Audrey Hepburn, posters of her wearing a multi-strand pearl necklace held together by a brooch while grasping a long-stem-cigarette-holder are standard fare on bedroom walls of college-aged women.

[2] The protagonist of *Scarface*, as played by Al Pacino, posters of him wearing a leisure suit while holding an automatic machine gun are standard fare on the bedroom walls of college-aged men.

[3] The host of *RuPaul's Drag Race*, as played by RuPaul Andre Charles, posters of them wearing a blond beehive wig and holding a golden scepter are standard fare on the bedroom walls of college-aged individuals who identify with a non-binary construction of gender.

As for why the FSU SGA has any compelling interest whatsoever in preventing students from posting campaign materials on all privately-owned properties, this Court is at a loss. This is especially true in light of the low voter turnout in FSU SGA elections, a sampling of which indicates that less than 25% of the student body participates in the spring elections, which includes the election of the Student Body President.

Yet, Appellee's counsel warned the Court of the potential ramifications of repealing this statute, specifically that repealing this statute would open FSU's administration to significant liabilities. When pressed for the causes of actions that could be filed against the University absent the presence of § 709.1(B)(1), Appellee's counsel posited that its repeal might lead to harassment of private citizens who want nothing to do with a student body election.

Considering that a supermajority of the FSU student body chooses not to participate in the election of officers of the Student Government Association, Appellee's counsel is likely correct that non-affiliates of the University do not want to hear why one campus political party deserves attention and support over the other. However, the magnitude of this potential harm does not come close to rising to the level of harassment under the substantial disruption test which permit a public university to regulate off-campus speech to preserve a safe and educational status quo.

For an example of what does rise to this level of "substantial disruption" to a public college's educational environment or campus safety, the Court turns to the example set in *Doe v. Valencia*. *See Doe v. Valencia Coll.*, 903 F.3d 1220 (11th Cir. 2018).

In *Valencia College*, a 42-year-old male nursing student sent a series of sexually harassing text messages to a 24-year-old female student over the course of the break between summer and fall classes. *Id.* at 1225.

Some of the more palatable of these text messages involved the male student calling the female student a "hussie" a "hooker" and a "whore." *Id.* at 1226. Most of the rest are unfit for print in this opinion. *Id.* All of these text messages were sent and received off-campus and when school was out of session. *Id.* at 1231.

When fall classes resumed, the 24-year-old female student showed the Dean of the

school the text messages. *Id.* at 1226. As a result of this meeting the Dean used these documents as the basis of a complaint against the 42-year-old male under Valencia's student conduct code. *Id.* at 1227.

The hearing on the matters concluded with a finding of responsibility, the panel having concluded by the preponderance of the evidence that the 42-year-old male was responsible for: 1) physical abuse; 2) sexual harassment; 3) stalking; and 4) lewd conduct. *Id.* at 1127–28. Accordingly, the Dean of Valencia College ordered a one-year suspension from school. *Id.* at 1228.

The 42-year-old male appealed his suspension in federal court, who ruled that the behavior complained of – although occurring off-campus and when school wasn't in session – met the threshold for the extreme sort of behavior which extends *Tinker's* substantial disruption test to off-campus speech. *Id.* at 1225.

The Eleventh Circuit roundly agreed with the district court's ruling. *Id.* ("[a]ccused robbers, rapists, and murderers have statutory and constitutional rights. So does a college student who is accused of stalking and sexually harassing another student.

The question in this case is whether Valencia College violated [name redacted]'s statutory or constitutional rights … [t]he district court did not think so, and neither do we"). Juxtaposed with the facts of this case, it is easy to see why *Valencia College's* holding is inapplicable here.

Where the respondent in the *Valencia College* case sent sexually harassing, lewd, and intimidating messages to a woman eighteen years his junior, the Appellant's party member left some pamphlets around the building in which she lived. That a couple of these pamphlets were found strewn about the Stadium Centre does not compromise FSU's educational environment or campus safety.

Where the respondent in the *Valencia College* case was in no way engaged in any sort of political activity when he embarked on his harassment campaign, the Appellant's party member was engaged in bona fide political activity. Even if it were no question whatsoever that members of Appellant's party posted these pamphlets in public areas of the Stadium Centre, this would not compromise FSU's educational environment or campus safety.

Where the respondent in *Valencia College*

case was, indeed, engaged in extreme and outrageous conduct involving "severe bullying [and] harassment targeting [a] particular individual," Appellant's party member was attempting to raise awareness and solicit support for her cause. *See Mahanoy*, 141 S. Ct. at 2040. That Appellant's party members were knocking doors on election day does not compromise FSU's educational environment or campus safety.

Whereas the dissenting opinion deems the regulation at issue to be a "content-neutral" restriction on speech, it suffers from a common misconception: the fact that regulation on speech can be fairly applied on persons with differing political views does not mean that the regulation is content-neutral. The proper test for content-neutrality is not performed by analyzing the content of any barred *expressions* under the regulation at issue, but rather by analyzing the *purpose* of the regulation itself. *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[o]n the contrary, '[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messaged but not others'")).

In other words, the "regulation of speech is content based if [it] applies to particular speech because of the *topic* discusses," which is disjunctive of "the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 169 (2015). Cutting directly to the core of this case, regulations banning the use of any specific item "for political speech – and only political speech" are content-based regulations, even if they imposed "no limits on the political viewpoints that could be expressed." *Id.*

Of note to the decisions in *McCullen* and *Reed* is that they were published – without dissent – over twenty *years* after the most modern case cited in the dissent regarding the issue of content neutrality. Directly relevant to the modern applicability of these cases, the majority in *Reed* and a concurrence in *McCullen* both discuss the holding in the seminal case relied upon by the dissent in its rationale. *Reed*, 576 U.S. at 166 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)); (Alito, J., *concurring*) *McCullen*, 573 U.S. at 512 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645-46 (1994)).

Leaving nothing to the imagination, *Turner* itself explicitly held that the test for content neutral speech does not "end the inquiry" regarding content neutrality,

but continues into the purpose of the regulation itself. *Turner*, U.S. 622 at 645. As rendered in *Reed*, a main proposition of the *Turner* Court was that "an innocuous justification cannot transform … [a] content-based law into one that is content neutral." *Reed*, 576 U.S. at 166.

Regarding the dissent's *in loco parentis* argument, it should be noted that University students, unlike high school students, are typically adults. Similarly, it is a minor curiosity that the dissent does not include any case law from a public college or university applying the modernized *Tinker* test to off-campus political speech. Rather, the dissent does not seem to include any reference whatsoever to how the modernized *Tinker* test is applied by institutions of higher learning in any fashion at all. Though the dissent claims that the cases cited by the majority "relate only to public high schools," it would seem that our rogue Justice somehow missed the eleven (11) consecutive paragraphs detailing the *Valencia College* case and how it relates to the issues here. *See infra* at 10-12.

Turning back to the majority's content neutrality analysis, the purpose of the regulation at issue in this case is obviously related to the "contents of expression" barred by the regulation. That this regulation is located in our Election Code, and not generally within our Student Body Statutes, should be a pretty strong indication that it is targeted solely at political speech in campus elections. *See* (Tjoflat, J., dissenting) *Alabama Student Party*, 867 F.2d 1354 (stating that the regulation at issue was designed to limit "only one topic of discussion: political speech").

A close reading of the regulation confirms this notion, as it explicitly applies only to "campaign materials." *See* Fla. St. U. Student Body Stat. § 709.1(B)(1) (2022). No other category of speech is targeted by this regulation. *Id.* Because the purpose of this regulation is to restrict political speech – even if fairly applied to all campus political parties – it is not a content-neutral regulation.

Hence, Part II of this opinion's dissent grossly misconstrues applicable case law by omitting – among other things – a routine step in a proper content-neutrality analysis.

In conclusion, a core tenet of constitutional analysis, especially in respect to First Amendment challenges, involves determining if a provision of law is

"unconstitutional on its face." Here, if § 709.1(B)(1) were a person, it would have "UNCONSTITUTIONALLY OVER-BROAD UNDER THE FIRST AMENDMENT" tattooed on its forehead in bright red ink.

Accordingly, § 709.1(B)(1) is so **stricken** from Florida State University's Student Body Statutes, and the finding of responsibility by the Election Commission against Appellant is **hereby vacated**. Perhaps now, with the unconstitutional prohibition against posting campaign materials in private residences lifted, our Student Government Association can muster a voter turnout greater than 25% of the student body when it comes time to elect our next Student Body President.

DONE and **ORDERED** on March 27, 2023 in Tallahassee, FL.

ASSOCIATE JUSTICE GARCIA MARRERO, concurring in part as to Issue I, and dissenting in part as to Issue II.

I write today to explain my agreement with the Majority on its decision as to Issue I but my disagreement as to Issue II. Disagreeing with the constitutional position adopted by the Majority today, I dissent.

Before the Court is the issue of whether the Elections Commission erred in finding by clear and convincing evidence that SURGE FSU improperly campaigned outside of the Florida State University campus—on private property—and without the express or implied permission of the owners or operators of the premises. To answer that question, I agree with the Majority. The Election Commission's finding, by clear and convincing evidence, was supported by the record and warrants affirmance. Because the Majority did not speak about this conclusion and focused on the potential constitutional issues with section 709.1(B)(1), I feel inclined to expand on the Court's finding before addressing the second issue.

ISSUE I

In the tribunal below, FORWARD FSU brought a violation against SURGE FSU for a purported violation of Student Body

Statute 709.1(B)(1), which states, in part, that "[c]ampaign material is prohibited on any privately-owned property, except that candidates may post materials on private property should they obtain the consent of the property owner or manager. . . ." § 709.01(B)(1), Student Body Stat.

The tribunal below, the Election Commission (the "Commission"), held a hearing where FORWARD FSU presented photographic and videographic evidence. *See Turkomer, v. SURGE FSU*, No. SPR-2023-15, at *3–4 (F.S.U. Election Comm'n Mar. 8, 2023) (detailing facts based on the evidence presented at the hearing). The Commission also heard testimony from Appellant's candidate for Student Body Treasurer—the alleged violator of section 709.1(B)(1). *See Id.* at *4.

Now, on appeal, Appellant urges this Court to reverse the Commission on two grounds: (1) because the use of a Quick Response ("QR") Code is not "campaign material" as defined in the Student Body Statutes and (2) because no campaign material was "posted on" private property. *See* Initial Brief at *4. I agree with the Majority that Appellant's arguments fail to persuade the Court that the Commission erred in its finding by clear and convincing evidence that Appellant violated section 709.1(B)(1).

First, Appellant's argument that the use of a QR code does not trigger the definition prescribed by section 701.1(E) is unsupported by the text of the statute. The definition for "campaign materials" is a broad one:

> Campaign Materials – ***any material***, <u>*including but not limited to*</u> social media, electronic communication, videos, posters, placards, signs, signboards, leaflets, folders, handbills, fliers, banners, t-shirts, buttons, paint, University owned walls that may be painted on, handwritten announcements or circulars of any size and consistency ***that publicize a political party or candidate for an elected office of the student body, and calling the action to vote***.

§ 701.1(E), Student Body Stat. (emphasis added). With such a broad statute in place, the question becomes, was a QR code in mind when the statute was written? A similar question came up in a previous case before this Court, *see* Forward FSU v. Abhari, No. 2022-SPR-8, 11, at *2 (F.S.U. Student S. Ct. Mar. 29, 2022) (Garcia Marrero, J.), however, there the Court considered whether a QR code was "contact

information" as required by the Florida State University Oglesby Union Policy 2.0131(3)(b) at the time the Policy was written—it was not. *See Id.*

Here, however, we have a statute that was reaffirmed prior to the Spring 2023 election cycle. *See* § 704.2(F)(1), Student Body Stat. (2023) (emphasis added) ("The Supervisor of Elections or the SGA Director of Student Affairs shall make all information pertaining to filing available *at least one (1) week prior* to the filing dates. At that time *the Election Code shall be considered binding for the elections in question and shall not be changed by the Student Senate*."). Thus, the definition found in section 701.1(E) was reaffirmed by the Student Senate prior to the violation occurring. Given the reaffirmation of the Election Code, the question becomes whether the Student Senate would consider a QR code to be encompassed in the broad definition of section 701.1(E) as of the statute's reaffirmance. Here, there can be no doubt that the Student Senate would believe QR codes to be included in the broad category of "campaign materials."

Although legislative inaction does not ratify a certain action, there is something to be said about the fact that the Student Senate has not altered the language of campaign material to exclude QR codes after this Court had a high-profile case revolving around QR codes just last year. Nevertheless, the Student Senate's inaction to alter the language is not the only support that QR codes are inclusive in the definition of "campaign materials."

Section 701.1(E) is a catch-all provision, which is evident by the use of the words "any" and "including but not limited to." *See* § 701.1(E), Student Body Stat. Therefore, it is not hard to see that the Student Senate wanted to include all possible materials that would be considered "campaign materials" in its definition.

Taking the broad language of the statute at its face, I find that the QR codes at question, here, are "any material" "that publicize a political party or candidate for an elected office of the student body, and call[s] the action to vote." § 701.1(E), Student Body Stat.

Next, Appellant argues that if the QR code, that was disseminated, was found to be a "campaign material" then it also had to be "posted on" private property for it run afoul of section 709.1(B)(1). *See* Initial Brief, at *4. The Court was unpersuaded by this

argument, and I agree.

Section 709.1(B)(1) is extremely clear on what activity it is prohibiting, the use of "campaign material" on "any privately-owned property" except when permission from an owner or manager is received. *See* § 709.1(B)(1), Student Body Stat. Appellant's argument, thus, rests on the second clause of section 709.1(B)(1), which states that "[c]ampaign materials posted on private property must still be in compliance with all applicable provisions of this [the Election] Code, including the time in which campaigning is allowed." *Id.* This clause, however, does not negate the flat out prohibition—with a limited exception—provided for in the first clause. Appellant attempts to argue that the second clause is the crux of the statute and that for the statute to be violated "campaign material" actually has to be "posted on" private property, rather than simply be handed out there. This argument simply is unsupported by the clear text of the statute.

The first clause details that all campaign material is prohibited on private property unless permission from an owner or manager is obtained. *See Id.* Therefore, the second clause, which Appellant's argument depends on, is a supporting clause that details under what conditions any campaign material must abide by ***if*** permission to use it is granted by a private property owner or manager.

Appellant's argument is not the correct one, however, even if Appellant had argued the application of the first clause of section 709.1(B)(1), it would fail. The record on appeal supports the Commission's finding that Appellant was indeed campaigning with campaign material at private property, Stadium Centre, without the permission of the buildings' owner or manager. *See Turkomer, v. SURGE FSU*, No. SPR-2023-15, at *3–4 (detailing evidence that was presented at the hearing showing that campaign materials were found at Stadium Centre and that Appellant did not have permission to campaign there). The Court reaffirmed the evidence in the record on appeal by hearing from the Appellant's candidate for Student Body Treasurer and the witness who saw her campaigning at Stadium Centre.

Therefore, I agree with the Majority that Appellant was indeed campaigning on private property without permission of the property's owner or manager, and thus, is in violation of section 709.1(B)(1). Accordingly, the Commission's ruling was not erroneous and is affirmed per the

Majority's holding. *See ante*, at p. 2.

ISSUE II

Now, I turn to the portion of the Majority's opinion with which I disagree. First, it is worth noting that the Commission did not hear any challenges to the constitutionality of section 709.1(B)(1), nor did Appellant raise such a challenge on appeal to this Court.

Rather, the Majority raised the issue *sua sponte* at oral argument and addresses the issue—and only that issue—in its opinion today. Given the limited application of *Tinker*[4] and its progeny to K–12 public schools and the text of section 709.1(B)(1), I disagree with the Majority in its conclusion that section 709.1(B)(1) is unconstitutional.

TINKER AND ITS PROGENY

I begin my analysis by establishing why *Tinker* and its progeny are inapplicable here—a common theme is evident at first glance.

Tinker dealt with a public high school that wanted to prohibit a peaceful student political demonstration, which consisted of "pure speech" on school property during the school day. *See Tinker*, 393 U.S., at 505–506. Next, in *Fraser*,[5] a public high school student was suspended for delivering a speech to an assembly of the school that contained "an elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S., at 675.

Then, in *Kuhlmeier*,[6] staff members of a high school newspaper were found to not have their speech rights violated by the excise of two pages of their newspaper for certain privacy reasons. *See Kuhlmeier*, 4874 U.S., at 273.

Later, in *Morse*,[7] a public high school principal was found to have the power to restrict student speech when it related to the promotion of illicit drug use. *See Morse*, 551 U.S. at 409–10. Finally, in *Mahanoy*,[8] the most recent of Supreme Court decisions, the Court held that a public high school could not restrict certain off-campus

[4] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

[5] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[6] *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988).

[7] *Morse v. Frederick*, 551 U.S. 393 (2007).

[8] *Mahanoy Area Sch. Dist. V. B.L.by and through Levy*, 141 S. Ct. 2038 (2021).

speech when its special interest was not as evident. *See Mahanoy*, 141 S. Ct., at 2048.

All of the cases dealing with the restriction of speech, including political speech, that the Majority depends on relate only to public high schools—not post-secondary institutions, such as Florida State University.

The issue with these cases is that the Supreme Court viewed the limits on speech through the lens of the *in loco parentis* doctrine, better known as a parents' ability to delegate their authority over their children to another authority—in this case public schools. *See Mahanoy*, 141 S. Ct., at 2051–53 (Alito, J., concurring). However, the application of the *in loco parentis* doctrine goes away when we leave the pre-adult public K–12 school system and enter the world of post-secondary adult education.[9] Thus, the "special interest" analysis that a court must undergo in determining if a provision, or statute, is justified is a bit different than that in *Tinker* and its progeny.

[9] At least two Justices of the U.S. Supreme Court agree with this notion. *See Mahanoy*, 141 S. Ct., at 2049 n. 2.

ANALYSIS

"Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" Morse, 551 U.S., at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)). And the Supreme Court has made quite clear that "students do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the school house gate.'" *Mahanoy*, 141 S. Ct., at 2044 (quoting *Tinker*, 393 U.S., at 506). Therefore, the question I must address is whether the text of section 709.1(B)(1) places an improper restriction on the political speech of Florida State University students that wish to run for student government office. I answer this question in the negative.

Typically, "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." *Mahanoy*, 141 S. Ct., at 2046. However, when the speech is conducted by students at or older than the emancipation age—which is 18 in the state of Florida, or 16 if court ordered, see § 743.015, Fla. Stat. (2022)—the analysis is not whether a school has consent to restrict such a right.

Rather, the analysis must be whether the restriction was an improper state government action. *See Turner v. Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641–42 (1994); see also Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344, 1349–50 (11th Cir. 1989) (Tjoflat, J., dissenting) (citing to the proper test to be applied in these circumstances).

The Supreme Court has identified three forums in which the state—and by extension public state post-secondary institutions[10]—can restrict speech, they are the following: (1) a traditional public forum, which is "a place which has 'immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"; (2) a nonpublic forum which "is 'not by tradition or designation a forum for public communication'"; and (3) a limited public forum which "is created when the government 'intentionally opens a nontraditional forum for public discourse.'" *Ala. Student Party*, 867 F.2d at 1350 (Tjoflat, J., dissenting) (citations omitted).

Here, there is no question as to what kind of forum the political speech was being conducted in—nonpublic. A privately owned apartment building is not a public forum which is known for holding public assemblies, nor is it a nonpublic forum that has been opened by the State of Florida, or Florida State University, for the purpose of public discourse—in fact, the Stadium Centre is not owned by the State or any of its political subdivisions. Therefore, the analysis, here, must be if section 709.1(B)(1) is an improper restriction of political speech in a nonpublic forum. It is not.

"In a nonpublic forum, the government may impose *reasonable* content-based restrictions on speech, provided that the restrictions are not viewpoint-based." *Id.* (Tjoflat, J., dissenting) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). Thus, if the F.S.U. Student Body Statutes' restriction on off-campus campaigning on private property is a reasonable content-based restriction, it passes the test.

[10] Florida State University is a political sub-division of the State of Florida, as an agency of the executive branch of the state, pursuant to section 1001.705(1)(d), Florida Statutes (2022).

However, I need not go so far as to determine if section 709.1(B)(1) is a reasonable content-based restriction because the plain and ordinary text of the statute is not content-based, rather it is content-neutral and is completely appropriate under the Supreme Court's First Amendment free speech jurisprudence.

"Deciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner*, 512 U.S., at 643. When looking to the content neutrality of government regulation is "whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Id.* "The purpose, or justification, of a regulation will often be evident on its face." *Id.*

Generally, any regulation that favors and disfavors speech "on the basis of the idea or views expressed are content based." *Id.* Whereas, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.* I find that section 709.1(B)(1) falls in the latter category. The regulation established by the F.S.U. Student Senate confers a burden on speech ***without*** reference to the ideas or views expressed in said speech.

Looking to section 709.1(B)(1) it is evident that the restriction of off-campus campaigning for student government elections on private property is content neutral. Section 709.1(B)(1) states that "[c]ampaign material is prohibited on any privately-owned property, except that candidates may post materials on private property should they obtain the consent of the property owner or manager." § 709.1(B)(1), Student Body Stat. The statute does not limit speech on account of any given viewpoint, political party, or reason for campaigning—rather it restricts campaigning on private property altogether. Such a regulation is not only content neutral but is recognized by the Supreme Court as completely proper. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *see also Martin v. City of*

Struthers, 319 U.S. 141 (1943) (discussing the propriety of the government protecting private householders from unwanted solicitors, while not cutting off access to homes whose residents are willing to hear what the solicitors have to say).

Thus, section 709.1(B)(1) has the intended purpose of restricting student campaigners from bothering private property owners or managers with their solicitation without restricting specific speech, nor without giving the student campaigners the ability to express their speech if the private property owner or manager grants them permission to do so.

Given the plain and ordinary text of the statute and the binding Supreme Court jurisprudence on this issue I find that section 709.1(B)(1) is not unconstitutional because it is a content-neutral regulation and does not infringe on the public forum freedom of speech that is protected under the First Amendment.

In fact, all Appellant had to do was ask the property managers of Stadium Centre for permission to campaign on the property's premises to avoid running afoul of the regulation. The evidence in the record shows that Appellant did not even bother to seek out the property's manager for said permission. Further still, Appellant has various other methods of expressing its political speech that is in no way restricted by section 709.1(B)(1)—namely, the widely accessible (and free) social media platforms that most students utilize in this day and age.

Based on the text of the statute at issue, the record before me, and the Supreme Court's jurisprudence on the government's restriction of free speech, I would hold that Section 709.1(B)(1) is not unconstitutional, and therefore, Appellant did violate the statute by campaigning on private property.