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

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellant,

vs.

THE ASSOCIATED PRESS, ET AL,

Appellees.

Case No.: 1D09-4385
L.T. Case No.: 2009-CA-2298

INITIAL BRIEF OF APPELLANT, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

On Appeal from a FINAL JUDGMENT

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PRELIMINARY STATEMENT

In this initial brief, Appellant National Collegiate Athletic Association will be referred to as "NCAA."

Appellees who were Plaintiffs in the case below will be referred to as "Plaintiffs." Appellees Florida State University Board of Trustees and T.K. Wetherell will referred to as "FSU" and "the University." Appellee GrayRobinson will be referred to as "GrayRobinson."

References to the Transcript of the Final Hearing below will be made as follows: [Tr. ___]. A copy of the Transcript is included in the Appendix transmitted with this brief.

References to the final judgment will be made below as follows: [F.J. at ___]. A copy of the trial court's final judgment is included in the Appendix, as well.

References to the record will be made as follows: [R. at ___].

STATEMENT OF THE CASE

A. Nature of the Case

This case presents significant questions of first impression under Florida law regarding the farthest boundaries of Florida's Public Records Act and the Florida Constitution. T he decision below effectively creates new, but unworkable definitions of "public records" and "public agencies" never before recognized by a Florida Court. The trial court has extended the reach of the Public Records Act to any information generated and maintained by a private entity that has been "viewed" by a Florida public official. The trial court's ruling converts a private entity into both a "public agency" and "custodian" of public documents even though the private entity (1) has never been delegated a statutorily authorized public function; and (2) has never generated documents in the course of that public function. While Florida's Public Records Act is to be liberally construed, the trial court has rewritten the plain words of the Act.

In this case, the private entity is Appellant, the National Collegiate Athletic Association ("NCAA"). The documents and information at issue were prepared and maintained by the NCAA for use in enforcing its private, association-wide rules. These rules provide that such information is confidential and are applied uniformly to all NCAA member universities and colleges. This case arose from a high profile infractions proceeding involving 61 student-athletes across ten sports

at Florida State University ("FSU"), a Florida public university and NCAA member institution. Plaintiffs below, representing various media outlets, made Public Records Act requests on FSU, its law firm GrayRobinson, P.A. ("GrayRobinson") and the NCAA, to obtain confidential NCAA information regarding allegations of academic fraud. Plaintiffs contended that FSU or its lawyers had transformed the NCAA's private documents into "public records" by viewing them electronically in the course of that private infractions proceeding.

The trial court agreed. The court held that (1) longstanding, national confidentiality rules adopted by the NCAA membership "circumvented" the Florida's Public Records Act, and (2) that, by agreeing to abide by those NCAA rules, FSU delegated a public function to the NCAA, making the NCAA both a custodian of public records *and* a Florida public agency. Although the trial court described this holding as narrow, its rationale is impossible to confine to the facts of this case. For this reason, this case presents more than a question of whether the court misapplied state law, but also whether the Act as applied violates the NCAA's federal constitutional rights.

B. Statement of Facts

The NCAA is a private, unincorporated voluntary organization, consisting of over 1200 member colleges and universities, both public and private, from among all fifty states. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179,

183 (1988). Defendant/Appellee FSU is a Florida public university and a NCAA member institution. *Id.*; Tr. 237.

Since 1905, four year colleges and universities such as FSU have associated through the NCAA to adopt uniform rules regarding recruitment, admission, eligibility, financial aid and other matters related to intercollegiate athletics competition among themselves. Tr. 102, 105, 112. The constitution, bylaws and rules approved by NCAA members can be found in the "NCAA Manual," available on the NCAA's website at http://www.ncaa.org. Tr. 104-106. These rules were carefully designed to be applied fairly and uniformly across the NCAA's diverse membership of public and private institutions, and to ensure "a level playing field" among its members. Tr. 104, 106-108, 111. This principle of competitive equity is a fundamental purpose of the NCAA and is a basic reason schools such as FSU choose to join this voluntary association. Tr. 104, 111.

This case relates to a current NCAA investigation of rules violations at FSU, involving allegations of academic fraud and cheating by a large number of student-athletes at FSU. These allegations included instances of student-athletes having been provided answers to tests, having portions of course work completed for them by tutors or others and related academic misconduct. Tr. 23-26. The NCAA investigated the allegations, interviewing student-athletes, student tutors and other witnesses. Tr. 97-98. This information was gathered by the NCAA and maintained

under a rigorous policy of confidentiality adopted and agreed to by all member institutions, including FSU. *See* NCAA Bylaw 32.3.9. This policy reflects the considered judgment of the NCAA membership that confidentiality is essential for the enforcement process to function, because the NCAA's ability to investigate alleged rule infractions is otherwise very limited. Tr. 106.

For example, because it is not a state actor, the NCAA has no subpoena power, nor does it even have the discovery procedures available to litigants in court cases. *Id.* Rather, the enforcement process functions primarily by virtue of voluntary disclosures of information by member institutions, student-athletes, coaches and/or third parties, former student-athletes, parents or friends of student-athletes. Tr. 106-108. Without an expectation of confidentiality, individuals are frequently afraid to come forward with relevant information because they fear retaliation, accusations of disloyalty, media scrutiny, litigation and other adverse consequences. Tr. 106-108, 111. The uncontested trial testimony of NCAA witnesses established that the ability to collect and maintain sensitive, confidential information, and the ability to do so *uniformly* with respect to all members, forms the "lynchpin" on which the NCAA functions. *Id*

Information gathered by the NCAA during an investigation is therefore treated according to NCAA Bylaw 32.3.9 and related procedures to ensure confidentiality. This documentary information is scanned and stored in an

electronic format in a NCAA database, with hard copies then discarded. Tr. 200, 203. This "paperless" electronic storage is now used uniformly in all cases as the NCAA's ordinary custom and practice. *Id.* The information is the property of the NCAA and the data is maintained solely by the NCAA. Tr. 203.

During all infractions proceedings, as in this case, the NCAA provides institutions, at-risk individuals and their representatives access to relevant information for use in the proceeding, provided those parties agree to maintain the confidentiality of such information as required by NCAA rules. This is now done through the use of a secured website, allowing portions of NCAA files to be viewed electronically by authorized parties. Tr. 98-99, 200. To protect the integrity of the website, in addition to requiring all users to execute a uniform confidentiality agreement, the information on the site is specifically designed so as not to permit the user to download, print or save the confidential information. F.J. at 3.[1] Once a user is authorized access, however, the NCAA has no technological or other means of determining what information, if any, that user reviews. Tr. 201.

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[1] Previously, parties were permitted to access information at a location such as a law office, where physical documents would be available for review but secure and under the same policy of confidentiality. Tr. 102. Beginning in approximately 2004 through 2006, for the convenience of its members, the secured website was developed. Tr. 102, 199. The purpose and function of the secured website remains the same, as does the requirement that the information be treated as confidential.

In this case, the subject matter of the FSU proceeding was academic fraud as the result of a cheating scandal affecting a large number of FSU student-athletes, student tutors and at least one employee. The secure website therefore included such things as transcripts and audio recordings of witness interviews, reports prepared by NCAA staff and numerous other documents that were created by and are the property of the NCAA. Tr. 202-03. Because this matter involved allegations of academic fraud, there is also information containing student-education records protected under the Family Educational and Privacy Act, 20 U.S.C. § 1232(g); 34 CFR Part 99 ("FERPA"), including student names, courses attended, test materials and results, and even an IQ score. Tr. 121, 202-03.

For similar reasons, the need for the confidentiality is integral not only to the NCAA's enforcement process, but is also vital to protecting information relating to, for example, the initial eligibility of prospective student-athletes and the student-athlete reinstatement process, matters frequently rife with student education records protected by FERPA and which are also governed by the principles of NCAA Bylaw 32.2.9 and related rules. Tr. 114-115.

1. FSU's Retention of the GrayRobinson Law Firm

An institution or "at-risk" individual may contest an infractions finding or penalty through the administrative process provided by NCAA rules. Tr. 99-100. Here, while there was no dispute that serious academic fraud had occurred

affecting the eligibility of numerous student-athletes, FSU denied institutional responsibility for those violations and a requested and received a hearing before an independent committee comprised of representatives of member institutions, who are not employed by the NCAA (the "Committee on Infractions" or "COI"). *Id.*

A non-public hearing was held before the COI on October 18, 2008. Because FSU disputed the recommendations of the NCAA enforcement staff, the proceeding was essentially of an adversarial nature. FSU's counsel conceded as much during trial, asserting that "there is no scheme. If there's a legal scheme, because we're a member of the NCAA, so far they aren't doing us any favors best as I can tell." Tr. 237 On March 6, 2009, the COI issued a report finding various rules violations at FSU and imposing sanctions. FSU has appealed that decision and NCAA administrative review is still underway.

FSU hired an outside law firm, GrayRobinson, to represent it in its appeal of the infractions. FSU also retained a private consultant, the Compliance Group, to assist it in its own investigation and before the COI. Both GrayRobinson and the Compliance Group executed the same uniform confidentiality agreement to access the secured website required by all members and their representatives. Tr. 123. The record is also clear and uncontroverted that the secured website was not unique to or devised for the FSU infractions proceeding. Rather, the same procedure is used by the NCAA nationwide. Tr. 111. All representatives of

member schools requesting access must enter the same agreement as did GrayRobinson. Tr. 111, 123, 200-205.

As noted above, in the course of representing FSU, GrayRobinson was authorized to view the secured website. Although GrayRobinson and FSU have subsequently identified certain documents they indicate were "reviewed" in preparing FSU's appeal, the NCAA had and has no means of determining what, if any, information GrayRobinson or any user reviews once given access to the website. Tr. 201.

2. Plaintiffs' Open Records Request and Proceedings Below

On June 4, 2009, counsel for Plaintiffs first requested documents from FSU, GrayRobinson and the NCAA, citing Florida's Public Records Act. When no documents were produced, Plaintiffs filed this suit on June 15, 2009, claiming that all three Defendants had failed to comply with the Act and s. 24(a), Art. I of the State Constitution. R. at 01-200. After a second request was declined, on July 6, 2009, Plaintiffs filed their Amended Complaint, alleging that NCAA information regarding the FSU proceeding had become a "public record" and that the Defendants, including the NCAA, had intentionally sought to circumvent the Act. Amended Complaint, ¶¶ 1-3, 54 ("The NCAA 'secure custodial website' was created for the express purposes of avoiding the disclosure requirements of Florida's Public Records Act.") (citing a newspaper article). R. at 330.

Although their pleadings demanded unfettered access to the information viewable on the secured website, *see id.* ¶¶ 62, 67, Plaintiffs later altered their request to include only documents that FSU's attorneys now say they viewed and/or used during their preparation of FSU's appeal of the rules violation: the transcript of the COI hearing on October 18, 2008 ("NCAA Transcript"), and a copy of the COI's June 2, 2009 Response to Appeal of Infractions Report No. 294 ("NCAA Response").[2] Plaintiffs alleged that all Defendants unlawfully withheld public records (Counts I and III), and that the NCAA was in "illegal possession" of public records (Count II).

On July 24, 2009, GrayRobinson moved to dismiss Plaintiffs' claims, arguing that because it could only access the website electronically, it could not be deemed a "custodian" of public documents it did not physically possess. R. at 641-655. On that same date, FSU filed its Answer denying Plaintiffs' claims, contending that "some or all of the documents located on the NCAA's secured custodial website contain or constitute education records of students" subject to "strong protection" under FERPA and Florida law. R. at 622. FSU also filed a Cross Claim against the NCAA, alleging in the alternative that NCAA rules had

[2] Plaintiffs' tactical decision to narrow their request does not resolve the question of how the NCAA is expected to determine what information FSU's representatives may have viewed. As discussed further below, because the NCAA has no means of knowing what information FSU has viewed, let alone utilized, all of the issues arising from Plaintiffs' first broad demands remain.

prohibited it from complying with Plaintiffs' request, that the NCAA illegally possessed its public records and seeking indemnification for any liability under the Act. R. at 613-640. Like GrayRobinson, FSU denied that it was an actual custodian of the information because it could only access it in electronic form. *Id.*

The NCAA also filed a dispositive motion on July 27, 2009, arguing that its records were not "public" under the plain language of the Act, and that any ruling applying the Act under the facts of this case would unconstitutionally impair its ability uniformly enforce its rules and carry out its interstate functions. R. at 675.

On August 6, 2009, the trial court denied Defendants' motions. R. at 1577-78. On August 12, 2009, GrayRobinson filed its Answer to Plaintiffs' Second Amended Complaint and a Cross Claim against the NCAA. R. at 1595-1613. GrayRobinson claimed that "the documents sought by Plaintiffs never became public records," and that, by "merely...look[ing] at the documents on a computer screen," they had not been "received" for purposes of the Act. *Id.* at 1603. Like FSU, GrayRobinson also contended that some or all of the NCAA documents were protected by FERPA. *Id.* Further, like the NCAA, GrayRobinson also alleged that application of the Public Records Act to the NCAA documents would violate the United States Constitution. *Id.*

The court below conducted a bench trial on August 20-21, 2009. The court accepted the stipulated facts submitted by the parties and heard testimony from

three witnesses, including David Berst, the Vice President for NCAA's Division I, and Julie Roe, the NCAA's Director of Enforcement. Mr. Berst and Ms. Roe testified to the critical importance of confidentiality to the NCAA, and confirmed that NCAA rules requiring confidentiality are longstanding and designed to promote the interests of its members rather than evade open records laws. Ms. Roe explained that the secured website was not created specifically for FSU, but for use by all members. Both witnesses also attested to the substantial injury to the NCAA's ability to uniformly enforce its rules if subject to the Public Records Act. This testimony was not rebutted by Plaintiffs or discredited by the trial court.

At the conclusion of the trial, the court ruled that the NCAA Transcript and NCAA Response are public records subject to disclosure because they had been viewed by GrayRobinson via the NCAA's secured website. Tr. 260, 264-68. While conceding that the documents were generated by the NCAA and that FSU had no role in creating the website, the Court found that "whether voluntary or not, FSU delegated improperly its recordkeeping function to the NCAA," solely by complying with the uniform confidentiality agreement required by NCAA rules. Tr. 286. Yet, at the same time, the Court also denied FSU's Cross-claim against the NCAA on the basis that the same confidentiality agreement, being "void" under Florida law, should not have prevented FSU from responding to Plaintiffs' requests. Tr. 281-82.

The Court ruled further that FSU, GrayRobinson, and the NCAA are each a "custodian" and "agency" under Florida law, and that the NCAA was the "primary custodian" in possession of the "most original" of the records, even though each had an identical electronic copy. Tr. 269: F.J. at 10-12. The Court ordered FSU, GrayRobinson, and the NCAA to provide the requested records to Plaintiffs. The Court issued its Final Judgment setting forth its ruling and rationale on August 28, 2009 ("F.J."); R. at 1806.

On August 28, 2009, the NCAA filed its Notice of Appeal. R. at 1825.

SUMMARY OF ARGUMENT

This case concerns far more than a garden-variety appeal of a Chapter 119 ruling. The court below held that any confidential, proprietary information of a private, nationwide association here generated and maintained by the NCAA - becomes a "public record" merely because a representative of a Florida public university is allowed to view it through the NCAA's private, secure website. This decision would create a new, but hopelessly unworkable definition of "public records" and "public agencies" never before recognized under Florida law.

The trial court applied this newly minted definition of public record to leap to the conclusion that, because FSU's representatives "viewed" NCAA documents on its secured site, the NCAA, GrayRobinson and FSU *all* became "custodians" (of the same electronic information) and "public agencies" under the Act. This finding is not supported by the case law, including a recent decision of this Court, which limit the application of the Act to private entities only where: (1) there has been an actual "delegation of a statutorily authorized" public function; and (2) the subject records were generated in the course of that public function.

The holding below is so broad it cannot be confined to the facts of this case, but also expands the reach of the law beyond constitutional limits. The trial court ignored compelling, undisputed evidence that application of the Act to the NCAA would unconstitutionally eviscerate its ability to uniformly enforce its rules and

conduct its affairs across its national membership. Noting that the Act was not "targeted specifically at the NCAA," the court casually dismissed the constitutional implications of its decision as mere matters of "public policy." The court's failure to distinguish between an "as applied" challenge and a facial challenge (the NCAA has never claimed the Act is itself unconstitutional) shows that it fundamentally misconceived the serious constitutional questions raised by its holding.

As a result, the NCAA now faces a myriad of unintended, virtually impossible, statutory obligations imposed by Florida law on "public agencies," and may be subject to untold records requests, however unwarranted, from any citizen of Florida, at the risk of multiple lawsuits and liability for attorney's fees. The ruling would, if allowed to stand, irreparably harm the NCAA's basic ability to function, and may well require it the immediate restructuring of its system of governance, membership and enforcement. Accordingly, the judgment below should be reversed.

ARGUMENT

A. The Trial Court Erred in Holding that the NCAA's Confidential Information Became a "Public Record" Merely Because It Could be "Viewed" Electronically by FSU's Counsel During the Conduct of Internal Rules Enforcement Proceedings of a Private Association

1. Standard of Review

The construction and application of statutes is purely a question of law which this Court will review *de novo*. *See State v. Sigler*, 967 So.2d 835, 841

(Fla.2007) ("[J]udicial interpretation of statutes ... are pure questions of law subject to the de novo standard of review."); *Allstate Property & Cas. Ins. Co. v. Lewis*,--- So.3d ----, 2009 WL 1856231 (Fla. App. 1st DCA 2009); *Abram v. Dep't of Health*, 13 So.3d 85 (Fla. 4th DCA 2009).

Where, as here, the facts are stipulated or uncontested, there are no findings below to which this Court need defer and the only question is whether the lower court properly applied the statute at issue. *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla.2003) ("Because the enforceability of [a statute] . . . is a question of law arising from undisputed facts, the standard of review is de novo.").

2. The Trial Court's Holding that "Viewing" Constitutes Receiving is Contrary to the Act's Plain Language and Expands the Public Records Act Far Beyond its Intent and Purpose.

For the first time in the State of Florida, a court has ruled that a voluntary association's private documents are "received" for purposes of Section 119.011(12), Florida Statutes, when electronic images of such documents are "viewed" by a public agency's agent in connection with a voluntary appeal under the private association's policies and procedures. While the trial court attempted to confine its judgment to the facts of this case, F.J. at 7 ("[t]his ruling is not a determination that all records created by the NCAA constitute 'public records' under Florida law"), the court's underlying rationale is impossible to limit and has vast, largely unintended consequences.

The initial, fundamental flaw underlying the judgment below begins with the court's failure to follow the plain language used by the Florida Legislature to define "public records." *See Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984) ("Florida courts have adhered to the principle that a statute must be interpreted according to its plain meaning."). Florida law defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, *made or received* pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. (2008)(Emphasis added.).

The trial court ruled that the NCAA's confidential documents on the secured website, when "viewed" electronically by FSU's attorneys, were therefore "received" by FSU for purposes of the Act. F.J. at 6-7. This holding disregards the plain meaning of "received" and such a construction has never been recognized by any Florida court.

To support its new definition of "received," the trial court instead relied on an out-of-context parenthetical citation to *Times Publishing Co. v. City of St. Petersburg*, 558 So.2d 487 (Fla. 2d DCA 1990), for the proposition that documents "exhibited" to, but not retained by, city officials were held to be "public," implying that that this was tantamount to GrayRobinson viewing the *NCAA's* documents on

its secured website. F.J. at 6-7. This misstates the facts and holding of *Times Publishing*, which is not remotely analogous to the present case.

In *Times Publishing*, the documents at issue acquired the character of public records not when they were "exhibited" to the city, but rather when the city helped create and even "revised" them. *See Times Publishing*, 558 So.2d at 492, 494 ("Once the City began actively inspecting, discussing and *revising* the various documents, it had an official duty to demand that the documents or copies thereof be delivered to the City.")[3]

Accordingly, the trial court's conclusion that reading the Act "narrowly" to mean that "received" requires physical possession of the document would "emasculate the policy of open government embodied in Florida's Public Records Act and Florida's Constitution," F.J. at 7, is not supported by Florida case law or a plain reading of the Act. Nor is it true. Florida law has always required that a document be made or *actually* received by an agency to acquire the character of a public record under the law. Every example of documents being "received" by a

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[3] In addition, because the *city* itself—not the White Sox -- designed a "scheme" to "avoid taking possession" of city documents, the *Times* court held that the city had improperly delegated its record keeping function. *Id.* at 492. While Plaintiffs originally alleged a "scheme" among Defendants in this case, *see* Amended Complaint, ¶¶ 1-3, presumably relying on the *Times* decision, they later abandoned that claim. The evidence at trial is uncontroverted that the NCAA's confidentially rules, procedures and website were developed well prior to the FSU matter, and were designed to promote the interests of the association rather than evade Florida law. Tr. 98-99, 102, 123, 200-203.

public agency for purposes of the Act has been by mail, facsimile transmission, hand delivery, or electronic mail. No court in Florida has held that records simply "viewed" by a public agency are thusly transformed into public records under the Act. There is good reason why this is not the law.

The ruling below would transform private citizens and entities into "custodians" of public records without their permission or knowledge, by the mere fact that a public agency employee views the citizen's or entity's documents. Here, for example, the NCAA has no way of knowing which of its documents, if any, are being viewed on its website by FSU or its lawyers. Tr. 201-202.

These implications are the necessary and unavoidable consequences of adopting the court's definition of "public records." Despite Plaintiffs' arguments below that this case involves just two documents, the "viewing equals receiving" rationale used by the trial court would also apply to all documents accessible on the secured website. Merely because these Plaintiffs voluntarily narrowed their original, broad request does not also narrow the court's holding (nor does it mean future plaintiffs would do so). The lower court's ruling would still make NCAA an unwitting "custodian" of "public records" it cannot identify, but which presumably remain subject to the same maintenance and retention policies as all "public records" in Florida. If accepted, this a result would impose an unmanageable, virtually impossible burden upon any private individual or entity.

This unintended, unwieldy consequence is easily avoided by applying the Public Records Act as every Florida court has done to date, by requiring that an ascertainable and specific document was actually mailed, e-mailed, or hand delivered to a public agency by a private individual or entity before it can be deemed a "public record."[4] For this reason, maintaining the requirement that a document be made or actually received by an agency to acquire the character of a public record will not "emasculate" Florida's Public Records Act, but will continue to allow it to be meaningfully enforceable.

B. The NCAA cannot be a "Public Agency" or "Custodian" of Public Records Where, as Here, FSU Did Not and Could Not, as a Matter of Law, Delegate Any Statutory Public Function.

Even if the trial court were correct in its liberal construction that "viewing" constitutes "receiving" under Section 119.011(12), Florida Statutes, the decision below must be reversed because it subjects a private entity to the Public Records Act in the absence of any evidence FSU delegated a public function to the NCAA. This is a threshold requirement for imposing the broad obligations of the Public Records Act to a private entity, well-established under Florida law, including this Court's recent holding in *B & S Utils., Inc. v. Bakersville-Donovan, Inc.*, 988 So.2d 17 (Fla. 1st DCA 2008).

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[4] Even then, the copy of the document retained by the private individual or entity is not itself a "public record" – only the document received by the public agency is so classified.

Because the trial court's ruling that the NCAA is both a "public agency" and a "custodian" of public documents rests on its erroneous, unsupported conclusion that FSU somehow delegated its recordkeeping or other public functions to the NCAA, the court fundamentally erred in applying the Act.

1. The Trial Court's "Public Agency" Finding Misapplies Well-Established Florida Law Requiring the Delegation of a Public Function to Trigger the Act.

Without citing any evidence and with little legal analysis, the court held that the NCAA is a "public agency" under Chapter 119 by simply concluding that "FSU improperly delegated its recordkeeping functions to the NCAA." F.J. at 18. This holding is contrary to the plain language of the Public Records Act and is unsupported by any facts or testimony.

Under Section 119.011(2), Florida Statutes, for the NCAA to be an "agency" it must have been "acting on behalf of a public entity." There is no evidence in the record that the NCAA was acting on behalf of FSU. Rather, the opposite is true. David Berst's uncontroverted testimony was clear that in the underlying enforcement proceeding, the NCAA was not acting behalf of FSU, but for the benefit of its other members to enforce association rules and maintain a "level playing field." Tr. 104, 111. ("The enforcement staff is representing basically all of the other institutions that are not under inquiry."). Both Section 119.011(2)

and simple logic dictate that, by definition, the NCAA was not acting "on behalf of FSU" when it sought to enforce association rules and impose sanctions on FSU.

In addition to ignoring the statutory definition of "agency," the ruling below also fails to address, let alone distinguish, the large body of Florida cases that clearly articulate the limited facts under which a private actor can be properly subject to the Act, including this Court's recent opinion in *B & S Utilities.*[5]

B & S Utilities plainly states that Florida law provides only two sets of circumstances under which a private entity can be subject to the Act, either: (1) through the delegation of a "statutorily authorized function to a private entity," during which "the records generated by the private entity's performance of that duty become public records" or (2) if the "totality of the factors" indicates a significant level of involvement by the public agency in the affairs of a private actor under the test set out in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla.1992). *B & S Utilities,* 988 So.2d at 22. The court below did not apply *Schwab* here and Plaintiffs do not allege a "totality of factors" exists.

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[5] The trial court acknowledged *B & S Utilities* only for the unremarkable, and irrelevant, proposition that "public records may be in the custody of private entities" F.J. at 17, but otherwise ignored the central holding in that case.

This leaves only the delegation of an *actual* and *statutory* public function as the exclusive standard, on which *B & S Utilities* is dispositive. In that case, the private entity, an engineering company, was found to be a "public agency" not because it was a "records custodian," but because it had contracted with a city to provide a wide range of ongoing engineering services, including the design and implementation of water and wastewater system improvements. *Id.* at 22. This Court found that the company had served as the "*de facto*" city engineer for more than 15 years, and was an "agency" within meaning of Public Records Act, because it had assumed the public function of providing a water and sewer system. *Id.* There is no remotely similar delegation of any public function here.[6]

B & S Utilities represents the latest in a long line of Florida cases requiring the actual delegation of functions that are statutorily required or ordinarily performed by a public entity. *See Putnam County Humane Soc., Inc. v. Woodward*, 740 So.2d 1238 (Fla. 5th DCA 1999) (private Humane Society used its statutory authority to investigate acts of animal abuse and to seize animals, and has therefore acted as an agent of the state); *Stanfield v. Salvation Army*, 695 So.2d 501

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[6] Further, this Court emphasized in *B & S Utilities* that only records *generated* by [the private entity's] performance of its *contracts with the City* here are subject to chapter 119." *Id.* (Emphasis added.) Additionally, there, unlike here, only one copy of the documents at issue existed, and those documents were maintained by the private entity, not the city. Therefore, the City could not be a custodian. Only the engineering firm could be so classified.

(Fla. 5th DCA 1997) (private organization, under statute and contract, took over county's role as provider of probation services); *Harold v. Orange County, Fla.*, 668 So.2d 1010 (Fla. 5th DCA 1996) (county delegated to private entity the responsibility, on behalf of the county, to assure that the trade contractors comply with a public ordinance and to maintain whatever records are necessary so that the county can verify such compliance); *Prison Health Servs., Inc. v. Lakeland Ledger Publ'g Co.*, 718 So.2d 204, 205 (Fla. 2d DCA 1998) (private organization provided medical services to jail inmates)

In short, the trial court erred in disregarding the plain language of Section 119.011(2) to leap to its conclusory holding that the NCAA is a "public agency," in the absence of any evidence that FSU actually delegated a statutory duty or public function of the kind required by *B&S Utilities* and other Florida decisions.

2. There is No Evidence that FSU Delegated, or Could Have Delegated as a Matter of Law, any Public Function to the NCAA, by Virtue of FSU's Membership in the NCAA and Given the Adversarial Posture of the Parties.

Because there is no evidence that FSU asked the NCAA to perform any duty normally reserved to FSU, the trial court appears instead to have found that FSU "delegated" some nebulous duty as the result of FSU's purported "acquiescence" to NCAA rules and/or having its law firm execute the NCAA's uniform confidentiality agreement. F.J. at 15. This holding has no support under Florida law, and also contravenes *National Collegiate Athletic Ass'n v. Tarkanian*, 488

U.S. at 183, 190-99 (1988), in which the Supreme Court held that a public university such as FSU cannot, as a matter of law, delegate its public function and legal duties to a private, voluntary association.

Tarkanian arose out of NCAA rule infractions in the men's basketball program at the University of Nevada Las Vegas ("UNLV"). *Id.* at 185-86. There, as here, the NCAA conducted an investigation of the institution's athletic program, held a hearing on the alleged infractions and issued a report. *Id.* The NCAA Committee on Infractions' report included language recommending disciplinary action against Coach Tarkanian, which UNLV disputed. *Id.* at 186. The Court in *Tarkanian* expressly rejected the precise notion relied on by the trial court—that the institution somehow cedes its state authority through "coerced" compliance with NCAA rules. *Id.* at 194-95.[7] Because "the NCAA is properly viewed as a private organization, not a governmental agency," it assumed no governmental function on behalf of UNLV as a matter of law. *Id.*

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[7] The Court observed that "UNLV retained the authority to withdraw from the NCAA and establish its own standards. The university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy." *Id.* at 194-95. Rejecting the idea that UNLV faced a "false choice," the Court stated: "The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and non-membership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent." *Id.* at 199 n. 19.

Just as in *Tarkanian*, FSU, like UNLV, agreed to join a private athletic association and abide by its rules and bylaws. Accordingly, the trial court's holding that the NCAA *forced* FSU to enter into an "unlawful" agreement for the purpose of evading the Public Records Act cannot be reconciled with *Tarkanian*. Likewise, to the same extent that UNLV did not delegate its status as a public employer to the NCAA by choosing to participate in an infractions proceeding, so too does *Tarkanian* preclude the trial court's specious finding that FSU somehow delegated a "record keeping" function by appealing NCAA sanctions.

In this regard, concluding that the NCAA became an "agency" through any conceivable form of delegation by FSU constructs an artificial reality directly contradicted by the adversarial relationship those parties assumed in the enforcement proceeding (and, obviously, in this litigation). *See id.* at 196 ("It is quite obvious that UNLV used its best efforts to retain its winning coach--a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports. During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged . . . . The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding.").

The significance of the distinction between a public university and private association such as the NCAA is acute and, as the Court made clear in *Tarkanian*,

FSU cannot be held to have "delegated" any of its public duties or functions by agreeing to comply with NCAA rules or by voluntarily participating in a private NCAA infractions proceeding. For this reason alone, the entire premise underlying each of the trial court's findings justifying the application the Public Records Act to the NCAA collapses.

3. The Trial Court's Finding that the NCAA is a "Custodian" of Public Documents Also Fails in the Absence of Delegated Public Authority and under the Plain Meaning of the Statute.

The trial court's ruling that that the NCAA is not only a "public agency" under the Act, but a "custodian" of public records, also finds no support under Florida law. The trial court apparently based its ruling that the NCAA is a "custodian" of public records on the erroneous notion that a private entity "assumes the same responsibility under Florida law as the lawful custodian of [a] public record" when that private entity retains custody of a document that it has transmitted to a public agency. F.J. at 17. This conclusion is flatly erroneous for at least three reasons.

First, as noted above, because there is no evidence that FSU actually delegated any authorized public function to the NCAA, it cannot be a "custodian" for the same reasons it is not a "public agency" under the Act. *B & S Utils,* 988 So.2d 17. To the contrary, the evidence shows the very opposite of delegation given the adversarial interests of the parties. *FSU was contesting and is appealing*

NCAA findings, hardly a situation where it would "delegate" a record-keeping, or any other authority, to an opponent. *See Tarkanian*, 488 U.S. at 196.

Second, the court's ruling that either FSU or GrayRobinson is a "custodian" precludes the NCAA from being a delegated custodian as a matter of law. Florida law recognizes that private entities may be "custodians" of public records only in very limited instances, and never when a public agency is in possession of the same documents in the same form, since there is no right to obtain such documents in a specific format. *See e.g. Seigel v. Barry*, 422 So. 2d 63, 67 (Fla. 4th DCA 1982).

Here, while the court found that GrayRobinson, FSU, and the NCAA all to be "custodians," it is uncontroverted that each had, as the court conceded, the very same documents. Tr. 269, 289. This was the basis for the court's denial of FSU's Cross Claim for public records against the NCAA, since Plaintiffs' "request . . . to FSU was for documents that it had" and could have produced to Plaintiffs. Tr. 281-82. Additionally, FSU's counsel acknowledged that FSU's position "all along [had] been that these were public records" because "when the law firm viewed the document on the [NCAA's] custodial web site [the documents] became received." Tr. 254.

Finally, if FSU delegated any agency function in this case, it was to GrayRobinson. FSU entered into a contract with GrayRobinson, retaining the law

firm to represent the University in the proceeding before the NCAA. GrayRobinson's delegated duties included reviewing private NCAA documents, and preparing documents on behalf of FSU. Tr. 275. Under the circumstances, even under the trial court's expansive rationale, GrayRobinson alone would be the delegated custodian of public records created or received by it in furtherance of its representation of FSU pursuant to the contract between them.[8]

The court's finding that FSU and GrayRobinson are custodians is, therefore, inconsistent and irreconcilable with its determination that either party delegated this duty to the NCAA. In other words, there cannot be more than one custodian when one of the custodians is the agency, and that agency has the same records as the alleged "delegated custodian." Any ruling otherwise would mean that every entity or citizen that has ever sent any correspondence to a public agency while retaining a copy also becomes a "custodian of public records," a result the legislature could not possibly have intended.

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[8] This finding too is a strained reading of the Act. The trial court relied primarily on *Tober v. Sanchez*, 417 So.2d 1053 (Fla. 3d DCA 1982 *review denied, Metropolitan Dade County Transit Agency v. Sanchez*, 426 So.2d 27 (Fla. 1983) to support its conclusion that GrayRobinson is a custodian. F.J. at 14. *Tobin* is readily distinguishable both because it involved a document (an accident report) *created* by the county agency, and the sole physical copy of that report was transferred to the county's attorney. *Tober*, 417 So.3d at 1054. Notably, the court did not rely on *Tober* for its holding as to the NCAA.

C. Even if Deemed a "Pubic Record," the NCAA File Related to Alleged Academic Fraud at FSU Education Records Exempt Under Federal and State Law.

Even if the trial court were correct that the NCAA is custodian of public records or public agency, it erred in finding that the requested records are not exempt from disclosure by federal and state law. Specifically, the (FERPA) protects the privacy of education records, which are defined as those records, files, documents, and other materials which (i) contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. *See*, 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.[9]

The trial court found that the NCAA's COI hearing transcript was not an "education record" protected by FERPA broadly stating that: "[d]ocuments maintained by an educational institution like FSU do not qualify as 'education records' merely because they mention, identify, or refer to a student." F.J. at 10. As a threshold matter, the trial court ignored the basic – and broad – statutory definition of "education record," which is clearly satisfied by the contents of the NCAA COI hearing transcript and the NCAA's response to FSU's appeal of the infractions report. These documents contain information directly relating to

[9] In dicta, the trial court referenced *Ark. Gazette Co. v. Southern State College*, 620 S.W.2d 258 (Ark. 1981), for the idea that the NCAA is not an educational agency or institution. However, the NCAA never argued it was an educational institution. Rather, the NCAA is bound by the third-party requirements of 34 C.F.R. § 99.33.

academic fraud by both student-athletes and a student tutor that are maintained by a covered entity. The trial court's dismissal of the NCAA's FERPA concerns as a preoccupation with the mere mention of student names misses the mark. Both the response and the COI transcript are more than just pieces of paper that contain student names; these documents directly address issues related to an investigation of student academic misconduct and contain detailed information of just that. For this reason, the trial court's reliance on cases dealing solely with the investigation of *teacher* or other staff misconduct is inapposite. *See, e.g., Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004) (finding that records related to the investigation of teacher misconduct are not governed by FERPA, but that records related to the investigation of student misconduct are governed by FERPA).[10]

In contrast to those cases, the FSU matter centers directly on the investigation of *student* academic misconduct. *See*, F.J. at 10. While a Learning Specialist was questioned during the COI hearing, this inquiry was directed at, and would never have occurred but for, allegations of academic misconduct by students. Notably, FSU's General Counsel carefully redacted the NCAA's response to FSU's appeal of the infractions report, presumably to comply with

[10] *See also Briggs v. Bd. of Trustees of Columbus State Cmty. Coll.*, No. 2:08-CV, 2009 WL 2047899 (S.D. Ohio July, 2009); *Baker v. Mitchell-Waters*, 826 N.E.2d 894 (Ohio Ct. App. 2005).

FERPA, because of the student information contained within the response. Tr. 64-65. However, the court's ruling does not require this and its erroneous interpretation of FERPA risks future improper requests directed at the NCAA and its members.

In addition, the trial court's ruling gutted the exempt status of student records provided by Florida law. *See* F.J. at 9; Fla. Stat. §1006.52 (2009)(effective July 1, 2009); Fla. Stat. § 1006.52 (2008)(effective through June 30, 2009); *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004). For instance, Section 1006.52 of the Florida Statutes provides that education records, as defined by FERPA, "are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." Notably, the language not only ensures compliance with FERPA, but also expands those protections by providing that the *entirety* of all such records are exempt and *confidential* from the public records act, not just personally identifiable information. Contrary to the trial court's ruling, sub-section two of Section 1006.52 explains that education records may only be released with written consent. F.J. at 9. By reading this sub-section to allow the release of records, with or without written consent, as long as the release is in accordance with FERPA, the trial court essentially rewrote the statute and removed

the exempt and confidential status assigned intentionally and unanimously[11] by the Legislature.

D. The Judgment Below Constitutes an Unconstitutional Application of Florida's Public Records Act to the NCAA.

The trial court's expansive definition of a "public record" and its equally expansive and dangerously vague standard for who might be deemed a "public agency" do more than violence to the Public Records Act. This tortured reading of the Act is necessarily fraught with constitutional infirmities that threaten to disrupt and irreparably injure the NCAA's ability to enforce its rules, uniformly conduct its affairs and serve its membership. Where, as here, a statute may be easily construed to avoid an unconstitutional application, Florida courts are admonished to do so. *See Department of Legal Affairs v. Rogers*, 329 So.2d 257, 265 (Fla. 1976).

As a private, voluntary association with membership in all fifty states, the NCAA's activities have been expressly held protected under the Commerce and Clause of the United States Constitution. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993); *accord NCAA v. Roberts*, 1994 WL 750585, *1 (N.D. Fla. 1994). In

[11] It should be noted that Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for passage of a newly created public record exemption. In the case of both HB 7117 (2009) and HB 7119 (2009), there was not a single nay vote from either legislative chamber, illustrating the Florida Legislature's commitment to keeping education records confidential.

addition, the NCAA has the unquestionable First Amendment right to freely associate. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

In support of its constitutional claims, the NCAA introduced uncontroverted evidence that its enforcement process depends on the maintenance of confidential information and the application of uniform rules across its diverse membership. The NCAA's Vice President for Division I, David Berst, testified that the NCAA cannot perform its fundamental enforcement or related functions, such as determining student-athlete eligibility, without the critical component of confidentiality. Plaintiffs offered no contrary evidence and the trial court did not discredit Mr. Berst's testimony. Rather, the court appears to accept as true the notion that compelled public disclosure of the NCAA's confidential information would, in fact, "rip the heart out" of the NCAA's enforcement process. F.J. at 12.

In rejecting the NCAA's constitutional arguments, the court relied on the obvious, but actually irrelevant, proposition that the Public Records Act is a "law of general application," not targeted to "single out the NCAA for disparate treatment." F.J. at 12. This confuses the difference between a "facial" and "as applied" constitutional challenge, and is the basic flaw in the trial court's constitutional analysis. The NCAA does not contend that the statute is itself unconstitutional, or that any provision of it is facially invalid. Neither does the NCAA simply argue that it should be exempted from disclosing its documents for

"public policy" reasons. Rather, the NCAA believes that the state law would be unconstitutional "as applied" in this case and presented uncontroverted testimony in support of its position.

This is a distinction with a significant difference. As noted by the Eleventh Circuit, "[a] facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir.2000). The general rule is that for a facial challenge to a legislative enactment to succeed, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Had the NCAA sought to overturn Florida's Public Records Act on this basis, the trial court may have indeed been correct.

However, the test for whether a particular law may be unconstitutional "as applied" is less rigorous and, necessarily, turns on the facts of the case. *See Gonzales v. Carhart*, 550 U.S. 124 (2007). Where, as here, the state law itself may be valid, but is applied in a specific manner that violates a fundamental right, a court should hold the state law unconstitutional "as-applied." *Id.; see also Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S. Ct. 1610, 1623 (2008); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760-61 (1988); *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1293 (11th Cir.2004); *Weaver v. Bonner*, 309 F.3d 1312, 1318 n. 9 (11th Cir.2002).

If the trial court had reviewed this case under the appropriate standard, it could not have ignored the undisputed facts that demonstrate the Act is, under the circumstances of this case, unconstitutional *as applied* to the NCAA, for the following reasons.

E. The Trial Court's Ruling Applying the Public Records Act to the NCAA Violate Article I, Section 8, Clause 3 of the United States Constitution Because it Would Effect a Substantial Burden on Interstate Commerce.

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress is granted the power "to regulate commerce ... among the several States...." Although the Commerce Clause is phrased as an affirmative grant of power to Congress, the Supreme Court has long recognized that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). This aspect of the Commerce Clause limits state interference with interstate commerce. *See H.P. Hood & Sons, Inc. v. C. Chester Du Mond*, 336 U.S. 525, 535 (1949).

Local attempts to intrude upon NCAA violate the Commerce Clause because "[c]onsistency among members must exist if an organization of this type is to thrive, or even exist." *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993); accord, *NCAA v. Roberts*, 1994 WL 750585, *1 (N.D. Fla. 1994). Here, it is undisputed that a critical component of the NCAA rules enforcement process is its policy of confidentiality and protection of the NCAA's information and records.

The trial court failed to distinguish or even address the numerous authorities cited by the NCAA, save *Roberts*, which it rejected as limited to statutes specifically designed to discriminate against the NCAA. F.J. at 12. However, neither *Miller* nor *Roberts* require that legislation be "targeted" to a specific entity to be unconstitutional. Rather, these cases hold that state laws applied to preclude or impair the national uniformity essential to the NCAA cannot withstand constitutional scrutiny. The "uniformity" line of cases under the Commerce Clause, which first arose to review state laws interfering with interstate shipping, steamboats and railroads, do not require any showing of discriminatory intent toward any organization or industry. *See e.g. Southern Pacific Railroad Co. v. Sullivan*, 325 U.S. 761 (1945).

Here, the court's application of the Public Records Act to the NCAA violates the Commerce Clause in two ways. First, to maintain the uniformity of its rules and to avoid violating the various, different state "open records" laws, the NCAA would have to attempt to regulate its affairs in every state according to each local law. *See Miller*, 10 F.3d at 638. One state's regulation "could control the regulation of the integrity of [the NCAA's] product in interstate commerce that occurs wholly outside" the state's borders. *Id.* at 639. Second, the "extraterritorial reach" of such regulation violates the Commerce Clause because of its "potential interaction or conflict" with regulations in other jurisdictions. *Id.* The Commerce

Clause prevents localities from supplanting NCAA rules intended to ensure fair nationwide competitions, because of the "serious risk of inconsistent obligations wrought by the extraterritorial effect" of such local regulation. *Id.* at 640.

In the present case, if only NCAA members who happen to be Florida public institutions such as FSU are effectively exempt from confidentiality requirements, there can be no uniformity in enforcement. The possible compelled public disclosure, under the differing standards, legal obligations and procedures of various divergent "open records" laws in the fifty states would impose a substantial burden on the NCAA to conduct its interstate activities and associate with its member institutions. Accordingly, the application of the Public Records Act in this case is every bit as deleterious as the impairment wrought by the legislation in *Miller* and *Roberts*.

As David Berst, the NCAA Vice President for Division I, testified here, and as the Ninth Circuit found in *Miller*, this intrusion into the affairs of the NCAA "goes to the heart of the NCAA and threatens to tear that heart out." *Miller,* 10 F.3d at 640. There must be consistency among the NCAA's members if the NCAA is "to thrive, or even exist." *Id.* "[C]hanges at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad." *Id.* (citing *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945)).

The trial court's holding therefore violates the Commerce Clause because it subjects the NCAA to a lack of uniformity that threatens the NCAA's fundamental principles of fair nationwide competition. Its conclusion that the resulting harm to the NCAA is "at most, *de minimis*," is belied by facts it accepted as true. F.J. at 12. Finally, while the court's acknowledgement that the Public Records Act serves a broad public interest may be sufficient to survive facial constitutional attack, this does not mean that the Act is immune to an "as applied" challenge (especially where, as here, the Act is contorted to apply to a private, national association).

F. The Trial Court's Application of Public Records Act Violates The NCAA's Right to Freely Associate under the First Amendment.

The court's application of the Public Records Act in this case also violates the NCAA's First Amendment right to freely associate among its membership, by directly intruding upon the affairs of a private association and burdening how it may gather, maintain and treat its confidential, propriety information that is necessary to regulate its athletic competitions

The Supreme Court has held that private associations, such as the NCAA, have a "First Amendment[] expressive associational right" protecting them from "[g]overnment actions that may unconstitutionally burden this freedom." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). A court's forced alteration of a group's rules infringes the freedom of expressive association if the alteration

impacts in a significant way the group's ability to advocate public or private viewpoints. *Id.*

The Supreme Court employs a three-step analysis to determine if the forced alteration of an association's decision violates that association's expressive freedom. *See Dale*, 530 U.S. at 648-50. First, the Court considers whether the private association engages in "expressive association." *Id.* at 648. Second, the Court determines whether alteration of the group's standards "would significantly affect" the group's ability to "advocate public or private viewpoints." *Id.* at 650. Third, the Court weighs whether the freedom should be overridden "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." *Id.* at 648 (internal citations omitted).

In the present case, the NCAA clearly engages in expressive association. "[O]ne of NCAA's primary objectives is to promote fair competition among its member institutions by maintaining uniform standards of scholarship, sportsmanship and amateurism." *Karmanos v. Baker*, 816 F.2d 258, 259 (6th Cir. 1987); *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1063 (N.D. Ga. 2000). The membership's purpose therefore falls well within the "fairly wide net" of expressive activity. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3rd Cir. 2000). Forcing the NCAA to modify confidentiality rules

approved by member institutions "would significantly affect" the NCAA's ability to carry out its central expressive mission. Courts "must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. "[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 651. Yet, by seeking to compel the disclosure of information that NCAA members have agreed to regard as confidential, that is what precisely what the trial court has ordered.

Finally, judicial oversight of the NCAA's enforcement and information access rules does not "serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedom." *Id.* at 640-41. Compelling interests sufficient to override associational freedom include such things as combating discrimination against a protected class. *See, e.g., Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547 (1987) (forced admission of women); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (same). There is no similar compelling state interest here.

To the contrary, merely because FSU is a public university is insufficient to establish any overriding state interest. Media curiosity alone is not a legitimate state concern to override the substantial interests of all the NCAA members, public

and private, in having an effective means for information gathering and fair rules enforcement. Nor is there any interest alleged here sufficient to warrant state compelled intrusion into the confidential, sensitive information regarding the affairs of the employees and representatives of NCAA member institutions, or hundreds of thousands of student-athletes and prospective student-athletes. Under *Dale*, the trial court cannot justify its fundamental intrusion on the NCAA's constitutionally protected freedom of association.

G. The NCAA Faces Prospective Constitutional Injury from the Application of the Act as Ordered by the Trial Court.

This Court cannot ignore the NCAA's evidence of injury resulting from the application of the Act, which was clear, undisputed by Plaintiffs and, it appears, even accepted by the trial court. That evidence showed that the continuing uniform viability of the NCAA's enforcement procedure depends upon the maintenance of confidential communications between the coaches, student-athletes, employees, supporters and administrators of the member institutions and the NCAA. Similarly, the NCAA's athletic eligibility and related reinstatement process rely on the collection and maintenance of confidential, sensitive information regarding the hundreds of thousands of student-athletes and prospective student-athletes who enroll at NCAA member schools each year.

In the case of rules enforcement, if such previously protected information is made public, persons and organizations having pertinent knowledge have little

incentive (and much disincentive) to come forward. Many of these sources (a) have requested and have been promised anonymity, and (b) could be adversely affected if their participation was disclosed. Without an expectation of confidentiality, individuals are afraid to come forward with relevant information because they fear retaliation, accusations of disloyalty, media scrutiny, litigation and other adverse consequences. Tr. 106-108, 111.

For all of these reasons, the NCAA and its members will be irrevocably damaged by the application of the Florida Public Records Act to NCAA files. The NCAA faces future, unlimited records requests, however frivolous, from any Florida citizen curious about internal NCAA governance matters relating to its Florida public university or college members. As great as the general public's passion about collegiate sports may be, this does not and should not make "public" the affairs of the NCAA.

Accordingly, should the trial court's ruling stand, the NCAA is faced with either restructuring its entire system of enforcement and governance, or attempting to comply with an interpretation of the Public Records Act which does not even allow it to determine when its information might be deemed a "public record" under the nebulous definitions adopted by the court. In every case, as here, if the NCAA provides *any* confidential information to a public member, it has no means

of knowing what specific portions might be viewed or later found to "relate to" a public matter.

The prospective injury to the NCAA presented by the trial court's application of the Act includes, but may likely not be limited to, the following:

a. Application of the Act would require the NCAA to treat its records regarding private schools differently from its records regarding public schools, thereby creating an unfair and double standard;

b. Application of the Act would interfere with an ongoing case involving FSU, which is not yet exhausted;

c. The NCAA enforcement process is designed to protect entities or individuals accused of rule violations until those allegations are proven. Release of enforcement files, prior to final conclusion of a matter, which includes appeals, would result in the premature publishing of information;

d. Application of the Act would limit who a private association could associate with (e.g., the association might not include public members if all documents regarding those members would be considered public);

e. Application of the Act could require the NCAA to deny schools (at least public ones in Florida) the opportunity to review NCAA documents used at COI or IAC hearings;

f. Application of the Act would have a chilling effect on NCAA investigations and documentation of its investigations, including a chilling effect on prospective witnesses;

h. Application of the Act would lead to disclosure of sensitive documents belonging to the NCAA with personal information, etc. Even prophylactic measures such as redaction would be ineffective to keep the media or the public from "connecting the dots" and determining who is involved;[12]

i. Application of the Act would create one rule for Florida and another rule for every other state.

While the trial court (erroneously) found these harms to be "*de minimis*," F.J. at 12, it did not deny them. Instead, it dismissed them as mere "public policy" considerations which do not fall within any statutory exemption to the Public Records Act. *Id.* at 13. The NCAA did not, however, argue for any such exemption and the trial court's disregard of the substantial injury to the NCAA is the result of its failure to distinguish between policy arguments and federal constitutional rights. This is evident in the court's apparent opining that the United States Constitution is subordinate to the Public Records Act. Tr. 174-175 ("I do

[12]Further, only these Plaintiffs agreed to redaction of records that the trial court ruled do not require redaction. Future requests will not be afforded this limited protection as the trial court found that the records at issue are not exempt.

not think the U.S. Constitution exempts the NCAA from Florida's Public Records Act . . . . I just think that the plaintiffs' analysis carries the day; so I deny the constitutional arguments and define [sic] that they do not override Florida's Public Records Act.").

This finding alone illustrates how, at best, the trial court profoundly misconceived the federal constitutional rights at issue. At worst, it is a facially erroneous disregard for the Article VI, Paragraph 2 of the Constitution (the "Supremacy Clause").[13] This result could have (and should have) been avoided if the Court had followed the Florida Supreme Court's simple admonition that a statute must be construed, "if possible, in such a manner as will be conducive to its constitutionality." *Department of Legal Affairs v. Rogers*, 329 So.2d 257, 265 (Fla. 1976).

CONCLUSION

This is not simply a case about one media request to obtain limited, discrete information. The trial court's ruling represents an unprecedented intrusion into the affairs of a private, national association. There should be no pretense that FSU "delegated" any public function to the NCAA either directly or by virtue of FSU's

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[13] The Supremacy Clause states that: [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

agreement to abide by the rules adopted by all NCAA member institutions. The uncontroverted record below shows otherwise. However liberally the Public Records Act might be construed, the trial court cannot rewrite the text of that statute to expand its reach far beyond that intended by the Legislature. Likewise, it should not be permitted to rewrite the NCAA's longstanding, uniform rules for the benefit of FSU.

The evidence is undisputed that these rules are necessary for the NCAA to carry out its mission and to do so fairly and uniformly with respect to every member, not to evade state public records laws. If accepted, the trial court's ruling would violate the NCAA's fundamental constitutional rights, substantially impairing is ability to function as a national, private organization. The court's expansive, impossibly vague definition of "public records" places virtually any private entity or citizen at similar risk. This result can and should be avoided by simply applying the Act as it was intended and as Florida cases have long provided.

For these reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

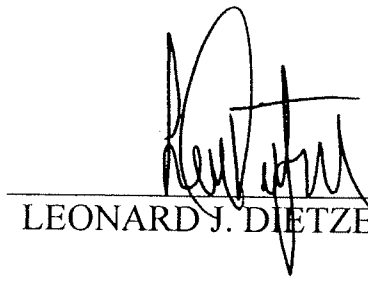
I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

LEONARD J. DIETZEN, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Electronic Mail to Gregg D. Thomas, Esquire, Carol Jean LoCicero, Esquire, Rachel E. Fugate, Esquire, Thomas, LoCicero & Bralow PL,

P.O. Box 2602, Tampa, FL 33602, George Freeman, Esquire, The New York Times Company, 620 Eighth Avenue, New York, NY 10018, Michael J. Glazer, Esquire, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302, George Gabel, Esquire, Holland & Knight LLP, 50 North Laura Street, Suite 3900, Jacksonville, FL 32202, David S. Bralow, Esquire, 220 E. 42nd Street, Suite 400, New York, NY 10012, representing Appellees The Associated Press; Cape Publications, Inc., Collier County Publishing LLC, First Amendment Foundation; Florida Press Association; Lakeland Ledger Publishing Corporation, Media General Operations, Inc., Miami Herald Media Company, Morris Publishing Group LLC, News-Journal Corporation, NYT Management Services Inc., Orlando Sentinel Communications Company, Multimedia Holdings Corporation; Scripps Howard Broadcasting Company, Scripps Treasure Coast Publishing LLC, Sun-Sentinel, Inc., Tampa Bay Television, Inc., Federated Publications, Inc. WJXX, Gannett River States Publishing Corporation; and WTSP, William E. Williams, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Betty Steffens, Florida State University, 211 Westcott Building, Tallahassee, FL 32306-1470, Representing Appellee Florida State University Board of Trustees and T.K. Wetherell and Peter Antonacci, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Representing Appellee GrayRobinson, P.A. this 14th day of September, 2009.



LEONARD J. DIETZEN, III