

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE No. SC02-1878

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NAACP, INC., THROUGH ITS FLORIDA CONFERENCE OF BRANCHES  
OF NAACP; MATTIE GARVIN, on her behalf as mother of KEITH GARVIN;  
and KEITH GARVIN,

*Petitioners,*

v.

FLORIDA BOARD OF REGENTS and the  
STATE BOARD OF EDUCATION,

*Respondents.*

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**BRIEF OF *AMICI CURIAE*  
IN SUPPORT OF  
PETITIONER NAACP, INC.**

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ON REVIEW FROM A CERTIFIED QUESTION FROM THE  
FIRST DISTRICT COURT OF APPEAL

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2. Academy of Florida Trial Lawyers, Inc.
3. Alliance of Healthcare and Professional Employees, NUHHCE, AFSCME, AFL-CIO
4. American Civil Liberties Union of Florida
5. Earthjustice
6. Farmworker Association of Florida, Inc.
7. Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees, NUHHCE, AFSCME, AFL-CIO
8. Florida AFL-CIO
9. Florida Consumer Action Network, Inc.
10. Florida Education Association
11. Florida League of Conservation Voters, Inc.
12. Florida National Organization for Women, Inc.
13. Florida Public Employees Council 79, AFSCME, AFL-CIO
14. Florida Wildlife Federation
15. Florida Women's Consortium
16. Floridians for Alternatives to the Death Penalty
17. International Brotherhood of Teamsters on Behalf of Its Florida Local Unions - 173 (Bradenton), 512 and 947 (Jacksonville), 390 and 769 (Miami), 385 (Orlando), and 79 (Tampa)
18. 1000 Friends of Florida, Inc.
19. Save Our Suwannee, Inc.
20. The Sierra Club
21. Trial Lawyers For Public Justice

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## **INTERESTS OF THE AMICI**

*Amici curiae* are twenty-one state and national associations with a combined membership of over 3.5 million Florida citizens, whose members are substantially affected by rules proposed and adopted by agencies of the State of Florida or who challenge such rules in the Florida courts. The interests of *amici's* members include the concerns of older Floridians, the civil rights and liberties of Floridians, the safety of working Floridians, the protection of Florida consumers, the environmental health of Floridians, and the humanity of Floridians convicted of capital crimes.

This case involves the associational standing of the NAACP to challenge rules promulgated by the Board of Education. *Amici* include membership organizations composed of members directly and substantially affected by state agency rulemaking under the Florida Administrative Procedure Act. The *amici* organizations have been charged by its members with representing their members' interests in monitoring the development of public policy by agencies of the State of Florida, including the promulgation of rules and bringing rule challenges under the Administrative Procedure Act.

## **STATEMENT OF THE CASE AND FACTS**

*Amici* adopt the statement of the case and facts in the NAACP's initial brief.

## SUMMARY OF ARGUMENT

In *Florida Home Builders Ass'n v. Department of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982), the Court approved associational standing in rule challenge proceedings for membership organizations which can demonstrate that a substantial number of their members are substantially affected by the rule. The Court grounded its decision on the intent of the legislature in adopting a new Administrative Procedure Act in 1977, which broadened public access to the activities of state agencies. The district court's decision restricts public access to rulemaking, contrary to the intent of the legislature and the rationale of *Florida Home Builders*.

*Amici* urge the Court to reaffirm the opportunities for public participation in the rulemaking processes of state agencies made possible by *Florida Home Builders*, by again stating that *all* associations with members substantially affected by a rule, not just professional and trade associations, may bring rule challenge proceedings on behalf of their members. The Court should reject the district court's unsupportable distinction between the impact of rules on members of trade and professional associations and those who belong to all other membership associations, and the imposition of impossible evidentiary burdens on associations which seek to represent their members in rule challenge proceedings.

## ARGUMENT

This case is before the Court on certification from a decision which denies associational standing to the NAACP for a rule challenge. *NAACP, Inc. v. Florida Bd. of Regents*, 822 So. 2d 1 (Fla. 1st DCA 2002). The narrow question presented is whether an association whose members include high school and college students has organizational standing to represent its members' interests by challenging a rule adopted by the Florida Board of Education. The answer to that question will determine the standing of all associations which have members substantially affected, but not directly "regulated" by rules promulgated by a state agency, which seek to represent their members' interests in the development of public policy through agency rulemaking.

Review of the district court's decision requires an evaluation of the intent of the Florida Legislature when it enacted a new Administrative Procedure Act in 1977 ("the APA" or "the Act"), and a determination of the scope and rationale of the Court's decision in *Florida Home Builders Ass'n v. Department of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982). Those two threshold considerations are the starting point for the Court's review of the district court's certified question.

## **XXII. The history of the APA, and the Court's construction of the Act to confer associational standing in rule challenge proceedings.**

In 1977, the Florida Legislature enacted Chapter 120, Florida Statutes, in order to modernize the state's predecessor administrative procedure act by, among other things, "broadening public access to the precedents and activities of agencies." Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, Mar. 9, 1974, at 3, *reprinted in* 3 ENGLAND & LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL 79 (1979).<sup>1</sup> One objective of the new APA was to provide due process rights in connection with the actions of state agencies, by conferring

the opportunity for adequate and full notice of agency activities, the right to present viewpoints and to challenge the view of others, [and] the right to develop a record which is capable of court review . . . .

*Id.* at 5. The new APA furthered that objective by providing in section 120.56 that the invalidity of an agency rule could be initiated by any "person substantially affected" by the rule.

*Florida Home Builders* was the Court's first decision on the issue of associational standing for a rule challenge under section 120.56. There, the Court had for review a decision of the First District holding that an association of builders had no standing to challenge a rule setting standards for apprenticeship programs in the building trades. The district court had followed its two prior decisions in rule challenge proceedings<sup>2</sup> to hold that only an individual who can show injury or immediate threat of injury from the operation of a rule would have standing to challenge it, and that an association would have no standing to act on behalf of members because the association itself was not substantially affected by the rule.

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<sup>1</sup> The Reporter's Comments have been recognized by the Court as the principal source of legislative intent of the APA. *E.g.*, *City of Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976); *Lewis v. Judges of Dist. Court of Appeal, First Dist.*, 322 So. 2d 16 (Fla. 1975).

<sup>2</sup> *Florida Dep't of Educ. v. Florida Educ. Ass'n/United, AFT-AFL-CIO*, 378 So. 2d 893 (Fla. 1st DCA 1979), and *Florida Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978).

On review, this Court turned to the intent of the legislature in enacting the 1977 APA as the touchstone for its analysis,<sup>3</sup> pointing out that “one of the major legislative purposes of the new Administrative Procedure Act” was a broadening of public access to agency activities. *Florida Home Builders*, 412 So. 2d at 352-53 & n.2. In light of that intent, the Court held that

the refusal to allow this builders’ association, or any similarly situated association, the opportunity to represent the interests of its [members before a court] . . . defeats this purpose by significantly limiting the public’s ability to contest the validity of agency rules.

412 So. 2d at 353.

The Court went on to hold that a denial of associational standing for a rule challenge results in restricted public access to the administrative processes established in the APA, and that the purpose of the Act is undermined by denying a rule challenge opportunity to the builders association in that case “or any similarly situated association.” 412 So. 2d at 353. The Court noted that individuals affected by a rule could themselves bring a challenge proceeding, but that the cost to individuals could be prohibitive and that the Division of Administrative Hearings would be needlessly taxed with multiple challenges on identical or similar allegations. *Id.*

The Court found support for its decision in decisions of the United States Supreme Court construing a counterpart provision in the federal APA (412 So. 2d at 353 n.5), and it expressly disapproved the two decisions on which the First District had relied. 412 So. 2d at 354.

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<sup>3</sup> Statutes are interpreted first and foremost from the intent of the legislature. *E.g., Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000).

**XXIII. The district court’s decision in this case is inconsistent with the APA and the Court’s construction of the Act in *Florida Home Builders*.**

In denying the NAACP standing to challenge rules enacted by the Board of Education, the two-judge majority of the district court panel gave no consideration to the intent of the legislature when it enacted the APA. Without considering the impact of the legislature’s broadening of public access, the panel majority construed the membership-only standing test of *Florida Home Builders* as being applicable only to professional and trade associations, and required a factual showing of substantial effect on members for all other forms of associations. *NAACP, Inc. v. Florida Bd. of Regents*, 822 So. 2d at 4-5.

The district court majority constructed an artificial and unprecedented distinction between associations whose members are “regulated” by the agency whose rule is being challenged, and those whose interests are substantially affected other than through direct regulation. Yet nothing in the *Florida Home Builders* decision differentiates between types of membership associations, and certainly nothing in the legislative history of the APA provides a basis to differentiate professional and trade associations from other forms of membership associations which seek to represent their members in rule challenge proceedings.

The requirement for an evidentiary showing of injury-in-fact for members of non-professional and non-trade associations as a predicate for associational standing is a throwback to the test which the Court in *Florida Home Builders* found to be an “excessively narrow construction” of associational standing under the APA. 412 So. 2d at 352. In rejecting that construction, the Court held that associational standing is available whenever “a substantial number of [association] members . . . are ‘substantially affected’ by the challenged rule” (*Id.* at 353),<sup>4</sup> and

<sup>4</sup> Other requirements for associational standing identified in *Florida Home Builders* are not in dispute here. The district court did not deny that the

did not hold (as the district court opined) that a substantial affect on members must be predicated on an evidentiary showing of a real and sufficiently immediate threat of injury from implementation of the rule being challenged. *Id.* at 352.

In limiting public access to agency processes by narrowing the Court's broad pronouncement in *Florida Home Builders*, the First District departed from several of its own post-*Florida Home Builders* decisions which had *not* distinguished between professional or trade associations on the one hand, and all others types of membership associations on the other. *E.g.*, *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000) (approving standing for environmental groups whose members were not regulated by the rule-promulgating agency); *Friends of the Everglades, Inc. v. Board of Trs. of Internal Improvement Trust Fund*, 595 So. 2d 186, 187 (Fla. 1st DCA 1992) (same); *Florida League of Cities, Inc. v. Department of Env'tl Regulation*, 603 So. 2d 1363, 1367 (Fla. 1st DCA 1992) (approving standing for an association of municipal governments); *Farmworker Rights Org. v. State Dep't of Health & Rehabilitative Servs.*, 430 So. 2d 1, 4 (Fla. 1st DCA 1983) (approving standing for farm workers not regulated by the challenged rule). A sister district court had also made no such distinction. *Sierra Club v. St. Johns River Water Mgmt.*, 816 So. 2d 687 (Fla. 5th DCA 2002).<sup>5</sup>

The district court's decision in this case narrows public access not just to an important activity of state agencies, but to the one activity that carries the broadest public effects – rulemaking. By limiting associational standing in this domain to

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subject matter of the Board of Education's rules was within the NAACP's general scope of interest and activity, or that the relief being requested was appropriate for the NAACP to seek on behalf of its members. *See NAACP, Inc. v. Florida Bd. of Regents*, 822 So. 2d at 6.

<sup>5</sup> A number of the associations participating as *amici* in this brief were parties or *amici* to several of these post-*Florida Home Builders* cases.

professionals and tradespersons and by imposing evidentiary burdens beyond the mere facial demonstration of membership, the district court has shown no concern for the cost to the millions of Florida citizens who are affected in a substantial way by the mass of rules promulgated by agencies which have no direct regulatory authority over a profession or a trade.

**XXIV. The district court's decision is inconsistent with federal precedent on which the Court relied in *Florida Home Builders*.**

A reaffirmation of broad associational standing for *all* membership associations would retain the Court's alignment of the APA on this issue with federal decisions applying the federal APA. The decisions of the United States Supreme Court, for example, do not parse standing among types of associations based on whether their members are directly regulated or not. In *Florida Home Builders*, the Court cited to *Warth v. Seldin*, 422 U.S. 490, 511 (1975), for the principle that where there is an interest and that interest is implicated, and “[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members.” 412 So. 2d at 353.

The federal courts have routinely utilized the rationale of *Warth* to accord standing to associations such as those participating in this case, without requiring proof of an injury-in-fact. For example, standing was accorded elder citizens in *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1033 (11th Cir. 1992), counselors in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), and the NAACP itself in *N.A.A.C.P., Boston Chapter v. Harris*, 607 F.2d 514, 526 n.14 (1st Cir. 1979).

In contrast, the First District's decision forces associations of this nature to satisfy an impossibly high standard of adducing proof of a substantial impact on their members. This heightened requirement for standing would seemingly require associations of older citizens to show that retirees would not be able to find quality

nursing homes in order to challenge a rule of the Department of Elderly Affairs or the Agency for Health Care Administration, require unions to quantify how many workers would likely be injured or lose health care coverage to challenge rules of the Department of Labor and Employment Security, and require environmental associations to determine with some specificity (having rejected “speculative” harm evidence<sup>6</sup>) the number of acres of wetlands and wetland dependent species to be lost as a result of a rule of the Department of Environmental Protection or the water management districts. The district court’s decision, which requires civil rights organizations to identify students who were denied access to the State’s colleges and universities in order to challenge an admission rule of the Board of Education, confirms that these are not speculative impacts of the ruling below.

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<sup>6</sup> *NAACP, Inc. v. Florida Bd. of Regents*, 822 So. 2d at 4.

**XXV. The district court's decision is inconsistent with the important public interests identified by the Court in *Florida Home Builders*.**

**A. Inconsistency with the APA.**

The district court's approach to associational standing is at odds with the APA itself, and defeats its goal of broad public access. The Court's observation in *Florida Home Builders* regarding the undue financial burden of individual rule challenges is, of course, more apt today than it was in 1982. It is increasingly expensive for individuals to vindicate rights and interests in court, including constitutional rights which have a high value to citizens but are not easily quantified economically. Civil rights, free speech, labor disputes, and threats to the environment are but a few of the areas in which individuals cannot practically assert their interests, and rely instead on their associations to act as their representatives. Indeed, in areas such as these, individual citizens typically have no access to or awareness of rules that are being proposed or have been adopted by the plethora of Florida state agencies, let alone know how to challenge rules or understand the nuances of rulemaking procedure. Only through associations can members' interests be effectively raised, which is precisely why individuals join associations in the first place.

It is increasingly true that associations have the expertise and resources needed to analyze: state agency rules, impact statements that support rules, and the statutory provisions on which agencies purport to ground their rules. It has long been recognized that

an association suing to vindicate its members' interests can draw upon a pre-existing reservoir of expertise and capital that can assist both courts and plaintiffs. In addition, the doctrine of associational standing recognizes that the primary reason people join an organization

is often to create an effective vehicle for vindicating interests that they share with others.

*International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288-90 (1986).

One of the by-products of broadened public access through the processes and rights created by the legislature in the APA is the benefit to administrative and judicial officers who are called upon to adjudicate rule challenge proceedings. The public interest favors decisions made by hearing officers and judges who have full information.

Given the structure of the APA, it would appear that the district court's decision, if upheld, would impose the same differentiating set of requirements for challenges to *proposed* rules. It is even more evident in that context that the district court's standing test for non-professional and non-trade associations is impossible to meet: it would require associations to establish the impact of a proposed rule on members *before* the rule is implemented. Representative public access is unjustifiably burdened by the district court's requirement that associations must prove what they cannot know in order to challenge rules that will substantially affect their members.

The courts have held that members only need fear that a proposed rule will directly regulate them in order for their association to have standing. The actual or threatened impact instead could fall on co-workers, other people, plants, animals, air and water. *See, e.g., Southwest Fla. Water Mgmt. Dist.*, 773 So. 2d at 597; *Friends of the Everglades*, 595 So. 2d at 188-89. Florida's courts have never required a "mangled manatee or an actual reduction in the quality of the manatee's habitat to confer standing" upon an environmental group, and they have held that even an allegation of potential emotional injury would be sufficient for an association to show its members were substantially affected. *NAACP, Inc. v.*

*Florida Bd. of Regents*, 822 So. 2d at 12-13 (Browning, J., dissenting). Unless the Court reaffirms its *Florida Home Builders* decision, associations will be forced to prove what they cannot – the impact of a proposed rule before its implementation.

In short, where an association’s members are impacted by proposed rulemaking or rules, standing should be accorded to allow the association to challenge them in court. Florida’s courts should not utilize standing requirements to determine which interests or organizations deserve protection. Instead, if the courts need to weigh competing interests, they should do so on the merits of a dispute, not by utilizing standing doctrines to restrict court access to certain types of associations.

As a practical matter, associations will recognize before most of their members when a rule or proposed rule affects the interests of their members, because the impact of rules are often not felt or appreciated until after implementation. Both effective public access and better decision-making result when the familiarity of associations with agency activities and the availability of combined financial resources are brought to bear on agency activities, proposed and promulgated through the rulemaking processes of the APA.

**B. Incompatibility with common law principles of standing.**

The district court’s decision creates a two-tier approach to associational standing, even though there is no legally cognizable distinction among membership associations that would justify imposing a heightened standing requirement on some. Neither the Court’s decisions nor those of the U.S. Supreme Court differentiate among types of associations, or impose differing burdens of proof needed to demonstrate standing for members substantially affected by rulemaking. The district court’s decision stands alone in attempting to draw such distinctions.

The district court’s decision creates the untenable legal proposition that certain ideas, interests, or viewpoints are more worthy and preferred in the judicial

system, such that groups advocating those interests deserve easier access to the courts for redress. Courts should not favor some viewpoints over others. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). Just as impermissible regulations of speech keep certain unpopular ideas or organizations out of the marketplace of ideas, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), the use of the district court's two-tier approach will keep certain associations from court although state agency policy is being developed in rules that affect their members. Neither legislatures nor courts may make such distinctions. *Id.* To carry out the legislative purpose of the APA, the Court should reaffirm its holding in *Florida Home Builders* that any association that has a "legitimate associational interest, on behalf of a substantial number of its members, in the rule's operation," has standing to initiate a rule challenge. 412 So. 2d at 354.

## CONCLUSION

The Court is respectfully requested to answer the certified question in the affirmative, and reverse the district court's APA-restricting decision.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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## APPENDIX A

- AARP is a non-profit membership organization serving more than 2.4 million members in the State of Florida that is dedicated to addressing the needs and interests of older Americans by promoting independence, dignity and purpose through information, education, advocacy, and service.
- Academy of Florida Trial Lawyers, Inc. (“AFTL”) is a statewide, not-for-profit trade association of trial lawyers who primarily represent plaintiffs in personal injury actions. AFTL has approximately 4,000 members. AFTL is dedicated to strengthening and preserving the laws that protect Florida’s families and make Florida a safer and better place to live.
- American Civil Liberties Union of Florida is a non-profit, non-partisan membership organization with more than 10,000 members and 12 local chapters in Florida working daily in the courts, legislatures and communities to defend constitutional principles such as free speech, freedom of expression, privacy, equality, and separation of church and state.
- Earthjustice, with offices in Tallahassee, Florida, is a non-profit public interest law firm, representing – without charge – hundreds of public interest clients to safeguard Florida’s public lands, national forests, parks and wilderness areas; reduce air and water pollution; prevent toxic contamination; preserve endangered species and wildlife habitat; and achieve environmental justice.
- Farmworker Association of Florida, Inc. is an organization of over 6,330 member farmworker families from predominately Mexican, Haitian, Afro-American, Guatemalan, and Salvadoran communities. Its goal is to build a strong multi-racial, economically viable organization of farmworkers in Florida and to empower farmworkers to respond to and gain control over the social, political, economic and workplace issues that affect them.
- Federation of Physicians and Dentists/Alliance of Healthcare and Professional Employees, NUHHCE, AFSCME, AFL-CIO, is a non-profit organization representing approximately 1,000 private and public-sector physicians, healthcare employees and professionals, dedicated to improving the working conditions of its members.

- Florida AFL-CIO, which represents over 500,000 Floridians, is primarily engaged in political and legislative action, mobilization, and organizing support regarding job training, safety and health programs, and community services, and actively protested the underlying One Florida policy.
- Florida Consumer Action Network, Inc., is a non-profit consumer and environmental advocacy organization comprised of more than 40,000 Floridians which participates in public-sector litigation and actively opposed the regulations underlying this case.
- Florida Education Association (sometimes referred to as FEA United) represents approximately 125,000 teachers throughout Florida and is the leading advocate for educators and education in Florida.
- Florida League of Conservation Voters, Inc. is an environmental advocacy organization which monitors legislation impacting the environment and engages in litigation and public advocacy regarding specific legislative and electoral reforms.
- Florida National Organization for Women, Inc. (“Florida NOW”) has approximately 6,000 members. Florida NOW is a multi-issue political organization with a mission to initiate change for the benefit of the greatest number of people and to affect the legal and institutional structures of the society in a way that systematically expands the choices and possibilities available to all women.
- Florida Public Employees Council 79, AFSCME, AFL-CIO is Florida’s second largest union, representing more than 110,000 employees working for the state, public universities, school boards, cities, counties, and private, non-profit hospitals.
- Florida Wildlife Federation is a private, statewide, non-profit citizen’s conservation education organization composed of approximately 40,000 members and supporters who are concerned Floridians from all walks of life who have a common interest in preserving, managing, and improving Florida’s fish, wildlife, soil, water, and plant life.
- Florida Women’s Consortium is an advocacy group comprised of organizations and individuals committed to achieving full equality and empowerment for women. The Florida Women’s Consortium consists of 35 member organizations and represents approximately 250,000 members.

- Floridians for Alternatives to the Death Penalty works for restorative justice in the form of effective alternatives to the death penalty by educating the public and legislators and advocating legislative improvements.
- The International Brotherhood of Teamsters on behalf of its Florida local unions - 173 (Bradenton), 512 and 947 (Jacksonville), 390 and 769 (Miami), 385 (Orlando), and 79 (Tampa) (“Teamsters”) collectively have over 19,000 members. The Teamsters is one of the largest labor unions in the world. It is also the most diverse union in the U.S.
- 1000 Friends of Florida, Inc. is a non-profit corporation and statewide growth management advocacy group whose mandate is to secure the reasonable implementation of laws related to land use planning and growth management and to support citizen access to administrative and judicial proceedings on growth management issues. 1000 Friends of Florida, Inc. has approximately 3,500 members.
- Save Our Suwannee, Inc., with 300 members in Florida, is dedicated to keeping the Suwannee River and its tributaries in their natural pristine state and to preserving and protecting the soil, flora, birds, animals and water (including the underground aquifer) in the Suwannee River Basin.
- The Sierra Club is a national non-profit organization of approximately 700,000 members (20,000 in the State of Florida) dedicated to exploring, enjoying and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.
- Trial Lawyers For Public Justice (“TLPJ”) is a national public interest law firm dedicated to using trial lawyers’ skills and resources to advance the public good. Through creative litigation, public education, and innovative work with the public interest community, TLPJ protects individuals and the environment; challenges governmental, corporate and individual wrongdoing; increases access to the courts; and combats threats to our justice system. TLPJ is the principal project of the TLPJ Foundation, a not-for-profit foundation and membership organization, with over 2,700 members.

