

SUPREME COURT OF FLORIDA

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Case No.: 02-1878

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NAACP, INC., through its Florida Conference of Branches of NAACP,  
MATTIE GARVIN, on her own behalf and as mother of Keith Garvin,  
and KEITH GARVIN,

Petitioners/Appellants,

vs.

FLORIDA BOARD OF REGENTS and the STATE BOARD OF EDUCATION,

Respondents/Appellees.

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On Review of The District Court of Appeal, First District

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

This jurisdictional brief addresses one of two issues raised in the Notice To Invoke Discretionary Jurisdiction (“Notice”) filed by Petitioners, NAACP, Inc., through its Florida Conference of Branches of NAACP, Mattie Garvin, on her own behalf and as mother of Keith Garvin, and Keith Garvin (“Petitioners”), on August 21, 2002. The bases for jurisdiction asserted in the Notice are direct conflict with a decision of the Florida Supreme Court on the same question of law, and passing on a question certified to be of great public importance. This brief only addresses the conflict issue, since Fla. R. App. P. 9.120(d) does not authorize the filing of a brief on matters certified by a district court of appeal.

This case originated as a rule challenge under § 120.56, Fla. Stat., to proposed amendments to existing Florida Administrative Code Rules 6C-6.001, 6C-6.002 and 6C-6.003 of the Florida Board of Regents (“Proposed Rule Amendments”). Rule 6C-6.001 establishes general standards for admission to state universities. Rule 6C-6.002 establishes admission standards for entering freshmen. Rule 6C-6.003 establishes admission standards for entering or transferring graduate students and post-baccalaureate professional students. Among other things, the Proposed Rule Amendments eliminate existing affirmative action policies within the state university system, and prohibit consideration of race, sex or national origin in future admissions

decisions. The proposals were developed as part of Governor Bush's "One Florida Initiative." *NAACP v. Florida Board of Regents*, 822 So.2d 1 (Fla. 1<sup>st</sup> DCA 2002).

The Administrative Law Judge ("ALJ") entered a Final Order on July 12, 2000, upholding the validity of the Proposed Rule Amendments. Petitioners appealed that decision to the First District Court of Appeal, and Respondents cross-appealed the ALJ's finding that Petitioners had standing to pursue their rule challenge. On February 26, 2002, the First District, in a 2-1 decision, held that Petitioners lacked standing to pursue their rule challenge, and ordered that the matter be remanded with directions that the ALJ enter an order dismissing the rule challenge for lack of standing. *Id.* at \*6.

In dissent, Judge Browning stated, "If I had a concurring vote, . . . I would certify the following question as one of great public importance: DO APPELLANTS HAVE STANDING TO ATTACK THE VALIDITY OF THE PROPOSED RULES UNDER *Florida Home Builders, Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982)." *Id.* at \*12.

On March 13, 2002, Petitioners filed a Motion for Rehearing, for Rehearing En Banc and Alternatively for Certification of Questions of Great Public Importance. On July 26, 2002, the First District Court entered an order granting certification and otherwise denying the motion. The court certified the question as follows:

DO APPELLANTS/CROSS-APPELLEES HEREIN  
HAVE STANDING TO MAINTAIN CHALLENGES TO  
THE SUBJECT RULES?

*Id.* at 12. This Notice followed.

SUMMARY OF ARGUMENT

The majority's decision in the instant case is in direct conflict with this Court's decision in *Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982), in which the Court held that a trade association had standing under Chapter 120, Florida Statutes, to challenge the validity of an agency rule on behalf of its members when the association fairly represented members who had been substantially affected by a proposed rule. In reaching its decision, this Court did not distinguish between trade associations and non-profit advocacy associations such as the NAACP. In fact, this Court relied on federal precedent that included both types of associations. In the instant case, the majority created a new presumption of standing applicable only to trade and professional associations, and specifically excluded advocacy associations such as the NAACP. This presumption misinterprets and misapplies this Court's decision in *Florida Home Builders*, thereby creating the conflict warranting invocation of this Court's discretionary jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

## ARGUMENT

As contemplated by Fla. R. App. P. 9.030(a)(2)(A)(iv), there is a direct conflict between the majority's decision in the instant case and this Court's decision in *Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982). *See Wilson v. State of Florida*, 645 So. 2d 1042, 1044, 1046 (Fla. 4<sup>th</sup> DCA 1994)(finding direct conflict based on interpretation and application by two district courts of the rule set forth by Supreme Court in *Ashley v. State of Florida*, 614 So. 2d 486 (Fla. 1993) regarding re-sentencing where defendant not advised of consequences of finding of habitualization); *see also Mikolosky v. Unemployment Appeals Comm'n*, 721 So. 2d 738, 740 (Fla. 5<sup>th</sup> DCA 1998)(noting that conflict of statutory interpretation by different courts of appeal may provide basis to reach Supreme Court under Rule 9.030(a)(2)(A)(iv)); *Brock v. State of Florida*, 667 So. 2d 1014, 1015-16 (Fla. 1<sup>st</sup> DCA 1996)(finding direct conflict under Rule 9.030(a)(2)(A)(iv) with respect to issue of whether statute gave defendant constructive notice of probation condition).

In *Florida Home Builders*, this Court held that a trade association has standing under § 120.56(1), Fla. Stat., to challenge the validity of an agency rule on behalf of its members when the association fairly represents members who have been substantially affected by a proposed rule. In so holding, this Court rejected the

Department's argument that the Court should adopt the "special injury" standing rule set forth in *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), finding that such a rule, *inter alia*, "defeats this purpose [public access] by significantly limiting the public's ability to contest the validity of agency rules." *Florida Home Builders*, 412 So. 2d at 353.

In the case at bar, the majority created a new presumption of associational standing for trade and professional associations, which specifically excluded advocacy associations such as the NAACP. The NAACP submits that the majority misinterpreted and misapplied this Court's decision in *Florida Home Builders* as limiting associational standing to trade and professional associations. This conflict was recognized by Judge Browning at the conclusion of his dissent, when he stated that if his own analysis was correct, the majority's opinion directly conflicts with this Court's decision in *Florida Home Builders*. See *NAACP*, at \*12. Specifically, Judge Browning argued that the presumption established by the majority in this case directly conflicts with the First District Court's prior ruling in *Coalition of Mental Health Professions v. Dept. of Professional Regulation*, 546 So. 2d 27 (Fla. 1<sup>st</sup> DCA 1989), in which the court held that any association whose members would be "regulated" by a proposed rule was in itself "sufficient to establish that their substantial interests will be affected and there is no need for further elaboration of how each member will be

personally affected.” *Id.* at 33. This holding was specifically predicated upon this Court’s decision in *Florida Home Builders*. *Id.* at 28.

The majority’s decision necessarily draws a distinction between professional and trade associations and advocacy associations such as the NAACP. However, Petitioners respectfully submit that there is nothing in this Court’s decision in *Florida Home Builders* upon which such a distinction can be made. Even the majority acknowledges that its decision “at least arguably, place[s] *Coalition* in conflict with *Florida Home Builders*. *NAACP*, at \* 4.

The majority’s decision is also inconsistent with this Court’s statement in *Florida Home Builders* that to adopt the “special injury” standing rule set forth in *United States Steel, supra*, would defeat the purpose of public access “by significantly limiting the public’s ability to contest the validity of agency rules.” *Florida Home Builders*, 412 So. 2d at 353.

In *Florida Home Builders*, this Court was guided by federal case law interpreting the requirements for associational standing and found that the Florida Home Builders Association had associational standing to challenge the validity of a rule promulgated by the Bureau of Apprenticeship, Department of Labor and Employment Security. *Florida Home Builders*, 412 So. 2d at 352. While it is true that the organization in question was a trade association, the precedent upon which this

Court relied in reaching its decision certainly was not limited to cases involving trade associations, but specifically included associations that were advocacy oriented: Two environmental groups (SCRAP and Sierra Club) and a welfare rights organization (Eastern Kentucky Welfare Rights Organization). This is shown by the following footnote reference in analyzing the federal precedent:

3. E.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Meek v. Pittinger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975); Sierra Club v. Morton, 405 U.S. 727, 92. S.Ct. 1361, 31 L.Ed.2d 636 (1972); National Motor Freight Traffic Ass’n. v. United States, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963).

*Id.* at 353.

Similarly, in another footnote, this Court found that “the standing requirement of [the Federal Administrative Procedure Act] is so similar to the ‘substantially affected’ requirement of section 120.56(1) that we are justified in looking to federal case law for guidance in formulating our rule regarding associational standing under section 12.056.” *Id.* at 353, fn 5. In reviewing the federal case law, this Court found that “[t]he federal courts have consistently allowed standing for this type of association to represent the interests of its members in appropriate circumstances.” *Id.* at 353 (citing *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343

(1975)). Even though trade associations were involved in *Warth v. Seldin*, a case upon which this Court relied extensively in *Florida Home Builders*, *Warth* in turn found its own precedent in a case involving the very advocacy association that is before this Court today. In finding that “in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members’ associational ties,” *Warth v. Seldin*, 422 U.S. at 511, the U.S Supreme Court cited to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)<sup>1</sup>. See also, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)(in decision under Federal Administrative Procedures Act (FAPA) Supreme Court found that appellees/environmental groups had standing to seek injunctive relief to restrain enforcement of Interstate Commerce Commission orders allowing railroads to collect surcharge where groups’ allegations in complaint demonstrated that they were

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In *NAACP v. Alabama*, the U.S. Supreme Court found that the NAACP had standing to assert the rights of its members to be protected from compelled disclosure of their affiliation with the NAACP because “[t]o require that [the right to withhold affiliation with NAACP] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. [The NAACP] is the appropriate party to assert these rights because it and its members are in every practical sense identical. The [NAACP] ... is the medium through which its individual members seek to make more effective the expression of their own views.” *NAACP*, 357 U.S. at 459-60.

“adversely affected” or “aggrieved” as contemplated by § 702 of the FAPA which gave persons so affected the right to judicial review of agency action).

Upon review of the legislative history, the purpose of chapter 120 of the Florida Statutes and a review of the federal case law, this Court found that “a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members.” *Florida Home Builders*, 412 So. 2d at 353. Contrary to the majority’s holding, given the precedent upon which this Court relied in *Florida Home Builders*, it must necessarily follow that this Court never intended its decision to lead to the creation of a presumption as to associational standing that excluded advocacy groups like the NAACP.

### CONCLUSION

In the case at bar, the majority has created a presumption based upon a legal distinction between a trade or professional association and an advocacy association which does not exist in the case law, specifically including this Court’s decision in *Florida Home Builders*. This newly created legal presumption directly conflicts with this Court’s interpretation of associational standing as set forth in *Florida Home Builders*. Based on the foregoing, the Petitioners respectfully submit that there is a direct conflict warranting invocation of this Court’s discretionary jurisdiction pursuant

to Fla. R. App. P. 9.030(a)(2)(A)(iv).<sup>2</sup>

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While not a basis for invoking this Court’s jurisdiction in the case at bar, it is important to note that if the majority’s decision is upheld, the NAACP’s federal and state constitutional rights of equal protection have been violated, since the majority has arbitrarily imposed a different standard for associational standing upon the NAACP, a voluntary non-profit civic association, than upon a trade or professional association, which results in the unconstitutional treatment of similarly situated persons. In addition, the presumption created by the majority, that an association like the NAACP, is not entitled to the same standards for associational standing as a trade or professional association, imposes a standard so different from the existing law of associational standing not in existence at the time the case was tried before the ALJ, such that the NAACP “could not fairly be deemed to have been apprised of its existence.” This violates the NAACP’s rights to due process. *Bush v. Gore*, 531 U.S. 98, 115, 121 S. Ct. 525, 535 (2000) (Rehnquist, J., concurring) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458, 78 S. Ct. 1163 (1958)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been delivered via U.S. Mail this \_\_\_ day of September, 2002 to Carol A. Licko, Esq., Thomson Muraro Razook & Hart, P.A., 1700 Suntrust International Building, One Southeast Third Avenue, Miami, FL 33131.

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CERTIFICATE OF FONT

This brief has been printed in scalable Times New Roman 14 point type.

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