

IN THE SUPREME COURT OF FLORIDA

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,

v.

CASE NO.: 02-1878

FLORIDA BOARD OF REGENTS AND  
the STATE BOARD OF EDUCATION,

Respondents/Appellees.

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INITIAL BRIEF OF PETITIONERS

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On Review of the District Court of Appeal, State of Florida, First District

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**PRELIMINARY MATTERS**

Abbreviations

The following abbreviations will be used in this Initial Brief:

ALJ ..... Administrative Law Judge  
Board ..... Florida Board of Regents  
NAACP ..... National Association for the Advancement of Colored People  
Petitioners ..... NAACP, Mattie Garvin and Keith Garvin  
Respondents ..... Florida Board of Regents and State Board of Education  
SUS ..... State University System  
First District ..... Majority opinion in the First District Court of Appeal

Citations to Record

In the Index to the Record filed in this case, specific pleadings are numbered sequentially. The Index identifies final hearing exhibits and transcripts only as Boxes/Attachments. For clarification, in this Initial Brief the pleadings will be sequentially numbered, and the exhibits and transcripts will be referenced in the same manner as did the parties in their proposed orders below and the ALJ in his Final Order. Those portions of the record that are numbered will be referred to by “R” followed by a colon and the appropriate page number ( i.e., R:#). Citations to the transcript of the final hearing are indicated by the letter “T” followed by a dash and the appropriate page number or numbers (i.e., T-#). The transcripts are in Box/Attachment 4 of the record. Citations to Petitioners’ Exhibits are indicated by the letter “P” followed by an “Ex.” and the exhibit number and page number if appropriate

(i.e., P. Ex.#, p.#). Petitioners' Exhibits are also in Box/Attachment 5 of the record. Citations to Respondents' Exhibits are indicated by the letter "R" followed by an "Ex." and the exhibit number (i.e., R. Ex. #). Respondents' Exhibits are in Boxes/Attachments 1, 2 and 3.

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

### **Procedural history**

This case originated as a petition to determine invalidity of proposed rules under § 120.56, Fla. Stat., filed by Petitioners on February 25, 2000, with the Division of Administrative Hearings. (R:1, 343) Petitioners challenged certain portions of the Florida Board of Regents' proposed amendments to existing Florida Administrative Code Rules 6C-6.001, 6C-6.002 and 6C-6.003 ("Proposed Rule Amendments"). (R:396-408) The Proposed Rule Amendments were developed as part of Governor Bush's "One Florida Initiative." *NAACP v. Florida Board of Regents*, 822 So.2d 1, 2 (Fla. 1<sup>st</sup> DCA 2002).

The Petitioners challenged seven proposed changes to the following three rules: Rule 6C-6.001, which requires universities within the SUS to establish admission criteria; Rule 6C-6.002, which establishes admission requirements for entering freshmen; and Rule 6C-6.003, which establishes admission requirements for entering or transferring graduate students and post-baccalaureate professional students. Among other things, the Proposed Rule Amendments would eliminate existing affirmative action policies within the SUS; prohibit "preferences in the admission process"--i.e., consideration of race, sex or national origin in future admissions decisions; and establish a "Talented 20" program that guarantees admission to

students who meet certain coursework requirements and rank in the top 20% of their high school class. *Id.* at 2, 3, 8.

While Petitioners alleged rule invalidity for a variety of reasons, their central argument was that under § 240.233, Fla. Stat. (1999), the Legislature gave authority over the regulation of student admissions to individual universities within the SUS, and not to the Board except under very limited circumstances not applicable here. Therefore, the Board lacked the necessary statutory authority to adopt rules that would prohibit universities within the SUS from considering race in the admissions process, or would establish the Talented 20 program in lieu of existing university admissions programs. (R:7-8, 18)

As part of their defense, Respondents challenged Petitioners' standing to pursue the rule challenge, both through a motion to dismiss (R:30) and at trial. The ALJ denied the Board's motion to dismiss except as to the standing of the NAACP to proceed in its individual (not associational) capacity. (R:345) After trial the ALJ entered a Final Order on July 12, 2000, finding that Petitioners had standing (R:443) and upholding the validity of six of seven Proposed Rule Amendments. (R:475-476) Petitioners appealed the determination of rule validity to the First District Court of Appeal, and Respondents cross-appealed the ALJ's finding that Petitioners had standing to pursue their rule challenge, as well as the ALJ's determination as to the

invalidity of the one Proposed Rule Amendment found to be invalid.

On February 26, 2002, the First District Court of Appeal, 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 8. In dissent, Judge Browning stated, *Id.* at 13:

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).

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 District Court entered an order granting certification and otherwise denying the motion. *Id.* at 14. The court certified the question as follows:

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

On August 21, 2002, Petitioners filed a Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court. Petitioners asserted two bases for

jurisdiction, direct conflict with a decision of this Court on the same question of law, and the District Court's passing on a question certified to be of great public importance.

### **The Proposed Rule Amendments**

Petitioners challenged seven provisions in the Proposed Rule Amendments.

The specific provisions being challenged are as follows:

- Rule 6C-6.001(10)(e)6, regarding enrollment plans for college upper level limited access programs, would be repealed. It states, "Where necessary to achieve established equal access enrollment goals, up to ten percent of the students may be admitted to a limited access program with different criteria." (R:400) This was the one rule determined by the ALJ to be invalid. (R:475)
- Rule 6C-6.002(3)(c), establishing alternative admissions criteria for entering freshmen who do not meet specified academic criteria, would be modified to create criteria based on a "student profile assessment," with the following caveat: "These additional factors shall not include preferences in the admissions process for applicants on the basis of race." (R:404)
- Rule 6C-6.002(3)(c) would add the following: "The number of first time in college students admitted through profile assessment at each university is determined by the Board; the system is limited each year to ten percent of the

total system first-time-in college students.” (R:404)

- A new Rule 6C-6.002(5) would create the following new admissions criterion:  
“A student applying for admission who is a graduate of a public Florida high school, has completed nineteen (19) required high school units as listed in Rule 6C-6.002(3)(a) and who ranks in the top 20% of his/her high school graduating class shall be admitted to a university in the SUS. The SUS will use class rank as determined by the Florida Department of Education.” (R:405)
- Existing Rule 6C-6.002(5) would be repealed. It states, “The Board reaffirms its Equal Educational Opportunity (EEO) commitments. Universities may utilize the above alternative admission methods to increase the enrollment of a diverse student body.” (R:406)
- A new Rule 6C-6.002(7) would be created to say, “Neither SUS nor individual university admissions criteria shall include preferences in the admission process for applicants on the basis of race, national origin or sex.” (R:406)
- Rule 6C-6.003(5), regarding graduate admissions policies that the Board allows individual universities to implement, would add, “Effective for Fall, 2001 admissions, these requirements shall not include preferences in the admission process for applicants on the basis of race, national origin, or sex.”  
(R:407)

## **Factual Basis for Standing**

### **Verbatim Rendition of Undisputed facts found by the ALJ**

In his evaluation of Petitioners' standing, the ALJ made findings of fact that are set forth verbatim in the following 19 paragraphs. In their Answer Brief below, at page two, Respondents stated that all of the ALJ's "findings and conclusions are well supported by substantial competent evidence." Respondents, therefore, did not object to any of the findings restated below. Rather, Respondents pointed to testimony in the record that they thought the court should also consider in order to reverse the ALJ's standing determination. The following paragraphs are identified by Final Order paragraph number and record page number.

The NAACP is chartered under laws in the State of New York. It has affiliates throughout the country. There are 39 state conferences. There is a Florida conference. The Florida conference, as other state conferences, is made up of local Adult Branches, Youth Councils, and College Chapters. (R:354, ¶34)

Within the NAACP national office is a department of education. That department has the function of development of educational policy at the state and national level through affiliated units in the NAACP. (R:354, ¶35)

NAACP, in pursuit of educational policy and in particular in relation to the desegregation of public education in elementary schools, secondary schools, undergraduate, and graduate studies in universities, is engaged in litigation. (R:453, ¶36)

The Florida Conference State Convention takes up topics concerning education related to enrollment in colleges and universities. (R:354, ¶37)

The Constitution and By-Laws for Branches of NAACP, Article I, Section 3, describes the purpose of its branches, to include:

. . . to improve the . . . educational . . . status of minority groups: to eliminate racial prejudice; to keep the public aware of the adverse effects of racial discrimination; and to take lawful action to secure, its elimination, consistent with the efforts of the National Organization and in conformity with the Articles of Incorporation of the Association, its Constitution and By-Laws and as directed by the National Board of Directors.

Article II, Section 1, establishes that "membership in the Branches shall include membership in the National Association." Under Article IV, Section 4, in that document, NAACP has a standing committee for education. Article IV, Section 5(d), refers to the education committee which shall, among other responsibilities, "(1) Seek to eliminate segregation and other discriminatory practices in public education; (2)

Study local educational conditions affecting minority groups . . ." (P. Ex. #18)  
(R:354, ¶38)

NAACP has a Constitution for Youth Councils. Under Article I, Section 2, to that constitution, Youth Councils are subordinate units of the NAACP and are expected to coordinate their activities to achieve the aims and objectives of NAACP. Article I, Section 3, within the Constitution for Youth Councils states the purpose of the Youth Councils to, among other expectations, advance educational status of Black people and other minority groups. Article II, Section 1, identifies members in Youth Councils as persons under the age of 25. Those members of the Youth Council may become members of the Youth and College Division by accepting the terms of the Constitution of the NAACP. Membership in the Youth Council constitutes membership in the NAACP. The Constitution for Youth Councils, Article V, Section 4(f), establishes a standing committee for education. That committee is charged with the responsibility to, "(1) Seek to eliminate segregation or other discriminatory practices in public education; (2) Study local educational conditions affecting minority groups . . ." (P. Ex. # 19) (R:355-356, ¶39)

NAACP has a Constitution for College Chapters. According to Article I, Section 2, the College Chapters are affiliated with NAACP and shall subscribe to the general policies and programs of NAACP. The College Chapters shall have as their

purpose, among other goals and responsibilities, the improvement of educational status in minority groups, elimination of racial prejudice and assistance to the public in becoming aware of the adverse affects of racial discrimination. In accordance with Article II, Section 1, membership in the College Chapters pertains to persons under the age of 25. Membership in the College Chapters shall include membership in the NAACP. Article IV, Section 4(e), identifies a standing committee on education within the College Chapters charged with the study of educational conditions affecting Black people and other minority groups and in particular, charged to:

- (1) Concern itself with educational practices on its own campus as well as other campuses.
- (2) Be a center for popular education on the problems of Black students in the work of the NAACP.
- (3) To work for the integration of students, faculty and non-teaching personnel; elimination of quota systems, particularly in medical, dental and engineering schools and to give attention to upgrading and granting tenure to professors.
- (4) Seek to secure unprejudiced presentation in the teaching of materials pertaining to racial and other minority groups.  
... (P. Ex. # 20).

(R:356, ¶40)

NAACP has established State Youth and College Division By-Laws. Article I, Section 3, to the By-Laws states the objectives of a State Youth and College Division

of NAACP to advance the educational status of Black people. Article II, Section 1, refers to membership partially composed of Youth Councils and College Chapters. Under Article IV (c), the By-Laws establish a standing committee on education charged to organize and study conditions affecting the education of Black people in Florida. (P. Ex. # 23) (R:357, ¶41)

NAACP sponsors the Afro-Academic, Cultural, Technological and Scientific Olympics (Act-So). Act-So was designed to stimulate, promote, and encourage high academic and artistic achievement among Afro-American high school students. NAACP Branches throughout the country conduct annual local Act-So competitions in the sciences, the humanities, the performing arts, and the individual arts. The competition is for students in grades 9-12. Winners in local competitions then compete with winners from other cities in national Act-So finals. (P. Ex. # 21) (R:357, ¶42)

Branches within NAACP work through the Back To School/Stay In School program to assist students who are "at risk" to remain enrolled in school. This program includes tutoring and mentoring. (R:357, ¶43)

The Florida Conference in relation to the Youth and College Divisions brings representatives of colleges and universities to address students about the opportunities

for attending college. Recently 13 colleges and universities sent representatives for this presentation. (R:357-358, ¶44)

NAACP prepared a membership report for its members in Florida for the period February 1, 1999 through February 29, 2000. The report reflects the number of members in Adult Branches, Youth Councils, and College Chapters. In the reporting period there were 7,205 regular adult members, and there were 2,587 regular youth members, further divided into 1,835 Youth Council members and 602 College Chapter members, all categories having membership in NAACP. (P. Ex. # 22) The number of members in Youth Councils enrolled as high school students cannot be discerned from the report; however, it is estimated to be 70 percent to 80 percent of Youth Council membership. (R:358, ¶45)

In its challenge, NAACP considers the term "preferences" to be a "negatively charged word" as used in the [Proposed Rules Amendments]. It believes that the term is used to [inflame] passions and create prejudice against the use of affirmative action programs. It alleges that in prohibiting "preferences" programs [benefitting] minorities such as scholarships, tutoring, and recruitment will be negatively affected. NAACP has its greatest concern in the Board of Regents' choice to refer to "prohibition of preferences" in the proposed amendment to Rule 6C-6.003(5), Florida Administrative Code. (R:358, ¶46)

Mattie Garvin and Keith Garvin reside in Miami, Florida. Mattie Garvin is Keith Garvin's mother. Mattie Garvin and Keith Garvin are African-American. Both are members of NAACP. Keith Garvin is a minor; he is 15 years old, a tenth grader at Miami Lakes Senior High School, in Hialeah, Florida. To this point Keith Garvin has received his education in public school. He anticipates graduating in the year 2002. (R:359, ¶47)

Keith Garvin has a 2.6 grade point average (GPA). He is unfamiliar with his class rank. (R. Ex. #98 and #99) Class rank is not determined until the twelfth grade. (R:359, ¶48)

Keith Garvin plans to attend college. He has particular interest in attending Florida State University within the SUS. He has interests in computer engineering and computer programming as possible college majors. In addition to his school course work, Keith Garvin visits with a counselor to assist him in identifying his needs in the interest of attending college following graduation from high school. These sessions also involve the discussion of the Scholastic Aptitude Test (SAT), and overall study habits. Keith Garvin has taken the PSAT. His aggregate score was 1400, divided 700 in English and 700 in Math. (R:359, ¶49)

For future reference concerning hypothetical admissions possibilities for Keith Garvin, information has been taken from the SUS Fact Book 1997-98. (P. Ex. # 40)

(R. Ex. # 54) It shows that for the fall of 1997 regular admissions the average SAT score was 1150.7 and the average GPA was 3.6. In that term, the entering freshmen class at the University of Florida had an SAT score of 1242.1 and a 3.8 GPA. In that term, the Florida State University entering class had an SAT score of 1151.6 and 3.5 GPA. At the other end of the scale, the Florida Gulf Coast University entering freshmen class had an SAT score of 1047 and a 3.5 GPA. (R:359-360, ¶50)

Keith Garvin participates in other activities aside from his education. He plays high school football, is involved with Future Business Leaders of America, as well as his membership in NAACP in the Miami Dade Youth Council. His NAACP Youth Council has approximately 500 members with approximately 80 percent of that membership attending high school. (R:360, ¶51)

Mattie Garvin actively participates in the education of Keith Garvin and her other two children. She is committed to advancing the education of her children, and she intends to have her children attend college. (R:360, ¶52)

#### Additional facts in support of standing

The record supports following additional facts in this case:

The NAACP is the oldest and largest civil rights organization in the world. It was founded in 1909 by a group of citizens, black and white, who felt that there was a need to enhance the situation in which persons of color then found themselves, and

to deal with acts of discrimination against and denial of opportunities for persons of color in all facets of life in the United States. (P. Ex. #21; T-166) The Florida Conference of State Branches is an affiliate of the national association and is registered with the Secretary of State to do business in the State of Florida. (P. Ex. # 125, pp.10-11)

The NAACP has always considered education the key to overcoming the adverse effects of discrimination against African-Americans. (T-167) Due to its goal of ensuring equal access to education for its members, the NAACP has always maintained a standing committee on education. (T-167) In addition, the NAACP focuses major efforts at increasing voter empowerment, educational excellence and individual responsibility, creating an infrastructure for economic and social development and new effective ways to develop young leaders. (P. Ex. # 21)

Leon Russell testified as the NAACP's witness on standing. He is the immediate past president of the Florida Conference of Branches of the NAACP, and has had numerous other positions with the NAACP at the state and national levels, including being a member of the National Board of Directors since 1990. (T-162-166) Mr. Russell has been on the executive committee of the Florida NAACP for over 20 years, with extensive involvement in educational issues. (T-163-164) Mr. Russell's current occupation is as the Human Rights Equal Opportunity Officer for Pinellas

County government, where he is responsible for enforcing affirmative action and anti-discrimination programs and ordinances. (R:161)

Mr. Russell explained why the NAACP decided to challenge the Proposed Rule Amendments. The NAACP is concerned that the removal of language affirming universities' commitments to equal opportunity, combined with the prohibition against "preferences," would lessen universities commitment to taking actions to ensure a diverse student body. (T-191) In addition, the NAACP considers the term "preferences" to be a "negatively-charged word" that has been used "to inflame passions and create prejudice against the use of affirmative action programs." (T- 191, 194) The term is incorrectly used to imply that affirmative action constitutes the granting of a preference even though the NAACP, and Mr. Russell in his professional capacity, use the term to mean corrective action that is specifically taken to overcome the present and past effects of discrimination. (T-194) The NAACP is concerned that prohibiting " preferences" will also be used to attack programs benefitting minorities within and beyond the admissions process, such as scholarships, tutoring and recruitment. (T-194)

This is particularly a problem because the term is not defined anywhere in the rules. (T-196) Dr. Barbara Newell, former chancellor of the SUS, (T-72) who was qualified as an expert on affirmative action, (T-86) described the Board's own use of

the term “preferences” as “fuzzy,” because the breadth of its use to include support systems, financial aid and all of the other things in the admissions process would make use of the term “extremely difficult and unreasonable.” (T-106)

Mr. Russell testified that no legitimate practitioner in the field of equal opportunity or affirmative action would use the term “preferences” in an equal opportunity or affirmative action program. (T-196-197) The term creates resistance to the use of affirmative action as a tool to help an institution to achieve equal opportunity, and furthers prejudice against minorities, because it implies that one individual is literally “preferred” over another. (T-202-203) An affirmative action program can exist in educational admissions without the use of the word “preferences.” Affirmative action programs do not mandate a preference for a particular race or gender. They allow for consideration of these factors to remedy discrimination. (T-200) An even greater concern exists for prohibiting “preferences” in the admission of graduate students in proposed Rule 6C-6.003(5), since graduate students slots are even more limited and underrepresentation of minorities and women in graduate school admissions is more prevalent. (T-201,202; P. Ex. # 9, 10 & 11)

Both as representative of the NAACP and in his professional capacity, Mr. Russell testified, “[W]e know . . . when we relax all of our equal opportunity programs, when we step back from our affirmative action efforts and institutions what

we see is retrogression in terms of . . . what actually happens. We see those numbers begin to decrease.” (T-197) Mr. Russell spoke from personal experience of one example of the effect of ending an affirmative action program, in Marion County, which resulted in slippage of participation rates by minorities. The County had to create a task force to stop the slippage through the reestablishment of affirmative action programs. Mr. Russell acted as a consultant to the County to help redevelop their affirmative action program and re-establish minority participation rates. (R:199)

Other testimony of record supports the legitimacy of Mr. Russell’s concerns over the elimination of affirmative action programs and the establishment of prohibitions against “preferences.” The ALJ recognized many of these concerns through findings in his Final Order. For example, he referred to a memorandum prepared by David Colburn, Provost of the University of Florida, on the removal of race and ethnicity as considerations in admissions practices for 1999 summer “B” and fall classes, and then found that the “memorandum demonstrates a considerable reduction in minority admissions and prospective enrollment for the academic year 2000 in the scenario portrayed when removing race and ethnic considerations.” (P. Ex. # 59, R:381-382)

As the ALJ also recognized, in a partnership in 1978 with the United States Office of Civil Rights, Florida established a plan entitled “Florida’s Commitment to

Equal Access and Equal Opportunity in Public Higher Education,” with the goal of establishing diversity and using alternative means in the admission process to accomplish this. (R:365-366) A 1998 statistical analysis of the effects of this plan demonstrated “why alternative admissions were necessary,” showing substantial increase in minority admissions over an approximate 10-year period. (R:372 - 373)

At the time of the Proposed Rule Amendments, several universities within the SUS had rules to promote diversity in the student body, including affirmative action programs and the University of Florida, Florida A&M University, Florida Atlantic University, the University of Central Florida and the University of North Florida. (R:376-378) In addition, the laws school at the University of Florida and Florida State University both considered race as a factor in the admissions process. (R:379) The existence of affirmative action programs within the SUS is beyond dispute. Indeed, Governor Bush, in his “Equality and Education Plan,” acknowledged, “Currently in Florida, race and ethnic background are used as a factor in admissions decisions at three levels.” (P. Ex. # 27, B-18)

At trial Respondents touted the ten year record of the University of North Florida from 1989 to 1999 as compelling evidence that increasing minority enrollment was not hindered by policies established at UNF prohibiting consideration of race in the admissions process. The UNF experience, however, does not compare favorably

or persuasively with the experience during the same time interval of the SUS as a whole or the vast majority of the universities in the SUS. (R. Ex. # 21; T-530, 532, 533, 537 & 538) For the ten year period of Fall 1990 through Fall 1999, seven of the nine SUS universities and the SUS as a whole achieved increases in the percentage of African American enrollment that exceeded that of the UNF. The UNF saw the percentage of its African American student population increase 2.71 points. The SUS saw an increase of 6.03 points. The increase at other universities ranged from a low of 3.25 points to a high of 6.67 points. (R. Ex. # 21) The reason for the comparatively lower levels of minority enrollment at the UNF, as repeatedly acknowledged by the assistant provost for enrollment services at UNF, (T-502) was that “we did not use race for the purposes of admission.” (T-537-538)

At final hearing Respondents could not provide any evidence to demonstrate with any degree of certainty whether Talented 20 would be effective in maintaining levels of participation by minorities comparable to the conditions prior to rule promulgation. In fact, the Board and the Governor’s office have not attempted to project and cannot project how many students who do not presently enroll in the SUS will enroll as a result of the proposed rules. (T-397, 484; P. Ex. # 7, pp. 28 &29) Every projection and calculation either of total students affected or minority students affected is nothing more than a calculation of the maximum number of students who

might be entitled to admission to the SUS. (T-400, 476, 477 & 478)

All of the projections ever made about the number of students eligible for admission under Talented 20 rely upon a data base compiled by the Board and the Department of Education that collects data for all high school students graduating in 1997-1998 and SUS admissions for five college terms starting the summer of 1998 and ending Fall of 1999. The data include high school grade point averages, application to college, acceptance into college, enrollment in college, and whether the high school students had taken the required 19 hours. (T-452-456; R. Ex. # 31) The Board used the data to calculate each high school student's class rank using an unweighted grade point average. (T-480) All subsequent determinations of who and how many would be part of Talented 20 depend upon that calculation. (T-452-464) If the calculations had been made using class ranking as determined by high school districts, some weighted and some un-weighted, the outcome of the calculations would change. (T-481) Consequently, the fundamental data relied upon to justify Talented 20 is data that does not reflect the reality of class rankings in the State of Florida. Furthermore, the study only looked at one year's worth of data even though two years would have provided more validity and three years would have provided even more validity. (T-479, 480)

In reviewing the evidence, the ALJ made the following analysis:

In establishing class rank, the SUS may not use class rank determined by the Florida Department of Education on the basis that school districts employ both weighted and unweighted calculations. This is not a competent process. It not only runs contrary to Section 240.233(4)(b), renumbered by House Bill 1567, it is arbitrary and capricious in its effect. It is so, by treating students differently from one district to the next, recognizing some for more rigorous academic achievement, as the law intends, while penalizing others for the same accomplishments in allowing less qualified students to take their place in this selection. Finally, the assumption which was erroneously made, contrary to law, that those students could be admitted without required SAT or ACT scores does not invalidate the proposed rule. (Emphasis added.)

(R:468) Clearly, the ALJ was troubled by whether or not the admissions criteria for Talented 20 would work, given the problems with the inconsistencies of class rank that are a necessary part of the rule.

This is further shown by the ALJ's consideration of impacts on African American and Hispanic minorities from the "student profile assessment" admissions policy under proposed Rule 6C-6.002(3)(c). The ALJ found that the policy leads to a reduction in the absolute number of alternative admissions, where most of these alternative admissions have been traditionally minority admissions. (R:424) He also found, "The prohibition against consideration of race and national origin in settings where race and nationality have played a role in alternative admissions . . . creates a significant change in the outcome." (R:424) He concluded, "The possibility exists that minority groups might suffer further reductions in numbers of minority students

admitted pursuant to this rule as a result of competition with all applicants.” (R:424)

Respondents’ witness Mr. John Lee Winn testified that he “felt” the short and long term effects of the education component of the One Florida Initiative would be a net increase, but he could not provide any hard data to evidence this feeling. (T-384) Under the newly proposed rules, Mr. Winn was also unable to say to what extent students in D and F rated schools would qualify for the Bright Futures Scholarship; or even for those D and F rated schools that had students in state colleges, how many of them would fall into the Talented 20. (T-396-398) All of the projections involved in the Talented 20 program to which Mr. Winn referred speak of a theoretical number of students who “if” they apply will be admitted under the new rules. (T-400) Outside of state government, Mr. Winn was unable to name any organizations and groups his work group consulted, and he specifically denied any consultation with the NAACP as to the potential effects the rule changes may have. (T-400-401) In fact, the whole category of alleged improvements described will not immediately benefit students who are graduating in 2000. (T-403)

A significant rationale for the proposed rules came from the research that was conducted from other states that implemented similar policies for state university admissions. Mr. Winn testified that he relied on Texas “as having a proactive program in place that seemed to be working.” (T-417) The Texas program is a guarantee of

admission to the top 10 percent of high school graduates, not the top 20 percent as in Talented 20. (R:380) Mr. Winn’s reliance on the effectiveness of the Texas program was not based on specific data, numbers, percentages, or formal reports of how things were before and after court cases surrounding the program. (T-417) Mr. Winn testified that he relied on reported media and “stories” for his information. (T-419) Mr. Winn’s reliance was based on “unanimous” testimony regarding “the people’s perception at different levels of the impact of that program.” (T-420) There were never any formal, controlled numbers before and after the changes in Texas that verified whether the goal of diversity was achieved. (T-421) Nonetheless, Mr. Winn testified that he used his research of the Texas plan as the basis for his recommendation of the One Florida Initiative, and the Talented 20 proposed rule change. (T-421)

### **SUMMARY OF ARGUMENT**

In his Final Order the ALJ made findings of fact and conclusions of law that Petitioners had standing. In order to reverse the ALJ’s holding, the District Court had to disregard the ALJ’s findings and the evidence of record that supports his findings, contrary to the review requirements of § 120.68(7)(b), Fla. Stat., as well as his conclusions of law based upon the findings and then established case law. The District Court disregarded the facts in order to make new law in the area of

associational standing.

The District Court's new law is in direct conflict with this Court's decision in *Florida Home Builders Association v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982), in which the Court held that associations had standing under the APA to challenge the validity of an agency rule on behalf of its members when a substantial number of its members would be substantially affected by it. The District Court distinguished *Home Builders* by creating an undefined, artificial and unprecedented distinction between trade and professional associations on one hand and advocacy associations on the other, the latter of which would have to prove "how" they would be substantially affected. To have standing the District Court would require advocacy associations to identify the specific injury that would occur to their members as a result of adoption of proposed rules, whereas other associations would continue to have to prove only that their members were regulated by the proposed rules. In reaching its decision, however, this Court made no such distinction between types of associations. This Court also relied on federal precedent that involved both types of associations. The District Court's decision misinterprets and misapplies *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).

Furthermore, this Court's jurisdiction has properly been invoked under Fla. R.

App. P. 9.030(a)(2)(A)(v) as a question of great public importance. It is a matter of sound public policy, consistent with the APA's intent and purposes, that this Court not sanction an interpretation of standing that would prohibit the NAACP, the largest and oldest civil rights organization in this country, who has placed great importance throughout its history on the role of promoting equal access to education in overcoming racial discrimination, from having the legal right to challenge the validity of proposed rules specifically intended to eliminate consideration of race in the admissions policies of educational institutions within the SUS.

To deny NAACP standing would have the ironic effect of giving the NAACP second-class status as an association, because it is not a trade or professional association. As a consequence, both the NAACP and the individual petitioners would not be allowed even to be heard on the merits of their petition, because they cannot predict with precision the impact on minorities that might result from the elimination of affirmative action programs with a demonstrated past record of success. This would be true even though, as the facts here demonstrate, the proponents of the Proposed Rule Amendments cannot themselves predict what impacts the Proposed Rule Amendments will have on minority enrollment in the SUS, or whether their alternative to affirmative action, Talented 20, will work. This would be true even if Petitioners could prove on the merits that the Board lacks the necessary statutory

authority to promulgate the Proposed Rule Amendments in the first place, or that the Proposed Rule Amendments are otherwise invalid--for example, because they are vague!

Such a holding would eviscerate the ability of advocacy organizations to challenge proposed rules, since by their very nature the impact of proposed rules are often impossible to predict. This is particularly true where, as here, an existing program is proposed for elimination, to be replaced by a new program that the facts show has no proven track record and, as Petitioners contend, that the law shows is without the necessary legislative authority to be implemented.

## ARGUMENT

### I

THE DISTRICT COURT'S DENIAL OF STANDING DISREGARDS THE RECORD AND THE CONTRARY FINDINGS OF THE ALJ, AS WELL AS ESTABLISHED LEGAL PRECEDENT.

Any appellate inquiry on the issue of whether a petitioner in a rule challenge has proven standing must start with the fundamental premise that a “court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.” § 120.68(7)(b), Fla. Stat. As stated in *Department of Banking and Finance, v. Osborne Stern and Company*, 670 So. 2d 932 (Fla. 1996), “It is well-established that a factual finding by an administrative agency will not be

disturbed on appeal if it is supported by ‘substantial evidence.’”

Here the ALJ made express findings of fact, which the Board did not challenge, to support his determination that both the NAACP and the individual petitioners had standing. The Statement of the Facts in this Initial Brief recites those findings. As the result of these factual findings, the ALJ entered the following conclusions of law:

230. The rules proposed for amendment concern admissions standards for students who desire to attend a state university. . . . The proposed amendments to those admissions standards are matters which substantially affect students who would be considered for admission to SUS universities under any of the rules. As such, the students must be allowed to contest the validity of the proposed amendments under review criteria in Section 120.52(8), Florida Statutes (1999).

231. Based upon the facts a substantial number of NAACP members, although not a majority, are "substantially affected" by the proposed amendments to Rules 6C-6.001, 6C-6.002, and 6C-6.003 that have been challenged by that party. Further, the proposed rule amendments are within the NAACP's general scope of interest and activity and the relief requested is an appropriate form of relief for NAACP to receive on behalf of its membership. In particular, significant numbers of middle or high school students in the Florida Youth Councils and college students in the Florida College Chapters are substantially affected. Thus, NAACP acting as representative of its membership may pursue this challenge. See Florida Home Builders Association vs. Dept of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). The fact that NAACP student members will be regulated by the proposed amendments in their admissions to the SUS establishes that they are substantially affected persons, without the need for further factual elaboration of how each member would be

personally affected. Coalition of Mental Health Professional vs. Florida Dept of Prof. Reg., 546 So. 2d 27 (Fla. 1st DCA 1989).

232. As parent, Mattie Garvin can proceed with the rule challenge for Keith Garvin, a minor. Cortese vs. the School Board of Palm Beach County, 425 So. 2d 554 (Fla. 4th DCA 1983). Keith Garvin has standing to proceed with the rule challenge in his own right. Mattie Garvin and Keith Garvin are substantially affected by the proposed amendments to Rules 6C-6.001 and 6C-6.002. Coalition, supra.

233. NAACP standing to proceed for its members, and the standing Mattie Garvin enjoys on her own behalf and as mother of Keith Garvin and Keith Garvin (limited to Rules 6C-6.001 and 6C-6.002 for the Garvins) can be reconciled when the Coalition case is read together with All Risk Corp of Fla. vs. State, Dep't of Labor and Employment Sec., 413 So. 2d 1200 (Fla. 1st DCA 1982) and Ward vs. Board of Trustees, 651 So. 2d 1236 (Fla. 4th DCA 1995), cited by the Boards. Given that student members within the NAACP, Keith Garvin, and Mattie Garvin on his behalf, have their admission to the SUS universities regulated and controlled by the proposed amendments, any non-compliance with the rule promulgation process as described in Section 120.52(8), Florida Statutes (1999), and alleged in this case, places those persons in jeopardy of real and sufficient immediate injury in fact when applying for admission. There are also changes in the rules that arguably have an adverse impact on minorities. This exposure, as alleged in the Second Amended Petition to Determine Invalidity of the proposed rules, is within the Petitioners' zone of interest. All Risk, supra. Generally the zone of interest element of the substantial affect test may be met where the rule implementing the enabling statute encroaches upon an interest protected by the enabling statute, some other statute or the constitution, Ward, supra. Read in context, with the Coalition decision, regulation of student admissions by the proposed rule amendments is within their zone of interest for purposes of determining any encroachment on the interest by the proposed amendments, in

violation of Chapter 120, Florida Statutes; Chapter 240, Florida Statutes; Chapter 120, Florida Statutes; Chapter 240, Florida Statutes; other statutes and the constitution. (Emphasis supplied.)

(R:442-445)

A judicious reading of his findings of fact and conclusions of law confirms the observation of the ALJ, as underscored in paragraph 233 above, that he had two reasons for determining that Petitioners had standing: First, because the NAACP met the legal requirements for associational standing first articulated by this Court in *Florida Home Builders Association vs. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), and then further elucidated *Coalition of Mental Health Professional vs. Florida Dep't. of Prof. Reg.*, 546 So. 2d 27 (Fla. 1st DCA 1989); and secondly, because both the NAACP (through its student members) and the individual petitioners were “in jeopardy of real and sufficient immediate injury in fact when applying for admission.” (R:444) The first reason alone would justify reversal, as will be discussed in Point II of this Initial Brief. This Point will discuss how the District Court also committed reversible error by disregarding both the ALJ’s findings of fact and existing precedent on standing in order to create new precedent based upon a faulty promise.

The District Court necessarily substituted its own judgment on the facts for that of the ALJ when it determined that any adverse impact of the Proposed Rule

Amendments would be speculative. This substitution is illustrated in the court's statement that the NAACP "offered no evidence to suggest that any of its members will suffer 'a real and sufficiently immediate injury in fact' as a result of implementation of any of the proposed rule amendments." To illustrate its point, the court focused on Mr. Russell's statement that it "was impossible to predict what effect the amendments would have on any of the NAACP's members." 822 So. 2d at 6.

As explained later in Point I of this Initial Brief, Petitioners believe that adoption of an "uncertainty principle" by the District Court would have the effect of eviscerating well established existing rights of citizens under the APA, thereby insulating many illegal rules from legal challenge. The purpose of this discussion is to provide an explanation of why the doctrine applies bad policy to create bad law, because it is necessarily founded on bad facts--i.e., a misinterpretation of the record below and consequent disregard of the findings of the ALJ.

The District Court's central bad fact is that the impact of the Proposed Rule Amendments is too speculative to allow Petitioners standing. The ALJ, however, never made a finding to that effect, finding instead, as noted above, that Petitioners were "in jeopardy of real and sufficient immediate injury in fact when applying for admission." Contrasted with the particular statement of Mr. Russell upon which the District Court relies to find the injury speculative, the ALJ's finding must be read in the

context of the other evidence that he considered. As detailed in the Statement of Facts in this Initial Brief, the ALJ heard ample testimony from Mr. Russell to indicate why he was concerned with the elimination of a program that had proven to be successful, based upon his own personal experiences with the elimination of affirmative action as well as other experiences of the NAACP. The ALJ also heard and accepted undisputed testimony that affirmative action programs within the SUS have been successful in increasing minority enrollment over the last ten years, that a program at the University of North Florida that eliminated affirmative action ten years ago has been substantially less effective in attracting minority students than universities elsewhere within the SUS with affirmative action programs, and that (as a Board witness acknowledged) the reason for the difference was that the UNF “did not consider race as a factor in admissions.” Last but not least, the Board could not demonstrate that Talented 20 would be an effective antidote to any backsliding that may occur as the result of elimination of “preferences.” The state’s own witness, Mr. Winn, could not predict whether or not the Talented 20 program would even work beyond his having a “feeling” that it would. The ALJ was clearly troubled by the class rank criteria that is the most critical element of Talented 20. By referencing one particular comment of Mr. Russell without undertaking any effort to understand that comment in the context

of evidence or the shortcomings of Talented 20, the District Court was unwilling to apply the same sauce to the gander (i.e., the Board) as it did to the goose.

Throughout this proceeding, starting with the filing of its motion to dismiss, (R. Ex. # 30) Respondents have argued that the nature of the injury to the NAACP and individual petitioners was too speculative to assess. The ALJ never accepted that argument. Whether or not it was clearly stated, the ALJ's Final Order certainly constitutes a rejection of the Respondents' factual and legal argument regarding the overly speculative nature of the injury. By relying solely on a witness' statement that truthfully acknowledges that prediction of future events is a speculative exercise, while disregarding all of the contrary evidence, the District Court was able to bypass the determination of standing by the ALJ in a manner entirely inconsistent with the findings of fact on standing and the supporting evidence.

With regard to Petitioner Keith Garvin, the District Court's disregard of the ALJ's findings of fact is particularly egregious. The court found, "[T]he evidence indicates that, at his current rate of academic progress, Keith will be eligible for admission regardless of the impact that any of the challenged amendments might have." 822 So. 2d at 7. This "evidence" is contrary both to what the ALJ found and the actual language of the Proposed Rule Amendments. As previously noted, the ALJ made the undisputed factual finding that Mr. Garvin has a 2.6 grade point average.

(R:359) Proposed Rule 6C-6.002(3)(a) provides for minimum admission criteria of at least a 3.0 average. Therefore, contrary to the District Court view of the evidence, it is undisputed that under the Proposed Rule Amendments Mr. Garvin would not meet this minimum criteria under the grade point average requirement unless he improves his average significantly.

With regard to Mr. Garvin's class rank, the District Court's determination also misses the mark. Proposed Rule 6C-6.002(5) provides admission for students in the top 20 percent of their class. (R:402, 405) Mr. Garvin's class rank is unknown because his class rank will not be determined until the twelfth grade. Therefore, the District Court should not be able to blandly state that Mr. Garvin will be eligible based upon class rank when the undisputed facts are that such information is unavailable. Furthermore, as previously noted, the ALJ was very troubled by whether or not the class rank approach even works. He also observed that the NAACP's expert witness "correctly criticizes" the admissions policy in the proposed rule relating to using class rank--the very essence of Talented 20--as not being an accurate gauge of measuring talent because of "unevenness, unreasonableness and unfairness" in how the ranking system is applied from school to school. (R:437)

Even assuming Mr. Garvin would be eligible under Talented 20, he would still have no assurance as to which university in the SUS he would be granted admission.

(T-634, 635) It is hard to believe that a student who wants to attend a particular university would not have standing to challenge a proposed rule that limits university choice.

Since the District Court did not find standing as to Mr. Garvin, the court did not even address Mattie Garvin's standing, which must now be reconsidered based upon the incorrect standard applied to Mr. Garvin. The ALJ concluded that Ms. Garvin had standing as a parent of a minor. (R:344) Unless this Court disagrees with the ALJ's reliance on *Cortese v. School Board of Palm Beach County*, 425 So. 2d 554 (Fla. 4<sup>th</sup> DCA 1983), for his conclusion, the ALJ's conclusion must stand.

Even setting aside the District Court's reinterpretation of the evidence, however, Petitioners would still have standing as a matter of law under precedent established prior to the instant case. Simply put, uncertainty of outcome is not a legal basis for a denial of standing. Proposed rules by their very nature have some degree of uncertainty, because they are in fact "proposed." Courts have previously rejected this "uncertainty principle" as a basis for rejecting standing in rule challenges, holding instead that "uncertainty" in the application of proposed rules does not render their impact speculative so as to defeat associational standing. *See, e.g., Federation of Mobile Home Owners of Florida, Inc., v. Florida Manufactured Housing Association, Inc.*, 683 So. 2d 586, 592 (Fla. 1<sup>st</sup> DCA 1996) (Mobile home park owners

association could challenge rule repealing existing rules because “uncertainty engendered by the resulting non-rule policy substantially affects the interests of mobile home park owners such that they have standing”); *Board of Dentistry v. Florida Hygienist Association*, 612 So. 2d 646, 652 (Fla. 1<sup>st</sup> DCA 1993) (If the existence of speculation as to the true nature of the impact of the proposed rules must result in a denial of standing, this “would result in the anomalous result that virtually no one would have such standing”). *See also, Televisual Communications, Inc., v. Florida Dep't. of Labor & Employ. Sec.*, 667 So. 2d 372 (Fla. 1<sup>st</sup> DCA 1995); *Florida Dep't. of Prof. Reg. v. Sherman College of Straight Chiropractic*, 682 So. 2d 559 (Fla. 1<sup>st</sup> DCA 1995). Furthermore, implicit in the District Court’s opinion is a requirement that a petitioner must be able to show an ability to prevail on the merits to establish standing to proceed thereon in the first place. Such a requirement has previously been rejected. *See, e.g., State, Bd. of Optometry v. Fla. Soc. of Ophthalmology*, 538 So. 2d 878, 881 (Fla. 1<sup>st</sup> DCA 1988).

The District Court’s establishment of an “uncertainty” principle is particularly inappropriate given that courts have recognized that standing in rule validity challenges is premised on a much broader range of participation than standing in licensing or other § 120.57 proceedings. This is true whether an association or an individual is the petitioner. *See, e.g. Society of Ophthalmology v. Board of Optometry*, 532 So.2d

1279, 1287-1288 (1<sup>st</sup> DCA 1988) (observing that standing in a § 120.57 proceeding “is predicated on a somewhat different basis than standing in a rule challenge proceeding”); *Board of Dentistry v. Florida Hygienist Association, Inc.*, 612 So.2d 646, 651 (1<sup>st</sup> DCA 1993) (noting that in a rule challenge proceeding, in which the illegality of the agency’s rule is in issue, standing is broader than an adjudicative claim of encroachment upon competitive economic interests under 120.57); *Cole Vision Corp. v. Board of Optometry*, 688 So.2d 404, 407 (1<sup>st</sup> DCA 1997) (“[T]his court has recognized that a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the ‘substantial interest’ standard of a licensure proceeding.”)

## II

THE DECISION OF THE DISTRICT COURT ON ASSOCIATIONAL STANDING CONSTITUTES DIRECT CONFLICT WITH *FLORIDA HOME BUILDERS ASSOCIATION V. DEPARTMENT OF LABOR & EMPLOYMENT SECURITY*, 412 So. 2d 351 (Fla. 1982)

There is a direct conflict between the District Court’s decision in the instant case and this Court’s decision in *Home Builders*, thereby providing a jurisdictional basis for review under Fla. R. App. P. 9.030(a)(2)(A)(iv). In his dissent, Judge Browning recognized this conflict when he stated that if his own analysis was correct, the majority’s opinion directly conflicts with this Court’s decision in *Home Builders*.

822 So.2d at 13. Judge Browning also noted 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. The *Coalition* holding was specifically predicated upon this Court’s decision in *Home Builders*. *Id.* at 28.

In *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 where (a) “a substantial number of the association’s members, but not necessarily a majority, are ‘substantially affected’ by the rule challenge,” (b) the subject matter of a rule is “within the association’s general scope of interest and activity” and (c) the requested relief is “of the type appropriate for a trade association to receive on behalf of its members.” 412 So. 2d at 353-354. In so holding, this Court rejected the agency’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). That rule stated that a plaintiff “‘must allege that his injury would be

different in degree and kind from that suffered by the community at large.’” *Id.* at 12. The Court in *Home Builders* found that such a rule, among other things, “defeats this purpose [public access] by significantly limiting the public’s ability to contest the validity of agency rules.” *Home Builders*, 412 So. 2d at 353.

While *Home Builders* clearly intended to put the final nail in the coffin of the “special injury” rule as it applies to rule challenges, the District Court managed to bring the concept back from the grave. That court claimed that “the amendments have not been shown to have an impact on NAACP’s members [e.g., black high school and college students concerned about the elimination of existing SUS affirmative action programs] that is different from the impact they will have on all citizens.” 822 So.2d at 5. As Judge Browning correctly notes in dissent, the case upon which the court relied in resuscitating the special injury requirement, *State Board of Optometry v. Florida Society of Ophthalmology*, 538 So.2d 878 (1<sup>st</sup> DCA 1988), is totally off the mark. In that case the professionals were not contesting rules affecting their rights, but rules giving new rights to others. The issue was not whether the injury was “special,” but whether the rule substantially affected the professionals in the first place--i.e., was any of their business. In contrast, in this case “African-American students lose their right to a privileged status under existing affirmative action programs. I believe it is reasonable to assume that had the professionals in *Board of Optometry* faced a rule

that reduced the range of medication they could prescribe, a different result would be reached.” 822 So.2d at 12.

The District Court disregarded its own precedent in *Coalition* by drawing an unprecedented, never defined distinction between professional and trade associations on the one hand and associations such as the NAACP (which for the purposes of this Initial Brief will be called an “advocacy association”) on the other. The court said that it was not sufficient for “associations other than trade or professional associations” (whoever they may be) to show that they are “substantially affected” by the proposed rules. Such associations must instead “specify *how*” any members would be substantially affected. *Id.* at 4. (Emphasis in original.) Because the ALJ did not “provide further elaboration of how each member would be personally affected,” opined the court, the ALJ’s ruling on standing must be set aside. *Id.* In other words, it is sufficient for trade or professional associations to show simply that they are regulated by a proposed rule, but advocacy organizations must specifically be able to prove what the consequence of the regulation will be.

At first blush, at least as applied to the facts in this case, it appears that the “*how*” distinction is an artificial one. As explained in Point I, Petitioners will be substantially affected by the Proposed Rule Amendments by losing the opportunity to benefit from existing affirmative action programs that have proven to be effective.

These minority students instead are left to wonder whether the Talented 20 replacement will work--an answer that the creators of the program cannot themselves answer. The court's "how" explanation, therefore, must be read in light of the fact that the court disregarded the ALJ's findings and instead pounced exclusively upon a statement of Mr. Russell that he could not predict the outcome either. What the court is saying, therefore, is that if the consequence to an advocacy (as opposed to a trade or professional) association of a proposed rule is unknown--for example, because, as here, neither challenger nor rule drafter can predict future success or failure--then the advocacy organization is out of luck.

Since *Home Builders* itself says nothing about distinguishing between types of associations, the District Court had to uncover the distinction indirectly, by noting that *Home Builders* involved a trade association and then asserting that failure to make such a distinction "would at least arguably, place *Coalition* in conflict with Florida Home Builders." 822 So.2d at 5. In other words, the implication that the holding in *Home Builders* only applies to trade associations was imputed by the court to create a similar implication in *Coalition* as to professional associations, with both associations thereby distinguished from advocacy associations, even though none of the language in either case supports these implications.

In reality, the court's imputing a double implication should not stand because it contradicts both the First District Court case law supporting *Coalition* and the precedent upon which this Court relied in *Home Builders*. While *Home Builders* did involve a trade association, subsequent First District Court opinions have consistently, until this case, applied the holding to advocacy organizations without distinguishing them from trade or professional associations. See, e.g., *Farmworker Rights Organization, Inc., v. Department of Health and Rehabilitative Services*, 430 So. 2d 1 (1st DCA 1983) (nonprofit organization with the purpose of improving the health and economic well being of farmworkers had standing to challenge HRS CON rules); *Friends of the Everglades, Inc. v. Board of Trustees of Intern. Imp. Trust Fund*, 595 So. 2d 186 (1st DCA 1992) (nonprofit environmental organization whose members live near and use land for recreation and educational purposes had standing to challenge rules regarding the land's uses under the Conservation and Recreation Lands statute); *Southwest Florida Water Management District v. Save the Manatee Club*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000) (standing established based upon environmental association's fear of rule's adverse affect on manatees and their habitat).

With regard to the precedent upon which *Home Builders* relied, this Court was guided by federal case law that made no distinction between types of associations, and the Court made no such distinction itself. While it is true that *Home Builders* involved

a trade association, the federal precedent upon which this Court relied in reaching its decision specifically included associations that were advocacy oriented, such as environmental groups and a welfare rights organization, and included other precedent that leads right back to the NAACP. Two footnotes illustrate this point. Footnote three states as follows:

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, fn. 3. What the footnote shows is not that this Court was making a distinction between types of associations, but that it was lumping them together. In the other footnote, this Court makes the point that “the standing requirement of [the Federal Administrative Procedures 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 guidance, 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 *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, Supreme Court found that environmental groups had standing to seek injunctive relief to restrain enforcement of Interstate Commerce Commission orders allowing railroads

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<sup>1</sup> 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.

to collect surcharge where groups' allegations in complaint demonstrated that they were "adversely affected" or "aggrieved" as contemplated by § 702 of the Act, which gave persons so affected the right to judicial review of agency action).<sup>2</sup>

### III

THE FLORIDA APA MUST NOT BE INTERPRETED TO PROHIBIT THE NAACP FROM BEING ABLE TO CHALLENGE PROPOSED RULES TO ELIMINATE THE CONSIDERATION OF RACE IN THE UNIVERSITY ADMISSIONS PROCESS.

This case is clearly one of great public importance, and therefore appropriate for this Court to consider under its jurisdiction as set forth in Fla. R. App. P. 9.030(a)(2)(A)(v). An appellate court in this state has said for the first time that the NAACP, the nation's oldest and largest civil rights organization, an organization that places a major focus of its efforts on the importance of equal opportunity in education as a means of advancing its social causes, does not have standing to challenge proposed rules that address issues that are fundamental to the very existence and purpose of the NAACP--the role that race should play in the

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<sup>2</sup> For a more recent example of federal precedent, *see, National Coalition for Students With Disabilities and Legal Defense Fund v. Bush*, 170 F. Supp. 2d 1205 (N.D. Fla. 2001), in which the District Court found that the National Coalition for Students with Disabilities, a non-profit corporation whose mission was "improving the educational opportunities and enforcing the legal rights of students with disabilities," had standing to sue on behalf of its disabled student members for violation of the National Voters Registration Act. *Id.* at 1210.

admissions policy of educational institutions. This is a type of decision that could send jurisprudence in this state back to where the law was in 1958 prior to *NAACP v. Alabama*. While the District Court did not state that there is no way the NAACP would ever have standing, the reality of the decision is precisely that statement, since the opinion clearly indicates that standing cannot be demonstrated until the NAACP can show “*how*” the implemented rule has caused harm—i.e., what will be the actual impact of the proposed rule once implemented, however ambiguous or unpredictable it may be. In the meantime, the “*how*” requirement for non-advocacy associations would remain in its current form--i.e., by their being able to show “*how*” by showing that they are regulated by the proposed rule, not that they can predict what will happen if it is implemented.

In so doing, the District Court has placed the whole concept of standing to challenge proposed rules on its head, by creating a separate and unequal class of rule challenge petitioners--members of associations bound together primarily by civil rights or other public interest considerations, not merely by a desire to advance trade or professional interests. The court made this distinction notwithstanding existing case law holding that economic impacts are not a prerequisite for standing. *See, e.g., Reiff v. Northeast Florida State Hospital*, 710 So. 2d 1030, 1032 (1st DCA 1998) (citing *Coalition* as an example of the proposition that “a showing of an adverse affect on

an economic benefit has never been considered a litmus test by which standing is determined”); *Save the Manatee, supra*.

Under the District Court’s “*how*” rule, many opportunities for rule challenges available to other associations would not be available to advocacy ones. For example, an advocacy petitioner could not just prove that it is regulated by a proposed rule, and then challenge its validity under §120.52(8), Fla. Stat., because the agency has not materially followed applicable rulemaking procedures; has exceeded its grant of rulemaking authority; has proposed a rule that enlarges, modifies or contravenes the specific provisions of law implemented is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; is arbitrary or capricious; and so forth. The advocacy petitioner would have to show the District Court’s version of “*how*” the particular illegal conduct would specifically injure petitioner. Otherwise, agencies would have a “so what” defense to their illegal conduct.

The consequence of such a decision would be to create a separate classification in standing for those associations whose substantial interests are based not upon financial and professional considerations, but rather upon such apparently lesser concerns as overcoming discrimination in education, protecting manatees, or advocating for the rights of farmworkers. The inappropriateness of the creation of

such a separate class was most eloquently explained by Judge Browning in his dissent:

Regulation of a professional's rights is generally an annoyance that can be, and often is, mitigated by future legislative change. But admission to college affects a person's entire life and is the time-honored "ladder for advancement" for minority citizens. It is no accident that the greatest litigation battles of the civil rights movement were fought over education. . . . Thus, contrary to the majority, I believe the impact of the proposed rules on the NAACP's members is far more substantial and profound than the impact suffered by the professionals in *Coalition*, or other professionals in similar situations. (Citations omitted.)

822 So.2d at 11-12. As the dissent also indicates, and as also shown (for example) by *Reiff, supra*, a rule challenge petitioner's public and economic interests can often be hard to separate. The District Court's distinction between classes of associations, therefore, does not bear up under closer scrutiny.

The public policy formulated in the District Court opinion is particularly troublesome, and therefore should not be accepted as a guide to interpreting the APA, because of the decision's disturbing equal protection implications. The decision denies NAACP and like associations equal protection of the law by arbitrarily treating them differently from similarly situated persons, and by creating a new standard so different from the existing law of associational standing that NAACP could not be charged with prior knowledge of its existence.

The constitutions of the United States of America and the State of Florida require that persons similarly situated be treated equally. *See*, U.S. Const. Amend. XIV, § 2; Fla. Const. Art. 1, § 2. The majority’s decision would deny that protection. The District Court acknowledged that the “NAACP qualifies as an association for purposes of *Home Builders* though it is not a trade or professional association.” 822 So.2d at 4. The court also accepted the associational standing holding in *Coalition* “that ‘[t]he fact that appellant’s members will be regulated by the proposed rules is alone sufficient to establish that their substantial interests will be affected and there is no need for further factual elaboration of how each member will be personally affected.’” *Id.* at 5. The court then said, however, that this presumption does not apply to the NAACP because the term “regulation” as used in *Coalition* for trade associations and professions does not apply in the same way to associations such as the NAACP. *Id.*

For the purposes of equal protection analysis, this is a distinction without a difference. It is absurd to claim, for APA standing purposes, that an organization that advocates on behalf of minority students, and has them as members, is not regulated by Board rules regulating consideration of race in student admissions, whereas a professional association that advocates (for example) for SUS faculty is regulated by Board rules relating to SUS faculty hiring and firing requirements. As

Judge Browning pointed out in his dissent, “‘Regulate’ is defined in The American Heritage College Diction (3rd ed. 1993) as ‘To control or direct according to a rule.’” *Id.* at 10. Applying the plain meaning of “regulate” to the *Home Builders* and *Coalition* decisions, the conduct of the NAACP’s members is regulated by the rules. Therefore, the denial of the *Coalition* associational standing criteria to associations that advocate for members but are not trade or professional is a denial of equal protection of the law.

The NAACP’s federal and state constitutional equal protection rights are further violated by the fact that the District Court has imposed a procedure so novel to the law of associational standing that the NAACP “could not fairly be deemed to have been apprized of its existence.” *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, 78 S. Ct. 1163 (1958). As Judge Browning recognized in his dissent, the majority reached its holding notwithstanding 12 years of decisional law to the contrary. 822 So. 2d at 8. The District Court majority at least tacitly admitted that it is applying a gloss to *Coalition* that is entirely unprecedented. In any event, the end result is an application of a rule of law not in existence at the time the case was tried before the ALJ, and therefore a denial to the NAACP of equal protection of the laws.

## CONCLUSION

Because the District Court erroneously reversed the ALJ's determination in his Final Order that Petitioners have standing, the District Court opinion should be reversed, and this matter remanded to the District Court for consideration of Petitioners' appeal on the merits.

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 \_\_\_\_\_, 2002 to Carol A. Licko, Hogan & Hartson, LLP, Barclays Financial Center, 19<sup>th</sup> Floor, 1111 Brickell Ave, Ste. 1900, Miami, FL 33131.

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

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