IN THE SUPREME COURT OF FLORIDA
THE STATE OF FLORIDA

NAACP, Inc., *Et al.*
Petitioners

v.

Florida Board of Regents, *Et al*.
Respondents

CASE No.: SC02 - 1878
Lower Tribunal No.: 1D00-3138

AMENDED BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE, IN SUPPORT OF PETITIONERS/APPELLANTS

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I. STATEMENT OF THE CASE

As prescribed in Florida Governor John Ellis Bush's "One Florida Initiative," the Florida Board of Regents proposed amendments to the Florida Administrative Code to "implement a policy prohibiting the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education."[1] *NAACP v. Board of Regents,* 822 So. 2d 1, 2 (Fla. 1st DCA 2002).

Pursuant to Florida Statutes § 120.56 (1999),[2] the Florida Conference of Branches of the National Association for the Advancement of Colored People, Inc. (NAACP), Mattie Garvin and Keith Garvin filed a petition before the State of Florida Division of Administrative Hearings challenging the Board of Regents' amendments. The petition challenged the validity of the Board of Regents' amendments which prohibit affirmative action in education.[3]

In a final order dated July 12, 2000, the Florida Division of Administrative Hearings held that the NAACP had "associational standing" to represent [its] members as persons substantially affected by the proposed amendments." *NAACP v. Board of Regents*, 822 So. 2d at 6. The Administrative Law Judge also

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[1] The "One Florida Initiative" was implemented through Executive Order 99-281 and also resulted in amendments to the following rules: Fla. Admin. Code R. 6C-6.001 (general requirements for student admissions), Fla. Admin. Code R. 6C-6.002 (admission requirements for entering freshmen), and Fla. Admin. Code R. 6C-6.003 (admission requirements for entering our transferring graduate and professional students).

[2] Fla. Stat. Ch. 120.56, provides that anyone "substantially affected" by a rule or proposed rule may challenge it in an administrative proceeding. This provision, also, sets forth the methodology for bringing such a challenge.

[3] Other significant amendments made to the rules included creating the program which guarantees state university admissions to students graduating in the top 20% of their class called the "Talented 20 Program." *NAACP v. Board of Regents* at 2-4.

found that the members of the NAACP would be regulated by the amendments in their admission to the State University System and, thus, were "substantially affected persons." *NAACP v. Board of Regents*, 822 So. 2d at 6. The ALJ ultimately ruled that all of the challenged amendments, except the repeal of rule 6C-6 (10) (e) 6, were valid. Rule 6C-6 (10)(e) 6, which permitted the satisfaction of equal access enrollment goals through a "limited access program with different criteria" for up to ten percent of students in the program, was found to be an invalid exercise of delegated legislative authority. *NAACP v. Board of Regents*, 822 So. 2d at 6.

Both the NAACP and the Florida Board of Regents appealed the ALJ determinations to the First District Court of Appeals. The First District Court of Appeals reversed and found that the NAACP, Mattie Garvin and Keith Garvin did not have standing to challenge any of the amendments. The majority found that the NAACP did not benefit from the "presumption" it found in *Coalition of Mental Health Professions v. Department of Professional Regulation*, 546 So. 2d 27, 28 (Fla. 1st DCA 1989). The majority in *NAACP v. Board of Regents* found a presumption, applicable only to trade and professional associations, that if an association's "members will be regulated by the proposed rules [this] alone [is] sufficient to establish that their substantial interests will be affected and that there is no need for further factual elaboration of how each members will be personally affected." *NAACP v. Board of Regents*, 822 So. 2d at 10, *Coalition* 546 So. 2d at 28. The First District Court of Appeals found that the NAACP members would

not be "regulated" or impacted by the amendments "unless and until they applied for admission to" a program for higher education, "and even then there is no evidence to suggest that any impact would be adverse." *NAACP v. Board of Regents*, 822 So. 2d at 11 - 12. Thus, the First District Court of Appeals found that the NAACP "failed" to present "substantial evidence to establish that any of its members would suffer 'a real and sufficiently immediate injury in fact' because of implementation of any of the rule amendments challenged." *NAACP v. Board of Regents*, 822 So. 2d at 15-16. The First District Court of Appeals did not address the merits of the NAACP challenge because it concluded that the association lacked standing. The *amici*, after highlighting the above points, adopt the detailed statement of the case and facts submitted by the petitioners/appellants, the NAACP, *et al*.

I. STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights under Law is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently include several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco and Washington, D.C.

Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of minorities and women in civil rights cases across the country.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous civil rights cases, in such areas as education, employment, and voting rights, in which it has represented associations as plaintiffs. Some of these cases have involved issues of Latino access to universities; securing such access is a key goal of MALDEF's Education Program.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Pacific Americans and other minorities in this country.

National Abortion and Reproductive Rights Action League (NARAL)

and NARAL Foundation share a mission to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. NARAL has 26 affiliates nationwide – including an affiliate in Florida -- and a current, paid membership of 145,000 Americans, with hundreds of thousands of other supporters. NARAL Foundation accomplishes its mission through education, training, organizing, legal action, and public policy. NARAL/NARAL Foundation have litigated on behalf of its membership and pro-choice Americans'' interests in Florida and in other states, and has participated as *amicus curiae* in many other cases. Restrictive standing requirements would impair the ability of NARAL/NARAL Foundation to advocate for a pro-choice America.

This case involves an examination of the standard that governs the standard for an association to have standing to represent its members under Fla. Stat. 120.56 (1) (a). The *amici* have a strong interest in the standards by which civil rights and other advocacy organizations may have standing to challenge the rules of administrative agencies that adversely affect their members. The *amici* participating in this brief believe that the First District Court of Appeals holding, including its new higher threshold for representational standing of non-trade associations, silences civil rights and other advocacy associations; diminishes their ability to effectively challenge violations of civil rights laws; and holds them to a higher standard than other organizations. The *amici* believe that the ability of people in this democratic republic to participate and be heard in the formulation of law and

policy through the Florida Administrative Procedure Act, and to associate with others who do so, is in jeopardy under the First District Court of Appeals' ruling. If that right is not vigorously protected by this Court, violations of law would go unrecognized and unredressed.

III. SUMMARY OF ARGUMENT

In *NAACP v. Board of Regents*, 822 So. 2d 1 (Fla. 1st DCA 2002), the First District Court of Appeals held that the NAACP lacked standing to challenge the validity of a proposed agency rule that would eliminate the use of affirmative action programs in State University Systems admissions. The creation of two classes of professional and trade organizations versus non-trade associations like the NAACP, with two sets of standing requirements, conflicts with precedent of this Court, the District Courts of Appeals and ignores a consistent line of relevant federal precedent. The NAACP not only satisfies the representational standing test articulated by this Court, that is consistent with federal precedent, but also the test previously followed by the Courts of Appeals.[4]

It the First District Court of Appeals' decision were to be affirmed, the

[4] The First District Court of Appeals held that the NAACP did not have standing to represent its members in its challenge of the validity of a rule that would eliminate the use of affirmative action programs in university admissions. While the First District Court of Appeals clouds the issue by referring to "associational standing ... to represent [its] members" (*NAACP v. Board of Regents*, 822 So. 2d 1, 6 (Fla. 1st DCA 2002)) on some occasions, and "associational standing" (*NAACP v. Board of Regents*, 822 So. 2d. 1, 9, 11, 14-16 (Fla. 1st DCA 2002)) on others; the cases relied upon by the Court articulate the test for representational standing. Accordingly, this brief focuses on the representational standing of the NAACP that was before the First District Court of Appeals and is presently before this Court.

access of civil rights and other advocacy organizations, like the NAACP, to challenge agency rules will in administering procedures be considerably more limited than those organizations that protect the interests of professionals, tradesmen, manatees, and the Florida everglades. It would also, as a practical matter, require civil rights and other advocacy organizations to prove an immediate injury in fact to its members before having standing to challenge administrative rules and, thus, defeat the purpose of the open administrative rule process enacted by the Florida legislature in Title X, Chapter 120 of the Florida Statutes.

The NAACP's voice should be heard by the Florida Division of Administrative Hearings on the critical issue of the use of affirmative action programs in State University System admissions. The issue here is not whether the NAACP has sufficient evidence to support the merits of its claim. Rather, the issue is whether the voice of organizations like the NAACP is to be heard and considered in administrative rule challenges. The First District Court of Appeals decision silencing this voice is inconsistent with this Court's established precedent, undermines the purpose of the Florida Administrative Procedure Act and presents equal protection concerns.

IV. THE NAACP SATISFIES THE REPRESENTATIONAL STANDING TEST OF THE FLORIDA SUPREME COURT WHICH IS CONSISTENT WITH FEDERAL STANDING

A. THE NAACP SATISFIES THE FLORIDA SUPREME COURT TEST ARTICULATED IN *HOME BUILDERS*

In *Florida Homebuilders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), this Court considered whether a trade association, which itself was not affected by an agency rule, but which some or all of its members were substantially affected by a rule, has standing to challenge the validity of the rule. In finding that the association before them had standing, this Court acknowledged the U.S. Supreme Court's finding that even associations that do not have injuries themselves "may have standing solely as the representative of its members." *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 2211 (1975).[5]

This Court then specifically approved the test articulated in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 97 S.Ct. 2434 (1977), explaining "that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Home Builders*, 412 So. 2d at 353 (citing *Washington State Apple Advertising*). Thus, the Florida Supreme Court test for

[5] In *Warth*, the U.S. Supreme Court ultimately found that the association did not have standing.

standing of associations representing its members is informed by, and is consistent with the federal test on standing.

Turning its attention to the appropriate test for standing in the administrative context this Court then outlined four requirements that an association must satisfy to have standing in the administrative process pursuant to Florida Administrative Procedure Act § 120.56. The association must show that (1) a substantial number of the association's members are impacted by the challenged rule; (2) the association's members are "substantially affected" by the challenged rule;[6] (3) the subject matter of the challenged rule must be within the association's general scope of interest and activity; and (4) the relief requested must be of the type appropriate for an association to receive on behalf of its members. *Home Builders*, 412 So. 2d at 353-354.

In adopting this test for standing in the administrative forum, this court again relied on federal precedent. Indeed, this court specifically acknowledged "[w]e believe that the standing requirement of [The Federal Administrative Procedures Act] is so similar to the 'substantially affected' requirement of § 120.56(1)(a) that we are justified in looking to federal case law for guidance in formulating our rule

[6] The majority of the First District Court of Appeals reasoned that an association demonstrates that it wil be "substantially affected" by a rule if it shows that application of the rule will result in an "injury in fact" and the interest is "arguably within the zone of interest to be protected or regulated." *NAACP v. Board of Regents*, 812 So. 2d at 7 (internal citations omitted). Obviously an association is "substantially affected" if it shows injury in fact. To the extent the First District Court of Appeals is requiring an association to show injury in fact in order to have standing, this would be directly contrary to this courts' ruling in *Home Builders* which expressly rejected the injury in fact requirement in favor of the more relaxed "substantially affected" requirement. *Home Builders*, 412 So. 2d at 354.

regarding associational standing under § 120.56." *Home Builders*, 412 So. 2d 353n.5. Accordingly, as long as an association's allegations, which if taken as true, satisfy each of these requirements, it has standing to bring an action on behalf of its members. *See Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund*, 595 So. 2d 186, 190 (Fla. 1st DCA 1992) (holding that the plaintiffs alleged sufficient facts, which if taken to be true, satisfy the "substantially affected" requirement for standing purposes).

The NAACP satisfied each of these four requirements. First, the NAACP's Florida Youth Councils have approximately 1,835 members and the approximately 602 students in the NAACP's Florida College Chapters.[7] There can be no doubt the NAACP has satisfied the numerosity requirement, which requires only that a substantial number of the association's members must or will be affected by the proposed rule. *See Home Builders*, 412 So. 2d at 353 (holding that to satisfy the numerosity requirement it is not necessary that a majority of an association's members are impacted by the challenged rule; it is sufficient as long as a substantial number of its members are impacted). Second, given the NAACP's long and proud history of commitment to education, especially its efforts to ensure meaningful and equal access to educational opportunities for all minority citizens and its historical effort to fight race discrimination in all aspects of life, there can be

[7] These numbers are from the NAACP's membership report for its Florida members for the period of February 1, 1999 through February 29, 2000. Final Order of Administrative Law Judge, par. 45 (R: 358).

no dispute that the challenged rules fall squarely within the NAACP's general scope of interest and activity. (See the detailed discussion of the NAACP work in this area in Section B of this Brief).

Third, the relief sought by the NAACP does not involve associational or individual claims for money. Rather, the NAACP simply seeks to have certain proposed agency rules declared invalid. Such relief is clearly of the type appropriate for an association to receive on behalf of its members. *See Home Builders*, at 354 (finding that the rule challenge proceeding did not involve association or individual claims for money damages and therefore satisfied this condition); *Florida League of Cities, Inc. v. Dept. of Environmental Regulation*, 603 So.2d 1363 (Fla. 1st DCA 1992) (where invalidation of the proposed rule was found to be the type of relief appropriate for an association to receive on behalf of its members); *Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services*, 417 So. 2d 753 (Fla. 1st DCA 1982) (association found to have standing for a request for formal administrative proceeding); *Federation of Mobile Home Owners of Florida, Inc. v. Dept. of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes,* 479 So. 2d 252 (Fla. 2nd DCA 1985) (where association had standing in a proceeding for declaratory statement); and *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So. 2d 587 (Fla. 2nd DCA 1992) (where an association met the standing requirements for standing in an action seeking declaratory and injunctive relief).

Accordingly, the only remaining requirement - whether its members are "substantially affected - is the one that the First District found that NAACP had not satisfied.

1. The NAACP Members Are "Substantially Affected" By The Administrative Change Eliminating Affirmative Action In Public Education

Under Florida law, it is clear that a limitation of access due to a change in regulations "substantially affects" an organization for the purpose of organizational standing. *See Friends of Everglades*, 595 So. 2d 186 (Fla. 1st DCA 1992); *City Lynn of Haven v. Bay Council of Registered Architects, Inc.*, 528 So. 2d 1244 (Fla. 1st DCA 1988) (where a nonprofit corporation composed of registered architects was allowed to challenge city bidding procedure which deprived them of the opportunity to submit their qualifications and to negotiate for construction project); *Dept. of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association*, 612 So. 2d 646 (Fla. 1st DCA 1993); *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243 (Fla. 1st DCA. 2002). *See also Macnamara v. Kissimmee River Valley Sportsmans' Association*, 648 So. 2d 155 (Fla. 2nd DCA 1994).

For example, in *Friends of Everglades*, a nonprofit environmental organization sought a formal administrative hearing challenging the decision of the agency to allow certain lands to be used by the Florida Department of Health and Rehabilitative Services (HRS) to offer alternative placements for delinquent youth

and to develop innovative programs with wilderness and environmental themes. These lands, however, had been acquired by the agency pursuant to a state program designed to acquire environmentally significant lands. FOE's members alleged that grant of the lands to the HRS would preclude use of the facility as a recreation area and could result in environmental damage.

The harm to the members of FOE was the potential of limited access to use these lands for recreational purposes. The First District Court of Appeals held that FOE had alleged facts, which if taken to be true, would be sufficient to prove that FOE's members would be substantially affected upon transfer of the lands to HRS, and, accordingly, FOE had associational standing on behalf of its members. This decision is particularly noteworthy because FOE's members did not own land near or adjacent to the subject area. Rather the harm to FOE's members was the rule's potential to limit the member's access to use the lands. Here the elimination of affirmative action is university admission significantly limits access to admissions to state universities with respect to NAACP's student members.

There can be no debate that proposed amendments to Rule 6C-6 (10)(e) 6, which, among other things, seek to eliminate the use of affirmative action programs in State University Systems admissions, substantially affect the student members of the NAACP. As the dissent explains:

> Before enactment of the proposed rules, African-American students' admission to the SUS was under affirmative action programs as members of a recognized minority who, in certain circumstances,

> would receive a "boost" not available to non-minority students. A white male student and other non-minority students were not entitled to a similar advantage. The proposed rules effect a complete change and make African-American students subject to the identical admission standards as non-minority students.

NAACP v. Board of Regents, 822 So. 2d at 32. This new limited access to state university admissions is a real and immediate harm to NAACP's members and provides sufficient grounds for the NAACP to have standing on behalf of its members. The *amici curiae* brief filed by AARP Foundation Litigation, *et al.*, discusses the "loss of privilege" to the NAACP members in further detail, and will not be repeated here.

The First District Court of Appeals majority asserts that NAACP's members have not suffered any injury as the NAACP cannot specify the adverse impact on its members of the "Talented 20" program that guarantees state university admission to public Florida high school graduates ranked in the top 20% of his/her high school[8]. This reasoning would be correct if the changes introduced by the proposed amendments were simply the introduction of the Talented 20 program However, that is not the case. The elimination of the affirmative action program "substantially affected" the NAACP members.

The proposed rules seek to make two major changes. First, is the prohibition of any consideration based on race or gender with regards to

[8] A detailed discussion of the rules proposed by the Florida Board of Regents may be found in the Initial Brief of the Petitioners/Appellants and will not be repeated here.

admissions to Florida's educational institutions. Second, is the introduction of the Talented 20 program. As discussed above, the adverse impact of the first change on NAACP's members is abundantly clear. Simply because the NAACP cannot predict the impact of the second change - the introduction of the Talented 20 program - does not mean that its members are not substantially affected by the first charge.

2. The Substantially Affected Requirement Is Also Satisfied By the *Coalition* "Presumption"

The NAACP, in the alternative, has satisfied the "substantially affected" requirement under the to *Coalition* presumption. In *Coalition*, several professional associations whose members would be subject to "three rules which propose[d] to define the practices of clinical social workers, marriage and family therapists and mental health counselors" appealed a final order denying it standing to challenge the proposed rules. The First District Court of Appeals held that the coalition had standing reasoning that:

> The 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 that there is no need for further factual elaboration of how each member will be personally affected. The Coalition was not required to allege precisely how, or even whether, the rules modified, enlarged or restricted the scope of practice by its members so long as it was made apparent that their conduct was regulated by the proposed rules.

Coalition, 546 So. 2d at 28 (internal citations omitted). The NAACP members will be regulated by the agency rules proposed by the Board of Regents to eliminate

affirmative action programs in State University System admissions.[9] Its members are substantially affected by the lack of consideration that the adverse affects of past discrimination on blacks will be given as they apply to state universities in Florida. The NAACP should not be required to show detailed evidence of how each member will be personally affected or allege precisely how or whether the proposed rule changes would restrict the scope of the ability of NAACP members to apply and/or become admitted to state universities. Like the Coalition of Mental Health Professions, it should be alone sufficient that the NAACP members are regulated by the proposed agency rule change to be granted standing.

B. THIS COURT SHOULD RECOGNIZE THE NAACP's COMMITMENT TO EDUCATIONAL EQUALITY AND HISTORY OF PROTECTING THE RIGHTS OF MINORITIES IN DECIDING IF THE NAACP HAS REPRESENTATIONAL STANDING TO CHALLENGE A RULE ELIMINATING AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

1. Through Its Standing In Federal Courts, the NAACP Has Protected the Rights of Minorities

The NAACP has been repeatedly and consistently granted federal representational standing. These cases should inform this Court as it considers the issue of whether the NAACP and similarly situated organizations should be granted

[9] Judge Browning in the dissent of the First District Court of Appeals decision, recognized the definition of the word "regulate" in the American Heritage College Dictionary (3rd ed. 1993) as "to control or direct according to a rule." Judge Browning reasoned that the "NAACP's members clearly meet this definition and proved its application by competent, substantial evidence by showing African-American students' preferential admission rights to the SUS under the repealed affirmative action programs are abolished, and they are instead treated as all other students - minority and non-minority." *NAACP v. Board of Regents*, 822 So. 2d at 26-27.

standing to challenge changes in agency rules on behalf of their members.

In 1909, the NAACP was founded by a group of citizens, both black and white, who saw the need to improve the situations of people of color through confronting acts of discrimination and denials of opportunities against them in all facets of American life. The NAACP is not a novice in this nation's battle for equality. As Judge Weinstein of the Eastern District of New York recently observed, the NAACP "is an organization that has battled with substantial success for generations to protect the civil rights and liberties as well as the economic and social freedom and opportunities of people of color in the United States - predominately African Americans - who, during most of the organization's life, has been abused and denigrated by governments and private persons." *NAACP v. American Arms, Inc.*, 2002 U.S. Dist. LEXIS 18905, 9-10 (internal citations omitted).

The NAACP's voice has been vital in the protection of minority rights. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), one of the U.S. Supreme Court's seminal cases on standing by an association to represent its members, the U.S. Supreme Court recognized this important role. In that case, the U.S. Supreme Court found that the NAACP had standing to assert the constitutional rights pertaining to its members as the association and its "members are in every practical sense identical." 357 U.S. 449, 459 (1958). *See also Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

Consistent with this seminal case, the NAACP has been repeatedly granted

representational standing; a historical fact ignored by the First District Court of Appeal. In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964), the U.S. Supreme Court unanimously rejected the efforts of the state of Alabama to oust the organization. NAACP standing was acknowledged in cases challenging racial profiling. *See Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) and *Maryland State Conferences of NAACP Branches v. Maryland Dept. of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999). NAACP standing was upheld in a challenge against an anti-loitering statute in *NAACP Anne Arundel County v. City of Annapolis*, 133 F. Supp. 2d 795 (D. Md. 2001). In *White v. Engler*, 188 F.Supp.2d 730 (E.D. Mich. 2001) the NAACP had standing to challenge a state trust fund awards of scholarships. The NAACP had standing to challenge the sales practices of gun manufacturers in *NAACP v. American Arms, Inc.*, 2002 U.S. Dist. LEXIS 18905.

In *NAACP v. Button*, 371 U.S. 415, 431 (1963), the U.S. Supreme Court recognized that litigation assisted by the NAACP "while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society." The historical importance of the NAACP's voice should not be ignored in determining whether it has standing to represent its members in the instant case.

2. NAACP's Commitment to Educational Equality

The ability of the NAACP's voice to be heard through standing is crucial in the education arena. Throughout our nation's shameful history of racial inequality, many of the most significant civil rights cases have been in the area of education. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the U.S. Supreme Court abolished the "separate but equal" doctrine which previously allowed racial segregation, stating that it had no place in education. *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (holding that school officials must show that one-race schools are not a result of past or present discrimination) and *Harrison v. NAACP*, 360 U.S. 167 (1959) (although the case was remanded to the district courts with instructions, the U.S. Supreme Court did not question the standing of the NAACP to challenge Virginia statues it deemed part of the state's plan of resistance to school integration).

Throughout this struggle for educational equality, the NAACP played and continues to play a critical role in ensuring that black students have the opportunity to meaningfully participate in education. Educational excellence is one of the NAACP's major efforts and is considered the key to overcoming adverse effects of discrimination against blacks. A detailed discussion on the history of the NAACP's commitment to educational equality is detailed in the petitioner's brief, and will not be repeated here.

While the NAACP's voice is nationally recognized, the ability to have its

voice heard in the State of Florida on the vital question of affirmative action in education is equally important. As recognized in the dissent of the First District Court of Appeals decision, African Americans comprise 15% of Florida's population "and their rights can best be asserted by the NAACP because the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for the NAACP's members, who are often poor and unable to maintain individual rule challenges." *NAACP v. Board of Regents*, 822 So. 2d at 36 (Fla. 1st DCA 2002), citing *Florida Homebuilders Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351, 353 (Fla. 1982) (internal citations omitted).

As one federal court recently recognized the NAACP is "well known in the courts for taking an active role in protecting the rights of persons of color; it is a respected leader in the field. The historical weight of the NAACP's activities lend weight to its assertion of standing and its claim that it, and its members, as well as the broader population on whose behalf it is dedicated are adversely affected by defendant's activities." *NAACP v. American Arms, Inc.*, 2002 U.S. Dist. LEXIS 18905, 12. The NAACP's voice through standing in this case should be heard to ensure that all black students have the opportunity to meaningfully participate in Florida university classrooms.

V. THE FIRST DISTRICT COURT OF APPEALS DECISION UNDERMINES ONE OF THE SPECIFIC PURPOSES OF THE FLORIDA ADMINISTRATIVE PROCEDURE ACT -- TO INCREASE PUBLIC PARTICIPATION IN THE ADMINISTRATIVE PROCESS

This Court in *Home Builders* explicitly recognized "(e)xpansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act" and found that "excessively narrow" restrictions on standing also restrict public access to the administrative process. *Home Builders*, 412 So. 2d at 352-353 (internal citations omitted). Obviously, this Court recognized that undue limitations in associational standing at administrative rule challenges defeat the public access purpose "by significantly limiting the public's ability to contest the validity of agency rules." *Home Builders*, 412 So. 2d at 353.

In 1996, the Florida legislature passed legislation that revised Florida's Administrative Procedure Act (APA). One of the principle purposes of the APA was to expand public access to the activities of governmental agencies. *See Home Builders*, 412 So. 2d at 352-353. This goal was articulated in the Executive Summary of the Final Report of the Governor's Administrative Procedure Act Review Commission (Final Report), and solidified in the final legislation, which contained numerous provisions designed to make it easier for citizens to challenge administrative decisions. *See* Final Report, February 20th, 1996. These provisions include: (1) allowing affected persons to enforce the requirement that an agency

prepare a cost report; (2) extending time to challenge proposed rules; (3) altering the presumption by expressly providing that a proposed rule is not presumed to be valid or invalid; and (4) requiring the agency to pay reasonable costs and attorneys' fees if the proposed rule is determined to be invalid. *See* FLA. STAT. CH. 120.56, FLA. STAT. CH. 120.54(4) (B), FLA. STAT. CH. 120.56(2) (C), AND FLA. STAT. CH. 120.595(2) (SUPP. 1996).

In its decision, the First District Court of Appeals concluded that because the NAACP was not regulated by the challenged rule amendments, the amendments would have no impact on their members until they applied for admission to an affected institution. *See NAACP v. Board of Regents*, 822 So. 2d at 11-12 (2002). The Court then stated that even when NAACP members are impacted, there is no evidence that such an impact would be adverse. *See id*. Based on these conclusions, the court ruled that the NAACP lacked associational standing to represent its members in a challenge of the proposed rules.

This ruling is wholly inconsistent with the APA's stated objective, which was to expand public access and supervision over governmental agencies. *See Home Builders*, 412 So. 2d at 352-353; *See also* Final Report. Establishing procedures that make challenging administrative action easier is meaningless if only a handful of people are entitled to avail themselves of those procedures. Indeed, if anything, this purpose should be used to justify increased standing in the administrative process, not a more limited standard. *See Home Builders*, 412 So. 2d at 352 - 353.

Yet that is precisely the situation created by the First District Court of Appeals' ruling. Such a narrow view of associational standing should not be allowed to frustrate this obvious expression of legislative intent.

VI. THE FIRST DISTRICT COURT OF APPEALS DECISION CONTRADICTS TWELVE YEARS OF APPELLATE COURT PRECEDENT

If this Court was to affirm the Court of Appeals decision, as a matter of Florida law, the ability of associations to protect manatees, parcels of land, docks and piers would be elevated above the ability of an association, like the NAACP, which seeks to ensure that black students receive a quality education free from discrimination. This is a result that clearly contradicts the standing requirement intended by the Florida legislature and one that this Court surely will not permit.

The First District Court of Appeals' opinion flies in the face of 12 years of its own precedent. In *Coalition*, the Court of Appeals held that it was "alone sufficient" to find that association members will be regulated by a proposed rule 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." *Coalition* at 28. The First District Court of Appeals, honoring the principles of stare decisis, allowed standing to the Save the Manatee Club because of its *fear* that the implementation of a proposed rule would result in an increase in manatee injuries and the deterioration of the manatee habitat in Tampa Bay. *See Southwest Florida Water Management v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st

DCA 2000). An injury in fact was not at issue and the fear of an adverse impact was sufficient.[10]

The Friends of the Everglades were allowed standing to challenge a proposed rule to change the classification of a parcel of land because its implementation could cause environmental damage and interferes with the recreational use of a parcel of land on which the organization spent "considerable" funds to protect. *See Friends of the Everglades*, 595 So. 2d at 186 (Fla. 1st DCA 1992). No environmental damage or interference of recreational use was required to allow the FOE standing.

In *Ward,* an individual engineer was allowed standing because he would be regulated by a proposed rule to change the construction specifications for docks and piers. The engineer's allegation that the proposed rules "would result in an economic and administrative adverse impact," undermine his ability to comply with his "statutory duty to design safe docks and piers," and would "unlawfully encroach" upon his engineering practice, were sufficient to prove he was "substantially affected" and were deemed. *Ward v. Board of Trustees of Internal Improvement Trust Fund, 651 So. 2d 1236*, (Fla. 4th DCA 1995). The Fourth District Court of Appeals found that the engineer would be immediately affected by the rules "in that he must comply with them." *Ward*, 651 So. 2d at 1238. The

[10] As stated by Judge Browning in the dissent of the Court of Appeals decision, "This Court did not require a mangled manatee or an actual reduction in the quality of the manatee's habitat to confer standing: the association members" fear of such impact was sufficient." *NAACP v. Board of Regents,* 822 So.2d 1,34 (Fla. 1st DCA 2002).

Court did not consider whether the engineer had a current design or plan to design a dock or pier which would be harmed in order to be allowed standing to challenge the agency rule.

The NAACP and its members should have the same opportunity to be heard as an individual engineer, the Save the Manatee Club, and the Friends of the Everglades. The First District Court of Appeals in this decision, unlike the engineers and the protectors of the everglades and manatees, required the NAACP to show that the impact of the rules on its members "is different from the impact they will have on all citizens" and provide "evidence to suggest that any impact would be adverse." *NAACP v. Board of Regents*, 812 So. 2d at 12. This is a clear departure from the Court of Appeals previous cases, this Court's rulings, and federal decisions.

The Save the Manatee Club did not have to show that its members suffered a greater harm than any other Floridian to have standing to challenge a rule. The FOE did not have to offer evidence of actual environmental damage to have standing to challenge a rule. The engineer in *Ward* was not required to prove that he was adversely impacted more than any other engineer. If a petitioner has been or will in fact be "perceptibly harmed standing is not to be denied simply because many people suffer the same injury." *NAACP v. American Arms, Inc.*, 2002 U.S. Dist. LEXIS 18905, 25-26. *See also United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687-88 (1973).

Neither *Coalition* nor *Home Builders* dictate the division created by

the First District Court of Appeals. There is no precedent that holds civil rights and other advocacy groups to a higher threshold for standing than other associations. The First District Court of Appeals erred in denying the NAACP standing to challenge the proposed rules that would adversely impact the opportunity of students to receive a quality education in an environment free from discrimination.

VII. THE FIRST DISTRICT COURT OF APPEALS' DECISION THAT *COALITION* ONLY APPLIES TO TRADE AND PROFESSIONAL ASSOCIATIONS, AND NOT OTHER ORGANIZATIONS LIKE THE NAACP, RAISES EQUAL PROTECTION CONCERNS

The First District Court of Appeals in *Coalition* held that an association's showing that its members "will be regulated by the proposed (agency) 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." *Coalition*, 546 So. 2d at 28. The First District Court of Appeals further explained that its holding in *Coalition* "was not intended to have wide application but, rather, was intended to apply only to trade or professional associations whose members were to be regulated by the challenged rules." *NAACP v. Board of Regents*, 822 So.2d at 10. The Court explained that the above standard in *Coalition* creates a presumption of standing for professional and trade associations only, but apparently not to associations like the NAACP. Such a ruling raises equal protection concerns as to the division of associations to which standing was presumed by the First District Court of Appeals.

Both the U.S. and Florida constitutions prohibit discrimination among similarly situated persons. U.S. Const. Amend XIV, § 2 and Fla. Const. Art.1, § 2. Unlike the First District Court of Appeals, this Court did not make a distinction between professional and trade organizations versus other organizations in its test for representational standing. On the contrary, the Court stated

> In our view, the refusal to allow this builders' association, or *any similarly situated association*, the opportunity to represent the interests of its injured members in a rule challenge proceeding defeats this purpose (of expanding public access to the activities of governmental agencies) by significantly limiting the public's ability to contest the validity of agency rules.

Home Builders, 412 So. 2d at 353. (emphasis added) Thus, the First District Court of Appeals' creation of different classes of associations not only contradicts the standing test articulated by this Court, but also raises equal protection concerns.

As discussed *infra* at Section VI, the Courts of Appeals have allowed standing to other non-trade associations such as the Save the Manatee Club, the FOE and an individual engineer. The only apparent distinction between the NAACP and the other non-trade associations is its focus on civil rights, its commitment to racial equality, and the advancement of blacks. Affirmance of its decision may not pass constitutional muster.

Surely, the First District Court of Appeals did not intend to draw a race-conscious distinction between associations. As the constituents of civil rights and

other advocacy organizations, however, are often members of suspect classes for purposes of constitutional review, the First District Court of Appeals decision, if allowed to stand, may violate equal protection in their limitation of access to the administrative process.

Discrimination against members of a suspect class is subject to strict scrutiny and must be narrowly tailored to further a compelling government interest. If the First District Court of Appeals is allowed to continue to apply a higher threshold for associational standing against organizations committed to the advancement and protection of racial minorities, then it must further a compelling government interest. The U.S. Supreme Court has repeatedly held that changes limiting the full participation of racial minorities are "subject to the most rigid scrutiny ." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (internal citations omitted) (holding that "racial classifications are constitutionally suspect"); *see also Washington v. Seattle School District*, 458 U.S. 457 (1982). Otherwise, such a classification is a violation of equal protection in the most literal sense. *Ranger v. Evans*, 517 U.S. 620, 633 (1996). As recognized by the U.S. Supreme Court, racial and gender classifications are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne v. Cleburne Living Center, Inc.*, 463 U.S. 432, 440, 87 L.Ed. 2d 313 (1985).[11]

[11] Further, it is inappropriate for the distinction to apply against the NAACP in the instant case. The ruling imposed a procedure to associational standing law that is so new that the NAACP could not

The legislature's goal to expand access to the administrative process is not furthered by granting a presumption of standing to only professional and trade associations. The Court of Appeals distinction among associations creates a barrier to equal access to the courts and to the administrative process for non-trade associations. The Court's silencing of the voice of the NAACP and its members in the same process to which optometrists, builders, engineers, the FOE, and the Save the Manatee Club were allowed standing clearly raises concerns of an equal protection violation.

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have been fairly apprised of its existence. *Bush v. Gore*, 531 U.S. 98, 115 (2000), (Rehnquist, J., concurring) quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Thus, the NAACP should not be penalized for not satisfying a requirement that did not exist at the time its challenge against the elimination of affirmative action programs in admissions to the State University System was filed. It was error for the First District Court of Appeals to hold the NAACP to a standard that no other association since 1989 was required to satisfy for representational standing to challenge proposed agency rules.

CONCLUSION

For all the foregoing reasons, the NAACP should be allowed standing to challenge a proposed rule that eliminates affirmative action programs relating to admissions in the State University System that substantially affect and regulate its members.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2002, I filed the original, seven copies, and virus free 3.5 diskette in Word Perfect 9 format of the Brief of the Lawyers' Committee for Civil Rights Under Law *Amici Curiae*, Mexican American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, and National Abortion and Reproductive Rights Action League, In Support of Petitioners/Appellants, NAACP, by first-class mail, postage prepaid, upon the **Clerk of the Court** at;

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CERTIFICATE OF COMPLIANCE

I hereby certify, as counsel for the Lawyers Committee for Civil Rights Under Law, *et al.*, counsel for the *Amici Curiae* in support of petitioners-appellants, NAACP, that the foregoing brief:

1. In compliance with Rule 9.210 (a) (2), the brief filed by the *Amici Curiae* was typed using Times New Roman 14 pt. font;

2. In accordance with Administrative Order In re: Mandatory Submission of Briefs on Computer Diskette, February 5, 1999, a 3 ½ inch computer diskette accompanying this brief is in Word Perfect 9 format. The diskette has been scanned for viruses and is virus free.

Dated: October 30, 2002

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