SUPREME COURT OF FLORIDA

CASE NO.: SC02-1878

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

Petitioners / Appellants,

vs.

FLORIDA BOARD OF REGENTS
and the STATE BOARD OF EDUCATION,

Respondents / Appellees.
_____/

ANSWER BRIEF OF RESPONDENTS

On Review of the District Court of Appeal, State of Florida, First District
Case No.: 1D00-3137

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Preliminary Matters: Abbreviations and Citations to the Record.

Abbreviations:

Respondents have used abbreviations consistent with those used by Petitioners:

"ALJ" refers to the Administrative Law Judge who conducted the three-day administrative hearing below.

"Amici" refers to the two amici groups that have filed briefs in support of Petitioners.

"Board" refers to the Florida Board of Regents, which has been replaced by the State Board of Education.

"First District" refers to the First District Court of Appeal.

"NAACP" refers to Petitioner National Association for the Advancement of Colored People.

"Opinion" refers to the opinion of the First District, *NAACP, Inc., et.al., v. Florida Board of Regents and the State Board of Education*, 822 So.2d 1 (Fla. 1st DCA 2002).

"Order" or "Final Order" refers to the 138-page final order entered by the Administrative Law Judge.

"Petitioners" refers to the three Petitioners here: NAACP, Mattie Garvin and Keith Garvin.

"Respondents" refers to the Florida Board of Regents and the State Board of Education.

"SUS" refers to the State University System.

Citations to the Record:

Citations to the record are based on the Index to the Record prepared and filed by the court clerk in this case, and are consistent with the references used by Petitioners. Specific pleadings are numbered sequentially. The Index identifies the transcripts of the final hearing, and the exhibits introduced at that hearing, only as "Boxes / Attachments." In this Answer Brief, portions of the record that are numbered will be referred to by "R" followed by a colon and the appropriate page number (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 (T-#). The transcripts are in the Box / Attachment 4 of the record. Citations to Petitioners' exhibits are indicated by the letter "P" followed by "Ex." and the exhibit number and page number. Petitioners' exhibits are in Box / Attachment 5 of the record. Citations to the Respondents' exhibits are indicated by the letter "R" followed by "Ex." and the exhibit number ("R.Ex.#). Respondents' exhibits are in Boxes / Attachments 1, 2 and 3.

INTRODUCTION

This Answer Brief responds to the Initial Brief filed by Petitioners and to the two Amici briefs filed in support thereof pursuant to this Court's August 29, 2002 order setting a schedule for briefs on the merits but reserving ruling on jurisdiction. Petitioners' appeal arises from their "Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court," and is based on the question certified to be of great public importance by the First District in its Opinion, *NAACP, Inc., et.al v. Florida Board of Regents and State Board of Education*, 822 So.2d 1 (Fla. 1st DCA 2002). The Opinion dismissed Petitioners' rule challenge for lack of standing, and denied Petitioners' motion for rehearing and rehearing *en banc*, but certified the following question: "Do Appellants / Cross – Appellees herein have standing to maintain challenges to the subject rules?"

STATEMENT OF THE CASE AND FACTS

Petitioners' recitation of the facts and procedural history of the case below omits significant facts that are established in the record below and are relevant to this appeal. These additional facts follow:

Petitioners challenged only seven of the several Amendments adopted by the Board of Regents in February 2000. Petitioners did *not* challenge the Board's authority to adopt the underlying Rules to which the seven Amendments were made.

The seven Amendments challenged by Petitioners modified three of the Board's existing Rules (Rules 6C-6.001, 6C-6.002 and 6C-6.003, Fla. Admin. Code). (Order, R.340, pg.2). The Amendments: (a) reaffirmed the State's commitment to increasing diversity in university admissions; (b) established the Talented Twenty Program, guaranteeing university admission to all students who are in the top 20% of their class and who have completed 19 required credits; and (c) prohibited the use of racial or gender preferences in the admissions process. (Order, R.340, pg. 3)

The ALJ conducted a three-day final evidentiary hearing on Petitioners' challenge to the seven Amendments. The ALJ heard testimony from eleven witnesses (Order, R.340, pgs. 7-8), reviewed a total of nearly 200 exhibits (Order, R.340, pg. 8) and thereafter issued a comprehensive 138-page Final Order, including 90 pages of factual findings based upon the evidence submitted to him (Order, R.340, par. 1-204).

The Final Order held: (1) that Petitioners had standing to pursue their challenge to the Amendments; (2) that Respondents had met their burden of proving, by a preponderance of the evidence, that six of the Amendments were valid under Section 120.52(8), Fla. Stat.; but (3) determined that one of the Amendments, the Amendment repealing Rule 6C-6.001(10)(e)(6), Fla. Admin. Code, was not supported by substantial competent evidence and thus was not a valid exercise of delegated legislative authority under Section 120.52(8)(f), Fla. Stat. (Order, R. 340, pgs. 135-136, par. 299).

The Final Order sets forth in great detail the rationale and substantial support for the Amendments. (Order, R. 340, pgs. 69-94; par. 141-193). Of particular significance was the ALJ's finding that the federal Office of Civil Rights in the Department of Education had determined the Amendments to be *not* inconsistent with the State's commitment under its 1998 partnership agreement for using alternative admissions criteria to broaden the opportunities of students, including minorities, who attend the SUS. (Order, R. 340, par. 74, 194-202; 291). [1/]

1/ Petitioners refer to the Office of Civil Rights' 1998 statistical analysis showing increased minority enrollment as a result of alternative admissions criteria, but then fail to acknowledge that the Office reviewed

Petitioners were not the only challengers whose standing was disputed. Respondents also challenged the standing of the petitioner-intervenor National Organization of Women ("NOW") to challenge the seven Amendments. The ALJ agreed with Respondents that NOW had failed to provide sufficient evidence to establish standing (Order, R. 340, pg. 105, par. 235). NOW never appealed this ruling.

NAACP's announced goal during the rule challenge was "to eliminate racial prejudice," [2/] but the NAACP had *no* evidence of any adverse discrimination or prejudice in the SUS admissions process. (*See* Order, R. 340, pgs. 14-18, par. 34-46). None of the Petitioners had been denied admission to an SUS. Petitioner NAACP could not identify even one individual member who had been or might be adversely impacted by the Amendments. (R. Box, 4, Final Hearing Transcript). [3/]

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the Amendments, and found them to be *not inconsistent* with the State's commitment to broaden opportunities for minority students.

2/The NAACP stated its goal was to "ensur[e] equal access to education for its members," and represented that its "members" were "both black and white". (*See* Petitioners' Brief at 13-14).

3/Petitioners' seven-page "verbatim rendition of undisputed facts" copies nineteen paragraphs of the ALJ's Final Order. Not one of these recited "facts," however, is relevant to the two-part test established by this Court pursuant to Section 120.56, Fla. Stat., for associational standing in the Chapter 120 context. For example,

Petitioners' "standing" argument was premised below (as it also is here on appeal) upon their contention that they *might* be harmed if they did not have the advantage of racial or gender-based preferences, set-asides or quotas in the admissions process. They could not state "how" they would be harmed, and had no evidence to support their speculative fear of harm.

The NAACP's representative first testified that "some" of its members "might be injured" by being denied admission to college as a result of the Talented Twenty Program established by the Amendment to Rule 6C-6.002(5) (Tr. 208, 220). The NAACP also claimed injury based upon its opinion that the word "preferences" was "negatively charged." (Order, R. 340, pg. 18, par. 46). However, the NAACP had no evidence of any discrimination, and in fact the ALJ found that the "proof in this case provides examples of the manner in which universities are actively pursing diversity." (Order, R. 340, pgs. 38-46, par. 102-113). The ALJ specifically rejected Petitioners' contention that the term "preferences" had a negative connotation.

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while it may very well be correct that the NAACP has an education committee, this "fact" does not establish standing.

(Order, R.340, pgs. 123-25, par. 280-281).

Respondents introduced undisputed evidence that the Talented Twenty Program was an *additional* method of gaining university admission, and would not displace students admitted through other methods. (T. 383). Thus, there could be no "injury" to any potential student. Indeed, the ALJ determined from the evidence that the Talented Twenty Program "will bring about significant future opportunities for minority admissions." (Order, R. 340, pg. 83, par. 170).

Petitioners introduced no factual support for their assertion that the Talented Twenty Program would prevent those students not in the top twenty percent of their graduating class from attending a SUS institution. As a result, the NAACP could not show any injury to any of its members. In fact, Petitioners' testimony actually showed that they expected the Amendments to be *beneficial*. For example, the NAACP presented the testimony of Dr. Barbara Newell, a former chancellor of the SUS. (Order, R. 340, pg. 97, par. 201). Dr. Newell was accepted as an expert witness in university admissions and affirmative action. (T. 78). Both Dr. Newell and Mr. Leon Russell, the immediate past president of the Florida Conference of Branches of NAACP,

Inc. agreed that use of the student profile assessment rather than the "alternative admissions process" could *increase* the number of minority students and women in the SUS. (T. 136, 221).

Dr. Newell further testified to the following:

--she confirmed that she had no knowledge of overt discrimination against either racial minorities or women in the undergraduate admissions process. (T. 123-128).

--she was not aware of the existence of any disparity studies documenting the present effects of past discrimination against either racial minorities or women in any degree program at any SUS institution. (T. 125-128).

--she confirmed that high school students would not have to make any changes in their curriculum in order to be eligible for the Talented Twenty Program. (T. 131).

---she testified that she did not believe the Talented Twenty Program would have any negative effect on either African Americans or women, and in fact, agreed that this Program would allow universities to tap into qualified students at low-performing high schools that have traditionally sent very few students to college.

(T. 138-139). [4/]

The testimony of Mr. Russell, past president of the NAACP, was just as compelling in acknowledging the benefits of the Talented Twenty Program. [5/] He testified that:

--he was not aware of any SUS institution that discriminates against any racial minority or women in the admissions process, and was likewise unaware of any disparity study that exists documenting the present effects of past discrimination in the SUS based on race or gender, or of any finding of discrimination that would justify the utilization of race or gender in the admissions process. (T. 207, 214).

--he could not state whether any member of the NAACP would be denied admission to an SUS institution as a result of the prohibition against the use of race or gender preferences in the admissions process.

4/Here on appeal, Petitioners have omitted nearly all references to their own expert, Dr. Barbara Newell, because as shown from this summary her testimony failed to support their legal arguments. (*See* Petitioners' Brief at pg. 16).

5/Petitioners' summary of Mr. Russell's testimony ignores what he actually said. Mr. Russell had no evidentiary support for the Petitioners' arguments, and in fact conceded the Talented Twenty Program could be beneficial.

In fact, he conceded that diversity could be achieved at a SUS institution with a race and gender-neutral admissions process. (T. 210-212).

--he agreed that diversity in limited access programs could be achieved through the use of race and gender neutral admissions criteria, and that neither race nor sex was an appropriate indicator of academic ability, creativity or talent required to perform work in a limited access program. (T. 208, 220).

--he testified that he did not know how many members of the NAACP had been admitted to the SUS under the alternative admissions method and conceded that the number of African-American students who could be admitted under the proposed student profile assessment could equal or exceed the number currently being admitted under the existing alternative admissions method. (T. 221). [6/]

6/Petitioners have mischaracterized the testimony of Mr. John Winn on behalf of the Respondents. (*See* Petitioners' Brief at pgs. 22-23). Mr. Winn presented undisputed testimony and analyses showing the projected benefits of the Talented Twenty Program. (Order, R. 340, pg. 69-75; par. 141-160). The ALJ found Mr. Winn's testimony and evidence to be supportive of and consistent with the goal of the Talented Twenty Program to increase minority enrollment without relying on quotas. (Order, R. 340, pg. 69-75; par. 141-160).

As to the second factor of the standing test, none of the Petitioners showed any legally protectable interest that was adversely affected by the Amendments. The ALJ found that there was no existing admissions quota and no provision in the existing Rules that *required* race or gender-based preferences (Order, R. 340, pg. 11; par. 19-20).

--None of the Petitioners could show any requirement in the Florida Statutes or in the Florida Constitution requiring that race or gender be considered in SUS admissions decisions. (T. 117).

--None of the Petitioners could show any requirement in the Florida Statutes or in the Florida Constitution requiring the use of race or gender preferences in the admission process. (Tr. 354).

--None of the Petitioners could show any right, whether by statute, Florida Constitution or the U.S. Constitution, to any preference based upon race or gender.

Despite Petitioners' failure to present the requisite evidence as to standing, the ALJ ruled the three Petitioners had standing to proceed with their challenge to the validity of the Amendments. (Order, R. 340, par. 229-235). The ALJ held that the NAACP had associational standing to represent its members as persons

"regulated by" and thus "substantially affected" by the Amendments. (Order, R. 340, pg. 104, par. 233). The ALJ held that the Garvins had standing to challenge the Amendments to two of the three Rules, but could not challenge the Amendment to Rule 6C-6.003 because "Keith Garvin is not even approaching graduate school." (Order, R. 340, pg. 102, par. 229). The ALJ's Order however then upheld all but one of the Amendments, holding the Amendments were *not invalid* exercises of delegated legislative authority, and that the *"actions taken in adopting the proposed Amendments were supported by thought, reason and rationality*." [7/] (Order, R. 340, pg. 127, 135-35, par. 283, 299). As the ALJ concluded:

> In Florida it was not found that present effects of past discrimination exist. Therefore, from the policy perspective, consideration of race as a factor in admissions should not be allowed, if Florida were to avoid the problems experienced in California and Texas where race as a consideration in admission policies was removed without the prior opportunity to adjust to that eventuality. In its analysis the Board of Regents looked at the SUS admissions policies in the overview and at the individual universities. By the outcome the Board of Regents intends to disallow consideration of race, national origin, or sex in its admissions

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7/The ALJ erred as to his finding that the repeal of Rule 6C-6.001(10)(e)6, Fla. Admin. Code, involving admissions to limited access programs, was invalid, as Respondents argued in their cross-appeal to the First District. To the extent this Court wishes to address the merits of Petitioners' challenge to the Amendments, Respondents herein adopt their arguments made in the First District.

practices, lacking evidence that consideration of those factors is necessary to maintain equal access to public education. *There is competent substantial evidence justifying the prohibition*.

Order, R. 340, pg. 126-27, par. 282. [8/]

Petitioners appealed to the First District, and Respondents cross-appealed. Respondents argued the ALJ's ruling on standing was made without substantial competent evidence, overlooked Petitioners' failure to show how they would be harmed in any way, and overlooked Petitioners' inability to identify any legally protectable right to race or gender-based preferences.

The First District agreed. The First District's Opinion reversed the ALJ's Order and remanded with directions that the ALJ dismiss the rule challenge for lack of standing, holding that on the facts established

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8/ Indeed, the ALJ's only objection to the Talented Twenty Program was based on his misunderstanding of class rank, and his insistence that *all* students be treated equally for consideration in this Program. The ALJ observed that school districts varied in their calculation of class rank, and then erroneously concluded that class rank was not a "competent process" because it would "treat students differently from district to district." (Order, R. 340, par. 276). The ALJ overlooked the fact that the Talented Twenty Program guaranteed admission to the top 20% of *each school*, so students competed only with other students in their own school. Students within each school thus had an equal opportunity to compete for admission under the Talented Twenty Program, regardless of differences in how districts calculated class rank.

in the record, Petitioners had failed to present competent, substantial evidence to establish that they (or in the case of the NAACP, its members) would suffer "a real and sufficiently immediate injury in fact" because of the implementation of the Amendments to the Rules. The First District did *not* address the merits of Petitioners' rule challenge, and specifically noted, "there is nothing to prevent [petitioners] from subsequently bringing another challenge, provided they are able to satisfy the requirements for standing." (Opinion at 7).

STANDARD OF REVIEW

The sole issue before this Court is whether the lower court's determination that petitioners lacked standing was legally incorrect. The standard of review for a pure question of law is *de novo*. *See e.g.*, *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2002). The standard of review of an ALJ's ruling is whether the ALJ's factual findings were supported by competent substantial evidence or whether his legal determinations were contrary to law. *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1st DCA 2001); *Board of Clinical Laboratory Personnel v. Florida Association of Blood*

Banks, 721 So.2d 317, 318 (Fla. 1st DCA 1998); *Adam Smith Enterprises, Inc. v. State of Florida, Department of Environmental Regulation*, 553 So.2d 1260, 1273-74 (Fla. 1st DCA 1989)

SUMMARY OF THE ARGUMENT

The First District's Opinion properly held that Petitioners had submitted no competent evidence of how they would have any "real and sufficiently immediate injury in fact" as a result of the implementation of the Amendments, and thus failed to establish their standing to challenge the validity of the Amendments under Section 120.56, Fla. Stat. For the reasons discussed below, the Opinion should be affirmed. The Opinion is narrow in scope, and is expressly limited to the facts developed in the record below. It does *not* stand for the proposition that Petitioners could *never* establish standing, and does not diminish in any way the institutional reputation of the NAACP as a civil rights advocacy association. Rather, the Opinion holds that on the limited facts established by Petitioners in *this* record, Petitioners had failed to show any "real and sufficiently immediate injury in fact." (Opinion at 6-7). Petitioners have now conceded that they had no evidence of any injury, but both Petitioners and Amici argue on appeal that there should be no such

requirement imposed upon them because they are "advocacy associations." Petitioners and Amici ask that this Court adopt a new test for standing under Section 120.56, Fla. Stat., applicable to advocacy associations – a test that would merely require association members to profess some interest in the subject matter of the challenged rule.

Petitioners are wrong, and their proposed "test" for standing would not only eviscerate the Legislature's requirements for standing under Section 120.56, Fla. Stat., but would also reverse well-established, fundamental, state and federal principles of law requiring standing based on the showing of an actual injury to a protectable right. The First District's Opinion is correct, is consistent with Section 120.56, Fla. Stat. and with this Court's holding in *Florida Home Builders Association v. Dept. of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982) ("*Florida Home Builders*"), and should be affirmed. *Florida Home Builders* represents this Court's test for allowing associations to represent their *injured* members in administrative rule challenges. Petitioners and Amici suggest that *Florida Home Builders* stands for the proposition that any association has standing to challenge the validity of an administrative rule under Section 120.56, Fla. Stat.,

so long as it merely professes some generalized interest in the rule on behalf of its members. However, standing, whether for an individual or an association, cannot be predicated on generalized interest or unsupported, speculative fears. Any such interpretation would turn *Florida Home Builders* on its head, would render the concept of standing meaningless, and would be directly *contrary* to the Legislative requirements for standing imposed by Section 120.56, Fla. Stat.

ARGUMENT

I. THE FIRST DISTRICT PROPERLY DETERMINED THAT PETITIONERS FAILED TO SHOW HOW, IF AT ALL, THEY WOULD SUFFER A "REAL AND SUFFICIENTLY IMMEDIATE INJURY IN FACT" FROM IMPLEMENTATION OF THE AMENDMENTS.

Petitioners argue on appeal that the First District erred by "substituting its own judgment on the facts for that of the ALJ." (Petitioners' Br. at 29-30). Petitioners' argument fundamentally confuses findings of fact with conclusions of law. The First District did *not* overturn the factual findings made by the ALJ.

Rather, the First District determined that the ALJ's legal conclusion was one that could not be made based on the facts established in the record below.

Indeed, the facts in the record below cannot be disputed. Petitioners recite in their brief page upon page of "facts" about the NAACP and its long history of civil rights advocacy. (*See* Petitioners' Brief at pgs. 6-13). Respondents did not dispute those "facts," however. Respondents instead simply argued any such facts were irrelevant to the legal requirements Petitioners had to satisfy to show their standing to proceed with an administrative rule challenge to the Amendments.

On appeal, Petitioners admitted they had no evidence of any injury, no disparity studies showing adverse effects of discrimination, and no evidence any injury was likely to occur -- in short, Petitioners had nothing to show any adverse impact as a result of the Amendments. As the First District noted, Petitioners conceded on appeal that they simply did not wish to see "successful affirmative action programs and polices in the admissions process" replaced "with an untried Talented 20 Program and a prohibition on preferences."

(Opinion at 6). In other words, Petitioners were (and still are) unwilling to have what they believe has been a beneficial policy replaced by one that may or may not prove to be equally beneficial. (Opinion at 5-6).

Based on the lack of relevant facts in the record below, the First District correctly held that the ALJ had no substantial competent evidence before him from which he could properly find standing to pursue an administrative challenge under Florida's Administrative Procedures Act, Chapter 120, Fla. Stat. As the First District noted, standing to challenge a proposed or existing administrative rule is governed by Section 120.56(1)(a), Fla. Stat. (1999), which states that only those who are "substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." (Opinion at 3-4).

In order to meet the "substantially affected" test, the two individual Petitioners (Keith Garvin and his mother, Mattie Garvin) were required to establish: (1) a "real and sufficiently immediate injury in fact" and (2) "that the alleged interest is arguably within the zone of interest to be protected or regulated." *See, e.g., Lanoue v. Fla. Dept. of Law Enforcement*, 751 So.2d 94, 96 (Fla. 1st DCA 1999); *Ward v. Bd. of Trustees*

of the Internal Improvement Trust Fund, 651 So.2d 1236, 1237 (Fla. 4th DCA 1995); *All Risk Corp. of Fla. v. State Dept. of Labor & Employment Sec.*, 413 So.2d 1200, 1202 (Fla. 1st DCA 1982); *see also Cole Vision Corp. v. Department of Bus. & Prof. Reg.*, 688 So.2d 404, 407 (Fla. 1st DCA 1997)("A petitioner who establishes a substantial injury in fact that is within the 'zone of interest to be protected or regulated' by the promulgating statute or other related statutes meets the standing requirements"); *Televisual Communications, Inc. v. State, Dep't of Labor & Employ. Sec.*, 667 So.2d 372, 374 (Fla. 1st DCA 1995)("The hearing officer correctly noted that to demonstrate that it is substantially affected by a proposed rule, a party must establish that, as a consequence of the proposed rule, it will suffer an injury in fact and that the injury is within the zone of interest to be regulated or protected.")

Under well-established Florida law, an injury is *not* "real and sufficiently immediate" if the likelihood of its occurrence rests upon speculation or conjecture. *See, e.g., Ward*, 651 So.2d at 1237; *see also, Board of Optometry v. Society of Ophthalmology*, 538 So.2d 878 (Fla. 1st DCA 1988).

As to the second element of the standing test, the "general rule regarding the zone of interest element of the substantially affected test is that such element is met where a party asserts that a statute, or a rule implementing such statute, encroaches upon an interest protected by a statute or the constitution." *Ward*, 651 So.2d at 1238. In the context of a rule challenge, the protected zone of interest need not be found in the enabling statute or the challenged rule itself." *Id.* (professional engineer satisfied the zone of interest test for establishing that he was substantially affected by proposed amendments to rules relating to the construction of docks in aquatic preserves, in light of statute regulating the rights and responsibilities of engineer and the engineer's claim that the proposed amendments would result in the construction unsafe docks and would undermine his ability to meet his statutory duty to design safe docks and piers); *see also Florida Med. Ass'n, Inc. v. Dept. Of Prof. Reg*. 426 So.2d 1112, 1117-18 (Fla. 1st DCA 1983).

Petitioner NAACP, as an association, was required to satisfy a modified test of standing established by this Court in *Florida Home Builders*, 412 So.2d 351 (Fla. 1982). To have standing to pursue an administrative rule challenge on behalf of its injured members, a trade or professional association must show,

by a preponderance of the evidence, that: (a) a substantial number of its members, although not necessarily a majority, were "substantially affected" by the challenged rule; (b) the subject matter of the rule was within the association's general scope of interest and activity; and (c) the relief requested was of the type appropriate for [an] association to receive on behalf of its members. *Id*. at 353-54. As this Court noted, the refusal to allow an association the opportunity to represent the interests of its injured members in a rule challenge proceeding would "defeat the purpose of the APA to expand public access to the activities of governmental agencies by significantly limiting the public's ability to contest the validity of agency rules." *Id*. at 352-53. Here, while the NAACP is not a trade or professional association, it has argued that it is entitled to have the same standing requirements imposed upon it by virtue of its status as an advocacy association. Petitioners and Amici then further argue that *Florida Home Builders* should *not* include any requirement to show a "real and sufficiently immediate injury in fact" on behalf of its members.

As the First District properly held, however, Section 120.56, Fla. Stat., and *Florida Home Builders* control this case, and simply do not grant standing to any and all advocacy groups professing some

generalized interest in the subject matter of the challenged rule. Here, on the record before it, neither the Garvins nor any NAACP member could show how the Amendments caused any injury to anyone.

A. The NAACP Failed To Show That A Substantial Number Of Its Members Would Be Substantially Affected By The Amendments

As to the first prong of the associational standing analysis, Petitioner NAACP failed to show that a substantial number of its members would be substantially affected by the Amendments to Rules 6C-6.001, 6C-6.002, and 6C-6.003. Petitioners claim the facts substantiating their "standing" are set forth in paragraphs 34-52 of the ALJ's Final Order. For example, NAACP representatives testified its members included "several hundred members" who were either currently enrolled in college or were in high school as part of its "Youth Council;" however, they then failed in their efforts to show that any of these members (let alone a "substantial number") would suffer a "real and immediate injury" as a result of the Amendments and as required by Section 120.56, Fla. Stat. (Order, pg. 14-20, par. 34-46); *see, i.e., State Dept. of Administration, Division of Personnel v. Harvey*, 356 So.2d 323 (Fla. 1st DCA 1977)(where the effect of minimum training and experience requirements of the Division of Personnel in the Florida Dept. of Administration meant that the

person seeking to challenge the rule embodying the requirements was not eligible for employment by state agencies in any of the 30 job classifications in which he expressed an interest, the denial of this avenue of employment substantially affected the person such that he had standing to institute the rule challenge proceedings).

Petitioner NAACP's own representative, Leon Russell, the immediate past president of NAACP's Florida Conference of NAACP branches, testified that it was impossible to predict what effect the Amendments would have on the NAACP's members, and admitted Petitioners could not show any injury. (T. 136, 221). To the contrary, he and the NAACP's expert, Dr. Newell, agreed that the use of the student profile assessment using race and gender-neutral factors could actually *increase* the number of minority students enrolled in the state university system ("SUS"). (T. 210-212). None of the Petitioners or their experts presented any evidence of, or even had any knowledge of, any discrimination by the SUS. (T. 123-128; 207-214). Petitioners had no disparity studies showing any discrimination in the SUS admissions process, and had no knowledge of any such studies. (T. 210-212). Petitioners presented no testimony of any

person denied admission to the SUS as a result of the Amendments. Indeed, Petitioners *agreed* that diversity could be achieved through the use of race and gender-neutral admissions criteria. (*See* Order, R. 340, pg. 14-18, par. 34-46). On these facts, presented by Petitioners' own representatives and experts, there was *no* basis to find any injury to anyone. Petitioners at most alleged a "concern" about "possible" decreased educational opportunities. (*See* Petitioners' Brief at pgs. 29-32). However, Petitioners did not – because they could not – present *any* evidence to support this contention. Petitioners had *no* evidence showing any injury resulting from the elimination of discriminatory practices in the admissions process, and in fact that goal was consistent with the responsibilities placed upon Petitioner NAACP's own education committee. (Order, R. 340, par. 38). Petitioners also could show no *actual injury* resulting from the Talented 20 Program – a program that for the first time in Florida history *guaranteed* admission to the state university system to the top 20% of each Florida high school. At best, Petitioners alleged a "hypothetical" decrease in opportunities for students who would have *only* gained admission through racial preferences, which allegation was offset by an *actual, guaranteed* benefit to *all* students in the top 20% of their class. The net result was an *actual increase* in

educational guarantees, *not* a decrease. Thus, the "facts" touted by Petitioners show *only* the NAACP's "general interest in education," and an interest in 'improving the educational status of minority groups" -- general interests that are insufficient as a matter of law to establish standing. *See Bd. of Optometry v. Soc. of Ophthalmology*, 538 So.2d 878, 881 (Fla. 1st DCA 1988).

B. The Garvins Failed To Show Any Real And Immediate Injury In Fact Resulting From The Amendments.

Neither of the Garvins submitted substantial competent evidence demonstrating facts sufficient to have standing to pursue their challenges to the Amendments. Keith Garvin was at the time a 10th grade student, with a 2.6 GPA and a total PSAT score (1400) sufficient to reasonably predict he would qualify for *regular* student admission if he decided to apply in his senior year.[9/] At the time of the challenge, he had not applied to any school. (Order, R. 340, pg. 9, par. 4, par. 47-51).

9/Petitioners refer to Keith Garvin's grade point average, but completely ignore his PSAT scores, which much more accurately predict his chances of admission, and which showed he was on a reasonable path to obtain regular admission to a state university. (Order, R. 340, at par. 49-50).

Petitioners presented *no* proof that the only way Keith Garvin would be admitted to a state university would be through the use of racial preferences, and thus could not show, even hypothetically, any "decreased" educational opportunities for him. In fact, the record below showed just the opposite: that Petitioner Garvin actually had *increased* educational opportunities with the addition of the Talented Twenty Program and its guaranteed method for gaining admission to a state university.

Mattie Garvin is Keith's mother, and her only interest in this case is obtaining the "best possible educational opportunities" for her son. (Order, R. 340, pg. 9, par. 3; pg. 20, par. 52). But of course, this is a goal shared by many parents in the State of Florida, a fact conceded by Petitioners. (*See* Pretrial Stipulation, R. 53, No. 27). Neither Keith Garvin nor his mother could show any "real and immediate injury" as a result of the Amendments. Despite the lack of any such evidence, the ALJ held that Mattie Garvin, on her own behalf and as mother of Keith Garvin, and Keith Garvin sufficiently pled standing to pursue their challenges to the Amendments to two of the three Rules: Rules 6C-6.001 and 6C-6.002, Fla. Admin. Code (Order, R. 340, App. 1, pg. 104, par. 232).

The First District reversed and held, as a matter of law, based on the facts developed in the record, that the Garvins had *failed* to establish standing to proceed. (Opinion at 6-7).

(1) Keith Garvin Had No Standing To Challenge Undergraduate Admissions.

Keith Garvin's objections to the Amendments to Rule 6C-6.002 (in relevant part eliminating the use of preferences based on race, national origin, or gender; replacing "alternative admissions" with the "student profile assessment;" and creating the Talented Twenty Program) were without merit. He testified that he was a tenth grade African-American student with a 1400 PSAT and a 2.6 GPA. As Respondents showed below, Keith Garvin was thus unaffected by the Amendments because at his current rate of academic progress he would be eligible for admission under 6C-6.002(3)(b), a provision *not* affected by the Amendments challenged in this proceeding.

Rule 6C-6.002(3)(b) provides that a student with a 2.6 GPA and an SAT score of 890 is eligible for regular admission. According to the evidence proffered by the Board of Regents, the PSAT is a predictor of what the student will score on the SAT. Thus, it was reasonable to conclude that Keith Garvin would be

eligible for regular admission based on his GPA and test scores. If Keith Garvin were eligible based on his GPA and test scores, he would *not* be affected by the change in the undergraduate admissions rule.

Evidence at the hearing established that some public universities were using race-based preferences to select students for admission. However, even if Keith Garvin had established that he would gain admission based solely on such a preference (as opposed to his educational background, extra-curricular activities, or test scores), he still lacked standing to challenge the Amendments. The racial and gender preferences being eliminated were not within Keith Garvin's protected "zone of interest" as contemplated by *Ward* because such preferences were improper under the Constitution of the United States, the Constitution of the State of Florida, and Florida's Educational Equity Act, and 42 U.S.C. 2000d. *Ward*, 651 So.2d at 1237.

(2) Keith Garvin Had No Standing To Challenge Limited Access Admissions.

The Garvins also claimed to be substantially affected by the Amendments to the limited access programs (those upper level programs requiring competitive admission due to limited space or other resources, or due to higher standards). *See* Rule 6C-6.001(11)(e), Fla. Admin. Code. The Amendment at issue deleted a

provision from existing Rule 6C-6.001(11((e)(6) that permitted up to 10% of the students to be admitted using "different criteria." Keith Garvin testified that when he completed his sophomore year of college he "might' be affected by the elimination of this provision because the university would not be permitted to consider his race as a "different criteria" on which to base his admission to a limited access program. There was no substantial competent evidence supporting Keith Garvin's assertions, and, as the First District held, the ALJ erred in holding that standing had been established. First, Keith Garvin was only a tenth grader at the time of the challenge, and thus was remote in time from the point at which he might apply for enrollment in a limited access program. Furthermore, the likelihood that this repeal could affect him is made more remote by the fact that only certain of the upper level programs are limited access.

(3) Keith Garvin Had No Standing To Challenge Non-Existent Pre-Teacher Education Pilot Programs.

Keith Garvin also could show no interest in Section 240.529(9), Fla. Stat., which authorizes "Pre-Teacher and Teacher Education Pilot Programs" for minority students so they can prepare for a career in education. (Order, R. 340, pgs. 10-11, par. 14-17; par. 292-293). There are *no* such programs. Obviously,

the elimination of preferences in university admissions has no affect on programs that do not exist. Keith Garvin could not be "eligible for enrollment" in programs that do not exist, and thus had no standing to challenge this Amendment. Mattie Garvin's ability to challenge the Amendments was based on the effect the Amendments would have on her son. Given that Keith Garvin lacked standing, she too, lacked standing to proceed. In sum, all Petitioners lacked standing to bring the rule challenge below because they failed to show any injury in fact.

II. THE FIRST DISTRICT'S OPINION IS CONSISTENT WITH *FLORIDA HOME BUILDERS*

Petitioners contend the First District's Opinion stands for the proposition 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 admissions policy of educational institutions."

(Petitioners' Br. at 44-45). Petitioners, supported by the Amici, contend the Opinion thus conflicts with *Florida Home Builders*, which they assert should be expanded to stand for the proposition that any and all advocacy associations are exempt from the standing requirements otherwise imposed upon individuals who seek to challenge an administrative rule. On appeal to this Court, Petitioners have adopted the dissent to the Opinion, which notes that: "*Florida Home Builders*," by passage of time, has become somewhat meaningless, because in almost every case involving standing, opposing parties advance it to support their respective positions, with equal conviction and intensity. In the area of standing, the case provides all things, except clear guidance to all litigants." (Opinion, dissent at 13).

As support for their "interpretation" of *Florida Home Builders*, Petitioners and Amici rely primarily on *Coalition of Mental Health Professions v. Dept. of Professional Regulation*, 546 So.2d 27 (Fla. 1st DCA 1989) ("*Coalition*") and *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1st DCA 2000) ("*Save the Manatee*"). Their reliance upon these cases is misplaced.

A. Petitioners' Proposed Test For Associational Standing Fundamentally Misconstrues Both *Florida Home Builders* and The First District's Decision In *Coalition*, And Ignores Section 120.56, Fla. Stat.

Petitioners' legal argument on standing is in direct and impermissible conflict both with Section 120.56, Fla. Stat., and with this Court's decision in *Florida Home Builders*, and would overturn decades of state case law construing standing requirements.

B. *Florida Home Builders* Does Not Entitle Petitioners To Standing As A Matter Of Law.

Petitioners contend that in the *Coalition* case, the First District created an "exemption" from the Legislature's requirements for standing as set forth in Section 120.56, Fla. Stat., and from this Court's requirements for associational standing set forth in *Florida Home Builders*. According to Petitioners, the *Coalition* court held that *any* association had standing to pursue a rule challenge as a matter of law, so long as it was able to "allege" that at least "some" of its members would be "regulated" by the proposed administrative rule. Petitioners asserted below that the First District applied this "exemption" to *all* associations in the past, but did not apply the same "exemption" here, thus creating a "new test" that

"discriminates" against associations (such as the NAACP) that are not trade or professional organizations. Petitioners are wrong in their analysis of both *Florida Home Builders* and *Coalition*.

Petitioners ignore the Legislature's requirements set forth in Section 120.56, Fla. Stat., and have misread this Court's requirements in *Florida Home Builders*. The Legislature determines standing requirements for administrative rule challenges, and Section 120.56, Fla. Stat., could not be more clear. Section 120.56, Fla. Stat., states that *only* those who can *show* that they are "*substantially affected* by the rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

In *Florida Home Builders*, this Court determined how to apply these statutory requirements to rule challenges brought not by injured individuals, but by a trade association on behalf of its injured members. The issue before the Court was whether an undisputed showing of standing as to individual builders was sufficient to give the builders' association standing to proceed on its members' behalf, or whether the *association* also had to establish a *special and direct injury* to its *own* interests. This Court held that a trade

or professional association is *not* required to make an additional showing that *it* suffered a *special and direct injury to its own interests,* holding that "an association does have standing under Section 120.56(1), Fla. Stat., to challenge the validity of an agency on behalf of its members when that association fairly represents members who have been substantially affected by that rule." (*Id*. at 352). The Court rejected any requirement to show a "*special injury*" to the association itself, and instead concluded that where individual members had standing to bring a rule challenge, the members' association would have standing to proceed on their behalf. [10]/ The Court held:

> To meet the requirements of Section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

10/As the Court observed, "While it is true that the "substantially affected" members of the builders' association could individually seek determination of rule invalidity, the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders." (*Id*. at 352) (emphasis added).

Petitioners assert that the First District's Opinion conflicts with *Florida Home Builders* because it somehow "resuscitates" a requirement that associations show some "special injury" to the association, by showing under their so-called "uncertainty principle" that they are "certain" to sustain an injury and thus likely to prevail on the merits. (*See* Petitioners' Brief at 34-44). Petitioners are simply wrong in their legal analysis. The Opinion makes *no* mention of "special injury" to the association (let alone requiring any such special injury), and is instead predicated on the well-established requirement that an association show some injury to the individual members. (Opinion at 3-5). Nor is there any requirement that Petitioners prove they were likely to prevail on the merits. Petitioners have simply misread the Opinion.

This Court has specifically *declined* to expand its doctrine of associational standing to associations other than trade and professional organizations. *Palm Point Property Owners' Association of Charlotte County, Inc. v. Pisarski*, 626 So.2d 195 (Fla. 1993) (refusing to apply its doctrine of associational standing under *Florida Home Builders* to a homeowners' association seeking to enforce restrictive covenants). The Court's

reasoning is consistent with its rationale that no association is entitled to standing unless and until *its individual members can show injury in fact to an interest protected by law*.

Florida Home Builders did *not* lower the Legislature's statutory requirements for standing in administrative rule challenges brought by associations. Petitioners assert that this Court accepted the standing test set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), but this argument ignores *Palm Point Property Owners' Association*, in which this Court made clear that its recognition of associational standing was not "a blanket adoption" of the "doctrine of associational standing in the Chapter 120 context." *Palm Point Property Owners' Association*, 626 So.2d at 197. Moreover, even under *Hunt*, associational standing requires that the association's members must have standing to sue in their own right. *Hunt*, 432 U.S. at 343. Here, the NAACP failed to show that *any* of its members had the right to sue in their *own* right because no member could show any real and immediate injury.

Seven years after this Court's decision in *Florida Home Builders*, the First District reached its decision in *Coalition*, holding that where the profession or trade occupation of an individual was licensed or otherwise

regulated by the Legislature, [11/] then such individuals had standing to pursue a challenge to any rule redefining that licensed occupation because their substantial interests in their livelihood would be adversely affected by the proposed agency action. These individuals easily satisfied the two-prong test: they could show the proposed rule presented a "real and immediate injury" and that the injury was related to their right to earn a livelihood by virtue of their licensed (or otherwise regulated) trade or profession.

In *Coalition*, as in *Florida Home Builders*, there was *no* dispute as to the standing of the individual members to proceed with their own rule challenges. In both cases, the issue was whether *the associatio*n could represent its *injured* members. The *Coalition* court, relying upon *Florida Home Builders*, held that it could, and found standing. **The *Coalition* court could not, and did not, eliminate, exempt or relax the standing requirements for rule challenges set by the Legislature in Chapter 120, Fla. Stat., and as applied to associations by this Court in *Florida Home Builders*.**

11/The rule at issue in *Coalition* redefined the practices of various professionals licensed by the same regulatory agency (clinical social workers, marriage and family therapists and mental health counselors).

This case was quite different from both *Florida Home Builders* and *Coalition*, because here *there was a substantial dispute as to whether any individual members of the NAACP had standing to pursue their own rule challenge*. Petitioner NAACP presented no evidence of any injury to its members, but argued it had standing because: the Amendments would "regulate" certain "students;" "some" of the NAACP's members are "students;" and thus the NAACP was entitled to standing as a matter of law, without the "need for further factual elaboration for how each member would be personally affected." (*See Coalition*, 546 So.2d at 28). According to Petitioners' reading of *Coalition*, these allegations in and of themselves satisfied the *Coalition* test for standing. However, even if correct about *Coalition*, these Petitioners could still *not* show that their members were "subject to regulation" by the Amendments. The Amendments at issue in this case simply do not "regulate" students in the way mental health professionals in *Coalition* were regulated by the Legislature; nor are students "regulated" by the Amendments in any common sense or logical understanding of the term "regulate."

C. The First District's Decisions Do Not Confer Standing On These Petitioners.

Petitioners, as well as the dissent to the Opinion, point to the First District's decision in *Save the Manatee* as further support for their argument that Petitioners should have been granted standing to proceed. Their contention, which has already been the subject of an unsuccessful motion for rehearing in the First District, is wholly without merit.

Petitioners' contention is based upon their misreading of *Southwest Florida Water Management District v. Save the Manatee Club, Inc*. 773 So.2d 594 (Fla. 1st DCA 2000), *a case that does not even contain any ruling on, or discussion of, standing*. There is *no* evidence standing was even raised as an issue in this case, and certainly this case cannot be read so as to conflict with the clear requirements imposed by *Florida Home Builders*. [12/] For these reasons, the First District properly denied Petitioners' motion for rehearing based upon this alleged "conflict."

12/Whether or not standing was an issue before the administrative law judge during the DOAH hearing is irrelevant since there is no mention of standing in the First District's opinion in *Save The Manatee.*

Petitioners are also wrong in their assertion that *Farmworker Rights Org. v. State Dep't of Health & Rehab. Servs.*, 430 So.2d 1 (Fla. 1st DCA 1983) somehow requires that Petitioners be granted standing here. *Farmworker Rights* involved a rule challenge by a non-profit organization established "for the purpose of improving the health and economic well-being of Florida farm workers." The organization brought the rule challenge on behalf of its injured farmworker-members, and submitted evidence of members' difficulty in obtaining adequate medical assistance due to lack of access to certain hospitals. (*Id*. at 4). Not only did farmworkers show a "real and immediate injury," but they also claimed the proposed rules were invalid because they violated federal regulations requiring state agencies conducting certificate of need reviews to provide criterion for dealing with the access of low income and minority groups. The challenged rules contained no such criteria, and for this reason the First District found them in violation of the federal regulations, and thus invalid as a matter of law. *Farmworker Rights* is thus not like this case at all, where Petitioners have shown no injury, no standing on behalf of members, and no legally protectable right to preferential admissions based upon race, gender or ethnicity.

Petitioners are further wrong in their contention that they are entitled to standing based on *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 595 So.2d 186 (Fla. 1st DCA 1992). There, an environmental organization ("FOE") filed a petition for an administrative hearing under Section 120.57 to challenge a final order of the Board of Trustees allowing the use of a botanical site that had been purchased under the Conservation and Recreation Lands statute ("CARL") as a juvenile detention facility. This Court found that the subject property had already been purchased pursuant to the CARL program, and the FOE members were already using the property in a manner consistent with the CARL program. The First District held:

> The nature of the proposed proceeding is to determine whether the use of the property as a juvenile facility will comply with section 253.023, Fla. Stat., or preclude use by the public for the purposes enumerated in section 253.023, Fla. Stat. The interests alleged by the FOE were within the 'zone of interests' protected by the CARL statute. The allegations of the petition are that utilization of the land as a juvenile facility will immediately preclude use of the facility as recreation areas, as well as cause environmental damage to the proposed site. We, therefore, find that FOE has alleged sufficient facts, if determined to be true, to constitute injury of the type which the CARL statute is designed to protect.

(*Id*. at 190). FOE thus showed a real and immediate injury to an interest protected by the CARL statute, and had standing. Here, Petitioners never showed any injury to any statutory or constitutional interest, and thus failed to show standing.

Petitioners also relied on the First District's decision in *Federation of Mobile Home Owners of Florida et.al. vs. Florida Manufactured Housing Association, Inc.*, 683 So.2d 586 (Fla. 1st DCA 1996). In this case, the First District held that the Association comprised of mobile home park owners had standing to challenge a rule repeal that left in its place non-rule policies governing the manner and method of amending the prospectuses required to be given to mobile home owners. Petitioners asserted that FMHA did not have standing to bring its claim under Section 120.535, Fla. Stat., because the alleged non-rule policies had yet to be applied. The First District applied the statutorily required standing test and held:

> We conclude that the uncertainty engendered by the Division's non-rule policy substantially affects the interests of mobile home park owners such that they have standing. … The mobile home part owner is statutorily obligated to provide tenants with an "approved' prospectus, and cannot enter into a binding rental agreement until after providing the prospective tenant with an "approved" prospectus. Therefore, the mobile home park owners have demonstrated the requisite injury in fact attributable to the elimination for the process for approval of amended prospectuses.

(*Id*. at 593).

Finally, Petitioners are wrong in asserting there is a conflict between the Opinion and *Board of Dentistry v. Florida Hygienist Association*, 612 So.2d 646 (Fla. 1st DCA 1993). In that case, the First District found the dental hygienists had standing to pursue a rule challenge based upon its conclusion that they were 'substantially affected" by the rule. The court based its ruling upon its determination that: "hygienists who are already qualified, licensed and practicing have a sufficient interest in maintaining the levels of education and competence required for licensing to afford them standing to challenge an unauthorized encroachment upon their practice." (*Id*. at 647). Here, there is no "license" for students.

These First District decisions relied upon by Petitioners simply do *not* stand for the proposition that this Court's decision in *Florida Home Builders* gives all associations a "free pass" on standing. *See Florida League of Cities, Inc. v. Dept. of Environmental Regulation*, 603 So.2d 1363 (Fla. 1st DCA 1992).

III. EVEN HAD PETITIONERS SHOWN THEY WERE SUBSTANTIALLY AFFECTED BY THE RULE AMENDMENTS, THEY FAILED TO ESTABLISH IN THE RECORD BELOW THAT THEY HAD ANY LEGALLY PROTECTABLE INTEREST.

The dissent to the Opinion found Petitioners had standing based upon the legal argument that affirmative action programs give "privileged status," and are part of African-American students' "right to full citizenship." (Opinion, dissent at 10-13). The dissent determined that Petitioners were unwilling to "give up" racial and gender preferences to which the dissent found Petitioners were "entitled." (Opinion, dissent at 12). Petitioners have *not* adopted this argument to support their appeal to this Court on grounds of standing, [13/] and indeed, there is no legal authority to support it. While the United States Supreme Court has not yet settled the law governing the consideration of race in admissions decisions, [14/] the law here in Florida and in the 11th Circuit is that racial and gender-based preferences and quotas are unlawful. In any event, no one in the State of Florida has any "right" (statutorily, constitutionally or otherwise) to be admitted to a state university based upon his or her race or gender. *See Engineering Contractors' Association v. Metropolitan Dade County*, 122

13/Petitioners adopt the dissent's *policy* favoring affirmative action, but do not assert any "right" to affirmative action as a basis for standing to proceed in their rule challenge.

14/On December 1, 2002, the United States Supreme Court granted certiorari review in *Grutter v. Bollinger*, _ S.Ct. __, 2002 WL 1968753, 71 USLW 3154 (U.S. Dec. 02, 2002)(No. 02-241 and No. 02-516).

F. 3d 895 (11th Cir. 1997), *cert. denied*, __U.S.__, 118 S.Ct. 1186, __L.Ed.2d __ (1998); *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308 (N.D. Fla. 1998); *Wooden v. Board of Regents*, 247 F.3d 1262 (11th Cir. 2001); *Johnson v. Board of Regents*, 263 F.3d 1234 (11th Cir. 2001).

The dissent is grounded on a fundamentally flawed misunderstanding of what the administrative admissions rules provided *prior* to adoption of the Amendments. Even before the Amendments were adopted, there were *no* rules "entitling" minorities to preferential admissions treatment or otherwise "requiring" or even "authorizing" such preferences. (Order, par. 282-83; pg. 126-27). Indeed, the rules were silent on this issue. The Amendments thus did not "take away" any existing "right." Nor does any general "education right" include *the* "right" to admission to a state university. As explained by Respondents in the record below, the Amendments were adopted in simple recognition of the fact that any gender or race-based affirmative action programs were becoming increasing constitutionally suspect.

In holding that the NAACP had standing, the ALJ overlooked or ignored the lack of any evidence showing that the Amendments "encroach[ed] upon an interest protected by statute or the constitution" as

required by *Ward v. Board of Trustees*, 651 So.2d 1236, 1238 (Fla. 4th DCA 1995). The NAACP argued that some of its members "might" be denied admission to the SUS as a result of the Amendments repealing racial preferences and adopting the Talented Twenty Program. However, even if this were true, any such "racial preferences" would be constitutionally suspect, without requisite factual support, and susceptible to strict scrutiny analysis upon challenge. In fact, as NAACP testified, one of the reasons for adopting the Talented Twenty Program and eliminating racial preferences in university admissions was recognition of the dubious legality of such preferences in light of recent federal and state court rulings. (T. 343, 349). The Respondents adopted the Talented Twenty Program as a legal method of *increasing* student diversity in Florida's university system, without the use of legally suspect racial preferences and quotas. (Tr. 353-54)

As a result of the three-day evidentiary hearing, the ALJ held that there was substantial competent evidence *justifying* the prohibition on racial and gender preferences in student admissions. (Order, R. 340, pg. 127, par. 282). Petitioners *never* challenged this determination by the ALJ in their appeal to the First District. Moreover, neither the SUS nor the individual universities could show a compelling state interest to

keep such preferences, because, as the NAACP conceded, no disparity studies exist that show there are present effects of past discrimination in Florida's SUS.

Here, the challenged Amendments created an *additional* merits-based admissions standard, and prohibited any further use of racial or gender-based preferences. Petitioners failed to show they had any legal interest within the zone of interest regulated by these statutes and rules. *See, i.e., Lanoue v. Fla. Dept. of Law Enforcement*, 751 So.2d 94 (Fla. 1st DCA 1999)(because driver had been charged with a DUI and had received a driver's license suspension, he had an interest within the zone of interest regulated by the rules implementing the implied consent law); *see also*, *Cole Vision*, 688 So.2d at 407 (reversing hearing officer's determination that appellants did not have standing to challenge rule: "Because this rule purports to regulate appellants, and as a result potentially exposes them to legal action and monetary penalties, appellants have demonstrated that they are substantially affected by this rule."); *State v. Rawlins*, 623 So.2d 598, 600-601 (Fla. 5th DCA 1993)(affirming the trial court's determination that "Rawlins only has standing to challenge the

constitutionality of the statute and the rules which pertain to the area of the St. Johns River in which he was cited for speeding").

Indeed, Respondents' adoption of the Amendments was fortuitous and timely in this respect. Less than two months after the Board's adoption of the Amendments, the Northern District of Florida issued an order in *Susan Wooldridge v. Frank Brogan, Commissioner of Education et.al*, Case No. 1:96cv4-M.P.(N.D. Fla. 2000), a case which involved, in relevant part, the plaintiff's challenge to the use of racial preferences in Florida's law schools. In its order, the court observed that plaintiff's challenge to alleged racial preferences used at Florida law schools would, if tried, require a strict scrutiny analysis. (*Id*. at 14). The court observed, however, "that in light of the Board of Regents' recent approval of rules eliminating race considerations in the admission policies of Florida's public universities, Plaintiff's motion for summary judgment on her claim for injunctive relief might be moot," and directed the parties to submit briefs on the mootness issue. A complete copy of the order is included as Appendix A to this brief. (*Id*. at 15); *see also*, *Johnson v. Board of Regents*, 263 F.3d 1234 (11th Cir. 2001).

Petitioners wrongly argued below that Florida's Educational Equity Act, Section 228.2001, Fla. Stat., granted a "right" to preferences. There was no legal support for that position, however. Section 228.2001, Fla. Stat., is modeled after its federal counterpart, 42 U.S.C. 2000d, which states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programmer activity receiving Federal financial assistance." Although there has been only one reported decision construing Section 228.2001, Fla. Stat., there have been numerous cases involving its federal counterpart, 42 U.S.C. 2000d. For example, in *Daniels v. School Board of Brevard County*, 985 F. Supp. 1458, 1460 (M.D. Fla. 1997), the court explained that Section 228.2001, Fla. Stat., prohibits, inter alia, gender discrimination in public education. It extends protection to those enrolled in public educational institutions which receive or benefit from either state or federal financial assistance." Prohibition of gender discrimination, however, is only one aspect of the Educational Equity Act. The Act, like 42 U.S.C. 2000d, also prohibits discrimination on the basis of race or national origin.

There have been no reported Florida decisions construing Section 228.2001, Fla. Stat., as it relates to university admission. However, in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit considered 42 U.S.C. 2000d in reviewing law school admissions policies of the University of Texas that gave preferences to certain minorities. In finding the school's preference program unconstitutional, the Fifth Circuit noted that the Equal Protection claims of the 14th Amendment provides that "[n]o State shall…deny any person within its jurisdiction the equal protection of the law,' and recognized that "[t]he central purpose of the Equal Protection clause "is to prevent the states from purposefully discriminating between individuals on the basis of race." 78 F.3d at 939 (quoting *Shaw v. Reno*, 509 U.S. 630 (1993)). In reaching its decision, the court applied a strict scrutiny analysis, and rejected the argument that diversity was a compelling state interest sufficient to justify the use of racial preferences.

Federal courts here in Florida have relied on *Hopwood* in striking race-based preferences as unconstitutional. For example, the federal court for the Middle District of Florida relied on *Hopwood* in *Kane v. Freeman*, No. 9402019, Civ-T-17, 1997 WL 158315 (M.D. Fla March 17, 1997), and applying the strict

scrutiny test, held the Tampa police department's use of race-base preferences in promotion decisions was unconstitutional. Similarly, in *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308 (N.D. Fla. 1998), the federal court applied a strict scrutiny test and found the Florida Department of Transportation's affirmative action program violates the Equal Protection Plan of the Fourteenth Amendment.

IV. THE FIRST DISTRICT'S OPINION IS EXPRESSLY LIMITED TO PETITIONERS' LACK OF STANDING BASED ON THE RECORD DEVELOPED BELOW, AND THERE IS NOTHING TO PREVENT PETITIONERS FROM BRINGING ANOTHER CHALLENGE PROVIDED THEY ARE ABLE TO SATISFY THE LEGAL REQUIREMENTS FOR STANDING.

The First District's Opinion is narrowly and carefully written. It is expressly limited to Petitioners' failure to satisfy the first part of the two-part test for standing, based on the record below. The Opinion does *not* address whether or not Petitioners met the other requirements, and made no ruling as whether or not Petitioners established that "that the alleged interest [was] arguably within the zone of interest to be protected

and regulated." The Opinion also makes no ruling on the merits of Petitioner's challenge to the Amendments.

Petitioners have exaggerated the significance of the Opinion, suggesting (erroneously) that they would never have standing. However, as the First District expressly stated, there is nothing to keep any of the Petitioners from again challenging the Amendments if and when they are able to satisfy the standing requirements. Section 120.56(3)(a), Fla. Stat., provides that "[a] substantially affected person may seek an administrative determination of the invalidity of an existing rule *at any time during the existence of the rule*." Petitioners have admitted that at the time they brought their challenge, in the spring of 2000, it was impossible to predict what effect the Amendments would have on the Garvins or on any of the NAACP's members. Their challenge was thus premature at best, and was based only on unproven speculation and an unwillingness to replace preferential admissions policies with an untried Talented Twenty Program open to all. However, administrative challenges cannot be brought based on rank speculation of what "might" happen. Indeed, Petitioners admitted the Amendments might even prove beneficial to minorities.

This appeal illustrates why Petitioners should have never been allowed to proceed with their premature challenge to the Amendments in the spring of 2000. First, Petitioners have conceded they had no evidence of any injury at that time. Second, the relief Petitioners seek is relief no court can give them, as what they really seek is a *mandate* for preferential, quota-based admissions policies. Third, even if this Court were to reverse on grounds of standing, the ALJ found six of the seven Amendments to be completely valid. Any continued challenge at this point is probably now moot, as over two years have now lapsed since Petitioners' administrative rule challenge to the Amendments, and Petitioner Keith Garvin may well be out of high school by now. Certainly, had Petitioners obtained any evidence of a "real and immediate injury in fact," they could have (and undoubtedly would have) brought another administrative challenge. *That has not happened*. Moreover, as the First District has made clear that if and when Petitioners can satisfy the fundamental elements of standing, there is *nothing* to prevent them from bringing another challenge.

Finally, even if this Court were inclined to find that Petitioners had standing, the ALJ's Final Order could and should be affirmed on the merits in accordance with Respondents' arguments made in the First District, all of which are adopted herein.[15/]

CONCLUSION

For the foregoing reasons, the Opinion of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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15/As to the merits of Petitioners' challenge, the Final Order should be affirmed as to the findings made on the six Amendments, and then reversed as to the ruling on the Amendment repealing Rule 6C-6.001(10(e)(6), which should also be found to be a valid exercise of authority.

By:_____
Daniel Woodring, Esq.
Florida Bar No: 86850

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was served via U.S. Mail this __ day of December, 2002 to counsel for Petitioners, Daniel H. Thomson, Berger Singerman, 215 S. Monroe Street, Suite 705, Tallahassee, FL 32301 and Mitchell Berger, Berger Singerman, 350 E. Las Olas Blvd., Suite 1000, Fort Lauderdale, FL. 33301 and counsel for Amici, Arthur England and Elliott Kula, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131; Woody Peterson, Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street, N.W. Washington, D.C. 20037-1526; David Lipman, 5901 S.W. 74th Street, Miami, FL 33145; Thomas Henderson, Lawyers' Committee for Civil Rights, 1401 New York Avenue, NW, Suite 400, Washington, D.C. 20005.

By: _____

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.201(a)(2).

By: _____