IN THE SUPREME COURT OF FLORIDA

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

Petitioners/Appellants,

v. CASE NO.: SC02-1878

FLORIDA BOARD OF REGENTS AND the STATE BOARD OF EDUCATION,

Respondents/Appellees.
_____/

REPLY BRIEF OF PETITIONERS

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

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Abbreviations

The following abbreviations will be used in this Reply Brief:

ALJ . . . . . Administrative Law Judge
APA . . . . . Administrative Procedures Act, Ch. 120, Fla. Stat.
Board . . . . . Florida Board of Regents
NAACP . . . . . National Association for the Advancement of Colored People
Petitioners . . . . . NAACP, Mattie Garvin and Keith Garvin
Respondents . . . . . Florida Board of Regents and State Board of Education
SUS . . . . . State University System
First District . . . . . Majority opinion in the First District Court of Appeal

Citations to Record

Citations to the Record filed in this case will be in the same format as in the Initial Brief.

SUMMARY OF ARGUMENT

The Board mistakenly argues that this Court chose not to extend to associations other than trade or professional ones the doctrine of associational standing in *Florida Home Builders Association v. Department of Labor and Employment Security,* 412 So. 2d 351 (Fla. 1982). The Board misapplies federal precedent on equal protection litigation to APA rule challenge proceedings. The Board misreads case law under the APA in arguing that persons challenging proposed rules must be able to predict, to establish standing in the first instance, the specific adverse consequences that will occur to the challenger after the rules are adopted and implemented, rather than how the challenger's substantial interests are affected, as § 120.56, Fla. Stat., requires. At issue in such challenges is whether the rules are invalid exercises of legislative authority, not, as the Board would suggest, whether they are sound public policy. Finally, the Board argues against standing for Keith Garvin based upon unsubstantiated references to the record, disregarding contrary findings of the ALJ.

ARGUMENT

I. THE BOARD HAS MISAPPREHENDED THE DISTINCTION BETWEEN STANDING TO CHALLENGE AGENCY RULES AND STANDING IN CIVIL PROCEEDINGS

In their Initial Brief Petitioners asserted that the District Court's opinion below conflicts with the associational standing test this Court enunciated in *Florida Home*

Builders, as further explained by the District Court in *Coalition of Mental Health Professional vs. Florida Dep't. of Prof. Reg.*, 546 So. 2d 27 (Fla. 1st DCA 1989). Petitioners claimed that the majority opinion below drew an unprecedented, never defined distinction between professional and trade associations on the one hand and advocacy associations such as the NAACP on the other.

In its Answer Brief the Board claims that the District Court's distinction is consistent with *Florida Home Builders* by citing *Palm Point Property Owners' Association of Charlotte County, Inc., v. Pisarski*, 626 So.2d 195 (Fla. 1993), for the proposition that "This Court has specifically *declined* to expand its doctrine of associational standing to associations other than trade or professional." (Answer Brief, p. 31) The Board's argument completely misses the point of *Palm Point*.

In *Palm Point* a homeowners association sued to enjoin a homeowner from violating certain deed restrictions. After being dismissed for lack of standing, the association appealed, ultimately to this Court, seeking to expand standing in *Florida Home Builders* to actions by associations to enforce restrictive covenants. The Court declined, holding that associational standing in that case was not a "blanket adoption of the doctrine," but rather was one established specifically to apply to proceedings under the APA, "in order to further the legislative purpose of expanding the public's ability to contest the validity of agency rules." *Id.* at 197. The doctrine was not

appropriate for actions to enforce restrictive covenants, however, because of "the long standing rule that covenants that run with the land must be strictly construed in favor of the free and unrestricted use of real property . . . ." *Id.*

If *Palm Point* does have relevance to this case, it is to reaffirm the applicability of associational standing in rule challenge proceedings as previously articulated in *Florida Home Builders*, not to suggest some new limitation on rule challenge standing, as the Board argues. The public policy of avoiding litigation that restricts the use of property is clearly different than the public policy articulated in *Florida Home Builders* in favor of enabling people to challenge agency rulemaking.

The Board also misses the mark in its reliance on federal case law. In their Initial Brief Petitioners referred to federal cases in discussing how *Florida Home Builders* relied upon such cases to draw a favorable analogy between standing under the Federal Administrative Procedures Act and standing under Florida's APA. The Board has chosen instead to cite to equal protection cases, in order to question the underlying constitutionality of affirmative action programs, and thereby argue that Petitioners have no standing because affirmative action programs within the SUS that Petitioners seek to preserve are unconstitutional.

Notwithstanding the Board's efforts to denigrate the legality of affirmative action policies, the United States Supreme Court has recognized that the educational benefit

of diversity is a compelling government interest justifying the use of race as a factor in admissions. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). The extent to which race-based admission policies are allowable is a complex issue currently pending before that Court. *Grutter v. Bollinger*, 123S.Ct. 67, 71 U.S.L.W. 3387 (*Certiorari granted*, Dec. 2, 2002). The Board's efforts to suggest that the case law in this area is settled is, to say the least, presumptuous.

At any rate, at issue here is standing to challenge proposed state rules, not to pursue federal constitutional claims. That said, no federal case the Board cites even suggests that persons of color lack standing to challenge programs that would eliminate consideration of race in university admissions policies. Indeed, contrary to the what the Board argues as discussed in Part II herein, the very case the Board attaches to its brief shows that predictability of outcome is not necessary for standing. On page 12 of *Wooldridge v. Brogan*, Case No. 1:96cv4-MMP (N.D. Fla. 2000), the court observed that to have standing to pursue an injunctive relief claim, the white plaintiff need not show she would have been admitted but for existing affirmative action policies. The Board's argument would thus appear to have the ironic effect of allowing standing for a white student to challenge an admissions program that considers race, but not a black student to challenge its elimination.

II. THE BOARD HAS MISAPPREHENDED THE MEANING OF "INJURY IN FACT" AS IT APPLIES TO RULE CHALLENGE PROCEEDINGS

In its Answer Brief the Board argues that Petitioners failed to meet the "injury in fact" requirement for standing because they did not prove "how" the proposed rules would cause such injury. Curiously, the Board does not directly challenge the ALJ's own determination that Petitioners were "in jeopardy of real and sufficient immediate injury in fact when applying for admission." (R:444) Instead, the Board simply argues, in essence, that mere existence of uncertainty necessarily means injury in fact does not exist, pointing to testimony of record where Petitioners' witnesses frankly acknowledged some uncertainty of outcome for an untested program that would, among other things, replace effective, existing affirmative action programs that currently benefit African Americans but would be prohibited by the new rules. (*See* Initial Brief, pp. 18-19) The Board seems to be arguing that if you cannot predict the precise impact of an injury, you cannot even ask for protection from injury at all.

As a threshold matter, it bears noting that the Board uses a standing test that this Court has not specifically applied to rule challenge proceedings. In *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997), this Court did adopt the two-pronged standing test established in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981), the first prong of which is "injury in

fact." The case applied the test to agency action challenges under § 120.57, Fla. Stat., however, not rule challenges under § 120.56. The wording of the two statutory standing tests is not the same. In *Florida Home Builders*, a rule challenge case, this Court described the test, quoting that statutory standard, as being whether the challenger was "'substantially affected.'" 412 So.2d at 353-354. No subsequent reported case of this Court has modified this holding.

The First District has applied the *Agrico* two pronged test to rule challenges. The cases cited on page 36 of Petitioners' Initial Brief,[1] however, show that the court has also recognized that standing is a less demanding test in rule challenges than in § 120.57 challenges to agency orders such as licensing proceedings. The reason seems obvious–proposed rules by their very nature are only "proposed," and outcome necessarily is at least to some degree speculative. The Board's argument fails not only because it ignores this distinction, but also because it ignores the ALJ's contrary well-grounded determination of injury, even assuming the distinction did not exist.

The central thesis of the Board's injury argument is that because Petitioners cannot specifically predict what decrease would occur to minority participation in the SUS from the rules, Petitioners have not shown injury in fact. The argument ignores

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[1] *Society of Ophthalmology v. Board of Optometry*, 532 So.2d 1279 (1st DCA 1988); *Board of Dentistry v. Florida Hygienist Association, Inc.*, 612 So.2d 646 (1st DCA 1993); *Cole Vision Corp. v. Board of Optometry*, 622 So.2d 404 (1st DCA 1997).

the case law on pages 34-35 of Petitioners' Initial Brief,[2] in which courts have repeatedly rejected the notion that unpredictability of impact defeats standing in rule challenge proceedings. The Board instead relies on five cases cited on page 16 of the Answer Brief [3] that reference the "injury in fact" requirement. Reliance on these cases hardly supports the Board's argument. Indeed, in four out of the five cases cited, the court overturned ALJ dismissals for interpreting "injury in fact" too narrowly, and in the fifth, *All Risk*, the court reversed a dismissal for standing on procedural grounds.

The case the Board relies on the most is *Ward*. The reliance is misplaced. In analyzing the meaning of "injury in fact," *Ward* reads *Coalition* to say that "pure speculation or conjecture" does not apply where the proposed rule would regulate a rule challenger's "occupational field per se by, for example, setting criteria to engage in that profession." 651 So.2d at 1237. *Ward* then goes further, saying that standing

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[2] *Federation of Mobile Home Owners of Florida, Inc., v. Florida Manufactured Housing Association, Inc.*, 683 So.2d 586 (Fla. 1st DCA 1996); *Board of Dentistry v. Florida Hygienist Association*, 612 So.2d 646 (Fla. 1st DCA 1993); *Televisual Communications, Inc., v. Florida Dep't. of Labor and Employ. Sec.*, 667 So.2d 372 (Fla. 1st DCA 1995); *Florida Dep't. of Prof. Reg. v. Sherman College of Straight Chiropractic*, 682 So.2d 559 (Fla. 1st DCA 1995).

[3] *Lanoue v. Fla. Dep't. of Law Enforcement*, 751 So.2d 94 (Fla. 1st DCA 1999); *Ward v. Bd. of Trustees of the Internal Improvement Trust Fund*, 651 So.2d 1236 (Fla. 4th DCA 1995); *All Risk Corp. of Fla. v. State Dep't. of Labor & Employment Sec.*, 413 So.2d 1200 (Fla. 1st DCA 1982); *Cole Vision Corp. v. Department of Bus. & Prof. Reg.*, 688 So.2d 404 (Fla. 1st DCA 1997); *Televisual Communications, Inc. v. State, Dep't. of Labor & Employ. Sec.*, 667 So.2d 372 (Fla. 1st DCA 1995).

exists "even where a challenged rule does not regulate the challenger's profession per se," but rather "the professional conduct of persons within such occupation." *Id.* This observation contrasts sharply with the Board's argument that "The Amendments at issue in this case simply do not 'regulate' students in the way that mental health professionals in *Coalition* were regulated . . . ." (Answer Brief p. 34)

In his dissent below, Judge Browning correctly recognized that the proposed rules clearly regulate Petitioners. *NAACP, Inc., v. Florida Board of Regents*, 822 So.2d 1, 9-10 (Fla. 1st DCA 2002). As the numbers indicate on page 11 of the Initial Brief, reciting undisputed ALJ findings, a substantial number of NAACP members (including Keith Garvin) are of high school and college age, and currently or in the future could enroll in the various SUS institutions and programs therein. The proposed rules will regulate these students by establishing admission policies that determine who does or does not get into the various institutions and programs.

Consistent with Judge Browning's view, *Ward* shows that courts should not take too narrow a view of regulation as it applies to establishing injury in fact. Mr. Ward was a professional engineer concerned that proposed rules relating to dock construction in aquatic preserves "would result in economic and administrative adverse impact to appellant; would undermine appellant's ability to meet his chapter 471 statutory duty to design safe docks and piers; and would unlawfully encroach

upon appellant's engineering practice." 651 So.2d at 1238. Reading Mr. Ward's allegations of standing as accepted by the court, it is clear that the direction in *Ward* is precisely the opposite of where the Board wants to go. Associational standing is not limited to professionals wanting to challenge proposed rules of the agency that specifically regulates them. What *Ward* shows, as do *Lanoue* and *Televisual*, also listed in footnote 3, is that such a narrow view is shortsighted and wrong. Mr. Ward was worried that new dock construction rules would make it too difficult for him, as a professional engineer, to design docks, which would create both an economic and an administrative hardship. The court said that the allegation was sufficient for standing even though the rules at issue regulated dock construction, not professional engineers. In other words, an association (or individual) can have standing to challenge rules even though the rules may not directly relate to the regulation of professional conduct of members, but to other activities of the membership that are equally if not more important to the organization's *raison d'etre*.

The Board's interpretation of injury stands in sharp contrast to the focus in *Ward* on the effect of regulation rather than on prediction of a specific outcome. If the Board's interpretation were to be accepted, Mr. Ward would certainly never have had the opportunity to pursue his rule challenge. How could Mr. Ward know whether the new rules would create "administrative and economic" problems to his engineering

practice until the rules were adopted, he was hired to build a dock in an aquatic preserve, the regulating agency made it more difficult to design and build the dock than the status quo prior to rule promulgation, and he suffered "administratively" or economically as a result? Clearly, there is a solid foundation for the First District Court precedent cited in footnote 2 for the proposition that speculation as to future impacts of proposed rules is not a barrier to challenging them.

Finally, as indicated on pages 12-13 of the Answer Brief, the Board claimed not to question, and concedes that the District Court did not question, the second prong of the *Agrico* standing test, whether the proposed rules were in the zone of interest of Petitioners. The Board reiterates this on page 45, when it says that once the rule is implemented and an injury does occur, Petitioners would then have standing for a rule challenge. This concession by the Board is a hollow one. In reality the Board elsewhere claims the second prong can never be met, by saying that the NAACP has nothing of interest to protect because "racial and gender-based preferences and quotas are unlawful." (Answer Brief p.39) As discussed elsewhere in this brief, this misrepresentation of both the law and of the NAACP's reasons for challenging these proposed rules should not be grounds for enabling the Board to argue that Petitioners cannot meet the second prong. It is not surprising that the Board does not directly challenge the reality, as noted in pages 13-14 of the Initial Brief, of the NAACP's

dedication to challenging discrimination against and denial of opportunities for persons of color, with equal access to educational opportunities being the key strategy to accomplish this. What the Board does do is fail once again to heed its own precedent, *Ward,* which cautions that, like with the first prong of the standing test, analysis of the second prong is not based solely on whether the enabling statute itself provides the basis for standing. 651 So.2d at 1238-1239.

III. THE BOARD HAS MISAPPREHENDED THE DISTINCTION BETWEEN STANDING TO CHALLENGE AN AGENCY'S AUTHORITY TO PROMULGATE RULES AND THE MERITS OF POLICIES EXPRESSED IN THOSE RULES

Throughout its Answer Brief the Board challenges Petitioners' standing by touting the wisdom of its proposed rules. The Board claims they will implement programs that are beneficial to minorities, who thus could not possibly be "injured in fact" by these programs. This argument assumes that standing cannot exist for those who cannot first prove they will prevail on the merits of a rule challenge.

On a conceptual level, this argument has previously been rejected. *See, e.g.*, *State, Bd. of Optometry v. Fla. Soc. of Ophthalmology,* 538 So. 2d 878, 881 (Fla. 1st DCA 1988); *Lanoue,* 751 So.2d at 99. The argument is not even relevant here, since the merits are still at issue in this case, the District Court having declined to address them because of its standing ruling. Even the Board admits, when the context is

convenient (e.g., Answer Brief, p. 45, last sentence), that the merits are not at issue here.

Even if the merits were at issue, the Board's argument misses the point, by misstating the merits. This case is not simply about the wisdom of the proposed rules, though Petitioners certainly consider them ill-advised. As in any rule challenge proceeding, the issue is whether the rules are "an invalid exercise of delegated legislative authority," as that term is defined in § 120.52(8), Fla. Stat. Often the wisdom of a proposed rule is irrelevant to an invalidity determination. In this very case, Petitioners focused their appeal below on whether the legislature had given the Board the necessary legal authority--i.e., the "specific powers and duties" under § 120.58(2), Fla. Stat.--to adopt the proposed rules in the first place, not whether the proposed rules were a good idea. *See, e.g., State Dept. of Insurance v. Insurance Services Office*, 434 So.2d 908, 914 (Fla. 1st DCA 1983) (where rule lacks necessary statutory authority, wisdom of rule is irrelevant).

The Board also argues the merits, as previously noted, by claiming that Petitioners cannot have standing to challenge the elimination of unconstitutional programs. Once again, the real issue is whether the Board had the legal authority to adopt the rules in the first place. The Board's argument is also wrong because the constitutional attack completely misrepresents Petitioners' position. For example, the

Board says, "NAACP's announced goal during the rule challenge was 'to eliminate racial prejudice,' but the NAACP had *no* evidence of any adverse discrimination or prejudice in the SUS admissions process." (Answer Brief, p.4) The Board proceeds to explain that racial prejudice no longer exists within the SUS, then argues that the proposed rules will maintain this status quo.

At hearing, Petitioners did not dispute the substantial progress made by SUS institutions in eliminating minority underrepresentation prior to development of these rules. Petitioners' concern was over backsliding resulting from the proposed rules' elimination of existing, effective affirmative action programs, which would be replaced with an untested "Talented 20" program; and with the very negative rule language used to attack affirmative action. As the Initial Brief points out on pages 14-23, while Petitioners could not conclusively prove that backsliding would occur, neither could the Board prove that the new rules would prevent backsliding.

Petitioners' concern about negatively charged terminology is illustrated by the Board's own use of its preferred terminology to mislead. This is shown by comparing page 9 of the Answer Brief, saying Petitioners could cite to "no provision in the existing Rules that *required* race or gender-based preferences," to page 24, saying "Evidence at the hearing established that some public universities were using race-based preferences to select students for admission." Any apparent inconsistency in

these two statements must be read in light of the Board's treatment of the terms "affirmative action" and "preferences" interchangeably, given that the Board wants to eliminate rules within individual SUS's expressly allowing affirmative action and to replace them with a blanket prohibition on "preferences." The Board itself demonstrates why Petitioners consider offensive the Board's use of "preferences" when the Board states, on page 47, that what Petitioners "really seek is a *mandate* for preferential, quota-based admissions policies." *See also* Answer Brief, p. 4, where the Board indicates Petitioners want to maintain "the advantage of racial or gender-based preferences, set-asides or quotas . . . ." In other words, the Board says "affirmative action" should really be called "preferences" because it really means a quota system, which is what Petitioners "really seek." The argument both disregards the record and directly contravenes Petitioners' own stated position, and thereby treats Petitioners' position in a very condescending manner. Petitioners did not argue at trial in favor of a quota system, but instead were trying to keep the Board from adopting rules that would prohibit consideration of race under any set of circumstances. (*E.g.*, T: 194, Initial Brief, pp. 15-16,) The Board itself had trouble trying to explain Petitioners' position in a consistent manner, conceding that "the ALJ found that there was no existing admissions quota and no provision in the existing rules that required race or

gender-based preferences;" and that Petitioners did not adopt the argument that they were "entitled" to "racial and gender preferences." (Answer Brief pp. 8-9,38-39.)

Finally, while not disputing the ALJ's factual findings, (*e.g.*, Answer Brief p. 14) which include findings specifically as to the standing of Keith Garvin (*e.g.*, Initial Brief, pp. 11-13, 27-28) the Board impermissibly tries to add new findings to support its argument that Mr. Garvin's substantial interests are not affected by the proposed rules. The Board presumably did this in response to Petitioners' explanation, at pages 32-34 of the Initial Brief, that the District Court was factually incorrect in saying that Mr. Garvin lacked standing because he would be eligible for admission notwithstanding the new rules. The Board now raises for the first time the suggestion that Mr. Garvin would be eligible for admission anyway by virtue of existing Rule 6C-6.002(3)(b). They offer no record evidence nor any findings by the ALJ in support of this argument, but simply refer to unidentified "evidence proffered by the Board" that "the PSAT [which Mr. Garvin did take] is a predictor of what the student will score on the SAT," which Mr. Garvin has not yet taken. (Answer Brief, p. 24) This vague, unsubstantiated argument is without merit.

CONCLUSION

The District Court opinion should be reversed, and this matter remanded to the District Court for consideration of Petitioners' appeal on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been delivered via U.S. Mail this ___ day of January, 2003, to:

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