NAACP, Inc. v. Florida Board of Regents

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE TWO IMPORTANT CASES BEFORE THE COURT THIS MORNING, AND WE APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE ON THE DOCKET. THAT FIRST CASE IS NAACP INC. VERSUS THE FLORIDA BOARD OF REGENTS. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS DAN THOMPSON. I AM AN ATTORNEY WITH THE LAW FIRM OF BERGER CENTER MAN. WITH ME AT -- OF BERGER SENTERMAN. AND WITH ME IS THE COUNSEL FOR THE CITY RIGHTS UNDER THE LAW, REPRESENTING A.M. I KUING CUSS UNDER -- REPRESENTING AMICUS UNDER THIS CASE.

CHIEF JUSTICE: LET ME SAY INITIALLY THAT THERE IS A ELEPHANT IN THE ROOM AND THAT BECAUSE WE HAVE SUCH A WONDERFUL AUDIENCE OF ATTORNEYS HERE FOR A SUPREME COURT SEMINAR, I WON'T REFER TO AN ELEPHANT, BUT THE ISSUE OF MOOTNESS, COULD YOU PLEASE ADDRESS THAT INITIALLY AND HOW YOU THINK THE COURT SHOULD PROCEED, BASED ON I REALIZE THERE HAS BEEN A SUGGESTION OF MOOTNESS AND THEN THERE HAS BEEN A RESPONSE TO THAT. COULD YOU GIVE US SOME INSIGHT AS TO WHETHER YOU THINK WE SHOULD HAVE FURTHER BRIEFING OR HOW WE SHOULD APPROACH THAT ISSUE BEFORE MAKING A DETERMINATION.

YOUR HONOR, I DON'T BELIEVE IT IS NECESSARY TO REJECT THIS CASE ON MOOTNESS. I DID FILE A RESPONSE TO THE SUGGESTION AND BASICALLY RAISED THREE POINTS. FIRST OF ALL, THIS MATTER WAS CERTIFIED TO THIS COURT BY THE DISTRICT COURT AS A MATTER OF GREAT PUBLIC IMPORTANCE, AND UNDER THE HOLLY CASE, THAT IS CERTAINLY A CONSIDERATION THAT THIS COURT SHOULD TAKE INTO ACCOUNT, WHEN DETERMINING WHETHER TO ACCEPT JURISDICTION ON THE ARGUMENT OF MOOTNESS. FURTHERMORE, AS THE HOLLY CASE POINTS OUT WHICH I CITED IN MY RESPONSE, ONE OF THE ASPECTS OF GREAT PUBLIC IMPORTANCE FOR CERTIFICATION OF THIS NATURE, IS A REVERSAL OF A DECISION OF A DISTRICT COURT OF APPEAL WHICH ESSENTIALLY ESTABLISHES BAD LAW. WHAT WE BELIEVE THIS CASE DOES IS THIS CASE ESSENTIALLY REINTERPRETS THIS ESTABLISHED SUPREME COURT PRECEDENT IN THE CASE OF --.

YOU ARE RELYING ON WELL-ESTABLISHED PRINCIPLE THAT THIS COURT DOESN'T HESITATE TO RECOGNIZE.

YES.

IN THE ORDINARY SITUATION. BUT IS THIS THE ORDINARY SITUATION? THAT IS ORDINARILY, IF THERE IS A VERY SIGNIFICANT ISSUE OF LAW OUT THERE, AND THERE IS A DECISION OUT OF A COURT OF APPEAL OR POSSIBLY A COUPLE COURTS OF APPEAL THAT WE NEED TO RECONCILE, THAT WE WON'T HESITATE TO DO SO IN RECOGNITION OF THE FACT THAT THAT ISSUE MAY RECUR IN, BUT IN THIS CASE, WE HAVE HAD THE WHOLE FUNDAMENTAL UNDERPINNINGS CHANGE, HAVE WE NOT, BY THE ASSERTION OF YOUR OPPONENTS, BUT NOW YOU HAVE A CONSTITUTIONAL BODY THAT IS IN PLACE, AND THAT HAS ADOPTED THESE SAME RULES, AND SO THE WHOLE BACKGROUND OR FOUNDATION IS DIFFERENT RENT, AND -- IS DIFFERENT, AND I AM NOT SO SURE, AND YOU ALL ARE GOING TO HAVE TO AT LEAST EDUCATE THIS ONE MEMBER OF THE PANEL AS TO WHETHER OR NOT THE SAME RULES APPLY AS TO CHALLENGES TO THOSE RULES ENACTED BY THIS NEW BODY. SO COULD YOU GIVE, AT LEAST, SOME, AS OPPOSED TO THE ORDINARY TIME,

WHEN THERE MAY BE MOOTNESS BECAUSE OF A DEATH OR EVEN PEOPLE SETTLE THE LITIGATION OR THINGS LIKE THAT, AND THIS COURT IS CONCERNED ABOUT THE LAW THAT IS STILL OUT THERE, HERE WE HAVE SUCH AN UNUSUAL CHANGE, IN SO FAR AS THE FOUNDATION OF THE RULE AT ISSUE, SO CAN YOU HELP ME WITH THAT A LITTLE BIT.

YOUR HONOR, IN ADDITION TO THE PRECEDENT, WHICH I BELIEVE WOULD BE APPLICABLE TO ALL TYPES OF STANDING CASES IN ADDITION TO THIS ONE, I DO WANT TO POINT OUT FIRST OF ALL, AS A TECHNICAL CLARIFICATION, THIS WAS A CHALLENGE NOT SIMPLY TO THE STATUTORY AUTHORITY OF THE PRIOR BOARD OF REGENTS TO ADOPT RULES, BUT IT WAS ALSO A CONSTITUTIONAL CHALLENGE TO THE AUTHORITY OF AN AGENCY TO ESTABLISH PROGRAMS.

BUT THE PROBLEM IS THIS IS NOT AN AGENCY ANY LONGER, AND UNDER, I MEAN, WE HAD A CASE THAT CAME OUT IN JANUARY, CARIBBEAN CONSERVATION VERSUS FLORIDA FISH, WHICH DIRECTLY CONFRONTED THE ISSUE OF WHETHER A CONSTITUTIONAL BODY IS COVERED BY THE ADMINISTRATIVE PROCEDURES ACT. AND FOUND THAT ONLY THOSE PORTIONS OF THE AUTHORITY OF THE FISH AND WILDLIFE THAT WAS LEGISLATIVELY CREATED, WAS EVEN COVERED BY THE APA. NOW, THIS IS A CHALLENGE UNDER THE APA, CORRECT?

THAT IS CORRECT, YOUR HONOR, ALTHOUGH THERE IS A CONSTITUTIONAL ISSUE RAISED, BUT IN THAT REGARD THERE IS A SUGGESTION OF MOOTNESS. THERE WAS NEVER A SUBSTITUTION OF PARTIES. THERE WAS NEVER AN EXPLANATION OF WHAT THE LEGISLATURE HAS DONE TO ESTABLISH THIS NEW AGENCY, AND IN FACT, THE REASON THERE HASN'T BEEN A SUBSTITUTE OF PARTIES IS BECAUSE THE RESPONDENT IN THIS CASE, THE STATE BOARD OF EDUCATION, STILL EXISTS.

ASSUMING THAT --

WHICH --

-- THAT WE HAVE THIS NEW CONSTITUTIONAL BODY IN PLACE AND NOW THEY HAVE ENACTED THESE NEW RULES, WOULDN'T IT APPEAR THAT, EVEN IF YOU ARE SUCCESSFUL HERE, THAT AFTERWARDS YOU WOULD HAVE TO MOUND MOUNT -- YOU WOULD HAVE TO MOUNT A NEW, A DIFFERENT CHALLENGE SOMEPLACE, UNDER WHATEVER PROCEDURE OR RUSE WOULD APPLY TO THIS NEW SET OF RULES THAT HAVE BEEN ADOPTED BY THIS NEW, NOW, CONSTITUTIONALLY-BASED ENTITY. ISN'T THAT, IN ORDER TO GET ANY RELIEF, IF THAT IS THE WAY THINGS ARE OPERATING NOW ON THE GROUND IN THE UNIVERSITY SYSTEM, WOULDN'T THERE HAVE TO BE A NEW CHALLENGE, AN ADDITIONAL CHALLENGE, NOW, IF A CHALLENGE CAN BE FILED, EVEN IF YOU WERE SUCCESSFUL HERE ON THE ISSUE CERTIFIED BY THE FIRST DISTRICT?

YOUR HONOR, ASSUMING THAT TO BE CORRECT, AND I AM NOT PREPARED TO ASSUME THAT BECAUSE OF THE ANSWER I WAS TRYING TO PROVIDE PREVIOUSLY ABOUT ESSENTIALLY THE NEW AGENCY BEING A SHELL AGENCY NOW WITH AN EXISTING STATE AGENCY THERE, BUT ASSUMING THAT DOES OCCUR, THEN WHAT YOU WOULD BE FACING, WHAT OUR CLIENTS WOULD BE FACING WHEN WE INITIATE THIS CHALLENGE AGAIN, A NEW, IS A LAW OF STANDING THAT HAS BEEN RADICALLY CHANGED IN THE FIRST DISTRICT COURT OF APPEAL,, WHICH EVEN THOUGH IT APPLIES SPECIFICALLY TO ADMINISTRATIVE ACTS, IN REALITY AS THIS COURT DID IN FLORIDA HOME BUILDERS, COURTS LOOK TO PRECEDENT IN OTHER AREAS. YOU KNOW, THEY LOOK BEYOND RULE CHALLENGES TO OTHER AREAS, TO DETERMINE PRECEDENT ON STANDING, AND IN FACT, IN THE CASE THAT THIS PRECEDENT HERE, THE FLORIDA HOME CASE, THIS COURT REACHED OUT TO PRECEDENT AND CASE OR CONTROVERSY CASES UNDER THE CONSTITUTION, WHICH IS A TYPE OF STANDING THAT WE WOULD BE LOOKING AT, IN THE EVENT WE DID NOT HAVE A RULE CHALLENGE BUT WERE SIMPLY FILING A CONSTITUTIONAL ATTACK TO ESTABLISH THE LAW OF CONSTITUTIONAL STANDING IN THIS CASE, SO THE PRECEDENT WOULD STILL BE IMPORTANT AND STILL BE LOOKED TO BY THE DISTRICT COURTS OF APPEAL AS WE TRY TO GET THROUGH OUR

CASE, SO YOU WOULD BE STILL FACING THE ISSUE AS TO WHETHER YOU HAVE TO PROVE THAT YOU HAVE TO GET INTO THE UNIVERSITY IN ORDER TO HAVE STANDING, WHICH YOU CAN'T DO UNTIL THE ADMISSION IS DENIED AND THE LEGISLATION GOES INTO EFFECT, SO IN REALITY YOU WOULD BE FACING THE SAME STANDING ANYWAY.

SO ASSUMING THE REALITY AND THE MOOTNESS ISSUE BRINGS YOU TO THE MERITS OF THIS CAUSE OF ACTION HERE, AS I UNDERSTAND IT, IT REALLY BREAKS DOWN TO WHETHER OR NOT YOU DEMONSTRATED, IN THE ADMINISTRATIVE PROCEEDING, THAT YOUR CLIENTS WERE SUBSTANTIALLY AFFECTED BY THESE RULES. IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND SO WHAT DID YOU, IN FACT, PRESENT TO THE ADMINISTRATIVE LAW JUDGE, THAT DEMONSTRATED THAT YOUR CLIENTS WERE SUBSTANTIALLY AFFECTED AND WHAT DO YOU HAVE TO PRESENT?

URNTS, OKAY, TO ANSWER YOUR SECOND QUESTION FIRST, BASICALLY THERE ARE TWO TESTS FOR STANDING THAT, ONE OF WHICH HAS BEEN DEVELOPED BY THIS COURT, THE ASSOCIATIONAL STANDING TEST, WHICH IS A THREE-PART STANDING TEST. THE OTHER IS --

ADMINISTRATIVE PROCEEDING ACT, ITSELF, SAYS THAT YOUR CLIENT HAS TO BE SUBSTANTIALLY AFFECTED, RIGHT?

THAT IS WHAT I AM TRYING TO GET TO THE SUBSTANTIAL AFFECT, AND TWO JUDGES SHOWED THAT WE HAD PROVED THE SUBSTANTIAL TEST. THE FIRST IS NOT NECESSARILY A MAJORITY OF MEMBERS ARE AFFECTED AND SECONDLY THAT THE FACTORS ARE WITHIN THE ASSOCIATION'S GENERAL SCOPE AND ACTIVITY OF INTEREST AND THIRD THAT THE REQUESTED RELIEF IS OF THE TYPE APPROPRIATE FOR AN ASSOCIATION ON BEHALF OF ITS MEMBERS.

AND IF YOU MEET THOSE THREE CRITERIA, YOU MAINTAIN THAT THAT SATISFIES "SUBSTANTIALLY AFFECTED".

YES. THIS COURT SAID IN 1982 THAT ESTABLISHES STANDING IF YOU MEET THAT 3-PART TEST. THE SECOND STANDING NOT DEVELOPED BY THIS COURT BUT DEVELOPED BY THE FIRST DISTRICT COURT OF APPEAL WHICH HEARS MOST OF THE ADMINISTRATIVE LAW CASES, SO IT IS REALLY THE COURT WITH THE MOST BODY, WHAT HAS BEEN CALLED THE SO-CALLED AGRACO TEST, ALTHOUGH THE AMERISTILL CASE APPLIED THAT TO PROCEEDINGS 157, CHALLENGES TO AGENCY ORDERS, SUCH AS PERMITS, LICENSES, AS OPPOSED TO PROPOSED RULES, AND THAT IS IN FACT IN A ZONE OF INTEREST TEST. THE INJURY IN FACT OF SUFFICIENT MEADACY TO ENTITLE PETITIONER -- IMMEDIACY TO ENTITLE PETITIONER TO A HEARING.

NOW, YOU SAID THIS WOULD BE PRECEDENT, EVEN IF IT WASN'T A CHALLENGE UNDER THE ADMINISTRATIVE PROCEDURE ACT. COULD YOU EXPAND THIS AND SAY LET'S ASSUME THAT YOU WERE GOING TO BRING A CHALLENGE IN COURT, WOULD THE TEST FOR STANDING BE DIFFERENT THAN THE TWO YOU HAVE ENUMERATED?

THE CASE WOULD BE THE CASE FOR CONTROVERSY TEST, WHICH THIS COURT RELIED UPON IN ESTABLISHING THE PRECEDENT OF FLORIDA HOME BUILDERS.

CHIEF JUSTICE: MARSHAL, PURSUANT TO THE TIME SCHEDULE, HAS REMINDED YOU THAT THE FIRST TEN MINUTES OF YOUR ARGUMENT HAVE BEEN USED.

SO IT WOULD BE DIFFERENT?

ALL I AM SAYING IS THIS COURT RELIED ON FEDERAL PRECEDENT UNDER CASE IN CONTROVERSY,

TO DETERMINE STANDING FOR THE PURPOSES OF THE ADMINISTRATIVE PROCEDURES ACT FOR ASSOCIATIONAL STANDING UNDER THE FLORIDA HOME BUILDERS CASE, SO I WOULD THINK THAT THE COURT, WHEN CONSIDERING CASE OR CONTROVERSY STANDING FOR ASSOCIATIONAL STANDING, WOULD PROBABLY BE LOOKING THE OTHER WAY AND LOOKING AT THE LOWER COURT DECISION HERE ON ASSOCIATIONAL STANDING, FOR THE PURPOSES OF DETERMINING WHETHER THERE WOULD BE STANDING TO PROCEED UNDER A CASE OR A CONSTITUTIONAL ATTACK, WHICH ESSENTIALLY WOULD BE THE TYPE OF ATTACK WHICH WOULD BE INVOLVED, IF THIS WAS BEING DONE AS A STATUTORY ATTACK RATHER THAN A CHALLENGE TO A RULE FOR WHICH IT IS DEVELOPED UNDER CHAPTER 120.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING.

GOOD MORNING, MR. CHIEF JUSTICE, MAY IT PLEASE THE COURT. I AM MICHAEL FORM AND HERE, ON BEHALF OF THE -- I AM MICHAEL FOREMAN HERE ON BEHALF OF THE COMMITTEE AND WE WANT TO THANK YOU FOR THIS OPPORTUNITY TO ADDRESS WHAT WE BELIEVE, AS TO THE ADVOCACY GROUPS, A VERY FUNDAMENTAL ISSUE, AND THAT IS THE ISSUE OF STANDING. IT IS REFLECTED BY THE APPROXIMATELY 20 AMICUS THAT HAVE SIGNED ON TO THE VARIOUS BRIEFS, AND OBVIOUSLY AFFECTS THE NAACP.

LET ME ASK YOU A QUESTION THAT I DIDN'T GET TO ASK YOUR COLLEAGUE. HE WAS TALKING ABOUT THE INJURY IN FACT REQUIREMENT. THE FIRST DCA SEEMED TO EQUATE THE SUBSTANTIALLY-AFFECTED REQUIREMENT OF RULE 120.56, WITH AN INJURY IN FACT. IS IT YOUR POSITION THAT THOSE TWO SHOULD NOT BE EQUATED? THAT SUBSTANTIALLY AFFECTED IS SOMETHING LESS THAN "INJURY IN FACT"?

THAT IS PRECISELY ONE OF OUR ARGUMENTS AND, WE THINK, ONE OF THE SERIOUS FLAWS IN THE STATE'S ARGUMENT HERE --.

SO THEN YOU ARE NOT ARGUING THAT THE, THAT THE NAACP OR SOME OF ITS MEMBERS, SUFFERED AN INJURY IN FACT, ONLY THAT THEY DON'T NEED TO SHOW THAT.

NO. WE ARE NOT, YOUR HONOR. WE ARE NOT CONCEDING. WE BELIEVE THE RECORD ADEQUATELY SHOWS THAT THEY BE, THEY MEET ENAN INJURY-IN-FACT -- THAT THEY MEET EVEN AN INJURY-IN-FACT TEST, BUT BASICALLY WHAT HAS HAPPENED IN ARTICLE III IS IT HAS BEEN INJURY-IN-FACT WITH THE ARTICLE III STANDARD SUBSTANTIALLY AFFECTED.

HOW ABOUT IN A FEW YEARS WE WILL BE CELEBRATING BROWN VERSUS BOARD OF EDUCATION. BROWN WAS A STUDENT AND THE PARENTS OF A STUDENT AT A SCHOOL, SO THAT IS THE CLASSIC INJURY-IN-FACT SITUATION, IS IT NOT?

THAT IS AN INJURY IN FACT. IN FACT, THE NAACP --

HELP ME, THAT I WOULD ASSUME THAT, YOU SAY HERE, IF YOU HAD A PORTION OF THE PETITIONERS THAT ARE ACTUALLY PEOPLE APPLYING FOR ADMISSION THAT ALLEGE AN ADVERSE IMPACT BY TAKING AWAY THESE RULES THAT WERE IN PLACE BEFORE, THAT WOULD BE THE STANDING IN FACT. NOW, WHAT IS THE BROADER CONCEPT OF STANDING THAT YOU ARE ARGUING FOR HERE, AND HOW HAS IT BEEN DEMONSTRATED?

WE HAVE LOOKED AT IT IN TWO DIFFERENT WAYS, YOUR HONOR. THE ONE, THE VERY FACTUAL BASIS WHICH MY COLLEAGUE WILL PROBABLY FOLLOW-UP MORE BECAUSE HE IS MUCH CLOSER TO THE FACTUAL BASIS, BUT IN THIS CASE, IN A VERY SIMPLISTIC BASIS IN THIS STATE, PRIOR TO THE "ONE FLORIDA" INITIATIVE, IF YOU WERE A BLACK CHILD INTERESTED IN GOING TO COLLEGE, YOU HAD, UNDER MOST OF THE PUBLIC INSTITUTIONS, THAT RACE COULD BE CONSIDERED AS A

FACTOR IN YOUR ADMISSION, AND EVERYTHING THAT RACE ENTAILS, THE HISTORY OF DISCRIMINATION AND EVERYTHING ELSE. THAT WAS, TO THE EXTENT YOU WANT TO CALL IT AN ENTITLEMENT, A ENTITLEMENT. THE MOMENT THESE RULES GO INTO A PLACE, THAT COULD NO LONGER BE CONSIDERED, SO THAT SUBSTANTIALLY, QUOTE, IN THAT TERM SUBSTANTIALLY AFFECTED ALL BLACKS THAT HAD AN INTEREST IN ATTENDING THESE PUBLIC INSTITUTIONS, AND WHAT I WOULD, WHAT I WOULD FOLLOW THAT UP WITH, THIS COURT, IN FLORIDA HOME BUILDERS, RECOGNIZED THAT THE STANDARD THAT WE ARE TALKING ABOUT HERE, THE APA STANDARD, WAS PUT IN PLACE TO OPEN UP THE ADMINISTRATIVE PROCESS. THIS COURT SPECIFICALLY ADDRESSED THAT, AND THIS COURT SUMMED IT UP THAT HOME BUILDERS EXPLICITLY RECOGNIZED THAT, QUOTE, THE EXPANSION OF PUBLIC ACCESS TO THE ACTIVITIES OF GOVERNMENTAL AGENCIES WAS ONE OF THE MAJOR LEGISLATIVE PURPOSES OF THE NEW ADMINISTRATIVE PROCEDURE ACT. AND THEN WENT ON TO SAY THAT NARROWING THAT STANDARD SIGNIFICANTLY LIMITS THE PUBLIC'S ABILITY TO CONTEST THE VALIDITY OF AGENCY RULES, AND THIS COURT SAID THAT SHOULD NOT BE ALLOWED. IT STANDS THE PURPOSE OF THE APA ON ITS HEAD, AND THAT IS PRECISELY WHAT WE HAVE HERE. WE LOSE, WE LOSE FOCUS SOMETIMES, AND START FALLING BACK INTO THE INJURY IN FACT, WHEN WHAT WE HAVE HERE IS A PROPOSED RULE.

LET ME ASK YOU, DOES THE, THERE IS AN INDIVIDUAL PLAINTIFF IN THIS CASE, ALSO, THE GAVINS ARE INDIVIDUAL PLAINTIFFS. DOES THEIR ARGUMENT, IS THEIR ARGUMENT THE SAME AS THE ASSOCIATION'S ARGUMENT? DO THEY HAVE AN INDEPENDENT STANDING RIGHT, OTHER THAN THE NAACP'S RIGHT OR AN ASSOCIATION'S RIGHT?

AND AGAIN, IN ALL DUE RESPECT, I AM GOING TO DEFER SOMEWHAT TO MY COLLEAGUE, BECAUSE I AM ONLY AUTHORIZED TO SPEAK ON BEHALF THE AMICUS, WHICH IS THE ORGANIZATIONAL STANDING, BUT I BELIEVE THEY HAVE AN INDEPENDENT STANDING. THEY HAVE INDEPENDENT STANDING, WHICH HAS BEEN DEMONSTRATED ON THE RECORD, MY VIEWS VIEW, BASED UPON -- -- IN MY VIEW, BASED UPON MR. CHIEF JUSTICE

THE MARSHAL HAS REMINDED US THAT WE ARE NOW 15 MINUTES INTO THE 20-MINUTE LOG.

ACCORDINGLY, YOUR HONOR, I AM GOING TO MOVE. IN ALMOST 50 YEARS AGO, BROWN VERSUS BOARD OF EDUCATION, WHERE THE NAACP WAS COUNSEL OF RECORD, THEY SAY, QUOTE, TODAY EDUCATION IS PERHAPS THE MOST IMPORTANT FUNCTION OF STATE AND LOCAL GOVERNMENT. IT IS A RIGHT WHICH MUST BE MADE AVAILABLE TO ALL ON EQUAL TERMS. THAT STATEMENT IS OBVIOUSLY TIMELY TODAY, GIVEN OUR DEBATE AND WHAT IS HAPPENING IN THE SUPREME COURT, AND FOR 50 YEARS, THE NAACP HAS HAD A VOICE AT THE FEDERAL LEVEL, AND ALL WE ARE ASKING, AS YOU HAVE DONE IN OTHER THINGS, IS TO MAKE SURE THAT THE NAACP HAS A VOICE IN THAT DEBATE HERE. WE CAN GET TO THE MERITS, BUT WE ARE ASKING THAT YOU RECOGNIZE STANDING, BECAUSE THEY HAVE ESTABLISHED IT UNDER YOUR OWN ESTABLISHED PRECEDENT. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU. COUNSEL.

GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS DANIEL WOODRING, AND I AM HERE ON BEHALF OF THE BOARD OF GOVERNORS, THE SUCCESSOR TO THE BOARD OF REGENTS AND THE FLORIDA BOARD OF EDUCATION AND WITH ME IS MAGGIE PARKER, A DEPUTY WITH ME. THIS CASE IS NOT A CASE ABOUT WHETHER THE NAACP HAS A VOICE. THEY HAVE A VOICE. NO ONE DISPUTES THAT THEY HAVE HAD A VOICE. NO ONE DISPUTES THE HISTORY. NO ONE DISPUTES THE ADVOCACY THEY HAVE DONE.

WOULD YOU FIRST SPEAK TO THE STANDING ISSUE, TO THE MOOTNESS ISSUE, AND WHAT IS YOUR POSITION, AS TO WHAT HAS TRANSPIRED HERE, INSOFAR AS THE ADOPTION OF RULES AND

WHETHER THE PRESENT CONTROL OF THE UNIVERSITY SYSTEM IS A LEGISLATIVE PREROGATIVE. TELL ME, EXPLAIN TO ME WHAT IS YOUR POSITION ON MOOTNESS.

CERTAINLY. THIS PAST FALL, THE VOTERS OF THE STATE OF FLORIDA CREATED A CONSTITUTIONAL ENTITY, WHICH IS THE BOARD OF GOVERNORS.

HASTA GONE INTO EFFECT?

THAT WENT INTO EFFECT JANUARY 7 OF THIS YEAR. THE BOARD OF GOVERNORS HAS GIVEN -- IS GIVEN VERY BROAD AUTHORITY TO MANAGE CONTROL, BASICALLY EVERYTHING RELATED TO THE STATE UNIVERSITY SYSTEM. THERE ARE TWO CONDITIONS ON THAT. ONE IS THE LEGISLATURE NEEDED TO ESTABLISH THE TERMS OF THE BOARD OF GOVERNORS BY LAW. LEGISLATURE HAS ACTUALLY DONE. THAT THE SECOND TERM IS THAT WHAT THE BOARD OF GOVERNORS DOES IS THEY ARE SUBJECT TO LEGISLATIVE APPROPRIATION, AND THEY MAY BE HELD TO ACCOUNT FOR THOSE APPROPRIATIONS.

WHAT IS ITS CONNECTION WITH THE DEPARTMENT OF EDUCATION?

THE BOARD OF GOVERNORS'S CONNECTION WITH THE DEPARTMENT OF EDUCATION IS THAT THE BOARD OF GOVERNORS, BY RESOLUTION OF THE BOARD OF GOVERNORS, HAS DELEGATED CERTAIN RESPONSIBILITIES, ADMINISTRATIVE RESPONSIBILITIES, TO THE DEPARTMENT OF EDUCATION. FOR EXAMPLE, MY OFFICE HAS BEEN DESIGNATED BY RESOLUTION, AS THE COUNSEL TO DEFEND THE BOARD OF GOVERNORS. THERE ARE OTHERS THAT ADMINISTRATIVELY HAVE BEEN ASSIGNED, SO IT IS A SITUATION WHERE, AS ONE COULD SAY WITH THE STATE BOARD, THE DEPARTMENT OF EDUCATION IS REALLY ADMINISTRATIVELY STAFFING ALL OF THE VARIOUS BOARDS THAT WE HAVE.

HAS IT ADOPTED THE APA?

THE BOARD OF GOVERNORS HAS NOT ADOPTED THE APA. WHAT THE BOARD OF GOVERNORS HAS DONE, THOUGH, AND I THINK IN ANSWER TO THE EARLIER QUESTION THAT YOU HAD, IS THE BOARD OF GOVERNORS, WHEN ACTING IN ITS CONSTITUTIONAL ROLE, IS NOT SUBJECT TO THE APA, AND WE HAVE CURRENTLY, I THINK IT IS 120.52, WHERE IT SETS OUT THAT THE COMMISSION ON ETHICS IS NOT SUBJECT TO THE APA WHEN IT IS ACTING IN ITS CONSTITUTIONAL ROLE. FISH AND GAME IS THE SAME TYPE OF A CONTEXT. THE BOARD OF GOVERNORS MAY CHOOSE TO FOLLOW THE PROCESS AND PROCEDURES THAT ARE SET OUT IN CHAPTER 120, BECAUSE IT IS A GOOD OPPORTUNITY OF THE PUBLIC INPUT INTO RULES AND THINGS OF THAT NATURE, BUT THE UNDERLYING CHALLENGE HERE, THE MERITS OF THIS CHALLENGE, WERE THAT THERE WAS NO SPECIFIC STATUTORY AUTHORITY FOR THESE RULES TO BE ADOPTED. WE BELIEVE THAT THERE WAS. OBVIOUSLY THE ALJ FOUND THAT THERE WAS AT THAT POINT IN TIME. HOWEVER, TODAY THERE IS SPECIFIC CONSTITUTIONAL AUTHORITY FOR THE BOARD OF GOVERNORS TO DO WHAT WAS DONE BY THESE RULES.

HOW WOULD THE RULES OF THE BOARD OF GOOMPBORS BE CHALLENGED?

WELL, THE RULES OF THE BOARD OF GOVERNORS WOULD BE CHALLENGED. BASICALLY WHAT THIS COURT HAS SAID IN THIS CONTEXT IS THAT THE BOARD OF GOVERNORS, NOW, IN THESE AREAS, IS ACTING AS A LEGISLATIVE BODY AS IT WERE, KIND OF LIKE THE COMMISSION ON ETHICS. WHEN IT IS DEALING WITH CONSTITUTIONAL DUTIES. SO ARGUABLY, TO THE EXTENT A PIECE OF LEGISLATION IS SUBJECT TO CHALLENGE, AND THE WAY I AM FAMILIAR WITH A PIECE OF LEGISLATION BEING SUBJECT TO CHALLENGE, IS IT HAS TO VIOLATE A STATE OR FEDERAL CONSTITUTION OR YOU HAVE A FEDERAL PREEVENINGS ISSUE, AND IF YOU HAVE THOSE -- A FEDERAL PREEMPS ISSUE, AND IF YOU HAVE ONE OF THOSE ISSUES, YOU CAN CHALLENGE THE BOARD OF GOVERNORS, AND IT IS ONLY A 120 CHALLENGE, BUT REMEMBER THIS CASE IS ONLY TALKING ABOUT THE 120 CHALLENGE. WE ARE NOT TALKING ABOUT A POTENTIAL NUMBER OF

CHALLENGES OUT THERE.

DEALING WITH THE DEPARTMENT OF EDUCATION, YOU ARE SAYING THE BOARD OF GOVERNORS HAS NOT REALLY DELEGATED BACK TO THE DEPARTMENT OF EDUCATION, THOSE KINDS OF DUTIES AND RESPONSIBILITIES THAT IT HAD PREVIOUSLY

I AM NOT SURE I UNDERSTAND.

WASN'T THE DEPARTMENT OF EDUCATION THE ONE THAT PROMULGATED THESE RULES WITH THE BOARD OF EDUCATION?

WHEN THE ISSUE OF RULES WERE PROMULGATED, THOSE RULES WERE PROMULGATED BY THE BOARD OF REGENTS. THE BOARD OF REGENTS WAS, WHILE IT MAY HAVE BEEN STAFFED BY SOME OF THE FOLKS FROM THE DEPARTMENT OF EDUCATION, IT WAS A SEPARATE ENTITY FROM THE DEPARTMENT OF EDUCATION. THOSE RULES WERE SUBJECT AT THAT POINT, TO APPROVAL BY THE STATE BOARD OF EDUCATION, AFTER THE BOARD OF REGENTS HAD PASSED THEM. THE STATE BOARD AT THAT POINT, WAS THE CABINET. OBVIOUSLY NOW, WE HAVE A STATE BOARD THAT IS NOT THE CABINET, AND THAT DOES NOT HAVE RESPONSIBILITY OVER HIGHER EDUCATION. WE HAVE THE BOARD OF GOVERNORS THAT CONSTITUTIONALLY DOES, SO I DON'T KNOW IF THAT CLARIFIES.

SO, ARE YOU SAYING, I MEAN, WE MAYBE GETTING FAR AFIELD FROM, OBVIOUSLY, WHAT THE FIRST DISTRICT WAS DEALING WITH, AND I WANT TO GET BACK TO THAT, BUT ARE YOU SAYING THAT, WHEN THE VOTERS OF THIS STATE APPROVED THIS CONSTITUTIONALLY BODY TO LOOK OVER THE EDUCATION SYSTEM, THAT IT ENVISIONED THAT THERE WOULD BE LESS ACCOUNTABILITY THAN IF IT HAD JUST BEEN AN AGENCY WHERE THE PUBLIC COULD, THROUGH THE ADMINISTRATIVE PROCEDURE ACT, AND IF THEY HAD APPROPRIATE STANDING, BE ABLE TO CHALLENGE RULES?

I WOULD NOT PRETEND TO SPEAK FOR THE VOTERS, ON LESS ACCOUNTABILITY. I DON'T KNOW THAT I WOULD CHARACTERIZE IT AS LESS ACCOUNTABILITY.

YOU MENTION IT IS AKIN TO THE LEGISLATURE, BUT THE LEGISLATURE GETS ELECTED, AND IF THE PUBLIC IS NOT HAPPY WITH DECISIONINGS OF THE LEGISLATURE, THEY CAN VOTE THEM OUT OF OFFICE, BUT THAT WOULD NOT BE TRUE WITH AN AGENCY THAT HAS BEEN CREATED BY A CONSTITUTIONAL AMENDMENT.

WELL, THAT IS TRUE, BUT IT IS ALSO NOT TRUE AS TO THE MAKEUP OF THE BOARD OF GOVERNORS, IN THAT THE BOARD OF GOVERNORS IS APPOINTED BY THE GOVERNOR WHO IS SUBJECT TO POPULAR VOTE. THE CONFIRMATION IS CONFIRMABLE BY THE SENATE, WHICH IS SUBJECT TO POPULAR VOTE, SO THERE IS A VERY CLEAR ACCOUNTABILITY THAT EXISTS.

NOW, I HEARD YOU SAYING THAT, MAYBE, THAT THIS COULD BE MOOT, BECAUSE THE CHALLENGE THAT WAS BEING MADE, WHICH WAS THAT THESE RULES WERE NOT PROPERLY PROMULGATED, WOULD BE NO LONGER VALID, BECAUSE OF THE NEW SET UP OF THE, IS THAT CORRECT?

THAT IS CORRECT.

BUT LET'S ASSUME THAT THAT ISSUE, WHICH IS THE MERITS OF THE CHALLENGE, IS NOT BEFORE US. COULD YOU THEN ADDRESS THE ISSUE OF, THAT, LET'S ASSUME THESE RULES WERE PROMULGATED BY THE BOARD OF GOVERNORS, THAT NAACP HAS A GROUP THAT HAS ITS MEMBERS BEING NOT JUST AFRICAN-AMERICANS BUT A SUBSTANTIAL, HAS BEEN COMMITTED TO THE ISSUE OF RACE EQUITY, COMES IN TO CHALLENGE IT. IS IT YOUR POSITION THAT WHAT THE FIRST DISTRICT COURT OF APPEAL HAS SAID ABOUT THAT THEY LACK STANDING IS A CORRECT

STATEMENT UNDER THE LAW?

YES. THAT IS DEFINITELY OUR POSITION. IF YOU REMEMBER IN THIS CASE, IF WE ARE LOOKING AT WHETHER THERE IS SPECIFIC STATUTORY AUTHORITY, WITH ONE EXCEPTION, THE ADMINISTRATIVE LAW JUDGE FOUND THAT THERE WAS SPECIFIC STATUTORY AUTHORITY.

I AM NOT TALKING ABOUT, AGAIN, THE MERITS. I AM TALKING ABOUT WHO COULD HAVE COME IN BETTER THAN THE NAACP, BEFORE THESE RULES WERE GOING TO BE GOING INTO EFFECT, AND CHALLENGED THE RULES, NOT WHETHER THE RULES ARE VALID, BECAUSE THAT IS NOT BEFORE US.

RIGHT. NO. I UNDERSTAND. MY, THE FIRST DISTRICT, IN STANDING, IT IS QUITE CLEAR, WHEN ONE LOOSE AT THE ALJ'S ORDER, WHICH IS WHERE HE MADE FINDINGS AS TO THE STANDING, WHEN ONE LOOSE AT THE TEST FOR IT, THE TEST THAT WAS REALLY LAID OUT, I DON'T BELIEVE THAT THERE ARE TWO TESTS FOR STANDING. THERE IS ONE TEST FOR STANDING IN THE ADMINISTRATIVE PROCEDURES CONTEXT, WHEN WE ARE TALKING ABOUT A RULE CHALLENGE, AND THAT SAYS THAT YOU HAVE A PARTY THAT MUST BE SUBSTANTIALLY AFFECTED.

DO YOU AGREE THAT THAT IS LESS THAN INJURE IN FACT, WHICH IS THE ARTICLE III STANDING THAT IT IS, BY THIS COURT'S DECISION IN FLORIDA HOME BUILDERS, THAT THE WHOLE IDEA OF THE ADMINISTRATIVE PROCESS IS THAT THERE IS GOING TO BE A LESSER DEGREE OF HARM THAT HAS TO BE ALLEGED, IN ORDER TO BE ABLE TO CHALLENGE A PROPOSED RULE?

NO. YOUR HONOR, I WOULD NOT AGREE WITH THAT, AND I DO NOT BELIEVE THAT IS WHAT THE COURT SAID IN FLORIDA HOME BUILDERS. WHAT WAS BEFORE THE COURT IN FLORIDA HOME BUILDERS WAS A SITUATION WHERE YOU HAD MEMBERS OF FLORIDA HOME BUILDERS THAT THERE WAS NO DISPUTE THAT THEY HAD SUFFERED INJURIES, BUT THE QUESTION WAS, IF FLORIDA HOME BUILDERS AS AN ASSOCIATION, CANNOT SHOW THAT, AS AN ASSOCIATION, IT HAS SUFFERED AN INJURY, DOES IT HAVE STANDING TO BRING A CAUSE OF ACTION ON BEHALF OF ITS MEMBERS WHO WERE INJURED? THE ONLY THING BEFORE THIS COURT IN FLORIDA HOME BUILDERS WAS THAT QUESTION. THE LOWER COURT HAD SAID, NO, YOU HAVE TO HAVE AN INJURED PERSON, AND SO IF YOU ARE AN ASSOCIATION, THE ASSOCIATION HAS TO BE INJURED.

SO UNDER THIS PROPOSED RULE, THERE COULD HAVE BEEN NOBODY IN THE STATE THAT COULD HAVE BROUGHT A CHALLENGE TO THIS RULE, UNTIL WE SAW WHAT THE EFFECT OF "ONE FLORIDA" WAS GOING TO BE?

I DO NOT BELIEVE THAT THAT IS NECESSARILY TRUE. WHAT I CAN SAY, THOUGH, THAT IS ON THIS RECORD, THE NAACP AND THE GARVINS, AND OF COURSE THE GARVINS WERE NEXT OF THE NAACP. THE LOWER, THE NLJ FOUND THAT NAACP DID NOT HAVE STANDING AS A SEPARATE ENTITY, SO THE ONLY STANDING THAT THE NAACP HAD WAS REPRESENTATIONAL STANDING AND ARGUABLY THE GARVINS ARE THE BEST REPRESENTATIVES THAT THEY PUT ON ANY EVIDENCE FOR STANDING. WHAT THEY NEVER, DID AND YOU CAN READ, ACTUALLY IF YOU READ IN THE PETITIONER'S BRIEF BROO, YOU READ ALL OF THE FACTS THAT SUPPORT FACTUAL FINDING H THERE IS NO FACTUAL FINDING THERE THAT SHOWS THAT THERE WAS AN ADVERSE IMPACT, THAT THERE WAS ANY INJURY.

WHAT ABOUT LET'S LOOK AT THE GARVINS THEN. THIS IS A YOUNG MAN WHO WAS IN THE TENTH GRADE, AND HIS ALLEGATION, I ASSUME, WAS THAT UNDER THESE NEW RULES, HE WOULD NOT HAVE GOTTEN INTO A STATE UNIVERSITY, BUT UNDER THE OLD RULES, HE WOULD HAVE? IS THAT BASICALLY WHAT? OR DO YOU HAVE, WELL, I GUESS MY REAL QUESTION TO YOU IS WHAT WOULD MR. GARVIN HAVE TO DO, IN ORDER TO GET STANDING? WOULD HE HAVE TO HAVE APPLIED TO A STATE UNIVERSITY AND ACTUALLY BEEN DENIED ADMISSION, BEFORE HE COULD ACTUALLY CHALLENGE THE RULES?

WELL, I THINK THERE ARE TWO THINGS THAT WOULD BE RELEVANT TO MR. GARVIN'S HAVING STANDING. THERE IS A QUESTION OF WHETHER, AND THIS IS A KEY QUESTION BECAUSE IT GETS TO THE OTHER PART OF THE ADVERSELY-AFFECTED, AND THAT IS DO YOU HAVE A LEGALLY COMING NIECEABLE RIGHT THAT IS WITHIN -- COGNIZEABLE RIGHT THAT IS AFFECTED. MR. GARVIN WOULD HAVE TO SHOW THAT HE HAD A LEGAL RIGHT THAT WAS BASED ON A STATUTE OR A PROVISION, TO BE ADMITTED INTO THE STATE UNIVERSITY SYSTEM ON THE BASIS OF HIS RACE. WE HAVE TAKEN THE POSITION THAT THERE WAS NO LEGAL RIGHT TO THAT. TO ANSWER YOUR QUESTION, ASSUMING THAT HE COULD SHOW THAT RIGHT, HE WOULD STILL HAVE TO HAVE SHOWN THAT THESE RULES WOULD HAVE TO HAVE BEEN "BUT FOR THESE RULES HE WOULD HAVE BEEN ADMITTED", AND EVEN THOUGH, AND HE NEVER GOT TO THAT POINT. HE NEVER MADE THAT SHOWING.

THAT MAKES SENSE TO ME, IN A CASE, IF THERE WAS A DECLARATORY JUDGMENT ACTION FILED, AND THAT IS WHAT, YOU KNOW, AND THERE IS A, TALKING ABOUT CASE IN CONTROVERSY, AND YOU HAVE, AGAIN, THE BROWN V BOARD OF EDUCATION, WHERE OBVIOUSLY WE ARE TALKING ABOUT A DECADE, A CENTURIES-OLD POLICY, BUT THIS IS NOW A DRAMATIC DEPARTURE, THE RULES THAT WERE PROMULGATED IN "ONE FLORIDA", WHETHER WE ARE NOT, AGAIN, DEBATING WHETHER THESE WERE GOOD RULES OR BAD RULES, BUT IT IS A DRAMATIC DEPARTURE. THEIR PROPOSED RULES, UNDER, THAT IS WHAT I AM TRYING TO UNDERSTAND, UNDER WHAT YOU ARE ALLEGING, WOULD HAVE TO BE PROVED NOBODY IN THIS STATE COULD HAVE MET THAT BURDEN, AND THEREFORE THESE RULES WOULD BE VIRTUALLY UNCHALLENGEABLE.

WITH ALL DUE RESPECT, YOUR HONOR, I DON'T BELIEVE THAT IS WHAT I AM PROPOSING. FIRST, ON DRAMATIC DEPARTURE, THERE WERE NO RULES AT THE BOARD OF REGENTS, PRIOR TO THE RULE AMENDMENTS THAT ARE ADD ISSUE IN THIS CASE, THAT ENTITLED ANYONE TO RAISE, AS A BASIS FOR ADMISSION TO THE STATE UNIVERSITY SYSTEM, SO I DON'T BELIEVE THAT WE ARE REALLY TALKING A DRAMATIC DEPARTURE, BUT ASSUMING THAT WE ARE TALKING, WHAT THE RULES DID, THERE ARE TWO THINGS THE RULES DID, TWO -- TOO, AND WE PROBABLY NEED TO FOCUS A LITTLE BIT MORE. THE RULES CREATED THE "TOWN OF 20" PROGRAM, WHERE YOU WERE ABLE TO GAIN ADMISSION TO THE UNIVERSITY SYSTEM IF YOU WERE IN THE TOP 20 PERCENT, AND THEY SAID THE STATE UNIVERSITY SYSTEM, NOT REALLY THE STUDENTS, COULD NOT USE RACE, ETHNICITY, GENDER AS A BASIS FOR ADMISSION.

LET'S CONCENTRATE ON THAT A SECOND. WHY ISN'T IT SUBSTANTIALLY AFFECTED THAT THERE ARE MEMBERS OF THE NAACP WHO WOULD HAVE RECEIVED A PREFERENCE IN ADMISSIONS UNDER THE OLD RULE, AND NO LONGER WILL RECEIVE A PREFERENCE UNDER THE NEW RULE? WHY ISN'T THAT, IN ITSELF, WHY DOESN'T THAT SUBSTANTIALLY AFFECT THEM FOR ADMINISTRATIVE REVIEW PURPOSES?

WELL, UNDER THE OLD RULES, THERE WERE ACTUALLY NO RULES THAT GAVE THEM THE RIGHT TO HAVE RACE AS A FACTOR IN THE ADMISSIONS. THE RULES DID NOT GIVE THEM THAT RIGHT. SO UNDER THE OLD RULES, THEY DIDN'T HAVE THAT RIGHT.

BUT AREN'T YOU SPILLING OVER, REALLY, INTO THE MERITS OF THE DEBATE, AS OPPOSED TO THE CLAIM, YOU KNOW, THAT IS BEING ASSERTED HERE? YOU, YOURSELF, HAVE ARTICULATED, IF I UNDERSTAND IT CORRECTLY, THAT THE UNIVERSITIES, BEFORE THE ENACTMENT OF THE NEW RULES, AND IN DELETING THE OLD RULES, THAT THE UNIVERSITIES HAD THE AUTHORITY TO WEIGH RACE AS ONE OF THE FACTORS FOR ADMISSION, AND THAT THAT IS THE FOCUS, REALLY, OF THE CHALLENGE, NOW, TO ELIMINATING THAT, UNDER, AND THEN SUBINSTITUTING, THEREFORE, THE -- AND THEN SUBSTITUTING, THEREFORE, THE NEW RULES. WHAT THE QUESTION NOW, AS I UNDERSTAND IT, FOCUSES ON, SINCE THE NAACP ALLEGES BROADLY THAT ITS MEMBERSHIP CONSISTS OF THOUSANDS OF PEOPLE YOUNG AND OLD AND WOMEN AND MEN AND WHATEVER, BUT THAT IT BROADLY, THEN, REPRESENTS A GROUP THAT WILL JUST NATURALLY BE AFFECTED BY THIS PROCESS, BECAUSE LARGE NUMBERS OF ITS MEMBERSHIP AT SOME POINT OR

ANOTHER, WILL BE THE ONES THAT WILL SEEK ADMISSION TO UNIVERSITIES UNDER THE OLD RULES, IF THEY HAD THEIR WAY, SO WHY ISN'T THAT SUFFICIENT ENOUGH TO BE SUBSTANTIALLY

I GUESS I WOULD HAVE TO ANSWER THAT THEY WERE NEVER TO PROVE THAT THEY HAD ONE MEMBER WHO, BUT FOR THE CHANGE IN THE RULES, WOULD HAVE BEEN ADMITTED TO THE UNIVERSITY SYSTEM.

I GUESS THAT IS WHERE ALL OF US ARE ASKING YOU THE QUESTION AS TO WHETHER YOU WOULD LIMIT, THEN, STANDING TO THIS VERY NARROW CONCEPT THAT WOULD END UP BEING BACK TO THERE IS JUST ONE WAY TO DO THIS, AND THAT IS THAT YOU HAVE TO GO AND SEEK ADMISSION, AND THEN BE ABLE TO DEMONSTRATE THAT, ONLY IF IT WAS UNDER THE OLD CONCEPT THAT THEY COULD HAVE GOTTEN IN AND THEN UNDER THE NEW RULES THAT THEY COULDN'T HAVE GOTTEN IN, AND THEN THAT THEY HAD THIS RIGHT, YOU KNOW, BASED ON RACE, SO WOULDN'T THAT BE TOTALLY AGAINST THE POLICY THAT WE HAVE ENUNCIATEED IN OUR CASE LAW, WHICH SAYS THAT THE RULES OF STANDING HAVE BEEN BROADENED, SO THAT THESE MATTERS MAY BE HEARD IN A RULES CHALLENGE? THAT IS NOT BROADENING. THAT IS NARROWING, ABOUT AS NARROW AS YOU CAN GET IT, IS IT NOT?

WELL, YOUR HONOR, IN THE CASE THAT THIS COURT HAD BEFORE IT IN FLORIDA HOME BUILDERS, THE ONLY REAL BROADENING THAT THIS COURT DID IN FLORIDA HOME BUILDERS IS THIS COURT SAID WE ARE NOT GOING TO REQUIRE, KIND OF TWO THINGS THERE THAT THE COURT DID NOT REQUIRE. THE COURT DID NOT REQUIRE THAT THE MEMBERSHIP HAVE AN INJURY THAT WAS SPECIAL TO THEM THAT WOULD NOT BE SHARED BY OTHERS IN THE COMMUNITY, AND THE COURT, ALSO, DID NOT REQUIRE THAT THE ASSOCIATION, ITSELF, HAVE SUFFERED THE INJURY, NOT THAT IT JUST BE BRINGING IN A REPRESENTATIONAL CAPACITY. THIS COURT HAS NEVER, AND 126 HAS NOT CHANGED THIS. COURT HAS NEVER SAID THAT YOU HAVE TO SHOW THAT YOU ARE SUBSTANTIALLY AFFECTED AND WITHIN SUBSTANTIALLY AFFECTED HAS BEEN THE REQUIREMENT THAT YOU DEPP STRAIGHT AN INJURY.

HOW ABOUT MEMBERS OF THE NAACP WHO WERE, SAY, SENIORS IN HIGH SCHOOL? ARE WE GETTING ANY CLOSER THAN TO A STANDING? SINCE YOU ALLEGE MR. GARVIN IS A TENTH GRADER, IF YOU WERE IN THE ELEVENTH OR TWELFTH GRADER AND CLOSER TO THE POSSIBILITY THAT THESE RULES ARE GOING TO BE USED FOR YOUR, TO DETERMINE YOUR ADMISSION TO THE STATE UNIVERSITY SYSTEM, ARE YOU GETTING ANY CLOSER TO HAVING STANDING AT THAT POINT?

THERE IS CLEARLY AN IMMEDIACY OF INJURY REQUIREMENT THAT IS IN THE STANDING DOCTRINE, BUT I THINK GIVEN THE HYPOTHETICAL, YOU MIGHT BE CLOSER BUT IT IS KIND OF LIKE THE GRAND CANYON. IF YOU HAVE MADE IT TWELVE FEET, THAT IS FINE, YOU STILL HAVEN'T MADE IT TO THE OTHER SIDE, AND HERE IS WHY. TAKE THE "TOWN OF 20" PROGRAM. THAT SENIOR IN HIGH SCHOOL WHO IS A MEMBER OF THE NAACP, HAS NEVER BEEN ABLE TO SHOW THAT A GUARANTEE OF ADMISSION TO THE STATE UNIVERSITY SYSTEM WHICH DID NOT PREVIOUSLY EXIST, IN ANY WAY ADVERSELY IMPACTS HIM.

SEE, WHAT YOU ARE STILL DOING, AND I APPRECIATE THAT, YOU KNOW, THE POSITION, THAT THIS NEW PROGRAM IS AS GOOD FOR AFRICAN-AMERICANS AS WHAT EXISTED OR EVEN BETTER. THAT IS THE MERITS OF THE ARGUMENT. I WOULD LIKE TO JUST, AGAIN, TO ASK YOU THE QUESTION, BEFORE THE RULE WENT INTO EFFECT, WAS THERE ANYBODY IN THE STATE OF FLORIDA THAT COULD HAVE MET THE TEST THAT YOU ARE ADVOCATING THIS COURT SHOULD BE FOLLOWING, AND THAT THE FIRST DISTRICT FOLLOWED? IN OTHER WORDS, YOU ARE SAYING THAT NOBODY COULD SHOW THEY HAD A RIGHT. NOBODY COULD SHOW THAT THEY WOULD HAVE BEEN ADMITTED UNDER ONE PLAN AND NOT THE OTHER, SO THEREFORE NOBODY COULD HAVE CHALLENGED THIS PROPOSED RULE BEFORE IT WENT INTO EFFECT!

I WOULD AGREE, SINCE WE ARE SAYING THAT THEY DID NOT HAVE A LEGALLY COGNIZEABLE INTEREST, THAT NO ONE HAS THE ABILITY TO COME IN AND BRING A CASE, IF THEY DON'T HAVE A LEGALLY COGNIZEABLE INTEREST.

WE ARE NOT TALKING ABOUT A CASE IN COURT, ARE WE?

120.56, YOUR HONOR.

THAT NOBODY COULD HAVE DONE THAT, UNDER THE TEST THAT IS LAID OUT BY THE FIRST DISTRICT FOR THIS PARTICULAR RULE.

POTENTIALLY, NO ONE AT THE TIME THE CASE WAS BROUGHT, BECAUSE IT IS SPECULATION AND CONJECTURE, AND IF YOU DON'T HAVE A LEGALLY COGNIZEABLE INTEREST, WHICH IS A SEPARATE MATTER, POTENTIALLY NO ONE WOULD HAVE BEEN ABLE TO BRING THAT CASE.

YOU ARE SAYING NO ONE, BUT I WANT TO CLARIFY MR. CHIEF JUSTICE

YOU CAN ANSWER THIS QUESTION BUT THEN WE WILL HAVE TO RECOGNIZE YOUR TIME IS UP. ANOTHER PARTIES BEING REGULATED HERE ARE THE UNIVERSITY SYSTEMS.

THAT'S CORRECT.

SO THE UNIVERSITY SYSTEMS, COULD OR COULD NOT THEY HAVE BROUGHT AN OBJECTION TO THE PROPOSED RULE, AS THE PARTY BEING DIRECTLY REGULATED?

I BELIEVE YOU ARE CORRECT, IN THAT, IF THEY HAD AN ARGUMENT THAT THERE WAS NOT SPECIFIC AUTHORITY FOR THE BOARD OF REGENTS TO HAVE ADOPTED THESE RULES, THE UNIVERSITIES CLEARLY WERE REGULATED, AND THEY WOULD HAVE HAD TO HAVE SHOWN THAT THEY HAD, AGAIN, A LEGALLY COGNIZEABLE INTEREST, BUT IF THEY HAD MADE THAT PART OF THE SHOWING, THEY CLEARLY WOULD HAVE HAD STANDING TO CHALLENGE THE RULE. THANK YOU VERY MUCH. CHIEF CHOO MR. CHIEF JUSTICE

THANK YOU VERY MUCH. MR. MARSHAL, HOW MUCH TIME IS LEFT ON REBUTTAL?

COUNSEL, IF YOU CAN ADDRESS THE ARGUMENT, WE HAVE BEEN TALKING HERE THE ENTIRE TIME ABOUT SECTION 120.56 AND SUBSTANTIALLY AFFECTED AND THE REQUIREMENTS OF THE STATUTE. IF WE HOLD IN YOUR FAVOR AND SAY YOU HAVE STANDING, HOW WAS THAT GOING TO AFFECT THE CASE LATER, IF YOU NO LONGER ARE GOING TO BE PROCEEDING UNDER SECTION 120.56? THERE IS NO LONGER A RULE IN EFFECT. THERE IS NO LONGER A BOARD OF REGENTS. YOU ARE GOING TO HAVE TO BE PROCEEDING UNDER SOME OTHER PROVISION, AND PRESUMABLY YOU WILL HAVE TO FILE A CASE IN COURT, ANNUL BE SUBJECT TO A DIFFERENT STANDING REQUIREMENT.

YOUR HONOR, AS I HAD ATTEMPTED TO ANSWER PARALLEL, I BELIEVE THAT THE COURTS WOULD -- TO ANSWER PREVIOUSLY, I BELIEVE THAT THE COURTS WOULD BE LOOKING AT THE CASES THAT WERE DETERMINED PREVIOUSLY AND THE STANDING DECISION --

WE HAVE BEEN DISCUSSING STANDING HERE. STANDING IN STATE COURT IS CERTAINLY A LOSER STANDING THAN IN FEDERAL COURT, BUT ALSO IN THE ADMINISTRATIVE CONTEXT, OUR CASE, FLORIDA HOME BUILDERS SAYS IN THE ADMINISTRATIVE CONTEXT, STANDING IS A LOSER REQUIREMENT THAN IN A LAWSUIT CONTEXT, AND SO HOW IS THAT GOING TO HELP YOU LATER ON, IF YOU HAVE TO FILE A LAWSUIT?

YOUR HONOR, IF I MIGHT, I STILL DON'T ACCEPT THE CONCEPT OF MOOTNESS, AND I WOULD LIKE TO REFER TO A DECISION OF THIS COURT THAT WAS ISSUED IN 2002, IN RE ADVISORY OPINION TO

THE ATTORNEY GENERAL RAY LOCAL TRUSTEES AND STATEWIDE GOVERNING BOARD TO MANAGE FLORIDA'S UNIVERSITY SYSTEM, WHICH WAS THE, THIS COURT'S REVIEW OF THE CITIZENS INITIATIVE THAT ADOPTED THIS AMENDMENT, AND THAT THERE WAS AN OBJECTION TO THAT, TO THIS AMENDMENT, THIS AMENDMENT WE ARE TALKING ABOUT. ONE OF THE OBJECTIONS WAS UNDER THE, THE DUAL SUBJECT ARGUMENT. OPPONENTS CITED TO ARTICLE IX SECTION ONE OF THE FLORIDA CONSTITUTION, WHICH STATES ADEQUATE PROVISION OF LAW SHALL BE ESTABLISHED FOR THE ESTABLISHMENT, MAINTENANCE AND OPERATION OF INSTITUTIONS OF HIGHER LEARNING AND OTHER PUBLIC EDUCATION PROGRAMS THAT MEETS THE NEEDS OF THE PEOPLE REQUIRE. WHAT THIS COURT SAID IS THERE IS NO CONFLICT BETWEEN THOSE TWO CONSTITUTIONAL PROVISIONS AND THE COURT SAID AS I QUOTED, WE THERE FOR CONCLUDE THAT THE ONLY SUBJECT EMBRACED IN THE PROPOSED AMENDMENT IS THE TWO-TIER SYSTEM OF GOVERNANCE, THE STATE UNIVERSITY SYSTEM. IN OTHER WORDS, THIS ONLY ADDRESSES THE BUREAUCRATCALLY, THE WAY THE SYSTEM IS ORGANIZED. IT DOESN'T CHALLENGE THE LEGISLATIVE AUTHORITY OVER ESTABLISHED MAINTENANCE AND OPERATION OF INSTITUTION OF HIGHER LEARNING. THE LEGISLATURE STILL HAS A STRONG, THERE IS NO PRINCIPLE OF LAW IN THE STATE THAT SAYS BECAUSE AN AGENCY IS A CONSTITUTIONAL AS OPPOSED TO A STATUTORY AGENCY, IS THERE BY EXEMPT FROM THE ADMINISTRATIVE PROCEDURES ACT.

COME BACK TO THE CASE WE ISSUED THIS JANUARY ON THE FISH AND WILDLIFE COMMISSION, AND THE ISSUE THERE WAS WHETHER THE APA WAS APPLICABLE TO THE AGENCY AS IT PERFORMED ITS CONSTITUTIONAL FUNCTION, AND WE WENT THROUGH, AT LENGTH, AND FOUND THAT THERE WAS A PORTION THAT WAS AND A PORTION THAT WASN'T.

RIGHT. AND YOUR HONOR,, AND MY POINT HERE IS THAT THIS COURT HAS ALREADY LOOKED AT THIS CONSTITUTIONAL AMENDMENT AND MADE SOME DETERMINATION. IN REALITY, THIS NEW INSIDE FUINGS NEEDS LEGISLATIVE AUTHORIZATION TO -- THIS NEW INSTITUTION NEEDS LEGISLATIVE AUTHORIZATION TO BE CREATED AND IT HASN'T RECEIVED MUCH IN THE WAY OF LEGISLATIVE AUTHORIZATION. I WOULD LIKE TO CLARIFY ONE THING. THERE WERE NO RULES OF THE BOARD OF REGENTS ON AFFIRMATIVE ACTION BUT THERE WERE RULES IN THE STATE UNIVERSITY SYSTEM. A NUMBER OF UNIVERSITIES HAD RULES. WHAT THE, WHAT THIS RULE DID, WHAT THE STATE BOARD RULE DID WAS PROHIBIT UNIVERSITIES FROM DEVELOPING THOSE RULES, AND THAT IS WHERE THE INJURY OCCURRED, BECAUSE PEOPLE NO LONGER COULD TAKE ADVANTAGE OF THOSE APPLICATIONS, COULD NOT APPLY USING EXISTING AFFIRMATIVE ACTION --

ONE THING, THERE HAS BEEN AT LEAST AN IMPLICATION HERE, THAT PERHAPS YOU DID NOT MAKE A DEMONSTRATION IN THE ADMINISTRATIVE PROCEEDINGS, THAT SOME OF YOUR MEMBERS ARE YOUNG ENOUGH OR OF THE ELIGIBLE AGE THAT, THEY WOULD BE APPLYING TO THE UNIVERSITIES. IS THAT CORRECT? IN OTHER WORDS WAS THERE A SHOWING HERE THAT, INCLUSIVE IN YOUR MEMBERSHIP, ARE PEOPLE THAT WILL BE UNIVERSITY AGE AND APPLICANTS?

YES, YOUR HONOR. THERE WAS EXTENSIVE FINDINGS, BECAUSE WE FOUGHT THIS STANDING ISSUE FROM DAY ONE. WE FOUGHT IT UNDER THE INJURY IN FACT, THE MORE STRINGENT TEST. 1700 STUDENTS, THIS IS IN THE FINDINGS OF FACT, 1700 STUDENTS IN THE YOUTH COUNCIL APPROXIMATELY 80 PERCENT WERE OF HIGH SCHOOL AGE, SO THAT IS ONE GROUP. THERE IS A COLLEGE CHAPTER, ONCE AGAIN FINDINGINGS OF FACT, OVER 600 STUDENTS OF COLLEGE AGE, RELATING TO THE LIMITED ACCESS PLANS, THE UPPER AGE COMPETITIVE BUSINESS AS WELL AS GRADUATE SCHOOLS.

THAT IS THE PORTION OF MEMBERSHIP THAT YOU CLAIM WOULD BE DIRECTLY AFFECTED BY THIS. ALL RIGHT.

RIGHT, AND THEN WE HAD THE INDIVIDUAL, MR. GARVIN, A MEMBER OF THE YOUTH COUNSILL, A

16-YEAR-OLD.

CHIEF JUSTICE: THANK YOU VERY MUCH. WE HAVE GONE OVER YOUR TIME. THANK YOU VERY MUCH FOR RESPONDING TO OUR QUESTIONS HERE THIS MORNING.

THANK YOU.