IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC07-520

MID-CHATTAHOOCHEE RIVER USERS,
Petitioner-Appellant,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent-Appellee.

ON APPEAL FROM THE FLORIDA FIRST DISTRICT COURT OF APPEAL (CASE NO. 1D06-0371)

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case involves the standing of commercial interests to initiate administrative hearings in environmental permit proceedings under the Administrative Procedure Act ("APA"), Chapter 120, Florida Statutes. *See* Opinion at 5-6. At issue is whether the First District misapplied the Second and Fourth Districts' precedents in *Agrico Chemical Co. v. Dep't of Envtl. Reg'n*, 406 So. 2d 478 (Fla. 2d DCA 1981) ("*Agrico*") and *City of Sunrise v. South Fla. Water Mgmt. Dist.*, 615 So. 2d 746, 747 (Fla. 4th DCA 1993) ("*City of Sunrise*"), in determining that Petitioner-Appellant Mid-Chattahoochee River Users' ("River Users") interests in commercial navigation fall outside the zone of interests of an environmental permit program that was expressly enacted to "assist in maintaining the navigability of rivers." Opinion at 5-11. A concise statement of the relevant facts follows.

The Chattahoochee and Flint Rivers converge at the Florida-Georgia border to form the Apalachicola River. *Id.* at 2-4. The U.S. Congress charged the U.S. Army Corps of Engineers ("Corps") with the responsibility to conduct maintenance activities, including dredging, as necessary to facilitate navigation on the entire Apalachicola-Chattahoochee-Flint ("ACF") River System. The Corps has sought and obtained a series of five-year permits from the Florida Department of Environmental Protection ("FDEP") and its predecessor agencies. *Id.* at 2. The

Corps filed its most recent permit application in 2004; however, this time DEP denied the permit application on October 11, 2005. *Id.* at 2-3.

Pursuant to section 120.569 of the Florida Statutes, on November 10, 2005, River Users petitioned DEP to hold an administrative hearing on the permit denial. *Id.* at 3. River Users' membership includes upstream municipalities and businesses that depend upon the continued availability of the Apalachicola River for commercial navigation. *Id*. at 2-4. River Users alleged that, if the Corps' permit was not issued, River Users and its members would suffer immediate harm from the inability to navigate down the Apalachicola River. *Id.* at 3-4. These allegations included specific examples as to how a substantial number of its members will suffer injury to their interests in navigation absent the relief requested in the petition. *Id.* DEP denied River Users' petition for an administrative hearing on the basis that River Users lacked standing. *Id.* at 4. On January 25, 2006, River Users filed an appeal of the Final Order with the First District. *Id.* at 4.

On November 22, 2006, the First District issued its opinion in this case. The Opinion addresses the sole issue of whether, under the test established in the Second District's decision in *Agrico*, River Users' injury is "of the type or nature that the proceeding is designed to protect," *i.e.*, whether River Users' injury falls within the "zone of interests" to be protected by the pertinent regulatory programs.

Id. at 4-5. Applying *Agrico*, the Opinion inexplicably concludes that River Users' interests in commercial navigation fall outside the zone of interests of Chapter 373, Florida Statutes, *see id.* at 10-11, even though that regulatory program was expressly enacted to "assist in maintaining the navigability of rivers," *see* Fla. Stat. § 373.016(3)(i), and requires DEP to consider the activity's effects on "navigation" during the permit process, *see* Fla. Stat. § 373.414(1)(a). *See* Opinion at 5-11. In doing so, the Opinion erroneously applies *Agrico*'s holding that competitive economic interests are insufficient to establish standing, even though River Users asserted no competitive economic interests but instead asserted direct harm to their interests in navigation. *Id.* at 6-8. River Users filed its Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court on March 16, 2007.

SUMMARY OF THE ARGUMENT

The First District's decision in this case misapplies the Second District's decision in *Agrico*, the seminal case in Florida concerning standing to initiate administrative hearings, giving rise to this Court's conflict jurisdiction. First, the court misapplied *Agrico's* two-part standing test and incorrectly held that River Users' interests in commercial navigation fall outside the zone of interests of a permit program which was expressly enacted to "assist in maintaining the navigability of rivers," because the interests are economic in nature. *Agrico* simply does not support such a result. Opinion at 5-11. Likewise, the First District

misapplied *Agrico's* competitor standing principles to River Users, who asserted no competitive economic basis for standing. *Id*. at 6-10. The First District, through misapplication of *Agrico*, has expanded *Agrico* to deny third-party standing to all economic interests including those specifically sought to be protected by the regulatory program at issue. River Users respectfully requests that this Court resolve the express and direct conflict between the First District's decision and its misapplication of *Agrico*.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISION IN *AGRICO.*

In Florida, the "seminal case" concerning third-party standing to initiate administrative hearings is *Agrico,*[1] where the Second District held that persons asserting only "competitive" economic interests lack standing to initiate administrative hearings in environmental permit proceedings, where such interests fall outside the zone of interests of the relevant regulatory program. 406 So. 2d at 481-82. In so holding, the Second District established a two-part test for standing to initiate an administrative hearing:

[1] *Boca Raton Mausoleum, Inc. v. State Dep't of Banking & Fin.*, 511 So. 2d 1060, 1062 (Fla. 1st DCA 1987) (referring to *Agrico* as the "seminal case"). This Court adopted the *Agrico* test in *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997).

> [T]o have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) *that his substantial injury is of a type or nature which the proceeding is designed to protect*. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482 (emphasis added). Here, the First District misapplied *Agrico's* standing test and its competitor standing principles to hold that River Users lacked standing to initiate an administrative hearing. *See* Opinion at 4-11.

This Court has jurisdiction to review a decision of a district court of appeal which "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Misapplication of decisional law creates conflict jurisdiction. *See Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 86-87 (Fla. 2005). It is within this Court's discretionary jurisdiction to hear a case where a district court misapplies a rule of law established by this Court or another district court of appeal. *See, e.g., Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1040 (Fla. 1982) ("The district court of appeal created express and direct conflict by misapplication of the rule announced in *Wackenhut Corp. v. Canty*, 359 So. 2d 430 (Fla. 1978). We have jurisdiction."). Misapplication conflict may also exist where a "district court correctly states a rule of law, but then proceeds to apply the rule of law to a set of facts for which it was not intended." Gerald Kogan & Robert C. Waters, *The Operation & Jurisdiction of*

the Florida Supreme Court, 18 NOVA L. REV. 1151, 1232 (1994); *see also Gibson v. Avis Rent-A-Car Systems, Inc.*, 386 So. 2d 520, 521 (Fla. 1980).

A. The First District Misapplied *Agrico's* Standing Test.

The Opinion begins by correctly stating that, in order to have standing to initiate an administrative hearing under Chapter 120 of the APA, a third party petitioner must satisfy the two-prong test established in *Agrico.* Opinion at 5. With respect to the first prong of this test, the Opinion includes the following description of River Users' interests:

> [River Users allege] that if the Corps' permit was not issued, its members would suffer immediate harm from the inability to navigate down the Apalachicola River. . . . [River Users] argues that if the notice of denial is not reversed, a substantial number of its members will be adversely affected because the Apalachicola River "will no longer be a reliable avenue for commercial navigation to the Gulf of Mexico."

Id. at 3-4, 10. The Opinion also notes correctly that River Users' allegations of injury must be "taken as true" for purposes of determining standing. *Id*. at 4.

Turning to the second prong of the *Agrico* test, the Opinion concluded that River Users' injury (*i.e.*, inability to navigate down the Apalachicola River) "is not of the type" that Chapter 373's Wetlands Resource Permit program is designed to protect, Opinion at 10-11, even though the Opinion recognized that this program was enacted to "assist in maintaining the navigability of rivers," Fla. Stat. § 373.016(3)(i). *See* Opinion at 5-6. Furthermore, the Opinion expressly recognized

that this permit program requires consideration of effects to "navigation" during the permitting process, Fla. Stat. § 373.414(1)(a)3, as well as the "welfare or the property of others," *id*. § 373.414(1)(a)1, and the "current condition and relative value of functions being performed by areas affected by the proposed activity," *id.* § 373.414(1)(a)7. *See* Opinion at 5-6.[2]

The Opinion's application of *Agrico* is, therefore, fatally flawed because of its conclusion that River Users' injury—"inability to navigate down the Apalachicola River"—is not protected by the statutory program to "assist in maintaining the navigability of rivers." *Id.* at 6-11. This mistaken interpretation of *Agrico* has been recognized by Florida commentators:

> The interest of a third party ("any other party") in administrative proceedings often will be (though by no means always) economic in nature. On that point, *Agrico* is sometimes misunderstood by administrative practitioners as denying standing to a petitioner whose interest is "merely economic." The inquiry must be made into whether the petitioner's "substantial interests" . . . are to be found in the "zone of interest" gleaned from the substantive regulatory scheme (statutes external to Ch. 120). A petitioner's standing may indeed be predicated upon economic injury—if the "zone of interest," inferred from the substantive statute (or statutes), accounts for economic injury. . . . . [A] close reading of the substantive statute(s) is imperative, in order to discern whether the "substantial interests" claimed by the would-be party are within the "zone of interest."

[2] The Opinion also fails to consider two other regulatory programs at issue here: the state's sovereign submerged lands program and the state's coastal management program. The zone of interests created by those programs also supports River Users' standing in this case.

Richard M. Ellis, *Standing in Florida Administrative Proceedings*, 75 FLA. BAR J. 49, 50 (2001) (internal citations omitted).

In effect, the First District has changed *Agrico's* standing test from the "zone of interests" to the "zone of environmental protection" test. This new standard imposes a nearly insurmountable barrier to third party commercial interests (whether River Users or businesses and industries within the State) to seek review of environmental permit proceedings, *even where the pertinent permit programs are created with an express purpose to protect, and require consideration of, those commercial interests (such as navigation)*. In short, under the First District's analysis, an interest in navigation is insufficient to confer standing under the statute solely because it is a commercial interest. Thus, the First District's holding expressly and directly conflicts with *Agrico*'s holding that standing to initiate an administrative hearing exists where a petitioner's "substantial injury is of a type or nature which the proceeding is designed to protect." 406 So. 2d at 482. Under the First District's holding, standing does not exist under *Agrico* when the injury is commercial or economic in nature, *no matter what the proceeding is designed to protect*.[3]

[3] Since standing must be established to intervene in an administrative hearing, the Opinion will not only preclude third-party commercial interests from *initiating* administrative proceedings, but it will also unduly deny third-party commercial interests the opportunity to *intervene* in such proceedings as well. *See Ameristeel*, 691 So. 2d at 477. The Florida Chamber of Commerce sought to

B. The First District Misapplied *Agrico's* Competitor Standing Holding.

The First District's Opinion equally misapplies the competitor standing holding of *Agrico*. *See* Opinion at 6-10. In *Agrico*, the Second District held that the petitioners lacked standing to initiate an administrative hearing concerning the Department of Environmental Regulation's decision to issue air and wastewater permits to the petitioners' *competitors*, where standing was based exclusively on a threat of *competitive harm*. 406 So. 2d at 482-83. *Agrico*, therefore, established the principle that one party may not intervene in the permit proceeding of an economic competitor, if the party's only interest is to place its competitor at a disadvantage rather than the subject matter of the proceeding itself.

River Users has never asserted a competitive interest or challenged that the denial of the permit resulted in a competitive advantage or disadvantage. Indeed, River Users is supportive of—not in competition with—the activities proposed in the Corps' permit application. Thus, the First District's erroneous application of *Agrico* presents precisely the situation described in *Gibson*, 386 So. 2d at 521, where this Court stated that jurisdiction exists to resolve a conflict created when a district court "misapplies the law by relying on a decision which involves a situation materially at variance from the one under review."

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participate as *amicus curiae* because of the Opinion's wide-reaching implications. Unfortunately, the First District denied the Chamber's request.

In the same way, the First District misapplied the Fourth District's decision in *City of Sunrise*, which held that the owner of a source of drinking water lacked standing to intervene in a proceeding in which its customer sought a permit to obtain water from a completely different source of water. *See* Opinion at 6-8. The principles of competitor standing discussed in that case are inapplicable to River Users as well. *Agrico* and *City of Sunrise* correctly held that competitive harm alone is insufficient to confer standing. The First District's Opinion here goes too far, holding that economic injury of any kind is insufficient to confer standing. If the First District is correct, then a party who suffers direct injury from a decision that impairs navigation is not within the zone of interests of a statute that is expressly intended to maintain navigation. The Court should exercise its conflict jurisdiction to correct the First District's misapplication of *Agrico* and *City of Sunrise*.

II. CONCLUSION

This Court has jurisdiction because the First District's decision expressly and directly conflicts with the Second District's decision in *Agrico* by misapplying *Agrico's* two-prong test for standing and by misapplying *Agrico's* principles of competitor standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), Petitioner hereby certifies that this brief is written in Times New Roman 14-point type face.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States Mail, certified, properly addressed and postage prepaid, on this the 30th day of March, 2007:

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