

No. SC91640

IN THE SUPREME COURT OF MISSOURI

ST. LOUIS ASSOCIATION OF REALTORS,

Plaintiff-Appellant,

v.

CITY OF FERGUSON,

Defendant-Respondent.

**Appeal from the Circuit Court of
St. Louis County, Missouri Judge Mary Elizabeth Ott**

**BRIEF OF AMICI CURIAE MISSOURI SOCIETY OF ASSOCIATION
EXECUTIVES, MISSOURI SCHOOL BOARD ASSOCIATION AND
MISSOURI ASSOCIATION OF REALTORS**

STINSON MORRISON HECKER LLP

Charles W. Hatfield, Mo. Bar. No. 40363

230 W. McCarty Street

Jefferson City, Missouri, 65101

Telephone: 573-636-6263

Facsimile: 573-636-6231

Crystal K. Hall, Mo. Bar No. 60646

7700 Forsyth Boulevard, Suite 1100

St. Louis, Missouri, 63105

Telephone: 314-863-0800

Facsimile: 314-863-9388

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

Table of Authorities.....4

Jurisdictional Statement.....7

Interest of Amici Curiae8

Statement of Facts 10

Argument..... 11

 I. The *Hunt* three-part associational standing test was first followed by this Court in 1992 without an in-depth analysis of Missouri law..... 11

 II. This Court should specifically clarify that the three-part *Outdoor Advertising* test is simply guidance and does not displace normal standing rules..... 15

 A. Rule 52.10 allows unincorporated associations to bring suit without analysis of purpose. The same rule should apply to incorporated associations 16

 B. The Declaratory Judgment Act is also relevant to the analysis in this case..... 18

 C. The three part *Outdoor Advertising* test is not necessary to uphold important judicial principles 20

 III. The trial court's dismissal of this action was wrong under the *Outdoor Advertising* test for associational standing 21

A. Whether litigation is germane to the organizational purpose should be an "undemanding" standard rather than a "talismanic" quest for magic language	21
B. If an association has acted pursuant to state law in authorizing litigation, such action should create, at a minimum, a rebuttable presumption of germaneness to the association's purposes	25
Conclusion	29
Rule 84.06(c) Certification	30
Certificate of Service	31

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Betty G. Weldon Revocable Trust v. Weldon,</i>	
231 S.W.3d 158 (Mo. Ct. App. 2007).....	26
<i>Citizens for Rural Preservation Inc. v. Robinett,</i>	
648 S.W.2d 117 (Mo.App. 1982)	12, 25
<i>Clark v. Grand Lodge,</i>	
43 S.W.2d 404 (Mo. 1931)	15
<i>Dudley v. Shaver,</i>	
770 S.W.2d 712 (Mo. Ct. App. 1989).....	19
<i>Executive Bd. of Mo. Baptist Convention v. Carnahan,</i>	
170 S.W.3d 437 (Mo. Ct. App. 2005).....	16
<i>Firefighters Local No. 77 v. City of St. Joseph,</i>	
822 S.W.2d 866 (Mo. Ct. App. 1979).....	16
<i>Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood,</i>	
32 S.W.3d 612 (Mo. Ct. App. 2000).....	13, 22
<i>Humane Soc'y of U.S. v. Hodel,</i>	
840 F.2d 45 (C.A.D.C. 1988).....	22, 23, 27
<i>Hunt v. Washington State Apple Advertising Commission,</i>	
432 U.S. 333 (1977).....	passim

<i>In Rep. Trustees Indian Springs v. Greeves,</i>	
277 S.W.3d 793 (Mo. Ct. App. 2009).....	16
<i>International Union, UAW v. Brock,</i>	
477 U.S. 274 (1986).....	22, 23
<i>Ironite Prods. Co., Inc. v. Samuels,</i>	
985 S.W.2d 858 (Mo. Ct. App. 1998).....	26
<i>Lake Arrowhead Property Owners v. Bagwell,</i>	
100 S.W.3d 840 (Mo. Ct. App. 2003).....	16
<i>Missouri Alliance v. Dept. of Labor,</i>	
277 S.W.3d 670 (Mo. 2009)	passim
<i>Missouri Bankers Ass'n v. Director of Missouri Division of Credit Unions,</i>	
126 S.W.3d 360 (Mo. banc 2004).....	13
<i>Missouri Growth Ass'n v. Metropolitan St. Louis Sewer District,</i>	
941 S.W.2d 615 (Mo. Ct. App. 1997).....	13, 24, 25
<i>Missouri Health Care Ass'n v. Attorney General,</i>	
953 S.W.2d 617 (Mo. banc 1997).....	13, 28
<i>Missouri Health Care Association v. Holden,</i>	
89 S.W.3d 504 (Mo. 2002)	28
<i>Missouri Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transp.</i>	
<i>Com'n,</i>	
826 S.W.2d 342 (Mo. banc 1992).....	passim

<i>Missouri State Medical Ass'n v. State,</i>	
256 S.W.3d 85 (Mo. banc 2008).....	13, 14, 15
<i>National Ass'n for the Advancement of Colored People v. State of Alabama,</i>	
357 U.S. 449 (1958).....	20
<i>Planned Parenthood of Kansas v. Nixon,</i>	
220 S.W.3d 732 (Mo. banc 2007).....	21
<i>Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians</i>	
<i>Mutual Risk Retention Group, et al.,</i>	
916 S.W.2d 821 (Mo. Ct. App. 1995).....	19, 20
<i>Warth v. Seldin,</i>	
422 U.S. 490 (1975).....	12

STATUTES

Mo. Rev. Stat. § 355.096.3(1)	24
Mo. Rev. Stat. § 355.141	26
Mo. Rev. Stat. § 527.010 et seq.....	18
Mo. Rev. Stat. § 527.020.....	19
Mo. Rev. Stat. § 527.130.....	19
Chapter 352 RSMo	8, 9
Chapter 355 RSMo	8, 9, 26

OTHER AUTHORITIES

Missouri Supreme Court Rule 84.05(f)(2)	8
Rule 52.10	16, 17, 19
Supreme Court Rule 52.01	18

JURISDICTIONAL STATEMENT

The Missouri Society of Association Executives, Missouri School Boards Association and Missouri Association of Realtors ("Amici") adopt the jurisdictional statement of Appellant St. Louis Association of Realtors ("SLAR").

STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), Amici file this brief with the consent of all parties.

This case presents a very important issue for Amici, who are all associations with members throughout the State of Missouri. The Amici have been organized under various provisions of Missouri law and their organizational documents contain statement of purposes, some of which are very general and some of which are rather narrow. The Court's guidance in this case will certainly influence the ability of all associations in Missouri to participate in litigation on behalf of their clients and, depending on the course chosen by this Court, may necessitate associations revisiting their corporate documents and stated purposes.

Amicus the Missouri Society of Association Executives is a not for profit association whose mission includes increasing the effectiveness, the image and the impact of associations as they serve their members and society.

Amicus the Missouri School Boards Association (MSBA) is a nonprofit association of public school boards in the state of Missouri. MSBA was originally formed under Chapter 352 RSMo, but later elected to be governed by Chapter 355 RSMo. MSBA was created to provide assistance and support to Missouri public schools. Approximately seventy-five percent of the public school districts in this state are members of MSBA and support that mission. MSBA, as an educational leader, speaks for its member school districts to secure and protect the interests of public education for the benefit of Missouri school children.

Amicus the Missouri Association of Realtors (MAR) was originally organized as a benevolent corporation under Chapter 352 RSMo but now operates as a Chapter 355 not for profit corporation. MAR is a statewide association of real estate professionals representing more than 20,000 realtors statewide. Its articles of incorporation provide "objectives" which include combining individuals together "for the purpose of exerting a combined influence on matters affecting real estate interest [and] to advance the civic development and the economic growth of the State of Missouri."

Amici regularly participate in court cases when the interests of their members are at stake. Amici have an important interest in being able to advance the goals of their association and their members through litigation and in seeing that the associations are able to advance those interests in the manner the properly selected leadership sees fit.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of SLAR.

ARGUMENT

Amici ask this Court to reexamine existing case law on associational standing. The current test in Missouri springs from the common law and relies on the United States Supreme Court's decision in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *Hunt* articulated a three part test for associational standing which included injury to an association's members, whether the action is germane to the association's purposes and whether individual members must be joined.

But *Hunt* stems from an Article III jurisdictional analysis, not Missouri law. This Court should reconsider whether to strictly follow the three part test for associational standing announced in *Hunt*. Should this Court continue to follow *Hunt*, a close reading of precedent, from both this Court and federal decisions applying *Hunt*, leads to the inescapable conclusion that *Hunt's* "germaneness" prong should never be applied in the hyper-technical manner employed by the trial court below. Instead, whether a suit is germane to an association's purpose should be an undemanding standard that gives great deference to the decisions of an association's leadership when acting within the association's governance structure.

I. The *Hunt* three-part associational standing test was first followed by this Court in 1992 without an in-depth analysis of Missouri law.

The three part test employed by the trial court below has not been uniformly applied by this Court and should not be strictly followed in associational standing cases.

In *Missouri Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transp. Com'n*, 826 S.W.2d 342, 344 (Mo. banc 1992), this Court conducted a *sua sponte* review of the standing of an association to bring an action on behalf of its members. The Court acknowledged a previous split in appellate decisions concerning associational standing and resolved this split by adopting the test articulated in *Hunt*. *Id.* The Court then went on, without an in-depth analysis of Missouri law and without specifically applying the facts of *Outdoor Advertising* to the *Hunt* test, to find "no reason why the association [could not] properly present legal points common to all of its members." *Id.*

Although *Outdoor Advertising* has been routinely cited by this Court and the Court of Appeals when analyzing associational standing, it contained no discussion of the rationale for each factor in the *Hunt* test and offered no explanation as to why those three factors were appropriate under Missouri law. Interestingly, *Hunt* itself adopted the three factors and cited a previous U.S. Supreme Court case, *Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth*, the Supreme Court acknowledged associational standing when a member of the association has injury such that the member could bring the suit. *Warth* did not include a three part test and contained no requirement that the suit be germane to associational purposes. *See also Citizens for Rural Preservation Inc. v. Robinett*, 648 S.W.2d 117, 133 (Mo.App. 1982).

Since *Outdoor Advertising*, many – but not all -- Missouri courts, including the trial court below, have comfortably settled into the three-part analysis outlined therein.¹ Under that test, an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See *Outdoor Advertising*, 826 S.W.2d at 344; *Missouri Health Care Ass'n v. Attorney General*, 953 S.W.2d 617, 620 (Mo. banc 1997); *Missouri Bankers Ass'n v. Director of Missouri Division of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2004); *Missouri Growth Ass'n v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615, 621 (Mo. Ct. App. 1997); and *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. Ct. App. 2000).

On the other hand, this court has at times analyzed associational standing without reference to the three-part *Outdoor Advertising* test. *Missouri State Medical Ass'n v. State*, 256 S.W.3d 85 (Mo. banc 2008). In *Missouri State Medical Ass'n*, the majority articulated the associational standing test as follows: "standing must be predicated, *inter alia*, on the fact that the association members would have standing to bring their claims

¹ On at least one occasion, the Court of Appeals tacitly acknowledged that *Outdoor Advertising* did not mandate the three-part test and went on to analyze standing under both *Hunt* and a more traditional analysis. *Missouri Growth Ass'n*, 941 S.W.2d at 615, 621 (Mo. Ct. App. 1997).

individually." *Id.* at 87. The majority did not reference the three-part *Outdoor Advertising* test at all, but found no standing because individual members of the association plaintiffs had no injury. *Id.* at 88.

In a dissent joined by Judge Breckenridge, Judge Price restated the three part *Outdoor Advertising* test as the law in Missouri but went on to write:

The purpose of our standing requirements is to ensure that an actual controversy exists and that the controversy is fairly litigated by adverse parties. There is no doubt that there is an actual controversy and that the medical associations are capable of fairly litigating the case. The purpose of the standing requirements is not to shield questionable legislation from legal challenge by denying standing to the only individuals capable of litigating the case at hand.

Id. at 90 (Price, J. dissenting) (internal citations omitted).

Similarly, in 2009, this Court analyzed the associational standing of labor organizations without reference to the three-part test. *Missouri Alliance v. Dept. of Labor*, 277 S.W.3d 670 (Mo. 2009). In *Missouri Alliance*, this Court looked to the requirements of the declaratory judgment act for guidance on the issue of standing and held:

The plaintiff labor organizations can sue on behalf of their constituent members if those members could have sued individually. Whether individual members of the unions "would have standing to bring this suit

in their own right depends upon whether they are able to satisfy the requirements for bringing a declaratory judgment action.

Missouri Alliance, 277 S.W.3d at 676 (citing *Missouri Health Care Ass'n*, 953 S.W.2d at 620.)

This Court's analysis in *Missouri State Medical Ass'n* and *Missouri Alliance* is the correct analysis to be employed when analyzing the standing of an organization to sue in a representational capacity. Amici ask this Court to clarify that the analysis of *Missouri State Medical Association* and *Missouri Alliance* is the correct analysis to conduct.

II. This Court should specifically clarify that the three-part *Outdoor Advertising* test is simply guidance and does not displace normal standing rules.

This Court's decisions in *Missouri Medical Ass'n* and *Missouri Alliance* importantly articulate that standing rules in Missouri are consistent across all types of cases. There is no basis in this Court's rules or the statutes for adopting a germaneness prong for associational standing. Nor is there any reason that "associations" should be held to a germaneness standard that is not applied to other entities (natural person, corporation, partnership, etc.). After all, a "corporation is merely an incorporated association, that is an association which, by complying with certain conditions prescribed by law, is clothed with corporate authority." *Clark v. Grand Lodge*, 43 S.W.2d 404, 408-409 (Mo. 1931). Amici urge this court to disclaim a formulaic analysis of associational

standing using the three-part test of *Outdoor Advertising* and instead clarify that there is no "associational" standing test; rather, there is simply standing or lack of standing.

A. Rule 52.10 allows unincorporated associations to bring suit without analysis of purpose. The same rule should apply to incorporated associations.

This Court has adopted no rule of civil procedure adopting the *Outdoor Advertising* three-part test for associational standing. However, Missouri Supreme Court Rule 52.10 specifically addresses associational litigation:

"[a]n action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." Mo. Sup. Ct. R. 52.10.

This rule exists "to provide a means of litigating claims of common interest to many parties, where bringing all of the parties before the court is impractical." *Executive Bd. of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 445 (Mo. Ct. App. 2005). It has frequently been used to litigate issues in the name of an association even though the association lacks corporate form. See *Lake Arrowhead Property Owners v. Bagwell*, 100 S.W.3d 840 (Mo. Ct. App. 2003); and *Firefighters Local No. 77 v. City of St. Joseph*, 822 S.W.2d 866 (Mo. Ct. App. 1979).

The Court of Appeals has pointed out that, on its face, Rule 52.10 only addresses capacity and does not specifically address standing. *In Rep. Trustees Indian Springs v. Greeves*, 277 S.W.3d 793 (Mo. Ct. App. 2009). Rule 52.10 gives capacity to sue and be

sued when a group of people have organized together but their association is not a legal entity at common law. From a standing analysis standpoint, since the entity does not exist separately, the only injury this group could have would be injury to its individual members. Rule 52.10 therefore allows suit in the name of an association when its members themselves have injury. It does not require an examination of the association's purposes.

This Court has given unincorporated associations the capacity to bring suit in the name of the association. If the members have standing to assert a claim, then the association would be the appropriate party to proceed under Rule 52.10. An unincorporated association, by definition, has no corporate documents that would govern the purposes and powers of the association, or if it does those documents could be changed without the formalities of corporate organization. It would be impossible for a court to conduct a germaneness analysis using corporate documents as was done below in this case.

Applying the *Outdoor Advertising* three-part test to incorporated associations – and examining corporate documents for "magic language" establishing germaneness—while allowing unincorporated associations to proceed without such scrutiny is simply an absurd result. In addition, in order to avoid the problem that has occurred in this case, a careful practitioner could simply advise leadership of an incorporated association to form an *unincorporated* association for the purpose of bringing a lawsuit since forming an unincorporated association is cost free and may be done instantaneously. This Court should not support a rule that places form over substance but should instead apply the

general standing analysis to all who come before the courts of this state regardless of the corporate form they chose to take. If an association – be it incorporated or unincorporated – has its own injury or if its "members could have sued individually" that ends the analysis and the association may proceed in its own name. *Missouri Alliance*, 277 S.W.3d at 676.

B. The Declaratory Judgment Act is also relevant to the analysis in this case.

This Court should also consider that the underlying claim in this case, as is the case with many suits filed by associations, sought a Declaratory Judgment. In *Missouri Alliance* this Court correctly held that ""the plaintiff labor organizations can sue on behalf of their constituent members if those members could have sued individually. Whether those individual members of the unions would have standing to bring this suit in their own right depends upon whether they are able to satisfy the requirements for bringing a declaratory judgment action." *Missouri Alliance*, 277 S.W.3d at 676. Although not addressed in *Missouri Alliance*, the reasoning of *Missouri Alliance* is also supported by Supreme Court Rule 52.01. Rule 52.01 states "a party authorized by statute may sue in their own names in such representative capacity without joining the party for whose benefit the action is brought." Mo. Sup. Ct. R. 52.01. This portion of the Rule appears to directly address standing.

The General Assembly has addressed the jurisdiction of Missouri courts to render declaratory judgments and has said that such judgments may be entered "whether or not further relief . . . could be claimed." Mo. Rev. Stat. § 527.010 et seq. This statute means that an entity is entitled to a declaration of rights without establishing some other

particular injury so long as the entity's rights are affected. The Missouri declaratory judgment act is a remedial statute that must be liberally construed in order to give effect to the purpose of the act. *Dudley v. Shaver*, 770 S.W.2d 712, 713 (Mo. Ct. App. 1989). The purpose of the Declaratory Judgment act is "to give parties relief from uncertainty and insecurity" and to reduce multiple lawsuits. *Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, et al.*, 916 S.W.2d 821, 823-24 (Mo. Ct. App. 1995).

Under the Declaratory Judgment Act, "any person. . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance." Mo. Rev. Stat. § 527.020. The definition of "person" includes any corporation or unincorporated association. Mo. Rev. Stat. § 527.130. Therefore, the statute very clearly allows an unincorporated association to proceed under the declaratory judgment act so long as its rights are affected by an ordinance. When the rights of an association's members are affected, the rights of the association itself are affected.

Rule 52.10 specifies that such an action may be brought in the name of an unincorporated association so long as certain members who protect the interest of the other members are named as representative parties. The same rule should apply to an incorporated association. A liberal construction of the Declaratory Judgment Act would have allowed SLAR to proceed as a plaintiff in this action because it is an association which adequately represents the interest of members – and there is no dispute that the members had an interest affected by the ordinance in question.

The factors to consider when determining whether to exercise discretion to grant declaratory relief include "public policy and interest, efficiency, convenience, economy, the good or bad faith of the party bringing the declaratory judgment action," and whether the trial court's grant of declaratory relief will serve the purposes for which the declaratory judgment legislation was enacted. *Preferred Physicians*, 916 S.W.2d at 825. The purposes of the Declaratory Judgment Act would be well served by allowing this suit to continue.

C. The three-part *Outdoor Advertising* test is not necessary to uphold important judicial principles

The purpose of the standing requirement is to ensure that issues are properly litigated by adverse parties. By clarifying that the three-part test for associational standing is not necessary and instructing that courts should instead focus on the traditional analysis of whether the party will be "directly and adversely affected by" the outcome of litigation, this Court would uphold the well-founded principle that standing requirements focus on substantive rights and not the form of the entity litigating them. *See National Ass'n for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958) (overturning a decision of the Alabama Courts thereby acknowledging standing of the NAACP to proceed for its members without an analysis of germaneness to purpose: "This Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. . . This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. . . The principle is not disrespected where constitutional rights of persons who are not immediately before the

court could not be effectively vindicated except through an appropriate representative before this Court.") *See also Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737-738 (Mo. banc 2007) (discussing a long line of cases allowing exceptions to the general standing rule so that doctors may litigate the interests of their patients).

III. The trial court's dismissal of this action was wrong under the *Outdoor Advertising* test for associational standing.

Even if the Court determines that the *Outdoor Advertising* test is applicable in this case, SLAR meets the requirements for associational standing. As outlined in Section I, *supra*, an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Outdoor Advertising*, 826 S.W.2d at 344. The Court of Appeals declined in this case to address the first and third prongs of the test for associational standing, finding instead that the second prong of the associational standing analysis was dispositive of the case. However, the interpretation of the trial court and the Court of Appeals concerning the germaneness prong of associational standing is far too restrictive and the claim brought by SLAR is, in fact, germane to its organizational purpose.

A. Whether litigation is germane to the organizational purpose should be an "undemanding" standard rather than a "talismanic" quest for magic language.

Prior case law states that in order for an association to bring suit on behalf of its members, the interests at stake in the suit must be germane to the stated purposes of the organization. *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. Ct. App. 2000). To be germane, some courts hold that the subject matter of the lawsuit must be pertinent or connected to the association's stated purposes. *Humane Soc'y of U.S. v. Hodel*, 840 F.2d 45, 56-57 (C.A.D.C. 1988). However, even in courts that analyze the "germaneness" prong separately, the lawsuit need not be central to the association's purposes. *Id.* at 57. Rather, the germaneness requirement is "undemanding." *Id.* at 58.

In *Hodel*, the court analyzed the existing case law regarding the relationship that must exist between an association's "organic purpose" and the types of lawsuits it may file on behalf of its members. 840 F.2d at 54-57. The court found the Supreme Court's decision in *International Union, UAW v. Brock*, 477 U.S. 274 (1986), to be particularly insightful. *Id.* at 55. In *UAW*, the Supreme Court recognized three special and advantageous features that distinguished associational representative suits from class actions: associations

- (1) can "draw upon a pre-existing reservoir of expertise and capital, . . . [possessing] specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack; (2) attract members whose primary reason for joining is often to create an effective vehicle for vindicating interests that they share with others; and (3) possess a self-policing mechanism guaranteeing a modicum of fair representation:

the very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

Id. (citing *UAW*, 477 U.S. at 2532-33) (internal citations omitted). The court found these "advantageous features" to be important justifications for not placing significant restrictions on an association's ability to bring suit on behalf of its members. *Id.* at 55-56. The court went on to further state that "[i]f the forces that cause individuals to band together guarantee some degree of fair representation, they surely guarantee as well that associational policymakers will not run roughshod over the strongly held view of association members in fashioning litigation goals." *Hodel*, 840 F.2d at 56.

After analyzing the Supreme Court's decision in *UAW*, the *Hodel* court determined that even though the association in question did not specifically list in its certificate of incorporation the membership interest being advanced in the litigation, the association had standing to bring suit on behalf of its members. *Id.* at 59. The court stated that the Supreme Court has "nowhere suggested that mention of a given purpose in an organization's organic papers is talismanic or . . . anything more than strong evidence of purpose," and found it reasonable to rely on the association's unstated, but "obvious side goal of preserving animal life." *Id.* In essence, the *Hodel* court promoted the application of a standard comparable to the business judgment rule for evaluating the germaneness prong of associational standing. The same analysis should be applied in Missouri courts.

This "talismanic" reading of corporate documents is a misapplication of Missouri precedent. In *Mo. Growth Ass'n*, the Court of Appeals appeared to acknowledge that it

was applying a narrow standard for germaneness, requiring that the suit be not just "germane" but "necessarily germane" to the organizational purpose. 941 S.W.2d at 621. The Court of Appeals analyzed the written charters of two associations that brought suit concerning sewer fees. The purpose of the Missouri Growth association was "to promote common business interest of people and companies involved in developing, owning and operating real estate." But the Court found that the stated purposes of the organizations were "very general . . . broad ... [and] vague" and that the issues addressed by the lawsuit were "too remote" to be germane to those general purposes. *Id.* In doing so, the Court of Appeals refused to interpret the corporate documents broadly for the purpose of finding standing and instead ignored the plain language of the documents to avoid addressing the underlying issues. *Id.* at 621-22. The exact same thing has occurred in this case.²

² The decision in *Missouri Growth* is particularly troubling to amicus and practitioners in the area of association law. It appears associations who incorporate may not rely on broad language concerning the purposes of the corporation, even though not for profit corporations may have as their sole purpose the "transaction of any lawful activity," including the commencement of a lawsuit. Mo. Rev. Stat. § 355.096.3(1). The logical result is that association boards seeking to bring litigation should amend their corporate documents to specifically list as a purpose the commencement of litigation. Again, this result puts form over substance, as there is no dispute in this case that the litigation was authorized by the SLAR Board of Directors, which could have easily amended its own corporate documents.

A decision of the Western District of the Court of Appeals appears to take a different approach when scouring corporate documents for evidence that litigation is germane to stated purpose. *Citizens for Rural Preservation Inc. v. Robinett*, 648 S.W.2d 117, 133 (Mo.App. 1982). In *Citizens for Rural Preservation*, the Court analyzed the *Hunt* factors and found that CRP's suit challenging the granting of a quarry permit was "sufficient[ly]" germane to its purpose of "promoting, preserving and protecting the rural environment." It is difficult to reconcile the *Missouri Growth* approach and the *Citizens for Rural Preservation* approach. A standard which relies solely on an analysis of association corporate documents produces unpredictable results that give little guidance to litigants or trial courts as to what "magic language" will do the trick.

B. If an association has acted pursuant to state law in authorizing litigation, such action should create, at a minimum, a rebuttable presumption of germaneness to the association's purposes.

In this case, the trial court and the Court of Appeals disregarded undisputed evidence that the Board of Directors of SLAR had authorized the lawsuit, that it had previously engaged in litigation of a similar nature and that the association had adopted a vision statement which included advocacy for private property rights. While there was no evidence to suggest that any member of SLAR was in disagreement with the litigation at hand or that there was any dissention whatsoever within SLAR about whether the litigation was consistent with SLAR's purposes, the Courts below simply substituted their own judgment for that of SLAR's authorized representatives concerning whether the suit was germane to SLAR's purposes.

In Missouri, the business judgment rule "protects the directors and officers of a corporation from liability for *intra vires* decisions within their authority made in good faith, uninfluenced by any other consideration than the honest belief that the action serves the best interests of the corporation." *Betty G. Weldon Revocable Trust v. Weldon*, 231 S.W.3d 158, 171 (Mo. Ct. App. 2007). Decisions of a board of directors will not be disturbed absent a showing of "fraud, illegal conduct or an irrational business judgment." *Ironite Prods. Co., Inc. v. Samuels*, 985 S.W.2d 858, 862 (Mo. Ct. App. 1998). A board of directors is "required to use its best independent discretion and judgment," and may decide all aspects of a corporation's business affairs unless specifically prohibited by the corporation's bylaws. *Id.*

Many associations, such as SLAR and amici, are organized as not for profit corporations under Chapter 355. Missouri's not for profit corporation statutes specify that the "validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act" except by directors, members or the Attorney General. Mo. Rev. Stat. § 355.141. This statute recognizes that how a not for profit corporation governs itself is a matter to be handled through internal process and not by means of collateral attack.

In this case, the City of Ferguson convinced the courts below to unnecessarily interfere in the internal decisions of SLAR so that Ferguson might avoid a substantive decision concerning a municipal ordinance. In essence, Ferguson argued that the Board had no power to bring the litigation because it was outside of the corporate purposes. Missouri law prohibits such an attack by strangers to the corporation. Rather

unauthorized acts may be challenged only by those with an interest in the not for profit entity.

The same deference mandated by Missouri courts for decisions by corporate directors under the business judgment rule and by the legislature for not for profit acts should be applied to decisions by association directors when bringing suit on behalf of their members. As the *Hodel* court pointed out, the voluntary nature of an association and the commitment of its members to a common purpose ensure that the association's decisions are in line with its general purposes. Unless specifically prohibited by the association's bylaws or clearly outside the sphere of the association membership's interests, a decision by association leadership to file suit on behalf of its members should be afforded a rebuttable presumption of germaneness to its organizational purposes. A court should not substitute its judgment for that of the association.³

Amici suggests that this Court has tacitly followed this rule in past cases. Although standing is a threshold issue that may be analyzed sua sponte by a court, amici can locate no case where this Court has raised the issue of whether the action is germane to corporate purposes. The fact that the litigant appears in Court in the name of the

³ This position is supported by Judge Romines' dissent from the majority opinion of the Court of Appeals in his statement that "the Board of Realtors should decide what is in their membership's economic self-interest, not this Court." *St. Louis Ass'n of Realtors*, No. ED94475, 2011 WL 939460, at *11 (Mo. Ct. App. March 15, 2011) (Romines, J., dissenting).

association appears to create at least a prima facie case that the association is acting consistent with its purposes. See e.g. *Missouri Health Care Association v. Attorney General*, 953 S.W.2d 617 (Mo. 1997) (recitation of the three prong Outdoor Advertising test but no discussion of the germaneness prong); *Missouri Health Care Association v. Holden*, 89 S.W.3d 504 (Mo. 2002) (decision on merits with no discussion of whether "trade association" has standing); *Committee for Educational Equality vs. State*, 294 S.W.3d 477 (Mo. 2009) (discussion of the *Outdoor Advertising* factors but no analysis of the "germane" prong of the test); *Missouri Alliance v. Dept of Labor*, 277 S.W.3d 670 (Mo. 2009) (no discussion of the germaneness prong of associational standing).

In this case, nothing in SLAR's bylaws prohibit its lawsuit against the City of Ferguson on behalf of its members. In fact, SLAR's bylaws and mission statement are actually evidence of the germaneness of the lawsuit. SLAR's bylaws maintain that SLAR "provides a unified medium for real estate owners *and* those engaged in the real estate profession whereby their interests may be safeguarded and advanced" (emphasis added) and "further[s] the interest of home and other real property ownership." *St. Louis Ass'n of Realtors*, 2011 WL 939460, at *3. SLAR's bylaws also create seven different classes of membership. *Id.* One of these classes is Affiliate Members, who are real estate owners and other individuals or firms who, while not engaged in the real estate profession, have interests requiring information concerning real estate and are in sympathy with the objectives of SLAR. *Id.* Clearly, the interests advanced by SLAR's bylaws are not just those limited to the real estate profession. Likewise, the vision statement developed by SLAR also lacks any restriction on associational purposes to just those of the real estate

profession: "[SLAR] strives to enhance the professionalism and success of realtors *and* advocates private property rights." *Id.* at *4 (emphasis added). SLAR's decision to file suit challenging the City of Ferguson ordinance is not prohibited, but rather allowed under its bylaws.

So long as SLAR's bylaws do not prohibit the prosecution of this suit, the decision of SLAR's leadership to take action to protect the interests of its membership should not be second-guessed by the courts of this state.

CONCLUSION

The trial court's decision must be overturned because it is inconsistent with this Court's prior precedent and with the general principles of standing. Associational standing should not be strictly analyzed under the three part *Hunt* test. Rather, the analysis should be "undemanding" and, if germaneness is considered at all, the decision of the association to bring the suit should create a rebuttable presumption that the suit is germane to the purposes of the association. This presumption should be rebutted only upon evidence that the suit is prohibited by the association's governing documents or that the suit has not been properly authorized through the association's internal processes.

WHEREFORE, Amici Missouri Society of Association Executives, Missouri School Boards Association and Missouri Association of Realtors respectfully request this Court overturn the decision of the trial court below, find that SLAR has standing to pursue the underlying litigation and instruct the trial court to proceed to a decision on the merits.

Respectfully submitted,

STINSON MORRISON HECKER LLP

/s/ Charles W. Hatfield, Mo. Bar. No. 40363
230 W. McCarty Street
Jefferson City, Missouri, 65101
Telephone: 573-636-6263
Facsimile: 573-636-6231
chatfield@stinson.com

Crystal K. Hall, Mo. Bar No. 60646
7700 Forsyth Boulevard, Suite 1100
St. Louis, Missouri, 63105
Telephone: 314-863-0800
Facsimile: 314-863-9388
chall@stinson.com

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief contains (1) the information required by Rule 55.03; (2) complies with the limitations of Rule 84.06(b); and (3) contains 5,856 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Office 2007. The undersigned counsel further certifies that the accompanying CD-Rom has been scanned and found to be free of viruses.

/s/ Charles W. Hatfield
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Amici Curiaes' Brief were placed in the United States mail, postage prepaid, this 18th day of May 2011, addressed to:

Stephen Murphy
Devereux Murphy LLC
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105

Stephanie Karr
Curtis, Heinz, Garrett and O'Keefe
130 S. Bemiston Avenue, Suite 200
St. Louis, Missouri 63105
ATTORNEY FOR DEFENDANT-RESPONDENT

/s/ Charles W. Hatfield