IN THE SUPREME COURT OF MISSOURI

Case No. 85170

MISSOURI BANKERS ASSOCIATION, et al.,

Appellants,

v.

DIRECTOR OF THE MISSOURI DIVISION OF CREDIT UNIONS, et al.,

Respondents.

ON APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY,
HONORABLE BYRON L. KINDER

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF APPELLANTS

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JURISDICTIONAL STATEMENT

Amicus Curiae American Bankers Association (sometimes hereinafter "ABA") adopts the jurisdictional statement of Appellants, Missouri Bankers Association, et al.

STATEMENT OF FACTS

Amicus Curiae American Bankers Association adopts the statement of facts of Appellants, Missouri Bankers Association, et al.

POINT RELIED ON

I.

The Trial Court Erred In Dismissing The Complaint In This Case For Lack Of Standing To Sue Because The Appellants, A Trade Association Appearing In A Representative Capacity On Behalf Of Its Members, And A Bank, Demonstrably And Easily Satisfy The Tests For Competitor Standing Established By The Supreme Court Of The United States And Followed By This Court And Other Courts Construing Missouri Law, And Also Followed By The Courts Of Numerous Other States In Contexts Closely Analogous To This One.

ARGUMENT

Introduction and Interest of Amicus

With the consent of the parties, the American Bankers Association hereby respectfully files its Brief as Amicus Curiae in the above-captioned case.

The American Bankers Association is the principal national trade association of the banking industry in the United States, representing members located in Missouri as well as the other forty-nine states and the District of Columbia. ABA member banks come in all sizes, charters and organizational forms, from community to regional to money center banks, national banks and those chartered by the states in which they are located, commercial banks, savings banks and savings and loan associations, independent banks and those owned by bank holding companies.

The members of the industry that this Association represents compete directly and on a daily basis with participants in the credit union industry throughout the nation. The parameters of that competition have undergone a substantial change in recent decades. Credit unions were once small institutions providing simple and limited services to groups of people who knew one another. Now, credit unions have grown large, provide a range of services all but equal to banks at the retail level, and no longer limit themselves to fields of membership in which the persons to be served have very much in common among themselves.

Thirty years ago, for example, there were over 23,000 credit unions in the United States, with an average membership of about 1,114 people and average assets of a little over $935,000. (*Credit Unions: Progress for People*, Credit Union National Association 1978 Yearbook at 37 [figures for 1972].) Today, there are only about 9,800 credit unions, but their average assets have grown to $55 million and average membership to over 8,100. (www.ncua.gov/ref/statistics/midyear2002.pdf).

Some of the change in the credit union industry is the result of legitimate legislative changes in the powers and service areas of the credit unions, some due to natural growth and inflation. But much of the growth is fueled by the credit unions and their regulators taking undue liberties with the restrictions that the statutes impose upon them. Their competitors in the banking business and the savings institution business have taken them to task in the state and federal courts throughout the nation, with considerable, though not universal, success, when the credit unions have overstepped their bounds to the competitive detriment of other institutions.

We have found that legislative oversight of enforcement of credit union law is nonexistent at either the federal or state level, and that the "regulators" appointed at the federal and state level to supervise compliance by credit unions with the applicable statutes turn a deaf ear to all reasonable opposition to legislatively

unsanctioned expansions of credit union powers and authorities. Missouri is a case in point.

The Credit Union Commission (the "Commission"), to which the Director's decisions are appealed, consists of seven persons. By law, the majority (four) of them must have "at least five years experience in this state as an officer, director or member of a supervisory committee of one or more credit unions." Section 370.061.2, RSMo.[1] In short, there is a necessary institutional bias in favor of the credit union industry. The regulatees are the regulators. There is no requirement that the Director or the Commission have any interest in or knowledge of the effect their decisions might have upon entities outside the credit union world, no need for them to balance any outside interests against whatever it is that the credit unions might want. No other agency or department of the state government has the authority to second-guess decisions about credit unions made by credit union people. Self-evidently, competitors of credit unions, that this Association represents, have only judicial review as a means of vindicating their own interests in the event that the Director or the Commission exceed the scope of their authority.

[1] Section 370.061.2, RSMo, was amended in 2002 to further specify that these four members are denominated as "credit union representatives".

There is a broader interest at stake here as well. The legislature meant *something* by what it did in enacting "field of membership" limitations in the credit union statute. If it did *not*, in fact, intend that an area code would suffice as a credit union's unifying factor, there is no way, short of fundamental structural change in the state's credit union regulatory regime, for the intent of the legislature ever to be carried out. If the actions of the Director and the Credit Union Commission are beyond review, then they could feel free to ignore any lesser changes in the statute that they deem unfavorable to their constituents. The lower court's decision abolishes the rule of law with respect to credit unions and places credit unions above the law. This Court should not countenance such a result.

In addition, as indicated above, the scope and extent of credit union powers and service areas has been and continues to be frequently litigated. Cases decided in the area by one state or federal court are invariably cited and relied upon in other jurisdictions. Consequently, the decision the Court makes in this case will be important not only to Missouri banks and Missouri credit unions, but will have widespread ramifications throughout the nation as well.

I.

The Trial Court Erred In Dismissing The Complaint In This Case For Lack Of Standing To Sue Because The Appellants, A Trade Association Appearing In A Representative Capacity On Behalf Of Its Members, And A Bank,

Demonstrably And Easily Satisfy The Tests For Competitor Standing Established By The Supreme Court Of The United States And Followed By This Court And Other Courts Construing Missouri Law, And Also Followed By The Courts Of Numerous Other States In Contexts Closely Analogous To This One.

To affirm the decision of the lower court in this case would require that this Court overturn its own precedents and other long-standing Missouri cases, ignore a line of Supreme Court of the United States precedents that this Court and other appellate courts construing Missouri law have previously followed, and set itself at odds with the courts of virtually every other state to have considered the kind of "competitor standing" issue presented here, moving Missouri--at least in this respect--far outside the mainstream of American jurisprudence. No sensible reason has been or can be advanced for such a drastic result.

The seminal case for competitor "standing to sue" issues is, of course, *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"). In that case, as here, the plaintiff was a trade association appearing in a representative capacity on behalf of its members. The defendant, as in this case, was the regulator of an industry other than the one occupied by members of the plaintiff trade association. In *Data Processing*, as here, the defendant had authorized his constituents to engage in a business in

competition with the plaintiffs' members, arguably in excess of the statutory authority of the defendant's constituents. And, in *Data Processing*, as here, the complaint was premised upon an Administrative Procedure Act that granted judicial review to "[a] person...aggrieved by agency action." (5 U.S.C. § 702). The Supreme Court famously held that a party has standing to sue if it can show "injury in fact" and that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute...in question." Id. at 153. Under that test, the plaintiff trade association in *Data Processing* was held to have had standing to sue.

Missouri has adopted and long followed the *Data Processing* rationale of the Supreme Court of the United States. See, e.g., *Harrison v. Monroe County*, 716 S.W. 2d 264 l.c. 266 (Mo. banc 1986); *Bank of Belton v. State Banking Board*, 554 S.W. 2d 451 (Mo. App. W.D. 1977) and *Missouri Cities Water Company v. City of St. Peters*, 508 S.W. 2d 15 (Mo. App. E.D. 1974).

In 1998, the Supreme Court of the United States did nothing more than follow *Data Processing* and its progeny when it resolved a case almost perfectly on point here. In *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998), the American Bankers Association and several of its members were held to have standing to sue in order to challenge the actions of a credit union regulator in allowing its constituents to enter into competition with the

bank members of the Association where it was alleged (and ultimately found) that the competition in question was beyond the statutory powers of credit unions and unlawful.

National Credit Union Administration explicitly followed *Data Processing* and three of its progeny – *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); and *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987). Of significance is that all of these cases involved actions by regulators of financial institutions and competitors of those financial institutions who were held to have standing to challenge the actions of financial institution regulators. The Court in *National Credit Union Administration* noted that in *Data Processing* the Comptroller had determined that national banks could enter the business of data processing, and a data processing corporation and a data processing trade association had standing to challenge that determination.

In *Arnold Tours* the Comptroller had determined that national banks could operate travel agencies, and travel agencies were held to have standing to challenge that determination. See, analysis in *National Credit Union Administration*, 522 U.S. at 489-490.

In *Investment Company Institute* the Comptroller had determined that national banks could "establish and operate what in essence were early versions of

mutual funds", and "an investment company trade association and several individual investment companies" were held to have standing to challenge this determination. *National Credit Union Administration*, 522 U.S. at 490. The Court in *National Credit Union Administration* then reasoned with respect to the *Investment Company Institute*:

> "Significantly, we found unpersuasive Justice Harlan's argument in dissent that the suit should be dismissed because 'neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evince[d] any congressional concern for the interests of petitioners and others like them in freedom from competition.'"

522 U.S. at 491. Consequently, the absence of a specific legislative grant of standing to competitors to question regulatory action does not defeat standing of a competitor.

And in *Clarke v. Securities Industry Assn*., the Comptroller had authorized two national banks to offer discount brokerage services at its branch offices and at other locations and a securities dealer trade association was held to have standing to challenge the lawfulness of that action. See, *National Credit Union Administration*, 522 U.S. at 491-492.

The Court in *National Credit Union Administration* reasoned:

> "Our prior cases, therefore, have consistently held that for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.' *Id*., at 399-400, 107 S.Ct., at 757 (citing *ICI*); see also *Arnold Tours*, 400 U.S., at 46, 91 S.Ct., at 159 (citing *Data Processing*). The proper inquiry is simply 'whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected . . . by the statute.' *Data Processing*, 397 U.S., at 153, 90 S.Ct., at 830 (emphasis added). Hence in applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them."

573 U.S. at 492.

Missouri Cases Adopting *Data Processing* Rationale.

This Court and other appellate courts applying Missouri law have adopted the *Data Processing* test for standing to secure judicial review. In *Harrison v.*

Monroe County, 716 S.W.2d 263, l.c. 266 (Mo. banc 1986) in finding standing reasoned:

> "A more familiar expression of this same concept is the statement that 'the interest sought to be protected by the complainant' must arguably be 'within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153. . . ."

A series of cases by the Missouri Court of Appeals have cited, relied upon and applied *Data Processing* to find that a business had standing to challenge the lawfulness of administrative action in favor of its competitor. In *Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. W.D. 1979) (per Shangler, J.), the Court considered, relied upon and applied *Data Processing* as the law of Missouri and found that a bank had standing to challenge the decision of the Director of Finance allowing a competing bank to have and maintain a drive-in facility. In so holding, Judge Shangler reasoned at page 921:

> "As prelude, we iterate that the law accords status to a competitor bank for judicial review of an administrative grant of charter or facility to another bank within the trade area, not to protect monopoly, but to keep the system of banks within an equipoise of competition

and regulation and so secure the public against the economic havoc of bank failure."

See also, citing to and relying upon *Data Processing – Bank of Belton v. State Banking Board*, 554 S.W.2d 451, l.c. 920-21 (Mo. App. W.D. 1977) (bank was aggrieved and had standing to challenge lawfulness of administrative decision allowing competitor facility to operate in the same trade area); *State ex rel. City of St. Louis v. Litz*, 653 S.W.2d 703, l.c. 706 (Mo. App. E.D. 1983) ("two prong test" of *Data Processing* applied and standing found); *Missouri Cities Water Company v. City of St. Peters*, 508 S.W.2d 15, l.c. 17 (Mo. App. E.D. 1974) (private water utility had standing to challenge lawfulness of city extending its lines beyond the city limits and thereby be in competition with water utility); and *Legal Communications Corp. v. St. Louis Printing & Pub. Co.*, 24 S.W.3d 744, l.c. 747-748 (Mo. App. E.D. 2000) (publisher had standing to challenge decision that competing publisher was qualified to publish legal notices).

And, the Eighth Circuit in applying Missouri law has determined that the standing test of *Data Processing* is the law of Missouri. See, *Metropolitan Express Services, Inc. v. City of Kansas City*, 23 F.3d 1367, l.c. 1371 (8th Cir. 1994) (holding that under Missouri law a bus service had standing to challenge the award of a contract for ground transportation services from the Kansas City International Airport); and *Springfield Television, Inc. v. City of Springfield*, 462 F.2d 21, 24 (8th

Cir. 1972) (television station had standing under Missouri law to challenge the lawfulness of a decision by the City of Springfield authorizing a community antenna television system).

The Western District of the Missouri Court of Appeals erroneously relied on a series of health care cases (primarily by the Western District) which are *sui generis* and bottomed upon statutory schemes which were enacted to comply with a 1974 federal law (since repealed) providing for the establishment of "voluntary health planning agencies". This history is recounted by Judge Shangler in *West County Care Center, Inc. v. Missouri Health Facilities Review Committee*, 773 S.W.2d 474, 476, ftnt. 2 (Mo. App. W.D. 1987). As a result of the National Health Planning and Development Act of 1974, Missouri adopted a system of voluntary health planning agencies, including the concept of certificates of need. The Missouri certificate of need law started out as a statute to enable Missouri to participate in the funding under the congressional enactment.

The federal statute was repealed in 1987. The Missouri Health Facilities Review Board, which started as a part of the voluntary health planning agency concept, is not the usual Board within the Executive Department, inasmuch as four of its nine members must be members of the General Assembly (selected by the President Pro Tem and the Speaker) (with the other five being appointed by the Governor with the advice and consent of the Senate). See Section 197.310, RSMo.

Consequently, in a very real sense that Board was created for planning purposes. While the federal planning requirement was repealed, however, the Missouri Health Facilities Review Board has continued its functions. Thus, there has built up a body of precedent which precluded review of "voluntary planning" decisions in the health care area which are *sui generis* and should be limited, at least, to the health care area.

In the traditional regulated industries such as financial institutions and utilities, the Missouri Courts have allowed financial institutions and utilities to challenge the lawfulness of actions by regulators allowing their competitors to engage in new activities or go into new areas. See cases cited above. See also, *Bank of Crestwood v. Gravois Bank*, 616 S.W.2d 505 (Mo. banc 1981) (action by bank allowed for judicial review to determine the lawfulness of an order of the State Banking Board affirming the granting of authority by the Commissioner of Finance to a competing bank to establish a facility; and *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40 (Mo. banc 1944) (per Hyde, J.) (private utilities which had opposed sale of an electric system within Mercer County to a cooperative before the Public Service Commission ("PSC") was held to be "aggrieved" by the PSC's approval and therefore could appeal and had standing to challenge the lawfulness of such order). In *Consumers Public*

Service Co., the affected private utilities who challenged the lawfulness of the sale served parts of Mercer County and adjoining areas.

Judge Hyde, speaking for this Court, reasoned:

> "We hold that Consumers Company was sufficiently 'interested' to have the right to intervene and likewise the right to apply for a rehearing, when the Commission decided that a competitor could take over these new locations adjoining the general territory in which both were operating. Our conclusion also is that this company had the further right, because of such interest, to seek a review in the circuit court and appeal to this court from its adverse decision. The motion to dismiss must be overruled as to the Consumers Company.
>
> We think the same thing is true of the Missouri Power & Light Company."

180 S.W.2d at 46. *Consumers Public Service Co.*, which predates the provisions of Chapter 536, RSMo, and Article V, Section 18, of the Missouri Constitution, affording judicial review rights, clearly allows for standing and judicial review here. None of the provisions of Chapter 536 or 370, RSMo, nor the provisions of Article V, Section 18, of the Missouri Constitution, limit those standing rights and rights of judicial review. The Appellants in *Consumers Public Service Co.*, as here,

appeared in proceedings before the administrative agency, but their rights to judicial review were upheld. [2]

Consequently, it is clear that inasmuch as appellate courts applying Missouri law have adopted the standing tests set forth in *Data Processing*, under that Opinion and its progeny the Appellants have standing here just as the banks had standing in *National Credit Union Administration, supra.*

Any doubts with respect to standing were removed by the actions of the Missouri General Assembly in 1998 by enacting the provisions of Section 381.081 (Senate Committee Substitute for House Substitute for House Committee Substitute for House Bill No. 1323 as Truly Agreed and Finally Passed, 89th General Assembly, Second Regular Session) and in 1999 by enacting Section 536.053 (Conference Committee Substitute for House Substitute for House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill Nos. 1, 92, 111, 129 and 222 as Truly Agreed and Finally Passed, 90th General Assembly, First Regular Session). This Court will recall the General

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[2] *Bank of Belton, supra* and *Farmers Bank of Antonia, supra*, properly distinguish and limit the holding in *Rouveyrol v. Donnelly*, 285 S.W.2d 669 (Mo. banc 1956), because the provisions of Chapter 536, RSMo, were <u>not</u> then applicable to appeal from the then Board of Bank Appeals. Furthermore, there was no statute which colorably allowed any additional persons to appear before the Board of Bank Appeals.

Assembly's reaction to this Court's Opinion in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. banc 1997) (the "JCAR Decision"). The final modified Opinion was handed down late in February 25, 1997, close to the deadline for introduction of bills.

In the next two regular sessions there was a concerted legislative attempt to provide for more oversight of regulatory actions.

In 1998 (Senate Bill No. 622) and again in 1999 (Senate Bill No. 92), Senator Ehlman introduced bills with the primary thrust of each Bill being to enact a new Section 536.053 which would provide as follows:

> "536.053. Any member of the general assembly shall have standing to challenge any rule promulgated by a state agency and may bring such an action pursuant to the provisions of section 536.050. Such member shall not be required to exhaust any administrative remedy and shall be considered a nonstate party."

That Bill as introduced would have extended standing to "any member of the General Assembly" to seek a declaratory judgment with respect to the validity of rules.

During the course of the 1999 Regular Session, Senator Ehlman's standing language in Senate Bill No. 92 was expanded so as to leave no doubt that standing to challenge rules of administrative agencies would be more broadly afforded and

would not be limited to affording additional standing only to members of the General Assembly. The above-quoted language for new Section 536.053 in Senate Bill No. 92 as originally introduced was expanded during the course of passage to provide:

> "536.053. Any person who is or may be aggrieved by any rule promulgated by a state agency shall have standing to challenge any rule promulgated by a state agency and may bring such an action pursuant to the provisions of section 536.050. Such person shall not be required to exhaust any administrative remedy and shall be considered a nonstate party." (Emphasis added).

The "may be aggrieved" language of Section 536.053 which was enacted in 1999, as well as the "claiming to be adversely affected" of Section 370.081.5 which was enacted in 1998 evince a clear and unequivocal legislative intent to expand standing for persons and entities seeking judicial review from that which was in existence previously. Quite obviously, the General Assembly concluded that because the Joint Committee on Administrative Rules after the JCAR Decision could not provide oversight over rules and administrative agencies, enhanced standing provisions would instead be provided through Sections 536.053 and 370.081.5, RSMo.

Consequently, even if Missouri courts had not adopted *Data Processing* and its progeny, the provisions of Section 370.081.5 enacted in 1998 and Section 536.053 enacted in 1999 afford standing to the Appellants Missouri Bankers Association and Century Bank of the Ozarks.

There is thus simply no question whatsoever that the Missouri Bankers Association or its member banks would have standing to challenge an allegedly unlawful "field of membership" approved by the *National Credit Union Administration* for a Missouri-based *federal* credit union that competes directly with Missouri banks. While it is no doubt true that Missouri courts, construing their own laws, need not blindly follow the rules and precedents set by federal courts construing similar (or even identical) federal laws, there is no sound policy reason why Missouri courts should not follow federal precedent here. As we indicated above, to do so would be consistent with the decisions of Missouri's own courts. It would also be consistent with the decisions of the courts of virtually every other state that has considered and resolved "competitor standing" issues.

Other Jurisdictions.

Utah. State credit union law authorized the formation of credit unions to serve persons who "reside within *an* identifiable neighborhood, community, rural district or county." Utah Code Ann. § 7-9-3 (5) (b) (emphasis supplied.) Notwithstanding the use of the singular in the statute, the state's Commissioner of

Financial Institutions authorized credit unions to take into their individual fields of membership the residents of more than one county, and in some cases, residents of any of the counties in the state could all belong to the same credit union. The Utah Bankers Association, on behalf of competing banks, filed suit to challenge the legality of the Commissioner's action. The trial court dismissed the complaint for lack of standing to sue, but the Utah Supreme Court reversed: "The Commissioner has the power to profoundly affect competition between various institutions through his authority to supervise the operation and management of institutions, authorize the expansion of the rights, privileges and benefits of institutions, and establish criteria for the approval of new institutions....Because UBA members are completely subject to this scheme, we conclude that they cannot be denied standing to challenge an alleged injurious action by the Commissioner." *Utah Bankers Association v. America First Credit Union*, 912 P.2d 988 (Utah 1996).

Nebraska. The state courts have adopted the comparable federal court tests for standing to sue *in toto*, so as to allow the state bankers association to challenge an allegedly unlawful expansion of a state credit union's geographic "field of membership" (*Nebraska Bankers Association v. Department of Banking and Finance*, Docket 504 Page 176, Dist. Ct. Lancaster County, May 31, 1994) and a savings and loan association to challenge the legality of regulatory approval of a

competitor's application to open a branch office (*First Federal Savings & Loan Association v. Department of Banking*, 192 N.W. 2d 736 (Neb. 1971).

North Carolina. Under the state's Administrative Procedure Act, associations representing both the savings and loan industry and the banking industry were authorized to pursue an administrative challenge to an unlawful expansion of a credit union's field of membership and to seek judicial review (successfully) of an adverse decision there. *North Carolina Bankers Association v. North Carolina Credit Union Commission*, 276 S.E. 2d 404 (N.C. 1981).

Colorado. A bankers association and several of its members were authorized to file formal written protests before the state's Financial Services Board, to have and participate in a public hearing before the Board, and to present evidence, including expert testimony, in opposition to an application by a credit union to expand its field of membership in an allegedly unlawful manner. Failing that, the competitors of the credit union were authorized to seek judicial review of the administrative decision, though on the merits their efforts were unsuccessful. *Colonial Bank v. Colorado Financial Services Board*, 961 P.2d 579 (Colo. App. Div. 4 1998).

See also Maine (same). *Maine Bankers Association v. Bureau of Banking*, 684 A.2d 1304 (Me. 1996).

Virginia. In a number of instances, the Commonwealth's Bureau of Financial Institutions authorized state chartered credit unions to expand their respective fields of membership by adding residents of geographical areas arguably beyond what might be considered a single "well-defined community." An association of competing commercial banks challenged the practice administratively. While the association was unsuccessful on the merits of its case, the State Corporation Commission explicitly found that because "[t]his matter involves the Bureau's construction -- and its application on a number of occasions -- of a Virginia statute affecting state-chartered credit unions and banks (especially 'community banks'), both of which are subject to regulation by the Bureau...[w]e find, in these circumstances, that the VBA may properly bring the Petition." *Petition of the Virginia Bankers Association*, Case No. BF1970070 (State Corporation Commission, 1998) Slip op. at 7.

New York. Prior to 1974, savings banks in New York, as their title implies, limited their deposit services to savings accounts, usually of the old "passbook" variety. In that year, two savings banks proposed to offer to their customers something called a "NOW Account," an acronym standing for "Negotiable Order of Withdrawal." As described by the Court of Appeals of New York, it was "manifestly and unabashedly ...intended to be the savings bank equivalent of a commercial bank checking account." *New York State Bankers Association v.*

Albright, 381 N.Y.S.2d 17, 19 (N.Y. 1975). The Superintendent of Banks of the state approved the plan (in the absence of any statutory authority for the new product), and his decision to do so was challenged by an association of the commercial banks with whose product the NOW account would be competing. The defendants challenged their standing to do so, but the state courts gave the argument short shrift, summarily finding it to be "without merit, for the 'interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute.'" *New York State Bankers Association v. Albright*, 361 N.Y.S.2d 949, 951 (N.Y.App.Div. 4th Dept. 1974), aff'd., supra. 381 N.Y.S.2d 17. In support of what the court found to be an essentially obvious proposition, the court cited (and clearly adopted) *Association of Data Processing Service Organizations v. Camp*, *supra*., 397 U.S. 150. See also *New York State Association of Life Underwriters v. New York State Banking Department*, 83 N.Y. 2d 353 (N.Y. 1994) (insurance trade association allowed to challenge (though unsuccessfully) allegedly unlawful banking department authorization to state banks to sell annuities in competition with the agents.)

New Hampshire. As in New York, the state Bank Commissioner allowed savings banks to offer "NOW Accounts" to customers in the absence of statutory authority to do so. The local state bankers association, representing the competitor commercial banks, filed a protest with the Commissioner who dismissed it for lack

of standing. On review, the Supreme Court of New Hampshire reversed that determination: "There is no question but that plaintiff will suffer an 'injury in fact' since the offering of N.O.W. accounts will allow savings banks to compete with checking accounts of commercial banks....This is sufficient to give plaintiff standing to appeal from the commissioner's action." *New Hampshire Bankers Association v. Nelson*, 302 A. 2d 810, 811-12 (N.H. 1973) (citations omitted.) The court went on to say that the "zone of interests" portion of the federal "standing to sue" rules had been "severely criticized" and that a single "injury in fact" test for standing was the one "that has been adopted by most State courts." *Id*. at 811.

Iowa. In the mid-1970s, state-chartered credit unions in Iowa sought out a legal opinion from state's superintendent of banking as to whether they could offer interest-bearing checking accounts, called "share draft" accounts, to their members in direct competition with commercial bank checking accounts which, by law, were not permitted to pay interest. When the superintendent concluded that the credit unions could do so, the Iowa Bankers Association, an association of commercial bank competitors of the credit unions, was permitted to "commence[] contested proceedings before the superintendent under the Iowa Administrative Procedure Act." The Association was successful in those proceedings, the credit unions sought judicial review, and the Iowa Bankers Association was permitted to intervene in the court proceedings as well, the ultimate result being a decision of

the state Supreme Court that the "share draft" program was unlawful. *Iowa Credit Union League v. Iowa Department of Banking*, 268 N.W.2d 165, 170-171 (Ia. 1978). In short, an association of competitors in Iowa is entitled to protect the interests of its members in judicial and administrative proceedings against unlawful incursions by another industry. See also, *Iowa Bankers Association v. Iowa Credit Union Department*, 335 N.W. 2d 439, 444 (Ia. 1983) ("We believe the legislature intended to make a judicial remedy available to any person or party who can demonstrate the requisite injury.")

Wisconsin. Here, too, savings and loan associations attempted to offer interest bearing checking accounts to customers in the absence of statutory authority to do so, but with the expressed view of the state Commissioner of Savings and Loans that accounts "of this kind are permitted under Wisconsin law." The Wisconsin Bankers Association challenged the legality of the program on behalf of its member commercial banks that would be faced with competition from the new product. The association's standing to sue was challenged, but upheld by the trial court. *Wisconsin Bankers Association v. Mutual Savings and Loan Association*, Case No. 442-840 (Cir. Ct., Milw. County, slip op. at 15 (1976). The court applied the familiar two-part test of "injury in fact" and "zone of protected interests" found in federal decisions and adopted in and for the State of Wisconsin by *Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis.2d 1 (1975). The

bankers lost on the merits in the trial court and appealed; the savings and loan did not cross-appeal on the standing to sue issue. Ultimately, the Wisconsin Supreme Court ruled in favor of the Association on the merits as well. *Wisconsin Bankers Association v. Mutual Savings and Loan Association*, 96 Wis.2d 438 (1980).

Florida. State chartered credit unions sought authority from the state's Department of Banking and Finance to offer interest-bearing checking accounts to their respective members and initiated an administrative proceeding before the Department to accomplish that end. The Florida Bankers Association was permitted to intervene in the hearings as a party on behalf of its members, competitors of the credit unions, to protest the application, and when the application was nevertheless granted, the association was permitted to seek judicial review of it, though unsuccessfully on the merits. *Florida Bankers Association v. Leon County Teachers Credit Union*, 359 So. 2d 886 (Fla. App. 1st Dist., 1978).

Illinois. State-chartered credit unions received approval from the state's Director of Department of Financial Institutions to offer interest-bearing checking accounts to their respective members. The Illinois Bankers Association and one of its members filed suit challenging the legality of such accounts on behalf of competing commercial banks, and succeeded in having those accounts declared unlawful. *Bartonville Bank v. Callahan*, No. 77 L 22948 (Cir. Ct. Cook County 1979) Report of Proceedings at 15-21.

Washington. State-chartered mutual savings banks offered interest-bearing checking accounts to customers. The Washington Bankers Association, on behalf of commercial bank competitors of the savings banks, sued over the legality of such accounts. While the litigation was ultimately unsuccessful on the merits, the ability of the association to bring the suit was unquestioned. *Washington Bankers Association v. Washington Mutual Savings Bank*, 598 P.2d 719 (1979).

See also Texas (same with respect to credit union share drafts). *Texas Bankers Association v. Government Employees Credit Union*, 625 S.W.2d 338 (Tex. App. 1981).

See also Pennsylvania (same): *Pennsylvania Bankers Association v. Secretary of Banking*, 392 A.2d 1319 (Pa. 1978); *Pennsylvania Automotive Association v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 550 A.2d 1041 (Pa Commonwealth Ct. 1988) (regulated car dealers had standing to challenge non-application of Board's rules to a competitor).

Massachusetts. Insurance agents' association in the Commonwealth had standing to sue the Commissioner of Insurance over implementation of marketing rules that applied to the association's members, but not to their competitors, who remained unregulated, to the economic detriment of the association's members. *Massachusetts Association of Independent Insurance Agents and Brokers v. Commissioner of Insurance*, 367 N.E. 2d 796 (Mass. 1977).

Ohio. A trade association of insurance agents is permitted to sue the state's insurance commissioner to prevent the licensing of bank-affiliated insurance agencies that would compete with the association's members in alleged violation of state law. *Independent Insurance Agents of Ohio v. Fabe*, 587 N.E. 2d 814 (Ohio 1992).

CONCLUSION

Throughout the nation, in federal and state courts alike, bankers associations are permitted to sue regulatory agencies when those agencies allow credit unions to exceed the scope of their authority to the competitive detriment of the banks. Throughout the nation, bankers associations are permitted to sue regulatory agencies to prevent unlawful incursions into their members' business from competitors other than credit unions. Throughout the nation, industry groups of all sorts are permitted to sue regulatory agencies to preserve their members' business interests from competition -- often even competition from banks -- that is arguably illegal. Sometimes the bankers win and sometimes they lose on the merits, but at least they get their day in court throughout the nation. Other regulated industries have those same rights, and same outcomes, throughout the nation. Let that continue to be the rule in Missouri as well. The decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains 7,312 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompanying this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

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Alex Bartlett

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Brief, together with a computer diskette containing an electronic version of the Brief, were mailed via First Class U.S. Mail, postage prepaid, this 12th day of May, 2003, to

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