IN THE SUPREME COURT OF MISSOURI

Supreme Court No. 85170

MISSOURI BANKERS ASSOCIATION, et al.,

Appellants,

v.

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

Respondents.

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

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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V.

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ARGUMENT

I.

RESPONDENTS' BRIEFS DO NOT PROVIDE ADEQUATE SUPPORT FOR THE AFFIRMANCE OF THE TRIAL COURT'S DECISION DISMISSING THE CONTESTED CASE REVIEW (COUNT I) BECAUSE: THEY HAVE FAILED TO RECOGNIZE AND UNDERSTAND THE LEGAL RIGHTS AND INTERESTS OF APPELLANTS THAT MERIT STANDING IN THIS CASE, IN THAT APPELLANTS HAVE RIGHTS TO BE FREE FROM ILLEGITIMATE COMPETITION AND TO COMPETE ONLY WITH LAWFUL COMPETITION; THEY HAVE FAILED TO SHOW THAT APPELLANTS ARE NOT AMONG THE INTENDED BENEFICIARIES OF THE STATUTE IN QUESTION AND ARE NOT WITHIN THE ZONE OF INTERESTS PROTECTED BY IT, IN THAT SECTION 370.080.2, RSMO LIMITS THE COMPETITION THAT CAN BE UNDERTAKEN BY A CREDIT UNION; AND THEY HAVE NOT SHOWN WHY THE UNIQUE STATUTORY LANGUAGE AUTHORIZING REVIEWS OF THE DIRECTOR'S EXPANSION DECISIONS SHOULD NOT INCLUDE JUDICIAL OVERSIGHT, IN THAT ANYONE "CLAIMING TO BE ADVERSELY AFFECTED" CAN BEGIN THE REVIEW PROCESS.

The Brief of Respondent Springfield Telephone Employee's Credit Union ("STECU") contains a number of allegations which do not withstand critical scrutiny, beginning with its implicit suggestion that Century Bank has never lost any business to credit unions. When asked whether Century Bank had lost any business to "a credit union," John Harlin, the Chairman and CEO of Century Bank, first noted one account that he knew had been lost due to a loan payoff. Then he stated that he was aware of that happening to his Missouri customers, but that he did not have a list of which ones. (L.F. 160-161) While Mr. Harlin said that no new "unrestricted" credit union had taken any business from his bank, there is no evidence that any community credit union was operating in that area at that time. Mr. Harlin also did not fail to say what effect the entry of such a credit union into its area would have on the bank, as contended by STECU. (STECU Brief, p. 18) Rather, he clearly stated his opinion that the entry of a credit union into that area would diminish banks' ability to obtain deposits and loans. (L.F. 160-162) Furthermore, the record does not support, as contended by STECU, its statement that "Century Bank suffers from pure supposition that a credit union operating within its area would be another competitor in its area for deposits and loans." (STECU Brief, p. 19) In addition to the essentially uncontroverted evidence in the record supporting the fact that the addition of a credit union would have such an impact (Appellants' Brief, p. 12), the necessary logical deductions from the undisputed facts in this case place the conclusion of adverse competitive effect far beyond any "speculative nature" criticism, as shown by the following:

a. The business of financial institutions - - like banks and credit unions - - requires depositors and borrowers.

b. There are a finite number of potential depositors and borrowers in any geographic area (like that of the 417 telephone area code);

c. When a new bank or credit union comes into a geographical area, it will compete with the existing financial institutions in that area for the finite number of depositors and borrowers there.

d. When a new financial institution which has fewer expenses (e.g., it does not have to pay income taxes) enters an area in which the existing institutions all have higher expenses (e.g., they do have to pay income taxes), the resulting higher interest rate that the new institution can pay to depositors and resulting lower loan rates that it can charge to borrowers will exacerbate the adverse competitive effect it will have on the business of the existing financial institutions.

To characterize a necessary consequence as "speculative" merely because it has not yet occurred - - because the agency approval to do the action has not yet gone into effect - - is an erroneous application of the doctrine reflecting the reluctance of the courts to entertain challenges which really are "merely speculative." However, there is no *real* speculation at all about what the impact on banks would be if large community credit unions having favorable income tax treatment are allowed regional access to bank customers. STECU seeks to expand its potential customer base solely for the purpose of increasing its

depositors and borrowers. Those depositors and borrowers do not appear out of thin air; rather, they would transfer their business to STECU from existing financial institutions. Any suggestion that the impact of the approval of the STECU application or the application of the challenged rule is "merely speculative" is therefore disingenuous. Something is speculative when it may or may not occur. There is no speculation in the statement that banks would be negatively affected if this decision and this challenged rule were allowed to be implemented.

Perhaps what STECU is suggesting that an agency decision cannot be challenged before it goes into effect, because until it goes into effect, there is no "discrete injury" that is necessary for standing. That is not Missouri law, however: the obvious potential negative impact that would have occurred to the plaintiffs if the administrative decision were allowed to be implemented was all that was required in, for example, ***Mo. Nat. Educ. Ass'n v. State Bd. of Educ.,*** 34 S.W.3d 266 (Mo. App. W.D. 2000) and in ***Legal Communications Corp. v. St. Louis County Printing & Publishing Co., Inc.,*** 24 S.W. 3d 744 (Mo. App. E.D. 2000)**.** In neither of those cases had the harm to the plaintiffs yet occurred (because the judicial review process prevented it from occurring); but in both cases the obviousness of the negative impact on the plaintiffs if the proposed agency action were implemented was sufficient for purposes of standing for judicial review.

In another inaccuracy at page 21 of its Brief, STECU contends that "The bank parties recognize that they are not 'aggrieved' as that term has been construed under Missouri law since time *in memoriam.*" On the contrary, Appellants made several standing arguments in

their Brief, each with different legal lineage, and they characterized the more recent healthcare cases relied upon by STECU as aberrations. (Appellants' Brief, pp. 27-30) The Appellants' plain meaning argument regarding the word "aggrieved" - - which was focused upon at this point in its Brief by STECU - - was but one of several made based upon Missouri law that support the grant of standing in this case.

Yet another inaccuracy leads off STECU's Point I.B., wherein it alleges that the Appellants' second point "concedes that they do not have a legally recognized interest to be free of any competition . . . ." No such "concession" was or needed to be made by Appellants in order to pursue the alternative bases for standing, because the Appellants have a legally recognized right to be free from at least *some* competition: in ***Legal Communications***, the Court of Appeals recognized the right to be free from illegitimate competition in a regulated field to be a sufficient basis for standing for purposes of judicial review.

STECU first attempted to differentiate the ***Legal Communications*** case by arguing that the statutes underlying credit union expansions "do not seek to regulate *competition* of credit unions . . . ."[1] (STECU Brief, p. 27) This is inaccurate, however, because the field-of-membership limitations contained in § 370.080.2, RSMo *do* regulate competition that can be undertaken by credit unions by limiting their potential members to very specific

[1] Contrary to STECU's assertion, the MBA witness did not "admit" that CUCOM is not supposed to regulate competition between banks and credit unions. (L.F. 168)

associational or local community groups. Credit unions may only compete for, and are limited to competing for, deposits and loans from potential customers who are in their field-of-membership groups. Credit unions are not legally authorized to compete for customers who are outside of their field-of-membership groups. Therefore, the relevant statutes do "seek to regulate competition by credit unions," which constitutes regulation of some of the competition faced by banks. While the additional criteria to be considered in making these expansion determinations that are set out in § 370.063.2, RSMo are financial issues, a precondition for consideration of any application for expansion is meeting the field-of-membership limitations contained in § 370.080.2, RSMo. STECU simply attempts to gloss over mandatory preconditions to an effective expansion application in making this argument.

STECU next attempts to distinguish ***Legal Communications*** by suggesting that there was a statutory grant of the right to be free from unqualified competition that was inextricably intertwined with "the right granted to a newspaper to compete in the first instance." (STECU Brief, pp. 28-29) Nothing is expressly stated in § 493.100, RSMo about a right to be free from illegitimate competition from unqualified publications, however. Rather, that right was inferred from the establishment of qualifications on the right to compete in that regulated field. The same inference is appropriate from the § 370.080.2 field-of-membership limitations in this case.

STECU then noted that in ***Legal Communications***, the court did not have explicit guidance from a statute on who has standing to challenge an administrative decision in that

area. (STECU Brief, p.30) That primarily reflects, however, only that ***Legal Communications*** was a noncontested case. Appellants first note that this "distinction" does not exist with regard to the portions of Appellants' petition dealing with its noncontested case claim. In addition, it should also not have any effect on Appellants' contested case and regulatory declaratory judgment claims, either; because if a party has a "legal right" that has been adversely affected, it has a constitutional right to other types of judicial review under Article V, § 18 of the Missouri Constitution. If something is a "legal right" or a "legal interest," then it is a legal right or interest in the context of both contested and noncontested cases. It is the right of plaintiff financial institutions not to have to compete with others which are not lawfully qualified to offer their services in that area (because of their failure to meet the statutory field-of-membership requirements) that provides the basis for the application of the reasoning in ***Legal Communications*** to this case.

STECU next suggested that § 493.100's purpose of adequate public notice of foreclosures is not paralleled by any similar public purpose in the instant case. The State's comprehensive regulation of the financial services industry serves a legitimate public purpose, however, as reflected in the observation in ***Farmer's Bank of Antonia v. Kostman*** that the banking statutes "keep the system of banks within an equipose of competition and regulation and so secure the public against the economic havoc of bank failure." (577 S.W.2d 915, 921 Mo.App. W.D. 1979)) Damage to financial institutions would occur if unqualified entities are allowed to do business in this field; the establishment of statutory

qualifications for doing business in this area seeks, at least in part, to prevent damage to existing financial institutions and to foster a sound state financial system. Therefore, damage to existing financial institutions from unqualified competitors would be damage sought to be prevented by those statutes. No Marxist-like rhetoric about a "tool of oppression" (STECU Brief, p. 33) should be allowed to obfuscate the fact that the public benefits which are provided by the regulatory schemes adopted in Title XXIV, RSMo, are substantial and worthy of protection.

It is also not the case, as contended by STECU at page 34 of its Brief, that "Chapter 370 contains no purpose to control, limit or otherwise involve the Director and Credit Union Commission in the competition between banks and credit unions." STECU evades any discussion in this context of the § 370.080.2 field-of-membership limitations and the statutory mandate to the Director and to CUCOM to assure that geographic credit unions are limited to persons who work or reside "in a well-defined local neighborhood, community or rural district."

After failing to provide any meaningful distinction between ***Legal Communications*** and this case in terms of the legal right or interest that serves as a basis for standing, STECU asks this Court to overturn that case. STECU suggests that it is worried that standing would otherwise be based on some "undetermined sliding scale that ignores whether the relief to be afforded in the case would actually redress a legally cognizable right." (STECU Brief, p. 35) But the recognition of a legally cognizable right in the right to be free from illegitimate competition has nothing "sliding" about it. Furthermore,

suggesting that all decisions by CUCOM and the Director serve only the public good (and not the parochial "venal" interests of the credit union industry seeking to operate with virtually no field-of-membership limitations whatsoever through captive agency fiat) is somewhat myopic, at the very least. Appellants' right to judicial review in this case should be affirmed because of their legally cognizable right to be free from illegitimate, unqualified competition, just as that right was recognized in ***Legal Communications.***

When, in Point I.C., STECU finally gets around to discussing the contents of the field-of-membership statute, it takes the position that "Appellants were neither an intended beneficiary of § 370.080.2(2), nor within the zone of interests sought to be protected by that section." However, it really doesn't offer support for that position. Rather, it argues more generally about the applicability of a zone of interests analysis in this case and its position that federal precedent should not apply. Appellants suggest that the clear disinclination of STECU to try to rebut Appellants' contention that they are within the zone of interests protected by § 370.080.2 is further corroboration of the validity of the Appellants' position. It is one thing to argue that a test does not apply; it is another thing to argue that if a test does apply, the test-taker has failed the test. By arguing essentially only for the former position, STECU should be deemed to be conceding the second. Consequently, if the zone of interests test applies in this case, Appellants must be passing it.

STECU asserts, without referencing any support, that a zone of interests analysis has not been used by Missouri courts "if the legislature has established a scheme for judicial

review of administrative actions." (STECU Brief, p. 37) The easy rebuttal of that error is provided by such cases as ***Bank of Belton v. State Banking Bd.,*** 554 S.W.2d 451, 453 (Mo.App. W.D. 1977), ***Farmers Bank of Antonio,*** 577 S.W.2d at 920, and ***West County Care Center v. Missouri Health Facilities Review Committee,*** 773 S.W.2d 474, 477 (Mo.App. W.D. 1989). The Missouri legislature did not "preempt" a zone of interests analysis by stating that any person "aggrieved" by a credit union expansion decision may obtain judicial review under § 370.081.5, RSMo. The zone of interests analysis merely helps courts ascertain when a party is indeed aggrieved for purposes of standing.

STECU states that the zone of interests analysis made by the United States Supreme Court in ***National Credit Union Administration v. First National Bank & Trust Co.,*** 522 U.S. 479 (1998) is inapplicable "because the interests to be protected by the two statutes are not the same." STECU Brief, p. 39) STECU says that because "multiple group credit unions" – which were the topic of the regulatory challenge in that federal case – were not allowed in federal law but are allowed under Missouri law, the zone of interests analysis of the U.S. Supreme Court in deciding the standing question in that case is inapplicable here. Precedent on standing issues in these cases, however, is not differentiated by the specific content of the rules or decisions that have been challenged as illegal abrogations of a statute. In addition, the legal right or interest would be the same regardless of whether a credit union is unqualified to provide services to a proposed group because of a statutory multiple group restriction or a statutory geographic area limitation. If an agency proposes to take an action that is impermissible under an applicable statute that would ostensibly

allow an unqualified credit union to ignore those statutory restrictions, other financial institutions which would be negatively affected by that competition should have standing to challenge that agency action.

Finally with regard to the zone of interests test, STECU argues that Missouri applies it on a much more limited basis than do federal courts. That characterization is not supported by the cases cited in Appellants' Brief (at pages 44-45) and in the Brief of Amicus Curiae American Bankers Association (at pages 14-15, 18-21). STECU also erroneously suggests that in ***Association of Data Processing Service Org. v. Camp,*** 397 U.S. 150 (1970), the U.S. Supreme Court recognized "the expansive federal standing doctrine" that exists to permit and further a private attorney general function." (STECU Brief, p. 41) Actually, in a footnote (fn. 1 at 153), the Court said that the "private attorneys general" issue was "inapplicable to the present case." Furthermore, if a party has, as here, a legal right or interest that is being adversely affected, it is not acting as a "private attorney general."

The Attorney General, in his Brief on behalf of Respondents Director of the Missouri Division of Credit Unions and Credit Union Commission of the State of Missouri, takes the position that no Missouri case law recognizes the right to be free of "illegitimate competition," even referencing ***Legal Communications*** at that point, but failing to notice the express holding in that case about the existence of that right. (Attorney General's Brief, p. 17) ***Legal Communications*** recognized the right with the following language:

> Standing exists if the alleged illegitimate competition of St. Louis Printing damages Legal Communications in a manner sought to be prevented by the statute. . . . If Legal Communications is forced to face illegitimate competition, its ability to compete is impeded, and the purpose of the statute is emasculated. Legal Communications has standing to bring the instant action. (24 S.W.3d at 748)

The Attorney General cites ***Gold Cross Ambulance, Inc. v. Mo. Dept. of Health***, 866 S.W.2d 473 (Mo.App. W.D. 1993) as support for its position that "mere competitor" status is insufficient for standing. (Attorney General's Brief, pp. 18-20) Of course, that case in no way impacts upon Appellants' arguments regarding *illegitimate* competition. In addition, the Court in ***Gold Cross Ambulance*** did recognize that when the legislature uses different words to grant standing, the issue - - if a claim is made "merely" on the basis of an economic competitor status - - is whether the legislature had broadened the class of aggrieved persons to include competitors. (866 S.W.2d at 475) While the Court found the language on appeal rights in ambulance statutes to be ambiguous, the "claiming to be adversely affected" wording in § 370.081.5 is quite clear. Because the denial of standing was based on completely different statutory language, the ***Gold Cross Ambulance*** case should be of no more value as precedent to Respondents here than are the CON cases in which the statute clearly limits the right of judicial review to the "applicant."

The Attorney General argues that the executive branch alone is supposed to protect the public from "possible remote consequences" of administrative agency harm. (Attorney

General's Brief, p. 20) That is coupled with an invitation for the courts not to make any determinations about whether a person or institution is qualified to provide a certain service. A distinction between cases involving the provision of services and those involving other types of administrative decisions cannot be found in Article V, § 18 of the Missouri Constitution, however (which states that "*All* final decisions, findings, rules and order . . . shall be subject to direct review by the courts. . . ." (emphasis added)). Furthermore, from a public policy standpoint with regard to the protection of the general public, challenges about *illegitimate* grants of authority to do business should not be left to the "political" process, particularly when those grants are made by an administrative agency that is dominated by the regulated industry. Judicial review should be provided regarding all types of agency decisions for the purpose of preventing the abrogation of the statutes by administrative absolutism.

The Attorney General then makes a "chamber of horrors" argument about clogged courts and competitors' misuse of the legal system for unbeneficial purposes. No such chamber need be visited or created with a reversal in this case, however, given the fact that the attack here is not upon the legitimate exercise of discretion by the agency, but upon its attempted abrogation of the controlling statutes. A decision allowing competitors standing on claims of illegal and illegitimate agency action would provide a line similar to that drawn in mandamus cases, which can be maintained to require compliance with a nondiscretionary duty, but not to control judgment or discretion. (See, e.g., ***State ex rel. Missouri Growth Ass'n v. State Tax Com'n,*** 998 S.W.2d 786 (Mo. banc1999))

The Attorney General suggests that no policy of competitive regulation exists which would allow Appellants relief because the statutes "protect depositors and borrowers, not institutions or their shareholders." (Attorney General's Brief, p. 28) One way to protect depositors and borrowers, however, is to protect the institutions they employ from illegitimate competition that could negatively affect them.

Amicus CUNA avers that the case of ***HHC Medical Group, P.C. v. City of Creve Coeur Board of Adjustment,*** 99 S.W.3d 68, 72 (Mo.App. E.D. 2003) supports its allegation that "The 'zone of interest' test is not to be used where standing is governed by a specific statute, as 'the right of appeal exists solely by statute.'" While the general statement that "the right of appeal exists solely by statute" does appear in that case, the first portion of CUNA's allegation (about the zone of interests test not being used where standing is governed by a specific statute) does not. CUNA cites no Missouri law to support the most important portion of that allegation, even though it would appear to be using the ***HHC*** case exactly for that purpose. In fact, Missouri law does not support CUNA's purported statement of it, as explained at page 18 above. Furthermore, even if the "specific statute" (§ 370.081.5) were somehow "exclusive," as alleged by CUNA, that would not be true for the noncontested case claims here.

CUNA says that it cannot even imagine any economic harm that could possibly accrue to banks due to the administrative actions contested in this case. (CUNA Brief,

p. 18) Any credit union administrator, however, could enlighten CUNA on the impact that would result if another type of financial institution with significantly fewer expenses than a credit union were allowed to solicit *its* depositors and borrowers to move their accounts.

CUNA's suggestion that Appellants offered "*no* evidence whatsoever to support the assertion that they are in actual (or even hypothetical) competition in any real economic sense" evinces an unfamiliarity with the record in this case (as referenced on page 12 of Appellant's Brief) and a lack of understanding of the financial industry itself (as different types of institutions and different entities within them all seek funds from the same potential depositors and interest income from the same potential borrowers). These are not "mere assertions," and the immediacy of negative repercussions here are as live as they were in ***MNEA*** and in ***Legal Communications.***

Finally, and most curiously, CUNA alleges that banks and credit unions are not economic competitors in Missouri. Evidently, CUNA believes that if a competitor is relatively small, it is somehow not a competitor. That is patently illogical. (Cf. "A small bird is not a bird because it is not as big as a big bird.") CUNA also argues that different forms of ownership mean they are not competitors (a position that would certainly come as a surprise to both for-profit and nonprofit hospitals, among others). Finally, CUNA states that their different statutory schemes also mean that banks and credit unions are not competitors. The fact that different regulations govern different types of institutions engaging in business in a given field has no logical or actual impact upon the fact that they are in competition with each other within that field, however. Thus, CUNA's assertion that

the Appellants' contention of economic competition "is a cannard" (sic) is, indeed, itself a canard.

The National Association of State Credit Union Supervisors' Brief discusses the cases from other jurisdictions cited as support for standing in the ABA Brief, most of which NASCUS attempts to dismiss on several general grounds. It argues that in a majority of those reported cases, the issue of standing was not addressed, so they are not authority for the position that the law from those jurisdictions supports the Appellants' standing arguments. However, NASCUS cites no authority for its proposition that "the fact that such issue of standing was not presented or addressed in the opinion of the Court cannot be taken as a Court finding and holding on the issue of standing by any party." (NASCUS Brief, p. 24) Support for the contrary proposition of Appellants may be found by analogy from the doctrine of the law of the case. As stated in ***Heineman v. Heineman,*** 845 S.W.2d 37, 40 (Mo. App. W.D. 1992):

> Pursuant to the doctrine of "law of the case," a former adjudication is conclusive as to all questions raised directly and passed upon and is also the law of the case as to matters which arose prior to the first appeal and to matters which might have been raised thereon but were not.

The Eighth Circuit has held that the law of the case applies to issues decided implicitly as well as explicitly. (See, e.g., ***Kansas Public Employees Retirement System v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.,*** 114 F.3d 679, 687 (8th Cir. 1997), cert. denied, 522 U.S. 1068) Standing must have been implicitly decided in all of those cases.

Therefore, they should all be deemed to have precedential value within those jurisdictions, and they do provide substantial support for the Appellants' standing arguments.

The second tier of "distinctions" advanced by NASCUS was the argument that the laws and agency structures of other states were different. While statutes and regulatory frameworks are naturally going to vary to some extent, the fact remains that in a number of other jurisdictions, parties like these Appellants would be found to have standing to challenge administrative decisions like those made by CUCOM and the Director.

The trial court was in error for dismissing Count I for lack of standing. The case should be remanded for a review on the merits.

II.

RESPONDENTS' ARGUMENTS IN SUPPORT OF THE TRIAL COURT'S DECISIONS ON COUNTS II AND III REGARDING THE NONCONTESTED CASE APPEAL FAIL TO SHOW WHY THE TRIAL COURT WAS NOT IN ERROR IN DISMISSING THEM, BECAUSE APPELLANTS HAVE STANDING IN THAT THEY ARE INTENDED BENEFICIARIES OF AND WITHIN THE ZONE OF INTERESTS PROTECTED BY SECTION 370.080.2, RSMO, PARTICULARLY GIVEN THEIR LEGAL RIGHT AND INTEREST IN BEING FREE FROM ILLEGITIMATE COMPETITION WITHIN THE FINANCIAL SERVICES INDUSTRY.

In its comments about Point II and noncontested cases, STECU appears to abandon its cherished argument that the word "aggrieved" is the be-all and end-all of the § 370.081.5 standing analysis by taking the position that the absence of that word from § 536.150.1 essentially makes no difference. If, as averred by STECU, the same principles apply to both contested and noncontested cases, however, then the legal interest to be free from illegitimate competition recognized in the noncontested case of ***Legal Communications*** should apply equally to contested cases, as well as noncontested cases.

The only other case cited by STECU on Point II was ***Querry v. State Highway and Transportation Commission,*** 60 S.W.3d 630 (Mo.App. W.D. 2001). To begin with, STECU erroneously contends that these Appellants, as the ***Querry*** appellants, made no

allegation in their petition "as to a legally protectable interest of appellants that was adversely affected or how those rights were affected." In the ***Querry*** case, the plaintiffs only alleged that they were Missouri taxpayers, and they made *no* allegation of a legal interest that was adversely affected. The Appellants in this case included in their petition a number of paragraphs contending the existence of such interests and the adverse effects on them. (L.F. 7-25) Furthermore, the Court in ***Querry*** also did not address the issue of a legal right not to have to compete with illegitimate competition, or the issue of intended beneficiaries of a specific statute, or the issue of the zone of interests protected by a statutory limitation on competitors' operations. Nothing in ***Querry*** supports a determination against noncontested case standing under § 536.150, RSMo in this case.

The Attorney General's Brief confuses the noncontested case claims that were made with contested case claims. He alleges that Count II of the petition (seeking noncontested case review of CUCOM's decision to "exempt" STECU from restrictions as stringent as those contained in federal rules, under § 370.081.2, RSMo) fails because § 536.100 "provides for appeals only by those 'aggrieved.'" (Attorney General's Brief, p. 25) But § 536.100 does not apply to noncontested cases; § 536.150 does, and it does not contain the word "aggrieved."

The Attorney General then proceeds to argue that § 536.150 does not apply when the decision is "subject to judicial review," and contends that the CUCOM "exemption" decision is subject to that review. However, the CUCOM decision at issue in the noncontested case counts is *not* subject to judicial review under § 536.100, because there

is no provision for a hearing before CUCOM on these "exemption" matters. As noted in ***Bruemmer v. Missouri Department of Labor Relations,*** 997 S.W.2d 112, 117 (Mo. App. W.D. 1999), the key to the distinction between contested and noncontested cases is the hearing requirement. Because there is no hearing requirement for CUCOM's determinations about exemptions, judicial review of an exemption decision would have to be as a noncontested case under § 536.150, and not under § 536.100.[2]

The Attorney General then argues that even if § 536.150 applies, noncontested cases are subject to "traditional rules" which preclude review to those who "only seek competitive advantage." (Attorney General's Brief, p. 26) He fails to discuss here, however, ***Legal***

[2] NASCUS erroneously suggests that a hearing is conducted on the exemption issue (even though none is provided for in either § 370.081.2, RSMo or 4 CSR 105-3.040, its cited authority for that proposition). There was no hearing on the exemption issue, nor was there even any open invitation for public comment when CUCOM actually considered that issue. (L.F. 39-40)

Communications and the standing that accrues in this case under the same kinds of legal rights and interests that were articulated in that § 536.150 case.

The Briefs of Respondents have not shown why the trial court should have dismissed Counts II and III of the Petition.

III.

RESPONDENTS' ARGUMENTS THAT APPELLANTS LACK STANDING TO LODGE A DIRECT ACTION CONTESTING THE ADMINISTRATIVE RULE UNDERLYING EXCESSIVE GEOGRAPHIC AREA EXPANSION APPROVALS ARE IN ERROR BECAUSE APPELLANTS HAVE SUFFICIENT RIGHTS AND INTERESTS TO MAINTAIN THIS CHALLENGE UNDER SECTION 536.053, RSMO, IN THAT THEY HAVE A RIGHT TO BE FREE FROM THE ILLEGITIMATE COMPETITION THE RULE TRIES TO ALLOW, AND IN THAT THEY ARE INTENDED BENEFICIARIES WITHIN THE ZONE OF INTERESTS PROTECTED BY SECTION 370.080.2, RSMO.

Standing for a declaratory judgment action on administrative rules may be at least somewhat different than standing for other types of actions because of the disparate wording that is included in the applicable statutes (be they in the words "the threatened application thereof" in § 536.050 or in the words "may be aggrieved" in § 536.053). For Counts I, II and III, STECU argued that the "mere possibility" of harm should help defeat

Appellants' claim to standing. For Count IV, because of the wording in Section 536.050 and 536.053, it cannot make the same argument.

Both STECU and the Attorney General argue that the only people who can challenge a rule are those to whom the rule is to be "applied." No legal support for that position is provided, however. All that Article V, § 18 requires is that a rule "affect private rights." It does not add "as the rule is applied to the plaintiff." These Appellants are aggrieved by the Commission's rule and by the actual and threatened applications thereof because they have private rights which are and would be negatively affected by them, as set out in Point I above and in the Appellants' Brief.

STECU argues that Appellants should not be allowed to explain why they have a legally protectable interest in this case and why they have standing under an analysis that considers the right to be free from illegitimate competition, the right to compete only with lawful competition, the zone of interests test and how it applies to § 370.080.2, and the intended beneficiary standards. Naturally, STECU does not want these matters to be considered, because they all explain why, under existing law, Appellants should have standing for all four counts in this case.

Perhaps because it may seem a little odd for the Attorney General to be arguing that illegal actions by administrative agencies should be unreviewable by the courts, his Brief suggests that an offended party might in egregious cases seek a writ of mandamus to challenge such a rule, given the exceedingly low standing thresholds for such actions. But nothing in ***Missouri Growth Ass'n,*** in which jurisdiction was taken due to a challenge to a

statute, expressly holds that the contents of a rule can be challenged by the extraordinary writ process; and the existence of a legal remedy under § 536.050, RSMo suggests that such a process would not be available.

The Respondents' arguments against standing for a direct rule challenge in this case are unconvincing, and the courts should proceed to make a determination on whether the challenged geographic area definition is lawful or unlawful.

IV.

RESPONDENTS' ARGUMENTS AGAINST THE ASSOCIATIONAL STANDING OF THE MISSOURI BANKERS ASSOCIATION ARE IN ERROR BECAUSE THEY FAIL TO SHOW THAT THE MBA DOES NOT MEET THE CRITERIA SET FORTH IN THE APPLICABLE TEST, IN THAT PROTECTION OF ITS MEMBERS IS GERMANE TO MBA'S PURPOSE AND PARTICIPA-TION BY INDIVIDUAL MEMBERS IS UNNECESSARY FOR THE RELIEF SOUGHT IN THIS ACTION.

If no member bank would have standing in this case, then MBA would not have standing either, as has previously been conceded by Appellants. Whether this first criterion for associational standing has been met will necessarily be determined by the Court's decision on the substantive contentions that have been made in this case. STECU's

arguments that the MBA does not meet the other two established criteria for associational standing are, however, in error.

While STECU appears to be conceding that the interests the MBA seeks to protect are germane to its purpose of protecting banks (which is the second criterion, simply stated), it argues that the MBA fails the second prong of associational standing test because its interests "are contrary to the Credit Union Act statute, relevant case law and public policy, because they are solely interests in stifling competition." (STECU Brief, page 54) No legal support is provided for this contention about allegedly "unrecognized and unlawful interests." These arguments are also refuted by the discussions of the lawful rights and interests of these Appellants in their Briefs.

STECU then suggests that the third prong of the associational standing test is also not met because the "affect" must be determined by an analysis of each individual member bank's claim of economic harm and that such an analysis could only take place if each individual bank were made a party. (STECU Brief, p. 54) Even if the former contention were true (which it is not), the second one is, of course, preposterous: evidence of "affect" or "aggrievement" need not be provided only by parties. There is no evidentiary rule limiting evidence on harm to evidence about parties. Such a requirement was certainly not imposed in, among other associational standing cases, ***MNEA***.

Respondents' Briefs thus fail to support the argument that the MBA is not a proper party in this case.

V.

RESPONDENT CREDIT UNION COMMISSION SHOULD NOT BE DISMISSED FROM THIS CASE BECAUSE ITS ONLY ARGUMENT IN SUPPORT OF ITS MOTION APPLIES TO ONLY ONE OF THE FOUR COUNTS, AND BECAUSE ITS ARGUMENT ON THE FOURTH COUNT IS INSUFFICIENT IN THAT IT IS BASED ONLY UPON CASES IN WHICH THE ADMINISTRATIVE REVIEW WAS CONDUCTED BY AN ENTITY WHICH, UNLIKE CUCOM, HAD NOT PREVIOUSLY PARTICIPATED IN THE ACTION.

CUCOM argues that because Chapter 370 does not expressly make it a party in an appeal of one of its decisions, its motion to be dismissed should be granted. That is only a contested case (Count I) argument, however. None of the cases cited by CUCOM in its Brief had anything to do with a declaratory judgment action on an agency's rule or with a noncontested case challenge to an agency decision.

Furthermore, all of those cases dealt only with whether the *agency* that was reversed in an administrative hearing could appeal, and not whether the agency should be a party to an appeal by a regulated private party. The decisions held that for purposes of a governmental entity appeal of a contested case decision, the statute would have to be clear in granting that right, because the public's interest is protected by the administrative entity to which the appeal was made in the first instance (which is why the Director might not be "aggrieved" for purposes of an appeal by him of a CUCOM decision made under

§ 370.081.5, RSMo).

In any event, CUCOM has offered no justification whatsoever for being dismissed from Counts II, III and IV of this case. Certainly the overly broad swath that CUCOM tried to cut from ***Baer v. Civilian Personnel Division,*** 714 S.W.2d 536, 538 (Mo. App. W.D. 1986), suggesting (at page 10 of its Brief) that "the court of appeals held that the Board of Mediation was not a proper party to an appeal of one of its own decisions," would not extend to the propriety of including the rulemaking authority when challenging one of its own rules, or of including the agency that made a noncontested case decision when a party seeks § 536.150 relief from that decision.

VI.

THE DECISION OF THE TRIAL COURT CANNOT BE SUSTAINED ON THE ALTERNATIVE THEORY ADVANCED BY AMICUS NASCUS, BECAUSE THIS CASE IS NOT AFFECTED BY THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES, IN THAT NO SUCH ADDITIONAL REMEDIES EXISTED AND IN THAT NO ADDITIONAL ACTS WERE REQUIRED OF THE APPELLANTS PRIOR TO FILING THE APPEAL.

For the first time in this case, the issue of exhaustion of administrative remedies has been argued not by any Respondent, but rather by one of the Amici (the National Association of State Credit Union Supervisors).

NASCUS argues, without any cited support, that a failure to provide comments during the early part of the process "waives any objection to approval of the application."[3] That is not Missouri law, however, because a plaintiff is only required to exhaust available administrative remedies before seeking judicial review. (See, e.g., ***Sperry Corp. v. Wiles,*** 695 S.W.2d 471, 472 (Mo. banc 1985).) Providing comments at a preliminary stage in the process is not an administrative "remedy." Appellants took advantage of the "remedy" of administrative review of the Director's decision before CUCOM. Subsequently, following the CUCOM decision, there was no "remedy" left to these Appellants but to seek judicial review under § 370.081.5, RSMo.

Furthermore, exhaustion would not be applicable to the noncontested case claims (under ***Strozewski v. City of Springfield,*** 875 S.W.2d 905, 907 (Mo. banc 1994)), nor would it be applicable to the claim challenging the validity of 4 CSR 105-3.010(1) (given the language in § 536.050.2, RSMo).

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[3] While the record indicates that the Director did not recall receiving any comments on this application, he did recall some comments during the rulemaking process. (L.F. 177)

Appellants sought the available administrative remedy by filing their notice of appeal of the Director's decision pursuant to § 370.081.5, RSMo. The exhaustion doctrine is simply not applicable to this case.

CONCLUSION

Because Respondents have failed to show why the trial court's decision should be sustained, the order and judgment of the Circuit Court dismissing this action should be reversed, and the case should be remanded to the Circuit Court of Cole County for determinations on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2003, two copies of the foregoing Substitute Reply Brief of Appellants and one computer diskette of the foregoing Substitute Replay Brief of Appellants were sent by U.S. Mail, postage prepaid, to Mr. James B. Deutsch, 308 East High Street, Suite 201, Jefferson City, MO 65101, attorneys for Respondents Springfield Telephone Employees Credit Union and Missouri Credit Union System, Inc.; to Mr. James R. Layton, Deputy Attorney General, Christie Kincannon and Michael J. Wambolt, Assistant Attorneys General, 221 West High Street, 8th Floor, Jefferson City, MO 65102, attorneys for Respondent Director of the Missouri Division of Credit Unions and The Credit Union Commission of the State of Missouri; to Mr. Alex Bartlett, Husch & Eppenberger, 235 East High Street, Jefferson City, MO 65102, attorneys for Amicus Curiae American Bankers Association; to Mr. Kurt Valentine, 613 East McCarty Street, Jefferson City, MO 65101, attorneys for Amicus National Association of State Credit Union Supervisors; and to Mr. Eric L. Richard, General Counsel, Credit Union National Association, 601 Pennsylvania Avenue, N.W., South Building, Suite 600, Washington, D.C. 20004, attorneys for Amicus Credit Union National Association.

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John S. Pletz

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) and that it contains 7589 words, as calculated by counsel's word-processing system. I also certify that the diskettes provided to this Court and counsel have been scanned for viruses and are virus-free.

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