**IN THE MISSOURI SUPREME COURT**

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**No. SC 85170**

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**MISSOURI BANKERS ASSOCIATION, et al.**

**Appellants,**

**v.**

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

**Respondents.**

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

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# BRIEF OF AMICUS NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS

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## JURISDICTIONAL STATEMENT

Amicus National Association of State Credit Union Supervisors ("NASCUS") adopts the jurisdictional statement of Springfield Telephone Employees Credit Union, Respondents herein. Amicus NASCUS files this Brief with consent of all parties to the current appeal.

## STANDARD OF REVIEW

Amicus NASCUS adopts the statement of the standard of review of Springfield Telephone Employees Credit Union, Respondents herein.

## STATEMENT OF FACTS

Amicus National Association of State Credit Union Supervisors adopts the Statement of Facts of the Respondent Springfield Telephone Employees Credit Union with the following changes.

During the comment period prior to the issuance of the decision by the Director of the Missouri Division of Credit Unions, Appellants Century Bank and Missouri Bankers Association did not submit any comments with respect to the application of Springfield Telephone Employees Credit Union. (L.F. 177). Appellants did not make any contact with the Director of the Division of Credit Unions, nor the Credit Union Commission, until after the Director issued his decision authorizing and approving the field of membership expansion for Springfield Telephone Employees Credit Union. (Id.).

## POINTS RELIED ON

### I.

**THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' CHALLENGE OF THE DIRECTOR'S DECISION IN THAT STANDING IS NOT AVAILABLE FOR APPELLANTS BECAUSE APPELLANTS HAVE NOT EXHAUSTED ALL OF THEIR ADMINISTRATIVE REMEDIES BECAUSE THEY DID NOT COMMENT OR FILE OBJECTIONS PRIOR TO THE DECISION OF THE DIRECTOR THUS DEMONSTRATING THAT THEY ARE NOT AGGRIEVED.**

Section 370.081, RSMo 2000

## II.

**THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' APPEAL OF THE DIRECTOR'S DECISION IN THAT MISSOURI LAW CONTROLS THE ISSUE OF STANDING OF ALLEGED COMPETITORS, SUCH AS BANKS, TO CHALLENGE THE CREDIT UNION COMMISSION'S DECISIONS, AND FOREIGN DECISIONS ARE NOT INSTRUCTIVE DUE TO MISSOURI'S STATUTORY SCHEME AND THE FACTUAL DIFFERENCES IN THE FOREIGN DECISIONS.**

*Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13 (Mo. App. 1987)

*Gold Cross Ambulance, Inc. v. Department of Health*, 866 S.W.2d 473 (Mo. App. W.D. 1993)

*Texas Bankers Association v. Government Employees Credit Union of San Antonio*, 625 S.W.2d 338 (Tex. App. 1981)

## ARGUMENT

## INTRODUCTION

Amicus NASCUS has a vital interest in the proper functioning of state regulatory systems for credit unions. Amicus opposes any attempt to impede, interfere with or defeat the proper functioning of such state systems and supports individual state authority to regulate credit unions as the state legislatures deem appropriate. Appellants' position in this appeal asserts that economic competitors (i.e. banks) have standing to challenge in state courts a decision of the Missouri Credit Union Commission regarding the regulation of the field of membership of the Springfield Telephone Employees Credit Union ("STECU"). Amicus NASCUS disagrees that the Appellants are competitors of STECU or any other credit union and disagrees that banks do or should have standing to interfere with credit unions. Amicus NASCUS will focus, in this brief, on the overriding issues of exhaustion of administrative remedies and the trend of authority to preserve state autonomy in regulation. Courts are nearly unanimous in denying standing to challenge a decision of a credit union regulation when administrative review is available. The controlling law in the current case is Missouri law. Foreign jurisdiction cases do not control, nor do they give support to Appellants' position, because such decisions are based upon statutory schemes that are widely divergent from Missouri's or are based upon facts entirely different than the facts in the current matter.

As a result, Amicus NASCUS urges this Court to affirm the decision of the trial court and the Western District Court of Appeals.

**I.**

**THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' CHALLENGE OF THE DIRECTOR'S DECISION IN THAT STANDING IS NOT AVAILABLE FOR APPELLANTS BECAUSE APPELLANTS HAVE NOT EXHAUSTED ALL OF THEIR ADMINISTRATIVE REMEDIES BECAUSE THEY DID NOT COMMENT OR FILE OBJECTIONS PRIOR TO THE DECISION OF THE DIRECTOR THUS DEMONSTRATING THAT THEY ARE NOT AGGRIEVED.**

The Appellants in the current matter sought judicial review in the Circuit Court of the decision of the Respondent Credit Union Commission ("CUCOM"), alleging standing is somehow "implied" due to Respondent CUCOM's administrative review of the decision of the Director of the Division of Credit Unions. The Appellants filed for such administrative review by CUCOM under Section 370.081.5,RSMo 2000[1] which specifies that any party "claiming to be adversely affected" may contest the decision of the Director by requesting administrative review by the Credit Union Commission. As the Missouri Court of Appeals, Western District, has observed, however, such status as an "affected person" at the administrative stage does not give Appellants the right to further appeal for judicial review of the CUCOM decision.

[1] All statutory citations are to RSMo 2000, unless otherwise noted.

*Missouri Health Care Association v. Missouri Health Facilities Review Committee*, 777 S.W.2d 241, 243 (Mo. App. E.D. 1989)

Being an "affected person" (as Appellants claim they are) may authorize administrative review, but does not entitle such person to judicial review in the Circuit Court. Section 370.081.4 expressly differentiates between an "affected" party, who is authorized to seek administrative review, and an "aggrieved" party who may seek judicial review. The Appellants are not, as they claim, "automatically" or "implicitly" granted judicial review under §370.081.5.

Moreover, Appellants have not even availed themselves of all opportunities, as "affected persons," to oppose STECU's application during the administrative process. Their failure to exhaust the available administrative remedies requires affirmance of the dismissal of their appeal.

The statutory scheme in Chapter 370 and the affiliated regulations authorize a party who claims to be affected by a proposed change in a credit union's field of membership to file comments with the Director of the Division of Credit Unions. Section 370.081.4. Additionally, when the Credit Union Commission holds its hearing on the exemption issue, any party, whether they claim to be aggrieved or not, has the opportunity to present evidence to the Commission regarding the exemption issue. Section 370.081.2(1) and 4 CSR 105-3.040. These hearings and opportunities to present evidence and testimony are a mandatory part of the process. *Id*. Failure to avail themselves of this procedure regarding a challenge to a field of membership application waives any objection to approval of the application.

After the Application of STECU was filed with the Director of Credit Unions, it was forwarded CUCOM to determine the appropriateness of an exemption due to the size of the proposed STECU field of membership. (L.F. 27-28.) The Credit Union Commission held an open public hearing to determine whether to allow an exemption from the 3,000 person group limit. (L.F. 28.) The Appellants did not appear or even file comments at this hearing. (L.F. 177.) Such hearing was publicly noticed and other affected persons did attend such hearing.

Additionally, while the Application was pending thereafter before the Director, the Appellants failed to present evidence during the mandatory time period allowed for comment. By this failure to present their evidence at the appropriate time, the Appellants have failed to exhaust available administrative remedies prior to seeking judicial review.[2]

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[2] Not only should this failure to exhaust remedies bar judicial review, it also defeats Appellants' argument that they are an "aggrieved" party. Failure to even appear before the administrative entity now alleged to have injured Appellants' "rights" clearly demonstrates that the Appellants themselves knew that they were not aggrieved or in any way in jeopardy from the STECU Application filed with the Director. This is especially true where the Application initially filed was even more expansive than the decision finally entered by the Director. (L.F. 28-29.) The doctrine of exhaustion of administrative remedies has always condemned this type of "laying in weeds" strategy for attacking administrative agency decisions.

Even *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo.App. W.D. 1977), the primary case relied on by Appellants for their standing argument, gave particular weight to the issue of exhaustion in determining "aggrievement." In determining whether there is real "aggrievement," the courts take particular note of whether a party has exercised each and every option to oppose an expansion of a competitor. *Id.* at 452-453. There is no aggrievement on the part of Appellants, as evidenced by their failure to exhaust available administrative remedies.

Appellants have failed to utilize the options available in the administrative process to contest the Field of Membership Application of STECU. As a result, they should be barred from asserting that they are aggrieved for purposes of asserting standing to seek judicial review of the decision of the Credit Union Commission in Circuit Court. This Court should affirm the trial court's decision and dismiss the appeal of the Appellants in this matter for failure to exhaust administrative remedies.

## II.

**THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' APPEAL OF THE DIRECTOR'S DECISION IN THAT MISSOURI LAW CONTROLS THE ISSUE OF STANDING OF ALLEGED COMPETITORS, SUCH AS BANKS, TO CHALLENGE THE CREDIT UNION COMMISSION'S DECISIONS, AND FOREIGN DECISIONS ARE NOT INSTRUCTIVE DUE TO MISSOURI'S STATUTORY SCHEME AND THE FACTUAL DIFFERENCES IN THE FOREIGN DECISIONS.**

Amicus American Bankers Association ("ABA" herein) has cited a number of cases from foreign jurisdictions in support of the Appellants' position. The decisions of the foreign jurisdictions are not supportive of the Appellants' position, due to direct rulings against Appellants' position, broad and significant differences in the underlying statutory scheme, or because of the facts of the cases. Moreover, this case arises out of Missouri law, not federal law[3] or foreign state law. Amicus NASCUS adopts Respondent STECU's brief with respect to its analysis of the unique features of Missouri's law of standing. Missouri law on the issue

[3] These federal law issues have also been thoroughly addressed by the Brief of Respondent STECU. Amicus NASCUS adopts, the Brief of Respondent STECU on these issues.

of competitor standing is quite clear: there is no standing for competitors unless it is statutorily granted.

Appellants and Amicus Curiae ABA suggest that Appellants have standing in this proceeding because they are "aggrieved," citing as authority *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo. App. 1977). The key to finding such standing in the banking cases was the statutory language contained in the bank branch expansion statute, §362.107:

> In determining whether or not to approve the application, the director of finance shall consider:
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> ****
>
> (3) Whether any other banks or trust companies will be seriously injured by the approval of the application for the branch;

§362.107.4. There is no such analogous statute relating to the evaluation of an expansion of a credit union field of membership. The uniqueness of the banking laws has long been recognized.

> The bank regulation statute at issue in that case [*Bank of Belton*] is unique in its specific grant of standing to competitor banks to appeal the grant of a new bank charter or an expansion of bank services in a geographic area.

*Gold Cross Ambulance, Inc. v. Department of Health*, 866 S.W.2d 473, 475 (Mo. App. W.D. 1993). The appellate courts have confined the authorities relied upon by Appellants for their claim of aggrievement and standing <u>strictly</u> to the banking industry. *Id.*

The identical claim to that made here of standing as an aggrieved party, based on the same authorities, was rejected in *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13 (Mo. App. 1987). In that case, a competitor argued that, although not itself an applicant, or a party entitled to appeal a decision, nor an entity accorded a specific litigable interest by the General Assembly in the statute, its economic interest was sufficiently adversely affected to give standing for appeal of an administrative decision. The Court recognized that a potential competitive economic injury might indeed be inflicted on Appellant, but the Court held that mere potential for competitive injury creates no private right entitling Appellant to review:

> In a factually similar case, the Eastern District in *St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821 (Mo. App. 1984), held they were not. . .[Fact recital omitted] The opinion held that there is no right to be free from legitimate competition nor does the law undertake to protect any such right.
>
> The doctrine announced is neither new nor limited to the health care field. The *St. Joseph's Hill* case cites *Schmitt v. City of Hazelwood*, 487 S.W.2d 882 (Mo. App. 1972), among others. Schmitt was the operator of a service station and car wash in Hazelwood. The city issued a permit for construction and operation of a car wash at a nearby location. Schmitt sued claiming the permit was invalid because it was issued contrary to the zoning law. He also contended that he had standing to question the validity of the permit because the establishment of another car wash would damage his business

> expectancy. The Court held Schmitt to have no interest sufficient to maintain the suit because judicial protection will not be extended to stifle competition. There is no legal right to enjoy a monopoly or to bar others from the trade.

*Community Care Centers, supra* at 14-15. (Emphasis provided.)

The foregoing responds authoritatively and categorically to the claim of Appellants of an adverse effect on them which bestows standing based upon injury from economic competition. There is no right to question decisions of administrative agencies through the legal process where the only claim of standing is that of an adversely economically affected competitor.

Moreover, as if to anticipate the claim of Appellants in this case that such bank regulation cases as *Bank of Belton* and *Farmers Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. W.D. 1979), require a different result, the Court of Appeals continued as follows:

> Despite the holding in *St. Joseph's Hill*, which must otherwise be deemed to be controlling on the point, appellant argues that its position finds support in *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo. App. 1977), and *Farmers Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. 1979). In those cases, competitor banks sought to oppose licensing of facilities expansion by the State Banking Board, in *Bank of Belton* by petition for judicial review, and in *Farmers Bank* by declaratory judgment. The opinions sanctioned the competitors' status to proceed with the litigation. Appellant argues that its

property rights in opposing competition by the certification of Barnes Hospital for construction of the additional nursing home are of equal standing to the rights of the competing banks given recognition in *Bank of Belton* and *Farmers Bank*.

The *Bank of Belton* and *Farmers Bank* cases are distinguishable from the present case in that the court based the decision on statutes evidencing a legislative purpose to permit intervention by competing banks in the administrative process. Where a new bank seeks charter approval by the State Banking Board, the right of intervention by competitors is expressly sanctioned. (Citation omitted.) . . .

The distinction between the banking cases and the certification of health care facilities is that in the former, the legislature has provided for competitor intervention whereas in the latter, it has not. The legislative decision is pivotal. It is a matter for the legislature to decide whether the public interest is served by permitting intervention by third parties having a collateral interest in the subject for administrative action.

*Community Care Centers, supra* at 15-16. (Emphasis provided.)

Missouri's analysis of competitor standing has been reviewed time and time again, always with the same results. There must be a specific grant of standing for an economic competitor to seek judicial review of an administrative decision. This Court should confirm

the long history of Missouri precedent on this issue and affirm the trial court's decision that Appellants lack standing to seek judicial review in this case..

**The ABA's Foreign Jurisdiction Case Law Is Not Instructive**

The Amicus Curiae American Bankers Association ("ABA") has put together a list of foreign state decisions that purports to demonstrate that banks should be allowed to challenge decisions of the Missouri Credit Union Commission. The ABA case citations are easily distinguishable and refuted.

**Utah**: The first foreign jurisdiction case cited is from Utah. Utah's statutory scheme is far different from Missouri's. In fact, the statute relating to the expansion of credit unions, which was challenged by the Utah Bankers Association, contains language which is noticeably absent from Missouri's statutory scheme. That language states that the purpose of that state's law is to:

> Grant powers, privileges and immunities to state chartered institutions at least equal to those possessed by federally chartered or insured institutions of the same class furnishing financial services to the people of the state *in order to promote competitive equality* in the financial services industry in this state.

*Utah Bankers Association v. America First Credit Union*, 912 P.2d 988, 991 (Utah 1996) (emphasis in original).

The Utah Court specifically relied on the italicized language as supporting its decision that the Utah Bankers Association had standing to challenge a decision regarding credit unions. *Id.* at 991-992. This language, in U.C.A. §7-1-102(1)(a), is very similar to the language found in Missouri's banking statutes. The decisions in *Bank of Belton* and *Farmers Bank of Antonia*, supra, were based upon similar "competitive effects" language. §362.107.4, RSMo. The Utah decision simply reaffirms the Missouri banking decisions, but does not expand that logic, since under Utah's statutory scheme banks and credit unions were legislatively deemed to be in the same industry. U.C.A. 7-1-103(8). Nothing in this Utah case changes prior Missouri precedent, but instead supports Missouri's approach to the law.

Furthermore, the statutory scheme enacted placed oversight of banks and credit unions under the same state regulatory department. Missouri's scheme requires a separate Credit Union Commission. *Id.* at 991. The Utah Court found this to be an important fact in light of the language contained in the credit union statute relating to competitive equality. In the end, the Utah case is based upon provisions of Utah statutes which have no similarity to the Missouri statutes. The scheme of regulation of credit unions in Utah is far different than that in Missouri. Accordingly, the Utah case relied upon by Appellants' Amicus offers no support to the position of Appellants.

**Nebraska**. The decision of the Nebraska Supreme Court referred in the ABA Brief does not relate to credit unions at all. In *First Federal Savings and Loan Association of Lincoln v. Department of Banking*, 192 N.W.2d 736 (Neb. 1971), the challenge was by a savings and loan against a bank expansion. The Supreme Court of Nebraska put great weight

and reliance on the fact that the statute involving banks and savings and loans vested regulation entirely within the Department of Banking of the State of Nebraska. *Id*. at 566. The actual parties involved were two savings and loans. Unlike the current case, the Nebraska case did not deal with separate types of financial institutions. *Id.* at 737. The Nebraska case is distinguishable on the same basis as the Missouri "bank versus bank" cases: in the current case we are dealing with a bank challenging a credit union regulatory decision;[4] Nebraska's savings and loan statutes are like Missouri's banking statutes which require that a new bank incorporation or expansion must be "established without undue injury to properly conducted existing local building and loan associations." Neb.Rev.Stat. 8-331(5). Missouri's credit union law has no such requirement.

The Nebraska decision offered by Appellants' Amicus offers no support to the position of the Appellants and should be disregarded by this Court.

**North Carolina**. The North Carolina decision is typical of a number of the decisions cited by the ABA where the courts have never been presented with or asked to rule upon the

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[4] Missouri courts have consistently distinguished the allowance of competing banks having standing to challenge actions of the Missouri Banking Board because the Missouri banking statutes specifically allow intervention of competing banks, as does Nebraska's savings and loan statute, 8-331. See Section 361.095(3), RSMo and *Gold Cross Ambulance, Inc. v. Missouri Department of Health*, 866 S.W.2d 473, 475 (Mo. App. W.D. 1993).

issue of standing. In the North Carolina case, *North Carolina Bankers Association v. North Carolina Credit Union Commission*, 276 S.E.2d 404 (NC 1981), the Supreme Court of North Carolina never addressed the issue of standing. 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. Omission of an issue from an opinion does not stand as authority on that issue.

The North Carolina decision offers no support whatsoever to the Appellants' position in this case.

**Colorado**. The decision in *Colonial Bank v. Colorado Financial Services Board*, 961 P.2d 579 (Colo. App. Div. 4 1998), is the same as the North Carolina decision discussed above. The issue of standing was neither raised nor addressed by the Court and therefore such decision offers no support for Appellants' position and should be disregarded.[5]

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[5] Colorado's statutes, however, expressly provide that banks must be notified and their concerns evaluated if an application for a credit union field of membership is submitted. C.R.S. 11-30-101.7(3). This statute is similar to the Missouri banking statute, §362.107, referenced in *Bank of Belton*, supra. The analysis above regarding Utah's statute would apply to Colorado's statute, because of their similarity to each other and difference from Missouri's statutes. However, no court we have found has made any analysis of a bank's standing to challenge credit union regulatory decisions in Colorado.

**Maine**. The decision of the Maine Supreme Court in *Maine Bankers Association v. Bureau of Banks*, 684 A.2d 1304 (ME 1996), is exactly the same as the North Carolina and Colorado cases where there is no discussion or ruling upon the issue of standing of the bankers. Since there is no ruling, the Maine case offers no support to the Appellants in this case and should be disregarded.

Furthermore, the statutory scheme enacted in Maine placed oversight of banks and credit unions under the same state regulatory department. Missouri's scheme requires a separate Credit Union Commission. The Maine Court found this to be an important fact in light of the language contained in the credit union statute relating to competitive equality. In the end, the Maine case is based upon provisions of Maine statutes which have no similarity to the Missouri statutes. The scheme of regulation of credit unions in Maine is far different than that in Missouri. Accordingly, the Maine case relied upon by Appellants' Amicus offers no support to the position of Appellants.

**Virginia**. The decision of the Virginia State Corporation Commission in *Virginia Bankers Association*, BFI-2002-00015 (3/12/2003) does not determine the issue of the standing of the Virginia Bankers Association. Indeed, since the issue of the standing of the Virginia Bankers Association was requested to be addressed by the Commission, and the petition of the Virginia Bankers Association was dismissed, it appears that if the Commission addressed the issue of standing at all it found that the Bankers did not have standing. Furthermore, this appeal was to an administrative agency, not to a court. The question of standing to seek judicial review was therefore not addressed or at issue.

The Virginia State Corporation Commission decision relied upon by Appellants' Amicus[6] offers no support for Appellants' position.

**New York**. In *New York State Bankers Association v. Albright*, 381 NYS.2d 17 (NY 1975), the Court of Appeals of New York never addressed the issue of standing of the Bankers Association to challenge a regulatory decision involving a savings bank.[7] Such omission of discussion of the issue of standing does not serve as an endorsement of the Appellants' position in this case.

Additionally, the statutory scheme in New York is different than Missouri's, in that savings banks and regular banks in New York were both under the supervision of the Superintendent of Banks. *Id.* at 18. As a result of both the lack of discussion of standing and the different statutory scheme in New York as opposed to Missouri (see discussion regarding Nebraska, supra.), the New York decision offers no support to Appellants' position and should be rejected by this Court.

**New Hampshire**. In New Hampshire, once again, the issue presented was "banks versus banks," in a regulatory scheme where both were regulated by the same administrative entity, the State Bank Commissioner. In *New Hampshire Bankers Association v. Nelson*, 302 A.2d

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[6] This decision was appealed to the Virginia Supreme Court on April 10, 2003 by the Virginia Bankers Association.

[7] *New York Association of Life Underwriters, Inc., v. New York State Banking Department*, 83 N.Y.2d 353 (N.Y. 1994), also is silent on the issue of who has standing to challenge state banking board determinations.

810 (NH 1973), the Supreme Court of New Hampshire reviewed a statute which allowed standing to seek review to a person who was "affected" by a decision. *Id*. at 129. This obviously differs from the Missouri statute, which requires that a person be "aggrieved" in order to seek judicial review. Section 370.081.5. The Court found that since the Bankers Association had been a party before the Commissioner that they were therefore "affected" by his decision. *Id*. The New Hampshire statutory scheme did not separately distinguish between parties that may appear and request a hearing before the State Bank Commissioner, and those who may take an appeal for judicial review to the courts. *Id*. Missouri's statutory scheme does make that distinction in Section 370.081.5, and as a result the New Hampshire decision is inapplicable and offers no support to Appellants.

**Iowa**. The next decision, cited by the ABA, *Iowa Credit Union League v. Iowa Department of Banking*, 268 N.W.2d 165 (Iowa 1978), like those in North Carolina, Colorado, and Maine, contains no discussion or reference to the standing of banks to challenge a decision of a separate credit union regulatory agency. The issue was neither raised before nor addressed by the Supreme Court of Iowa.

In *Iowa Bankers Association v. Iowa Credit Union Department*, 335 N.W.2d 439 (Iowa 1983), the Iowa Supreme Court did review the question of standing of the Iowa Bankers Association. The Court looked at the Iowa Administrative Procedure Act, which was the only law upon which to base an appeal, and found the Iowa statute included a two-part test to determine whether a litigant was "aggrieved **or** adversely affected." *Id*. at 443 (emphasis

supplied). [8] The Court in *Iowa Bankers Association* ultimately held that the Bankers Association failed to demonstrate that it had standing even under this broader grant of authority to challenge the rules proposed by the Iowa Credit Union Department. *Id.* at 445.

The Iowa cases do not support the Appellants' position but support the position of the Missouri courts below. In fact the Iowa case shows that the Appellants have not complied with their burden to show actual injury. If the Iowa case does stand for anything of importance here, it is that without sufficient evidentiary basis to demonstrate actual harm (i.e. injury in fact), even under a lesser standard of being "affected," that standing in court shall not be granted.

**Wisconsin**. In Wisconsin, the Bankers Association challenged authorization for a Savings and Loan Association Negotiable Order Withdrawal (NOW) account. *Wisconsin Bankers Association v. Mutual Savings and Loan Association of Wisconsin*, 291 N.W.2d 869 (Wis. 1980). The Wisconsin Supreme Court never addressed the issue of standing, as it was not raised or decided. This is similar to North Carolina, Colorado and Maine and demonstrates that the Wisconsin decision provides no support for Appellants' position. There was never any determination that the bankers' had standing to challenge a administrative decision of a separate regulatory agency in the Wisconsin case. As a result, this Wisconsin decision has no value in the current case.

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[8] The Iowa Supreme Court rejected application of the Federal Administrative Procedure Act analysis that the United States Supreme Court had used in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970).

**Florida**. The Florida decision referred to in the ABA Brief, *Florida Bankers Association v. Leon County Teachers Credit Union*, 359 So.2d 886 (Fla. App. 1st District, 1978), is just like the North Carolina, Colorado, Maine and Wisconsin cases. It is devoid of any mention of the issue of standing of banks to challenge a decision of an unrelated and separate credit union regulatory agency. In the Florida case, the Department overseeing both credit unions and banks was the Department of Banking and Finance, and there was no separate Division of Credit Unions and Credit Union Commission, as there is in Missouri. *Id*. at 888. The silence of the Florida Appellate Court on the issue of the bankers' standing cannot be deemed to be viewed as authority for the granting of such standing. The decision in that case has no bearing on the current matter. Accordingly, the Florida case offers no support to Appellants' position.

**Illinois**. The ABA Brief refers to Illinois, but cites no precedential decision in the State of Illinois in support of its position. A Circuit Court decision from Cook County is referenced. Such decision has no precedential value or effect even in Illinois; and in any event, the question of the standing of the Illinois Bankers Association was never a material issue in the case. The question of the Bankers' standing was not raised in that case and, therefore, the Illinois Circuit Court case has no value on the issues currently before this Court.

**Washington**. The Supreme Court of Washington, in addressing an action by banks against savings banks, had no discussion of standing -- that issue, again, was not raised or adjudicated by the Court. *Washington Bankers Association v. Washington Mutual Savings Bank*, 598 P.2d 719 (Wa. 1979). This was not a challenge to a state regulatory or

administrative agency decision, but a direct lawsuit brought against the Mutual Savings Bank itself. *Id.* at 720. The issue of standing was neither raised nor addressed, and therefore the Washington decision has no value in the current matter.

**Texas**. The Texas Court of Appeals did address a challenge by the Bankers Association to a credit union's authority in *Texas Bankers Association v. Government Employees Credit Union of San Antonio*, 625 S.W.2d 338 (Tex. App. 1981). In the Texas case, again however, standing was not an issue raised or addressed in the Appellate Court. However, the Court did review the statutes authorizing credit unions and banks in Texas. The Court found that "credit unions are created and authorized to do business under regulatory sections wholly distinct and apart from Article XVI, Section 16 of the Constitution, and the legislation effectuating Section 16." *Id.* at 342. The constitutional provision referenced are provisions that relate to Texas banks. The Court found that credit unions are in fact distinct and separate entities from banks. *Id.* Importantly, with regard to the issue of competition in the present case, the Court concluded that the credit union was not engaged in the banking business, and thus was not subject to the State Banking Code. *Id.* at 343.

The Texas case again makes no reference to standing, but it does clearly demonstrate that in a legal sense there is no competition for "banking business" between credit unions and banks. Accordingly, the Texas case, if it has any impact on the current case at all, is supportive of Respondent STECU's position or lack of competitor standing.

**Pennsylvania**. The Supreme Court of Pennsylvania dealt with a suit by the Bankers Association against the Secretary of Banking related to mutual savings banks. *Pennsylvania*

*Bankers Association v. Secretary of Banking*, 392 A.2d 1319 (Pa. 1978). In that case, standing was neither raised nor ruled upon by the Supreme Court of Pennsylvania. It was an issue that was never addressed. It is important to again note, however that the savings banks that were challenged and the Bankers Association bringing the case for its members were all regulated by the Secretary of Banking and not by a separate agency like the Respondents Commission and Division. *Id.* at 1324. Accordingly, the decision of the Pennsylvania Court has no bearing upon the issues presented in this case to this Court.

**Massachusetts**. The Massachusetts case that is referenced by the Amicus ABA deals with independent insurance agents. *Massachusetts Association of Independent Insurance Agency Brokers, Inc. v. Commissioner of Insurance*, 367 N.E.2d 796 (Mass. 1977). The Supreme Court of Massachusetts unsurprisingly found that where insurance agents were challenging an Insurance Commissioner's decision that directly affected their business as insurance agents, that there may be standing. This case is factually quite different than the current case, where the Bankers Association is attempting to challenge the actions of a Credit Union Commission that does not and cannot regulate them as banks. Additionally, as the Texas case above discussed noted, credit unions and banks are not even engaged in the same regulated business. *Texas Bankers Association*, 625 S.W.2d at 343. Although it is at least possible to argue for standing based upon being competitors within the same regulated industry, *Id.* at 800, in the current case, banks and credit unions are not in a regulated industry, not in the same regulated industry, and are not subject to the same regulatory authority. See Chapter 362 and 370, RSMo.

**Ohio**. The final ABA reference is to an Ohio case, *Independent Insurance Agents of Ohio, Inc. v. Fabe*, 587 N.E.2d 814 (Ohio 1992). This case also never makes any reference to the issue of any party's standing, as it was not raised, argued, or ruled upon. Again, since there is no discussion of standing, the Ohio decision sheds no light at all upon the matters before this Court.

In summary, the analysis of foreign jurisdiction decisions conducted by the Amicus ABA is flawed because every case referenced stands on significantly different facts or law than that applicable to this case, or simply makes no reference to the issue of standing to seek judicial review of administrative agency decisions at all. ABA's litany of cases that are irrelevant. Accordingly, this Court should disregard the urging of Appellants and their Amicus to adopt some other state's law of standing in this case for Missouri.

## CONCLUSION

The Appellants in the current case have not demonstrated that they are aggrieved. They have no standing under Missouri law to seek judicial review of a decision of the Credit Union Commission. They failed, on a number of occasions, to avail themselves of statutory procedures provided to oppose the application of STECU while it was before the Director and the Credit Union Commission for approval. This failure to exhaust available administrative remedies belies their claim to be aggrieved by the administrative agency decision. Furthermore, there is no guiding precedent from other states on the issue here presented of standing where credit unions and banks are regulated under different entities and statutory schemes. Instead, the controlling precedent is found in the long line of case decisions of

Missouri courts, holding that mere economic competitors like banks have no standing to seek judicial review or intervention in a separate agency's decisions regulating credit unions. Accordingly, this Court should affirm the decision that the Appellants' appeal of the Credit Union Commission's decision was properly dismissed by the Circuit Court of Cole County.

Respectfully submitted,

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**CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 6,676 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Brief was sent U.S. Mail, postage prepaid, to, the following on this 2nd day of July, 2003:

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