SUPREME COURT OF MISSOURI

APPEAL NO. SC91640

ST. LOUIS ASSOCIATION OF REALTORS
Appellant

vs.

CITY OF FERGUSON
Respondent

On Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Mary Elizabeth Ott, Circuit Judge, Division 31
Case No. 07CC-003604

SUBSTITUTE BRIEF OF RESPONDENT

CURTIS, HEINZ, GARRETT
& O'KEEFE, P.C.

Kevin M. O'Keefe, # 23381
Stephanie E. Karr, #39593
Edward J. Sluys, #60471
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725 – 8788
(314) 725 – 8789 (Fax)
Email: kokeefe@lawfirmemail.com
skarr@lawfirmemail.com

Attorneys for Respondent City of Ferguson

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional and Statutory Provisions

JURISDICTIONAL STATEMENT

A decision was rendered in this appeal by the Eastern District Court of Appeals and this case was subsequently transferred to this Court in accordance with Rule 83.03, Missouri Rules of Civil Procedure.

STATEMENT OF FACTS

Appellant St. Louis Association of Realtors filed this action along with DPN LLC, a Missouri limited liability company which later voluntarily dismissed its claims. [SuppLF 36].

The Appellant challenged Ordinance No. 2006-3257 enacted by the governing body of the City of Ferguson which is a constitutional home-rule charter city. [¶1, Plaintiff's Petition, LF 8].

The City's Charter specifically provides:

> The city shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this state and are not limited or denied either by this charter or by statute. The city shall, in addition to its home rule powers, have all powers conferred by law.

Article II, Section 2.1, Ferguson's Charter.

In addition, the Charter states:

> The powers of the city shall be liberally construed. The specific mention of a particular power in this charter shall not be construed as limiting the powers of the city.

Article II, Section 2.2, Ferguson's Charter.

> The council shall have power by ordinance to license, tax, and regulate all business services, occupations, professions, vocations, activities, or things

> of any nature which are now or may hereafter be enumerated by state statute for any statutory, special charter, or constitutional charter cities, but the foregoing shall not be taken to affect or impair the general power of the city to impose license taxes upon any business, vocation, pursuit, or calling, or any class or classes thereof now or hereafter not prohibited by law. Any ordinance imposing a license tax may divide and classify any subject of taxation and may impose a different tax upon each class, but the tax shall be uniform for each class. All licenses shall be issued for such periods as may be provided by ordinance, but no such period shall exceed one year.

Article XI, Section 11.6, Ferguson's Charter.

Ordinance 2006-3257 [Exhibit A to the Petition, LF 24-29] established several minimum building and housing standards as a supplement to the City's current building and housing codes which included, for example: (i) the "foundation, exterior walls and roof shall be substantially watertight, weather-tight, and protected against rodents and shall be kept in sound condition and repair" [Section 7-120 (A), LF 24]; (ii) "Every window shall be fully supplied with window panes which are without cracks or holes" [Section 7-120 (C), LF 24]; (iii) "Every dwelling unit shall have a safe and unobstructed means of egress leading to a safe, open space outside at the ground level" [Section 7-120 (K), LF 26]; (iv) "All dwellings and dwelling units shall be adequately and safely provided with an electrical system in compliance with the requirements of the Electrical Code and providing a minimum service requirement of 100 AMP/240 Volts" [Section 7-

122 (A), LF 27]; (v) "Every dwelling unit shall contain a room which affords privacy to a person within said room and which is equipped with a flush water closet, lavatory basin and bathtub or shower, all of which are in good working condition and are properly connected to hot and cold water lines and to an approved water and sewer system" [Section 7-123 (A), LF 27]; and (vi) "Every dwelling or dwelling unit shall have heating facilities which are capable of safely and adequately heating all habitable rooms, bathrooms, and water closet compartments within its walls to a temperature of least seventy degrees…" [Section 7-124 (A); LF 28].

In addition, Ordinance 2006-3257 imposed a license and fee requirement upon owners of residential property which is rented in whole or in part to others. [LF 29-30] And, the ordinance set forth requirements for the holding of such license, such as compliance with public health, property maintenance and other ordinances and regulations enacted under the City's Charter and/or police powers [LF 30-35], and set forth a procedure for discipline, suspension or revocation of the license to ensure that due process is afforded to a licensee. [LF 30 and 35-38].

Lastly, Ordinance 2006-3257 contained a severability clause which declared the City Council's intent that each and every part, section and subsection of this Ordinance shall be severable from each and every other part and, in the event that any part of the Ordinance is determined to be unlawful or unconstitutional, all remaining parts, sections and subsections shall be and remain in full force and effect. [LF 38].

In connection therewith, the Ferguson City Council subsequently enacted other

ordinances which contain provisions relating to or amending the challenged provisions of Ordinance 2006-3257. For instance, Ordinance 2009-3394 clarified the description of the property which is subject to the ordinance's requirements including the definition of rooming house. [App. 58]. And, following voter approval of an increase in the business license fee, the City Council amended the provisions of Ordinance 2006-3257 accordingly. [*See*, Ordinances 2009-3380 and 2009-3394, App. 55 and 58].

However, Appellant's challenge is solely limited to certain provisions set forth in Ordinance 2006-3257. Appellants do not challenge other ordinances pertaining to the same program or any amendments to the same provisions originally set forth in Ordinance 2006-3257. [Appellant's Petition, LF 8].

The Appellants questioned Ordinance 2006-3257 on several grounds including i) whether the City's Charter and other powers authorized the imposition of the license and fee requirements upon owners of residential rental real estate [LF 15-17]; ii) whether the imposition of the license and fee requirements violate Missouri's Hancock Amendment [LF 18-19]; and iii) whether the license requirement "interferes with the private contractual rights of landlord and tenant" [LF 21].

Although Appellant now claims to have "abandoned" [Appellant's Substitute Brief, Page 28] its challenges under the Hancock Amendment, no dismissal of such claims was ever filed by Appellant and the Appellant's Petition was never amended to reflect the abandonment of such claims. [LF 1-7].

Plaintiff's Petition also alleged that DPN LLC is a Missouri limited liability

company which owns residential rental properties within the City of Ferguson numbered as 427 Warford, 618 Graf Avenue and 517 Ballman Avenue, and, therefore, is subject to the license and other requirements set forth in Ordinance 2006-3257.

However, in fact, DPN LLC had sold the property at 618 Graf more than a year before the Petition was filed [SuppLF 21] and sold the properties at 427 Warford and 517 Ballman within a few months after the Petition was filed. [LF 25 and 29].

Given that DPN LLC no longer owned any property within the City of Ferguson, did not hold a license issued by the City of Ferguson and was not subject to any of its ordinance requirements, DPN LLC voluntarily dismissed its claims against the City of Ferguson. [SuppLF 36].

In its Answer, Affirmative Defenses and Counterclaim [SuppLF 8], the City set forth several affirmative defenses including the fact that the St. Louis Association of Realtors lacked standing. [SuppLF 13-14]. The City later filed a separate motion to dismiss the action based on the lack of standing. [SuppLF 17]. Throughout the proceedings before the trial court, the City continued to argue that Plaintiff lacked standing. [LF 32-33].

The trial court determined that the St. Louis Association of Realtors, which was the only remaining Plaintiff, did not have standing to bring this suit and, therefore, granted Defendant's Motion to Dismiss. [LF 44-49 and 52]. This appeal followed.

I. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT'S PETITION, BECAUSE APPELLANT LACKED CAPACITY AND STANDING TO SUE, IN THAT THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES AND THE APPELLANT LACKS ASSOCIATIONAL STANDING

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434; 53 L.Ed.2d 383 (1977).

Missouri Growth Association, et al. v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615 (Mo.App.E.D. 1997)

Associated General Contractors of North Dakota v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979)

II. THE TRIAL COURT WAS CORRECT IN APPLYING THE THREE PRONG TEST IN DISMISSING APPELLANT'S PETITION BECAUSE SAID TEST IS NECESSARY TO DETERMINE WHETHER AN ASSOCIATION HAS STANDING IN THAT, ABSENT STANDING, THE COURT LACKS JURISDICTION OVER THE MATTER, AND A COURT CANNOT SIMPLY DEFER TO THE "BUSINESS JUDGMENT" OF AN ASSOCIATION

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434; 53 L.Ed.2d 383 (1977).

Warth v. Seldin, 422 U.S. 490; 95 S.Ct. 2197; 45 L.Ed.2d 343 (1975)

Farmer v. Kinder, 89 S.W.3d 447 (Mo. banc 2002)

Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C.Cir. 1988)

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT'S PETITION, BECAUSE APPELLANT LACKED CAPACITY AND STANDING TO SUE, IN THAT THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES AND THE APPELLANT LACKS ASSOCIATIONAL STANDING

Standard of Review

The appellate standard of review when considering a trial court's grant of a motion to dismiss is *de novo*. Moynihan v. Gunn, 204 S.W.3d 230 (Mo.App.E.D. 2006). More specifically, the standard of review for an appeal of a motion to dismiss for lack of standing is *de novo.* Wilson v. Cramer, 317 S.W.3d 206 (Mo.App.W.D. 2010).

Appellant St. Louis Association of Realtors

The St. Louis Association of Realtors is a Missouri non-profit corporation and a Member of the National Association of Realtors. [Article III, Section 1, Bylaws, Appendix 20, 32].

The Association "consists of realtors, realtor associates, those who are licensed by the State of Missouri to participate in real estate transactions." [Tr. 31]. The Association also has "affiliate members that could range from mortgage brokers – to other representatives that may have a common interest within the real estate business." [Tr. 31].

The specific classifications of members are described in the Association's Bylaws. [Appendix 23, 24, 27].

The “REALTOR” members of the association hold all of the authority within the corporation.

Only “REALTOR Members” and “REALTOR-ASSOCIATE Members” may serve on the Board of Directors [App. 36-37]; however, the chairperson of the Affiliate Committee shall serve on the Board as a Director for a one year term and may not succeed himself in office [App. 37].

Only “REALTOR Members” and “REALTOR-ASSOCIATE Members” may serve as Officers of the Association. [App. 35-36]

Other members within lower classifications, such as Institute Affiliate Members and Life Members, do not have specific standing within the corporation but merely “have rights and privileges and…obligations prescribed by the Board of Directors”. [App. 29]

Interestingly, the Association grants "Provisional membership" due to a prospective member's outstanding "complaints or arbitration requests (or hearings)" [App. 27] although the Association attacks the City's similar "provisional" license status as vague and arbitrary. [LF 17, 18].

As members, the REALTOR-Members and REALTOR-ASSOCIATE Members are required to:

1. be actively engaged in the real estate profession;
2. maintain a current, valid real estate broker’s or salesperson’s license or be licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property;

3. have a place of business within the state or be an employee or an independent contractor associated with a Designated REALTOR Member;

4. have no record of official sanctions involving unprofessional conduct;

5. complete a course of instruction covering the Bylaws, Rules and Regulations and the Code of Fair Housing of the Association, the Bylaws of the State Association, and the Constitution and Bylaws and Code of Ethics of the National Association of Realtors and pass written examinations related to same;

6. abide by such the Constitution, Bylaws, Rules and Regulations of the local Association, State Association and National Association; and

7. abide by the Code of Ethics of the National Association of Realtors.

[App. 23-24]

The focus of the 25-page Bylaws is on the business of being a real estate broker, salesperson or appraiser and furthering the business activities of those persons. For instance, the Association:

- controls the use of the term "REALTOR" for the benefit of its members [App. 20, 27-28, 31];
- provides REALTOR Members with automatic membership in the National

Association of Realtors [App. 32];

- develops and provides the "Multiple Listing" service to assist in the activities of brokers, agents or appraisers "so participants may better serve their clients and customers and the public" [App. 41-42];

- provides a "lockbox system" for members holding a real estate license [App. 30]; and

- requires REALTOR Members to comply with the Code of Ethics of the National Association of Realtors and to "**safeguard and promote the standards, interests, and welfare of the Association and the real estate profession**" [App. 27].

There is absolutely no focus in the Corporation's governing documents[1] relative to advocating in favor of the private property rights of its Members.

In fact, Article III of the Articles of Consolidation, which includes the corporation's Articles of Incorporation, specifically states, "The corporation shall not

[1] Appellant refers, in its Brief, to a "Vision Statement" which was, simply, a piece of paper with the title "Vision" and one sentence typed thereon. This statement was not incorporated into the Corporation's governing documents; it is not even mentioned in the Corporation's governing documents. There was no testimony regarding this statement other than Ms. Devereaux stating that it had been "adopted". [Tr. 35]. There was no testimony regarding when it was adopted and which committee or board adopted it. Quite frankly, it appears to be a simple exhibit specifically prepared for trial and, certainly, does not carry any authority especially to contradict the governing Articles or Bylaws.

have power to engage or be directly or indirectly interested in any business or enterprise designed for its own **or the pecuniary profits of its members**." [App. 10].

Appellant cannot construe its Bylaws inconsistently with this provision. The bylaws must be consistent with the purposes set forth in the Articles of Incorporation. *See,* Section 355.116 R.S.Mo.:

> The incorporators or board of directors of a corporation shall adopt bylaws for the corporation. **The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation**.

(Emphasis added).

Furthermore, to the extent that the bylaws are not consistent with or are outside of the purposes set forth in the Articles of Incorporation, the inconsistent portions of the bylaws should not be considered in determining the true purposes of the Corporation.

The members of the Association represent buyers, sellers, landlords, **tenants** and other clients in the course of their real estate business. [App. 44]. The Association's Bylaws incorporate the Code of Ethics and Standards of Practice of the National Association of Realtors and require all REALTOR Members of the Association to adhere to such Code and Standards. The professional and ethical obligations for specifically representing **tenants** are mentioned throughout the Code of Ethics and Standards of Practice. [App. 44, 45, 49, 50, 51].

The Association has approximately 9,000 members. [Tr. 32].

Only one person out of Appellant's more than 9,000 members individually owns rental property in the City of Ferguson – Glen Sperry owns one property which is used as rental property. [Tr. 23] Mr. Sperry is a real estate agent licensed by the State of Missouri and a member of the Association. [Tr. 23] He holds the rental property to supplement his income and to, one day, provide retirement income [Tr.25]

Only two other Association members hold interests in limited liability companies which own the rental properties as "investments" for profit. [Tr. 70, 78] Both James Crews and John Williams are licensed real estate agents or brokers; there was no testimony as to the whether their investment partners or other directors, officers and members of such companies are also licensed real estate agents or brokers. [Tr. 59, 60].

The Association does not manage private property held by any member and does not manage or advise with regard to other investments and ventures of its members'. [Tr. 78].

Appellant Lacks Standing

Appellant is not a taxpayer, resident or licensee of the City of Ferguson. Furthermore, as Appellant is not present within the City of Ferguson, it is not regulated by the City. There is no controversy between the Appellant and the City.

Standing is a jurisdictional matter antecedent to the right to relief. Standing inquires into "whether the persons seeking relief have a right to do so." Farmer v. Kinder, 89 S.W.3d 447, 451 (Mo.banc 2002). Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual

injury. Eastern Mo. Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43, 46 (Mo.banc 1989).

> …courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.

Farmer, at 451.

In other words, "[r]egardless of the merits of Appellants' claims, without standing, the court cannot entertain the action." Pace Constr. Co. v. Missouri Highway & Transp. Comm'n, 759 S.W.2d 272, 274 (Mo.App. W.D.1988) (quoting Champ v. Poelker, 755 S.W.2d 383, 387 (Mo.App. E.D.1988)).

More specifically, standing to bring a declaratory judgment action requires a justiciable controversy. A justiciable controversy exists where: 1) the plaintiff has a legally protectable interest at stake; 2) a substantial controversy exists between the parties with genuinely adverse interest; and 3) the controversy is ripe for judicial determination. Mo. Health Care Association v. Attorney General, 953 S.W.2d 617, 620 (Mo.banc 1997).

Further, consistent with the long-established principles of standing, the Hancock Amendment specifically requires that any action brought pursuant to such provision must be lodged by a "taxpayer" of the particular state, county or other political subdivision levying the challenged tax.

> Notwithstanding other provisions of this constitution or other law, any **taxpayer**

> of **the** state, county or other **political subdivision** shall have standing to bring suit in a circuit court of proper venue…to enforce the provisions of sections 16 through 22, inclusive, of this article…

Mo.Const. Article X, Section 23 (emphasis added).

The Association, itself, does not have any legally protectable interest at stake as the Association does not own property and is not licensed or regulated by the City of Ferguson. Therefore, there is no justiciable controversy between Appellant and Respondent and, further, Appellant lacks standing.

If this Court were to apply the test advocated by the *Amici* parties – that "there is simply standing or lack of standing" [*Amici* Brief, page 15] – then the Appellant lacks standing in this case.

Appellant Lacks Associational Standing

Because Appellant does not have standing otherwise to bring this action, it relies solely on the concept of representational or associational standing. Such type of standing is, arguably, a looser form of standing used often as a fallback position when typical standing - resulting from justiciable controversy involving a legally protectable interest of the Plaintiff - is not present.

"The modern doctrine of associational standing, under which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself, emerges from a trilogy of cases…" United Food and Comm'l Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552; 116 S.Ct. 1529; 134 L.Ed. 2d 758

(1996).

Beginning with Warth v. Seldin, 422 U.S. 490; 95 S.Ct. 2197; 45 L.Ed.2d 343 (1975), the Supreme Court recognized an organization's right to bring suit on behalf of its members depending on the nature of the claim and relief sought.

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least **so long as the challenged infractions adversely affect its members' associational ties…**Even in the absence of injury to itself, an association may have standing solely as the representative of its members.

Warth, 422 U.S. at 511; 95 S.Ct. at 2211 (Emphasis added).

The doctrine was refined into a clearly delineated three-part test in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434; 53 L.Ed.2d 383 (1977).

> Thus we have recognized than an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks are germane to the organization's purpose; **and** (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 344, 97 S.Ct. at 2441 (Emphasis added).

The Supreme Court later reaffirmed these principles in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274; 106 S.Ct. 2523; 91 L.Ed.2d 228 (1986), and, since then, the Hunt three-part test has been utilized by federal and state courts across the country in determining whether an organization has proper standing to assert a claim on behalf of its members.

While the origination of the doctrine was with respect to Article III jurisdiction in federal courts, the Article III "case and controversy" standard is similar to Missouri's standard for bringing declaratory judgment actions in state courts. *See,* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118; 127 S.Ct. 764; 166 L.Ed.2d 604 (2007) and Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F.3d 1330 (Fed.Cir. 2007) (Article III limits the jurisdiction of federal courts to actual cases or controversies including those cases for declaratory relief which are justiciable. Article III encompasses several justiciability doctrines, including standing and ripeness that are instructive in determining whether an action for declaratory relief raises an actual case or controversy. Federal courts are to decide only actual controversies by entering a judgment which can be carried into effect, and are not to give opinions on moot questions or abstract propositions, or to declare principles or rules which cannot affect the matter in the case before it.)[2]

[2] This is consistent with the rule that courts are to refrain from giving advisory opinions. *See e.g.* State ex. rel Williams v. Marsh, 626 S.W.2d 223, 227 (Mo. banc. 1982)

Missouri courts have utilized this doctrine when appropriate. *See, for example,* Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. banc 2003); and Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612 (Mo.App.E.D. 2000).

An organization must meet all three factors necessary for associational standing regardless of the nature of the claim. Sanner v. Board of Trade, 62 F.3d 918, 922 (7th Cir. 1995).

As set forth *infra*, Appellant fails to meet **all** three factors necessary to establish associational standing.

1. Members Lack Standing in their Own Right

To satisfy this element, first, there must be a justiciable controversy between the members of the Corporation and the City of Ferguson. Whether the individual members have standing to bring this in their own right depends upon whether they are able to satisfy the requirements for bringing a declaratory judgment action. Missouri Alliance for Retired Americans. v. Department of Labor and Ind. Relations, 277 S.W.3d 670, 676 (Mo.banc 2009).

Again, a declaratory judgment action requires a justiciable controversy. A justiciable controversy exists where: 1) the plaintiff has a legally protectable interest at

---

("Standing is related to the doctrine which prohibits advisory opinions because the latter requires the court to dispose of only those issues which affect the rights of the parties present.")

stake; 2) a substantial controversy exists between the parties with genuinely adverse interest; and 3) the controversy is ripe for judicial determination. Mo. Health Care Association v. Attorney General, 953 S.W.2d 617, 620 (Mo.banc 1997).

The Ordinance being challenged in this case does not affect a legally protectable interest of the Association's members **as real estate agents and brokers in their business as such.**

In order to satisfy this first prong, the member's legally protectable interest, which is being relied upon to further the organization's challenge, must relate to the purposes of the organization and the reason why members join the particular group.

> …to have associational standing, we conclude that the interest that is "germane to the organization's purpose" – thereby satisfying the second prong – must also relate to the interest by which its members would "have standing to sue in their own right" – thereby satisfying the first prong…Therefore, SOS Alliance cannot satisfy the second prong of associational standing based on its members' environmental concerns, while satisfying the first prong solely based on certain members' unrelated concerns regarding their property values.

Save Our Springs Alliance, Inc. v. City of Dripping Springs, 304 S.W.3d 871, 886 (Tex.App. 2010).

In the case at bar, Appellant's members, as real estate agents and brokers, do not have a justiciable controversy in which a legally protectable interest related to their work

as real estate agents and brokers is at stake.

Appellant relies on one individual member who may have standing as a **landowner** or a **taxpayer**, but not as a **real estate agent or broker**.

This single member, in addition to being a real estate agent or broker, happens to be separately engaged in the business of owning one residential rental property in the City of Ferguson which he uses to supplement his income and hopes to use as retirement income. [Tr. 25]. One member's separate business interest in the rental of his investment property is not related to the reasons why he joined the Association or the conduct of his business activities in his capacity as a real estate agent and, therefore, is not germane to the purposes of the St. Louis Association of Realtors. The member's possible standing as a landowner or taxpayer does not satisfy the first prong of the test.

See, Mainstreet Organization of Realtors v. Calumet City, 505 F.3d 742 (7th Cir. 2007) (Association of real estate brokers lacked standing to challenge Calumet City's "point-of-sale" ordinance which forbids the sale of a house without an inspection and all requisite repairs to bring it into compliance with the City's building and zoning codes. The Association's standing was derivative from its members as real estate brokers. "They are suing to enforce the property rights of the owners of residential property…No doubt some members of the association own homes in Calumet City, since they work there. But, the association that is the plaintiff in this case is suing on behalf of its members interest as brokers, not as homeowners.").

Appellant misunderstands the first prong of the test; Appellant argues that only

one member with standing is sufficient and prematurely ends its analysis by stating one member owns property in the City and two other members are affiliated with limited liability companies which own property.

Appellant's analytical failure is not with regard to numbers, but, instead, the examination of the **nature** of the particular member's interest. At the hearing before the trial court, Appellant only demonstrated that its member had an interest as a taxpayer and property owner. Such a limited interest does not equate to a legally protectable interest as a real estate agent thereby affording standing as a real estate agent. Appellant presented absolutely no evidence proving any impact on the day-to-day business activities of real estate agents and brokers.

Appellant's over-simplistic analysis would mean that the St. Louis Association of Realtors also has standing to sue banks, investment advisors and other financial institutions because of other investments made by one or more of their members or has standing to challenge the state's regulations pertaining to bidding on public works projects because one of its members may be a member of a limited liability company which engages in construction projects. At this point, there would be no need for any type of standing analysis because the concept of standing would have been eviscerated.

2. Suit is not Germane to Organization's Purpose

The interests sought by Appellant are not germane to the organization's purpose. Quite simply, the issues presented in the Petition do not pertain to the business activities of real estate agents and brokers.

The number of Appellant's members, 0.03 percent, possibly having a personal interest in this particular litigation, the language of the corporation's governing documents, the fact that the Association does not engage in the private, separate activities of its members including the ownership or management of private property and the fact that the Association does not even keep any record of its members' activities outside of agent and brokerage services, is sufficient to show that the interests sought are not germane to the purposes of the corporation.

Moreover, the members join the Association solely because of their practice as agents, brokers or other similar professionals – people do not join the St. Louis Association of Realtors because they own property. The membership is not comprised of property owners or residential rental property owners/landlords.

The reason that members join a particular organization is important in determining whether a claim is germane to the organization's purpose.

In Hunt, the Supreme Court determined that the Washington State Apple Advertising Commission had standing to challenge the constitutionality of another state's statutes which, in effect, prohibited the display of Washington State apple grades on closed containers shipped into that state. The Court pointed out that the Commission's purpose was "the protection and promotion of the Washington Apple industry;" all of its constituents were Washington apple growers and dealers; only apple growers and dealers may serve on the Commission; and "the Commission represents the State's growers and dealers and **provides the means by which they express their collective views and**

protect their collective interests." Hunt at 344-345 (Emphasis added).

Later, the Court, in reaffirming the framework for associational standing set forth in Hunt, explained that there are "special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions". These special features include: (1) the ability of "an association suing to vindicate the interests of its members [to] draw upon a pre-existing reservoir of expertise and capital," and (2) the fact "**that the primary reason people join an organization is often to create an affective vehicle for vindicating interests that they share with others**." Brock, *supra*, at 289-290 (Emphasis added).

> 'The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to the permit the association or corporation in a single case to vindicate the interests of all'…The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

Brock at 290 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 187; 71 S.Ct. 624, 656; 95 L.Ed. 817 (1951) (Jackson concurring)).

Most federal and states courts have recognized that an element of Hunt's germaneness requirement is to examine "**the grounds that bring its membership together**." Humane Society of the United States v. Hodel, 840 F.2d 45, 56 (D.C.Cir. 1988) (Emphasis added.)

> If the 'forces that cause individuals to band together' guarantee some degree of fair representation, they surely guarantee as well that associational policymakers will not run roughshod over the strongly held views of association members in fashioning litigation goals.

Hodel, at 56.

See, also, Building and Construction Trades Council of Buffalo, New York v. Downtown Development, Inc., 448 F.3d 138, 148-149 (2nd Cir. 2006) ("We also think that the defendants' argument here…is inconsistent with the recognition by the Supreme Court 'that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.'…Over time an association may use diverse legal avenues to pursue the various **interests that bring its membership together**.") and Friends of the Earth, Inc. v. Chevron Chemical Co., 129 F.3d 826, 829 (5th Cir. 1997) (Friends of the Earth, Inc., is a nonprofit corporation to promote environmental awareness and objectives. Between October, 1990, and January, 1994, Chevron exceeded its discharge limits of total suspended solids into Round Bunch Gully which flows into Cow Bayou and then down to the Sabine River and Sabine Lake. Stating, "[t]his suit is clearly within FOE's central purpose, and **thus within the scope of reasons that individuals joined the organization**," the court determined that Friends of the Earth, Inc., had associational standing to sue Chevron Chemical Co. with regard to the illegal discharges.)

This Court has also carefully examined the ties which bind an association's

membership together in determining whether such association is pursuing action related to its purposes. Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo.banc 2003); Missouri State Medical Association, et al. v. State of Missouri, 256 s.w.3d 85 (Mo.banc 2008).

The determination of the true purpose which joins the membership of an organization is essential in order to avoid the recognized problem of associations becoming nothing more than law firms with standing.

> …we cannot say precisely what the Supreme Court intended to accomplish by the germaneness requirement, this temperate understanding also seems coextensive with the goal the Court most likely had in mind in adding prong two. That goal, as we explain, seems to have been the modest yet important one of preventing litigious organizations from forcing…courts to resolve numerous issues…about which few of their members demonstrably care…The germaneness prong serves as a backstop against such suits. It ensures a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing.

Hodel, at 57-58.

And, see, Building and Construction Trades Council of Buffalo, 448 F.3d 138, 148-149 ("We conclude that the 'germaneness' requirement of Hunt should be read in accordance with the 'modest yet important' goal 'of preventing litigious organizations

from forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care." quoting Brock, *supra*, at 290; and Hodel at 57).

In the case at bar, the members of the St. Louis Association of Realtors join the association because they are **realtors** engaged in the business of representing buyers, sellers, landlords, tenants and other clients in real estate transactions.

The fact that some realtors may also have outside interests to supplement their income is not germane to the conduct of business as a realtor and does not confer standing upon the Association relative to its members' unrelated interests.

In a similar case, the Eastern District Court of Appeals determined that the St. Louis Association of Realtors did **not** have associational standing to challenge fees imposed upon property owners by the Metropolitan Sewer District. Missouri Growth Association, et al. v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615 (Mo.App.E.D. 1997).

> The charter purpose of SLAR is to promote the interests of real estate dealers. Because these real estate dealers do not pay their own sewer bills, they would not have standing to bring this suit. Therefore, SLAR does not have standing on their behalf. Furthermore, the paying of sewer bills is not "germane" to the general and vague purpose of promoting the interests of real estate dealers. Thus, SLAR does not have standing to bring this suit.

Missouri Growth, at 621.

Just as in Missouri Growth, real estate agents and brokers are not subject to Ferguson's licensing requirements and fees which are challenged in this case. Real estate agents and brokers – even those practicing in the City of Ferguson – are not required to obtain the license and are not required to pay the business license fee.

In Medical Association of the State of Alabama v. Schweiker, 554 F.Supp. 955 (N.D.Alab. 1983), *affirmed* 714 F.2d 107 (11th Cir. 1983), the court granted a motion to dismiss for lack of standing because the medical association could not rely on their members' status as taxpayers.

> …the association is not a proper organization to represent its members as taxpayers. Members of the association joined the association because they were physicians, not because they were taxpayers. Although it is well established that an organization whose members are injured may represent those members in judicial proceedings…reason dictates that the organization may do so only when the injury to its members has some reasonable connection with the reasons the members joined the organization and with the objectives of the organization. This is not the case with the Alabama Medical Association to the extent that it is seeking to represent its members simply as taxpayers.

Schweiker at 964-965.

Given the extremely small subset of members who have an interest in this litigation, the purposes outlined in the Corporation's governing documents, the reason

why members have joined the Association, the Corporation's lack of involvement in the outside business interests of its members, it is clear that the interests sought by Appellant Corporation in this action are not germane to the Corporation's purposes.[3]

Appellant inartfully attempts to satisfy the second prong of the Hunt test with the idea that 'we have done it before'. Other than the case of Real Estate Board of Metropolitan St. Louis v. City of Jennings, 808 S.W.2d 7 (Mo.App.E.D. 1991), *discussed infra*, Appellant does not cite to any other case in which the Association is the named challenger and has been afforded associational standing. During testimony before the trial court, three cases were mentioned. Two were actually brought by private parties and the Association was not even named as a party. Clifford Hindman Real Estate, Inc. v. City of Jennings, 283 S.W.3d 804 (Mo.App. 2009); 9141 Locust LLC v. City of Olivette, Cause

[3] Interestingly, for potentially proper challengers to regulations similar to those challenged in this case, *see* Greater New Haven Property Owners Association v. City of New Haven, 951 A.2d 551 (Conn. 2008) (An association of approximately 50 property owners and managers who own or manage residential rental property within the City of New Haven challenged the City's ordinance imposing licensing and inspection requirements for residential rental properties); and Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, 136 Cal.App.4th 119, 38 Cal.Rptr.3rd 575 (Cal.App. 2006) (Association comprised of owners of apartment buildings challenged city ordinance controlling rent at apartments after termination or nonrenewal of Section 8 contracts with the City's Housing Authority).

No. 2104CC-03809, St. Louis County Circuit Court. In the third case involving the City of University City, the trial court dismissed that action in 2008 and, apparently, no appeal of that judgment was ever filed by the Association.

Appellant mistakenly states, in its Brief, that the St. Louis Association of Realtors "defended" the case styled City of Dellwood v. Twyford, 912 S.W.2d 58 (Mo.banc 1995). [Appellant's Brief, Page 21]. However, the Association was not a party to that litigation and was not even mentioned in that opinion. Instead, that case involved two private parties, one a real estate agent and the other a property owner who were found guilty of violating an ordinance which required payment of a $50.00 before placement of a "for sale" sign on private property. Upon their conviction, the trial court imposed a fine for the violation. The two private individuals appealed their respective convictions and fines.

The Association's only legitimate attempt at pursuing claims on behalf of its membership appears to be Real Estate Board of Metropolitan St. Louis v. City of Jennings, 808 S.W.2d 7 (Mo.App.E.D. 1991). In that case, the Association was determined to have standing to challenge municipal regulations on the size of "for sale" signs which real estate agents could utilize within the City of Jennings. The municipal regulation directly affected the duties and responsibilities of real estate agents and directly affected any real estate agent which would represent a buyer or seller of real estate within the City of Jennings. This case clearly shows the **huge divide** between a proper lawsuit filed by the St. Louis Association of Realtors and the case at bar. Clearly,

the Jennings case involved a regulation which affected real estate agents in general while the instant case seeks relief relating to the private, unrelated business interests of a very small number of the Corporation's members.

Lastly, Appellant's blatant mischaracterization of the Association's purposes by use of a few broad catch-phrases does not automatically make its claim germane to its purpose. Appellant's description of itself as an advocate for "private property rights" contradicts the Association's governing documents including the Articles of Consolidation and Bylaws. Not that there is any magic language which should be included within corporation documents, but, taken as a whole, it is apparent that the focus of the Association is on the practice undertaken by real estate agents and brokers. For instance, there are extensive regulations on the use of the term "realtor", the development and use of the "Multiple Listing" service which provides a marketing database for real estate agents and brokers; and use of the "lockbox system" in order for real estate agents to gain access to and show structures for sale. There is no mention of issues pertaining to private property rights such as a periodic review of all real estate taxes and fees assessed upon private property; the review of and participation with regard to local flood plain and floodway maps which impact the private property included on such maps; or the survey of properties to ensure the proper location of property boundaries and right-of-way and the absence of unlawful encroachments.

The Association's assertion of interest is just too expansive and too remote from the Association's true functions to be legitimate. See, White's Place, Inc. v. Glover, 222

F.3d 1327 (11th Cir. 2000).

In White's Place, a corporation argued that it had associational standing in its challenge to an ordinance prohibiting opposition to police officers. The corporation's true function was to advocate for and participate in the dissemination of erotic speech. The corporation argued that because erotic speech is protected by the First Amendment, then the corporation should have standing to bring any First Amendment claims.

> The corporation creatively asserts that its purpose is 'dedication to the dissemination of erotic speech, which is protected by the First Amendment' and that, consequently, protection of First Amendment freedoms is certainly within the ambit of the interests of White's Place, Inc…the ordinance being challenged here does not directly relate to the interest of the business. White's Place is a corporation whose primary purpose is to present erotic dancing for profit. The restriction on speech at issue in this appeal, the ability to oppose a police officer legitimately through spoken words, is not related sufficiently to the organization's purpose.

White's Place at 1330.

The overly-broad interest in protection of First Amendment rights claimed by the company in White's Place is strikingly similar to the overly-broad interest in "furthering private property rights" claimed by Appellant in the case at bar. In White's Place, the court found that the corporation did **not** have standing.

3. Action Requires Participation of Individual Members

Lastly, the third element of the test for representational or associational standing is that the claim asserted or the relief requested **does not** require the participation of individual members in the lawsuit.

In the case at bar, the primary question is the ability of the City of Ferguson to license and impose a tax or fee on all owners of residential rental property within the City. Appellant has challenged such license and fee under Missouri's Hancock Amendment (LF 18-19); Appellant's Petition has never been amended and no claim by the Association has been voluntarily dismissed.

Any claim brought under the Hancock Amendment **requires the participation of a taxpayer** who is subject to the challenged taxes or fees levied by the City of Ferguson. Article X, Section 23, Missouri Constitution.

Associations and organizations which are not taxpayers, themselves, do not have standing to pursue claims involving the Hancock Amendment. Missouri Association of Counties et al., v. Wilson, 3 S.W.3d 772 (Mo. 1999).

See, also, Firemen's Retirement System et al. v. City of St. Louis, 2006 Mo.App. LEXIS 1234, (Mo.App.E.D. 2006) ("The import of these two cases is that in order to have standing to raise the *Hancock Amendment* either offensively or defensively, a party has to be a taxpayer.").

Therefore, Appellant's Hancock Amendment claims cannot survive without a taxpayer bringing the action as a party in accordance with Article X, Section 23, Missouri Constitution.

Moreover, Appellant filed this action to solely further the private, unrelated business interests of two or three out of its 9,000 members. In doing so, the Association has sought to i) eliminate licensing of landlords and requirements that landlords effectively maintain residential rental property; and ii) weaken building and housing standards by the invalidation of Ordinance 2006-3257 and the minimum housing standards set forth therein.

The Association represents both buyers and sellers of property and both owners and **tenants** of property. The Code of Ethics and Standards of Practice clearly sets forth the professional and ethical obligations to tenants while representing those persons in real estate transactions. [App. 44-51]. In fact, even some members of the Association, themselves, may be tenants residing in residential rental property.

The Association's stance in this case will create conflicting interests within the membership, requiring individual participation by the affected members.

> Prong three of the *Hunt* test provides that neither the claim nor the relief requested can require the participation of individual members…This prong is not met with conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests.

Maryland Highways Contractors Association, Inc., v. State of Maryland, 933 F.2d 1246, 1252 (4th Cir. 1991).

In Maryland Highways, the association of contractors challenged the state's

minority business enterprise statute; this law established procedures and standards designed to encourage participation in bidding by minority businesses and to provide a share of contracts for procurement of supplies and services to such businesses.

The Maryland Highways court determined that the Contractors Association lacked associational standing to file suit on behalf of its member contractors.

> The members of the Association in this case have conflicting interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other non-minority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests.

Maryland Highways at 1253.

Similarly, associational standing was denied by the Eighth Circuit Court of Appeals because, among other reasons, "actual and potential conflicts" among members resulted in the association not satisfying the third prong of the Hunt test. Associated General Contractors of North Dakota v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979).

> Moreover, the claim asserted requires the participation of the individual members of the association. The association is clearly not in a position to speak for its members on the question of whether the Stabilization

> Agreement is violative of antitrust laws. Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members…some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so. The fact that the Association voted unanimously to bring the lawsuit sheds little or no light on the germaneness of the lawsuit to the organization's purpose. It is for the court, not the members of the association to determine whether their interests require individual representation. Here, in view of the actual and potential conflicts, they clearly do.

Associated General Contractors of North Dakota at 691.

Missouri state courts have also recognized that potential conflicts among members bars associational standing. In Sherwood National Education Association v. Sherwood-Cass R-VIII School District, 168 S.W.3d 456 (Mo.App.W.D. 2005), the Court found that the Association did not have standing to bring suit on behalf its member teachers challenging the school district's policy of paying differing "commitment fees" to teachers who returned contracts within a certain time frame and agreed to complete two school years.

> Even assuming that all the teachers wish to be compensated by an amount equivalent to a "commitment fee", it is not clear what "commitment fee"

($1,000 or $2,000) would be appropriate to each individual teacher. The arguments about how to determine such an amount might put some teachers at odds with other teachers. There would also be potential issues as to whether the commitment fee would apply to any teachers who left the district in the contemplated period, and as to any teachers now deceased. There is no reason here that individual teachers who wish to pursue a claim could not do so in their own names. Because it seems that the claim asserted and the relief requested arguably require the participation of individual members in the lawsuit, SNEA appears to lack standing.

Sherwood National Education Association at 463-464.

Given the actual and potential conflicting interests of the Association's 9,000 members in the case at bar, especially given their obligations to their tenant clients, the participation of individual members is required and, therefore, the third prong of the Hunt test is not satisfied.

Appellant fails to Satisfy even the most basic "Associational Ties" Analysis

Even if one were to ignore standing rules and perform only the most superficial analysis which is something akin to that advocated by the *Amici* parties, Appellant's action still fails.

Absent direct injury or effect to the Association itself, the Appellant must prove, at a very bare minimum, some legitimate interest, which is demonstrated by the associational ties of its members, that shows it is truly a party in interest to pursue the

litigation.

In Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. banc 2003), this Court determined that the Missouri Bankers Association had standing to challenge administrative regulations and decisions relating to the operation of credit unions. At the time the Court's decision was rendered, the Missouri Bankers Association had 385 members **which were all financial institutions engaged in the banking business**. The administrative regulations and decisions at issue were alleged to give a regulatory advantage to credit unions in the business of accepting deposits and loaning money and create unfair competitive circumstances against banking institutions and otherwise adversely **affect the banking operations common to the Bankers Association's members**. The common interest shared among the membership was to protect the interests of the financial institution members in respect to **engaging in the business of banking**. As the litigation had an obvious and integral connection to the banking business, the Bankers Association had standing.

Similarly, this Court found that the Missouri Health Care Association had standing to challenge a bill adopted by the Missouri General Assembly relating to the long-term care of persons in the state and the financing of such long-term care. Missouri Health Care Association v. Attorney General, 953 S.W.2d 617 (Mo.banc 1997). The Health Care Association represented "a majority of the long-term care facilities in the state." Id. at 619. The association's membership engaged in the business of providing long-term care for the elderly, infirm and others, and the conduct of that business was directly affected

by the provisions under challenge. In its standing analysis, this Court clearly considered the common thread among the members, who were in the business of providing long-term care and operating facilities for such care, and the connection between the association's challenge and that common business practice.

In Missouri State Medical Association, et al. v. State of Missouri, 256 S.W.3d 85 (Mo. banc 2008), this Court determined that the State Medical Association lacked standing to challenge a statute relating to the legalization of midwifery. Once again, this Court focused on the business which was common to the members of the Medical Association, namely the practice of medicine. Given that there was no connection between the midwifery provisions under attack and the physicians' practice of medicine, the Medical Association lacked standing.

See, also, Missouri Outdoor Advertising Association, Inc. v. Missouri State Highways and Transportation Commission, 826 S.W.2d 342, 344 (Mo. banc 1992) (Association whose members were vendors of outdoor advertising had standing to challenge state project relating to the state vending logo signs and advertising at highway exits. "In the case before us…we see no reason why the association cannot properly present legal points **common to all its members**." – Emphasis added); and Committee for Educational Equality et al. v. State of Missouri, 294 S.W.3d 477 (Mo. banc 2009) (The Committee for Educational Equality and the Coalition to Fund Excellent Schools, both not-for-profit education advocacy groups **representing member public school districts**, had standing to argue that the state's school funding formula **did not provide**

adequate funding for the proper operation of public schools, but lacked standing to bring Hancock Amendment and Equal Protection challenges.)

With regard to any association or group of people, incorporated or unincorporated, if there is no such connection between the subject of the litigation and the common thread binding the membership or group, standing has not been afforded.

In the instant case, the subject of the litigation is not connected to the common interests of the Appellant's membership – that being, quite simply, the business of realtors: real estate transactions.

As Appellant Lacks Standing, Dismissal of Petition was Appropriate

In this case, there is no justiciable controversy between Appellant and City of Ferguson; Appellant does not have standing in its own right to bring this action. In addition, Appellant fails to meet all three of the factors necessary for associational standing. Given that there are no other Plaintiffs participating in this action, the suit was appropriately dismissed.

II. THE TRIAL COURT WAS CORRECT IN APPLYING THE THREE PRONG TEST IN DISMISSING APPELLANT'S PETITION BECAUSE SAID TEST IS NECESSARY TO DETERMINE WHETHER AN ASSOCIATION HAS STANDING IN THAT, ABSENT STANDING, THE COURT LACKS JURISDICTION OVER THE MATTER, AND A COURT CANNOT SIMPLY DEFER TO THE "BUSINESS JUDGMENT" OF AN ASSOCIATION

The *Amici Curiae* Missouri Society of Association Executives, Missouri School Board Association and Missouri Association of Realtors have filed a brief asking this Court to abolish the doctrine of associational standing as it exists in Missouri today. The position they adopt is self-serving as they ask the Court to replace the existing three-pronged test for associational standing with a deferential standard, whereby the decision of the association to bring suit creates a rebuttable presumption that the suit is germane to its purposes, and that the presumption should only be rebutted if the association's governing documents prohibit such a suit. For the reasons set forth herein, the position of the *Amici* is unsupported under Missouri Law and would spur the creation of litigious associations.

Standard of Review

The appellate standard of review when considering a trial court's grant of a motion to dismiss is *de novo*. Moynihan v. Gunn, *supra*. More specifically, the standard of review for an appeal of a motion to dismiss for lack of standing is *de novo*. Wilson v.

Cramer, *supra*.

This Court's adoption of the three-part test for associational standing is appropriate under Missouri Law

The *Amici* first seek to disparage the grounds upon which Hunt v. Washington State Apple Advertising Commission, *supra*, was decided arguing that Hunt cited to Warth v. Seldin, *supra*, in adopting the three prong test for associational standing and that Warth itself contained no requirement that the suit be germane to associational purposes." [*Amici's* Brief at 12]. This is simply not true as discussed above in Point I; Warth requires that "the challenged infractions adversely **affect its members' associational ties**. Warth, at 511 (emphasis added). Only those issues affecting the very ties that caused the association to form, or its continued existence, are "germane" to its purposes. All three Hunt factors, while not articulated in the same manner, are to be found in Warth at 511,[4] and, therefore, the *Amici*'s assertion that Warth did not include a three part test and the resulting implication that Hunt was an erroneously decided case are both equally without merit.

Amici further suggest that this Court's adoption of the Hunt test was improper as *Hunt* "stems from Article III Jurisdictional analysis." [*Amici's* Brief at 11]. Article III, Section 2, Clause 1, of the United States Constitution requires that in order for a court to

---

1 Warth also requires that the association members themselves have standing, and that the nature of the claim not require the individual participation of each injured party, representing the first and third Hunt factors respectively.

have jurisdiction, there must be a "case" or "controversy." "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate… The parties must continue to have a 'personal stake in the outcome' of the lawsuit." Spencer v. Kemna, 523 U.S. 1, 7 (U.S. 1998). "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Id.

Amici concede that the Declaratory Judgment Act is applicable to the analysis of the instant case. [*Amici's Brief* at 18]. In similar fashion to Article III, Section 2, Clause 1 of the United States Constitution, a "declaratory judgment action requires a justiciable controversy." Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations, 277 S.W.3d 670, 676 (Mo. banc 2009). A case presents a justiciable controversy if: (1) the plaintiff has a legally protectable interest at stake; (2) a substantial controversy exists with genuinely adverse interests; and (3) the controversy is ripe for judicial determination." Id.

Amici's position that this Court was wrong to adopt the Hunt test as a means of analyzing associational standing is, without merit, as Article III, Section 2, Clause 1 of the United States Constitution and the Missouri Declaratory Judgment have similar justiciable controversy requirements and, therefore, the analysis of the U.S. Supreme Court in Warth, Hunt and their progeny is equally applicable to Missouri law.

Without the three pronged associational standing test, it will in fact be harder for associations to meet the requisite threshold to demonstrate standing

Amici ask this court to "clarify that there is no "associational" standing test; rather there is simply standing or lack of standing." *Amici's Brief* at 15. The U.S. Supreme Court in Warth noted that associations have two mechanisms through which they can have standing to sue: (1) to vindicate whatever rights and immunities it may itself enjoy; and (2) assert the rights of its members, when the associational ties of its members are implicated. Warth at 511. The former represents individual standing of the association, and the latter became the genesis for modern day associational standing. See United Food and Comm'l Workers Union Local 751 v. Brown Group, Inc., *supra*, at 552. Thus, without the associational standing test, Appellant would be required to demonstrate that as an organization, separate and apart from its members, it has standing.

"Standing requires that a party seeking relief has some legally protectable interest in the litigation so as to be affected directly and adversely by its outcome." Committee for Educational Equality v. State, 294 S.W.3d 477, 484 (Mo. banc 2009). Appellant pays no tax to the City, nor owns any rental property in the City. The fact that one of its members, may be affected by the ordinance, does not provide Appellant with a legally protectable interest, any more than it would the St. Louis Cardinals if one of its players owned rental property in the City.

The U.S. Supreme Court in considering non-economic claims made by a teachers association considered:

> "[The claims made by] the teachers association reduce to something like the association's contention that the state law undermines "the quality of

education in Arizona." Complaint ¶ IV. We cannot say with any certainty that this contention is even likely to be correct. The claims raised here, moreover, are the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts."

ASARCO Inc. v. Kadish, 490 U.S. 605, 616 (1989).

Similarly, absent claiming associational standing the Appellant's claim of standing is reduced to a generalized claim that the City's ordinance affects rental properties in the City, something they have an academic interest in perhaps, but no legally cognizable interest capable of conferring standing.

Thus, removing the concept of associational standing would hinder, not help, associations such as the Appellant and the *Amici Curiae*.

The germaneness prong is not unreasonable as the Amici suggest and is necessary to prevent the advent of law firms with standing

Additionally, *Amici* claim that there is no reason for associations being held to a germaneness standard that is not applied to other entities, such as natural persons, corporations, partnerships, etcetera. [*Amici's Brief* at 15]. This claim lacks any logic. Individuals are of course held to a germaneness standard, as are corporations, as they only have standing to bring suits where they have a "legally protectable interest at stake." Missouri Alliance for Retired Americans at 676. If an individual has no protectable interest at stake in bringing a suit, then the suit is evidentially not germane to his or her

interests, and therefore, the individual lacks standing. If the position of the *Amici* was correct, then individuals could bring a suit for any reason whatsoever, even if they have no legally protectable interest in a suit. This of course is not the state of the law in Missouri as "[e]very action shall be prosecuted in the name of the real party in interest." Section 507.010 R.S.Mo. Thus, as noted by the *Amicus Curiae* Missouri Municipal League, an individual cannot bring a lawsuit on behalf of a third party. [*Amicus Brief* of Missouri Municipal League at 13].

If associations are not held to a germaneness standard the door is left wide open for the advent of "law firms with standing." The germaneness prong "ensures a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing… Human Society of United States v. Hodel, *supra* at 57; Washington Legal Foundation v. Leavitt, 477 F. Supp. 2d 202, 212 (U.S. App. D.C 1987). Further, "[i]t of course also serves the desirable goal of preventing association leaders from abusing their offices." Hodel at 57.

Amici argue that Missouri Rule of Civil Procedure 52.10 allows an unincorporated association to bring suit in the name of the association when its individual members have suffered an injury. [*Appellant's Brief* at 17]. This is incorrect, as Rule 52.10 in fact allows for suit to be brought in the name of the representative parties, **not** the association.

Rule 52.10 pertains only to capacity to sue and not standing. "Unincorporated associations have no entity status beyond the status of those persons who comprise the association." Executive Board of Missouri Baptist Convention v. Carnahan, 170 S.W.3d

437, 445 (Mo. App. W.D. 2005). "As a consequence, an unincorporated association ordinarily lacks the legal capacity to sue or be sued in the name of the association." Id. "The purpose of Rule 52.10 is to overcome this incapacity and to endow the association with entity status for suit." Id. at 451.

The *Amici* acknowledge that Rule 52.10 pertains to capacity to sue and not standing, however, seemingly aver that since the rule does not reference "germaneness" that an unincorporated association may have standing without demonstrating germaness. This argument ignores the very case cited by the *Amici*, In Their Representative Capacity as Trustees for Indian Springs Owners v. Greeves, 277 S.W.3d 793 (Mo. App. E.D. 2009). In Greeves, the Eastern District stated[5] that:

> "Under the current law, **an unincorporated property owners association**, like the one in the instant case, may sue in two ways. First, under Rule 52.10, an unincorporated property owners association may sue by designating certain members, such as trustees, as representative parties in an action so long as they fairly and adequately protect the interest of the association and its members. Secondly, under the holding in *Lake Arrowhead*, an unincorporated property owners association may sue in its own name under a subdivision's indenture in order to enforce a restrictive covenant against non-compliant members of the association.

5 Citing Lake Arrowhead Property Owners Association v. Bagwell, 100 S.W.3d 840 (Mo. App. W.D. 2003).

Greeves at 798 (internal citations omitted – emphasis added)

Immediately after the forgoing quote, the Eastern District set forth and applied the three pronged associational standing test, to determine whether the unincorporated property association had standing. Id. at 798-799.

Thus, Rule 52.10 dictates **only** whether an unincorporated association has capacity to bring suit, by reviewing whether the representatives would sufficiently represent the interests of the association[6] and its members. Conversely, the three pronged associational standing test is used to determine whether the unincorporated association has standing. As such, unincorporated associations must also demonstrate germaneness, however, due to their unique legal status, they face the additional burden of proving capacity.

The suggested deferential standard for associational standing offered by Amici in essence asks this court to waive lack of standing, which violates the precepts of the law on jurisdiction

Having first attempted to abolish the concept of associational standing, *Amici* thereafter, ask this court to adopt a deferential standard, akin to the business judgment rule, when reviewing whether an association has standing. [*Amici's Brief* at 27]. The

6 Rule 52.10 requires that the representative parties adequately protect **the interests of the association and its members**, since such an association often will only exist for the purpose of litigation, in such cases, the "interests" of the members will necessarily be germane to the legal action it is pursuing.

courts of this state cannot simply defer to an association on the issue of standing. As discussed previously, "[s]tanding is a jurisdictional mater antecedent to the right of relief." Farmer v. Kinder, *supra* at 451. "Where, as here, a question is raised about a party's standing, courts have a **duty** to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issue presented." Id. "**Lack of standing cannot be waived**. Id. (Emphasis added).

Essentially, the *Amici* ask this Court to waive lack of jurisdiction in those circumstances where the association's leadership determines that they have standing, and where the governing documents for the association do not expressly prohibit suit. This standard would be extremely vulnerable to abuse, as savvy associations could simply edit their corporate documents to allow the association to bring suit whenever the association's governance sees fit, thus, giving an association's leadership seemingly limitless power to instigate litigation.

The law in Missouri does not, and should not, allow associations to self-police on matters of jurisdiction, and as this Court noted in Farmer, courts in this state have a **duty** to consider standing, they cannot simply defer to the choices made by the association. Such a deferential approach would facilitate the creation of the type of "law firms with standing," that the court in Hodel warned of.

Such a vista would entirely frustrate the secondary goal of the associational standing test, namely, preventing abuse of the association's assets by the leadership. See

Hodel at 57.

Thus, the trial court correctly applied the three pronged associational standing test in granting the City's Motion to Dismiss, as said test remains valid law in Missouri, contrary to the *Amici*'s suggestions. Further, this Court should resist the invitation to eliminate or replace the three-pronged test because it successfully balances both reasonable access to the courts and the need for a real justiciable controversy and has been adopted by federal courts and the vast majority of state courts.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the decision of the trial court to dismiss Appellant's Petition be affirmed.

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.

Kevin M. O'Keefe, #23381
Stephanie E. Karr, #39593
Edward J. Sluys, #60471
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)
Email: kokeefe@lawfirmemail.com
skarr@lawfirmemail.com
esluys@lawfirmemail.com

Attorneys for Respondent City of Ferguson

RULE 84.06 CERTIFICATE

I hereby certify that Respondent's Brief contains 12,060 words and 1,182 lines and complies with the limitations contained in Rule 84.06(b). In addition, I hereby certify that Respondent's Brief has been transferred in Microsoft Word format to a CD Rom, and IBM-PC compatible; the attached disk has been scanned for viruses using Symantec Endpoint Protection virus detection software and the CD is virus-free.

Stephanie E. Karr

CERTIFICATE OF SERVICE

I hereby certify that two copies of Respondent's Brief in printed form and a copy of Respondent's Brief in electronic form was mailed on this 20th day of June, 2011, by placing same in the U.S. Mail, postage paid, to: Mr. Stephen Murphy, Attorney for Appellant, 190 Carondelet Plaza, Suite 1100, St. Louis, Missouri 63105.

_____

Stephanie E. Karr

SUPREME COURT OF MISSOURI

APPEAL NO. SC91640

ST. LOUIS ASSOCIATION OF REALTORS
Appellant

vs.

CITY OF FERGUSON
Respondent

On Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Mary Elizabeth Ott, Circuit Judge, Division 31
Case No. 07CC-003604

APPENDIX TO SUBSTITUTE BRIEF OF RESPONDENT

CURTIS, HEINZ, GARRETT
& O'KEEFE, P.C.

Kevin M. O'Keefe, # 23381
Stephanie E. Karr, #39593
130 South Bemiston, Suite 200
St. Louis, Missouri 63105
(314) 725 – 8788
(314) 725 – 8789 (Fax)
Email: kokeefe@lawfirmemail.com
skarr@lawfirmemail.com

Attorneys for Respondent City of Ferguson

APPENDIX
TO
RESPONDENT'S
SUBSTITUTE BRIEF

TABLE OF CONTENTS