STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hon. Colleen O'Brien, Presiding Judge

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, Michigan nonprofit corporations,

Plaintiffs/Appellants,

v

CITY OF TROY,
a Michigan Home Rule City,

Defendant/Appellee.
_____/

Supreme Court No. 156737

Court of Appeals No. 331708

Lower Court No. 10-115620-CZ

Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Plaintiffs/Appellants
1305 S. Washington Avenue, Suite 102
Lansing, MI 48910
(517) 482-4890
_____/

Lori Grigg Bluhm (P46908)
Allan T. Motzny (P37580)
Attorneys for Defendant/Appellee
500 W. Big Beaver Road
Troy, MI 48084
(248) 524-3320

MICHIGAN HEALTH AND HOSPITAL ASSOCIATION'S AND MICHIGAN SOCIETY OF ASSOCIATION EXECUTIVES' AMICI CURIAE SUPPLEMENTAL BRIEF IN SUPPORT OF THE POSITION OF PLAINTIFFS/APPELLANTS

Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Amici Curiae,
Michigan Health and Hospital Association &
Michigan Society of Association Executives
1305 S. Washington Ave, Suite 102
Lansing, MI 48910
(517) 482-4890

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

I. WHETHER APPELLANTS HAVE STANDING?

The Court of Appeals did not answer this question.

The Circuit Court did not answer this question.

Plaintiffs/Appellants answer: "Yes."

Defendant/Appellee answers: "No."

Amici Curiae answer: "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

A. Michigan Health and Hospital Association

The Michigan Health and Hospital Association ("MHA") is a statewide advocacy organization representing over 170 Michigan health care facilities providing inpatient care, including long-term acute care and rehabilitation facilities as well as other specialty hospitals. Of those, 134 are community hospitals providing inpatient, outpatient and emergency care 24 hours a day, 7 days a week, 365 days a year. MHA membership encompasses large urban trauma centers and teaching hospitals, mid-size community hospitals, and rural Critical Access Hospitals. The MHA represents *all* nonprofit and several for-profit hospitals in the state, advocating on behalf of them and the nearly 10 million people they serve.

Established in 1919, the MHA represents the interests of its member hospitals and health systems on key issues and supports their efforts to provide quality, cost-effective and accessible care. The mission of the MHA is to advance the health of individuals and communities. Through its leadership and support of hospitals, health systems and the full care continuum, the MHA is committed to achieving better care for individuals, better health for populations and lower per-capital costs. In addition, the MHA provides members with essential information and analysis of health care policy and offers relevant education to keep hospital administrators and their staff current on statewide issues affecting their facilities. Using its collective voice, the MHA advocates for its members before the Legislature, government agencies, the media, the public and the Michigan courts.

B. Michigan Society of Association Executives

Associations, formed as early as our democracy was formed, have served as the collective voice for the industry or profession they represent along with the provision of best and new practices, conducting and supporting research, mentoring students and apprentices, the setting of guideline standards, and conducting collective marketing. Each industry or profession thereby forms and maintains the group, or association, for this unified, collective approach to better themselves and their industry colleagues. There is an association formed to serve every interest – from Labrador Retriever owners, to Christmas tree farms, and all in between.

The Michigan Society of Association Executives ("MSAE"), formed in 1922, is the association in Michigan which exists to represent the association sector as a whole. MSAE is an association whose membership is comprised of other associations throughout the State of Michigan. MSAE's 2,100 members work for over 300 independent organizations headquartered in Michigan that advance their respective sector. MSAE categorizes these associations by the industries they represent. Some examples of these broad groupings include:

- Agriculture/Horticulture
- Automotive/Transportation
- Business/Manufacturing
- Chambers of Commerce
- Construction/Lumber/Forestry
- Education
- Engineering
- Environmental
- Financial
- Food & Beverage
- Health
- History/Art/Music
- Human Services
- Insurance
- Legal
- Media/Advertising/communications
- Protection/Law Enforcement
- Public/Political/Professional
- Real Estate/Property Development
- Recreation/Travel/Tourism
- Religion
- Service/Retailing
- Technology
- Utilities/Energy/conservation

The mission of MSAE is to assure a professional, knowledgeable, and successful association community. One of its primary organizational initiatives is to assure civility in the legislative and legal arenas. The diversity of its membership sometimes leads to MSAE members maintaining service to volunteer and professional coalitions often in unity and other times against each other based on the particular issue. Regardless, it is considered an imperative that its members maintain civility in discourse and the understanding that it is an association's responsibility to maintain dialogue about public policy and a healthy interpretation of the law.

Associations are the only structure that collectively represents a profession or industry providing valuable insights to decision-makers. They are a critical element of our democracy.

Providing support to this effort are the following organizations:

- Construction Association of Michigan
- Michigan Farm Bureau
- Michigan Petroleum Association
- Michigan HomeCare & Hospice Association
- Michigan Licensed Beverage Association
- National Truck Equipment Association
- Michigan Health and Hospital Association
- Michigan Dental Association
- Michigan Athletic Association

C. Interest in This Case

At issue in this case is the standing of associations to bring lawsuits on behalf of their members. Both MHA and MSAE are actively involved in advocating for the legal rights of their members. Accordingly, it is vital to MHA and MSAE that they have standing to represent their members before the Courts of this State, not only as amicus curiae participants, but also as party plaintiffs. Thus, the issue of association standing is one in which MHA and MSAE have significant interest and vital concern and can offer specialized expertise. In *City of Grand Rapids*

v Consumers Power Co, 216 Mich 409, 415; 185 NW 852 (1921), the Michigan Supreme Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." MHA and MSAE, therefore, respectfully request that this Court grant their Motion for Leave to File Amicus Curiae in support of the position of Plaintiffs/Appellants.

II. FACTS

Amici Curiae MHA and MSAE accept the facts as set forth by Plaintiffs/Appellants, Michigan Association of Home Builders; Associated Builders and Contractors of Michigan; and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") in their Application and Supplemental Brief.

III. ARGUMENT

A. Policy Considerations Weigh in Favor of a Liberal Standing Requirement for Associations Under Michigan Law

Members of associations voluntarily join them. The choice to join is presumably made because each individual member has the same or similar interests as every other individual member. Therefore, associations constitute communities of interest. At the same time, however, members of associations "hail from all walks of life" – virtual "melting pots" of individuality drawn together to further a common goal, interest or purpose. Members of associations represent a broad spectrum of economic, ethnic, educational and regional diversity. As a result, associations are able to bring to the table a wide range of perspectives acting in furtherance of universal objectives.

In many instances, as here, the universal objective of an association being advanced is its representation of the interests of its members in legal matters – including, litigation and

lobbying efforts. The "association" dynamic presents unique advantages for litigants and courts alike.

For example, an association is, of course, just one party which files one lawsuit. Contrast that with the thousands of members of an association, each filing their own individual lawsuits, each bringing different claims under different legal theories, each requesting different forms of relief, and each potentially resulting in inconsistent rulings and results. Judicial economy and this state's jurisprudence are thus best served by association representation of their members in litigation. Michigan standing law should promote these interests.

In addition, representation of the interests of members through their association advances one of the very premises upon which the doctrine of standing is based. Standing denotes the existence of a party's interest in the outcome of the litigation sufficient to assure sincere and vigorous advocacy. *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). Associations are likely to be better organized, have greater expertise, are typically better funded and have more resources at their disposal than their members individually. Associations, therefore, are more likely to engage in vigorous advocacy and pursue litigation to its conclusion. As stated by the United States Supreme Court, commenting on the advantages of representational standing,

> . . . suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital.

UAW v Brock, 477 US 274, 289; 106 S Ct 2523, 2532; 91 L Ed 2d 228 (1986).

Accordingly, from a policy perspective, conferring standing on associations to represent the interests of their respective members will positively impact litigation throughout the Michigan Courts.

Courts are less congested as a result. And, the Michigan court rulings will be more cohesive and legal remedies more vigorously pursued.

B. Association Standing in Michigan

The case which defines the standing doctrine under prevailing Michigan law is *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349; 792 NW2d 686 (2010). After nearly a decade of a more restrictive test rooted in the traditional case and controversy requirement of the United States Constitution, this Court, in *Lansing Schools*, announced Michigan's return to a "prudential approach" to standing rooted in Michigan's historical purpose for standing jurisprudence – to "ensure sincere and vigorous advocacy by litigants." *Id.* at 358 and 372. Under this "prudential approach," standing is a matter of judicial discretion, not law. *Id.* at 355 and 356-357. The standing test ultimately developed and adopted by this Court in *Lansing Schools* provides that a litigant has standing:

> (1) whenever there is a legal cause of action,
> (2) whenever the litigant meets the requirements of MCR 2.605 to seek a declaratory judgment,
> (3) where he/she has a special injury, or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large, or
> (4) if the statutory scheme implies that the legislature intended to confer standing on the litigant.

Id. at 372. Applying these principles to the facts in *Lansing Schools*, this Court found that Lansing Schools had standing to pursue its claim for injunctive relief as well as declaratory relief (should, on remand, it satisfy the requirements of MCR 2.605). *Id.* at 373.

Although *Lansing Schools* involved a plaintiff that was an association, this Court did not discuss association representational standing. Thus, left unclear, is the precise standard for, or approach to, association standing under current Michigan law.

Michigan law has long supported liberal standing requirements for associations. For example, using the prudential approach, Michigan courts historically held:

> This Court has stated that a "voluntary association whose 'sole purpose is to represent the interest of its members,' . . . may bring suit to effectuate that purpose . . . ."

Civic Ass'n of Hammond Lake v Hammond Lake Estates No 3 Lots 126-135, 271 Mich App 130, 135; 721 NW2d 801 (2006), quoting *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 272-274; 177 NW2d 473 (1970).

Similarly, under the prior more restrictive, constitutional approach, Michigan courts held:

> There is no dispute that a nonprofit organization has "standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs."

Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals, 279 Mich App 25, 29; 755 NW2d 553 (2008).

> Initially, we note that we do not question the validity of CRAM's standing to bring this suit on behalf of its members. "Nonprofit organizations . . . have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs." *Nat'l Wildllife, supra* at 629; 684 NW2d 800. CRAM has standing if it alleges that its members (the county road commissions of the state of Michigan) suffered either an actual injury or an imminent injury. *Id.*

Co Rd Ass'n of Mich v Governor, 287 Mich App 95, 115; 782 NW2d 784 (2010).

Accordingly, historically and consistently, and under all approaches to standing, Michigan law has liberally granted standing to associations. The prevailing law in Michigan should reflect this historical consistency.

C. Standing Law in Other States

The approaches taken by other state courts are instructive on the issue of association standing. A sampling of that case law follows.

1. The 3-Prong Hunt Test

A number of states subscribe to the federal approach to association representational standing. Under this approach, associations have standing to sue on behalf of their members if:

1. its members would otherwise have standing to sue in their own right;
2. the interests it seeks to protect are germane to the organization's purpose; and
3. neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v Washington State Apple Advertising Comm , 432 US 333, 343; 97 S Ct 2434; 53 L Ed 2d 383 (1977).

Applying this test for standing, associations such as the Builders and Amici Curiae, are consistently found to have standing to represent the interests of their members in litigation. For example, in *Florida Home Builders Ass'n v Dep't of Labor and Employment Security,* 412 So 2d 351, 352 (Fla, 1982), the Florida Supreme Court reversed the lower court's dismissal of the Florida Home Builders Associations' lawsuit challenging the validity of an agency rule. In particular, the Florida Supreme Court found the lower court's restriction on association standing "excessively narrow," quoting federal law for the proposition that "[e]ven in the absence of injury

to itself, an association may have standing solely as the representative of its members." *Id.* at 353, quoting *Warth v Seldin*, 422 US 490; 95 S Ct 2197; 45 L Ed 2d 343 (1975). The Court added support to its ruling with a discussion of some of the very policy concerns reviewed supra, stating:

> While it is true that the "substantially affected" members of the builders' association could individually seek determinations of rule invalidity, the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders. Such a restriction would also needlessly tax the ability of the Division of Administrative Hearings to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action.

Id.

The Missouri Supreme Court engaged in a protracted analysis and discussion of *St Louis Ass'n of Realtors®* v *City of Ferguson*, 354 SW3d 620 (Mo, 2011). Therein, the City enacted an ordinance which the Realtor® association challenged on statutory and constitutional grounds, seeking declaratory relief. The trial court dismissed the case for lack of standing. *Id.* at 622. The Supreme Court reversed, noting first that "Missouri has adopted the *Hunt* framework for analyzing associational standing." *Id.* at 623. The Court then explained the nature of the inquiry under each of the three prongs of the Hunt test, as follows:

> To satisfy the first prong of *Hunt*, an association claiming standing on behalf of its members, "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."
>
> * * *
>
> In determining whether the [second] germaneness prong is satisfied, the relevant question is whether the basis on which the individual association members were found to have standing under the first prong of *Hunt* – here, the affect the ordinance is having on these members' real property interests – also is germane to the association's

> purpose. . . . The issue an association is litigating does not, for instance need to be *central* to the organization's purpose. . . . Instead, "mere pertinence between litigation subject and organizational purpose is sufficient."
>
> * * *
>
> [As to the third prong,] [w]here an association seeks only a prospective remedy, it is presumed that the relief to be gained from litigation "will inure to the benefit of those members of the association actually injured" [and satisfy the third prong of *Hunt*]. . . . Accordingly, requests made by an association for prospective relief generally do not require the individual participation of the organization's members.

Id. at 623-625 (citations omitted). The Court concluded that the Realtor® association had satisfied all three prongs as follows:

- Prong 1 – some members of the association owned property in Ferguson and, therefore, would have standing in their own right to bring suit. *Id.* at 623-624.
- Prong 2 – the activities and governing documents of the association demonstrated an organizational interest in the issue at hand – protecting private property rights. *Id.* at 626.
- Prong 3 – the association sought only prospective relief and not damages or other relief that would require joinder of individual members. *Id.* at 625.

Thus, the Missouri Supreme Court held that the Realtor® Association had standing to sue the City of Ferguson. *Id.*

Similarly, in Hawaii, a state medical association was found to have standing under the Hunt test to sue on behalf of its physician members and bring claims against a health insurer for unfair competition and tortious interference with an economic advantage. *Hawaii Med Ass'n v Hawaii Med Serv Ass'n, Inc,* 113 Hawaii 77; 148 P3d 1179 (2006). Similar to the facts of this case,

the Hawaii Supreme Court's conclusion hinged on: (1) the ability of the association's members to bring the same claims against the same defendant in their own right [*Id.* at 95-96]; and (2) the nature of the relief being sought – declaratory and injunctive only, noting, in particular, that individual participation of the association's members through discovery and trial testimony did not make participation of individual members in the lawsuit indispensable such that standing should be denied. *Id.* at 99.

In *Aldridge v Georgia Hospitality & Travel Ass'n*, 251 Ga 234; 304 SE2d 708 (1983), the Georgia Supreme Court addressed the issue of whether the association, an unincorporated voluntary trade association organized to promote the business interests of its hotel, motel and restaurant establishments, had standing to sue the county board of health on behalf of its members. In a case of first impression in Georgia, that Supreme Court adopted the 3-prong test for standing of associations set out in Hunt. *Id.* at 236. In addition to addressing each prong of the Hunt test, and finding that the association satisfied each prong, the Court noted that the following policy concerns supported its decision.

> We note three policy reasons, apart form the concerns embodied in the Hunt test, which favor associational standing in this case. First, the record clearly demonstrates that [the association] is a zealous advocate of its members' interests, and has provided adequate representation in this suit. Second, allowing associations to represent their members' interests in appropriate cases promotes judicial economy. One litigant can, in a single lawsuit, adequately represent many members with similar interests, thus avoiding repetitive and costly separate actions. <u>This is particularly true where, as in this case, the contested administrative action involves fees so small that separate court challenges by aggrieved members may not be economically feasible</u>. A third policy favoring standing for [the association] in this case was noted by the trial court. Associations are generally less susceptible than individuals to

retaliation by those officials responsible for executing the challenged policies.

Id. at 236-237. As discussed supra, all of these policy concerns exist in this case and favor the promotion of association representational standing within Michigan's jurisprudence.

In *State ex rel Affiliated Constr Trades Foundation v Stucky,* 229 WVa 408; 729 SE2d 243 (2012), the Supreme Court of West Virginia applied the three elements of the Hunt test to conclude that the trade association, Affiliated Construction Trades Foundation ("ACT"), had standing to sue on behalf of its members. The lawsuit sought a declaration that a public highway construction project contract between defendants, Department of Transportation and a private contractor, violated state prevailing wage and competitive bidding laws. *Id.* at 411. The defendants challenged ACT's standing primarily on the basis of the first prong of the Hunt test, arguing that any injury to ACT's members was hypothetical because it was not demonstrated that any contractor employing union members had an interest in bidding on the contract. *Id.* at 412. The West Virginia Supreme Court disagreed with this analysis, stating:

> The undisputed facts easily prove the first element of representative standing. Contractors who employ union workers were not allowed to bid on the highway construction contract. The inability to compete for a government contract as a result of improper government action is a cognizable injury in fact and a competitor does not need to prove it would have received the contract. . . . Consequently, union employees of the union contractors who were not allowed to bid suffered injury or threatened injury because they were not likely to be employed on the highway construction project. Standing is proven because there is a putative improper action and the union workers were less likely to be employed on the highway construction project. They had standing to sue in their own right.

Id. at 413 (citations omitted).

Overall, the federal Hunt 3-prong test constitutes the framework within which many states apply the doctrine of standing. In addition to those states just discussed, the following states follow the Hunt approach to standing.

- Alabama – *ABC Coke v GASP*, 233 So3d 999 (Ala App, 2017) (An association may have standing solely as the representative of its members.);

- California – *Prop Owners of Whispering Palms, Inc v Newport Pacific, Inc*, 132 Cal App 4th 666; 33 Cal Rptr 3d 845 (2005) (Even in the absence of injury to itself, an association may have standing to sue solely as the representative of its members.);

- Connecticut – *Timber Trails Corp v Planning and Zoning Comm of Town of Sherman*, 222 Conn 380; 610 A2d 620 (1992) (Association may have representative standing to bring suit on behalf of its members even though all its members are not aggrieved by particular issue in litigation.);

- Idaho – *Beach Lateral Water Users Ass'n v Harrison*, 142 Idaho 600; 130 P3d 1138 (2006) (Property owners association may have standing to seek judicial relief not only to protect its own interests, but also those of its members.);

- Indiana – *Bd of Comm'rs in Co of Allen v Northeastern Indiana Building*, 954 NE2d 937 (Ind App, 2011) (Association of construction trade unions had associational standing to bring action seeking judicial review of county's determination.);

- Iowa – *Teamsers Local Union No 421 v City of Dubuque*, 690 NW2d 464 (Iowa, 2004) (An association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity);

- Kansas – *NEA-Coffeyville v Unified Sch Dist No 445, Coffeyville, Montgomery Co, Kansas*, 268 Kan 384; 996 P2d 821 (2000) (An unincorporated association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members.);

- Kentucky – *Bailey v Preserve Rural Rds of Madison Co, Inc,* 394 SW3d 350 (Ky, 2011) (At a minimum, to establish associational standing under Kentucky law, at least one member of the association must individually have standing to sue in his or her own right.);

- New York – *Mental Hygiene Legal Serv v Daniels*, 158 AD3d 82; 67 NYS3d 147 (2017) (Mental Hygiene Legal Services (MHLS) had organizational standing to commence Article 78 proceeding seeking writ of mandamus compelling psychiatric facility to provide copy of each patient's medical record in special proceeding.);

- North Carolina – *Creek Pointe Homeowner's Ass'n, Inc v Happ,* 146 NC App 159; 552 SE2d 220 (2001) (An association may have standing to bring suit either as a plaintiff, to redress injury to the organization itself, or as a representative of injured members of the organization.);

- Ohio – *State ex rel Food & Water Watch v Ohio*, 153 Ohio St 3d 1; 100 NE3d 391 (2018) (An association has standing to bring a lawsuit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests the association seeks to protect are germane to association's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.);

- Texas – *City of Laredo v Rio Grande H2O Guardian,* memorandum opinion of the Court of Appeals Texas, San Antonio, issued July 27, 2011 (Docket No. 04-10-00872-CV); 2011 WL 3122205 (The test for associational standing was established by the United States Supreme Court in *Hunt v Washington State Apple Advertising Comm'n,* and adopted by the Texas Supreme Court in *Tex Ass'n of Bus v Tex Air Control Bd.*, [852 SW2d 440 (1993)]). A copy of the *Laredo v Rio Grande H2O Guardian* case is attached as Exhibit A;

- Washington – *Riverview Community Group v Spencer & Livingston*, 181 Wash 2d 888; 337 P3d 1076 (2014) (Under the doctrine of standing, cases should be brought and defended by the parties whose rights and interests are at stake.);

- Wisconsin – *Munger v Seehafer*, 372 Wis 2d 749; 890 NW2d 22 (2016) (In addition to the requirement that the Association demonstrate that at least one of its members would have standing, the Association must also show that "the interests at stake in the litigation are germane to the organization's purpose . . . and . . . neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit.").

2. Other Approaches to Standing

States that have not adopted the Hunt test have taken varying approaches to standing. However, many of these approaches emphasize, if not rely solely on, the first prong of the Hunt test; specifically, an analysis of economic injuries to the association's members.

For example, in *Builders Ass'n of Minnesota v City of St Paul*, 819 NW2d 172 (Minn, 2012), the Builders Association of Minnesota ("BAM") sued the City of St. Paul seeking a declaratory judgment that the state building code preempted a certain "Uniform Egress Window Policy" adopted by the city and an injunction prohibiting the city from enforcing the policy. The parties filed cross-motions for summary judgment. The city argued, in part, that BAM lacked standing to sue. The trial court disagreed, concluding that BAM had "associational" standing because its members had suffered concrete economic injury. The Minnesota Supreme Court affirmed, stating:

> The doctrine of standing requires a party to demonstrate a "sufficient stake in a justiciable controversy to seek relief from a court." *Enright v Lehmann,* 735 NW2d 326, 329 (Minn 2007). To establish standing, a party must have suffered "some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *In re Crown CoCo, Inc,* 458 NW2d 132, 135 (Minn App 1990) (quotation omitted). The injury must be traceable to the challenged action, and it must be capable of being redressed in court. *Id.* Economic injury may be sufficient to establish standing, so long as it is not abstract or speculative. *State v Knutson,* 523 NW2d 909, 911 (Minn App 1994), review denied (Minn, Jan 13, 1995); *Byrd v Indep Sch Dist No 194,* 495 NW2d 226, 231 (Minn App 1993), review denied (Minn, Apr 20, 1993).
>
> An organization can assert standing if its members' interests are directly at stake or if its members have suffered an injury-in-fact. *State ex rel Humphrey v Philip Morris Inc,* 551 NW2d 490, 497–98 (Minn 1996); *Minneapolis Fed'n of Teachers, Local 59 v Special Sch Dist No 1,* 512 NW2d 107, 109 (Minn App 1994), review denied (Minn, Mar 31, 1994).
>
> * * *
>
> Thus, because BAM's members suffered economic injuries, BAM itself derived associational standing to bring the action. The district court did not err in determining that BAM has standing.

Id. at 176-177.

New Jersey applies a "broad and liberal approach to standing" inquiry into: (1) whether the litigant has a sufficient stake in the outcome of the litigation; (2) whether there is a real adverseness in the proceeding; and (3) whether the complaint relates to matters of common interest, not individual grievances. *Garden State Equality v Dow,* 434 NJ Super 163, 197; 82 A3d 336 (NJ Super Ct, 2013). However, like Minnesota, the deciding factor and focal point of standing is on the injury to members, that is,

> . . . if an individual plaintiff has standing, the organizational plaintiff of which the individual is a member also has standing. *People For Open Gov't v Roberts,* 397 NJ Super 502, 515; 938 A2d 158 (App Div 2008)."

Id.

And, Pennsylvania, like Minnesota and New Jersey, targets only the first prong of the Hunt test as the criterion for associational standing. Accordingly, in Pennsylvania, an association has standing if at least one of its members has standing. As stated by the Pennsylvania Court:

> To have derivative standing, an organization must establish that at least one of its members is suffering immediate or threatened injury as a result of the challenged action. *Pa Med Soc'y v Dep't of Pub Welfare*, 615 Pa 574; 39 A3d 267 (2012).

Friends of Lackawanna v Dunmore Borough Zoning Hearing Bd, 186 A3d 525 (Penn Commw, 2018).

3. The Burden of Proof as to Standing

Many states, including Michigan, place the burden of demonstrating its standing on the plaintiff. See, for example, *Trout Unlimited, Muskegon White River Chapter v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992) ("To have standing, a plaintiff must demonstrate . . . ."). However, that is not the case in other states. For example, in Illinois,

because standing is an affirmative defense, the burden is not on the plaintiff to establish standing. Rather, it is the defendant's burden to plead and prove lack of standing. *Winnebago Co Citizens for Controlled Growth v City of Winnebago,* 383 Ill App 3d 735, 739; 891 NE2d 448 (2008). Similarly, in New York, the burden of establishing a plaintiff's lack of standing is on the defendant. *Shinnecock Neighbors v Town of Southampton*, 53 Misc 3d 874; 37 NYS3d 679 (2016).

4. Conclusion as to Standing

Michigan's historical approach to standing, like the states of Minnesota, New Jersey and Pennsylvania, has been broad and liberal. Under this approach, the emphasis for standing is on the first prong of the federal test announced in Hunt and an association has standing if its members would have standing. That is, an association has standing if at least one of its members has suffered immediate or threatened injury as a result of the challenged action. Under this framework, the Builders have standing in this case.

And finally, standing, or lack thereof, is an affirmative defense under Michigan law which, if not timely raised, may be waived. *Cross v Burhans*, unpublished opinion per curiam of the Court of Appeals, issued Dec 13, 2016 (Docket Nos. 328019, 328598); 2016 WL 7233833, attached as Exhibit B. Little or no explanation exists, however, why this affirmative defense, unlike other affirmative defenses, available under Michigan law, requires no proof, evidence or factual support on the part of the party raising the defense. Michigan law could align the burden of proof as to the affirmative defense of lack of standing with the other Michigan law affirmative defenses and place the burden of proof on the party raising that affirmative defense.

IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, the MHA and MSAE respectfully request that this Court grant their Motion for leave to file this Amici Curiae Brief in support of the position of Plaintiffs/Appellants.

McCLELLAND & ANDERSON, LLP
Attorneys for Amici Curiae,
Michigan Health and Hospital Association and
Michigan Society for Association Executives

By: */s/ Melissa A. Hagen*
Melissa A. Hagen (P42868)
Business Address:
1305 S. Washington Ave, Suite 102
Lansing, MI 48910
Telephone: 517-482-4890

Date: September 6, 2018

G:\docs\2700\C2795\M001\Amici Curiae Supp Brief fnl.wpd

LIST OF EXHIBITS TO MICHIGAN HEALTH AND HOSPITAL ASSOCIATION'S AND MICHIGAN SOCIETY OF ASSOCIATION EXECUTIVES' AMICI CURIAE SUPPLEMENTAL BRIEF IN SUPPORT OF THE POSITION OF PLAINTIFFS/APPELLANTS

A. *City of Laredo v Rio Grande H2O Guardian,* memorandum opinion of the Court of Appeals Texas, San Antonio, issued July 27, 2011 (Docket No. 04-10-00872-CV); 2011 WL 3122205

B. *Cross v Burhans*, unpublished opinion per curiam of the Court of Appeals, issued Dec 13, 2016 (Docket Nos. 328019, 328598); 2016 WL 7233833