

Founded in 1852
by Sidney Davy Miller

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May 22, 2012

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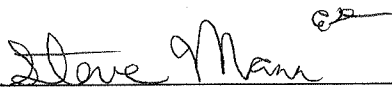
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Re: TIMOTHY ADER v. DELTA COLLEGE BOARD OF TRUSTEES,

Gentlemen:

With respect to the above captioned matter, enclosed please find a copy of the Brief of Amici Curiae The Michigan Municipal League, The Michigan Townships Association and the Public Corporation Law Section of the State Bar Of Michigan in Support of Defendant-Appellant's Brief on Appeal (and cover letter and Proof Service) which we filed yesterday with the Michigan Supreme Court.

Miller, Canfield, Paddock and Stone, P.L.C.

By: 
Steven D. Mann

SDM/bd

Enclosures

c: Don Schmidt, Esq.
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May 21, 2012

Via Hand Delivery
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Avenue
Lansing, MI 48915

Re: TIMOTHY ADER v. DELTA COLLEGE BOARD OF TRUSTEES
Supreme Court Case No: 143621
Court of Appeals Case No: 290583
Saginaw County Circuit Court No: 08-001822-CZ

Dear Clerk:

Enclosed for filing in relation to the above captioned matter, please find an original and twenty-four (24) copies of the Brief of Amici Curiae the Michigan Municipal League, the Michigan Townships Association and the Public Corporation Law Section of the State Bar of Michigan, in Support of Defendant-Appellant's Brief on Appeal. Also enclosed is our Proof of Service of same upon counsel of record.

We understand that a motion is not necessary pursuant to MCR 7.306(D)(2).

Please stamp and return the extra copy with our messenger and file in accordance with your usual procedures. Thank you for your assistance in this matter.

Miller, Canfield, Paddock and Stone, P.L.C.

By: Steven D. Mann
Steven D. Mann

SDM/bd
Enclosures
c: Parties of Record (via USPS)

20,158,288.1\1107546-00023



STATE OF MICHIGAN
IN THE SUPREME COURT

TIMOTHY ADER,

Plaintiff-Appellee,

v

DELTA COLLEGE BOARD OF TRUSTEES,

Defendant-Appellant.

Supreme Court Case No: 143621

Court of Appeals Case No: 290583

Saginaw County Circuit
Court No: 08-001822-CZ

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PROOF OF SERVICE

The undersigned certifies that on May 21, 2012 he served a copy of a Brief of Amici Curiae the Michigan Municipal League, the Michigan Townships Association and the Public Corporation Section of the State Bar of Michigan, in Support of Defendant-Appellant's Brief on Appeal upon:

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Service was made by first-class mail, postage prepaid, addressed as indicated.

I declare that the above statements are true to the best of my information, knowledge, and belief.

Steven D. Mann

Steven D. Mann

20,166,061.1\107546-00023

STATE OF MICHIGAN
IN THE SUPREME COURT

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DELTA COLLEGE BOARD OF TRUSTEES,

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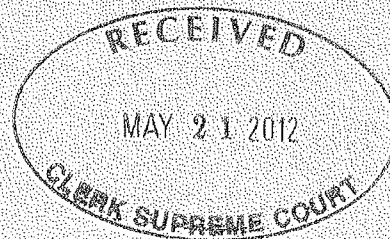
BRIEF OF AMICI CURIAE
THE MICHIGAN MUNICIPAL LEAGUE, THE MICHIGAN TOWNSHIPS
ASSOCIATION AND THE PUBLIC CORPORATION LAW SECTION OF THE STATE
BAR OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT'S
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STATE OF MICHIGAN
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STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt the jurisdictional summary of the Defendant-Appellant, Delta College Board of Trustees, in its Brief on Appeal.

STATEMENT OF QUESTION PRESENTED

WHETHER THE LEGISLATURE HAS THE AUTHORITY TO STATUTORILY
CONFER STANDING ON ANY PERSON WHERE THE PERSON HAS NOT
SUFFERED A PARTICULARIZED OR PERSONAL INJURY.

Appellant Delta College Board of Trustees answers:	No.
Appellee Timothy Ader answers:	Yes.
The Court of Appeals, on remand, (based on <i>Lansing Schools</i>) answered:	Yes.
The Court of Appeals (based on <i>Lee</i>) answered:	No.
The Saginaw County Circuit Court answered:	No.
Amici Curiae answer:	No.

STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts and Material Proceedings of the Defendant-Appellant, Delta College Board of Trustees, in its Brief on Appeal.

DESCRIPTION OF AMICI CURIAE

I. The Michigan Municipal League

The Michigan Municipal League is a non-profit corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. The brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Cities of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Cities of Farmington and Novi; and William C. Mathewson, general counsel, the Michigan Municipal League.

II. The Michigan Townships Association

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists in excess of 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more

efficient and knowledgeable administration of township government services under the laws and statute of the State of Michigan.

III. The Public Corporation Law Section of the State Bar of Michigan.

The Public Corporation Law Section (the "Section") is an affiliate section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to municipalities and other public entities in the state. The Section provides educational programs for its members as well as the public at large. Any member of the State Bar of Michigan is eligible for membership in the Section.

INTRODUCTION

This is a case of first impression. Who has standing to bring suit under the Open Meetings Act (OMA). The case has serious implications for the constituencies of all three Amici Curiae. The issue in this case is simple: whether a claimant must have suffered an actual injury to have standing to bring suit. Specific injury has been a longstanding requirement for one to avail themselves of the court; both for federal and state purposes. A recent decision of this court completely changed the standing requirement. The longstanding constitutional requirement for standing must be reinstated. To leave it unchanged would undermine the constitutional framework of separation of powers and judicial review.

All three Amici Curiae acknowledge and respect the importance of the OMA and the public's right to know how its business is being conducted. They realize that the public policy of this State has been clearly stated as being one of openness as set forth in the OMA. However, Amici also believe that it is extremely important that the rights of the public, as well as the obligations of those serving on public bodies, be consistent with the OMA as adopted by the Legislature -- not as expanded by judicial interpretation.

The Court of Appeals has effectively ruled that private citizens who have not suffered any personal particularized injury may bring an action against a public body for an alleged violation of the OMA. However, the plain language of the OMA does not support such an interpretation. This decision effects every public body in Michigan.

Practical Consequences

The decision in this case will have a striking effect on governmental entities across the state. As a result of the Court of Appeals' interpretation of the OMA, specifically with respect to

standing, the courts and public agencies, who are already operating with scarce resources, will potentially become overburdened by the sheer number of lawsuits they may have to defend.

Requested Relief Should be Granted Because the Court's Decision Effectively Amends the OMA

This Court should grant the Defendant-Appellant's requested relief in this case because the Court of Appeals' decision impermissibly amends the OMA. The Michigan Legislature enacted the OMA in 1976 to require public bodies to conduct nearly all of their business at open meetings as a way to ensure that Michigan citizens could participate in the governmental process. When the OMA was enacted, the understanding at the time was that unless a private citizen was hurt in a manner separate and distinct from the citizenry at large, a citizen had no standing to enforce a public right or vindicate a public wrong. Thus, there was no need to add a disclaimer in the language of the OMA to limit the standing of "a person" to those persons who have suffered a particularized injury. By removing the constitutional limitations on standing in their decisions, the Court of Appeals and this Court in *Lansing Schools* have effectively amended the OMA (and potentially other statutes with similar statutory standing provisions).

STANDARD OF REVIEW

Amici Curiae adopt the Standard of Review of the Defendant-Appellant, Delta College Board of Trustees, in its Brief on Appeal.

ARGUMENT

“Standing is the legal term used to denote the existence of a party's interest in the outcome of a litigation; an interest that will assure sincere and vigorous advocacy.” *Waterford Sch Dist v State Bd of Ed*, 98 MichApp 658, 662; 296 NW2d 328, 331 (1980) (citing *Michigan License Beverage Ass'n v Behnan Hall, Inc*, 82 MichApp 319, 324; 266 NW2d 808 (1978)).

I. THE LEGISLATURE DOES NOT HAVE THE AUTHORITY TO STATUTORILY CONFER STANDING ON ANY PERSON WHERE THE PERSON HAS NOT SUFFERED A PARTICULARIZED OR PERSONAL INJURY.

A. Standing Cannot Be Conferred By Statute Alone Without A Showing Of Actual And Particularized Injury

Until the anomalous opinion in *Lansing Schools Education Association*, 487 Mich 349; 792 NW2d 686 (2010), actual injury was a longstanding requirement for a party to have standing to bring suit. Prior to the change in law, this Court recognized standing as an “indispensable doctrine rooted in our constitution” and thus, a fundamental prerequisite to the prosecution of any lawsuit. *Michigan Citizens for Water Conservation v Nestle Waters North America*, 479 Mich 280, 292; 737 NW2d 447 (2007). “Standing ensures that a genuine case or controversy is before the court,” *Id.* at 294, and “requires a demonstration that that the Plaintiff’s substantial interest will be detrimentally affected in a manner different from the citizenry at large.” *Dodak v State Administrative Board*, 441 Mich 547, 554; 495 NW2d 539 (1993).

Prior to *Lansing Schools*, this Court held that standing to sue under a statute which creates a private right of action must be construed consistently with the constitutional requirement that an actual injury exists before a court may adjudicate a controversy. In *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich. 608, 684 N.W.2d 800 (2004), this Court construed the standing of a plaintiff to maintain a private cause of action under the

Michigan Environmental Protection Act, which provided that “[t]he attorney general or *any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.” *Id.* at 611 (emphasis added).

Although the statute in *Cleveland Cliffs* allowed for suit by “any person,” the majority held that to interpret “any person” literally would disregard the constitutional requirement of an actual injury. The Court held that for “any person” to have standing to bring suit under the statute, the plaintiff must allege that it “suffered either an actual injury or an ‘imminent’ injury.” *Id.* at 629. The Court further stated that where a defendant brings a summary disposition motion, “the plaintiff must further support the allegations of injury with documentation, just as he has to support the other allegations that make up his claim.” *Id.* at 631.

Just as in *Cleveland Cliffs*, the OMA purports to convey statutory standing to any person to bring an action:

If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a **person** may commence a civil action to compel compliance or to enjoin further noncompliance with this act. MCL 15.271(1) (emphasis added).

However, this broad conferment of standing, if relied upon as the sole basis for suit, disregards the constitutional requirement for actual injury.

With all due respect, this Court should reconsider its ruling in *Lansing Schools* where it found that, without more, “the fact that there [is] a cause of action under law, or the Legislature expressly confer[s] standing, [is] sufficient to establish standing.” *Lansing Schools*, 487 Mich at 357 (discussing the historical development of Michigan’s standing doctrine). In support of this blanket statement that “[i]f a party ha[s] a cause of action under law, then standing [is] not an

issue,” *Id.* at 359, the Court relied on a dissenting opinion dealing with the Michigan Environmental Protection Act and two opinions dealing with the Child Custody Act (CCA, MCL 722.21 et seq.). The CCA addresses disputes regarding a minor child’s custody, an area where particularized injury is almost inherent in those who are granted standing by the CCA: a guardian or limited guardian. But, the CCA goes on to *limit standing* if: the parent or parents have substantially complied with a limited guardianship placement plan (MCL 722.26b); or a third party *if* (1) the child was placed for adoption with that third party and the order was still effective when the action was filed, *and* after placement, the child resided with the third party for at least 6 months; or (2) the child’s biological parents were never married to one another, the parent with custody dies or is missing and the other parent has not been granted legal custody under court order, *and* the third party is related to the child within the fifth degree by blood, marriage, or adoption (MCL 722.26c). These limitations placed within the CCA on who is conferred standing are *more restrictive* than the general rule that a citizen plaintiff has standing if the citizen has “some individual interest in the subject matter of the complaint which is not common to all the citizens of the state.” *Lansing Schools*, 487 Mich at 356 (internal citations and quotation marks omitted).

Here, in granting citizens standing to bring suit, the OMA has no additional language restricting or placing conditions on the private citizen such as found in the CCA. It is inappropriate to generalize the law from those cases dealing with the CCA. The finding that “[i]f a party ha[s] a cause of action under law, then standing [is] not an issue,” *Id.* at 359, is not appropriate under the OMA. The only logical way to read the OMA’s conferment of standing to private citizens is in conjunction with the traditionally held standing requirements, which find their root in Michigan law and the constitution.

At least through *Cleveland Cliffs*, “‘judicial power’ in Michigan has been exercised only on behalf of plaintiffs who have suffered actual and particularized injuries.” 471 Mich at 636. Michigan courts have long held that without damages or an injury that can be attributed to the alleged wrong, an individual is not entitled to relief. *See, e.g., Henry v Dow Chemical Co*, 473 Mich 63, 77; 701 NW2d 684, 691 (2005) (finding that under both negligence and tort theories, an individual is only entitled to relief or recovery if the individual suffered an actual injury; also noting that “perhaps most significantly, the requirement of a present physical injury avoids compromising the judicial power. The exercise of the ‘judicial power’ by this Court contemplates that there will be standards—legally comprehensible standards that guide the judicial branch’s resolution of the matters brought before it. The present physical injury requirement establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim, and which plaintiffs have not. In the absence of such a requirement, it will be inevitable that judges ... will be required to answer questions that are more appropriate for a legislative than a judicial body”) (internal citation omitted).

B. Public Bodies Have A Particular Interest In Standing That Is Separate And Distinct From Individual Persons

Public bodies are active participants in the constitutional separation of powers, and therefore have a particular interest in standing that is different from an individual citizen’s right to sue someone. Public bodies operate in the public eye, are granted certain self-governing powers and immunities, and thus have a special status.

Under *Lansing Schools* and the Court of Appeals’ decision, the OMA elevates an individual private citizen to that of a “representative” for the public, irrespective of injury, and irrespective of the fact that public officials already hold this position through the democratic election process. Public officials represent the public’s interests and are held accountable for the

protection and representation of those interests. There are political consequences for public officials who fail to properly represent their constituents. An individual alone has no special power to represent or be responsible for the public. They are responsible only to and for themselves.

The OMA purports to confer standing to "a person," the attorney general or the prosecuting attorney to bring a claim. MCL 15.271(1). However, with respect to "a person," this must be read within the context of longstanding constitutional jurisprudence. Attorneys general and prosecuting attorneys have authority to enforce laws of this state. A private citizen does not. An attorney general is elected by the public; a prosecuting attorney is also elected by the public. A private citizen, on the other hand, has not been elected by the public, thus has no right to vindicate claims of the public. Individual citizens have no legal right to represent the public, nor would they face any political repercussions for filing a civil action. Thus, a citizen may only bring suit on his own behalf for a particular injury suffered.

However, this does not mean that reinstating the longstanding requirement for an individual to have incurred an actual injury to have standing to sue will remove recourse for private citizens or prevent them from exercising their right to have entities abide by laws. Citizens can always appeal to their publicly elected representatives for relief, or to the attorney general or prosecuting attorney to bring an action against an entity that has allegedly violated the OMA. Moreover, citizens who have suffered an actual injury may also bring suit, if the injury was due to the alleged violation.

C. Separation of Powers

As Justice Corrigan states in her dissent in *Lansing Schools* (concurring with Justices Young and Markman), "[t]he Michigan Constitution both separates the powers of the various branches of government and limits the power of the judicial branch to hear cases when actual

disputes exist. Thus, standing *is* a constitutional requirement. Because the Constitution vests the judicial power of the state exclusively in one court of justice, the source and boundary of this power is constitutional in nature.” *Lansing Schools*, 487 Mich at 418 (internal citation and quotation marks omitted) (emphasis in original).

“Moreover, separation of powers and its importance “is reaffirmed explicitly in our current Constitution, which states: ‘The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.’ Const 1963, art 3, §2.” *Id.* “Michigan has consistently acknowledged that the state’s constitution limits the judicial power to hearing disputes involving *actual* cases or controversies. Understanding this most basic of principles is imperative to defining what, precisely, this state’s doctrine regarding ‘standing’ should be because there is a clear link between the doctrine of standing and the separation of powers.” *Id.* at 419 (referencing *Allen v Wright*, 468 US 737 (1984)).

Justice Corrigan further found in her *Lansing Schools* dissent that “it is clear that the framers of Michigan’s constitution believed, first, that the judicial power is generally circumscribed by the case or controversy requirement and, second, that the only way to expand judicial power beyond the traditional case or controversy limitation was through affirmative amendment of the constitution.” *Id.* at 425. This finding is rooted in the language of Michigan’s constitution. *Id.* at 429.

The OMA cannot confer standing upon private citizens irrespective of particular injury. The OMA can only confer standing to the extent the citizen is also able to show actual, particularized injury. As with the CCA, the Legislature is free to place further limitations on a citizen’s right to bring suit, but it may not confer blanket standing to citizens to sue.

D. If Left Unchanged, The Resulting Flood Of Litigation Will Lead To A Waste Of Limited Judicial Resources And Public Funds, Time, And Energy

The decision in *Lansing Schools*, followed by the Court of Appeals in this matter, significantly broadens the scope of "judicial power" for Michigan courts. If standing can be conferred to private citizens without the need to show particularized injury, plaintiffs under the OMA would need no firsthand or personal interest and need not have suffered any harm to sue a public body. The OMA, as interpreted by the Court of Appeals' decision (and based on *Lansing Schools*) would allow an extremely unrelated party—someone without injury, who was not even a resident of the public body or in attendance at a public meeting—to bring suit for some alleged violation of the act. By way of example, as a result of an alleged violation of the OMA in southern Michigan, a person living in the Upper Peninsula could sue even if they did not attend the meeting and was not at all affected by the meeting. If no separate and distinct injury is required, standing, or the lack thereof under the OMA, may very well become a method and outlet of political opposition, opening the gates to flood the courts with political grievances. Under this decision, public agencies will be increasingly spending their limited resources defending and administering suits, which takes away from their ability to deliver services to the public.

This broadened scope of standing poses a serious burden to local governments and the courts. Defense of OMA claims takes scarce staff time and resources and results in the expenditure of legal defense costs, not to mention damages and mandatory attorney fees. Section 15.271(4) provides that: "If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action." MCL 15.271(4)

(emphasis added). Moreover, even if “the purpose of the OMA [is] essentially and realistically fulfilled,” a court would still award the mandatory attorney fees and court costs if the defendant was found to have violated the OMA. *Nicholas v Meridian Charter Twp Bd*, 239 MichApp 525, 532-533; 609 NW2d 574, 578-579 (2000) (awarding plaintiffs attorney fees and costs because the defendants had committed a technical violation of the OMA, even though the court found that “rights of the public” were not impaired by defendants’ actions and that “the purpose of the OMA was essentially and realistically fulfilled”).

All of this detracts from the ability of local governments to deliver services essential to their constituencies. There must be some reasonable limit to bringing suit—that limit is personal injury.

The Legislature enacted the OMA in 1976 to require public bodies to conduct nearly all of their business at open meetings as a way to ensure that Michigan citizens knew what was going on in the government. When the OMA was enacted, the understanding at the time was that unless a private citizen was hurt in a manner differently than the citizenry at large, a citizen had no standing to enforce a public right or vindicate a public wrong. See *Waterford*, 98 Mich App at 662 (“Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large.”) (citing *Inglis v Public School Employees Retirement Board*, 374 Mich 10; 131 NW2d 54 (1964)). “The framers of a constitution are presumed to have a knowledge of existing laws, and to act in reference to that knowledge.” *Council of City of Saginaw v Bd of Trustees of Policemen & Firemen Ret Sys of City of Saginaw*,¹ 321 Mich 641, 647, 32 N.W.2d 899, 902 (1948) (quoting *City of Detroit v Chapin*, 108 Mich 136, 142 (1895), in turn quoting *People ex rel Hughes v May*,

¹ While the court in *Saginaw* was dealing with an amendment to the constitution, the sentiment can be analogized to the drafting of laws—the Legislature is presumed to act in reference to its knowledge of existing laws when drafting new ones (or amending old ones).

3 Mich 598 (1855)). Similarly, “[t]he Legislature is presumed to know of and legislate in harmony with existing law.” *Matter of Colon*, 144 MichApp 805, 811; 377 NW2d 321, 325 (1985) (citing *Rochester Community Schools Bd of Ed v State Bd of Ed*, 104 MichApp. 569, 578; 305 NW2d 541 (1981)). Thus, in drafting the OMA, there was no need to add a disclaimer to limit standing of “a person” to only those persons who have suffered a particularized personal injury.

As stated above, the only logical way to read the standing provision in the OMA is in conjunction with the constitution. If the Legislature did not consider constitutional limitations on the laws it drafts, it essentially disregards those limitations, thus defeating the purpose of having constitutional limitations. Just as lawmakers are expected to have knowledge of existing laws, new laws should be read and interpreted within the context of existing laws.

If the decisions of this Court in *Lansing Schools* and the Court of Appeals in this case are not reversed, the Legislature may be forced to revisit previously enacted laws that confer standing to ensure that the intent at the time of adoption is still consistent under *Lansing Schools*.

CONCLUSION AND RELIEF REQUESTED

This appeal involves an issue of great significance to the jurisprudence of this State and to every governmental entity in Michigan. For over a hundred years, Michigan courts found that standing could not be conferred by statute irrespective of an actual injury. The decisions of *Lansing Schools* and of the Court of Appeals have upended this position, which is grounded in the Michigan and Federal constitutions. This case presents this Court with the opportunity to revisit the decision of *Lansing Schools* as applied by the Court of Appeals and to reinstate the longstanding requirement of actual injury for a party to have standing to bring suit.

For the reasons set forth above, Amici Curiae respectfully request that this Court grant Defendant-Appellant's requested relief and reverse the decision of the Court of Appeals.

Respectfully submitted,

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