To: Friends of Cause of Action

From: Cause of Action Staff

Date: 4/3/2012

Re: Associational Standing Grounded in Injuries to Facebook Members

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April 2012: Issues of First Impression Memorandum

I. Question Presented

Is it possible for a public-interest organization to litigate issues as a plaintiff by asserting associational standing to sue based on alleged injuries to Facebook and other social-media followers or members, thereby enabling or compelling federal courts, consistent with constitutionally mandated Article III and prudential standing requirements, to reach the merits of the public-interest organization's claims?

II. Short Answer

Probably not. Although courts use a functional indicia-of-membership analysis, as opposed to a bright-line test, to determine whether a putative "association" has individual members that have suffered sufficient injury to have standing to sue in their own right, merely belonging to an organization's Facebook page, following the organization on Twitter, commenting on a Facebook Wall, or the like will almost certainly not be sufficient, standing alone, to make someone a "member" on whose behalf an organization may sue. Further, the Supreme Court has repeatedly made clear that at least one *identified* member of an organization must have suffered a constitutionally sufficient injury before the organization can sue in federal court on that member's behalf.

III. Analysis

A. Overview of Constitutional Requirements for Associational Standing

An association has standing to represent the interests of its members when (i) the *individual member* would have standing to sue in their own right; (ii) the *interests* the association seeks to protect are "germane" to its purpose; and (iii) the nature of the claim and the relief sought are such that the presence of the individual members is not required.[1] In 2009, in *Summers v. Earth Island Institute*,[2] the Supreme Court reaffirmed the well-established proposition that the law of organizational standing requires plaintiff organizations to make specific allegations establishing that at least one identified member has suffered or would suffer harm—meaning that at least one member that has alleged a constitutionally sufficient injury must be specifically named (in light of *Iqbal* and *Twombly*, he, she, or it would likely have to, as a practical matter, submit an affidavit as well)—unless *all* of the members suffer the same harm.[3] By implication, then, the person or entity that has allegedly suffered a constitutionally sufficient injury must be a *member* of the association.

B. "Membership" Jurisprudence

Courts use an indicia-of-membership test, first announced in *Hunt*,[4] *supra*, to determine whether an organization is a "membership association" and, if so, whether a person or entity is a "member" of that membership association.[5] Though there is some divergence of authority regarding the analysis required by the indicia-of-membership test and how much weight to accord to that prong of the *Hunt* analysis for associational standing,[6] it is clear that it requires is a

[1] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), *superseded by statute on other grounds*; *see, e.g., National Motor Freight Assoc. v. United States*, 372 U.S. 246 (1963) (association of motor carriers may represent the interests of its members in challenging an order of the Interstate Commerce Commission). Associational standing can exist on multiple levels. *E.g., New York State Club Assoc. v New York City*, 487 U.S. 1 (1988) (association of associations has standing to bring suit on behalf of its member associations so long as they, in turn, would have standing to bring suit on behalf of their individual members).

[2] 555 U.S. 488 (2009).

[3] *Id.* at 498-99. The *Summers* Court observed in dictum that "[w]ithout individual affidavits, how is the court to assure itself that the Sierra Club, for example, has 'thousands of members' who 'use and enjoy the Sequoia National Forest'?" *Id.* at 499. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (all organization members affected by release of membership lists, thus no need to name specific member).

[4] *See Hunt*, 432 U.S. at 344-45 ("Moreover, while the apple growers and dealers are not 'members' of the Commission in the traditional trade association sense, they possess all of the *indicia of membership* in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, 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.").

[5] *See, e.g., American Legal Foundation v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) ("ALF's relationship to its 'supporters' bears none of the indicia of a traditional membership organization discussed in Hunt. With its broadly defined mission as a 'media watchdog,' ALF serves no discrete, stable group of persons with a definable set of common interests. To the contrary, ALF's constituency of supporters is completely open-ended; ALF could, consistent with this 'institutional commitment,' purport to serve all who read newspapers, watch television, or listen to the radio. Furthermore, it does not appear from the record that ALF's 'supporters' play any role in selecting ALF's leadership, guiding ALF's activities, or financing those activities. Finally, we can discern no linkage between ALF's interest in the outcome of this kind of litigation and those of its supporters.").

[6] *See* Kristen L. Melton, Friends of the Earth, Inc. v. Chevron Chemical Co.: *The United States Court of Appeals for the Fifth Circuit Extends Associational Standing to a Nonmembership, Nonprofit Corporation*, 72 Tul. L. Rev. 1875, 1886-87 (1998) ("In determining whether to extend associational standing to organizations seeking to represent

functional rather than formal analysis. In *Friends of the Earth v. Chevron Chemical Co.*,[7] for example, the Fifth Circuit concluded, *inter alia*, that "an organization's form under state law does not affect its federal standing,"[8] describing the indicia-of-membership inquiry thus:

> The next step is to apply the *Hunt* 'indicia of membership' test. The Court in *Hunt* looked to who elected the governing body of the organization and who financed its activities. The purported members of FOE meet both these elements. Additionally, the members have voluntarily associated themselves with FOE, in contrast to the apple growers who financed the Commission through mandatory assessments. The individuals testified in court that they were members of FOE. FOE has a clearly articulated and understandable membership structure. This suit clearly is within FOE's central purpose, and thus within the scope of reasons that individuals joined the organization. For all these reasons, FOE has associational standing to represent its members.

More recently, a federal district court explained the inquiry this way:

> Corporate formalities and formal membership structure are not constitutional requirements for associational standing. In determining whether the relationship between an association and its members is sufficiently close for constitutional standing, courts do not "exalt form over substance." Thus, the association must demonstrate that the individuals it seeks to represent possess sufficient "indicia of membership." The purpose of the inquiry is to determine whether the association provides the means by which its members "express their collective views and protect their collective interests." In *Chevron*, the Fifth Circuit found associational standing even though a non-profit environmental organization did not have formal membership requirements. The court reasoned that the organization's members joined voluntarily, testified that they were members, elected the organization's governing body, and financed the organization's activities. The court also reasoned that the "practice of considering all those who gave a donation, as well as those who had a donation made in their name, to be members" was a "clearly articulated and understandable membership structure."[9]

The U.S. District Court for the District of Columbia recently opined that even an organization without formal members can have the "functional equivalent" of members under some circumstances:

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nonmembers, the United States Courts of Appeals for the Third, Sixth, and Seventh Circuits focus almost exclusively on the second factor of Hunt's three-factor analysis, the 'indicia of membership' test, and fail to apply even that factor rigorously. The District of Columbia Circuit, however, applies all factors and distinguishes between members and others who may associate with an organization, such as general supporters. Similarly, some district courts examine all three factors and recognize distinctions between members and solicitors, contributors, and customers. Until the noted case, neither the Fifth Circuit nor its district courts had addressed associational standing for a nonmembership corporation.").

[7] 129 F.3d 826 (1997).

[8] *Id.* at 828.

[9] *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 675 (E.D. La. 2010).

> [A]n organization with no formal members can still have associational standing if it "is the functional equivalent of a traditional membership organization." Three main characteristics must be present for an entity to meet the test of functional equivalency: (1) it must serve a specialized segment of the community; (2) it must represent individuals that have all the "indicia of membership" including (i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities; and (3) its fortunes must be tied closely to those of its constituency.

The bottom line is that there is some confusion in the courts regarding the specific analysis but there is a consensus understanding that it is indeed a functional inquiry.

C. "Membership" Based on Facebook or Other Social-Media Contacts with an Organization

It is doubtful there is any case law addressing the specific topic of this memorandum. It is an issue of first impression. As explained *supra*, although there are salient distinctions in the analysis that different jurisdictions use,[10] there are some common elements. Applying these common elements using analogical reasoning to the issue presented, it is difficult to conceive of a circumstance where a person or entity's mere Facebook following or membership via Facebook or other social-media-related connections with an organization would be sufficient, standing alone, to allow an organization to use that person or entity's injury to serve as a basis for Article III and prudential standing. To be sure, this is a fact-specific analysis, which will vary accordingly based on the characteristics of and relationship between the organization and its putative "members." However, absent some other connection between the organization and the putative "member," mere social-media-related connections, standing alone, will likely be insufficient to confer standing.

It is worth noting, however, that a public-interest organization of any stripe could conceivably organize itself in such a way to make it much more likely for a Facebook or other

[10] *Compare Public Interest Research Group v. Magnesium Elektron, 123 F.3d 111, 119 (3d Cir. N.J. 1997)* ("MEI argues that PIRG lacks organizational standing because its members do not have standing to sue individually based on the facts of this case. MEI's counsel also contended at oral argument that PIRG and FOE lacked standing because their charters prohibit them from having members. We do not accept this formalistic argument because it lacks merit. To meet the requirements of organizational standing, PIRG and FOE need only prove that their members possess the "indicia of membership" [**20] in their organizations. Hunt, 432 U.S. at 344, 97 S. Ct. at 2442. Thus, in considering PIRG's standing, we will consider only if PIRG's members would have standing as individuals to sue MEI."), *with American Legal Found. v. FCC*, 808 F.2d 84, 88, 91 (D.C. Cir. 1987) (finding that a nonprofit legal foundation whose charter prohibited the foundation from having members did not have standing to represent the interests of television viewers or supporters), *and Health Research Group v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979) (holding that public interest organization, organized as nonprofit corporation under the laws of the District of Columbia, did not have representational standing to sue on behalf of its contributors and supporters, noting that "[a]lthough none of the characteristics of the non-membership association ... [are] immutable requirements for representational standing of all non-membership organizations, Hunt clearly reaffirms that a plaintiff cannot gain standing merely on a showing that its interests and expertise are germane to the interests of any third parties who would have standing in their own right ... [and] strongly suggests that some very substantial nexus between the organization and the parties it purports to represent will be required where those parties are not actually members").

social-media follower or member to be characterized as a "member" of a "membership association" on whose behalf the public-interest organization could litigate matters. For example, by allowing Facebook followers to vote or donate to the organization or by somehow ensuring that the interests of the Facebook follower and organization are closely aligned, it would make it more likely that a court would conclude that the entity has organizational standing.