IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,115

NORTH BROWARD HOSPITAL DISTRICT, a special tax district,

Petitioner,

v.

SHARON T. FORNES,

Respondent.

QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE COMMON CAUSE OF FLORIDA

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INTEREST OF AMICUS CURIAE

Common Cause of Florida ("Common Cause") is a non-profit, non-partisan organization with a membership of more than 12,000 persons throughout the state. Common Cause was organized to encourage greater public participation in all levels of government, and believes that citizen standing in judicial proceedings is necessary for public participation to become a reality. Effective citizen involvement in local government is precluded if citizens cannot hold their public officials accountable in judicial proceedings. Common Cause has an active interest in seeing that residents of municipal service taxing units have standing to initiate judicial proceedings to ensure that such taxing units exercise their powers in a manner consistent with state law.

Common Cause's interest in this case is to ensure that taxpayers have access to the courts to hold accountable public officials whose illegal actions may increase their taxes. Common Cause therefore asks this Court to affirm the decision of the Fourth District Court of Appeal, and answer the certified question in the affirmative. The Fourth District's opinion is supported not only by the decisions of this Court but by Florida's long-established policy of providing citizen access to the courts. This Court should affirm the Fourth District for the following reasons:

First, a reversal of the Fourth District's decision would be contrary to the prior decisions of this Court regarding taxpayer standing. In fact, prior to the Second

District's decision in Godheim v. City of Tampa, 426 So.2d 1084 (Fla. 2nd DCA 1983), which denied a taxpayer standing to challenge an illegal government expenditure, the courts of this state had never refused to grant standing to a taxpayer who alleged an increased tax burden resulting from an illegal act. As both the Fourth and First Districts have now recognized, Godheim is an aberration. It departs from rudimentary precepts of traditional Florida standing law, and should not be followed here.

Second, there is no factual support for the argument that affirmance of the Fourth District's opinion will open the floodgates for frivolous taxpayer litigation. The Fourth District has accurately stated the current law of taxpayer standing and there is no evidence that the rule of standing has impaired the normal functioning of local governments or has burdened the courts.

Third, if taxpayers wish to challenge a local government's violation of competitive bidding procedures, they should not be forced to depend on a rejected bidder or a government official to initiate a legal suit to safeguard their rights. Common Cause believes citizen initiated judicial review is the only sure way to guarantee governmental responsibility.

Finally, although this Court has used the term "special injury" to describe the injury a taxpayer suffers when illegal government action increases his taxes, the injury is actually the same as that of all others who pay

taxes to the unit of local government which has acted illegally. As such, "special injury" is not a useful term to describe the showing required of a taxpayer who challenges illegal conduct of local government. Where a taxpayer has alleged that local government has acted illegally, the allegation that his taxes will thereby be increased has been and should remain sufficient to confer standing. Requiring a taxpayer to show some injury, above and beyond the increased taxes that he and other taxpayers will suffer, would preclude virtually all taxpayer suits against local government for their illegal conduct.

STATEMENT OF THE CASE AND FACTS

Common Cause adopts the Statement of the Case and Statement of Facts contained in the Brief of Respondent Sharon Fornes.

QUESTION CERTIFIED

> Does a taxpayer who alleges that the taxing authority is acting illegally in expending public funds, which will increase his tax burden, have standing to sue to prevent such expenditure, or is it necessary that he suffer some other special injury distinct from other taxpayers (as opposed to other inhabitants) or launch a constitutional attack upon the taxing authority's action in order to have standing?

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL PROPERLY INTERPRETED THE DECISIONS OF THIS COURT IN HOLDING THAT A TAXPAYER ALLEGING AN INCREASED TAX BURDEN HAS STANDING TO SUE TO ENJOIN AN ILLEGAL EXPENDITURE OF PUBLIC FUNDS

The Fourth District Court of Appeal held that Respondent Sharon Fornes ("Fornes") had standing to sue Petitioner North Broward Hospital District (the "District") to enjoin an allegedly illegal expenditure of public funds which would increase her tax burden. Fornes v. North Broward Hospital District, 455 So.2d 584 (Fla. 4th DCA 1984). In reaching this conclusion, the Fourth District followed a long line of Florida Supreme Court cases which have upheld the right of taxpayers to sue public officials where illegal actions would increase the public's tax burden. Accordingly, this Court should answer the certified question in the affirmative: A taxpayer who alleges that a taxing authority is acting illegally in spending public funds, which expenditure will increase his tax burden, has standing to prevent such expenditure and need not suffer any other injury or launch a constitutional attack on the taxing authority's action.

In the Fornes opinion, the Fourth District rejected the Second District's decision in Godheim v. City of Tampa, 426 So.2d 1084 (Fla. 2d DCA 1983). In Godheim, the Second District misconstrued Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (Fla. 1917) and, for the first time, denied

a Florida taxpayer standing to prevent an illegal expenditure of public funds, holding that a taxpayer would have standing to enjoin such an expenditure only if that taxpayer suffered a special injury distinct from other taxpayers. In his thoughtful dissent, Judge Lehan showed that the majority opinion in Godheim created a barrier for taxpayer-plaintiffs which this Court has never approved of. Indeed, the majority opinion has now been rejected, not only by the Fourth District, but more recently by the First District in Bull v. City of Atlantic Beach, No. AW-339, slip. op. (Fla. 1st DCA Jan. 8, 1985). This Court's adoption of the Godheim decision would require the reversal of a long line of cases dating back to 1856. But more importantly, approval of the Godheim decision would completely prohibit taxpayers from enjoining illegal government expenditures unless they were to allege that the government's action was not only illegal but also unconstitutional.

A. The Taxpayer Standing Requirements of Rickman v. Whitehurst Have Been Misconstrued

Since 1983, three District Courts of Appeal have considered the rule of taxpayer standing originally stated by this Court in Rickman v. Whitehurst, supra. Those cases are Fornes v. North Broward Hospital District, supra; Bull v. City of Atlantic Beach, supra; and Godheim v. City of Tampa, supra. Seven of nine judges who have considered the issue have concluded that the Rickman Rule, which grants a

taxpayer standing to enjoin an illegal local government expenditure when he alleges an increased tax burden will result from the expenditure, is the law of Florida. Two, however, have felt constrained by recent holdings of this Court and have abandoned the rule set forth in Rickman.

Judge Grimes, in his majority opinion in Godheim, conceded that Rickman may have been misinterpreted, but relied on this Court's recent pronouncements on the Rule in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) and Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). He stated that this Court had in those opinions "unmistakenly interpreted Rickman to mean that the plaintiff must show a special injury different from other taxpayers in order to have standing to bring a taxpayer's suit," and that this Court "intended to impose the special injury requirement upon all taxpayer suits except where constitutional issues are involved." Id. at 1087-1088. While Judge Grimes conceded that the dissent of Judge Lehan advanced good reasons for permitting a taxpayer to attack the legality of government acts which increase his tax burden, he nonetheless felt bound by the "highly debatable" policy choice in Markham, first described in Paul v. Blake, 376 So.2d 256, 259 (Fla. 3d DCA 1979): "that without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits."

Since Godheim, both the Fourth and First District Courts of Appeal have rejected Judge Grimes' analysis, and have agreed instead with the dissent of Judge Lehan. In Fornes, Judge Downey recognized the present "uncertainty" regarding standing requirements in taxpayer suits, pointing to the divergent opinions in Godheim. Nevertheless, he determined that this Court had not overruled Rickman in either Horne or Markham and read the Rickman rule as meaning that:

> an allegation [by a taxpayer] of an increased tax burden fulfills the standing requirement because it constitutes a peculiar injury distinct from other inhabitants.

455 So.2d at 586 (emphasis in original). Judge Downey also concluded there are persuasive policy reasons why a taxpayer whose taxes would be increased by an illegal expenditure should be allowed to bring suit to enjoin such illegality, and questioned whether enforcement of such laws should be left only to public officials and bidders. Id.

Only three months after the Fourth District decided Fornes, a unanimous panel of the First District issued an opinion relying on Fornes and Judge Lehan's dissent in Godheim. Bull v. City of Atlantic Beach, supra. Thus, there is a real conflict between the District Courts of Appeal on the interpretation of this Court's opinion in Rickman.

1. Rickman requires a special injury of increased tax burden

In Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (Fla. 1917), a taxpayer filed an action against the commissioners of DeSoto County and the bond trustees of a special road and bridge taxing district to restrain them from using bond monies to construct roads and bridges, except under a contract to the lowest bidder pursuant to a competitive bid procedure. While the taxpayer alleged an illegal expenditure of public funds, he failed to allege that he would suffer an increased tax burden as a result of that expenditure. The Supreme Court ruled the taxpayer did not have standing to sue because of that omission, and laid down the rule that an affected taxpayer may bring a suit to enjoin government expenditures:

> The right of a citizen and taxpayer to maintain a suit to prevent the unlawful expenditure by public officials of public moneys, unless otherwise provided by legislative enactment, is generally recognized.

A taxpayer may maintain an action:

> if the acts complained of were unauthorized and . . . tended to produce a resultant injury to the complainant by increasing the burden of his taxes.

Id. at 207 (citations omitted).

In Rickman the Court went on to explain the principle behind the rule:

> [T]he taxpayer is necessarily affected and his burdens of taxation increased by any unlawful act of the [public officials] which may increase the burden to

> be borne by the taxpayers of the county, and no relief from such injury is obtainable elsewhere than in a court of equity.

Id. at 207 (emphasis added).

The Rickman opinion contains additional language referring to the plaintiff taxpayer who fails to plead any sort of injury.[1/] Such taxpayer plainly has no standing:

> [The Taxpayer whose tax burden will not increase] is not contradistinguished from that of all other taxpayers, or citizens who are not taxpayers, and therefore cannot invoke the aid of equity merely to prevent an unlawful corporate act. . . .

Id. But as this Court implicitly and other courts explicitly have recognized, the distinction being made by the Court in Rickman is between those taxpayers in the taxing district whose tax burden will increase and taxpayers elsewhere and non-taxpayer residents of the district who will be unaffected by the increased taxes in the district. Accord, Robinson's, Inc. v. Short, 146 So.2d 108, 112 (Fla. 1st DCA 1962), cert. denied, 152 So.2d 170 (Fla. 1963).

The District and amici curiae appearing on behalf of the District, however, have read this language in Rickman to require a "special" injury different from that of other taxpayers within the taxing district. But, as pointed out by Judge Lehan, such a construction negates taxpayers'

1/ In Rickman, the County Commission had elected to use less expensive day labor, rather than to contract with the lowest bidder, for the construction at issue. Therefore no increased cost or tax increase (injury) could be alleged. 74 So. at 207.

standing to challenge the illegal conduct of their public officials because the aggrieved taxpayers in the district will all be equally injured by the increase in their tax burdens.

2. Neither Horne nor Markham overruled Rickman

The taxpayer cases on which the District relies simply do not support the District's argument. In Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972), taxpayers launched a constitutional attack contesting the validity of a legislative appropriations act without alleging a special injury to themselves. While the Court discussed the "Rickman Rule" as requiring a "showing of special injury," it did not determine that allegations of increased tax burden would not satisfy that requirement. Id. at 662.[2/] Rather the Court held that where there is a constitutional basis for the challenge, no showing of increased tax burden is required. The Court specifically stated that an "ordinary citizen" could bring a constitutional challenge. Id. at 663.[3/]

2/ Indeed, in prior holdings the Court expressly held the contrary. See, e.g., Lewis v. Peters, 66 So.2d 489, 492 (Fla 1953); Bryan v. City of Miami, 56 So.2d 924, 926 (Fla. 1951).

3/ In Horne, Florida adopted the federal rule of standing articulated in Flast v. Cohen, 392 U.S. 83 (1968), as an independent ground for attacking government taxing and spending. Flast permits federal standing where there is an

(Footnote Continued)

The District also relies heavily on Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). In that case, the Court held that a property appraiser, both in his official capacity and as a taxpayer, lacked standing to seek a declaratory judgment concerning application of a statute requiring taxation of non-residents' household goods. In Markham, there was no allegation of any injury, through increased tax burden or otherwise, nor was there any constitutional attack. Thus, the taxpayer failed to satisfy the standing requirements of either Rickman or Horne.

The District, however, bases its entire argument that Rickman has been reversed sub silentio on certain dicta in Markham:

> It has long been the rule in Florida that, in the absence of a constitutional challenge, a taxpayer may bring suit only upon a showing of special injury which is distinct from that suffered by other taxpayers in the taxing district.

Id. at 1121 (citation omitted). Common Cause acknowledges this language in Markham is troublesome. But only the two judge majority in Godheim has concluded this dicta accurately states Florida law on standing in taxpayer suits. Every other Supreme Court case on taxpayer standing holds

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(Footnote Continued)

attack on specific constitutional grounds. Much earlier, in Frothingham v. Mellon, 262 U.S. 447 (1923), the U.S. Supreme Court had recognized that taxpayers of municipal governments had standing to challenge the validity of municipal expenditures. Id. at 486.

otherwise[4/] and both the First and Fourth Districts have followed the holdings of this Court rather than the dicta in Markham.

B. The Importance of Allowing Taxpayers Access To Courts To Enjoin Illegal Government Expenditures Outweighs The Possibility That Courts Will Be Inundated With Frivolous Claims

1. Fear of proliferation of baseless suits is unfounded

The admonition that liberalized standing will open the floodgates to frivolous litigation and prevent public officials from performing their duties has no basis in fact. Florida courts have not been inundated with frivolous taxpayer suits although the courts of this State have been open to taxpayers since 1856. Cotton v. Commissioners of Leon County, 6 Fla. 610 (Fla. 1856). The District cites Department of Administration v. Horne, supra, in support of its position that affirmance of the Fourth District will open the proverbial floodgates and inflict on all taxpayers the "high legal

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4/ See, e.g., Lewis v. Peters, 66 So.2d 489 (Fla. 1953); Bryan v. City of Miami, 56 So.2d 924 (Fla. 1951) (en banc); Marrell v. Lake County, 199 So. 491 (Fla. 1940) (en banc); Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 357 (Fla. 1936) (en banc); Barrow v. Smith, 158 So. 819 (Fla. 1935); City of Daytona Beach v. News Journal Corp., 116 Fla. 706, 156 So. 887 (1934); Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931); Thursby v. Stewart, 133 So. 742 (Fla. 1931); Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (1930); Hathaway v. Munroe, 97 Fla. 28, 119 So. 149 (Fla. 1929).

cost" associated with "numerous and unfounded litigation challenges." (Petitioner's Initial Brief at 10)[5/] Horne says no such thing. What Horne does say is that "it is the 'ordinary citizen' and taxpayer . . . who is sometimes the only champion of the people." Id. at 663 (emphasis added). Indeed, this Court in Horne expressly declined to deprive responsible taxpayers of their "right of attack" on illegal expenditures, stating such right outweighed "possible unwarranted litigation that might in some instances ensue." Id.

Even though this Court in Horne determined that taxpayer standing was more important than the possible increased litigation which might result from such standing, the District asks this Court to reverse that position and require all Florida courts to reject meritorious taxpayer complaints challenging illegal governmental actions on nonconstitutional grounds, merely because some taxpayer claims may be frivolous. The problem with engrafting onto taxpayer suits a requirement that the plaintiff allege an injury different from that of other taxpayers is that it

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5/ The District also relies on United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974). The only language in Sand Key that relates to frivolous suits is a quote from Askew v. Hold the Bulkhead - Save Our Bays, Inc., 269 So.2d 696 (Fla. 2d DCA 1972), ovrl'd sub nom., Save Sand Key, Inc. v. United States Steel Corp., 281 So.2d 572 (Fla. 2d DCA 1973), quashed, 303 So.2d 9 (Fla. 1974), a land use case which concerned a citizen group's attempt to halt construction of recreation facilities on land donated to the state for public use. That quote forewarns of "interminable litigation" which portends to hamper public officials' discretion in the performance of their duties. Save Our Bays says nothing about litigation to prevent unlawful expenditures or give-aways.

effectively precludes taxpayer suits altogether. Clearly, standing is just the threshhold requirement in a suit to enjoin government illegality. Granting taxpayers standing may cause more complaints to be filed but it will hardly inundate the courts. Suits that are without merit will be summarily disposed of early on and will not place an undue burden on public officials or the judicial system.

The Godheim majority relied on the Third District decision Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1979), for the contention that special injury standing requirements are justified to "guarantee that the state and counties lawfully exercise their taxing and spending authority without unduly hampering the normal operations of a representative democratic government." 426 So.2d at 1087. Judge Grimes himself conceded that adoption of the special injury standing rule was a highly debatable policy choice but decided that Markham and Horne made it the clear choice of this Court in taxpayer suits based on non-constitutional grounds. But Florida has never been inundated with frivolous taxpayer suits during the entire period that this Court's decisions were interpreted in a way that would grant Fornes standing, as suggested by Judge Lehan's dissent in Godheim. 426 So.2d at 1096.[6/]

6/ Neither the District nor amici curiae who are supporting the District's position have provided any authority to show that an increase in frivolous lawsuits occurs when citizens freely are granted standing to sue. There is no

(Footnote Continued)

Courts do not always provide the least expensive or most efficient forum for protecting citizen rights. But when those rights are affected by illegal conduct of government officials, courts often provide the only forum in which members of the public can vindicate their rights. The "floodgates" argument is more often than not advanced by those who wish to insulate their conduct from judicial scrutiny. Although the District obviously wishes to be exempt from taxpayer lawsuits, such motivation is hardly a proper ground for reversing this Court's established precedent on taxpayer standing.

2. There are multiple deterrents to frivolous suits

While frivolous taxpayer lawsuits have not burgeoned even though the opportunity for abuse of the taxpayer standing privilege already exists, there are mechanisms for

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(Footnote Continued)

evidence of an increase even where standing is conferred by statute. See, e.g., Sections 542.22(1)-23, Florida Statutes (1983) (damages and equitable relief authorized under Florida Antitrust Act); Section 817.41, Florida Statutes (1983) (misleading advertising); Section 812.035, Florida Statutes (1983) (civil theft). These statutory provisions indicate an awareness that citizens are the proper and most effective parties to act as "watchdogs"; their enactment has promoted stricter enforcement of the laws.

Professor Kenneth Culp Davis notes that statutes of the 1970's affording standing to "any interested person" or "any person" have not given rise to an inordinate amount of litigation. 4 K. Davis, ADMINISTRATIVE LAW TREATISE § 24:6 (2d ed.) (1984). See also Meyers, Standing in Public Interest Litigation: Removing the Procedural Barriers, 15 Loy. L.A.L.Rev. 1 (1981).

discouraging frivolous litigation. For example, Rule 1.150, Florida Rules of Civil Procedure, provides for the dismissal of sham pleadings and Section 57.105, Florida Statutes provides for recovery of attorney's fees by prevailing parties in civil actions where the losing party fails to raise a justiciable issue of either law or fact. No Florida statute provides for attorney's fees in unsuccessful litigation against the government. Indeed, under the Sunshine Act, Section 286.011(4), Florida Statutes, attorney's fees may be assessed against the unsuccessful litigant. In view of the substantial expense of litigation and the possibility that attorney's fees may even be assessed against the taxpayer, there is simply no motivation for a taxpayer to bring a baseless claim against government officials. And those claims that have no merit will be disposed of promptly.

C. Neither The Attorney General Nor Unsuccessful Bidders Can Adequately Protect The Public From Illegal Acts of Government

This Court has never adopted the position that the rights of individual taxpayers are adequately safeguarded by public officials and unsuccessful vendors. In Horne, the Court conceded that taxpayer suits were necessary:

> It would be appropriate in such a taxpayer's suit that, as in other similar instances, the certificate of the Attorney General be provided, setting forth that he elects not to sue, as a predicate to a taxpayer proceeding. . . .

> Despite our reluctance to open the door to possible multiple suits by "ordinary citizens," nonetheless, it is the "ordinary citizen" and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause.

Id. at 663 (emphasis added). Thus, the Court recognized the improbability of the Attorney General becoming involved in actions to enjoin unlawful expenditures, even those based on purely constitutional grounds. The Attorney General, although charged with the responsibility, simply cannot bring suit in all cases where illegal acts occur. See Section 16.01, Florida Statutes (1983). Furthermore, while the Attorney General undoubtedly may bring such actions, he has plenary discretion to decide which cases to prosecute. See State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir.), cert. denied sub nom., Standard Oil Co. v. Florida, 429 U.S. 829 (1976); Powers, Duties and Operations of State Attorneys General (The National Association of Attorneys General Committee on the Office of Attorney General) 197-202 (1977). And prosecutorial decisions (which may hinge on political considerations) are themselves not subject to review.[7/] In Horne the Court observed the need for taxpayer suits in light of these limitations:

> If a taxpayer does not launch an assault, it is not likely that there will be an

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7/ See Boe v. Gorton, 88 Wash.2d 773, 567 P.2d 197 (Wash. 1977) (Attorney General not required to sue to recover funds disbursed under a statute subsequently declared unconstitutional); see also Mercer, The Citizen's Right to Sue in the Public Interest: The Roman Actio Popularis Revisited, 21 U.W.Ont.L.Rev. 81, 93 (1983).

> attack from any other source. . . . The Attorney General would be an appropriate officer to bring such a suit, but in some instances this is not done and it is in such cases that it is only the taxpayer's attack which preserves the public treasury.

269 So.2d at 660-661 (emphasis added). The Court concluded, in determining there to be no basis for a distinction between an attack on illegal appropriations and illegal expenditures:

> If we should immunize from attack the same provision hidden in a General Appropriations Act, then there would be no avenue of relief even if it were illegal, should the appropriate public officials choose not to sue.

Id. at 661 (emphasis added). Thus, as this Court has recognized, taxpayers simply cannot rely on the Attorney General to protect their interests in all cases.

The District not only argues that taxpayers can safely rely on the Attorney General to protect their interests in all cases, it further asserts that where the alleged illegal conduct is based on a violation of competitive bidding requirements the losing vendor can effectively represent the public in his suit. This argument misapprehends the purpose of competitive bidding statutes. Such laws have been enacted for the protection of the public, not government officials or bidding vendors. In Wester v. Belote, 103 Fla. 976, 138 So. 721, 724 (Fla. 1931), this Court stated:

> [Competitive bidding statutes] thus serve the object of protecting the public against collusive contracts and

> prevent favoritism toward contractors by public officials. . . .

Id. The Court added the well accepted rule:

> [W]here illegal or void contracts have already been executed, and payments of money made by the public officers under them, a suit in equity lies at the instance of a citizen and taxpayer to obtain an accounting and recover the payments back for the benefit of the public treasury, when no other remedy is available.

Id. (emphasis added) (citations omitted). In Wester, the Court said nothing about an aggrieved vendor seeking an accounting and recovery, but attributed remedial rights to the citizen/taxpayer, whom the law was intended to protect. Likewise, in Hotel China & Glassware Co. v. Board of Public Instruction, 130 So.2d 78, 81 (Fla. 1st DCA 1961), the First District observed that "[c]ompetitive bidding statutes are enacted for the protection of the public." Accord, Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662 (Fla. 3d DCA 1980).

Furthermore, there is no reason to believe that vendors will be able to represent taxpayers adequately. While aggrieved vendors may, in some cases, coincidentally champion the rights of the public, the taxpayer should not be forced to rely on such vendors when it is the taxpayer whose rights have been violated. Although a losing vendor could sue in a number of circumstances, there is no mechanism by which the taxpayer can compel him to sue where competitive bidding laws have been violated.

Thus, when local government violates its competitive bidding requirements, the taxpayer has no guarantee that his rights will be protected by the Attorney General or a losing vendor.

D. Godheim Deprives The Public Of A Remedy For Breach Of The Public Trust

The question before the Court turns on one important issue: whether a taxpayer's allegation of an increased tax burden is sufficient special injury or whether the taxpayer must allege an additional injury beyond increased tax burden. In its prior holdings, this Court has not required an allegation of additional injury, although dicta in Markham suggests otherwise. Before changing the taxpayer standing requirement, the Court should fully examine the ramifications of a decision to abrogate Rickman as it has been interpreted in taxpayer cases for 67 years. A rule which requires taxpayers to show an injury beyond increased tax burden would deprive the public of any available remedy against illegal acts of public officials.[8/]

8/ Taxpayer suits challenging municipal and state action traditionally employ liberalized standing rules; in fact, taxpayer suits are a means of challenging municipal action in virtually every jurisdiction.

A well accepted rationale for permitting taxpayer suits is the absence of alternative means of correcting illegal practices of public officials. Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 910 (1960).

As Judge Downey wrote in his opinion below:

> [I]f an offended taxpayer cannot sue to prevent such activity, who will? . . . Should the enforcement of competitive bidding laws be left solely to the public officials and the bidders?"

The answer is clearly no.

II. PUBLIC POLICY CONSIDERATIONS DEMAND THAT THE SPECIAL INJURY REQUIREMENT BE ABANDONED IN CERTAIN CIRCUMSTANCES

A. The "Special Injury" Requirement Of Zoning And Land Use Cases Is Not Applicable In Taxpayer Suits

The District argues this Court's decisions since 1941 support the Godheim decision. But the argument rests chiefly on zoning and land use cases unrelated to expenditures of public monies.[9/] The "special injury" requirement in zoning and land use cases is totally different from the standing requirement for a taxpayer to enjoin an illegal expenditure by a public authority.

The "special injury" or "special damage" commonly referred to in zoning and land use cases finds its origins

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9/ See Florida Wildlife Federation v. State Department of Environmental Regulation, 390 So.2d 64 (Fla. 1980) (citizens granted standing to seek injunction against pollution by State); United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974) (special injury required for standing to enjoin owner from interfering with public's prescriptive rights on land); Town of Flagler Beach v. Green, 83 So.2d 598 (Fla. 1955) (suit to prevent construction of a public recreation facility on publicly owned land); Henry L. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238 (Fla. 1941) (special injury required to challenge termination of public easement). None of these cases concern taxpayer challenges to illegal expenditures of public monies.

in public nuisance law. There a private citizen was required to show special damage because a public nuisance was considered an offense against the state and subject to abatement in an action by the government. Skaggs Albertson's v. A.B.C. Liquor's, Inc., 360 So.2d 1082, 1088 (Fla. 1978). The policy behind this rule was to prevent persons creating public nuisances from being held liable in a multiplicity of damage suits brought by individual members of the public, regardless of the injury of each.[10/] Moreover, regulating public nuisances was deemed best done by authorities and not private citizens. Thus, while courts eventually permitted private citizens to seek injunctions against public nuisances, special damages had to be pled and proved. This rule of special damages later carried over into building code enforcement and zoning laws. Foss at 29 n.39.

Standing to sue in zoning and land use cases should be treated differently from standing in taxpayer suits. In the former, citizens are frequently complaining of discretionary acts that have no direct or measurable impact on challengers. Taxpayer cases, however, because they require an allegation of increased tax burden, deal with a readily identifiable and direct injury. If public officials disregard a competitive bidding law which results

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10/ Such a rule actually makes little sense as to actions for injunctive relief, however. A multiplicity of suits will not be filed once an action seeking equitable relief is instituted. See generally Foss, Interested Third Parties In Zoning, 12 U.Fla.L.Rev. 16, 29 (1959).

in a greater public expenditure, the consequence will directly impact each taxpayer in the taxing district. Thus, the "special injury" discussed in zoning cases should not be used in taxpayer cases.

In Renard v. Dade County, 261 So.2d 832, 835 (Fla. 1972), this Court recognized that even in zoning cases the special damage rule was not intended to be applied to zoning matters "other than suits by individuals for zoning violations." 261 So.2d at 835. In Renard, the Court stated the "special damage rule should not be invoked when a zoning ordinance itself was challenged on substantive or procedural grounds." Id. (emphasis added).

The special damage rule was recently declared to have continuing vitality in Skaggs Albertson's v. A.B.C. Liquors, Inc., supra. There, the Court reviewed application of the rule in the three types of zoning challenges described in Renard. The third type of challenge discussed in Renard permits virtually anyone to sue and occurs when a zoning ordinance is claimed to be void because it has not been properly enacted. "Any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an ordinance." 363 So.2d at 1087 (emphasis added).

If this special damages analysis used in a type three Renard zoning challenge were to be applied to the taxpayer's suit, arguably any taxpayer would have standing to sue when the government's action is alleged to be void ab

initio because it is illegal or unauthorized (e.g., violation of competitive bidding requirements). This is because the taxpayer seeking to enjoin the expenditure of funds in violation of a competitive bidding statute is attacking the validity of the contract itself or the award of the contract.[11/] The taxpayer is tantamount to an "affected resident, citizen or property owner of the governmental unit." If an analogy to special damages in type three zoning cases is to be used for taxpayer cases, there should be no requirement that a taxpayer show injury peculiar from others in his taxing district where the government action is being challenged as illegal and therefore void ab initio.

B. "Special Injury" Should Not Be Required In Suits By Taxpayers Or Others Complaining Of Unconstitutional Or Illegal Conduct By Government Officials

"Special injury" is not an appropriate test for determining whether a taxpayer or other citizen should have standing to challenge the illegal conduct of government officials which injures all taxpayers or members of the

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11/ Taxpayers have always had standing to enjoin the unauthorized expenditure of public funds where a contact under which the funds are to be paid is unauthorized and, as such, void. See, e.g., Rickman v. Whitehurst, supra; Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14, 17 (1930); Hathaway v. Munroe, supra; Anderson v. Fuller, 51 Fla. 380, 41 So. 684, 688 (1906).

public in the same way.[12/] Other jurisdictions have recognized that a "special injury" requirement serves no useful purpose in taxpayer suits or in other suits brought by citizens challenging the legality or constitutionality of government conduct. In Delaware, Illinois and Massachusetts, for example, a taxpayer need not show any special damage to have standing to enjoin the unlawful expenditure of public money, or misuse of public property. City of Wilmington v. Lord, 378 A.2d 635, 637 (Del. 1977); Poepecke v. Public Building Commission of Chicago, 46 Ill. 2d 330, 263 N.E.2d 11, 18 (Ill. 1970); Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577 (Mass. 1969). The Supreme Court of Illinois has explained the policy reason for abandoning the requirement:

> If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.

263 N.E.2d at 18.

Delaware has likewise adopted a liberal rule based on the taxpayer's "direct interest in the proper use and allocation of tax receipts." Such interest "gives the

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12/ "A would-be-plaintiff's status as a taxpayer, however, has been held sufficient to allow damage to him which is shared equally with all members of the public to form the basis of a judicially cognizable issue." Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 898 (1960).

taxpayer a sufficient stake in the outcome of the suit to allow him to challenge improper uses of tax funds." 378 A.2d at 637; see also Green v. Shaw, 114 N.H. 289, 319 A.2d 284, 285 (N.H. 1974) ("[e]very taxpayer 'has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched.'") The Delaware Supreme Court has also adopted this rule of standing where the alleged illegal activity involves the use of public property held by the government for public use. That Court has said:

> The improper use of publicly held real property is sufficiently analogous to the improper use of public money so that if a taxpayer has a legal right to sue in the latter case, then necessarily a taxpayer should have a similar right in the former case.

378 A.2d at 637-638 (citations omitted). This reasoning is sound, in view of the fact that if taxpayers' suits are not allowed, the government action is likely to go unchecked. Id.; see also Department of Administration v. Horne, supra.[13/]

In City of Wilmington v. Lord, supra, the Supreme Court of Delaware extended its rule of taxpayer standing based upon the theory that a taxpayer should have standing to enjoin the sale of land held by a city in trust for park purposes because such a sale would be a breach of that public trust. 378 A.2d at 638.

13/ The U.S. Supreme Court has reflected on the consequences of unchecked government power: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Florida has not yet adopted such an expansive view of taxpayer standing. There have been cases, however, where the rule of City of Wilmington could be applied to grant taxpayers a remedy. One example is Grove Isle, Ltd. v. Bayshore Homeowners' Association, Inc., 418 So.2d 1046 (1st DCA 1982), the facts of which parallel those of City of Wilmington. In Grove Isle, however, the First District Court of Appeal denied standing to individuals and organizations who challenged the use of publicly held submerged lands. In that case the challenge was of a decision by the Board of Trustees of the Internal Improvement Fund ("Trustees") not to require a lease from a developer who proposed to construct a private marina over 5-1/2 acres of state-owned submerged lands. Although the Trustees had held that the individuals and organizations did have standing to challenge the proposed give-away of state-owned property, the First District disagreed and concluded that the individuals and organizations lacked standing because their "substantial interests" would not be affected by a decision not to require a lease or payment of money to the State for the exclusive private use of publicly owned property. 418 So.2d at 1047.

The First District's imposition of a kind of special injury showing on citizens and groups challenging as illegal and unconstitutional the Trustees' disposition of state-owned lands, served to prevent any citizen from making such a challenge. In cases like this, all citizens are

equally affected when the state gives away property (of which the citizens are beneficial owners) or otherwise acts inconsistent with legislative or constitutional mandates in the disposition of state-owned land. The "special injury" or "substantial interests" rule thus serves only to frustrate the rights of citizens to hold government officials accountable where the illegal conduct sought to be enjoined or set aside adversely affects all members of the public, but no one member more or less than another.

Accordingly, this Court should recognize that the special injury rule (or special damage rule as it is called in zoning) works an injustice against the public when extended to areas where the impact of the government's illegality is shared equally by members of the public.[14/] If a taxpayer is not granted standing in a case where government illegality causes an increase in his tax burden merely because other taxpayers will suffer the same injury, the public will be denied access to the courts to correct governmental abuses which otherwise will go unchecked.

14/ Standing has been described as "only a vehicle to avoid advisory opinions." One commentator argues that judicial inquiry should therefore not focus on the standing of the plaintiffs in litigation between citizens and the government but on the relief sought. A relief-directed inquiry will ensure that members of the public are not deprived of their right to challenge illegal government action merely because a court determines they are not sufficiently "aggrieved" or "injured" by the government action. "[W]here the government has proceeded unlawfully, relief should not be denied merely because the harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens.'" Meyers, note 6 supra, at 26-27 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourth District and answer the certified question in the affirmative holding that a taxpayer who alleges that a taxing authority is acting illegally in spending public funds, which expenditure will increase his tax burden, has standing to sue to prevent such expenditure and need not suffer any other injury or launch a constitutional attack on the taxing authority's action.

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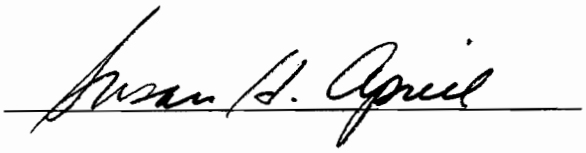

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