IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,446

CITY OF ATLANTIC BEACH, FLORIDA,

Petitioner,

v.

GEORGE BULL,

Respondent.

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

BRIEF OF AMICUS CURIAE COMMON CAUSE OF FLORIDA

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS.	iii-v
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE AND FACTS	2
QUESTION CERTIFIED.	2
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.	2
I. THE IMPORTANCE OF PERMITTING TAXPAYERS STANDING TO SUE TO ENJOIN ILLEGAL GOVERNMENT EXPENDITURES OUTWEIGHS THE POSSIBILITY THAT COURTS WILL BE INUNDATED WITH FRIVOLOUS CLAIMS.	2
A. The Florida Constitution Guarantees Taxpayers Access To Courts	3
B. The Judiciary Has The Ability To Summarily Dispose Of And Penalize Spurious Claims	4
C. Liberalized Standing Rules Will Not Inundate The Courts With Frivolous Claims	5
1. Neither the Attorney General nor the Governor can safeguard taxpayer's rights.	8

Page

2. Vendors cannot safeguard taxpayers' rights 10

3. The electoral process cannot safeguard taxpayers' rights . . 11

II. THE FIRST DISTRICT COURT OF APPEAL PROPERLY INTERPRETED THIS COURT'S PRECEDENT IN HOLDING THAT A TAXPAYER ALLEGING AN INCREASED TAX BURDEN HAS STANDING TO SUE TO ENJOIN AN ILLEGAL EXPENDITURE OF PUBLIC FUNDS 11

A. The Rickman Rule Requires Only A Special Injury Of Increased Tax Burden 13

B. Neither Horne Nor Markham Affect The Rickman Rule 15

CONCLUSION. 19

CERTIFICATE OF SERVICE. 19

TABLE OF CITATIONS

CASES:	Page
Barrow v. Smith, 158 So. 819 (Fla. 1935).	18
Bryan v. City of Miami, 56 So.2d 924 (Fla. 1951). .	16, 18
Bull v. City of Atlantic Beach, 10 Fla.L. Wkly. 142 (Fla. 1st DCA Jan. 8, 1985) (Case No. AW-339) . . .	1, 12, 13
City of Daytona Beach v. News Journal Corp., 116 Fla. 706, 156 So. 887 (1934).	18
Cotton v. Commissioners of Leon County, 6 Fla. 610 (1856)	6
Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972)	4, 6, 7, 8, 12, 13, 15, 16, 17
Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981).	13, 15, 17
Flast v. Cohen, 392 U.S. 83 (1968).	16
Flood v. State ex rel. Homeland Co., 95 Fla. 1003, 117 So. 385 (1928)	3
Fornes v. North Broward Hospital District, 455 So.2d 584 (Fla. 4th DCA 1984)	1, 12, 18
Frothingham v. Mellon, 262 U.S. 447 (1923).	16
G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977).	4
Godheim v. City of Tampa, 426 So.2d 1084 (Fla. 2d DCA 1983).	12, 13, 17
Hathaway v. Munroe, 97 Fla. 28, 119 So. 149 (1929).	18
Hotel China & Glassware Co. v. Board of Public Instruction, 130 So.2d 78 (Fla. 1st DCA 1961)	10
Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 357 (Fla. 1936)	18

CASES: Page

Lewis v. Peters, 66 So.2d 489 (Fla. 1953) 16, 18

Marrell v. Lake County, 199 So. 491 (Fla. 1940) (en banc) 18

Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662 (Fla. 3d DCA 1980). 10

Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1979) 13, 17

Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917). 13, 14, 15, 16, 17, 18

Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (1930). 18

Robinson's, Inc. v. Short, 146 So.2d 108 (Fla. 1st DCA 1962), cert. denied, 152 So.2d 170 (Fla. 1963) 15

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 8

Thursby v. Stewart, 133 So. 742 (Fla. 1931) 18

Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931). 9, 10, 18

Williams v. Howard, 329 So.2d 277 (Fla. 1976) . . . 15, 17

OTHER AUTHORITY

FLORIDA CONSTITUTION (1838), ARTICLE I § 9. 3

FLORIDA CONSTITUTION (1968), ARTICLE I § 21 3

Florida Statutes:

Section 16.01 9

Section 57.105. 5

Section 286.011(4) ("Sunshine Act") 5

Florida Statutes:	Page
Section 542.22(1)-.23	6
Section 812.035	6
Section 817.41.	6
Michigan Compiled Laws Annotated § 691.1202 (Supp. 1970).	7
4 K. Davis, ADMINISTRATIVE LAW TREATISE § 24:6 (2d Ed.) (1984)	7
Homburger, Private Suits in the Public Interest, 23 Buff.L.Rev. 343 (1973-74).	7
Meyers, Standing in Public Interest Litigation: Removing Procedural Barriers, 15 Loy. L.A.L.Rev. 1 (1981)	7
Powers, Duties and Operations of State Attorneys General (The National Association of Attorneys General Committee on the Office of Attorney General) 197 (1977)	8
Rule 1.150, Florida Rules of Civil Procedure. . . .	5
Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895 (1960)	11

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 encourages greater public participation in all levels of government, and believes that citizen standing in judicial proceedings is necessary for public participation. 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 legally exercise their powers.

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 First District Court of Appeal,[1/] as well as that of the Fourth District Court of Appeal,[2/] and answer the certified question in the affirmative.

1/ Bull v. City of Atlantic Beach, 10 Fla. L. Wkly. 142 (Fla. 1st DCA Jan. 8, 1985) (Case No. AW-339).

2/ Fornes v. North Broward Hospital District, 455 So.2d 584 (Fla. 4th DCA 1984).

STATEMENT OF THE CASE AND FACTS

Common Cause adopts the Statement of the Case and Statement of Facts contained in the Brief of Respondent George Bull.

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 IMPORTANCE OF PERMITTING TAXPAYERS STANDING TO SUE TO ENJOIN ILLEGAL GOVERNMENT EXPENDITURES OUTWEIGHS THE POSSIBILITY THAT COURTS WILL BE INUNDATED WITH FRIVOLOUS CLAIMS

No valid reason exists for denying taxpayers the right to sue to enjoin illegal government actions. First, taxpayers have a constitutionally guaranteed right of access to the courts which should be liberally granted. Second, the judiciary has available means to detect, dispose of, and penalize frivolous actions. Third, the fear that liberalized standing will open the "floodgates of litigation" is completely unjustified. Finally, no other litigant, nor the

electoral process, can adequately protect the taxpayer's particular interest.

A. The Florida Constitution Guarantees Taxpayers Access To Courts

The sole issue presented in this case concerns a taxpayer's right to access to courts. The Florida Constitution, however, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Fla. Const. Art. I, Section 21 (emphasis added).

The Constitution thus guarantees every taxpayer contesting government official's illegal conduct that has a direct impact on that taxpayer's pocketbook, the right to seek redress in court. Courts often provide the only forum in which taxpayers can vindicate their rights.

This constitutional right has roots deep in Anglo-American legal history dating back to the Magna Carta.[3/] Flood v. State ex rel. Homeland Co., 95 Fla. 1003, 117 So. 385 (1928). "It guarantees to every person the right to

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3/ The right is first described in Florida in the 1838 Florida Constitution ("We declare . . . that all courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice administered, without sale, denial, or delay." Art. I, § 9, Fla. Const. (1838)) and has been retained in every constitutional revision since then.

free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions. Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right." G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977).

Obviously, not every taxpayer claim asserted will be meritorious. But there can be no requirement that only "winning" claims be permitted to proceed. Indeed, in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972), this Court 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. at 663.

B. The Judiciary Has The Ability To Summarily Dispose Of And Penalize Spurious Claims

Clearly, standing is just the threshhold requirement in a suit to enjoin government illegality. To deny standing is to deny the right of taxpayers to open the door to the courtroom. Standing -- the constitutionally guaranteed right of access --should be denied only under extreme circumstances.

The valid way to dispose of non-meritorious claims is, by definition, on their merits. Suits that are without merit will be summarily disposed of in the early stages of litigation through motions to dismiss or motions for summary judgment. This controls frivolous actions, while preserving

the rights of those parties presenting meritorious claims. Because of the judiciary's ability to detect frivolous claims early, any meritless suits that may result from a liberalized standing rule will not unduly burden public officials or the judicial system.

Additionally, there are mechanisms available to discourage frivolous litigation. For example, Rule 1.150, Florida Rules of Civil Procedure, provides for the summary dismissal of sham pleadings. Section 57.105, Florida Statutes, permits prevailing parties to recover attorney's fees in civil actions where the losing party fails to raise a justiciable issue of either law or fact.[4/] In view of the substantial expense inherent in litigation and the possibility that a taxpayer presenting a sham claim may be taxed attorneys' fees, there is no incentive whatsoever for a taxpayer to bring meritless claims against government officials.

C. Liberalized Standing Rules Will Not Inundate The Courts With Frivolous Claims

Those opposing a liberal rule of taxpayer standing argue that "interminable litigation" will hamper the ability of public officials' to function. There is no basis for this argument.

4/ No Florida statute provides for attorney's fees in unsuccessful litigation against the government. Indeed, under the Sunshine Act, § 286.011(4), Fla. Stat., attorney's fees may be assessed against an unsuccessful litigant.

The "floodgates" argument is most often advanced by those who themselves wish to insulate their conduct from judicial scrutiny. Such motivation is hardly a proper ground for curtailing Florida's constitutional right to access to courts and liberal rule of taxpayer standing.

There is simply no evidence that affording taxpayers standing in the type of challenge presented by this appeal will open the floodgates to frivolous litigation and hamper the performance of public officials.

Florida courts have never 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). In Department of Administration v. Horne, supra, this Court expressly recognized that "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).

There is no evidence of an increase of frivolous claims 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 show the legislature's awareness that ordinary citizens are the proper and most effective parties to police the acts of public officials.

The enactment of these statutes has promoted stricter enforcement of the laws without constraining public servants from performing their functions.

Professor Kenneth Culp Davis notes that statutes enacted in various jurisdictions during the 1970's which afford 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). The number of reported cases under wide-open statutes authorizing citizen suits in public interest cases is also small. See Homburger, Private Suits in the Public Interest, 23 Buff.L.Rev. 343, 385, 400 (1973-74). "Under the Michigan Environmental Protection Act, Mich. Comp. Laws Ann. § 691.1202 (Supp. 1970), which became effective on October 1, 1970, only 33 citizen suits were brought [during the two years following enactment.] The experience with environmental protection laws in other states is similar." Homburger at 385, n.196. See also Meyers, Standing in Public Interest Litigation: Removing the Procedural Barriers, 15 Loy.L.A.L.Rev. 1 (1981).

D. Neither The Attorney General, The Governor, Unsuccessful Bidders, Nor The Election Process Can Adequately Protect The Public From Illegal Acts of Government

Taxpayers' suits are necessary to correct illegal practices of government officials which would otherwise go

unremedied. This is because neither the attorney general, the governor, unsuccessful vendors, nor the electoral process can adequately safeguard the rights of individual taxpayers.

1. Neither the Attorney General nor the Governor can safeguard taxpayer's rights

This Court in Horne, supra, recognized the improbability of the Attorney General becoming involved in actions to enjoin unlawful public expenditures, even when based on purely constitutional grounds:

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

Id. at 660-661 (emphasis added).

Furthermore, while the Attorney General undoubtedly has the authority to bring actions to prevent illegal expenditures of public funds, he is imbued with plenary discretion to decide which cases to prosecute.[5/] This Court

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5/ 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).

should not require taxpayers to rely solely on the Attorney General to protect their interests in all cases.[6/]

Nor can the Governor be relied on to initiate such suits in the public interest. Amici have found no reported cases where the Governor acted to safeguard private rights of taxpayers.

The Attorney General and Governor are especially ill-suited to protect a taxpayer's interest, where, as in this case, the taxpayer has alleged illegal conduct based on a violation of competitive bidding requirements. Competitive bidding statutes have been enacted to protect members of the public, not government officials. In Wester v. Belote, 103 Fla. 976, 138 So. 721 (Fla. 1931), the Court attributed remedial rights to the citizen/ taxpayer, whom the law was intended to protect:

> [Competitive bidding statutes] thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials.
>
> * * *

6/ In its brief, the City cites numerous Attorney General opinions and implies that the Attorney General has actually brought suit under § 287.055 -- the statute at issue here -- to protect the public's rights. Initial Brief at 23-24. This contention is misleading, however, as the cited Attorney General opinions were not based on actions brought by the Attorney General at all. In fact, they are merely non-binding advisory opinions addressed to, and requested by, a statutorily-defined class concerning a particular application of § 287.055. Section 16.01, Fla. Stat. The Attorney General is not even authorized to render opinions to private individuals.

> [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. at 724. (Emphasis added) (citations omitted). See also Hotel China & Glassware Co. v. Board of Public Instruction, 130 So.2d 78, 81 (Fla. 1st DCA 1961) ("[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).

2. Vendors cannot safeguard taxpayers' rights

Additionally, there is no reason to believe that a losing vendor, who would have standing to challenge the expenditure by virtue of "special injury" under the position asserted by Petitioners, would adequately represent taxpayers. Individual bidders may chose not to file suit for various reasons such as the expense of litigation or the fear of antagonizing governments with whom they wish to do future business. There is no mechanism by which a taxpayer can compel an unsuccessful vendor to sue where a competitive bidding statute has been violated. Therefore, taxpayers should not be forced to rely on such vendors when it is the taxpayers' rights that have been violated.

3. The electoral process cannot safeguard taxpayers' rights

Finally, the electoral process cannot adequately protect the public's right to redress. First, the electorate may ignore corruption, illegality, or unconstitutionality which occurred early in the term of a particular official or commissioner. Second, at the time of election the illegal activity may seem relatively unimportant or have been forgotten as compared to the overall record of incumbent officeholders. Third, those taxpayers who bring actions to enjoin illegal expenditures may well be in the minority and unable to bring about change at the ballot box. There would thus be no redress for them or for the public at large. See Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 9510 (1960). Finally, the other alternative -- citizen-initiated recall petitions which seek to remove officeholders between elections -- would seem to be far more disruptive to local governments than isolated taxpayer lawsuits.

II. THE FIRST DISTRICT COURT OF APPEAL PROPERLY INTERPRETED THIS COURT'S PRECEDENT IN HOLDING THAT A TAXPAYER ALLEGING AN INCREASED TAX BURDEN HAS STANDING TO SUE TO ENJOIN AN ILLEGAL EXPENDITURE OF PUBLIC FUNDS

The First District Court of Appeal held that the Respondent taxpayer, George Bull, had standing to sue the Petitioner City of Atlantic Beach to enjoin an allegedly

illegal expenditure of public funds which would have increased his tax burden. Bull v. City of Atlantic Beach, supra. In reaching this conclusion, the First 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 and hold 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 allege any other injury or launch a constitutional attack on the taxing authority's action.

In the Bull opinion, the First District rejected Godheim v. City of Tampa, 426 So.2d 1084 (Fla. 2d DCA 1983), and adopted the Fourth District's opinion in Fornes v. North Broward Hospital District, 455 So.2d 584 (Fla. 4th DCA 1984). In Godheim, the Second District 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 alleged a special injury distinct from other taxpayers. Judge Grimes, for the majority, conceded that Judge Lehan's dissent advanced good reasons for permitting a taxpayer to attack the legality of government acts which increase his tax burden. Nevertheless, Judge Grimes felt bound by this Court's decisions in Department of Administration v. Horne,

supra, and Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981), as well as the policy described in Paul v. Blake, 376 So.2d 256, 259 (Fla. 3d DCA 1979) ("without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits"). Thus implicit in Judge Grimes' opinion is the indication that he would have allowed the taxpayer standing had he not felt bound by Horne and Markum.

Since Godheim, both the First and Fourth Districts have rejected Judge Grimes' analysis, and agreed with the dissent of Judge Lehan. In Bull, Judge Booth relied on the Fourth District opinion, which recognized the persuasive policy reasons for granting standing to a taxpayer whose taxes would be increased by illegal expenditures.

This Court's adoption of the Godheim decision would not only require the reversal of a long line of cases dating back to 1856, but more importantly, would bar taxpayers from enjoining illegal government expenditures absent a constitutional basis for challenge.

A. The Rickman Rule Requires Only A Special Injury Of Increased Tax Burden

In the 1917 case of Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (Fla. 1917), a taxpayer sued county commissioners and 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 awarded

to the lowest bidder pursuant to a competitive bid procedure. The taxpayer alleged an illegal expenditure of public funds, but failed to allege that he himself would suffer an increased tax burden as a result of that expenditure.[7/] This Court held the taxpayer had no standing and laid down what is referred to as the Rickman Rule:

> [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.
>
> 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.

Id. at 207 (citations omitted).

The Court further explained 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).

7/ 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.

The Rickman opinion explains why a taxpayer who alleges an increased tax burden has alleged special injury and has 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. (emphasis added). The key phrase in this paragraph is "citizens who are not taxpayers." In using that phrase, this Court likened the nontaxpayer citizen to the unaffected taxpayer, saying such persons could not possibly claim the same injury suffered by a taxpayer whose taxes are increased. The affected taxpayer was thus said to suffer a "special injury." 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).

B. Neither Horne Nor Markham Affect The Rickman Rule

This Court reaffirmed the Rickman holding in Department of Revenue v. Markham, supra, Williams v. Howard, 329 So.2d 277 (Fla. 1976), and Department of Administration v. Horne, supra.

In Horne, 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 have satisfied that requirement. Id. at 662.[8/] Rather the Court found that Horne presented an "exception" to the "Rickman Rule," and held that where there is a constitutional basis for the challenge, no showing of increased tax burden is required.[9/] What this "exception" appears to mean, then, based on a reading of the "taxpayer standing" cases decided up until Horne, is that taxpayers have standing in three situations: (1) when asserting an illegal expenditure which will increase his taxes; (2) when he suffers another kind of "special injury" distinct from other members of the public; and (3) when asserting a constitutional challenge to a taxing and spending clause.

8/ Indeed, in prior holdings this 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).

9/ 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 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.

This interpretation is directly supported by this Court's decision in Williams v. Howard, supra. Williams was an action challenging the constitutionality of certain statutes affecting the Parole and Probation Commission. Two of the challengers sued as citizens and taxpayers. Their complaint, however, failed to allege unlawful expenditures of public monies. This Court, relying on Rickman, held that lack of such allegations was a fatal deficiency to the taxpayers' standing, and pointed out that the principles of Rickman were reaffirmed by Horne. 329 So.2d at 279-80. Thus, Williams clearly states that allegations of unauthorized expenditures are sufficient to confer standing, and that such basis is consistent with Horne.

Similarly, in Department of Revenue v. Markham, supra, this 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 described in both Rickman and Horne.[10/]

10/ Amicus curiae acknowledges that certain dicta in Markham -- citing Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1980), to the effect that a taxpayer has standing only upon a showing of injury distinct from other taxpayers in his taxing district -- is somewhat misleading. 396 So.2d at 1121. However, only the two judge majority in Godheim has concluded this dicta accurately states the Florida law of standing in taxpayer suits.

To avoid reversal of long standing precedent and continue Florida's tradition of liberal access to courts, the Court need only determine that a taxpayer's allegation of increased tax burden is sufficient "special injury" to satisfy standing requirements. This Court previously has never required an allegation of additional injury.

Every Supreme Court case on taxpayer standing is in accord with both the First and Fourth Districts' interpretations of the Rickman Rule.[11/]

Before changing the taxpayer standing requirement, the Court should fully examine the ramifications of a decision to abrogate the Rule as it has been interpreted for the past 67 years. As Judge Downey wrote in the Fornes opinion:

> [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?"

Any rule which requires taxpayers to show an injury beyond increased tax burden would effectively deprive the public of any remedy against illegal acts of public officials.

11/ 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).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the First 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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I HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae Common Cause of Florida was served by mail this 18th day of March, 1985 upon the following:

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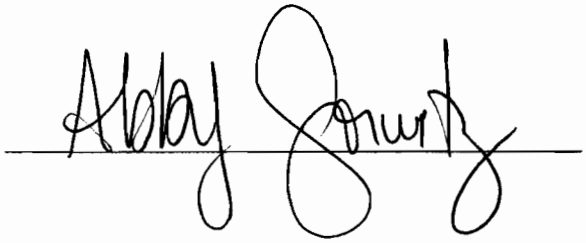

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