No. 11-685

IN THE
# Supreme Court of the United States

Highway J Citizens Group, U.A.,
*Petitioner*,
v.
Village of Richfield, Wisconsin,
*Respondent*.

On Petition for Writ of Certiorari
to the Wisconsin Court of Appeals

## MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL TAX LIMITATION COMMITTEE, REASON FOUNDATION, AND LIBERTARIAN LAW COUNCIL IN SUPPORT OF PETITION FOR CERTIORARI

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January 4, 2012

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER HIGHWAY J CITIZENS GROUP, U.A.'S, PETITION FOR WRIT OF CERTIORARI

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The National Tax Limitation Committee, the Reason Foundation, and the Libertarian Law Council (hereinafter "*amici*") hereby respectfully move for leave to file the attached brief as *amici curiae*. The consent of the attorney for the Petitioner, Highway J Citizens Group, U.A., has been obtained. The consent of the attorney for the Respondent, the Village of Richfield, was requested, but refused.

Proposed *amici* in this case are all nonprofit, public interest organizations, devoted to the protection and furtherance of individual liberties. Because this case implicates important rights of individual taxpayers to challenge the government's illegal expenditure of their tax dollars, it is a case in which all *amici* have a marked interest.

All *amici* represent the interests of individual municipal taxpayers. The National Tax Limitation Committee is a taxpayer advocacy group that provides support and education to taxpayers and entrepreneurs. The Reason Foundation engages in nonpartisan public policy research on a variety of libertarian issues, and provides training and support, through its magazine and television projects, to numerous individual taxpayers across the United States. Finally, the Libertarian Law Council (LLC) is an organization comprised of lawyers and

others that sponsors meetings and debates concerning constitutional and legal issues, and LLC participates in legislative hearings and public commentary on matters of choice and competition, economic liberty, and free speech.

Of the two questions presented in the Petition for Writ of Certiorari, *amici* focus primarily on the second; namely, whether this Court should grant certiorari to resolve the conflict among lower federal courts regarding the appropriate legal standards to apply to municipal taxpayer standing cases. It is not the intent of *amici* to duplicate Petitioner's excellent efforts in the Petition for Writ of Certiorari, but, rather, to supplement the arguments contained therein, by offering the Court a more comprehensive analysis on the issue of pocketbook injury or, as the Wisconsin Court of Appeals phrased it, "pecuniary harm."

Accordingly, *amici* respectfully move this Court for leave to file the attached Brief of *Amici Curiae* in Support of Petitioner Highway J Citizens Group, U.A.'s, Petition for Writ of Certiorari.

Respectfully submitted this 4th day of January, 2012,

By: _____

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## INTEREST OF *AMICI CURIAE*

The National Tax Limitation Committee (NTLC), based in Sacramento, California, was founded in 1975, by individuals concerned about ever-increasing taxation and government spending, both at state and federal levels. NTLC's mission is to provide national leadership to achieve the optimal size and functions of government and promote candidates and initiatives that support these goals. One of its specific goals is to lower tax rates and reduce government spending, so as to maximize economic liberty. NTLC is a dedicated advocate for the rights of individual taxpayers, including the right to challenge illegal expenditures of taxpayer money, which is at issue in the instant case.

The Reason Foundation (RF) is a national, nonpartisan, nonprofit public policy think tank, founded in 1978. RF's mission is to promote liberty,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. It is hereby certified that Petitioner has consented to the filing of this brief and that Respondent's consent was sought, but refused. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. RF promotes policies that allow and encourage individuals and voluntary institutions to flourish. RF advances its mission by publishing *Reason Magazine,* as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. To further RF's commitment to "Free Minds and Free Markets," RF selectively participates as *amicus curiae* in cases, such as this one, raising significant issues which implicate important individual rights.

The Libertarian Law Council (LLC) is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including the right to liberty and property. Founded in 1974, LLC sponsors meetings and debates concerning constitutional and legal issues and developments; it participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and it files briefs *amicus curiae* in cases involving serious threats to liberty.

This case involves the denial of standing to municipal taxpayers seeking to challenge an illegal local governmental action that has caused, is causing, and will continue to cause pecuniary loss and injury to these taxpayers. The wrongful expenditure of taxpayer monies is an issue squarely

within the scope of *amici's* diverse missions and goals.

## SUMMARY OF ARGUMENT

The subject of standing, while a threshold issue in every lawsuit,[2] is by no means a simple issue in cases brought by taxpayers to enjoin the expenditure of public funds.

Though this Court has largely precluded federal and state taxpayers from bringing suits to challenge government spending,[3] it has never similarly restricted *municipal* taxpayers from bringing such suits. On the other hand, neither has this Court expressly set forth the requirements that a municipal taxpayer must meet in order to achieve standing in federal court, but has merely affirmed, in dicta, his or her ability to do so.[4]

Given the lack of specific Supreme Court guidance regarding municipal taxpayer standing issues, the lower courts have dealt with such cases in numerous and diverse ways. Accordingly, there is a split of opinions among the lower courts on several key points, including whether economic impact, or "pocketbook injury," must be shown before a

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[2] *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-231 (1990).

[3] *See Frothingham v. Mellon,* 262 U.S. 447, 487 (1923) (*Frothingham*); *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 434 (1952) (*Doremus*); and *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 346 (2006) (*DaimlerChrysler*).

[4] *Frothingham , supra,* 262 U.S. at pp. 486-487.

municipal taxpayer has standing to challenge an expenditure of public funds, and if so, what kind of injury will satisfy that requirement.

In spite of these differences, the majority of federal courts appear to favor granting standing to municipal taxpayers, and, in some cases, have gone to great lengths to permit such suits, even where the alleged injury is non-economic in nature. Though this has resulted in more municipal taxpayers gaining access to federal courts, it has muddied the legal waters to such an extent that it is nearly impossible to distill a coherent doctrine on municipal taxpayer standing.

One scholar estimates that the lower federal courts published nearly 300 taxpayer standing cases between 1982 and 2003.[5] The sheer volume of case law relevant to municipal taxpayer standing indicates that the issue arises often, and that it will continue to do so. With more than 87,000 municipalities in the United States,[6] a ruling from this Court, setting a clear precedent for the evaluation of municipal taxpayer standing cases, would be of great value to lower courts and litigants.

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[5] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 802 (2003).

[6] See Petition for Writ of Certiorari (filed November 30, 2011) at p. 13, citing U.S. Census Bureau, 2002 Census of Governments: Government Organization (2002), *available at* http://www.census.gov/prod/2003pubs/gc021x1.pdf.

The instant case presents important questions of law that have resulted in a split of authority among lower courts, and carry widespread national impact. This Court should avail itself of the opportunity to clarify the long-misunderstood and often-debated issue of municipal taxpayer standing and grant certiorari in this case.

## ARGUMENT

### I. This Court Should Define and/or Clarify the Requirements for Municipal Taxpayer Standing, Just as This Court Has Already Articulated Straightforward Precedents Regarding Federal and State Taxpayer Standing

Federal and state taxpayers have generally been denied access to federal courts, based on a lack of standing. (See e.g. *Frothingham v. Mellon,* 262 U.S. 447, 487 (1923) (*Frothingham*); *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 434 (1952) (*Doremus*); and *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 346 (2006) (*DaimlerChrysler*).) In the case of federal taxpayers, the reason that standing is usually not found is because the taxpayer's interest in the federal treasury is "shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventative powers of a court of equity." (*Frothingham, supra,* 262 U.S. at p. 487.)

Similarly, state taxpayers suffer a lack of standing because any injury they may suffer is too indirect or remote to confer standing. (*See DaimlerChrysler, supra,* 547 U.S. at p. 345 [rationale for rejecting a federal taxpayer challenge to a federal statute is equally true when a state Act is assailed; state taxpayers are likened to federal taxpayers for purposes of taxpayer standing].)

Nevertheless, while preventing federal and state taxpayers from bringing suit to enjoin the expenditure of public funds, this Court has retained and affirmed the standing of *municipal* taxpayers to do so. In *Frothingham, supra,* 262 U.S. at p. 486, this Court held that

> resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. … The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate …. [¶] The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Moreover, in *DaimlerChrysler, supra,* 547 U.S. at p. 487, this Court cited with approval the rule set out in *Frothingham*, above; *i.e.*, that municipal taxpayers have standing to bring suit to enjoin a

municipality's illegal use of public funds. In *DaimlerChrysler,* however, the plaintiffs' challenge to a *municipal* property tax exemption was not before the Court; rather, plaintiffs were challenging a *state* franchise tax credit. Accordingly, the Court denied them standing as municipal taxpayers, but did not disapprove or alter the general rule allowing municipal taxpayer suits, as set forth in *Frothingham*.

Accordingly, while affirming the propriety of municipal taxpayer standing, even as recently as 2006,[7] this Court has not before been presented with a case requiring it to specifically define the parameters of, and prerequisites to, municipal taxpayer standing. The instant case is just such a case, and it would afford this Court the opportunity to clarify an area of law that has long been the

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[7] Furthermore, many lower federal courts have interpreted this Court's holdings in *Frothingham, DaimlerChrysler* and other cases as a tacit approval of municipal taxpayer suits. (*See e.g. U.S. v. City of New York,* 972 F.2d 464, 470 (2d Cir. 1992) [noting this Court's "ringing endorsement" of municipal taxpayer standing and that "municipal taxpayer standing has ancient roots in our jurisprudence"]; *Annunziato v. New Haven Board of Aldermen,* 555 F.Supp. 427, 431-432 (D.Conn. 1982) [holding that *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982) did not undermine *Frothingham's* long-established rule]; *Hawley v. City of Cleveland,* 773 F.2d 736, 741 (6th Cir. 1985) [noting that *Frothingham* intended to leave undisturbed the rule of municipal taxpayer standing and noting the Supreme Court's continued adherence to the rule since *Frothingham* (citing cases)].)

subject of confusion and conflicting results among the lower courts.

## II. Lower Courts are Divided on Both the Definition of "Pocketbook Injury," and its Application as a Requirement in Municipal Taxpayer Suits

As noted above, since *Frothingham,* this Court has not undertaken to set forth specific prerequisites to attaining municipal taxpayer standing. One scholar observes that

> The [Supreme Court's] silence in recent cases as to what types of municipal taxpayer challenges are justiciable in federal court, along with the dicta set forth in *Frothingham* sanctioning municipal taxpayer suits, has led to a strong bias in favor of allowing municipal taxpayers to litigate a wide range of constitutional claims. … The courts are far more lenient with municipal taxpayers, but … this approach is not uniform. Some federal courts hold municipal taxpayers to the same restrictive standards applied to state and federal taxpayers and others seem to impose no restrictions whatsoever.[8]

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[8] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, *supra,* at p. 826.

Perhaps the most obvious example of the disparate treatment of municipal taxpayers is the lower courts' varied definition of "pocketbook injury," and its application as a requirement to achieve standing.[9] Most federal courts appear to define "pocketbook injury" as any wrongful expenditure of tax dollars. Other courts, including the Third Circuit,[10] and the Wisconsin Court of Appeals (which follows federal law on standing), have been known in some cases to impose a rigid standard, requiring a distinct and unique individual injury to achieve standing.[11]

As to the application of the term "pocketbook injury," some federal circuits uniformly require a pocketbook injury in all municipal taxpayer cases, while others allow non-economic injuries to sustain municipal taxpayer standing, especially in challenges related to Establishment or Free Exercise violations.

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[9] *Id.,* at p. 834:

> The erratic nature of the lower court decisionmaking can easily be seen in the varied use of the concept of injury. Some federal judges argue that economic injury is required for standing while others suggest that the municipal taxpayer need only be offended by the local activity at issue to get into court.

[10] *See Goode v. City of Philadelphia,* 539 F.3d 311, 321-322 (3d Cir. 2008) [holding that appellant, a municipal taxpayer, had alleged only a general injury that all persons in the city suffered equally, and denying standing].

[11] *See Highway J Citizens Group, U.A. v. Village of Richfield,* 2011 Wisc. App. LEXIS 116 at *3 and *4.

These disparities in the definition and application of "pocketbook injury" have resulted in wildly varied results in municipal taxpayer challenges across the country.

> In short, without clear precedent governing the lawsuits, lower courts are left with complete discretion, and this discretion produces a collection of chaotic legal outcomes giving the impression that judges are deciding cases according to their own policy perspectives and ideological preferences.[12]

As a result, a clarifying decision from this Court is sorely needed.

### A. Let's Talk Dollars and Cents: *Doremus* and the Inception of the Good Faith Pocketbook Injury Rule

The "good faith pocketbook" language originated in *Doremus, supra,* 342 U.S. 429, a case involving a state taxpayer's challenge to a statute that provided for the reading of the Bible at the start of every school day. In denying taxpayer standing, this Court held:

> [B]ecause our own jurisdiction is cast in terms of "case or controversy," we

[12] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, supra,* at p. 835.

> cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such. [¶] The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference.

(*Doremus, supra,* 342 U.S. at p. 434.) Of course, *Doremus* involved a *state* taxpayer challenging a *state* statute. Nonetheless, some lower courts have chosen to apply *Doremus'* requirement of pocketbook injury to municipal taxpayers as well.

### B. What is a "Good Faith Pocketbook" Injury, Anyway?

This Court has never elaborated on the meaning of the "good faith pocketbook" or "dollars-and-cents" language in *Doremus*. Thus, lower courts have applied their own—sometimes arbitrary—interpretations of the terms to municipal taxpayer suits.

Most of the lower federal courts agree that a pocketbook injury is some measurable appropriation of public funds in support of the challenged activity. The Fifth Circuit defines a "good-faith pocketbook action" simply as one in which the municipal taxpayer shows that tax revenues are expended on

the disputed practice.[13] The Seventh Circuit follows a similar rule and defines a good-faith pocketbook action as one in which municipal taxpayers object to a disbursement of tax revenues "occasioned solely by the alleged unconstitutional conduct."[14] The Ninth Circuit defines a "good-faith pocketbook challenge [as one which] identifies a measurable sum of public funds being used to further a challenged activity,"[15] and the D.C. Circuit requires a municipal taxpayer to establish that the challenged activity involves a "measurable appropriation or loss of revenue" to satisfy the pocketbook injury requirement.[16]

One District Court within the Second Circuit characterized a municipality's prospective loss of revenue as a good faith pocketbook injury, even though there was no identifiable pecuniary loss to the individual taxpayer: "[P]laintiffs have alleged New Haven's treasury would have been benefitted by $29,999 but for the allegedly unconstitutional sale. Therefore, … municipal taxpayers, have standing to bring this 'good faith pocketbook action' challenging the sale."[17]

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[13] *Ward v. Santa Fe Independent School District,* 393 F.3d 599, 606-607 (5th Cir. 2004), citing *Doe v. Duncanville Independent School District,* 70 F.3d 402, 408 (5th Cir. 1995).
[14] *Clay v. Fort Wayne Community Schools,* 76 F.3d 873, 879 (7th Cir. 1996).
[15] *PLANS, Inc. v. Sacramento City Unified School District,* 319 F.3d 504, 506 (9th Cir. 2003)
[16] *District of Columbia Common Cause v. District of Columbia,* 858 F.2d 1, 5 (D.C. Cir. 1988).
[17] *Annunziato v. New Haven Board of Aldermen, supra,* 555 F.Supp. at p. 431 (D.Conn. 1982).

Perhaps the most tenuous definition of a pocketbook injury is found in a District Court decision from the Eleventh Circuit. In *Harvey v. Cobb County, Georgia,* 811 F.Supp. 669 (N.D.Ga. 1993), a court was so anxious to award municipal taxpayer standing that it found the following to constitute a pocketbook injury sufficient to confer standing:

> [I]n 1967 the panel [displaying the Ten Commandments] was moved from the old Courthouse to its present location by Cobb County inmates. Further, the panel has been dusted by a night cleaning crew consisting of Cobb County inmates and a supervisor employed by Cobb County several times during the past twenty-five years. On one occasion the panel was taken down and replaced by the crew after removing the heavy buildup of nicotine on the panel. actions by a supervisor and by Cobb County inmates, who were housed, fed, and transported by Cobb County at Cobb County's expense, constitute the use of tax revenues, however small and indirect, on the panel. Accordingly, the Court concludes that Cunningham has standing to bring this action as a Cobb County taxpayer.

(*Id.* at pp. 675-676.) Consequently, while some of the federal circuits agree as to what constitutes a

pocketbook injury sufficient to confer standing, there are also cases, such as the one cited immediately above, that, in the absence of guidance from this Court, have applied arbitrary or result-oriented rules, and, thereby, produced anomalous results.

### C. When is a "Good Faith Pocketbook Injury" Necessary?

Even greater disparity exists among the federal circuits when it comes to identifying the circumstances in which a good faith pocketbook injury is required to support standing for a municipal taxpayer.

As with the definition of pocketbook injury, most of the federal circuits agree that some sort of financial or economic impact is required in order to assert municipal taxpayer standing, and apply this rule to *all* municipal taxpayer suits, including challenges based on First Amendment violations. However, a few circuits pay lip service to this general rule, but, nonetheless, find municipal standing in cases where no economic injury exists. In most of those cases, the challenged activity implicated First Amendment concerns; however, the bases for awarding standing without economic injury are vague and varied. Again, a ruling from this Court, defining the parameters and prerequisites for municipal taxpayer standing—including those in the First Amendment context—will unify the lower courts in ruling on such cases in the future.

### i. The Fourth, Fifth, Eighth, and Ninth Circuits Require Pocketbook Injury, Regardless of the Character of the Municipal Taxpayer Challenge

As noted above, the majority of the circuits require a pocketbook injury to sustain a municipal taxpayer challenge, whether the allegedly wrongful activity is a First Amendment violation, or some other municipal act. The rationale for this appears to be that if no public funds are involved, it is not a legitimate *taxpayer* suit.[18]

In *Koenick v. Felton,* 190 F.3d 259, 263 (4th Cir. 1999), a case involving an Establishment Clause challenge to municipal activity, the Fourth Circuit held that "a municipal taxpayer has standing in cases where the litigant's only injury is the alleged improper expenditure of municipal funds." Applying this rule, the Fourth Circuit affirmed standing for a municipal taxpayer to challenge the expenditures of tax revenue towards paid holidays on the Friday before and the Monday after Easter for public school employees. Since the tax revenues funded the public school system and, thereby, funded the paid, statutory holidays for school employees, the taxpayer was found to "indirectly" bear the burden of funding a paid public school holiday around Easter. (*Id.* at pp. 263-264.)

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[18] *See e.g., Freedom From Religion Foundation, Inc. v. Zielke,* 845 F.2d 1463, 1470 (7th Cir. 1988) ["A plaintiff's status as a municipal taxpayer is irrelevant for standing purposes if no tax money is spent on the allegedly unconstitutional activity"].

The Fifth Circuit held, in *Doe v. Duncanville Independent School District,* 70 F.3d 402, 408 (5th Cir. 1995) that "[i]n order to establish state or municipal taxpayer standing to challenge an Establishment Clause violation, a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice."

A District Court in the Eighth Circuit held, in *Freedom From Religion Foundation, Inc. v. Olson,* 566 F.Supp.2d 980 (D.N.D. 2008), that the plaintiffs must establish a causal link between the use of tax money and the challenged activity. The Plaintiffs complained that costs of referring and committing children to a religious boys and girls ranch were funded, in part, by taxpayer appropriations, thus establishing a link between tax money and the challenged activity. However, even absent the referral of children to the ranch, those tax appropriations would still occur because there would be other treatment facilities to which the county would refer children. Thus, there was no causal link between the challenged activity and the expenditure of public funds, and plaintiffs did not have standing.

**ii. The Third, Seventh and Eleventh Circuits—While Paying Lip Service to the General Rule Requiring Pocketbook Injury—Have Also Found Standing in Cases Where the Only Injury is Non-Economic**

In contrast, several of the federal circuits have acknowledged a pocketbook injury requirement, only to turn around and find standing to exist even in the absence of economic harm.

For example, in *ACLU-NJ v. Township of Wall,* 246 F.3d 258, 263 (3d Cir. 2001), the Third Circuit Court of Appeals denied standing to the plaintiff municipal taxpayers because they failed to establish that the township had spent any money, much less tax money, on a Christmas display to which they objected. However, the court indicated that, but for the plaintiffs' failure to preserve the issue on appeal, it would have awarded standing based on the plaintiffs' non-economic injuries—*i.e.,* their "personal contact" with the Christmas display and their resulting feelings of resentment and exclusion. (*Id.* at p. 265.)

In *Gonzalez v. N. Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), the plaintiffs were Township residents and taxpayers who challenged a crucifix display based on the Establishment Clause. The plaintiffs were unable to show that any tax revenue had been spent on the display, so they claimed standing based on non-economic injuries that they claimed to have suffered due to the presence of the crucifix. Although the court initially denied taxpayer standing, due to the absence of actual expenditures of tax revenue (*id.* at p. 1416), it ultimately found standing on the basis that the plaintiffs incurred an injury by avoiding the area near the crucifix. "[Plaintiffs'] claim that they avoid the area of the park where the crucifix is displayed

because of its presence constitutes an injury in fact." (*Ibid.*)

In *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), plaintiffs challenged the display of a cross on public property; however, no part of the expense of the cross was paid for out of tax revenues.

> The fact that the plaintiffs do not like a cross to be displayed on public property — even that they are deeply offended by such a display — does not confer standing, for it is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays. To be made indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit. … [However, t]hey say they have been led to alter their behavior — to detour, at some inconvenience to themselves, around the streets they ordinarily use. … The willingness of plaintiffs … to incur a tangible if small cost serves to validate, at least to some extent, the existence of genuine distress and indignation, and to distinguish the plaintiffs from other objectors ….

(*Id.* at p. 268, internal citations and quotations omitted.) Because one plaintiff testified that she detoured from her accustomed route to avoid seeing the cross display, the court found standing to exist. (*Id.* at p. 269.)

And although district courts in the Eleventh Circuit have affirmed the requirement that municipal funds be spent on challenged activities,[19] the Eleventh Circuit Court of Appeals held that the word "Christianity" appearing on a City seal, which plaintiffs were forced to see regularly, constituted an injury in fact and conferred standing.[20]

This list of cases is by no means exhaustive, but it does indicate that non-economic injury is frequently held to confer standing on plaintiffs who otherwise would not qualify for standing under a "pocketbook injury" rule. Whether this distinction should be preserved at all, and, if so, whether the nature of the challenge (*i.e.,* First Amendment issues versus other municipal acts) is relevant to the determination are issues that this Court should confront and clarify.

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[19] *See Alabama Freethought Association v. Moore,* 893 F.Supp. 1522, 1532-1533 (N.D.Ala. 1995) and *Bats v. Cobb County, Georgia,* 495 F.Supp.2d 1311, 1317 (N.D. Ga. 2007).

[20] *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-693 (11th Cir. 1987); *see also Foremaster v. City of St. George,* 882 F.2d 1485, 1490-1491 (10th Cir. 1989) [finding standing to challenge the religious element of a city logo displayed in the city hall, on city vehicles, and on city stationary where the plaintiff had "direct, personal contact" with the logo on a daily basis and was offended and intimidated by it].

## IV. The Questions Presented in this Case Are of National Significance

Municipal taxpayer standing is an issue of law that will arise over and over in the future. As Petitioner estimated in its Petition for Writ of Certiorari, there are approximately 87,000 distinct municipal corporations in the United States,[21] and each municipality engages in hundreds, if not thousands, of official actions every year, any one of which could become the subject of a taxpayer's challenge.

In 2003, one scholar estimated that, "Since 1982, … lower federal courts have published almost three hundred opinions addressing challenges to public expenditures on federal constitutional and statutory grounds. … [T]he state and municipal taxpayer suits are far more numerous than the federal taxpayer suits, eighty-six and fourteen percent, respectively."[22]

This estimate does not take into account the number of taxpayer suits resulting in unpublished opinions, or the cases where courts merely presumed taxpayer standing to exist and moved directly to the merits without discussing standing. Moreover, this estimate is more than eight years old. Since 2003 there have, no doubt, been many more such cases,

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[21] See fn. 6, *supra*.

[22] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, supra,* at p. 802.

including two which made it all the way to this Court: *DaimlerChrysler* in 2006 and *Hein v. Freedom from Religion Foundation*[23] in 2007.

Moreover, the significantly greater number of municipal and state taxpayer standing suits versus federal taxpayer standing suits indicates that further guidance from this Court is sorely needed regarding municipal, and possibly even state, taxpayer standing.[24] The instant case presents the perfect opportunity for this Court to set a clear precedent for the evaluation of municipal taxpayer standing claims in the future.

## CONCLUSION

The confusion over municipal taxpayer standing has continued unmitigated since the *Frothingham* court first affirmed the doctrine in 1923. Since that time, federal courts, and state courts following federal law on standing (such as the Wisconsin Court of Appeals), have floundered amidst a sea of inconsistent and perplexing opinions. It would behoove this Court to eliminate the confusion, once and for all, by creating a streamlined approach to analyzing municipal taxpayer standing issues, just as it has done in the past for federal and state

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[23] 551 U.S. 587 (2007).

[24] Again, it should be noted that the 86% versus 14% figure is from 2003, *i.e.,* before this Court issued its 2006 decision in *DaimlerChrysler* clarifying the requirements for *state* taxpayer standing. It is highly likely that the *DaimlerChrysler* opinion has mitigated the confusion surrounding *state* taxpayer standing suits.

taxpayer standing. "[C]lear rules foster respect for the judiciary; they require judges to render consistent outcomes and ensure that judges draw on a body of law that represents the collective experience of the judiciary over time rather than upon their own political or ideological viewpoints."[25]

For these reasons, *amici* respectfully request that this Court grant the instant Petition for Certiorari and clarify the matter of municipal taxpayer standing for the benefit of the lower courts and municipal taxpayers throughout the United States.

Respectfully submitted this 4th day of January, 2012.

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[25] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, supra,* at p. 838.

Foundation and the Libertarian
Law Council

No. 11-685

*In the*
*Supreme Court of the United States*

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Highway J Citizens Group, U.A.,
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On Petition for Writ of Certiorari
to the Wisconsin Court of Appeals

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the motion for leave to file and brief of *amici curiae* in the above-entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in Century 12 point for the text and 10 point for the footnotes. The motion contains 377 words and the brief contains 4,711 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 4, 2012.

Gary G. Kreep