QUESTIONS PRESENTED

1. This Court and several Circuit Courts of Appeal have recognized that municipal taxpayers have standing to sue for illegal municipal expenditures without having to show actual pecuniary harm. Here, the Wisconsin Supreme Court (following federal law) allowed a Wisconsin Court of Appeals decision holding that there must be actual pecuniary harm for a taxpayer to sue a municipality. Does this conflict with federal decisions that do not require such harm?

2. There is a major split among the Circuits, with the Third, Fourth, and Seventh Circuits requiring a showing of actual pecuniary harm, and the First, Second, Sixth, Ninth, and D.C. Circuits not requiring actual pecuniary harm to establish municipal taxpayer standing. Should this Court grant the petition to resolve the split and provide judicial consistency and clarity with respect to municipal taxpayer standing?

LIST OF PARTIES

Petitioner–Plaintiff Highway J Citizens Group, U.A., is a Wisconsin unincorporated non–profit association with approximately 15,000 members, many of whom are taxpayers, property owners, and residents of the Village of Richfield and the Town of Polk (two local municipalities located 30 miles northwest of Milwaukee in Southeastern Wisconsin). Highway J's mission includes promoting proper land use decisions. Some of Highway J's members include Village of Richfield residents Raymond Cox, Terry L. Margherita and William S. Martin III and Town of Polk resident Alois Wilhelmi, all of whom signed sworn affidavits in support of this municipal taxpayer lawsuit.[1]

Respondent–Defendant, the Village of Richfield, is an elected local municipality with its principal address at 4128 Hubertus Road, Hubertus, Wisconsin 53033. The Village of Richfield was, until February 13, 2008, known as the Town of Richfield.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations and no stock. No publicly held company therefore owns 10% or more of Petitioner's stock.

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[1] *See* Pl's Am. Compl., App. 92–109.

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OPINIONS BELOW

Review is sought of the opinion of the Wisconsin Court of Appeals, decided February 16, 2011, and reported at *Highway J Citizens Group, U.A. v. Village of Richfield*, No. 2010-1162, 2011 Wisc. App. LEXIS 116 (Feb. 16, 2011), and appearing at pages App. 1 to App. 6 of the Appendix.

JURISDICTION

Petitioner seeks review of the Wisconsin Court of Appeals decision affirming the trial court's grant of summary judgment for the Village of Richfield, and issued February 16, 2011.[2] The Wisconsin Supreme Court denied Highway J's petition for review on September 1, 2011.[3] The Supreme Court has jurisdiction to review this opinion in accordance with to 28 U.S.C. § 1257(a) and Supreme Court Rule 13.

STATUTORY PROVISIONS

This case involves part of Wisconsin's municipal annexation statute, reproduced at page 21 of the Appendix.

STATEMENT OF THE CASE

This is a municipal taxpayer lawsuit to challenge the illegal expenditure of municipal funds.

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[2] App. 1–6.

[3] App. 18–19.

In this case, Highway J challenged an illegal annexation by the Village of Richfield, but the Wisconsin Court of Appeals (which follows federal law on standing) held that Highway J did not have standing because Highway J's members did not suffer a dollars–and–cents injury beyond what the rest of the taxpaying members of the communities suffered.

In 2008, the Wisconsin Department of Administration reviewed the Village of Richfield's proposed annexation of territory, which Highway J now challenges, from the Town of Polk and found the annexation to be contrary to the public interest. The proposed annexation was a "balloon–on–a–string" configuration, where the annexed property (a business park) is not contiguous to Richfield's boundary, but rather connected to Richfield only by a road known as Cabela Way. The Department explained that because such configurations "create bizarre and unworkable municipal boundaries that are difficult to serve and are confusing for area residents, businesses, emergency response personnel, and others,"[4] this proposed annexation was contrary to Wisconsin law.

Richfield nonetheless disregarded the Department's conclusion and annexed the business park, thereby obligating itself to make five annual payments to Polk in order to compensate for lost

[4] App. 75.

property taxes.[5] Two of those tax payments already have been made in 2010 and 2011, and three more payments will be made in 2012, 2013, and 2014.[6]

In February 2009, Highway J, an unincorporated non–profit association that promotes proper land use decisions, challenged the annexation in Wisconsin state court. Highway J also argued that if the annexation is invalid then any related tax payments made by Richfield would be an illegal use of taxpayer funds. Richfield filed a motion to dismiss alleging that Highway J lacked standing. Highway J responded that it has members that live and pay taxes in both Richfield and Polk, and so under Wisconsin law (which follows federal law) Highway J has standing to challenge this illegal expenditure of municipal funds.

The trial court dismissed the case, ruling that because Highway J's members would suffer no unique "pecuniary loss or injury,"[7] and no injury different from the injury suffered by any other member of the community, Highway J did not have standing. Affirming the trial Court, the Court of Appeals held that a taxpayer "must have sustained, or will sustain, some pecuniary loss before he or she has standing"[8] to challenge the illegal expenditure of municipal funds.

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[5] *See* Wis. Stat. 66.0217(14)(a)(1), App. 21.
[6] *See* App. 22, 30, 45.
[7] App 13.
[8] App 4.

The Wisconsin Supreme Court denied review, leaving in place the Court of Appeal's requirement that a taxpayer may only challenge the illegal expenditure of municipal funds if that individual has already suffered actual pecuniary harm.

The Wisconsin Supreme Court (which follows federal standing law) upheld the Court of Appeals's ruling—in conflict with this Court and five other Circuit Courts of Appeal—that taxpayer standing requires actual pecuniary loss. Three other Circuits—the Third, Fourth, and Seventh—however, do require a showing of pecuniary harm, placing them in conflict with those Circuits and this Court's rulings. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Court should grant this petition because the Wisconsin Supreme Court decision is contrary to the decisions of this Court and several Circuit Courts of Appeal

Although Wisconsin follows federal law on taxpayer standing,[9] the Wisconsin Supreme Court

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[9] *See Wisconsin's Envtl. Decade, Inc. v. Pub. Service Comm.*, 69 Wis.2d 1, 10 (Wis. 1975) (*citing Data Processing Service v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970) (analysis required under Wisconsin rule on standing is "conceptually similar" to the analysis required under the federal rule)). *See also Thompson v. Kenosha County,* 221

(following what it perceived to be the federal law) allowed the Wisconsin Court of Appeals decision that held that Highway J lacked municipal taxpayer standing because it had not alleged actual pecuniary loss as a result of the municipal action: "[T]he taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing."[10] And the Wisconsin court went on to hold that the allegation that Petitioner's taxes or the municipal tax bases would be affected by the annexation was insufficient to sustain municipal taxpayer standing:

> They assert standing because they are taxpayers and the tax base or taxes will be affected by the annexation. These allegations of pecuniary harm are nothing more than what every taxpayer in the Town of Polk and Village faces.[11]

N.W.2d 845, 849 (1974) (fact that plaintiffs were taxpayers and alleged the illegal expenditure of public funds was sufficient to establish their pecuniary loss); *Hart v. Ament,* 500 N.W.2d 312, 314 (1993) (taxpayers have standing to challenge illegal expenditure of county funds because they each have a financial interest in those funds like a stockholder has in a private corporation); *and*, *Ass'n of Career Employees v. Klauser*, 536 N.W.2d 478, 484 n.12 (Ct. App. 1995) (citing both federal and state case law showing well–settled legal support for municipal taxpayer standing).

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

[11] *Id.* at *4, App. 4.

But the decision of the Wisconsin court flatly contravenes this Court's repeated endorsement of municipal taxpayer standing in cases such as *Frothingham v. Mellon*, *Doremus v. Board of Education*, *ASARCO Inc. v. Kadish*, and *DaimlerChrysler v. Cuno*.[12] So even as this Court has ruled against standing for federal taxpayers[13] and state taxpayers,[14] it has retained municipal taxpayer standing.

According to this Court's decision in *Frothingham*, plaintiffs seeking to establish municipal taxpayer standing are required to meet a less rigorous injury standard than those seeking standing as federal and state taxpayers. Unlike federal or state taxpayers, municipal taxpayers may fulfill the injury requirement by pleading an alleged misuse of municipal funds.[15] That is exactly what Highway J has done here for its Village of Richfield taxpaying members (Raymond Cox, Terry L. Margherita and William S. Martin III) in its amended complaint.[16]

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[12] 262 U.S. 447 (1923); 342 U.S. 429 (1952); 490 U.S. 605 (1989); and 547 U.S. 332 (2006) respectively.
[13] *Frothingham*, 262 U.S. at 488–489.
[14] *DaimlerChrysler*, 547 U.S. at 337.
[15] *Frothingham,* 262 U.S. at 486 (*citing Crampton v. Zabriske*, 101 U.S. 601, 609, 25 L.Ed. 1070 (1880)); *see also Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210 (6th Cir. 2011) (en banc), *cert. denied*, 181 L. Ed. 2d 31 (2011).
[16] App. 92–109.

And according to the Sixth Circuit's recent en banc decision in *Smith v. Jefferson County Board of School Commissioners*, municipal taxpayer standing "appears to rest on the assumption that the relatively small number of taxpayers involved and the close relationship between residents of a municipality and their local government results in a direct and palpable injury whenever tax revenues are misused."[17] And "[a]lthough this assumption could be questioned in an age in which some cities boast populations in the millions, the rule 'is one that the Supreme Court has maintained for 86 years and one we have no authority to second guess.'"[18]

To be sure, commentators have questioned this Court's continued endorsement of municipal taxpayer standing.[19] But the fact remains that a municipal taxpayer need not, under this Court's precedent, show pecuniary loss in order to challenge a municipality's unconstitutional or unlawful act: "Taxpayer standing in this context will not turn on whether it was a bargain . . . ."[20] As stated in a 2009

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[17] *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210 (6th Cir. 2011) (*quoting Taub v. Kentucky,* 842 F.2d 912, 918 (6th Cir. 1988)).
[18] *Smith,* 641 F.3d at 210 (*quoting Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 287 (6th Cir. 2009)).
[19] Kyle B. Gee, Note and Comment: DaimlerChrsyler Corp. v. Cuno – *Denying State Taxpayers Standing in Federal Court: Are Municipal Taxpayers Next?*, 38 U. TOL. L. REV. 1241, 1244 n.21 (2007) (collecting commentary).
[20] *Smith*, 641 F.3d at 211.

scholarly article in the *Journal of Appellate Practice and Process,* this Court has consistently held that "municipal taxpayer standing rests on the bare taxing and spending by a municipality for illegal purposes. In this context, the Article III injury is the use of the individual's taxes for illegal purposes, *with nothing more*."[21]

The Wisconsin Court of Appeals held that Highway J did not have municipal taxpayer standing because they had not sustained any pecuniary loss.[22] The Wisconsin Supreme Court (which follows federal law) allowed this decision to stand. This holding is contrary to both this Court's precedent and the precedent of several Circuit Courts of Appeal. Because the Wisconsin Court of Appeals misapplied federal law on an important state and federal question, this Court has jurisdiction[23] and should grant the petition for a writ of certiorari to correct the error.[24]

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[21] Akiva Shapiro, *Should the Courts Save Taxpayer Standing? Interpreting* Hein v. Freedom *From Religion Foundation Narrowly Through the Lens of Judicial Branch Spending*, 10 J. APP. PRAC. & PROCESS 273, 316 (2009) (emphasis added).
[22] 2011 WI App. LEXIS 116 at *3, App. 4.
[23] *See Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 106 (2003); *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984).
[24] *See* S. Ct. R. 10.

II. The Court should grant this petition to resolve a major split between the First, Second, Sixth, Ninth, and D.C. Circuits—which do not require actual pecuniary harm in municipal taxpayer cases—and the Second, Third, and Fourth Circuits—which do require such harm

A deep divide exists between the federal circuits on the question of whether municipal taxpayer standing requires a showing of pecuniary loss by the taxpayer. The First, Second, Sixth, Ninth, and D.C. Circuits have all held that a "pocketbook impact" is not required.

In *Donnelly v. Lynch*,[25] the First Circuit found taxpayer standing based on the longstanding rule (established by this Court in *Crampton* and *Frothingham*) that municipal taxpayers can challenge "allegedly unconstitutional use of their tax dollars."[26]

In *United States v. City of New York*,[27] the Second Circuit held that "municipal taxpayers do have standing to challenge municipal expenditures even where there is no likelihood that resulting savings will inure to the benefit of the taxpayer."[28] Following this Court's decision in *Frothingham*, the

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[25] 691 F.2d 1029, 1031 (1st Cir. 1982).
[26] *Id.*
[27] 972 F.2d 464, 466 (2d. Cir. 1992).
[28] *Id.* (citing *Crampton*, 101 U.S. at 609 and *Frothingham*, 262 U.S. at 486–87).

Second Circuit presumed that a municipal taxpayer's relationship to the municipality is "direct and immediate" such that the taxpayer suffers concrete injury whenever the "challenged activity involves a measurable appropriation or loss of revenue."[29]

In *Smith v. Jefferson County Board of School Commissioners*,[30] the Sixth Circuit en banc held that "[u]nlike federal or state taxpayers, municipal taxpayers may fulfill the injury requirement by pleading an alleged misuse of municipal funds."[31] Quoting the D.C. Circuit, the Sixth Circuit explained its reasoning as follows:

> The taxpayer's injury is not the *payment* of taxes, for which the only cure would be a rebate or reduction in taxes. Just as the shareholder need not prove that the funds he claims the Board of Directors has misapplied will be returned to him as a dividend, so the taxpayer need not show that the specific taxes he paid were used unlawfully, nor that his taxes will be reduced as a result of the judgment. By enjoining an illegal expenditure, the court can redress the taxpayer's injury caused by the misuse of public funds and ensure that the funds will

[29] *Id.* at 470.
[30] 641 F.3d at 210.
[31] *Id.*

> be devoted to lawful purposes of possible benefit to the taxpayers.[32]

In *Cammack v. Waihee*,[33] the Ninth Circuit stated: "We conclude that municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds . . . ."[34]

And in *D.C. Common Cause v. District of Columbia*,[35] the D.C. Circuit held that "[t]he Supreme Court has never required . . . municipal taxpayers to demonstrate that their taxes will be reduced as a result of a favorable judgment."[36] According to the D.C. Circuit, "when a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied."[37] Thus, the municipal taxpayer's injury here which conveys standing is the "misuse" of municipal funds.[38]

In contrast, three Circuit Courts of Appeal[39] have taken just the opposite view. Relying on this Court's state taxpayer standing doctrine, the Third

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[32] *Id.* at 215 *(quoting D.C. Common Cause v. District of Columbia,* 858 F.2d 1, 5 (D.C. Cir. 1988)).
[33] 932 F.2d 765, 770 (9th Cir. 1991).
[34] *Id.*
[35] 858 F.2d 1, 5 (D.C. Cir. 1988).
[36] *Id.*
[37] *Id.*
[38] *Id.*, *citing Frothingham* at 262 U.S. at 486.
[39] The 3d, 4th, and 7th.

and Seventh Circuits appeared to overlook the state/municipal distinction and to believe that the "pocketbook" rule also applied to municipal taxpayers.[40] The Fourth Circuit simply deferred to an incorrect interpretation of the Ninth Circuit's law.[41]

Scholars have described the law of taxpayer standing as uncertain and confusing.[42] This Court should also grant certiorari to resolve this confusion among the circuits. The opinion and analysis of *Doremus* in particular "has created confusion among the lower courts."[43] One author has flatly observed that the question of "What are the appropriate standing rules for state and municipal taxpayers in

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[40] *See ACLU of NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 262 (3d. Cir. 2001); *Clay v. Fort Wayne Cmty. Sch.*, 76 F.3d 873, 879 (7th Cir. 1996).
[41] *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999) (*citing Cammack*, 932 F.2d at 769).
[42] *See* Hans A. Linde, *The State and The Federal Courts in Governance: Vive La Difference!*, 46 WM. & MARY L. REV. 1273, 1274–75, 1280 (2005). *But see* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265 (1990) (proposing that state courts adjudicating federal law questions be required to adhere to Article III's case or controversy requirement).
[43] Richard M. Elias, Note, *Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit,* 66 MO. L. REV. 413, 420 (2001).

federal court?" is one that has been "left unexplored."[44]

Until this confusion is resolved federal courts (and state courts that follow federal law on this issue) will continue to apply conflicting rules on municipal taxpayer standing. Because only this Court has the authority to resolve the conflict, the question of municipal standing will continue to appear in petitions to this Court—just as it did in *Smith v. Jefferson County Board of School Commissioners*.[45]

According to the U.S. Census Bureau, there currently are more than 87,000 local municipalities in the United States (for example, county, city, village, town, school district, and special purpose districts such as utility, fire, police, and library), and each of these local governmental units will continue to take formal actions on a regular basis that require the expenditure of public funds.[46] When these local governmental actions violate the law (like the Village of Richfield's annexation of noncontiguous property in the case at hand), the resulting expenditure of public funds (like the five years of directly-related

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[44] Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 775 (2003).

[45] Petition for Writ of Certiorari Denied, *Smith*, 181 L. Ed. 2d 31 (No. 10-1402) (2011).

[46] *See* U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: GOVERNMENT ORGANIZATION (2002), *available at* http://www.census.gov/prod/2003pubs/gc021x1.pdf.

tax payments here) also becomes illegal and will trigger scores of municipal taxpayer lawsuits like this one. Given the expected recurring nature of these types of lawsuits, this Court now needs to provide judicial consistency and clarity on municipal taxpayer standing – an issue that is of great national importance and will continue to have widespread impact on local taxpaying citizens all across the United States of America.

To resolve this major split among the Circuits and provide judicial consistency and clarity on municipal taxpayer standing, this Court should grant the petition.

CONCLUSION

For all of these reasons, this Court should grant the Petition.

Respectfully submitted,

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