No. 121293

IN THE
SUPREME COURT OF ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD, Plaintiffs-Appellees, v. ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, Defendant, Appellant.	Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 4-15-0522 There on Appeal from the Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois No. 15 MR 16 The Honorable JOHN MADONIA, Judge Presiding.

BRIEF OF AMICUS CURIAE GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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POINTS AND AUTHORITIES

INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) is a public policy organization that litigates in state courts across the country in defense of individual rights and limited government, frequently invoking the principle of taxpayer standing to seek redress when government violates constitutional rules protecting taxpayers. *See, e.g., Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016) (taxpayer standing suit involving Gift Clause); *Friedman v. Cave Creek Unified Sch. Dist. No. 93*, 299 P.3d 182 (Ariz. Ct. App. 2013) (taxpayer standing suit involving Special Law Clause); *Turken v. Gordon*, 224 P.3d 158 (Ariz. 2010) (taxpayer standing suit involving Gift Clause). The Institute is currently litigating a case involving taxpayer standing in Cook County Circuit Court. *Mendez, et al., v. City of Chicago* (No. 2016-CH-15489, filed Nov. 29, 2016).

Goldwater Institute attorneys and policy scholars have also published extensive research and analysis regarding taxpayer standing rules. *See, e.g.,* Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 ARIZ. ST. L.J. 505 (2012); Nick Dranias, *The Local Liberty Charter: Restoring Grassroots Liberty to Restrain Cities Gone Wild*, 3 PHOENIX L. REV. 113 (2010).

Like many public interest legal organizations, GI relies on taxpayer standing to give citizens an opportunity to enforce constitutional rules when public officials violate, disregard, or misunderstand the duties and limits of their offices. When standing doctrines are too narrowly drawn, citizens can be deprived of a critical aspect of checks-and-balances. GI thus supports Respondents and affirmance of the Court of Appeals decision.

INTRODUCTION

Taxpayer standing makes intuitive sense: if taxpayer funds—held in trust by the government—are unlawfully spent then taxpayers have been injured, and should be able to seek redress in court. Taxpayer standing has accordingly been recognized by Anglo-American common law courts for nearly two centuries. *See* Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 898 (1960) (citing *Bromley v. Smith*, 57 Eng. Rep. 482 (Ch. 1826), as earliest taxpayers suit). In fact, the U.S. Supreme Court's refusal to entertain taxpayer standing in federal courts, in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), is the outlier in this area, and it has been sharply and persuasively criticized. *See, e.g.*, Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001). Of course, that decision was based on federalism considerations that do not apply to state court.

Instead, "taxpayer standing rules have evolved in many jurisdictions" to ensure meaningful enforcement of "state constitutional fiscal limitations" by "allowing individual taxpayers to challenge purported violations of these widespread and specific—but otherwise unenforceable—state constitutional fiscal limitations." Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1295 (2012).

California courts, for example, view the standing question as basically a function of the political question doctrine: standing requirements exist "to ensure that courts address actual controversies between parties who have sufficient adverse interests to press their case with vigor." *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 30, 112 Cal. Rptr. 2d 5 (2001). But so long as a dispute presents a justiciable question, and other prudential

requirements such as adversity are satisfied, there is no reason to deprive taxpayers of standing to sue.

The argument typically proffered for closing the courthouse doors here is that broad taxpayer standing doctrine will open the "floodgates" of litigation and cause courts to intrude into all tax and spending decisions by the government. This argument fails for two reasons. First, there is no evidence to support fears of a flood of litigation, and, second, it is proper in our checks-and-balances system for courts to enforce constitutional limits on taxing and spending decisions by the government. While *policy* decisions about taxes and spending are beyond the courts' purview, the *legal limits* on the taxing and spending powers are properly subject to judicial review.

The Court of Appeals was correct in holding that taxpayer plaintiffs need not show that their individual tax bills will increase as a consequence of a challenged law. Such an excessively formalistic requirement will likely deter meritorious cases and undermine the essential reason for taxpayer lawsuits: to enable citizens to enforce the law when elected officials fail to do so. This would put taxpayers at the mercy of these officials, *Department of Admin. v. Horne*, 269 So. 2d 659, 660–61 (Fla. 1972), and would enable the executive and legislative branches effectively to collude in evading legal limits on their authority. *Common Cause v. State*, 455 A.2d 1, 9 (Me. 1983). The reasoning adopted below—that taxpayers have an equitable interest in the pool of taxpayer moneys, and consequently a right to seek equitable enforcement of laws securing that interest against unlawful expenditures—fits more realistically with the demands of litigation, has proven manageable in those states that embrace it, and is more consistent with the principles of the Illinois Constitution. The decision below should be affirmed in all respects.

ARGUMENT

I. TAXPAYER STANDING IS A TRADITIONAL AND LONG-ACCEPTED PRINCIPLE OF EQUITY

The concept of standing exists to prevent parties from invoking the courts to address matters that are either not justiciable disputes, or in which the parties have no real stake, and which should be left to resolution by those whose rights and interests are actually involved. To put it simply, standing exists so that people do not go to court about things that are none of their business. That principle applies equally in the realm of public law, where constitutional or legal questions are at stake. Such matters are the business of a lot of people. If courts craft an excessively limited standing doctrine, they risk closing the courthouse doors to citizens who not only need protection, but are also in the best position to ensure that the law is followed. Worse, it risks prejudice, because it transforms the standing analysis into what is essentially a substantive ruling that the challenged action is legally bulletproof. "If no one has standing to call [the government] to account, it can disregard the law with impunity—a result that would 'make an ass of the law.'" WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 696 (7th ed. 1994).

Standing need not be complicated when it comes to tax dollars. "The adage, 'a public office is a public trust' is the foundation of the law supporting the action." *Cass Cnty. v. Kloker*, 239 Ill. App. 301, 305 (App. Ct. 1925). Tax dollars are public funds, that are collected in accordance with constitutional rules for public purposes, consistent with the Constitution and statutes. Tax money is therefore also a public trust. And it was on that basis that the earliest American cases allowing taxpayer standing were decided.

In the earliest Illinois decision on the subject, *Colton v. Hanchett*, 13 Ill. 615 (1852), this Court allowed a group of taxpayers to seek an injunction against the unlawful

construction of a bridge. The Court noted that the plaintiffs had no other alternative but to file the type of suit they did, because they could not sue afterwards and seek a refund—that "would be impracticable"—and because any other form of redress, "if available at all, would most likely have been less prompt and efficacious." *Id.* at 618. The Court noted that because the question of "the [government's] right to appropriate the funds … in the manner proposed" was "a question affecting the public interest," it was "most direct, speedy and efficacious" for the taxpayers to seek an injunction. *Id.*

Hanchett recognized that taxpayer standing is a tool of equity, that plays a role similar to that played by the class action procedure in law. In a class-action lawsuit for damages, each victim has suffered an injury so small that it would be inefficient for each to sue individually. Consequently, the victims are allowed to combine their injuries, to obtain legal resolution. A case in which the government unlawfully spends taxpayer money likewise injures each individual taxpayer by a small, fractional amount. The taxpayer suit for injunction against illegal expenditure by the government is therefore one of the equitable rules "that allow[] the amalgamation of [their] small interests." Epstein, *supra*, at 10.

That equitable rule is plain in *Sherlock v. Village of Winnetka*, 59 Ill. 389, 398-99 (1871), in which this Court explained that the taxpayer suit is analogous to the shareholder derivative action (also an equitable proceeding). Given that a local government is a type of corporation, it was logical to conclude that city property "is held in trust for the benefit of its constituents, and the [municipal] corporation is bound to administer [it] faithfully, honestly and justly." *Id*. at 398. If city officials "dispos[e] of its valuable property" in an unlawful manner, they are "guilty of a breach of trust," and should be "regarded in the

same light" as a corporate board that wastes resources unlawfully, or a trustee who misappropriates trust funds for personal gain. *Id.*[1]

This principle does *not* depend on proof that the plaintiff's own tax burden will be increased as a result of an allegedly wrongful expenditure. Rather, it depends on the principle that taxpayers, like corporate shareholders, have an equitable right in the funds they turn over to the treasury—a right to have that money spent in accordance with the terms on which their funds are contributed to the government's fund. *See also Mellon*, 262 U.S. at 486-87 ("[t]he reasons which support the extension of the equitable remedy to a single taxpayer … 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.").

Like the shareholder derivative suit, taxpayer standing is "a long-standing doctrine of equity jurisprudence, having been woven into the quiltwork of equitable principles … over a century ago." *Brown v. Tenney*, 125 Ill. 2d 348, 359 (1988). It rests upon the principle that the citizen is the beneficiary, and the public officer the trustee, of a public trust, and that when public officers fail to abide by the law in spending tax money, nobody represents the interests of the general public—except, of course, the taxpayer who files a taxpayer suit. *Cf. id.* at 360.

[1] After this Court remanded the *Sherlock* case, it was tried and appealed again, and this Court found that the public officials had, indeed, misappropriated public funds for the benefit of a private corporation. *Sherlock v. Village of Winnetka*, 68 Ill. 530, 537 (1873). This Court warned that if officials could make such allocations without fear of redress in court, they would be able "under the forms of the law, to plunder the people to their ruin." *Id.*

That is why, in *City of Chicago ex rel. Cohen v. Keane*, 64 Ill. 2d 559 (1976), this Court *rejected* the proposition that taxpayer standing requires the taxpayer to show that his taxes will be increased as a result of the alleged violation. *See id.* at 562-63. This Court found that such a requirement would be a "'dangerous precedent to lay down,'" *id.* at 567 (quoting *United States v. Carter*, 217 U.S. 286, 306 (1910)), and that "such a limitation cannot be imported into either the statutes or the common law rule …. To do so would plainly rob them of their effectiveness." *Id.* at 567–68. Emphasizing "the analogy between the position of the taxpayer and that of the stockholder," *id.* at 568, this Court declared that the taxpayer had standing, because it is "the abuse of the relationship that triggers the right to recover, rather than loss to the principal." *Id.* at 565–66.

That does not mean, of course, that taxpayers have *carte blanche* to file lawsuits that the Attorney General has exclusive constitutional authority to file. *Lyons v. Ryan*, 201 Ill. 2d 529, 540 (2002). But where "the funds alleged to be misappropriated, misapplied or wrongfully retained [are] unquestionably public funds," this Court has long recognized that taxpayers have standing to sue—so long as they satisfy other jurisdictional requirements, *Fuchs v. Bidwill*, 65 Ill. 2d 503, 509 (1976)—and that standing does *not* depend on a showing that the taxpayer will be subjected to a heavier tax burden as a result of the alleged wrongdoing.

II. REQUIRING A SPECIFIC SHOWING OF AN INCREASED TAX BURDEN IS UNNECESSARY AND WOULD CLOSE THE DOORS TO VALID TAXPAYER LAWSUITS

The appellees argue that the decision below broadens the rule of taxpayer standing and will lead to "a proliferation of taxpayer actions," allowing citizens to sue whenever the government misappropriates funds. Pet. for Leave at 2. This is an exaggeration—and one that runs the risk of imposing a rule that will prevent appropriate judicial review of important legal questions.

First, the distinction at issue here—between a taxpayer's equitable interest in funds and the taxpayer's allegation that his taxes will increase as a consequence of misappropriation—will amount to a meaningless formalism in most cases. Appellees concede that taxpayers have standing if they will have to replenish the public treasury for misappropriations. *Id.* at 3. But as the court below rightly recognized, *every* misappropriation imposes that injury to some non-zero degree, because public employees must administer any challenged expenditure, and they are paid to do so out of general taxpayer funds. *Jenner v. Illinois Dep't of Commerce & Econ. Opportunity*, 2016 IL App (4th) 150522, ¶ 25, 59 N.E.3d 204, 211. That may be an infinitesimal amount, but the purpose of taxpayer standing is to allow taxpayers to amalgamate small interests of that sort and seek legal redress. Epstein, *supra* at 10. As Maryland's highest court has observed, "the loss to one taxpayer in any such proceeding seldom amounts to $20 … But, when a suit is instituted by one or more taxpayers in representation of all, the case is quite different. The amount involved and sought to be protected is then the total amount of loss to taxpayers, or the total amount which may be wrongfully expended." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 92 A.3d 400, 478 (Md. Ct. App. 2014). While prudential

limits on standing—discussed below—may be appropriate, there can be no question that taxpayers are *injured* by unlawful expenditures.

In fact, even in cases where there is no dispute that the wrongful expenditures will result in an increased burden on the plaintiff taxpayers, that element is still typically a legal fiction, *see* Susan L. Parsons, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMP. L.Q. 951, 970 (1986), since, as the court below noted, it is never really possible to *prove* that a wrongful expenditure will be the proximate cause of a later tax increase. Worse, forcing taxpayers to prove such an allegation in order to establish standing disregards the nature of the taxpayer suit: that it is an equitable device for enabling citizens who are each harmed in a tiny amount to bring suit when efficiency considerations might otherwise prohibit that. To impose the high degree of specificity demanded by the appellants here would require overlooking the equities involved in such lawsuits. "[I]t is true that the total cost exposure to the State [of misspent funds] is difficult to ascertain … such a difficulty *is the reason that we do not require taxpayers to demonstrate* in pleading the exact pecuniary loss or increase in taxes." *State Ctr., LLC*, 92 A.3d at 475 (emphasis added).

The Missouri Supreme Court has explained its refusal to require proof that a taxpayer will experience a heavier tax burden by noting that the "primary basis for taxpayer suits" is "the need to ensure that government officials conform to the law"; that they remain "strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers." *Eastern Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 46 (Mo. 1989).

Missouri courts do not require a taxpayer plaintiff to prove that his particular tax bill will increase, because when "public funds are about to be dissipated for an illegal purpose," the injury to the taxpayer "is presumed." *Id*. The taxpayer has "'a direct interest in the proper use and allocation of tax receipts,'" and injury to that interest—even aside from any increase in financial liabilities to the complaining taxpayer—is an injury. *Id*. at 47 (citation omitted). Even if taxpayers are financially better off because of the illegal expenditure, they have an interest in ensuring the rule of law:

> Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, it is illegal and should be enjoined. Taxpayers must have some mechanism of enforcing the law.

Id. at 47.

The legal injury here is analogous to the federal courts' holding that being subjected to unequal treatment is *itself* an injury for Article III purposes, without regard to the cost suffered as a result of that inequality. In *Northeastern Fla. Ch. of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla*., 508 U.S. 656, 666 (1993), the Supreme Court held that a plaintiff is injured when the government discriminates in the allocation of benefits by "the denial of equal treatment … not the ultimate inability to obtain the benefit." Likewise, a taxpayer plaintiff is harmed by the breach of public trust when the government spends resources unlawfully, not the burden of ultimately having to replenish the public treasury.

While that injury might be measured in fractional or hypothetical monetary terms (the amount spent, or the liability for replenishing the public coffers) the injury itself really boils down to the government's breach of the legal limits on expenditures—which is

properly a matter of equity, just as with lawsuits to restrain unlawful corporate expenditures, or other breaches of trust. *Cf. Bradley v. Ballard*, 55 Ill. 413, 419 (1870). Because the injury is a breach of trust, rather than a monetary question about tax liability, it makes little sense to require taxpayer plaintiffs to prove that their tax bill will increase as a result of unlawful action before seeking equitable relief.

That is why most states have rejected strict taxpayer standing requirements. *See, e.g., City of Wilmington v. Lord*, 378 A.2d 635, 638 (Del. 1977) (excusing requirement that taxpayer show pecuniary loss because "if suit by taxpayers is not allowed, the governmental action questioned will likely go unchecked."); *Upper Bucks Cnty. Vocational-Tech. Sch. Educ. Ass'n v. Upper Bucks Cnty. Vocational-Tech. Sch. Joint Comm.*, 474 A.2d 1120, 1122 (Pa. 1984) (citing "the policy of ensuring judicial review which otherwise would not occur."). *See also West Farms Mall, LLC v. Town of W. Hartford*, 901 A.2d 649, 660 (Conn. 2006) (noting that "an overwhelming majority of jurisdictions confer standing on taxpayers" without requiring showing of increased tax burden, and citing cases).

The Maine Supreme Judicial Court likewise takes the view that taxpayer standing is necessary to ensure judicial review—and the rule of law:

> The chief argument against taxpayer standing … is that the acknowledgement of such standing opens a door to litigation …. However, other considerations must be taken into account. One is that, other than a taxpayers' suit, there is no mechanism available … preventing the [challenged] project from being carried out if the project should indeed entail unconstitutional expenditures …. It is apparent that the project will not be stopped by the attorney general, who has vigorously defended the state and its officials throughout the action. *It would conflict with the basic theory of American government if two branches of government, the legislative and the executive, by acting in concert were able, unchecked, to frustrate the mandates of the state constitution*.

Common Cause, 455 A.2d at 9 (emphasis added). This Court should resist the effort to jam up the machinery of checks and balances.

III. TAXPAYER STANDING UNDER THE LONG-STANDING RULE EMPLOYED BY THE COURT BELOW IS APPROPRIATE AND DOES NOT "OPEN THE FLOODGATES" TO LITIGATION

It is commonplace that state courts, lacking the jurisdictional limits of the federal Constitution, are freer to hear disputes than are their federal counterparts. That reflects the fact that while the federal government has only limited, enumerated powers, state governments have general jurisdiction and—given the broader scope of the states' constitutional powers, and the more detailed provisions in state constitutions regarding taxing and spending—this is all the more reason why state courts must hear such cases. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1855 (2001) ("Because state constitutions include many substantive social and economic provisions, taxpayer standing provides an important mechanism for regulatory enforcement and policy elaboration, sometimes placing interbranch disputes before the court."). In short, the federal roadmap is not the one to follow here because it contemplates a different journey.

In fact, the stricter federal taxpayer standing doctrine may not even be appropriate for those courts, and has been sharply criticized as based on a confused and politically-motivated reading of prior precedents. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443-58 (1988) (arguing that federal standing doctrine was purposely designed "to insulate from judicial scrutiny

governmental actions with many, diffuse, and indirect effects.").[2] Be that as it may, even under modern taxpayer standing precedent, federal courts have recognized the propriety of taxpayer suits at the *state* level. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of A (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 803–04 (2003). Even *Mellon* itself recognized that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." 262 U.S. at 486.

Appellants' worry that the decision below opens the floodgates to litigation is unpersuasive. Even if the "floodgates" argument were true, it does not rise to the level of a *constitutional* concern that would justify closing the doors to meritorious cases, but it is hard to find any factual or statistical foundation for the floodgates argument. The argument "is based on speculation and inference rather than empirical evidence demonstrating that such a flood of frivolous lawsuits would occur. In fact, courts made this same slippery slope argument when first considering whether to allow state taxpayers' actions and the current volume of such suits illustrates that the anticipated flood of litigation has not occurred." Parsons, *supra*, at 972. In part, that is because the costs of litigation remain a significant enough barrier to deter much of the "flood" that is regularly cited as a basis for denying standing. Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673–74 (1973).

More than 34 states have permissive taxpayer standing rules, Urquhart, *supra*, at 1276, and these states have not experienced a deluge of litigation. While caseloads have

[2] Justice Brandeis, who championed the restriction of taxpayer standing at the federal level, even sought to overturn the concept of corporate shareholder derivative suits. *Id.* at 1448.

increased over the past several decades, that is attributable more to increased population and the enactment of new laws that create new causes of action than to any expansion of standing doctrines. *See* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 388–89 (2003).

It is difficult to measure how real the floodgates threat actually is, because that argument "can be easy to make and difficult to rebut." *Rummel v. Estelle*, 445 U.S. 263, 304 (1980) (Powell, J., dissenting). But in past cases when courts expanded standing doctrines or new causes of action, predictions of litigation floods have proven incorrect. *See* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1074–75 (2013) (floods of litigation predicted after *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and similar cases allowing new types of claims never materialized).

Scholars who have tried to assess such things have concluded that previous expansions of standing doctrine have not caused floods of lawsuits that previously would have been barred for lack of standing. *See Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970) ("The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. … [S]o far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied."); *see also Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 275 A.2d 433, 438 (N.J. 1971) (noting that "experiences to date have given us ample reassurance" that the "spectre of 'a flood of litigation' resulting from liberalized rules of standing" was baseless). *See also* Kenneth Culp Davis, *The Liberalized*

Law of Standing, 37 U. CHI. L. REV. 450, 470 (1969) (commenting on lack of evidentiary basis for "floodgates" argument)[3]; Stern, *supra*, at 398-99, 406-08 (same).

Indeed, even after the Missouri Supreme Court adopted its broad standing doctrine in *Eastern Mo. Laborers Dist. Council*, *supra*, there is no indication that Missouri courts have experienced any "flood" of taxpayer lawsuits which was previously being held back by standing doctrine. *See* Thomas C. Albus, *Taxpayer Standing in Missouri*, 54 J. MO. B. 199, 202 (1998) (noting that other legal limits on Missouri's "reasonably clear and fair rule" have allowed its liberal standing doctrine to work well). On the contrary, parties continue to litigate complex questions of standing doctrine itself, such as this case, which likely swamps any salutary effect on the dockets that stricter standing doctrine might have. Davis, *supra*, at 470.

Most likely, this lack of a flood is caused by the fact that there are plenty of aspects of litigation that keep it within manageable levels. When the Second Circuit rejected a similar "floodgates" argument in 1965, it noted that "the expense and vexation of legal proceedings is not lightly undertaken," *Scenic Hudson Pres. Conference v. Federal Power Comm'n*, 354 F.2d 608, 617 (2d Cir. 1965), and that is correct. Plaintiffs must obtain counsel, pay filing fees, engage in motion practice and discovery, and, of course, win on the merits. These considerations are likely effective enough at barring mere officious intermeddlers from trying to invoke the courts to settle generalized social grievances. *See also Office of Commc'n of United Church of Christ v. F.C.C.*, 425 F.2d 543, 544 n.2 (1969) ("The fears of [an]…inundat[ion of lawsuits] by expansion of standing criteria are rarely

[3] In any event, parties continue to litigate complex questions of standing doctrine itself, which likely swamps any salutary effect on the court dockets that a stricter standing doctrine might have. *Id.*

borne out" because "legal and related expenses of administrative proceedings are such that even those with large economic interests find the cost burdensome.").

Courts have many tools with which to police their dockets, including rules against frivolous litigation, causation doctrines, attorney fee rules, and, of course, an adverse ruling on the merits. In taxpayer suits, for example, it is typical for courts to require that the taxpayer plaintiff pay taxes to the specific government entity alleged to have committed the wrong. *See, e.g., Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 30–31, 112 Cal. Rptr. 2d 5, (Cal. Ct. App. 2001). And "[t]he common requirement that a taxpayer can only enjoin an improper expenditure, and not compel the government to take some type of action" also "serves as an important gatekeeping mechanism." Urquhart, *supra*, at 1297.

Nor should the courts try to deter citizens from active involvement in public affairs. *Boryszewski v. Bridges*, 37 N.Y.2d 361, 364, 334 N.E.2d 579 (N.Y. Ct. App. 1975). Liberal standing doctrine "is and has been a salutary policy conducive to the advancement of the public interest and should not be narrowed or impaired." *Thomas v. Howard Cnty.*, 276 A.2d 49, 55 (Md. Ct. App. 1971). In fact, as the California Supreme Court once noted, the fact that there may be an increase in litigation from recognizing certain injuries as judicially cognizable is not necessarily an argument for closing the courtroom doors. On the contrary, "courts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress." *Dillon v. Legg*, 68 Cal. 2d 728, 749 n. 3, 69 Cal. Rptr. 72 (1968).

State constitutions have, as noted, stricter and more detailed protections against the abuse of taxpayer resources, such as ILL. CONST. art. VIII sec. 1(a) (gift clause); art. IV sec.

13 (special legislation clause); or art. IX sec. 2 (uniformity clause), and to restrict taxpayer standing could make it harder to enforce these provisions. As the Second District has observed, taxpayer standing plays an important role because taxpayers should not be required to "rely solely upon the efforts of public law officers for the protection of public rights." *People ex rel. Hamer v. Board of Educ. of Sch. Dist. No. 109, Lake Cnty*., 130 Ill. App. 2d 592, 594 (1970). *See also Highgate Condominium Ass'n v. Watertown Fire Dist*., 553 A.2d 1126, 1132 (Conn. 1989) ("failure to recognize [taxpayer] … standing … would in effect erect an impenetrable barrier to any judicial scrutiny of the legality of the actions of the fire district. This we will not permit.").

New York's highest court put the point well when it eliminated a common-law rule that impeded taxpayer standing in the same way that the test sought by the petitioners in this case would, "the failure to accord such standing" might in many cases "erect an impenetrable barrier to any judicial scrutiny of legislative action." *Boryszewski*, 37 N.Y.2d at 364. When courts restrict standing doctrines, they typically do so in the expectation that public officials, such as the attorney general, will adequately enforce the law, 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 treasur[y]," given the fact that the agency engaged in the (alleged) wrongdoing is not going to challenge the expenditure. *Horne*, 269 So. 2d at 660–61. As the *Boryszewski* court put it, "'[t]he suggestion … that the Attorney-General and other state officials may be relied upon to attack the constitutional validity of state legislation is both unreal in fact and dubious in theory.'" 37 N.Y.2d at 364 (citation omitted).

CONCLUSION

"For the Constitution to be law, it must be enforceable," writes Professor Jeremy Patrick, "but the standing doctrine has rendered several portions of the Constitution functionally void." *A Polemic Against the Standing Requirement in Constitutional Cases*, 41 CAP. U. L. REV. 603, 607 (2013). This Court should avoid adopting a rule that has similar consequences in Illinois. The Court of Appeals decision is manifestly correct: a taxpayer has standing to sue because he or she has an equitable interest in public funds, which interest is intruded upon by unlawful government expenditures. That suffices for purposes of standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, and certify that I verily believe the same to be true.

/s/ Timothy Sandefur
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CERTIFICATE OF SERVICE

I certify that on October 25, 2017, I served the foregoing Brief of Amicus Curiae Goldwater Institute in Support of Plaintiffs-Appellees upon counsel of record by sending three copies via U.S. mail to:

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