

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DAIMLERCHRYSLER CORPORATION, ET AL.,       :

4                   Petitioners,                       :

5           v.                                       :   No. 04-1704

6   CHARLOTTE CUNO, ET AL.;                       :

7           and                                       :

8   WILLIAM W. WILKINS, TAX COMMISSIONER       :

9   FOR THE STATE OF OHIO, ET AL.,               :

10                  Petitioners,                       :

11           v.                                       :   No. 04-1724

12   CHARLOTTE CUNO, ET AL.                       :

13   - - - - - x

14   Washington, D.C.

15   Wednesday, March 1, 2006

16           The above-entitled matter came on for oral

17   argument before the Supreme Court of the United States

18   at 10:05 a.m.

19   APPEARANCES:

20   THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of

21           the Petitioners in 04-1704.

22   DOUGLAS R. COLE, ESQ., State Solicitor, Columbus, Ohio;

23           on behalf of the Petitioners in 04-1724.

24   PETER ENRICH, ESQ., Boston, Massachusetts; on behalf of

25           the Respondents.

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P R O C E E D I N G S

[10:05 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in 04-1704, Chrysler versus -- DaimlerChrysler versus Cuno, and 04-1724, Wilkins versus Cuno.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON  
ON BEHALF OF PETITIONERS IN 04-1704

MR. OLSON: Mr. Chief Justice, and may it please the Court:

Respondents dispute the wisdom, efficacy, and constitutionality of Ohio's franchise tax system, but they face two insurmountable obstacles in this Court. First, they cannot demonstrate any actual, concrete, and direct injury as a result of Ohio's investment tax credit to satisfy the irreducible minimum requirement for standing in this Court. Secondly, the facial Dormant Commerce Clause challenge that they bring is without merit.

Ohio imposes no burdens or tariffs on interstate commerce. Its investment incentive program is available on equal terms to in-State, out-of-State, local, or interstate businesses. It is nondiscriminatory, and it stimulates, rather than

1 impedes, commerce.

2           Respondents are not injured when a business  
3 with which they do not compete receives a reduction in  
4 their taxes as a result of a tax credit. Respondents  
5 pay no higher taxes for products. They suffer no  
6 coercion because of a tax credit that is given to  
7 others. Their tax burden is not increased by Ohio's  
8 investment tax credit, nor will it be lessened if it is  
9 eliminated.

10           JUSTICE GINSBURG: Mr. Olson, who would have  
11 -- who would have standing? I understand your argument  
12 that Ohio taxpayers don't, but are there people who  
13 would have standing?

14           MR. OLSON: I'm not sure, Justice Ginsburg.  
15 In some of this Court's Dormant Commerce Clause cases,  
16 competitors, who are arguably injured because they are  
17 paying a higher tax against the -- compared to the  
18 company that's receiving the benefit -- in a couple of  
19 cases, this Court has recognized customers of companies  
20 that are paying higher products, and, therefore,  
21 potentially higher prices, for the products that they  
22 purchase. And, in one or two cases, States have been  
23 recognized for purposes of standing. But --

24           JUSTICE SCALIA: You think there has to be  
25 somebody who can challenge it, though.

1 MR. OLSON: No, we don't think that at all.

2 As this Court --

3 JUSTICE SCALIA: Some of our opinions say  
4 that, don't they, that --

5 MR. OLSON: Well --

6 JUSTICE SCALIA: -- it's not necessarily true  
7 that there has to be --

8 MR. OLSON: What -- Justice Scalia, I think  
9 the strongest statement is in the Valley Forge case, at  
10 page 489, where the Court said, "If Respondents have no  
11 -- the argument that if Respondents have no standing to  
12 sue, no one would have standing, is not a reason to  
13 find standing." This would convert "standing" into a  
14 requirement that must be observed only when satisfied.  
15 But the fact is that under any standard articulated by  
16 this Court in its article III cases, the Respondents  
17 here do not have standing. The effect of the tax is  
18 very "uncertain, hypothetical, or speculative," to use  
19 the words of this Court, with respect to them. They  
20 cannot demonstrate that they are affected by it. And  
21 as --

22 JUSTICE GINSBURG: Mr. Olson, I had asked you  
23 the question, because I wanted to know whether this  
24 case was distinguishable from Flast in that regard,  
25 although I recognize your quotation from Valley Forge.

1     That -- Flast seemed to be a case that fit that  
2     description, that there was no one who would have a  
3     better claim for injury, in fact.

4             MR. OLSON: Well, nonetheless, the Court made  
5     that distinction in the Flast case with respect to the  
6     Establishment Clause, and, specifically, the spending  
7     and taxing powers exercised by Congress. And the Court  
8     determined, in that case, that the Establishment Clause  
9     was a specific limitation on spending authority. The  
10    Court has been very careful, and many Justices of this  
11    Court, individually, have said that that distinction in  
12    that case will not be extended beyond the Establishment  
13    Clause, in the context of spending, in connection with  
14    a religious conviction, or the establishment of a  
15    religion. The Court has indicated, frequently, I  
16    think, that that is not going to be extended.

17            At any rate, it wouldn't be extended -- the  
18    logic of Flast wouldn't be applicable here anyway.  
19    This is not an application of the spending power by  
20    Congress or the taxing power by Congress. This is the  
21    Commerce Clause, which is a permissive grant of  
22    authority to Congress, and, at most, under the Dormant  
23    Commerce Clause, a limitation on the States.

24            These respondents are not remotely close to  
25    what this Court has said are the irreducible minimums.

1 Even if they --

2 CHIEF JUSTICE ROBERTS: With respect to the  
3 claims that are before us. But there was standing  
4 below for the municipal taxpayers with respect to their  
5 challenge to the property taxes.

6 MR. OLSON: We believed, at the time, that  
7 there was standing with respect to the property taxes -  
8 - the municipal taxpayers, with respect to the property  
9 taxes. That was the --

10 CHIEF JUSTICE ROBERTS: Right.

11 MR. OLSON: -- basis for the --

12 CHIEF JUSTICE ROBERTS: So, why isn't --  
13 these -- why aren't the present claims brought under --  
14 you know, within the same nucleus of operative facts,  
15 the same sort of supplemental jurisdiction that allows  
16 the Federal court to consider purely State law claims  
17 if they have jurisdiction of another related Federal  
18 claim?

19 MR. OLSON: The Court has never treated  
20 article III standing that way, Mr. Chief Justice. The  
21 Court has said, "a standing is not dispensed in gross"  
22 -- that was the Lewis versus Casey case -- that  
23 standing has to be looked at -- be looked at individually  
24 with respect to the claim. Furthermore, this -- there  
25 was not an identical nucleus of facts. I mean, it is the

1 -- the property tax exemption was issued pursuant to a  
2 contract between the company here, DaimlerChrysler, and  
3 the City of Toledo. The State tax --

4 CHIEF JUSTICE ROBERTS: But just to get -- I  
5 mean, you don't dispute the standing of the municipal  
6 taxpayers on the property tax issue?

7 MR. OLSON: We did not, and do not. Now, I --  
8 there may be arguments that might be made, that are  
9 not before this Court, with respect to the whole idea  
10 of --

11 CHIEF JUSTICE ROBERTS: Well, if it's an  
12 article III issue, I think that's always before us.

13 MR. OLSON: Well, with respect to the  
14 municipal taxpayers and the -- and whether there would  
15 be standing to challenge the property tax exemption.  
16 That's not an issue that has been briefed here. It's --

17 CHIEF JUSTICE ROBERTS: Well, I was thinking  
18 if your -- if the argument is that the claims that  
19 you're concerned about today can be piggybacked onto  
20 the other ones, then we do have to consider whether  
21 there's a pig to piggyback them onto.

22 MR. OLSON: Yes. But that would require a  
23 rather significant change in the Court's article III  
24 standing jurisprudence. It would, furthermore, allow  
25 the tail to wag the dog, the exception to swallow the



1 rule. If anybody could bring any kind of a case at  
2 all, then all manner of cases of -- with -- for which  
3 the Court had no jurisdiction at all could be along  
4 with them.

5 JUSTICE SCALIA: In any case, it's clear that  
6 that -- that that entity no longer has standing, isn't  
7 it?

8 MR. OLSON: No, the -- there's a separate  
9 entity, called Kim's Auto. That --

10 JUSTICE SCALIA: Yes.

11 MR. OLSON: -- that entity no longer has  
12 standing. There are still property taxpayers, but that  
13 --

14 JUSTICE SCALIA: But they don't --

15 MR. OLSON: -- that's cause --

16 JUSTICE SCALIA: But they don't -- I mean, I  
17 thought the assumption here is that they don't have  
18 standing. The --

19 MR. OLSON: The --

20 JUSTICE SCALIA: The former standing of Kim's  
21 Auto cannot allow this suit to proceed, under any  
22 theory --

23 MR. OLSON: That's --

24 JUSTICE SCALIA: -- can it?

25 MR. OLSON: That's --

1 JUSTICE SCALIA: Don't you have to have  
2 standing during the entire --

3 MR. OLSON: That's --

4 JUSTICE SCALIA: -- process --

5 MR. OLSON: That's absolutely correct. But  
6 the Chief Justice was asking me about the municipal  
7 property taxpayers with respect to the claim concerning  
8 the property tax exemption. Those plaintiffs --  
9 respondents are still in the case. That's not Kim's  
10 Auto.

11 JUSTICE SCALIA: Yes, but the only person who  
12 could give them standing, even by this associational  
13 theory, is gone.

14 MR. OLSON: No, there are -- there are still  
15 property tax -- some of the respondents that are still  
16 in the case are property taxpayers. Kim's Auto --

17 JUSTICE SCALIA: But --

18 MR. OLSON: -- wasn't the only one.

19 JUSTICE SCALIA: But they are not property  
20 taxpayers who have standing under any -- under the  
21 argument that you've just made.

22 MR. OLSON: With respect to --

23 JUSTICE SCALIA: The only property-tax  
24 individual who had standing was somebody whose land had  
25 been condemned. None of these other people in it have

1 had their land condemned --

2 MR. OLSON: In --

3 JUSTICE SCALIA: -- have they?

4 MR. OLSON: In fairness, Justice Scalia, I  
5 think that there are other respondents who claim to be  
6 property taxpayers in the City of Toledo, aside from  
7 Kim's Auto.

8 JUSTICE SCALIA: Whose land has been  
9 condemned.

10 MR. OLSON: No. They are -- they are  
11 complaining about the --

12 JUSTICE SCALIA: Well, but --

13 MR. OLSON: -- property tax --

14 JUSTICE SCALIA: -- but you say that a  
15 property taxowner, simply by being -- simply by being  
16 subject to the property tax, does not have standing.  
17 Isn't that your position?

18 MR. OLSON: No, we're saying -- we -- the  
19 property -- under this Court's jurisprudence, municipal  
20 taxpayers have been permitted, under some  
21 circumstances, to challenge municipal actions,  
22 irrespective of the imminent domain proceeding. So,  
23 there is that separate issue that's in the case.

24 If I might, I would like to spend a moment or  
25 two with respect to the merits of this case, because it

1 is a very important issue.

2 Nearly every State in the United States has  
3 some sort of incentive program. This -- with respect  
4 to the location of businesses or the drawing of  
5 businesses within the State, which is --

6 JUSTICE GINSBURG: Mr. Olson, I don't mean to  
7 deflect you from getting on to the merits, but there  
8 was one point in your brief that was of concern to me.  
9 That is, you said that you questioned whether,  
10 assuming we accept your argument on standing, it would  
11 be appropriate to return this case to the court of  
12 appeals with instructions that it be remanded to the  
13 State court and with the counsel fees that 1447 entitle  
14 one to. And you said that would not be right.

15 MR. OLSON: No. We believe that the case was  
16 properly removed, and, therefore, there's not counsel  
17 fees with respect to the removal statute; that the  
18 proper resolution would be to vacate the Sixth Circuit  
19 decision and then remand to the district court for a  
20 dismissal because of lack of standing, or the Court --  
21 this Court hasn't resolved whether it would be a  
22 dismissal or a remand to the -- to the State court. We  
23 don't believe that there would be standing under State  
24 court taxpayer or State -- Ohio jurisprudence, either.

25 If I may, Mr. Chief Justice, I'd like to

1     reserve the balance of my time.

2                 CHIEF JUSTICE ROBERTS:   Thank you, Counsel.

3                 Mr. Cole.

4                 ORAL ARGUMENT OF DOUGLAS R. COLE

5                 ON BEHALF OF PETITIONERS IN 04-1724

6                 MR. COLE:   Mr. Chief Justice, may it please  
7     the Court:

8                 We agree with DaimlerChrysler's position,  
9     both as to standing and as to the merits.   The  
10    Respondents' grievance as taxpayers, the sole standing  
11    argument they press here, is a textbook example of the  
12    generalized public grievance that the Court has  
13    repeatedly rejected as a basis for -- or for standing.  
14    Respondents' only claimed taxpayer harm is their  
15    assertion that the State first loses money as a result  
16    of the investment tax credit.

17                CHIEF JUSTICE ROBERTS:   Do they have standing  
18    in State court?

19                MR. COLE:   Your Honor, we do not believe that  
20    they have standing in State court, either.   Ohio has a  
21    taxpayer standing doctrine much like the Federal  
22    taxpayer standing doctrine.   They would need to show  
23    some unique harm separable to them.   I believe the  
24    language is that they would have to show that they  
25    contribute to a special fund.   And that's out of a case

1 called Masterson, in Ohio. There is a separate Sheward  
2 case that the Respondents cite in, I believe, footnote  
3 5 of their brief. We don't believe that this falls  
4 within the Sheward exception to standing, in Ohio.  
5 There's a certain exception that allows certain case  
6 of great public importance to go directly to the  
7 Supreme Court, but we do not believe that --

8 CHIEF JUSTICE ROBERTS: So --

9 MR. COLE: -- this would fall within that.

10 CHIEF JUSTICE ROBERTS: And what about the  
11 municipal taxpayers on the property tax claim that we  
12 were talking about earlier?

13 MR. COLE: Yes, Your Honor --

14 CHIEF JUSTICE ROBERTS: Do they have  
15 standing?

16 MR. COLE: Yes. And I wanted to respond a  
17 little bit to Justice Scalia's point. I think what  
18 they're trying to claim is, because they have municipal  
19 taxpayer standing to challenge the property tax  
20 exemption, that that somehow allows them, then, to  
21 sweep in their challenge to the investment tax credit,  
22 as well. We don't dispute that they have municipal  
23 taxpayer standing to challenge the property tax  
24 exemption. We do, however, dispute whether or not that  
25 gives them standing to also challenge the ITC.

1 JUSTICE GINSBURG: And that's because it's a  
2 local -- it's a Toledo city property tax, is that the  
3 distinction you're making?

4 MR. COLE: Well, the property tax exemption  
5 is a State tax program, Your Honor, but it requires  
6 action by local city leaders --

7 JUSTICE GINSBURG: So, that's --

8 MR. COLE: -- to --

9 JUSTICE GINSBURG: You would be challenging  
10 the local action --

11 MR. COLE: It --

12 JUSTICE GINSBURG: -- rather than the State --

13 MR. COLE: It --

14 JUSTICE GINSBURG: -- action, and that's how  
15 you distinguish the municipal taxpayer.

16 MR. COLE: In a sense, that's right, Your  
17 Honor. This Court has noted that the relationship  
18 between a municipal citizen and a municipal corporation  
19 is akin to between a shareholder and a corporation,  
20 generally, and that, in some instances, that will allow  
21 the municipal citizens to challenge the actions of  
22 their municipal leaders, in a sense. This property tax  
23 exemption involves that type of action. It would, in a  
24 sense, be a challenge to that, and, I think, cognizable  
25 under the Court's municipal taxpayer --

1 CHIEF JUSTICE ROBERTS: So, a tax -- just --  
2 so, a taxpayer in Wyoming can't challenge the State tax,  
3 because his claim is too diffuse, but a resident in New  
4 York City can challenge the city tax, because it's not.

5 MR. COLE: Your Honor, when looked at from a  
6 numerical basis, I agree that the distinction might not  
7 seem to carry a lot of weight. The Court, however, has  
8 not looked at it in terms of numbers, it has looked at  
9 it in terms of the, quote, "special relationship" that  
10 arises between a municipal citizen and a -- and a  
11 corporation. And presumably that special relationship  
12 exists independent of the size of the municipality.

13 But, in any event, whether or not they have  
14 municipal taxpayer standing to challenge the property  
15 tax exemption, there's no way to somehow grow that into  
16 standing to challenge the separate enactment by the  
17 Ohio General Assembly.

18 JUSTICE SCALIA: There's also a  
19 redressability problem, too, isn't there? I mean,  
20 assuming they could, is there any -- would action  
21 against the Assembly eliminate their tax?

22 MR. COLE: It wouldn't, Your Honor, although --

23 JUSTICE SCALIA: No?

24 MR. COLE: -- I think it puts a point on the  
25 problem with, in a sense, trying to grow a standing. You



1 ask, would it redress? And I guess the question is,  
2 redress what? I mean, they don't have any separate  
3 harm associated with the investment tax credit that's  
4 constitutionally cognizable.

5 JUSTICE GINSBURG: There are some -- at least  
6 it's arguable that there's Federal municipal taxpayer  
7 standing. And certainly some States have said that  
8 there is. And that -- and whatever Ohio might or might not  
9 do is not relevant to this proceeding. We don't know  
10 that. I'm -- you've given your opinion on what it  
11 would be.

12 MR. COLE: Well, that's correct, Your Honor,  
13 but, still, there needs to be some way to grow the  
14 municipal taxpayer standing into --

15 JUSTICE GINSBURG: Well, that's a --

16 MR. COLE: -- standing to --

17 JUSTICE GINSBURG: -- that's the piggybacking  
18 question. That's quite different. And --

19 MR. COLE: Right. Exactly, Your Honor. And  
20 my only suggestion was that, even if there is municipal  
21 taxpayer standing to challenge a property tax  
22 exemption, which we've conceded below, that doesn't  
23 somehow confer standing to challenge of separate  
24 enactment by Ohio's General Assembly. Respondents, in  
25 their brief, talk about this notion of ancillary

1 standing, but that -- the case they cited -- and they --  
2 principally, they talk about the Flast case, where,  
3 in addition to considering the Establishment Clause  
4 challenge, the Court also, in a footnote, mentioned the  
5 free-exercise challenge and the question of whether  
6 there would be separate standing for that.

7 But there, in the Flast case, it was a  
8 situation where they were using two theories to attack  
9 the same legislative enactment. Here, they're trying  
10 to attack a statute which they haven't shown causes  
11 them any harm. And so, the case is -- the challenge  
12 that they are bringing is, in a sense, an abstract  
13 challenge. It isn't one that's in a -- in a form  
14 that's judicially cognizable. That's why this  
15 ancillary standing theory, which would represent a  
16 dramatic expansion of the Court's article III  
17 jurisprudence, would not be a sound constitutional  
18 interpretation. It would allow the Court to interject  
19 itself into disputes where there's no injury to any --  
20 no concrete injury to any specifically identified  
21 plaintiff.

22 Article III's case for a controversy  
23 requirement is supposed to ensure that when the Court  
24 takes action, it takes action in the context of a  
25 particular concrete harm, and it can do its legal

1 analysis against the backdrop of this plaintiff who's  
2 been harmed in this manner. These plaintiffs can't  
3 meet that. They haven't shown any harm to themselves,  
4 any judicially cognizable harm, under article III.

5 If I could, for a moment, Your Honors, I'd  
6 also like to turn to the merits, briefly, of the  
7 Respondents' claim.

8 We believe Respondents' claim also fails on  
9 the merits of the Dormant Commerce Clause. Ohio  
10 provides a benefit for those who invest in the State;  
11 but Respondents have not, and cannot, identify any  
12 burden that the ITC places on interstate commerce.  
13 Absent that burden, their Dormant Commerce Clause claim  
14 fails.

15 JUSTICE BREYER: On the merits, I think that  
16 their claim is -- take company A and company B. Both  
17 are located in Toledo, both hire a certain number of  
18 people, have a certain payroll, have a certain amount  
19 of property, and have a certain amount of business.  
20 Identical. And they're charged a tax. And now, what --  
21 company B, when it's thinking of building a new plant  
22 or make new investment in machinery, if it goes to  
23 Wisconsin, it will discover it pays less taxes on all  
24 those things that were already in Ohio. And,  
25 therefore, the people who sell land or machinery in

1 Wisconsin are discovering it isn't being bought,  
2 because that old tax, which really had nothing to do  
3 with this new investment, is now less because of the  
4 new investment. So, that hurts businesses in  
5 Wisconsin.

6 As I understand it, that's their claim. And  
7 if I've got it wrong, I'm sure you'll correct me.

8 MR. COLE: Well, I don't think that -- that's  
9 not the way that I understand their --

10 JUSTICE BREYER: All right.

11 MR. COLE: -- claim, Your Honor.

12 JUSTICE BREYER: Well, then I'm probably  
13 wrong.

14 [Laughter.]

15 MR. COLE: I understand their claim -- I  
16 understand their claim more to be that two identically  
17 situated businesses, if -- both have the same tax bill  
18 --one builds a new facility in Ohio, one builds a new  
19 facility in Wisconsin. The one who builds the new  
20 facility in Ohio is going to have a lower tax bill than  
21 the one who builds the new facility in Wisconsin.

22 JUSTICE BREYER: So, that -- that is true,  
23 and then the effect of that is that firms that now do  
24 business in Ohio won't build their new facility in  
25 Wisconsin, because they like the lower tax bill in

1 Ohio. And that hurts businesses and others in  
2 Wisconsin.

3 MR. COLE: Your --

4 JUSTICE BREYER: You were saying they have no  
5 harm? I think they're pointing to that harm.

6 MR. COLE: Well, Your Honor, first, I'd note  
7 that's not a harm that they face, of course, going back  
8 to --

9 JUSTICE BREYER: Well, what is the harm --

10 MR. COLE: -- standing issue, but --

11 JUSTICE BREYER: -- they think -- well, they  
12 can tell me. All right.

13 MR. COLE: Yes. But --

14 [Laughter.]

15 MR. COLE: -- separately, Your Honor, I think  
16 what -- in this Court's Dormant Commerce Clause  
17 jurisprudence, when the Court has talked about  
18 "burden," in the past, the Court has talked about the  
19 situation where activity out of State is somehow  
20 assessed a tax. That is, the tax in State A goes up as  
21 a result of activities in State B. The Westinghouse  
22 case is a perfect example. There, there was a New York  
23 tax that increased for each export transaction that  
24 occurred outside the State. In a sense, New York was  
25 exporting the tax burden to activities that existed in

1 some other State. And that's the sense in which the  
2 Court has used the word "burden" in its past cases, not  
3 this more amorphous sense that Plaintiffs -- or  
4 Respondents are pushing here.

5 JUSTICE GINSBURG: There isn't -- the tax  
6 credit doesn't give them -- require them to buy, in  
7 State. I mean, the purchase -- whatever they equip the  
8 plant with can come from vendors and manufacturers, out  
9 of State?

10 MR. COLE: That's absolutely right, Your  
11 Honor. There's no limit on where the taxpayer  
12 purchases the equipment they install in the State.  
13 There's no limit -- no effect on where the goods from  
14 the factory go. There's no limit on who you can hire  
15 to work in the factory, or where they come from.

16 JUSTICE SCALIA: And the credit's available  
17 to out-of-State companies.

18 MR. COLE: Absolutely, Your Honor. The  
19 credit is available independent of whether you already  
20 have a presence in Ohio, whether you've never had a  
21 presence in Ohio, whether you've never even paid taxes  
22 in Ohio before. Certainly, if you invested within the  
23 State, you're now going to have a corporate franchise  
24 tax bill, and the credit would be useful to you at that  
25 point. But you could have had no pre-existing

1 relationship with the State at all, as a taxpayer, and  
2 still take advantage of this tax credit. It's equally  
3 available to all comers.

4           The only question is, What do you do in the  
5 State of Ohio? Do you invest money in the State of  
6 Ohio? And the credit turns on the amount of that  
7 activity in Ohio. If DaimlerChrysler establishes a new  
8 plant in Missouri or Montana or California, it, in no  
9 way, impacts the credit that they receive in Ohio.  
10 They're not deprived of that credit. It doesn't become  
11 of a -- of a lower value because of their decision to  
12 invest elsewhere.

13           And so, under this Court's --

14           CHIEF JUSTICE ROBERTS: Well, but it would be  
15 of higher value if they invest it in Ohio. I mean,  
16 that's all --

17           MR. COLE: Interestingly, Your Honor, it --

18           CHIEF JUSTICE ROBERTS: Presumably, the Ohio  
19 legislators were not doing this irrationally.

20           MR. COLE: I would -- I would hope not, Your  
21 Honor. I mean, I think the sense is that it increases  
22 investment in Ohio. And that's what this Court has  
23 called a "laudable goal" of State economic policy, is  
24 to try to increase investment within the State to  
25 benefit the citizens of the State. Certainly, that's --

1 CHIEF JUSTICE ROBERTS: That -- in some  
2 sense, at the expense of the citizens in other States.

3 MR. COLE: I don't know, Your Honor. A  
4 couple of responses to that. First, to the extent this  
5 spurs investment that otherwise would not have taken  
6 place anywhere else, of course that's just positive  
7 sum. That's new economic development that wouldn't  
8 have occurred, but for this incentive, or incentives  
9 like it.

10 Of course, at some level there's going to be  
11 competition for where these manufacturing facilities  
12 are located. But, again, this Court has noted that  
13 competition among the States for their share -- or  
14 their fair share of interstate commerce is not, in and  
15 of itself, a Commerce Clause problem. The question is  
16 only when that competition becomes discriminatory in  
17 some way. And what the Court has meant by  
18 "discriminatory" is, Does it somehow tax your decision  
19 to be somewhere else? When you decide to be in  
20 Missouri, does that increase your Ohio tax bill over  
21 what it would otherwise be?

22 Camps Newfound, perfect example. You decide  
23 that you're going to serve an interstate clientele,  
24 your tax bill goes up above what it would be if you  
25 didn't serve an interstate clientele. And Ohio's tax



1 credit doesn't have that characteristic that the Court  
2 has found so troubling.

3 In fact, looking back through the Court's  
4 cases, over and over again this notion of burden comes  
5 up, and -- whereby, "burden," it means "imposing taxes  
6 on the business of other State," all the way back to  
7 Guy versus Baltimore, "You can't build up your commerce  
8 by means of an -- unequal and oppressive burdens upon  
9 the industry and business of other States."

10 So, certainly if Ohio were attempting to tax  
11 DaimlerChrysler, or treat DaimlerChrysler worse because  
12 it had put a plant in Missouri, that would create a  
13 Dormant Commerce Clause question. But here, there's  
14 simply nothing like that. In fact, Respondents' theory  
15 would dramatically expand this Court's Dormant Commerce  
16 Clause jurisprudence, and would strike down a whole  
17 swath of State laws that have engendered substantial  
18 investment-backed expectation at this point. Billions  
19 of dollars have been invested by thousands of companies  
20 in reliance on various forms of locational credits,  
21 whether it be job incentive credits, whether it be  
22 investment tax credits, whether it be environmental  
23 cleanup credits. All of those credits would be at risk  
24 under the theory that Plaintiffs espouse.

25 Your Honors, this Court has more than once

1     noted that the Commerce Clause demands that the States  
2     must sink or swim together, but it has never suggested  
3     that the States must be indifferent between those two  
4     options. Frankly, Your Honor, the States would prefer  
5     to swim. ITCs like Ohio's help the States keep their  
6     economies afloat.

7             Respondents disagree with this, as a policy  
8     matter, but that debate belongs in Ohio's statehouse,  
9     not here. The ITC is not protectionist, and it imposes  
10    no burden on interstate commerce. And, thus, it does  
11    not violate the Dormant Commerce Clause.

12            Ohio respectfully urges the Court to reverse  
13    the decision below or, in the alternative, to vacate  
14    the decision for lack of standing.

15            JUSTICE STEVENS: May I ask this question?  
16    Would the case be any different if, instead of a tax  
17    credit, they offered a cash subsidy?

18            MR. COLE: Your Honor, I don't actually think  
19    it would be any different, in the sense that neither  
20    one of those two would violate the Dormant Commerce  
21    Clause. Of course, this Court has noted, in various  
22    cases, albeit in dicta, that subsidies ordinarily do  
23    not run afoul of the Dormant Commerce Clause. I think  
24    this tax credit ends up having the same economic  
25    impact. And, for all the reasons I stated about a lack

1 of burden, even if some tax credits that might be like  
2 subsidies could create a Dormant Commerce Clause  
3 problem, this tax credit does not. It imposes no  
4 burden on out-of-State activities.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cole.  
7 Mr. Enrich.

8 ORAL ARGUMENT OF PETER ENRICH  
9 ON BEHALF OF THE RESPONDENTS

10 MR. ENRICH: Mr. Chief Justice, and may it  
11 please the Court:

12 I'd like to begin with the question of  
13 standing, and then turn to the Commerce Clause merits.

14 Let me begin at the point where Petitioners  
15 and Respondents agree on the question of standing. The  
16 original lawsuit brought by Respondents in the Ohio  
17 State Court raised two claims, one challenging the  
18 investment tax credit that's before this Court today,  
19 the other challenging the property tax exemption. The  
20 point on which Petitioners and Respondents agree is  
21 that Respondents do have standing, in their status as  
22 municipal taxpayers, to bring their challenge to the  
23 property tax exemption. And, indeed, the district  
24 court agreed and found that there was standing, in the  
25 district court's judgment, to reach both parts of the

1 case on the basis of the Respondents' municipal  
2 taxpayer standing.

3 JUSTICE GINSBURG: Is there any --

4 CHIEF JUSTICE ROBERTS: What was --

5 JUSTICE GINSBURG: Is there any authority at  
6 all for saying you can piggyback the basic case or  
7 controversy requirement? I mean, it's one thing to say  
8 you can hook a nondiverse claim, but it's a claim; it's  
9 a case or controversy. I'm -- I don't know of any  
10 authority that says that you can -- you can take a  
11 matter that is not a constitutional case or controversy  
12 and latch it onto something that does qualify.

13 MR. ENRICH: Justice Ginsburg, there are two  
14 reasons why we believe that there is such a basis.  
15 First, there are cases -- one case in this Court, in  
16 *Flast v. Cohen*, where the Court has found that standing  
17 to raise one claim extended, as well, to raise, in that  
18 case, a free-exercise claim. There are a number of  
19 such cases in the courts of appeals. Wright and Miller  
20 has recognized a concept of what they refer to as  
21 "ancillary standing" on that basis.

22 But the second point that we think is perhaps  
23 more important is, once there is one claim in the case  
24 that satisfies the article III "case and controversy"  
25 requirement, then there is a case or controversy here.

1 The question that then faces this Court is, how far  
2 should it reach in addressing the other claims which  
3 are part of that very same case or controversy?

4 JUSTICE GINSBURG: I think it was pointed out  
5 that, in *Flast*, at least, you were dealing with the  
6 same spending on the part of the Federal Government.  
7 Here, you have apples and oranges. The property tax is  
8 quite discrete from the investment tax credit.

9 MR. ENRICH: That is true, Your Honor. And  
10 in at least some of the circuit court cases, they have  
11 reached a second claim where the -- where a different  
12 part of the same transaction was being attacked. The  
13 *Sierra Club* case that we cite in our brief is one good  
14 example of that.

15 In the present case, the two issues that we  
16 challenge both arise out of the very same transaction,  
17 out of a deal that was entered into between the City of  
18 Toledo and DaimlerChrysler --

19 CHIEF JUSTICE ROBERTS: Can I back you up  
20 just a bit before we talk about piggybacking? This  
21 Court hasn't held that municipal taxpayers have  
22 standing in this sort of situation, have they?

23 MR. ENRICH: No, this Court has not ever had  
24 to address the question of municipal taxpayer standing,  
25 except in Establishment Clause contexts.

1 CHIEF JUSTICE ROBERTS: So, if you want us to  
2 piggyback, we -- and if it is an article III question -  
3 - we would have to decide that issue before we can  
4 decide whether we can piggyback your current claims  
5 onto it.

6 MR. ENRICH: Mr. Chief Justice, you would at  
7 least have to decide the question of whether municipal  
8 taxpayer standing was -- satisfied the article III  
9 requirements under your standing doctrines. If you  
10 found that it satisfied the article III requirements,  
11 then that would suffice to bring this case or  
12 controversy past the article III threshold --

13 CHIEF JUSTICE ROBERTS: Right. And you agree  
14 that the --

15 MR. ENRICH: -- bring us to prudential  
16 threshold.

17 CHIEF JUSTICE ROBERTS: And you agree that  
18 the municipal taxpayer standing on the property tax  
19 question is an open issue before this Court. We have  
20 not had a holding on that.

21 MR. ENRICH: That's absolutely correct, Your  
22 Honor. We would suggest that, in keeping with the  
23 consistent holdings of every circuit court that has  
24 addressed this topic, it would make sense for this  
25 Court to acknowledge municipal taxpayer standing, or,

1 at the very least, to acknowledge that the obstacles,  
2 any obstacles to municipal taxpayer standing, are  
3 prudential obstacles, rather than article III  
4 obstacles.

5           There are actually other reasons why we  
6 believe the article III barrier is crossed. We believe  
7 that this case -- that, as Judge Posner wrote in a  
8 recent opinion that we referenced in a letter to the  
9 Court -- it came out after our brief was filed -- in  
10 his analysis of the taxpayer standing cases, he  
11 concluded that the Court's burden on taxpayer standing  
12 was based on prudential, not on constitutional grounds.  
13 We believe his analysis is correct.

14           Once this becomes a question of the  
15 prudential standards, we believe that the very  
16 particular factual history of this case provides ample  
17 reason for the Court to find that there should be  
18 standing in this particular case to reach the  
19 investment tax-credit claim.

20           Respondents brought this case in the Ohio  
21 State courts largely out of a recognition that the  
22 standards for standing were different in the State and  
23 Federal courts in this area. In fact, if Petitioners  
24 felt that we didn't have standing in Ohio, perhaps the  
25 wisest strategy for them would have been to oppose

1 standing there. But, instead, they chose to remove the  
2 case to the Federal court. And there, we requested  
3 that the case be remanded to the State courts, because  
4 we identified to the district court the risk, that if  
5 the Federal court kept the case, we might find  
6 ourselves, years later, before a higher court that  
7 might say, "But you don't have standing," and require  
8 us to go back and begin all over in the State courts.

9           Petitioners, at that time, argued that, in  
10 fact, we did have standing. And the district court so  
11 held. And then Petitioners have not again raised the  
12 question of standing until before this Court.

13           JUSTICE BREYER: Have you found any other  
14 instance in which -- any case -- there was a absolute  
15 lack of standing, prudential standing, but the Court  
16 waived that, because it was prudential and not  
17 constitutional?

18           MR. ENRICH: Yes, Justice Breyer.

19           JUSTICE BREYER: Which one?

20           MR. ENRICH: In Craig v. Boren, this is  
21 exactly what the -- this Court did. There, the one  
22 plaintiff who provided standing for a sex  
23 discrimination claim no longer had standing by the time  
24 the case was adjudicated. The plaintiff who ultimately  
25 had standing to keep the case going was one who,



1     although she suffered an actual injury, was not -- was  
2     asserting third-party rights, and so, did not satisfy  
3     prudential standing requirements.

4             JUSTICE KENNEDY: Did the case use the phrase  
5     "capable of repetition and evading review," or -- which  
6     is a mootness --

7             MR. ENRICH: I actually --

8             JUSTICE KENNEDY: I just have to read Craig --

9             MR. ENRICH: -- don't believe that --

10            JUSTICE KENNEDY: -- on the --

11            MR. ENRICH: -- they did use that concept in  
12     Craig. I think that's a concept that has come into  
13     this Court's jurisprudence more frequently in later  
14     cases --

15            JUSTICE GINSBURG: The problem in Craig, with  
16     the name plaintiff, is, it wasn't a class action, an  
17     18-year-old sent to turn 21 in the fullness of time.  
18     But I didn't understand your answer about the beer  
19     seller whose standing saved the case, at least in the  
20     view of the majority of this Court. She had a real  
21     pocketbook injury. She was not able to sell her beer  
22     to the thirsty boys. So --

23            [Laughter.]

24            JUSTICE GINSBURG: -- I don't understand why  
25     that's an example of a loose standing connection. I

1 mean, she surely had an -- a pocketbook injury. True,  
2 she was complaining about a denial of equal protection  
3 to the fraternity brothers, but that she had an injury,  
4 in fact, there was no doubt.

5 MR. ENRICH: Justice Ginsburg, the premise  
6 behind our argument is that the article III hurdle is  
7 cleared on other grounds, on grounds that I've already  
8 discussed and we can certainly reiterate. The question  
9 then becomes -- on prudential grounds. And that is the  
10 issue that was presented in Craig, that she had a  
11 direct injury, but she was in -- she did not satisfy  
12 the prudential standards because she was asserting  
13 third-party rights. And what this Court there held  
14 was, because the parties had adjudicated the issue  
15 below without objecting about standing, that the Court  
16 would proceed to the merits.

17 JUSTICE GINSBURG: There was no lack of  
18 standing below. The problem was that the -- Craig  
19 turned 21 while the case was pending in this Court.  
20 There was standing below. He was 18 when the  
21 litigation started.

22 MR. ENRICH: Yes, Your Honor, that -- and,  
23 similarly, we believe that there was standing, and  
24 still is standing, for the Plaintiffs to be in this  
25 Court on article III grounds because of the continuing

1 pendency of our challenge to the property tax exemption  
2 as municipal taxpayers. We --

3 JUSTICE SCALIA: Counsel, could I ask about  
4 the ancillary doctrine? You say the case you cite to  
5 establish it is Flast versus Cohen. Was the doctrine  
6 discussed in Flast versus Cohen, or are you relying  
7 simply on the fact that Flast versus Cohen involved  
8 both an Establishment Clause and a free-exercise  
9 challenge, and the Court only discussed the  
10 Establishment Clause challenge?

11 MR. ENRICH: No, Justice Scalia, in a  
12 footnote in Flast, the Court specifically says, "Having  
13 now decided that there's Establishment Clause standing,  
14 we can also reach the free-exercise question without  
15 discussing whether there would be" --

16 JUSTICE SCALIA: Okay. I --

17 MR. ENRICH: -- "independent standing" --

18 JUSTICE SCALIA: -- I had not --

19 MR. ENRICH: -- "for that claim" --

20 JUSTICE SCALIA: -- recollected that  
21 footnote. I will -- I will find it. I don't read  
22 footnotes, normally.

23 [Laughter.]

24 JUSTICE GINSBURG: In any event, they were  
25 attacking the same thing. So, your case is different,

1 at least to that extent, that you have two discrete  
2 taxes.

3 MR. ENRICH: It is, indeed, Your Honor. We  
4 acknowledge that, although, again, as I say, in some of  
5 the lower court cases there have been challenges where  
6 the claim that the plaintiffs did not have standing  
7 with regard to was challenging a different outcome in  
8 the same transaction or occurrence. The specific  
9 example was a challenge to an environmental impact  
10 statement, where the plaintiffs had standing to  
11 challenge certain elements, but did not have standing  
12 to challenge the potential -- the failure of this  
13 impact statement to consider impacts on indigenous  
14 tribes. And the District -- the District of Columbia  
15 Circuit held that they did have standing, based on  
16 their other standing claims, to reach that claim, as  
17 well.

18 If I can turn, Your Honors, to the merits, if  
19 Ohio were to impose an income tax on those corporations  
20 which did their manufacturing outside of the State of  
21 Ohio, but not to impose that tax on those businesses  
22 which did their manufacturing inside of Ohio, there's  
23 no question that such attacks would violate the  
24 Commerce Clause by facially discriminating in favor of  
25 in-State business activity. It would be a tariff, by

1 any other name.

2 JUSTICE SCALIA: What about the fact that a  
3 State has a lower income tax or a lower property tax  
4 than any other State in the Union? Does that violate  
5 the Commerce Clause because it induces businesses to --

6 MR. ENRICH: No, Your Honor, we are not  
7 suggesting that any tax measure which gives an -- which  
8 encourages businesses to locate in the jurisdiction,  
9 poses a Commerce Clause problem. A Commerce Clause --

10 JUSTICE SOUTER: What's --

11 MR. ENRICH: -- problem --

12 JUSTICE SOUTER: What's the difference?

13 MR. ENRICH: A Commerce Clause problem, Your  
14 Honor, is posed only when the provision provides a  
15 benefit which is specifically distinguished and  
16 provided to in-State activity but not provided --

17 JUSTICE SOUTER: But that's the case --

18 MR. ENRICH: -- to out-of-State --

19 JUSTICE SOUTER: That's the case --

20 MR. ENRICH: -- activity.

21 JUSTICE SOUTER: -- in the tax example. I  
22 mean, the taxes are apportioned. The part of the tax --  
23 or the business that would be taxable in the State  
24 gets taxed at a lower rate. Businesses say, "Gee,  
25 let's do more business in Ohio and pay less taxes." In

1    this case, they're getting, effectively, taxed at a  
2    lower rate, because they make an investment in Ohio.

3           MR. ENRICH: But, Your Honor, in this case,  
4    the only ones who are getting the lower effective tax  
5    rate are those who locate their manufacturing activity  
6    in the State.

7           JUSTICE SOUTER: Well, I --

8           MR. ENRICH: They --

9           JUSTICE SCALIA: The only one who gets the  
10   advantage of the lower -- the lower income tax rate and  
11   the lower property tax rate is someone who is located  
12   in the State. It's exactly the same.

13          MR. ENRICH: Well, I'm -- in the case of a  
14   lower income tax rate, Your Honor -- it's a different  
15   situation for the lower property tax rate, but take the  
16   lower income tax rate first -- the lower income tax  
17   rate will reduce the tax burden on all businesses,  
18   wherever their manufacturing capacity is located, who  
19   have a taxable business presence in Ohio. There is no  
20   discrimination based on where they locate any activity.  
21   If they locate new activity in Ohio, more of their  
22   income will be subjected to that lower rate of tax, but  
23   that is not discriminating between two businesses,  
24   based on where they locate their activity.

25          JUSTICE SCALIA: I told you, you have to

1     locate -- you'd have to locate in the low-tax State to  
2     get advantage of the low -- of the low tax.

3             MR. ENRICH:   That's not true, Your Honor.  
4     The way that corporate income taxes work, they look at  
5     a tax -- an apportioned share of the worldwide income  
6     of the business.

7             CHIEF JUSTICE ROBERTS:   Well, then all the --  
8     but all you're saying -- but you have to do business in  
9     the State with the lower income tax rate to get the  
10    advantage of the lower rate.

11            MR. ENRICH:   Yes.   If you're not doing  
12    business in the State, then you will not pay any tax.

13            CHIEF JUSTICE ROBERTS:   Well, that --

14            MR. ENRICH:   If --

15            CHIEF JUSTICE ROBERTS:   -- would seem to  
16    present the same Commerce Clause problem that you're  
17    posing for us today.

18            MR. ENRICH:   Well, Your Honor, a business  
19    that doesn't have a business presence in the State of  
20    Ohio will not pay any Ohio tax.   It is not subject to  
21    any burden.   It is not discriminated against in any  
22    way.   That's the same situation for the property tax.

23            JUSTICE SCALIA:   Likewise, a business that  
24    does not locate in Ohio is not subject to the -- to the  
25    higher Ohio tax, which has been reduced for them.

1 MR. ENRICH: Yes, Your Honor. The --

2 JUSTICE SCALIA: I mean, they're --

3 MR. ENRICH: -- discrimination --

4 JUSTICE SCALIA: -- they're exempt from it  
5 entirely, which is even better, I suppose.

6 MR. ENRICH: Yes, Your Honor. The  
7 discrimination here is not between those businesses  
8 which are not present at all in Ohio and those which  
9 are doing their manufacturing in Ohio, the  
10 discrimination is between those who are doing business  
11 in Ohio, but not locating their new manufacturing  
12 activity in Ohio, and those who do business in Ohio,  
13 but do locate their new manufacturing activity. This  
14 is the same situation that the Court has confronted  
15 over and over again. In Boston Stock, the  
16 discrimination only affected those purchasers or  
17 sellers of stock where the transactions had sufficient  
18 nexus with New York to be subject to New York's tax.  
19 The problem was that, of that universe of transactions,  
20 the ones where the sale was made on a New York exchange  
21 were subjected to a lower rate of tax than the ones  
22 that were transacted on an out-of-State exchange.  
23 JUSTICE SCALIA: Was the legislation that  
24 established this tax benefit -- was it controversial?  
25 Were there those who opposed it as a giveaway to --



1           MR. ENRICH: Your Honor, the record does not  
2 disclose what the political context was in Ohio at the  
3 time that --

4           JUSTICE SCALIA: Well, they --

5           MR. ENRICH: -- that this was enacted.

6           JUSTICE SCALIA: I have -- I will take  
7 judicial cognizance of the fact that such proposals are  
8 sometimes politically controversial. Isn't that the  
9 place to fight out this thing? Isn't your basic  
10 objection here that you don't agree that a State should  
11 give tax credits to business, and that's something  
12 that, you know, is in the political arena, and let the  
13 people fight it out?

14          MR. ENRICH: Justice Scalia, our objection --

15          JUSTICE SCALIA: Why should that be an issue  
16 that a court should decide?

17          MR. ENRICH: -- our objection is that when  
18 States use discriminatory tax measures as a way to  
19 provide tax benefits to those businesses that locate in  
20 the jurisdiction, that it leads to a competition  
21 between the States that ends up hurting taxpayers, like  
22 Respondents here, by reducing the ability of the States  
23 to generate tax revenues from business.

24          JUSTICE SOUTER: Yes, but what you call --

25          MR. ENRICH: This Court has --

1 JUSTICE SOUTER: -- what you call  
2 discrimination is any differential. In fact, in this  
3 case, the effective tax differential is a quid pro quo  
4 for an investment. And, basically, your argument boils  
5 down to saying that there's discrimination whenever the  
6 State offers a quid pro quo for an advantage and  
7 somebody decides not to take advantage of it.

8 MR. ENRICH: Your Honor --

9 JUSTICE SOUTER: That's not discrimination.  
10 That is simply the effect of a free choice, and any  
11 business is free to make that choice.

12 MR. ENRICH: Your Honor, we would suggest  
13 that that is exactly the situation in many of the cases  
14 that this Court has previously struck down as facially  
15 discriminatory tax provisions. In Bacchus Imports,  
16 anyone could move to Hawaii and produce pineapple wine  
17 and receive the benefit of the tax exemption. In  
18 Boston Stock, anyone could make their transactions on  
19 the New York exchanges, rather than an out-of-State  
20 exchange, and get the benefit of the lower rate.

21 What this Court has consistently said is,  
22 when the benefit that is given is -- takes the form of  
23 a credit, an exemption, a reduction in a tax which  
24 applies to out-of-State businesses, transactions, and  
25 activities, that that constitutes the kind of

1 discrimination --

2 JUSTICE SOUTER: Oh.

3 MR. ENRICH: -- that the Commerce Clause  
4 forbids.

5 JUSTICE SOUTER: I could -- I could see your  
6 argument, if, for example, in the tax exchange case,  
7 there was not taxation being made of the out-of-State  
8 transactions. But that was the case in --

9 MR. ENRICH: Yes. And --

10 JUSTICE SOUTER: -- the tax. And there is --  
11 there's no such parallel here.

12 MR. ENRICH: Yes, Your Honor, there is a very  
13 precise parallel here. The corporate income tax  
14 imposed by Ohio applies to any business that transacts  
15 business in Ohio, whether or not it has manufacturing  
16 presence.

17 JUSTICE STEVENS: May I ask you the same  
18 question I asked your adversary? Suppose, instead of a  
19 tax credit, they said, "We'll pay for the construction  
20 cost of a building, or we'll give you a piece of real  
21 estate, in order to get you to come in. Part of big  
22 redevelopment progress" --

23 MR. ENRICH: Yes.

24 JUSTICE STEVENS: -- "program, we would give  
25 you this parcel of real estate." Would that also be

1 subject to the same analysis?

2 MR. ENRICH: No, Your Honor, it would not.

3 As this Court has suggested, as far back as Hughes v.  
4 Alexandria Scrap, when the State is essentially acting  
5 as a participant in the market, deploying its own  
6 resources --

7 JUSTICE STEVENS: No, they wouldn't be acting  
8 -- other than the one transaction, "We'll give you one  
9 particular benefit in this new development progress --  
10 project, with no further participation as a market  
11 participant or anything like that," that would -- it  
12 seems to me that would fit right into your analysis.

13 MR. ENRICH: Well, in terms of its economic  
14 effect, it would, Your Honor, but this Court, in cases  
15 like Camps Newfoundland, has recognized a significant  
16 distinction between cash subsidies, on the one hand,  
17 and tax benefits, on the other, largely because the tax  
18 that is reduced is a tax which does involve an exercise  
19 of what this Court has called "a primeval governmental  
20 activity," and constitutes a kind of regulation which  
21 brings it within the scope of the Dormant Commerce  
22 Clause; whereas, in -- ordinarily, a direct subsidy  
23 paid out of the general funds of the State does not  
24 involve any such regulatory impact on interstate  
25 commerce.

1 JUSTICE STEVENS: But in terms of  
2 discrimination and economic impact, they really are the  
3 same?

4 MR. ENRICH: Yes, Your Honor. In fact,  
5 there's a wide, wide continuum. At the one end, there  
6 is the standard -- the pure tariff. On the other end,  
7 there is providing training for workers or  
8 infrastructure for a plant. This Court has clearly  
9 recognized that tariffs are unconstitutional. There is  
10 no suggestion that providing training or infrastructure  
11 would be. All of those have the same economic effect.

12 JUSTICE SCALIA: Yes, but they're -- what our  
13 opinions hold are that there are some matters of  
14 producing the same result as a cash subsidy --

15 MR. ENRICH: Yes.

16 JUSTICE SCALIA: -- that are no good, but  
17 there are other matters that are perfectly okay.

18 MR. ENRICH: That --

19 JUSTICE SCALIA: And the mere fact that it  
20 has the same effect as a cash subsidy is not a problem,  
21 as far as the Commerce Clause is concerned. And what  
22 you're arguing here is, the mere fact that it has that  
23 effect of favoring businesses that choose to locate in  
24 Ohio is what makes it bad, not the fact that it's  
25 relieving, from a tax that applies to both in-State and

1 out-of-State businesses, only in-State business.

2 That's -- that was the Hawaii case, and all the other  
3 cases you cite. But what your argument here is that  
4 the mere fact of providing a subsidy violates the  
5 Commerce Clause. And I don't know --

6 MR. ENRICH: No, Your Honor --

7 JUSTICE SCALIA: -- any case --

8 MR. ENRICH: -- what we're suggesting is that  
9 a measure which has the identical effect, and is  
10 structured very much like a provision which applies a  
11 tax to those businesses who engage in out-of-State  
12 activity, while excusing from tax those businesses that  
13 engage in in-State activity, is a tariff, by another  
14 name. And this provision, as --

15 JUSTICE SOUTER: Except the criterion is not  
16 mere in-State activity. The criterion is a particular  
17 in-State activity, an investment, as to which the  
18 credit is a quid pro quo. And the opportunity to make  
19 that investment is open to every business, presently  
20 in-State, presently out-of-State, no matter where  
21 domiciled.

22 MR. ENRICH: Yes, Your Honor. And, in that  
23 respect, this is no different than, for instance, the  
24 Westinghouse Electric case, which granted -- which  
25 struck down a grant of a credit against a corporate

1 income tax that was available to any business that  
2 chose to locate some of its export activity in the  
3 State of New York. Again --

4 JUSTICE SCALIA: But that tax did apply to  
5 out-of-State businesses --

6 MR. ENRICH: It was --

7 JUSTICE SCALIA: -- and they got no reduction  
8 --

9 MR. ENRICH: It was exactly --

10 JUSTICE SCALIA: -- right?

11 MR. ENRICH: -- the same tax as the tax in  
12 question here, Your Honor. It was a corporate income  
13 tax apportioned on the basis of the ordinary three  
14 factors that Ohio uses, on the basis of where the  
15 company's sales are located, where the company's  
16 payroll is located, where the company's property is  
17 located. The two taxes, in Westinghouse and here, were  
18 identical. There were some small differences in  
19 exactly the way that the credit was structured, but the  
20 underlying taxes were, in all respects, identical.

21 The problem that the Court recognized in  
22 Westinghouse is that by giving a credit that was  
23 restricted to a particular kind of in-State activity,  
24 and not to its out-of-State counterpart, the State was  
25 effectively providing a benefit to in-State business

1 and a burden on out-of-State business that constituted  
2 the functional equivalent of a tariff, and the Court  
3 struck it down. Now --

4 CHIEF JUSTICE ROBERTS: Some States --  
5 Counsel, some States have homestead exemptions to  
6 property taxes for people when they're buying homes in  
7 the State. That -- those would be invalid under your  
8 theory?

9 MR. ENRICH: Your Honor, I don't believe that  
10 they would be. Again, a homesteader who buys a  
11 property in another State is not going to owe any tax  
12 to --

13 CHIEF JUSTICE ROBERTS: Yes, but that --

14 MR. ENRICH: -- Ohio.

15 CHIEF JUSTICE ROBERTS: -- that person may  
16 have another piece of property in the -- in the other  
17 State.

18 MR. ENRICH: But --

19 CHIEF JUSTICE ROBERTS: And he's not getting  
20 the benefit of this, because his homestead -- he lives  
21 somewhere else.

22 MR. ENRICH: Your Honor, we would suggest  
23 that the question is whether the tax scheme in question  
24 in the State whose provision is being challenged  
25 imposes differential burdens on two different entities



1 based on where they locate some activity. In the case  
2 of the homestead exemption, the State offering the  
3 homestead exemption is not saying, "We'll tax you if  
4 you locate outside the State." Perhaps some other  
5 State is taxing them. But, again, this Court has  
6 repeatedly avoided judging the legitimacy of one  
7 State's tax by the question of what other States did.

8 CHIEF JUSTICE ROBERTS: But they're two  
9 identical pieces of property, and they'll say -- one  
10 say, "You're going to be taxed at a lower rate if  
11 that's where you're living, if that's your homestead;  
12 but if you happen to live outside the State, you're going  
13 to get taxed at a higher rate." It would seem to be  
14 very similar to what you're challenging here.

15 MR. ENRICH: Your Honor, maybe I'm not  
16 understanding your example. Are you imagining that the  
17 State that's offering the homestead exemption was  
18 imposing a tax on the property located outside the  
19 State?

20 CHIEF JUSTICE ROBERTS: No, it's imposing tax  
21 on property in the State at a higher rate if it's not  
22 the person's homestead; in other words, if they don't  
23 live in the State.

24 MR. ENRICH: Okay. So, that is a provision  
25 that, I think, does raise at least some questions. It's one

1 where I think there are strong justifications outside  
2 of the effect on interstate commerce that very well  
3 might provide ample justification for it. It raises --  
4 and the question on which we have asked this Court to  
5 grant cert about the property tax exemption raises  
6 precisely the question of what sorts of conditions on a  
7 property tax exemption do, and what sorts do not,  
8 constitute discrimination against interstate commerce.  
9 I would suggest that there would be ample opportunity  
10 to distinguish something like the homestead provision,  
11 which is directed at a quite different purpose than  
12 encouraging in-State economic activity from --

13 CHIEF JUSTICE ROBERTS: It's the same  
14 purpose. There's some place -- they want people to  
15 move in -- into the District here, for example, just  
16 like Ohio wants businesses to move in.

17 MR. ENRICH: I would suggest that the  
18 Commerce Clause is much more concerned with efforts to  
19 relocate businesses than with efforts to protect  
20 individuals from burdens of local property taxation.

21 JUSTICE SCALIA: A lot of money in building  
22 homes.

23 MR. ENRICH: That is true, Your Honor.

24 We would suggest that that raises a very  
25 different set of questions from the facially

1 discriminatory distinction between out-of-State  
2 businesses who are subjected to the tax, in the case of  
3 the Ohio investment tax credit, and in-State  
4 businesses, which are excused from paying that same  
5 tax, which is, again, exactly what a tariff does, Your  
6 Honor.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 Mr. Olson, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF THEODORE B. OLSON

10 ON BEHALF OF PETITIONERS IN 04-1704

11 MR. OLSON: Thank you, Mr. Chief Justice.

12 In the first place, this is article III  
13 standing that we're talking about, not prudential  
14 considerations of standing, as the Court made very  
15 clear in Valley Forge, where a taxpayer seeks to employ  
16 a Federal court to air grievances about the conduct of  
17 Government or the allocation of power in the Federal  
18 system. The "case and controversies" requirement of  
19 article III is not met.

20 With respect to the issue of municipal  
21 taxpayer standing, the Court would have to determine  
22 that that did exist, something that has not happened  
23 before, and then would piggyback onto that claim a  
24 challenge to a separate tax by a separate Government  
25 under a separate claim arising out of a separate

1 transaction. The deal between DaimlerChrysler and  
2 Toledo was separate from the tax granted by the  
3 investment tax credit under the State's system.

4 Respondents state, in the first page of their  
5 brief, that, because all of these States do these  
6 things, these investment tax credits have only minimal  
7 effect on business transactions. That's the first page  
8 of their brief. That's harmful to their standing,  
9 that's harmful to their Commerce Clause challenge.

10 Ohio only taxes in-State activity. It uses a  
11 constitutionally appropriate apportionment formula to  
12 determine how much of the interstate business's  
13 activity is attributable to Ohio, and only taxes that.

14 So that if there is a benefit given because someone  
15 comes to the State and builds a plant there, it may  
16 result, actually, in increased taxes in Ohio, because  
17 the plant will raise the proportion of business being  
18 done in Ohio. But what Ohio does not do is -- what  
19 this Court has held unconstitutional -- is, tax the  
20 out-of-State activity, or burden the out-of-State  
21 activity, or make interstate commerce itself more  
22 burdensome.

23 As the Court has pointed out in questions,  
24 Justices have pointed out in questions, this same issue  
25 could be raised with respect to the State of Nevada.

1 There's no franchise tax in the State of Nevada, and  
2 same with other States. Some States offer accelerated  
3 permitting requirements or relaxed environmental rules  
4 or different educate -- employment standards, all  
5 matters of State regulation. This Court has said that  
6 competition between States for commerce lies at the  
7 heart of a free-trade society. That is what's going on  
8 here. States are competing with appropriate permissive  
9 incentives to do business within the State. This is,  
10 as this Court said, a laudable purpose for State  
11 activity.

12 What the Respondents would do would  
13 nationalize State tax systems. You couldn't have a  
14 more beneficial tax system in Massachusetts than in  
15 Ohio, because that would provide some sort of a burden,  
16 under the Respondent's theory. The same with other  
17 regulations by States of business. We would have a  
18 system where this Court would be deciding -- all States  
19 would have to have uniform taxation, uniform systems of  
20 regulations, the very antithesis of federalism.

21 JUSTICE BREYER: If you have --

22 MR. OLSON: Now, what I would --

23 JUSTICE BREYER: -- dog license -- dog  
24 license costs \$10, but you have to pay 20 if you invest  
25 next time in Wisconsin.

1 [Laughter.]

2 JUSTICE BREYER: By the way, we're not going  
3 to do it that way, we're just going to say you pay  
4 half.

5 MR. OLSON: If you have your dog in  
6 Wisconsin, you may pay whatever --

7 JUSTICE BREYER: No, no.

8 MR. OLSON: -- Wisconsin decides --

9 JUSTICE BREYER: No. But, you see -- but my  
10 point is --

11 MR. OLSON: If --

12 JUSTICE BREYER: -- separate tax in Ohio, and  
13 we're going to double it, though, if your next  
14 investment is in some --

15 MR. OLSON: That would be --

16 JUSTICE BREYER: -- other State.

17 MR. OLSON: That would be something this  
18 Court would be severely concerned with.

19 JUSTICE BREYER: Correct. Now, all we do is,  
20 we say, "We're not going to double it. You're going to  
21 pay the same. But everybody invests here, pays half."

22 MR. OLSON: Well, again, that's -- and I  
23 think that goes to Justice Souter's point, that there's  
24 a relationship between the tax system and the  
25 investment.

1           We should end on the point that every --  
2   virtually every State has this kind of system, not just  
3   because of competition with States, but to find the  
4   right location, a depressed area within a State. And  
5   this is important with respect to businesses in the  
6   United States competing with foreign countries.

7           JUSTICE SCALIA: You don't believe in  
8   harmonization, Mr. Olson?

9           [Laughter.]

10          MR. OLSON: We don't believe that the Dormant  
11   Commerce Clause stands the -- stands for the  
12   proposition that these regulations should be  
13   nationalized.

14          CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15          The case is submitted.

16          [Whereupon, at 11:06 a.m., the case in the  
17   above-entitled matter was submitted.]

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