

No. _____

In The
Supreme Court of the United States

CHARLOTTE CUNO, et al.,

Petitioners,

v.

DAIMLERCHRYSLER, INC., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state law that conditions personal property tax exemptions on the taxpayer's agreement to hire specified levels of in-state employees and make additional in-state investment violate the Commerce Clause's prohibition on discriminatory tax provisions because the law provides preferential tax treatment that favors in-state economic activity?

LIST OF PARTIES

PETITIONERS:

Charlotte I. Cuno, Branwen M. Lowe, Judith A. Pfaff, Kenneth P. Pfaff, Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Duane M. Arquette, Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek, Rick Van Landingham, Kathleen Hawkins, Carrie Hawkins, Phoenix Earth Food Co-op, Inc., Hutton Pharmacy, Inc., Kim's Auto and Truck Service, Inc., Jane Slaughter

RESPONDENTS:

DaimlerChrysler, Inc., Toledo Public School District, Washington Local School District, City of Toledo, Treasurer of State of Ohio, Ohio Department of Taxation, Ohio Department of Development

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 386 F.3d 738 and is reproduced in the appendix at App. 1-20. The opinion of the United States District Court for the Northern District of Ohio is reported at 154 F.Supp.2d 1196 and is reproduced in the appendix at App. 21-34.

JURISDICTION

The court of appeals entered judgment on October 19, 2004. Respondents filed timely petitions for rehearing *en banc* on October 29, 2004, which the court of appeals denied on January 18, 2005. App. 36 This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the validity of Ohio Rev. Code §§ 5709.62 and 5709.631. The text of these statutes, as in effect in 1998 and applicable to the agreement challenged in the instant case, are reproduced at App. 38-52.¹

These provisions are challenged under Article I, sec. 8, clause 3 of the United States Constitution, the Commerce Clause, which provides:

¹ Subsequent to 1998, the statutes have been amended several times, but not in respects that alter the issues raised in this litigation.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

◆

STATEMENT OF THE CASE

This petition challenges the constitutionality of Ohio Rev. Code §§ 5709.62 and 5709.631, which authorize the granting of personal property tax exemptions to businesses which commit to make agreed levels of investments and to provide a specific number of jobs at a facility located in a designated enterprise zone in Ohio. Because Ohio's property tax exemption statutes condition the grant of tax benefits on the taxpayer's commitment to undertake agreed levels of in-state economic activity, they violate the Commerce Clause's prohibition against tax measures that discriminate against interstate commerce by giving preferential treatment to in-state activity. Petitioners also challenged the constitutionality of Ohio's investment tax credit, Ohio Rev. Code § 5733.33. The Sixth Circuit found that the credit violated the Commerce Clause, and respondents have obtained an extension until June 17, 2005 from this Court, in which to seek certiorari on that ruling.

On November 12, 1998, Chrysler Corporation (the corporate predecessor to Respondent DaimlerChrysler, Inc., hereafter referred to as DaimlerChrysler) entered into a Development Agreement with the City of Toledo, for the expansion and redevelopment of its Stickney Avenue facility. See Complaint ¶ 18. In the agreement, DaimlerChrysler committed to construct a \$1.2 billion Jeep assembly plant near its existing facility in Toledo and to preserve most of the jobs from its prior facilities in Toledo, in exchange for a package of over \$280 million in incentives, including an

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investment tax credit against its Ohio corporate franchise tax and an exemption from property taxes on its personal property acquired for the new facility. *Id.* at ¶¶ 20, 24.

The investment tax credit (“ITC”), authorized by Ohio Rev. Code § 5733.33, provided DaimlerChrysler with tax credits against Ohio’s franchise tax, which is a tax on DaimlerChrysler’s corporate income apportioned to Ohio. That credit is equal to 13.5 percent of the cost of qualifying new manufacturing machinery and equipment placed in service at the new facility. The personal property tax exemption, authorized by Ohio Rev. Code §§ 5709.62 and 5709.63, permits municipalities to offer incentives to a business that “agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees” in an economically depressed area. Ohio Rev. Code § 5709.62(C)(1). A municipality may grant the exemption “for a specific number of years, not to exceed ten, of a specified portion, up to seventy-five percent, of the assessed value of the tangible personal property first used in business at the project site as a result of the agreement.” Ohio Rev. Code § 5709.62(C)(1)(a). In addition, with the consent of the board of education of any affected school districts, the exemption may exceed 75 percent. Ohio Rev. Code § 5709.62(D)(1). In the present case, the City of Toledo and the two affected school districts agreed to a ten-year exemption of one hundred percent of DaimlerChrysler’s personal property, conditioned upon modest payments in lieu of taxes to the two school districts. *See* Complaint ¶ 20.

As was required by Ohio Rev. Code § 5709.631, the personal property tax exemptions were expressly made conditional upon DaimlerChrysler’s covenant to make

specified levels of investment in the new facilities and to hire or retain a specified number of employees at the facility. *See* Complaint ¶¶ 19-20. Specifically, Daimler-Chrysler agreed to invest approximately \$1.2 billion in the facility, of which approximately \$519 million was to be personal property subject to the agreed property tax exemption, and it agreed to retain approximately 4200 employees at the facility. *See* Development Agreement, Exhibit 4.04, ¶¶ 1-2. Moreover, as was required under the statute, DaimlerChrysler agreed that, if it materially failed to meet these obligations, the property tax exemptions could be terminated or modified by the City. *Id.* at ¶ 10.

On March 28, 2000, Petitioners filed suit in the Ohio state courts against DaimlerChrysler and other parties responsible for the granting of the tax incentives covered by the Development Agreement, claiming that the Ohio statutes authorizing both the investment tax credit and the personal property tax exemption violate the federal Commerce Clause by discriminating against interstate commerce.² Most of the Petitioners are residents of the City of Toledo or small businesses located there. *See* Complaint ¶¶ 1-14. Many of them were displaced from their former homes or places of business by the City in order to assemble the site for the Jeep plant.³ These

² Petitioners also challenged the tax incentives under the Equal Protection Clause of the Ohio Constitution, OHIO CONST. Art. I, § 2. These equal protection claims were dismissed by the district court, and the dismissal was affirmed by the Sixth Circuit. Petitioners are not petitioning for review of these rulings.

³ One of these plaintiffs, Kim's Auto and Truck Service, Inc., has also pursued separate litigation, challenging the City's eminent domain taking of its property for private purposes. Its petition for writ of
(Continued on following page)

plaintiffs pay taxes to and receive the benefit of services from the City of Toledo, the affected school districts, and the State of Ohio, and are injured by the city's, school districts', and state's loss of tax revenues due to the challenged tax incentives.⁴ These plaintiffs have standing to raise their challenges on the basis of their status as municipal citizens* and taxpayers. *See, e.g., State of New York v. City of New York*, 972 F.2d 464, 470-71 (2nd Cir. 1992) (observing that courts of appeal "have uniformly concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures"); *Taub v. Kentucky*, 842 F.2d 912, 917 (6th Cir. 1988) (recognizing municipal taxpayer standing "in a variety of cases" including both unlawful expenditures and unlawful losses of revenues); *cf. State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081-82 (Ohio 1999) (describing Ohio state courts' more permissive approach to standing in cases involving the public interest).

Defendants removed the suit to the United States District Court for the Northern District of Ohio, pursuant to 28 U.S.C. § 1441(b). *See Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196, 1197 (N.D. Ohio 2001). App. at 22. After denying Petitioners' motion to remand the case to the state courts and before the commencement of discovery, the District Court dismissed the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for

certiorari in the eminent domain case remains pending before this Court. *See City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318 (Ohio Ct. App. 2003), *petition for cert. pending*.

⁴ Several other plaintiffs are citizens and taxpayers of the state of Michigan, where DaimlerChrysler reportedly would have located the Jeep plant in the absence of the incentives offered in the Development Agreement.

failure to state a claim. Petitioners appealed the dismissal to the Court of Appeals for the Sixth Circuit. After briefing and oral argument, the Court of Appeals reversed the District Court's dismissal of the claim that Ohio's investment tax credit violated the Commerce Clause and ordered an injunction against the future enforcement of that discriminatory tax incentive. *Id.* at 750. App. at 7-13.⁵ The Court of Appeals, however, affirmed the District Court's dismissal of Petitioners' challenge to the personal property tax exemption.

As to Ohio's investment tax credit, the Sixth Circuit reasoned that it violated the Commerce Clause's prohibition on tax measures that discriminate against interstate commerce, because the ITC provides preferential tax treatment to taxpayers that elect to locate new investment in Ohio rather than outside the state. By allowing businesses already subject to Ohio's corporate franchise tax to reduce their tax burden by locating additional plant and equipment in the state, while denying such tax reductions to similarly situated competitors choosing to locate new investment elsewhere, Ohio's ITC provided impermissibly differential, and favorable, treatment for in-state economic activity. *Id.* at 743-46. App. at 20.

By contrast, in the case of Ohio's program of personal property exemptions, the court found no unconstitutional discrimination, despite the fact that the exemptions are only available to taxpayers who commit to agreed upon levels of in-state economic activity above and beyond the

⁵ The Sixth Circuit panel issued its initial opinion in the case on Sept. 2, 2004, but, after petitions for rehearing, substituted a slightly modified opinion on Oct. 19, 2004.

acquisition and location of the exempted personal property. While acknowledging that the imposition of discriminatory conditions on otherwise legitimate tax exemptions would, in some circumstances, invalidate the exemptions, the court concluded that Ohio's program passed constitutional muster because the conditions it imposed "related to the use or location of the [exempted] property itself." *Id.* at 746. App. at 14. This conclusion rested upon a novel distinction, unsupported by either precedent or the purposes of the Commerce Clause, between conditions on a tax benefit that "discriminate based on an independent form of commerce" and are therefore unconstitutional and conditions that "are related to the use . . . of the property itself" and are therefore constitutional. *Id.* at 746-47. App. at 14-15.

After denial of Respondents' petitions for rehearing by the Sixth Circuit, they were granted a stay of the Sixth Circuit's injunction against the enforcement of Ohio's investment tax credit, pending their petition for review by this Court. App. at 14. In light of the importance of the issues raised by this case, Petitioners do not intend to oppose Respondents' anticipated petitions for review of the constitutionality of Ohio's investment tax credit, although they reserve the right to respond to those petitions to clarify the scope and nature of the controversy. In this petition, Petitioners seek review of the portion of the Sixth Circuit's decision that upheld Ohio's conditional property tax exemption program against Petitioners' Commerce Clause challenge.



REASONS FOR GRANTING THE WRIT

In the Sixth Circuit's analyses of both Ohio's investment tax credit and its conditional property tax exemptions, the court correctly recognized that tax incentive programs which provide discriminatory benefits conditioned on in-state economic activity violate the Commerce Clause. Nonetheless, the court upheld Ohio's property tax exemption program, on the ground that the conditions it imposed "related to the use or location of the [exempted] property itself." 386 F.3d at 746. App. at 14.

The distinction upon which the Sixth Circuit's analysis depends – between, on the one hand, conditions that are related to the use or location of the exempted property and are therefore constitutional and, on the other hand, conditions that "discriminate based on an independent form of commerce," *id.* at 747. App. at 14, and are therefore unconstitutional – does not, however, have any basis in the decided cases of this, or any other, Court. On the contrary, the Sixth Circuit's approach conflicts with decisions of both the Fifth Circuit, in *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997), and this Court, in *Camps Newfoundland/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), each of which invalidated property tax exemption programs because they conditioned the exemptions on discriminatory requirements concerning the use of the exempted property itself. Nor is the Sixth Circuit's distinction compatible with the Commerce Clause's central task of foreclosing state measures that "discriminate against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (quoting *Northwestern*

States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

In the absence of definitive guidance from this Court, both the states and the businesses that enter into location agreements on the basis of promised property tax exemptions will face deep, and potentially costly, uncertainties about the validity of the programs on which they rely. States have adopted a wide variety of property tax exemption programs in their efforts to encourage businesses to locate within their borders. While many of these programs raise no Commerce Clause concerns, many others involve a range of requirements or conditions analogous to those involved in this case, in *Pelican Chapter*, and in *Camps Newfound*. Moreover, to the extent that different standards apply in different judicial circuits, some states will enjoy an advantage over others in their ability to offer incentives for businesses to locate in their state, thus frustrating a fundamental Commerce Clause purpose of keeping “the commercial intercourse among the States free from all invidious and partial restraints.” *Camps Newfound*, 520 U.S. at 571 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824)).

I. The Sixth Circuit’s Decision Upholding Ohio’s Conditional Property Tax Exemption Program Conflicts With Precedent From The Fifth Circuit And From This Court And With Well-Established Commerce Clause Principles.

Petitioners’ challenge to the constitutionality of Ohio’s program of personal property tax exemptions rests upon the discriminatory conditions that Ohio imposes as a requirement for eligibility for the exemptions. It is accepted law that a state may impose a personal (or real)

property tax only on assets within its borders, and that limitation alone raises no issue of discrimination under the Commerce Clause. It is also undisputed that the Commerce Clause would raise no barrier against a state granting a general exemption from personal property taxation for all business property, or for certain categories of personal property, located within the state. Such a measure would not impose differential tax burdens on different taxpayers based on the in-state or out-of-state location of their economic activity and hence would not discriminate against interstate commerce. Ohio's program, by contrast, only authorizes personal property tax exemptions for a business that enters into an agreement with the affected municipality, in which the business specifies the amount of investment to be made at the facility (including both real and personal property) and also specifies the number of employee positions to be created or retained due to the project. Ohio Rev. Code § 5709.631. The agreement must stipulate that the municipality may terminate the exemptions if the business materially fails to fulfill its commitments under the agreement. *Id.*

Thus, Ohio's personal property tax exemption is only available to a business that, in addition to locating the exempted property in Ohio, agrees to locate specified levels of jobs and to make other investments in the state as well. It is these conditions upon the granting of tax exemptions that confer a differential benefit on those businesses that commit to locating their jobs and investment in Ohio, as opposed to competitors who may have comparable amounts of personal property in the state, but choose to locate (or simply choose to retain the freedom to locate) some of their jobs and other investment elsewhere and for that reason are denied a personal property tax

exemption entirely. In this manner, Petitioners argue, Ohio's program imposes unconstitutionally "discriminatory burdens" on those taxpayers "not deterred by the statute from doing a principally interstate business." *Camps Newfound*, 520 U.S. at 578.

The Sixth Circuit acknowledged that an otherwise constitutional exemption "may be discriminatory if it requires the beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence." 386 F.3d at 746. App. at 14. But the court then narrowed the range of conditions that will render a tax exemption program unconstitutional, concluding that "conditional exemptions raise no constitutional issues when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself," and, similarly, that "if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible." *Id.* at 746-47. App. at 14. Relying on this proclaimed distinction between permissible and impermissible conditions on property tax exemptions, the court concluded that Ohio's program is constitutional, because "the conditions imposed on the receipt of the Ohio property tax exemption are minor collateral requirements and are directly linked to the use of the exempted personal property." *Id.*⁶ The court also suggested that Ohio's personal property tax exemption can be

⁶ The court offered no explanation of why it characterized Ohio's requirements of agreed levels of investment and jobs as "minor collateral requirements," but the fact that the granting municipality must retain the right to terminate the exemption upon failure to meet these conditions, Ohio Rev. Code § 5709.631, suggests that they are scarcely minor in Ohio's eyes.

distinguished from its investment tax credits because the exemption does not reduce a pre-existing tax liability. *Id.* at 747-48. App. at 15. However, the court's own examples of property tax exemptions whose conditions would render them unconstitutional, *id.* at 746. App. at 14, reveal that the distinction between new and pre-existing tax liabilities is not determinative.

The Sixth Circuit's effort to distinguish among different types of discriminatory conditions is not only without foundation in the case law, but it also places that court in direct conflict with recent decisions of the Fifth Circuit and of this Court. In *Pelican Chapter, Associated Builder & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997), the Fifth Circuit considered a Louisiana property tax exemption scheme closely analogous to the Ohio system. The Louisiana program authorized the state to enter into agreements granting new manufacturing establishments exemptions from property taxation. By regulation, Louisiana limited eligibility for the exemption to businesses that agreed to give preference to in-state suppliers, contractors and labor in the construction and operation of the exempted facility. *Id.* at 912 n.1. The Fifth Circuit concluded that this regulation impermissibly discriminated against interstate commerce because it "inhibit[ed] the ability of contractors to offer employment to out-of-state workers and to utilize supplies and other resources produced by other states." *Id.* at 918.

Like Ohio, Louisiana conditioned its property tax exemption on the beneficiary's agreement to target aspects of its economic activity in Louisiana, beyond the investment in the exempted property itself. And like Ohio, these conditions were closely related to the beneficiary's use of the exempted property. The Louisiana rule did not "require[] the

beneficiary to engage in another form of business” in Louisiana; nor was it “limited to businesses with a specified economic presence” in the state. *Cuno*, 386 F.3d at 746. App. at 14. Like the Ohio provision, the conditions imposed by the Louisiana rule were closely “related to the use . . . of the [exempted] property itself.” *Id.* Yet, the Fifth Circuit did not hesitate to find that these conditions on the Louisiana exemptions unconstitutionally discriminated against interstate commerce. The distinctions drawn by the Sixth Circuit simply play no role in the Fifth Circuit’s analysis. The two circuits thus take inconsistent approaches and arrive at incompatible results.

This Court has also recently addressed the application of the Commerce Clause to a conditional state property tax exemption involving an allegedly discriminatory condition. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997). Although the condition involved in that case was somewhat different from the conditions involved in *Pelican Chapter* and in the present case, the Court’s analysis is again inconsistent with the Sixth Circuit’s approach. In *Camps Newfound*, Maine offered property tax exemptions for property used by charitable institutions, but restricted the exemption to institutions operated principally for the benefit of Maine residents. Because the Maine statute expressly distinguished between institutions based on the residence of the clientele they served and thereby discouraged charities from benefitting non-residents, the Court found that Maine’s exemption was facially discriminatory and violated the Commerce Clause. *Id.* at 575-76.

The discriminatory condition in *Camps Newfound* concerned the location of the consumers who make use of the taxpayer’s services, rather than the location of the

taxpayer's workforce and other investments. Hence the details of the Court's analysis of the discriminatory character of the condition are not directly applicable to the present case. Nonetheless, the Court's conclusion that a discriminatory condition renders the exemption program unconstitutional is in direct conflict with the Sixth Circuit's approach in the present case. As in this case, the restriction imposed by Maine's scheme related directly to the use of the exempted property itself, and there was no suggestion that the condition requiring a primary benefit to in-state residents involved an "independent form of commerce" aside from the operation of the property for which the exemption was sought. *Cuno*, 386 F.3d at 747. App. at 14. Maine's statute did not "require[] the beneficiary to engage in another form of business," nor was it limited to taxpayers "with a specified economic presence." *Id.* at 746. App. at 14. Thus, if the Court had applied the Sixth Circuit's standard, it would have found the discriminatory condition unproblematic because it "related to the use or location of the property itself." *Id.*⁷

The Court's opinion in *Camps Newfound* in fact appears to anticipate an argument like the Sixth Circuit's, in its discussion of why Commerce Clause scrutiny must

⁷ In a brief, and unilluminating, discussion, the Sixth Circuit opinion contends that *Camps Newfound* and *Pelican Chapter* are "inapplicable here, because they fail to address the question of whether conditions attached to the receipt of an exemption violate the anti-discrimination principle where the conditions themselves do not impose *independent* burdens on commerce." 386 F.3d at 747. App. at 15. (emphasis added). While the Sixth Circuit is correct that neither the Fifth Circuit nor this Court saw a need to consider this distinction, the opinion offers no explanation of how the conditions in these other cases are somehow more "independent" of the use of the exempted property than are the conditions imposed by the Ohio statute.

extend to property tax exemptions, if the Commerce Clause is to serve its underlying purposes. *See Camps Newfound*, 520 U.S. at 575. As the Court explains, if states were permitted to impose property taxes that varied based on the extent to which the taxed property was used in connection with interstate commerce, states would be empowered to “create the functional equivalent of an import tariff,” in contravention of the most fundamental precept of Commerce Clause jurisprudence. While the Court’s stated purpose in this discussion was to establish that Commerce Clause strictures must apply to property taxation, its example supports the conclusion that these strictures must extend to conditions that relate to the use of the very property that is subjected to taxation. The Sixth Circuit’s proposed exception from Commerce Clause scrutiny for conditions on property tax exemptions that relate to the use of the property itself, and that do not discriminate based on an independent form of commerce, would re-open a path to property tax-based interference with the free flow of interstate economic activity of precisely the sort the Commerce Clause is intended to foreclose.

Indeed, the instant case presents an example of precisely such interference. Under the terms of the Development Agreement and pursuant to the requirements of Ohio Rev. Code § 5709.631, DaimlerChrysler is only entitled to continue to receive the benefits of the exemption from personal property taxes so long as it materially meets its commitment to employ at least 4200 full-time workers at the plant. The practical effect of this condition is to provide a powerful financial incentive for DaimlerChrysler to retain these jobs in Ohio, rather than relocating them to an alternative, out-of-state facility, for the ten-year

duration of the tax exemption. In this way, the conditions placed on Ohio's personal property tax exemptions use the state's "power to tax an in-state operation as a means of 'requiring [other] business operations to be performed in the home State,'" *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)), in a manner "wholly inconsistent with the free trade purpose of the Commerce Clause," *id.* Therefore, not only is the decision below in conflict with decisions of the Fifth Circuit and this Court, but it runs counter to the purposes of the Commerce Clause as well.

II. Continuing Uncertainty Concerning The Constitutionality Of Conditional Property Tax Exemptions Raises Important Issues On Which Both States And Businesses Require Guidance And Intensifies The Very Conflicts That The Commerce Clause Seeks To Avoid.

Property tax exemptions and abatements are among the most ubiquitous tax incentives used by states and municipalities in their efforts to attract business investment. The most recent annual survey by *Site Selection* magazine indicates that forty states presently offer incentive programs involving tax exemptions or moratoria on land or capital improvements, and that forty-four states provide programs involving tax exemptions or moratoria on equipment or machinery. 49 SITE SELECTION 763, 765 (2004); see also NATIONAL EDUCATION ASSOCIATION, PROTECTING PUBLIC EDUCATION FROM TAX GIVEAWAYS TO CORPORATIONS 11 (2003) (displaying state-by-state chart showing that every state offers either property tax abatements for business property or tax incrementing financing,

which is often the functional equivalent of tax abatement). Many exemption and abatement provisions offer generally available tax relief to all property of a particular type, without any conditions relating to the location of taxpayer economic activity, and hence do not raise Commerce Clause concerns. *See, e.g.*, Mass. Gen. Laws c. 59, § 5, cl. 16(3) (exempting the personal property of manufacturing corporations from property taxation). Others, however, incorporate a wide diversity of conditions of the sorts considered by the courts in *Pelican Chapter, Camps Newfound*, and this case. *See, e.g.*, Fla. Stat. §§ 196.012(16)-(17), 196.1995 (authorizing economic development property tax exemptions conditioned on jobs created and on proportion of out-of-state sales); Tex. Tax Code §§ 313.001-313.104 (providing property tax abatements and credits conditioned upon magnitude of investment and number of new jobs created); *see generally* Esteban G. Dalehite, John L. Mikesell, & C. Kurt Zorn, *Variation in Property Tax Abatement Programs Among States*, 19 *ECON. DEV. Q.* 157 (2005) (presenting a fifty-state review and analysis of property tax abatement programs indicating that many programs are conditioned on employment or investment requirements).

Econometric studies have repeatedly demonstrated that the actual influence of these, and other, state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives. *See* ROBERT G. LYNCH, *RETHINKING GROWTH STRATEGIES* (2004) 25-36 (surveying the numerous econometric studies assessing the impacts of state and local tax incentives on business location and finding they “are nearly unanimous in concluding that

state and local tax incentives fail to attract a significant number of new businesses, create numerous jobs, or substantially enhance state economic performance”); Dalehite, et al., *supra*, 19 ECON. DEV. Q. at 160 (reviewing literature specific to property tax abatements and reaching “tentative conclusion that if abatements are effective, they are only partially, temporarily, or conditionally effective at best”). Nonetheless, the impacts of property tax abatement programs both on governmental fiscal capacity and on business tax liabilities are very substantial. In the city of Toledo alone, the city school district was estimated to lose some \$13.7 million annually due to Ohio’s personal property tax exemption program, a loss of approximately fourteen percent of its available property tax revenues. See Robert Tomsho, *In Toledo, a Tension Between School Funds and Business Breaks*, WALL ST. J., July 18, 2001 at A1; see also NATIONAL EDUCATION ASSOCIATION, *supra* at 19 (estimating statewide revenue losses in Ohio in 1999 in excess of \$100 million). The property tax exemptions in the recently enacted Texas Economic Development Act are estimated to exceed \$400 million annually by 2008. See TEXAS TAX EXPENDITURE AND INCIDENCE REPORT 2005-2007, Table 1 at 36 (2003).

Given the existence of these laws on the books of many states, both businesses and state and local governments face frequent and important decisions that depend on conclusions about the validity of these programs based on the various types of conditions that are imposed upon participation in them. The stark conflict among the decided cases about how the Commerce Clause applies to such conditions confounds such judgments, by both governments and businesses, with a high degree of indeterminacy and uncertainty. Many measures that might

survive scrutiny under the Sixth Circuit's approach, because the conditions they impose are related to the use of the exempted property, would not pass muster under the *Pelican Chapter* and *Camps Newfound* analysis, with its focus on whether the conditions pressure the taxpayer to favor in-state over out-of-state economic activity other than the siting of the exempt property itself. This uncertainty is only compounded by the tenuous distinction that the Sixth Circuit's decision drew between the impermissibly discriminatory character of Ohio's investment tax credit and the permissible discrimination it finds in the conditions attached to Ohio's property tax exemptions, and by uncertainties about the relevance of the delicate differences that the Sixth Circuit identifies among types of conditions on property tax exemptions that it would and would not find unconstitutional. It is, therefore, vital for this Court to step in to resolve the conflict among the circuits, so that businesses will be able to make well-informed decisions about where to locate new facilities, and so that state and local governments will be able to design and offer incentive packages that comport with constitutional requirements.

Moreover, perpetuation of this conflict among the courts about what sorts of state and local tax incentives are permissible is itself injurious to central Commerce Clause values. "The very purpose of the Commerce Clause was to create an area of free trade among the several States." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). That purpose requires the avoidance of "'a multiplication of preferential trade areas destructive of' the free trade which the Clause protects." *Boston Stock Exchange*, 429 U.S. at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)). But, if different states, governed by

the different approaches of the circuit courts, have varying authorities to enact tax exemption programs conditioned on the beneficiaries' agreements to concentrate their economic activities within the state, it is almost inevitable that those states with the greater freedom to establish and enforce such programs will aggressively pursue their competitive advantage and establish the very "preferential trade areas" the Commerce Clause seeks to avoid. Thus, this Court's intervention is needed to prevent the very "tendencies toward economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), that the Commerce Clause was designed to prevent.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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