IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLOTTE CUNO, *et al.*,	:	
	:	
Plaintiffs-Appellants	:	
	:	
v.	:	**No. 01-3960**
	:	
DAIMLERCHRYSLER CORP., *et al.*,	:	
	:	
Defendants-Appellees.	:	

THE STATE OF OHIO'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

In an opinion with disastrous consequences for Ohio's ability to compete with its sister States for new business, the panel here declared Ohio's Investment Tax Credit ("ITC") unconstitutional on dormant Commerce Clause grounds. See *Cuno v. DaimlerChrysler, Inc.,* —F.3d—, No. 01-3960 ("Panel Op.") (attached as Ex. A). Remarkably, the sole basis for the decision was a theory that plaintiffs-appellants themselves candidly called "novel." Appellants' Br. at viii. And "novel" it is, for no other federal court has ever held, or even suggested, that an ITC like Ohio's (or any other ITC for that matter) is unconstitutional. In fact, such credits have previously been understood as not only acceptable, but as critical to State power, as nearly all States offer an ITC or similar development incentive.

While rehearing en banc is "an extraordinary procedure," this case presents precisely the type of "precedent setting error of exceptional public importance" for which the procedure was designed. See 6th Cir. R. 35(c). Indeed, the case lies at the intersection of economic development and tax policy, two undeniably vital issues in any State. The importance of this issue is further reflected in the nearly *$30 billion* companies have spent in Ohio in reliance on the ITC. And ironically, while the panel based its decision on concerns about discrimination *in favor of* Ohio, its decision will result in discrimination *against* Ohio. States across the country (at least those outside this Circuit) remain free to use their virtually

identical ITCs to lure business development away from Ohio. Ohio respectfully urges review by the entire Court before plaintiffs-appellants' "novel legal theory" puts the State at such a dramatic disadvantage in the hard-fought competition for new development.

The need for review is particularly pressing here, as plaintiffs-appellants' legal theory is not merely "novel," but wrong. Plaintiffs urged, and the panel adopted, a distorted view of Supreme Court precedent. Review is thus also needed to maintain uniformity with Supreme Court authority. See FRAP 35(b)(1).

Finally, the panel decision should be vacated because the Court lost subject-matter jurisdiction over the case two weeks before issuing the decision. Kim's Auto and Truck Service, Inc. was the only plaintiff who ever had standing, but it no longer does. Kim's faced a particularized injury, in that it sought to stop Toledo from taking Kim's property for use in DaimlerChrysler's expansion. But Toledo took possession of the property on August 17, 2004, pursuant to a final judgment in state court eminent domain proceedings. Apart from Kim's unique status, Plaintiffs can assert only general "taxpayer standing," but that is insufficient to support a challenge to a statewide tax such as the ITC. Because the case is now moot—and was when the panel decision issued—that decision must be vacated, and the case dismissed. See *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

For all of these reasons, Ohio respectfully urges further review.

STATEMENT OF THE CASE

To avoid duplication, Ohio adopts DaimlerChrysler's Statement of the Case. See DaimlerChrysler En Banc Pet. at _-_. We emphasize here only the following:

- Every State in the Sixth Circuit, and nearly all 50 States, have an ITC that provides corporations with tax credits based on new investment in the State.

- In Ohio, in 2002 alone, over 2100 corporations claimed investment tax credits totaling $73 million based on their new investments in Ohio. Since the ITC's inception in 1995, corporations have made over $30 billion in new investment in plants and equipment in Ohio in reliance on the credit.

- Relying on the ITC, DaimlerChrysler invested *over $1.2 billion* in Toledo.

- Ohio has consistently maintained that no plaintiff in this action except Kim's ever appropriately had standing to challenge the ITC. See Mem. of State Def. in Opp. to Pfs. Motion for Remand ("Ohio Opp. to Remand") at 7-13.

- Kim's had a unique injury based only on its allegation that, if DaimlerChrysler expanded as a result of the tax incentives, Kim's would lose its then-current business location. See *id*.

- The City of Toledo has since taken Kim's property through eminent domain proceedings. Title to the property has transferred, Kim's former facility has been demolished, and Kim's is now operating in a new location.

REASONS FOR GRANTING THE PETITION

A. The Constitutionality of Ohio's Investment Tax Credit Statute Is An Issue of Exceptional Public Importance.

Questions regarding a State's authority to tax raise important questions of federalism and implicate vital State interests. In fact, the "taxation authority of state government" is "central to state sovereignty." *Dep't of Revenue v. ACF*

Indus., 510 U.S. 332, 345 (1994). And "[t]he power to tax is basic to the power of the State to exist." *Ark. v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997).

Perhaps nowhere is the State's authority to structure its tax system more important than with regard to business development incentives such as those at issue. Surely one of a State's core functions is promoting its citizens' welfare. New growth, new jobs, and new opportunities are central to that welfare. In short, the panel decision attacks not one, but two, vital aspects of State governance—clearly matters of "exceptional public importance." See FRAP 35(a)(2).

The particular facts regarding the ITC here further underscore the gravity of this case. Ohio's ITC is an essential tool in Ohio's attempts to generate new investment, clearly reflected in the fact that business owners have invested over $30 billion in Ohio in reliance on the ITC. In 2002 alone, over 2100 corporate taxpayers took credits totaling over $73 million.

Moreover, nothing in the panel's opinion turned on anything that is unique to Ohio's statute as compared to those in other States. Accordingly, the ITCs in our three sister States in this Circuit are now suspect. When the opinion's impact on these other States is considered, the results are truly staggering. These three States have provided hundreds of millions in tax credits, corresponding to billions in new investments—business capital that could have flowed just as easily to States outside this Circuit, or even foreign countries. Not surprisingly, our sister

States share Ohio's concern over the Panel's errant ruling, and they join our call for review. See Amicus Br. of Michigan, Kentucky and Tennessee. Moreover, manufacturing associations, Chambers of Commerce, and regional and local development groups also share the view that this case presents a matter of "exceptional public importance." See, e.g., Br. of Govt. Interest Amici.

The discriminatory impact of the panel decision on Ohio's ability (and that of our sister States in this Circuit) to compete for investment dollars further reinforces the exceptional public importance of the issue presented here. Business capital is very mobile. States compete vigorously with each other, and with foreign countries, in their attempts to secure development dollars. The Panel Opinion will irreparably harm this Circuit's States in that competition. Certainly no one disputes that businesses consider tax issues in making investment decisions. *See* Geraldine Gambale, *18th Annual Corporate Survey*, Area Development Magazine (2003), at http://www.area-development.com/FrameCorpSurvey.html. That is why States across the country use ITCs to compete for such investment. *Id*. The direct result of the panel decision, however, is that Ohio can no longer do so.

The Supreme Court has recognized that Commerce Clause challenges to taxation involve a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers." See *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402 (1984). In light of the devastating practical and

doctrinal effects of striking Ohio's investment tax credit plan, that "delicate balancing" merits the entire Court's attention. No matter how the Court ultimately rules, this case certainly involves issues of "exceptional public importance."

B. The Panel's Commerce Clause Theory Conflicts With Precedent.

In adopting plaintiffs' "novel" theory, the stunningly broad Panel Opinion calls into question every ITC in the country. The Panel's unwarranted departure from existing Commerce Clause precedent merits en banc review.

Even in striking down taxes, the Supreme Court has emphasized that States are free to structure their "tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Moreover, the Court has similarly noted that competition among the States "for a share of interstate commerce … lies at the heart of a free trade policy." *Id.* at 336–37. And of course, tax incentives such as those at issue here are an important way in which States use their tax systems to compete. In fact, the Supreme Court has at least tacitly blessed such incentives. See *Westinghouse*, 466 U.S at 406 n. 12. To be sure, economic protectionism is off-limits, but State attempts to foster in-state growth are not merely permissible, they are encouraged.

Against this backdrop, the panel opinion here errs both in the Commerce Clause view it rejects, and the view it adopts. First, the panel flatly rejected the idea that "the Commerce Clause is primarily concerned with preventing economic

protectionism—that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce." See Panel Op. at 10. But the Supreme Court itself has said: "the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

While the panel's willingness to reject Supreme Court teachings is troubling enough, the real problem is what it adopts in place of a focus on protectionism, *i.e.*, the panel's apparent notion that the dormant Commerce Clause prevents *any* efforts to "encourage further investment in-state at the expense of development in other states." Panel Op. at 10. The problem with severing the dormant Commerce Clause from its anti-protectionist moorings, as the panel did here, is that there is no ready limiting principle. After all, *any* growth in one State must, at some level, come "at the expense of development in other states." DaimlerChrysler had to locate its $1.2 billion facility somewhere. Its decision to place it in Ohio meant it would not go somewhere else. Under the panel opinion then, *any* efforts by Ohio to secure that investment would ostensibly violate the Constitution. Indeed, even abolishing the corporate franchise tax in its entirety, for all taxpayers, could be labeled an effort to foster Ohio's growth "at the expense of development in other States." In short, the dormant Commerce Clause view that the Panel adopted here is hopelessly overbroad.

Moreover, to the extent that the opinion even tacitly suggests a limiting principle, that principle appears nowhere in Supreme Court precedent. Arguably, the panel opinion forbids only those credits that result in a negative tax—that is, credits for new development that exceed the tax the new development generates, and are thus available to offset pre-existing tax liabilities. See Panel Op. at 7 (noting "any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state"). Even if the panel opinion were limited that way, however, the principle it adopts appears nowhere in existing precedent. None of the three cases on which the panel relies, *Maryland v. Louisiana*, 451 U.S. 725 (1981), *Boston Stock Exch.*, or *Westinghouse*, reflects any such principle. *Maryland* was a tariff case where the tax resulted in differential prices for in-state versus out-of-state uses of natural gas, a clear Commerce Clause problem. In *Boston Stock Exch.*, the legislation was specifically and admittedly designed for the protectionist purpose of aiding the New York Stock Exchange at the expense of out-of-state rivals. And, in *Westinghouse*, the New York tax assessment increased and decreased in response to out-of-state activities. That is not true of Ohio's ITC. In short, the tax in each of those cases was easily distinguishable from the ITC here, so those cases do not support the plaintiffs' "novel legal theory" that is now the law in this Circuit.

To be sure, Ohio may not practice "economic protectionism" by improperly discriminating in its tax system. But as the Michigan Supreme Court noted in upholding a virtually identical tax credit, no such discrimination occurs where, as here, (1) the tax credit is equally available to in-state and out-of-state companies, and (2) the amount of the credit does not vary as a company's out-of-state activities increase. See *Caterpillar, Inc. v. Dep't of Treasury*, 488 N.W.2d 182 (Mich. 1992). Thus, the ITC is not "protectionism," but is a legitimate way for Ohio to compete with other States to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

C. The Court Lost Jurisdiction Over The Case Shortly Before The Panel Issued Its Decision, So That Decision Should Be Vacated.

The panel decision should be vacated because the Court lost jurisdiction over the case in August 2004, when the only party with standing lost that status.

1. Kim's lost its standing, leaving the case moot and requiring the Court to vacate the panel decision and dismiss the case.

Ohio has consistently argued that only one plaintiff, Kim's, had standing here.[1] See Ohio Opp. to Remand at 7-13. Kim's owned land that was slated to become part of the Jeep project, and Toledo began eminent domain proceedings.

[1] We believe that Kim's once had standing, but we are obliged to note that others have questioned that assertion. For example, we understand that Ford Motor Co., as amicus, argues that no party ever had standing in this case.

See Compl. ¶ 6. While this "takings"-style injury differed from the Commerce Clause theory of this case, Kim's nonetheless faced a concrete injury-in-fact.

But now things have changed, as Kim's recently lost its fight with Toledo in the eminent-domain case. On July 27, 2004, a state court ordered Kim's to "vacate the premises ... within 21 days of this Order," so that possession could "be given, pursuant to law, to the plaintiff, city of Toledo." Order (attached as Ex. B). Kim's has complied, and its former building has been demolished.

Consequently, Kim's no longer faces any concrete injury that it seeks to redress through this litigation. Here, Kim's wanted to stop the credit, to stop the Jeep plant, to stop the loss of its land. Kim's never sought damages (nor could it, as the eminent-domain case compensates its loss). But once Kim's surrendered possession, on August 17, 2004, it lost its sole viable claim to standing.

Such loss of standing, even during an appeal, undisputedly moots a case. Indeed, just this week, this Court dismissed an appeal on similar facts. See *Chirco v. Gateway Oaks,* —F.3d—, No. 03-1126 (6th Cir. Sept. 14, 2004). In *Chirco*, the Court reiterated that a party's loss of standing leads to mootness, because an "actual live controversy 'must be extant at all stages of review.'" *Chirco,* slip. op. at 4, quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). In *Chirco,* as here, mootness arose when a party (there a defendant) no longer owned a piece of land that was involved in the dispute. Here, the change in ownership

was forced by litigation, but that does not change things. In fact, this Court has also recognized that mootness may result from decisions in separate litigation. *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906, 909 (6th Cir. 1989).

Nor does it matter that the panel decision was issued before the Court was apprised of the mootness issue, as case law leaves no doubt that opinions issued in moot cases should be vacated. See *Arizonans for Official English*, 520 U.S. at 73 (where appellate court "refused to stop the adjudication" in a moot case, "we set aside the unwarranted en banc Court of Appeals judgment"). Indeed, this rule even works retroactively, so that if a case becomes moot on initial appeal or on further appeal, then either this Court or the Supreme Court will vacate all decisions that have been issued along the way, even those released before the case became moot. As this Court has explained, "if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss," *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997); *WJW-TV*, 878 F.2d at 911–12. Because the Panel Decision was entered on September 2, 2004, weeks after Kim's surrendered possession, that result is the proper course here.[2]

[2] At most, Kim's could assert continued standing because it still seeks to litigate its eminent domain case, perhaps to get its land back. Even if that is a viable theory, all Kim's has left is a petition for certiorari pending in the U.S. Supreme Court. That case (No. 03-1629) is scheduled for the Court's September 27 Conference, so

2. The other plaintiffs never had standing, as they did not satisfy the prudential "zone of interests" test for standing.

While Kim's did have standing until recently, the other plaintiffs never did. Thus, those other plaintiffs may not fill in for Kim's. At a minimum, their standing is questionable enough to warrant further review.

This case was originally filed in state court, and defendants removed it. Plaintiffs sought a remand to state court, citing among other concerns what they termed "the significant possibility that most Plaintiffs will not be able to demonstrate Article III standing as mere taxpayers," and urging that on that basis the district court ought to "yield jurisdiction over this case to the Ohio court system." Remand Motion at 9. In opposing remand, Ohio argued that, apart from the possibility that some municipal taxpayer plaintiffs might show local taxpayer standing, none of the plaintiffs did in fact allege a genuine case or controversy.

Ohio also noted that prudential standing doctrine required that at least one plaintiff show that its interest "arguably falls within the zone of interest protected or regulated by the statutory provision of constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The "zone of interest" test has been recognized as defining Commerce Clause standing, *Boston Stock Exch.,* 429 U.S. at 320 n.3, and the dormant Commerce Clause has been defined as preserving

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a decision on certiorari is expected on October 4, 2004. If the petition is denied, as we expect, then even mootness at that point requires vacatur under *Munsingwear*.

a plaintiff's "right to engage in interstate trade free from restrictive state regulation," *Dennis v. Higgins*, 498 U.S. 439, 448 (1991).

Apart from Kim's, all plaintiffs based their standing upon taxpayer status, alleging harm to state and local revenues and increased tax burdens on themselves. But a private taxpayer does not have a recognized injury within the "zone of interests" the Commerce Clause protects, as opposed to an injury to the taxpayer's own pocketbook as a participant in commerce. Indeed, because the very purpose of the prudential "zone of interest" test lies in the "concern about the proper—and properly limited—role of the courts in a democratic society," *Bennett*, 520 U.S. at 162, the Ohio taxpayers should instead pursue their remedy of participating in the political process in Ohio that created the tax breaks. Simply put, just as "[i]t is not the purpose of the commerce clause to protect state residents from their own state taxes," *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989), the Commerce Clause does not operate to protect state residents from their own state's tax *credits* either. Because all plaintiffs other than Kim's predicated their standing on taxpayer status, none of them qualified for Commerce Clause standing under the prudential "zone of interests" test.[3] Thus, Kim's loss of standing leaves the entire case moot.

[3] The Michigan taxpayers also lack standing. They say that, but for Ohio's ITC, the Jeep plant would have been built in Michigan. Compl. ¶3. This "link" is too tenuous to show that this injury is "fairly traceable" to defendants or is redressable here. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976). Even without the ITC, DaimlerChrysler would not necessarily build in Michigan.

While the District Court reached a different conclusion, its decision was limited in two independently significant ways. First, although the Court said that the issue "must be examined closely and determined at this juncture," it also indicated that its ruling was tentative, as it found that Plaintiffs' standing was enough to avoid dismissal "at least at this early stage in the litigation." D. Ct. Op. at 6, 7 (Nov. 20, 2000). Second, the Court relied on just one factual predicate for standing, namely the Plaintiffs' allegation "that the property tax exemption reduces the funds available for" local schools. *Id.* at 7. The Court then concluded that this "injury is fairly traceable to application of the statutes at issue," but it seems undeniable that this logic applies only to the property-tax challenge, not to the ITC claim, as the Ohio franchise tax is a state-collected tax.

Ohio acknowledges that it did not challenge taxpayer standing in this Court, but that fact is both understandable and irrelevant. It is understandable in light of our concession of Kim's standing. Indeed, courts similarly take the approach of not addressing other parties' standing as long as one party has standing. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977). Further, the delay in re-asserting the standing argument is irrelevant, as subject-matter jurisdiction can and should be raised at any time. Finally, Ohio regrets that it did not learn of Kim's factual change-in-circumstances in time to advise the Court before the Panel

Decision issued. But that neither diminishes our duty to inform the Court of facts showing mootness, nor the Court's duty to question its own jurisdiction.

In any case, the best path now is for this Court to vacate the Panel Decision. Ohio urges that the lack of standing is clear enough that the Court should simply order the case dismissed. But even if the Court does not agree, it should at least address the standing issue more fully through further briefing, whether to the panel or en banc. Regardless of the procedural path from here, the Panel Decision should be vacated, as a federal court decision of this magnitude should not rest on such a shaky jurisdictional foundation.

CONCLUSION

For the above reasons, Ohio respectfully asks the Court to grant the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc was sent by regular U.S. mail, postage pre-paid, this 16th day of September, 2004, to:

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EXHIBIT A

EXHIBIT B

EXHIBIT C