

2 - - - - - x

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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF THEODORE B. OLSON, ESQ. On behalf of the Petitioners in 04-1704	3
ORAL ARGUMENT OF DOUGLAS R. COLE, ESQ. On behalf of the Petitioners in 04-1724	13
ORAL ARGUMENT OF PETER ENRICH, ESQ. On behalf of the Respondents	27
REBUTTAL ARGUMENT OF THEODORE B. OLSON, ESQ. On behalf of the Petitioners in 04-1704	51

[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.]

18

19

20

21

22

23

24

25