

Cuno v. DaimlerChrysler, Inc. Dormant Commerce Clause Limits State Location Tax Incentives

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In its most recent term, the Sixth Circuit Court of Appeals examined the validity of tax incentive programs which encourage businesses to remain in, expand in, or move to a particular state.¹ Since the 1980s, many of these programs have been specifically aimed at persuading businesses to expand in or locate in particularly impoverished areas of the state deemed “enterprise zones.”² State policymakers have touted these location tax incentive programs as essential tools for maintaining and stimulating business investment, job opportunities, and economic growth.³ Economists and social scientists, however, have been skeptical about the efficacy of location tax incentive programs; such programs may have little effect on attracting businesses or increasing job opportunities, but they can be extremely costly to the state.⁴

In *Cuno v. DaimlerChrysler, Inc.*,⁵ the Sixth Circuit brought the constitutionality of these location tax incentives into question, approving some measures and invalidating others. The court examined whether Ohio’s personal property tax exemption and franchise tax credit violated the federal Interstate Commerce Clause and Ohio’s equal protection clause.⁶ The personal property tax exemption is one of several tax incentives offered through Ohio’s Enterprise Zone program, which primarily uses tax incentives to stimulate economic activity in impoverished areas of the state.⁷ The fran-

¹ See *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), *reh’g en banc denied* (Jan. 18, 2005), *petition for cert. filed* (U.S. Apr. 18, 2005) (No. 04-1407).

² Kara Lamb, Note, *Revitalization from the Inside Out: The Attempts to Move Towards an Urban Renaissance in the Cities of the United States and the United Kingdom*, 19 CONN. J. INT’L L. 159, 163 (2003). In Ohio, for example, both municipalities and counties can designate enterprise zones within areas defined by the United States Office of Management and Budget as either a principal city of a metropolitan area or a city designated as an urban cluster in a rural area. The state’s director of development must then certify the area as an enterprise zone. OHIO REV. CODE ANN. §§ 5709.62(A), 5709.93(A) (Anderson 1998).

³ George Voinovich, *Court Wrong To Threaten States’ Tax Incentives*, CRAIN’S CLEVELAND BUS., Oct. 11, 2004, at 10.

⁴ Alan Peters & Peter Fish, *Enterprise Zone Incentives: How Effective Are They*, in FINANCING ECONOMIC DEVELOPMENT IN THE 21ST CENTURY 113, 116 (Sammis B. White et al. eds., 2003).

⁵ 386 F.3d 738 (6th Cir. 2004), *reh’g en banc denied* (Jan. 18, 2005).

⁶ *Id.*

⁷ OHIO REV. CODE ANN. §§ 5709.62(A), 5709.62(C), 5709.93(A) (Anderson 1998). Because the contract at question in *Cuno* was made in 1998, I generally reference the 1998 edition of the Ohio Revised Code Annotated.

chise tax credit is a tax credit available to businesses throughout the state.⁸ The franchise tax credit is not technically an incentive offered through Ohio's Enterprise Zone program. However, because the franchise tax credit increases for businesses located in "distressed areas," it is another benefit to locating in enterprise zones, which usually also qualify as distressed areas.⁹ The Sixth Circuit Court of Appeals ultimately upheld Ohio's personal property tax exemption, but it struck down the franchise tax credit.¹⁰

Cuno arose out of a 1998 agreement between DaimlerChrysler and the City of Toledo.¹¹ DaimlerChrysler agreed to build a new vehicle-assembly plant in an economically depressed area of Toledo which, according to the company, represented an investment of \$1.2 billion and the creation of thousands of new jobs.¹² In exchange, the State of Ohio, the City of Toledo, and two local school districts provided DaimlerChrysler with a tax incentive package that included a 13.5% franchise tax credit¹³ against the business's state franchise tax liability and a ten-year, 100% personal property tax exemption¹⁴ for equipment and machinery bought for use at the new facility.¹⁵ The total value of the tax incentive package was estimated at \$280 million.¹⁶

A group of individual taxpayers and small business owners sued DaimlerChrysler, the State of Ohio, the City of Toledo, and a local school district, claiming that Ohio's franchise tax credit and the personal property tax exemption violated the federal Interstate Commerce Clause and the Ohio equal protection clause.¹⁷ The Plaintiffs were represented by Peter Enrich, a Northeastern University professor and author of a seminal article discussing the constitutionality of state location tax incentives.¹⁸

⁸ OHIO REV. CODE ANN. § 5733.33(B).

⁹ OHIO REV. CODE ANN. § 5733.33(C)(2).

¹⁰ 386 F.3d 738 (6th Cir. 2004), *reh'g en banc denied* (Jan. 18, 2005).

¹¹ *Id.* at 741.

¹² *Id.*

¹³ *Id.* The State of Ohio can grant a state franchise tax credit to taxpayers who "purchase[] new manufacturing machinery and equipment during the qualified period" as long as the purchased property is installed in Ohio. *Id.* Generally, the franchise tax credit is equal to 7.5% of the difference between the taxpayer's new investment and the host county's average new investment. *Id.* However, if a business purchases machinery and equipment "for use in specific economically depressed areas," the franchise tax credit rate increases to 13.5%. *Id.* Companies located in enterprise zones are eligible for the franchise tax credit, and in fact, they are eligible for the higher credit rate, but the franchise tax credit is not a formal component of the Enterprise Zone Program. *Id.*

¹⁴ *Id.* Ohio municipalities are authorized to provide a personal property tax exemption to companies that "agree[] to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees" in areas designated as enterprise zones. *Id.* Unilaterally, a municipal authority can grant an exemption for 75% of the value of new personal property purchased during a ten-year period, but where the municipal authority seeks an exemption exceeding 75%, it must obtain the consent of the school districts whose property tax base would be reduced. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196, 1198 (N.D. Ohio, 2001).

¹⁸ See Peter Enrich, *Saving the States from Themselves: Commerce Clause Constraints*

Initially, the Plaintiffs filed suit in the Lucas County Court of Common Pleas in Toledo, Ohio,¹⁹ but the Defendants removed the case to federal district court based on the federal constitutional claims in the Plaintiffs' complaint.²⁰

The district court initially dismissed without prejudice the Plaintiffs' claims against the State of Ohio, basing its decision on sovereign immunity grounds.²¹ It then examined the motions to dismiss the claims made against the remaining Defendants in which the Plaintiffs argued that the Ohio tax incentives violated the Ohio equal protection clause and the federal Interstate Commerce Clause.²² First, in examining the tax incentives under Ohio's equal protection clause, the district court found that both withstood rational basis review.²³ It held that the purpose of the credits was "to encourage industrial investment and development in Ohio, particularly in economically troubled areas," and that the tax incentives under question were thus rationally related to that purpose.²⁴ Next, the district court held that neither tax incentive ran afoul of the federal Interstate Commerce Clause.²⁵ It distinguished the tax incentives from two types of tax schemes found unconstitutional by the Supreme Court: those that effectively place a tariff on interstate commerce, and those that increased a business's tax burden based on increased activity in another state.²⁶ Because they applied to property located in and used within the state, the district court held that the Ohio tax incentives did not function as tariffs. It also found that the value of these incentives was not linked to a business's level of out-of-state commerce.²⁷

The Sixth Circuit affirmed the district court's dismissal of the Plaintiffs' claims under the Ohio equal protection clause,²⁸ and it also affirmed the district court's holding that the personal property tax exemption withstood challenge under the Interstate Commerce Clause.²⁹ However, the court held that the state's franchise tax credit unconstitutionally discriminated against interstate commerce.³⁰ While the court has enjoined application of the franchise tax credit, it has stayed an order to allow the Defendants to file a petition for a writ of certiorari to the Supreme Court.³¹

on State Tax Incentives for Business, 110 HARV. L. REV. 377, 383 (1996).

¹⁹ *Cuno*, 154 F. Supp. 2d at 1198.

²⁰ *Id.*

²¹ *Id.* at 1200–01.

²² *Id.* at 1198.

²³ *Id.* at 1201.

²⁴ *Id.*

²⁵ *Id.* at 1203.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 748–49 (6th Cir. 2004).

²⁹ *Id.* at 748.

³⁰ *Id.* at 745–46.

³¹ The Plaintiffs filed their petition for a writ of certiorari on April 18, 2005. The Defendants' response is due on May 20, 2005. See <http://www.supremecourtus.gov/docket/04->

In affirming the district court's holding that both the state franchise tax credit and the local personal property tax exemption withstood challenge under the Ohio equal protection clause,³² the court applied rational basis review. It did so because the tax credits were granted based on location and therefore did not implicate a suspect class or a fundamental right.³³ The court found that Ohio had a legitimate purpose in "revitalizing economically troubled areas in order to eliminate problems frequently associated with urban blight" and that the tax incentives, which were structured to encourage business to locate or expand in economically depressed areas, were rationally related to this interest.³⁴ It also distinguished the Ohio tax incentive programs from other state tax schemes that violated the federal Equal Protection Clause, which the court described as the functional equivalent of the Ohio equal protection clause.³⁵

In analyzing the Plaintiffs' federal Interstate Commerce Clause claims, the Sixth Circuit first provided an overview of Dormant Commerce Clause doctrine.³⁶ The federal Interstate Commerce Clause entrusts the power to regulate interstate commerce to Congress alone.³⁷ Where Congress has not exercised this power, it lies dormant, but the Dormant Commerce Clause nonetheless places some limits on state action, including levying taxes, that affect interstate commerce.³⁸ Generally, the Dormant Commerce Clause allows states to levy taxes on interstate commerce, but only if:

1. the activity taxed has a substantial nexus with the taxing state;
2. the tax is fairly apportioned to reflect the degree of activity that occurs within the state;
3. the tax does not discriminate against interstate commerce; and
4. the tax is fairly related to benefits provided by the state.³⁹

1407.htm (last visited May 2, 2005).

³² *Cuno*, 386 F.3d at 749.

³³ *Id.* at 748.

³⁴ *Id.* at 748–49.

³⁵ *See id.* at 749 (citing *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (holding that Alabama could not impose lower tax rates on domestic insurance companies in order to promote the domestic insurance industry)); *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 343–44 (1989) (holding that imposition of differential property tax rates based on last sale price did not serve legitimate purpose of "assess[ing] properties at current value"); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (holding that linking tax exemption for veterans to period of residence in the state did not serve legitimate purpose of encouraging veterans to relocate to the state and of repaying veterans for service).

³⁶ *Cuno*, 386 F.3d at 742.

³⁷ U.S. CONST. art. I, § 8, cl. 3.

³⁸ *Cuno*, 386 F.3d at 742.

³⁹ *Id.* (citing *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977)).

In *Cuno*, all parties agreed that the tax incentives provided to DaimlerChrysler had a substantial nexus with Ohio; they were correlated to the degree of activity in Ohio; and they were related to the benefits conferred by the state.⁴⁰ Thus, the only contested issue in *Cuno* was whether the franchise tax credit and the personal property tax exemption discriminated against interstate commerce.⁴¹

The *Cuno* court acknowledged that the Supreme Court has not developed a precise test for determining when a state tax scheme unconstitutionally discriminates against interstate commerce.⁴² Nonetheless, it stated that under the Supreme Court's jurisprudence, a state tax scheme seems to run afoul of the Dormant Commerce Clause in two situations: (1) where the tax scheme is facially discriminatory against interstate commerce or (2) where, based on "a sensitive, case-by-case analysis of purposes and effects," the tax scheme effectively discriminates against interstate commerce by "providing a direct commercial advantage to local business."⁴³ Where a court finds that a tax scheme is discriminatory, it is unconstitutional unless "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."⁴⁴

The Sixth Circuit held that the Ohio franchise tax credit violated the Interstate Commerce Clause. The decision largely relied on Supreme Court jurisprudence "invalidating tax schemes that encourage the development of local industry by imposing greater burdens on economic activity taking place outside the state."⁴⁵ The court recognized that the state franchise tax credit did not facially discriminate against interstate commerce because it was available to in-state as well as out-of-state companies.⁴⁶ Nonetheless, it found that the credit reduced a business's Ohio franchise tax liability if it placed new equipment in Ohio, but not if it placed the equipment elsewhere. As a consequence, the franchise tax credit created incentives for increased activity in Ohio and burdened those companies

⁴⁰ *See id.*

⁴¹ *Id.* at 743.

⁴² *Id.*

⁴³ *Id.* (quoting *W. Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994)); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

⁴⁴ *Cuno*, 386 F.3d at 743 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

⁴⁵ *See id.* at 743–46 (citing *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (holding New York tax scheme that applied a lower tax rate to securities sales conducted in-state versus those conducted out-of-state violated the Interstate Commerce Clause)); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1988) (holding New York tax credit that increased with increased exports from New York and decreased with increased exports from another state violated the Interstate Commerce Clause); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (holding Louisiana tax scheme violated the Interstate Commerce Clause where it provided companies with tax credits for extracting natural gas in Louisiana that offset the companies' state severance tax liability).

⁴⁶ *Cuno*, 386 F.3d at 743.

with Ohio tax liability that decided to expand their operations and install new equipment outside the state.⁴⁷

In finding the franchise tax credit unconstitutional, the Sixth Circuit disagreed with the Defendants' contention that the Supreme Court's Interstate Commerce Clause precedents should be more narrowly construed.⁴⁸ First, the court rejected the argument that tax credits only violate the Interstate Commerce Clause where they either "function like [] tariff[s] by placing a higher tax upon out-of-state business or products" or "penalize out-of-state economic activity by relying on both the taxpayer's in-state and out-of-state activities to determine the taxpayer's effective tax rate."⁴⁹ Such a rule, in the court's view, would prohibit tax schemes that affirmatively burden interstate commerce while allowing tax incentives meant to benefit in-state activity. As a result, it relied on a distinction that was "tenuous" in light of the Supreme Court's jurisprudence.⁵⁰

Second, the court rejected the Defendants' attempt to analogize the franchise tax credit to a subsidy.⁵¹ The court conceded that the effect of the franchise tax credit was the same as a subsidy for capital investments in economically depressed areas.⁵² Nonetheless, as the court saw it, the Supreme Court treated these methods for spurring in-state economic growth differently in its Commerce Clause jurisprudence since tax incentives "involve[] state regulation of interstate commerce through its power to tax," whereas subsidies do not require states to enter the field of interstate commerce.⁵³ Interestingly, the court acknowledged that Ohio's goal of "attract[ing] industry to economically depressed areas" is legitimate,⁵⁴ but it never squarely addressed whether Ohio had reasonable, nondiscriminatory alternatives available for achieving this goal. Although the court did not speak clearly on this point, its comparison of the tax incentives in question to pure subsidies indicates that pure subsidies would be a reasonable, nondiscriminatory alternative.⁵⁵ In fact, it seems that pure subsidies would provide a reasonable alternative even where they are not politically viable.⁵⁶

While finding the franchise tax credit unconstitutional, the Sixth Circuit held that the personal property tax exemption withstood challenge under the Interstate Commerce Clause.⁵⁷ The court stated that conditional tax

⁴⁷ *See id.*

⁴⁸ *See id.* at 745–46.

⁴⁹ *Id.* at 745.

⁵⁰ *See id.*

⁵¹ *Id.* at 746.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.").

⁵⁷ *See Cuno*, 386 F.3d at 748.

exemptions are constitutional where the conditions “are related to the use or location of the property itself” and do not result in discrimination against interstate commerce by requiring the taxpayer in question “to engage in another form of business” or maintain a “specified economic presence” in the state.⁵⁸ Conditions attached to the Ohio personal property tax exemptions—that the purchased property be located and used in a specified area and that the business maintain employees—were not unconstitutional because they were related to the property itself and did not burden interstate commerce.⁵⁹

The Sixth Circuit initially stated that the personal property tax exemption did not facially discriminate against interstate commerce.⁶⁰ The court rejected the Plaintiffs’ attempts to equate the personal property tax exemptions in question with similar tax exemptions that had been found facially discriminatory by other courts.⁶¹ The tax exemptions in those cases required taxpayers to show a preference for in-state activity while the Ohio personal property tax exemption, according to the court, did not require recipients of the exemption to use in-state suppliers, contractors, or workers. Therefore, it was not unconstitutional.⁶²

The Sixth Circuit was also not persuaded by the Plaintiffs’ claim that the personal property tax exemption, like the franchise tax credit, would have the same discriminatory effect on interstate commerce.⁶³ The court, adopting the reasoning of an article by Professors Walter Hellerstein and Dan Coenen of the University of Georgia, found that the personal property tax exemption lacked two qualities of discriminatory tax incentives and therefore passed constitutional muster.

The court first noted that the personal property tax exemption did not implicate the coercive taxing power of the state and therefore did not have a discriminatory impact on companies that decide to locate or expand outside Ohio.⁶⁴ Specifically, the personal property tax is only levied on a business that is located in Ohio.⁶⁵ Therefore, if a business locates in Ohio, it can

⁵⁸ *Id.* at 746–47.

⁵⁹ *See id.* at 747.

⁶⁰ *Id.*

⁶¹ *Id.* (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (holding that property tax exemption for charitable organizations that excluded organizations run principally for nonresidents violated the Interstate Commerce Clause)); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997) (holding tax exemption unconstitutional under the Interstate Commerce Clause because it required taxpayer to give preference to in-state manufacturers, suppliers, and workers).

⁶² *See Cuno*, 386 F.3d at 747. Specifically, the Ohio Code only requires that the enterprises receiving these property incentives agree to operate a facility in the designated area and hire new employees or maintain current employees. OHIO REV. CODE ANN. §§ 5709.62(C)–(C)(1) (Anderson 1998).

⁶³ *See Cuno*, 386 F.3d at 747 (relying on Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 806–09 (1996)).

⁶⁴ *Id.*

⁶⁵ *Id.*

receive the exemption and reduce its personal property tax liability, but if it decides to locate in another state, it does not incur Ohio personal property tax liability, and it consequently does not feel the loss of the tax credit.⁶⁶ In contrast, the franchise tax credit reduces franchise tax liability, an amount which is tied to a business's total business in Ohio, not simply the business conducted at the location of a new or rehabilitated facility.⁶⁷ Hence, if a business decides to locate in another state, it will incur higher Ohio franchise tax liability than if it decided to locate in Ohio.⁶⁸ According to the court, where a business foregoes the property tax credit, it incurs no Ohio personal property tax liability, and "any discriminatory treatment between a business that invests in Ohio and one that invests out-of-state cannot be attributed to the Ohio tax regime or its failure to reduce current property taxes."⁶⁹ On the other hand, where a business foregoes the franchise tax credit by locating in another state, it will most likely still have Ohio franchise tax liability. This, states the Sixth Circuit, creates a disparity in tax liability between businesses that do and do not decide to locate or expand in Ohio that is due directly to the franchise tax credit scheme.⁷⁰

The Sixth Circuit then applied the "internal consistency test" to the personal property tax exemption, a test which examines the consequences of a hypothetical scenario in which every state adopted the same exemption.⁷¹ It concluded that under these circumstances, companies would pay no personal property taxes regardless of where they decided to locate, and as a result, all companies in interstate commerce would be treated equally.⁷² Therefore, according to the court, "businesses that desire to expand are neither discriminated against nor pressured into investing in Ohio."⁷³ Under this test, the court found that the personal property tax exemption did not run afoul of the federal Interstate Commerce Clause.⁷⁴

Ultimately, the Sixth Circuit distinguishes constitutional and unconstitutional location tax incentives based on whether or not they implicate the "coercive taxing power."⁷⁵ As a result, the Sixth Circuit's opinion in effect means that tax incentive programs that only require a business to locate in a particular city or state will likely be found constitutional.⁷⁶ In contrast, tax incentive programs that contain accountability measures with more stringent requirements will be held unconstitutional.⁷⁷

⁶⁶ *Id.*

⁶⁷ *See id.* at 743–46.

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.* at 748.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.* at 747.

⁷⁶ *See id.*

⁷⁷ *See infra* text accompanying notes 131–137.

These implications of the *Cuno* decision become evident when one compares the Ohio personal property tax exemption to other tax incentives offered through the Ohio Enterprise Zone program. The personal property tax exemption offered through the Ohio Enterprise Zone program survived Dormant Commerce Clause scrutiny because it simply required a business to locate in an enterprise zone and aspire toward set goals for economic activity and job creation.⁷⁸ However, most of Ohio's other Enterprise Zone tax incentives would likely be found unconstitutional because they require businesses to meet such goals.

Initially, it is important to understand how the Ohio Enterprise Zone program operates. The program aims to stimulate development in economically depressed areas of Ohio and to create or preserve employment opportunities within the state.⁷⁹ A municipal authority, with the approval of the Ohio Department of Development, can designate an area as an enterprise zone if it meets at least two of eight characteristics indicating that the area is economically depressed.⁸⁰ A municipal authority can then seek proposals from companies that wish to enter into an agreement with the locality to do business in the enterprise zone area in exchange for certain tax benefits.⁸¹ Proposals must include estimates of new employees who will be hired or current employees who will be retained within the enterprise zone; estimates of the total amount of wages and benefits to be paid to these employees; and estimates of the amount to be invested to "establish, expand, renovate, or occupy a facility," including investments in real and personal property.⁸² If the municipal authority finds that the business is qualified to create and preserve jobs and promote economic development,

⁷⁸ See *Cuno*, 386 F.3d at 741, 747.

⁷⁹ OHIO REV. CODE ANN. §§ 5709.61, 5709.671 (Anderson 1998).

⁸⁰ OHIO REV. CODE ANN. §§ 5709.62(A), 5709.61(A)(1)(a)–(h) (Anderson 1998). The characteristics that can qualify an area for enterprise zone designation include (1) location in an area designated as a "central city of a metropolitan statistical area" by the federal Office of Management and Budget; (2) location in an Appalachian region; (3) the average rate of employment is equal to at least 125% of the average unemployment rate for the State of Ohio; (4) the area has several vacant or demolished structures on which taxes are delinquent and designation of the area as an enterprise zone would likely reduce the vacancy or demolition rate or rate of tax delinquency; (5) the population of all census tracts within the area has decreased at least 10% between 1970 and 1990; (6) at least 51% of the residents of the area have incomes of less than 80% of the median income of the municipal corporation or corporations in which the area is located; (7) the area contains abandoned industrial spaces; (8) the area is located within one or more school districts the income-weighted capacity of which is less than 70% of the average income-weighted tax capacity of all school districts in the state. See OHIO REV. CODE ANN. § 5709.61(A)(1)(a)–(h) (Anderson 1998).

⁸¹ OHIO REV. CODE ANN. § 5709.62(B) (Anderson 1998). Note that counties are also authorized to designate areas that are part of more than one municipality or are located in unincorporated land as enterprise zones. OHIO REV. CODE ANN. § 5709.63 (Anderson 1998). These county-designated enterprise zones operate almost exactly like municipality-designated enterprise zones. OHIO REV. CODE ANN. § 5709.62(B) (Anderson 1998).

⁸² OHIO REV. CODE ANN. § 5709.62(B) (Anderson 1998).

it can enter into an enterprise zone agreement.⁸³ The business agrees to “establish, expand, renovate, or occupy a facility” and hire new employees or preserve employment opportunities.⁸⁴

The municipality, in return for the business’s efforts, agrees to provide the personal property tax exemption analyzed in *Cuno*.⁸⁵ The business can obtain a personal property tax exemption for (1) a certain amount of personal property bought for use in the enterprise zone area or (2) the increase in the assessed value of the real property constituting the project site.⁸⁶ The property tax exemption is normally limited to 75% of the specified property for up to ten years, but the exemption can be increased to 100% of the specified property, as happened in *Cuno*, with the consent of affected school districts.⁸⁷ Although not required, companies may agree to give preference to residents of the enterprise zone relative to residents of other parts of Ohio.⁸⁸

Additionally, where a business has entered an agreement with a municipal authority to do business in an enterprise zone, it can also apply yearly for a tax incentive qualification certificate.⁸⁹ In order to obtain this certificate, the business must prove that it has actually “established, expanded, renovated, or occupied” a facility according to its agreement with the municipality;⁹⁰ that it has hired new employees of whom at least 25% must be members of certain populations living within the enterprise zone itself or the county in which the enterprise zone is located;⁹¹ that the number of positions attributable to the business in the enterprise zone exceeds the number of positions attributable to the business in the state for the last calendar year;⁹² and that the enterprise has not closed or reduced employment at any location within Ohio for the purpose of “establishing, expanding, renovating, or occupying” a facility in an Ohio enterprise zone.⁹³

⁸³ OHIO REV. CODE ANN. § 5709.62(C) (Anderson 1998).

⁸⁴ *Id.*

⁸⁵ *Id.*; *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 741 (6th Cir. 2004).

⁸⁶ OHIO REV. CODE ANN. § 5709.62(C) (Anderson 1998).

⁸⁷ OHIO REV. CODE ANN. § 5709.62(D) (Anderson 1998); *Cuno*, 386 F.3d at 741.

⁸⁸ OHIO REV. CODE ANN. § 5709.62(J) (Anderson 1998).

⁸⁹ OHIO REV. CODE ANN. § 5709.64(A) (Anderson 1998).

⁹⁰ OHIO REV. CODE ANN. § 5709.64(A)(1) (Anderson 1998).

⁹¹ OHIO REV. CODE ANN. § 5709.64(2)(a)–(e) (Anderson 1998). Specifically, 25% of the new employees hired must fall into one of five categories. *Id.* This includes one-year residents of enterprise zones located in the county where the enterprise zone in question is located. OHIO REV. CODE ANN. § 5709.64(2)(e) (Anderson 1998). Additionally, this includes persons who have resided for at least six months in the county in which the enterprise zone is located who are also: (1) unemployed persons; (2) “Jobs Training Partnership Act” eligible employees; (3) participants of the Ohio Works First program or the prevention, retention, and contingency program or recipients of general assistance, disability benefits, or unemployment compensation; or (4) handicapped persons. OHIO REV. CODE ANN. § 5709.64(2)(a)–(d) (Anderson 1998).

⁹² OHIO REV. CODE ANN. § 5709.64(3) (Anderson 1998).

⁹³ OHIO REV. CODE ANN. § 5709.64(4) (Anderson 1998).

If a business meets these requirements, the business is entitled to additional tax benefits for the taxable year. First, the business is entitled to reduce its “property factor” and “payroll factor” for assets bought and wages paid in connection with the facility located in the enterprise zone.⁹⁴ These factors are used to determine what portion of a business’s income is taxable income in Ohio, and ultimately, to calculate the business’s Ohio franchise tax liability.⁹⁵ Next, the business is entitled to obtain tax credits for amounts paid for child care and training for certain qualifying employees.⁹⁶

Finally, a business that has entered an agreement with a municipal authority in order to do business in an enterprise zone is also eligible for an employment tax credit certificate every calendar year.⁹⁷ In order to qualify for this certificate, the enterprise must have “established, expanded, renovated, or occupied” a facility according to its agreement with the municipality.⁹⁸ The business cannot have “closed or reduced employment at any place of business in this state within the twelve months preceding application,” unless the municipal authority allowed the business to do so; in that case, the business must have “hired new employees equal in number to not less than fifty per cent of the total number of employees employed by the enterprise at other locations in this state on that date.”⁹⁹ If a business meets both these criteria, it is entitled to a non-refundable employee tax credit of up to one thousand dollars for each eligible employee hired.¹⁰⁰

When examined within the context of the Ohio Enterprise Zone program as a whole, the personal property tax exemption survived constitutional challenge precisely because businesses needed only to locate to an enterprise zone community in order to obtain the exemption.¹⁰¹ To obtain the personal property tax exemption, a business must provide “estimates” regarding how much investment and how many jobs a facility located in an enterprise zone will generate.¹⁰² However, it must only agree to establish the proposed facility and agree to create new jobs or maintain job opportunities generally;¹⁰³ there is no requirement that the business actually meet its goals in order to obtain the personal property tax exemption.¹⁰⁴

⁹⁴ OHIO REV. CODE ANN. §§ 5709.65(A)(1)–(3) (Anderson 1998).

⁹⁵ See OHIO REV. CODE ANN. §§ 5733.05(B)(2)(a)–(b) (Anderson 1998).

⁹⁶ OHIO REV. CODE ANN. §§ 5709.65(A)(4)–(5) (Anderson 1998). The qualified employees are those listed at OHIO REV. CODE ANN. §§ 5709.64(2)(a)–(e) (Anderson 1998).

⁹⁷ OHIO REV. CODE ANN. § 5709.66(A) (Anderson 1998).

⁹⁸ OHIO REV. CODE ANN. § 5709.66(A)(1) (Anderson 1998).

⁹⁹ OHIO REV. CODE ANN. § 5709.66(A)(2) (Anderson 1998).

¹⁰⁰ OHIO REV. CODE ANN. § 5709.66(B)(1) (Anderson 1998). For the purposes of this section, an eligible employee means an individual who has resided for at least one year in the county in which the facility is located and who was a participant in the Ohio Works First program; the prevention, retention, and contingency program; or a recipient of general assistance.

¹⁰¹ See OHIO REV. CODE ANN. §§ 5709.61–5671 (Anderson 1998); *Cuno v. Daimler-Chrysler, Inc.*, 386 F.3d 738, 746–47 (6th Cir. 2004).

¹⁰² See OHIO REV. CODE ANN. § 5709.62(C)(1) (Anderson 1998).

¹⁰³ See *id.*

¹⁰⁴ See *id.*

A business is also not required to hire residents of the enterprise zone or even Ohio residents, although the business can agree, but is not obligated, to give preferences to residents of the proposed enterprise zone area relative to other residents of Ohio.¹⁰⁵ Ultimately, the personal property tax exemption provides no guarantee of sustained economic development in the enterprise zone or job opportunities for residents of the area.¹⁰⁶ Instead, states and municipalities rely on the hope that the enterprise's presence will lead to hiring of local residents, purchasing of local goods, and contracting with other local businesses, even though these "trickle-down effects" do not necessarily eventuate.¹⁰⁷ Thus, the Sixth Circuit could quite easily find the personal property tax exemption constitutional because it did not coerce companies to engage in other in-state activity to obtain the personal property tax exemption.¹⁰⁸

In contrast, both the tax incentives available through the tax incentive qualification certificate [hereinafter "certificate incentives"] and the employment tax credit certificate [hereinafter "employment tax credit"] are suspect under *Cuno's* analysis of discriminatory tax incentives.¹⁰⁹ These tax incentives are not facially discriminatory against interstate commerce as they are equally available to in-state and out-of-state companies that have facilities located in Ohio enterprise zones.¹¹⁰ However, under the Sixth Circuit's analysis, these tax incentives would be considered to have a discriminatory effect on interstate commerce precisely because they require businesses to achieve various economic development goals, particularly with regard to hiring low-income residents of the area.¹¹¹

First, both the certificate incentives and the employment tax credit under the Ohio Enterprise Zone program would likely run afoul of *Cuno* because they require businesses to maintain a certain level of economic activity in Ohio and because they require businesses to hire at least some Ohio residents.¹¹² Businesses applying for the certificate incentives or the em-

¹⁰⁵ See OHIO REV. CODE ANN. § 5709.62(J) (Anderson 1998).

¹⁰⁶ DaimlerChrysler is an excellent case in point. When DaimlerChrysler entered its 1998 enterprise zone agreement with the City of Toledo, it stated that it would build the plant for its new Jeep model in the zone, and it claimed that building the new plant would preserve 4900 jobs for the Toledo area. When the plant opened in 2001, it had so much automated machinery, the value of much of which was probably exempted from taxation under the personal property tax exemption, that the business only needed 2100 workers for the facility. See Gideon Kanner, *The New Robber Barons*, NAT'L L.J., May 21, 2001, at A19.

¹⁰⁷ See *id.*

¹⁰⁸ See *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746–47 (6th Cir. 2004).

¹⁰⁹ See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998); *Cuno*, 386 F.3d at 743–48.

¹¹⁰ See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998); *Cuno*, 386 F.3d at 743.

¹¹¹ See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998); *Cuno*, 386 F.3d at 743–48.

¹¹² See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998); *Cuno*, 386 F.3d at 746–47.

ployment tax credit must “establish, expand, renovate, or occupy” the facility within the enterprise zone.¹¹³ This means that a certain level of economic activity is mandatory to obtain the certificates. Both the certificate incentives and the employment tax credit are also linked to hiring Ohio residents.¹¹⁴ For the certificate incentives, an employer must have hired new employees of whom 25% must be either residents of the enterprise zone itself or be unemployed, underemployed, or disabled residents of the county in which the enterprise zone is located.¹¹⁵ For the employment tax credit certificate, the business cannot have closed or reduced employment at any place of business in Ohio unless it has hired a certain number of new employees at the facility located in the enterprise zone.¹¹⁶ Further, the business can only obtain the credit for “eligible employees.”¹¹⁷ These requirements are meant to ensure that the business actually honors its commitment to developing the enterprise zone area and to creating employment opportunities for low-income individuals in the area.¹¹⁸ However, because the incentives are tied not only to locating in the enterprise zone, but also to making continuing business decisions in favor of investment and hiring within the area, *Cuno* indicates that these requirements unduly burden interstate commerce by coercing business to “maintain a specified economic presence” in Ohio.¹¹⁹

Second, most of the tax incentives available through the tax incentive qualification certificate and the employment tax credit certificates are tied to a company’s overall business in the state, not simply the activity taking place within the enterprise zone, and therefore, they are arguably even more discriminatory than the Ohio franchise tax credit.¹²⁰ The tax incentive qualification certificate entitles a business to four tax benefits: (1) exclusion of an increase in property values at the enterprise zone facility site from the “property” tax numerator factor; (2) the exclusion of certain wages paid

¹¹³ OHIO REV. CODE ANN. §§ 5709.64(A)(1), 5709.66(A)(1) (Anderson 1998).

¹¹⁴ See OHIO REV. CODE ANN. §§ 5709.64(A)(2), 5709.66(A)(2) (Anderson 1998).

¹¹⁵ OHIO REV. CODE ANN. §§ 5709.64(A)(2)(a)–(h) (Anderson 1998).

¹¹⁶ OHIO REV. CODE ANN. § 5709.66(A)(2) (Anderson 1998).

¹¹⁷ OHIO REV. CODE ANN. § 5709.66(B)(2) (Anderson 1998). “Eligible employees” are defined as residents of the county in which the enterprise zone is located who have participated in certain work programs or have received general assistance. OHIO REV. CODE ANN. § 5709.66(B)(2)(a) (Anderson 1998).

¹¹⁸ See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998).

¹¹⁹ *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746–47 (6th Cir. 2004). Neither the franchise tax credit nor the property tax exemption required a specified level of economic activity in Ohio or a certain level of hiring in the state; therefore, the Sixth Circuit did not squarely address this issue. Nonetheless, the court, in discussing two unconstitutional property tax exemption schemes that required preferences serving or hiring in-state residents, indicated that such requirements would be suspect under Interstate Commerce Clause precedents. See *id.* at 747 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997)); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997).

¹²⁰ See OHIO REV. CODE ANN. §§ 5709.64, 5709.66 (Anderson 1998); *Cuno*, 386 F.3d at 743–46.

at the enterprise zone facility from the “payroll” tax numerator factor; (3) a tax credit for providing day care to qualified employees; and (4) a tax credit for providing training to qualified employees.¹²¹ The “property” and “payroll” numerators determine the amount of a business’s property and payroll that is attributable to the business’s total economic activity in Ohio, not simply its economic activity in the enterprise zone. Therefore shrinking the numerator reduces a business’s total Ohio tax liability.¹²² Because these incentives decrease a business’s tax liability if it expands economic activity in the enterprise zone but increase the business’s tax liability if it conducts the same activity out-of state, they function like the franchise tax credit and would therefore be unconstitutional under *Cuno*’s rationale.¹²³

The day care and training tax credits are more difficult to evaluate under *Cuno*’s rationale. Like the franchise tax credit, these tax credits reduce a business’s tax liability if they provide day care and training to certain Ohio residents employed at the facility located in an Ohio enterprise zone, and they are not available if a business provides these benefits to employees in other states.¹²⁴ However, the credits essentially reimburse the business for outlays on day care and training for employees at the enterprise zone site itself. The credits would not be available unless the business actually spent money on these programs.¹²⁵ Therefore, it is possible that the day care and training tax credits would survive scrutiny under the Sixth Circuit’s analysis in *Cuno* because they are sufficiently tied to the locality and because the credits function more as a partial reimbursement mechanism for outlays on training and day care than as traditional tax credits.¹²⁶

Finally, the employment tax credit would almost certainly be unconstitutional under *Cuno*.¹²⁷ If a business fulfills the requirements for the employment tax credit, it is entitled to a credit for each “eligible employee” that can be used to offset the business’s total tax liability.¹²⁸ Because this tax incentive encourages companies to hire Ohio residents in order to reduce their already existing Ohio tax liability, it parallels the Ohio franchise tax credit and is therefore unconstitutionally discriminatory against interstate commerce.¹²⁹

¹²¹ OHIO REV. CODE ANN. § 5709.65 (Anderson 1998). The qualified employees are those listed in OHIO REV. CODE ANN. §§ 5709.64(2)(a)–(e) (Anderson 1998).

¹²² See OHIO REV. CODE ANN. § 5709.65 (Anderson 1998).

¹²³ See OHIO REV. CODE ANN. § 5709.65(1)–(3) (Anderson 1998); *Cuno*, 386 F.3d at 743–46.

¹²⁴ See OHIO REV. CODE ANN. § 5709.65(4)–(5) (Anderson 1998); *Cuno*, 386 F.3d at 743–46.

¹²⁵ See OHIO REV. CODE ANN. § 5709.65(4)–(5).

¹²⁶ See *id.*; *Cuno*, 386 F.3d at 742–48.

¹²⁷ See OHIO REV. CODE ANN. § 5709.66(B)(1) (Anderson 1998); *Cuno*, 386 F.3d at 742–48.

¹²⁸ “Eligible employees” are defined as residents of the county in which the enterprise zone is located who have participated in certain work programs or received general assistance. OHIO REV. CODE ANN. § 5709.66(B)(2)(a) (Anderson 1998).

¹²⁹ See OHIO REV. CODE ANN. § 5709.66(B)(2)(a) (Anderson 1998); *Cuno*, 386 F.3d at

As demonstrated by applying the Sixth Circuit's analysis to Ohio's Enterprise Zone program as a whole, *Cuno* affirms the constitutionality of location tax incentives that simply require businesses to locate in the state or area, but it casts serious doubt on the constitutionality of location tax incentives that incorporate accountability mechanisms. Ultimately, this is due to the fact that in practical terms, the Sixth Circuit's decision stakes a middle ground. It did not find that all location tax incentives discriminated against interstate commerce,¹³⁰ nor did it find that location tax incentives are almost always permissible exercises of state taxing power.¹³¹ Doctrinally, the Sixth Circuit interpreted Supreme Court precedent to prohibit state tax incentives that implicate the coercive taxing power of the state.¹³² Practically, this meant that tax incentive programs in the Sixth Circuit with no strings attached are constitutional, but tax incentive programs with accountability mechanisms will not pass constitutional muster.

There are several states that have enterprise zone tax incentive programs that may be susceptible to constitutional scrutiny after *Cuno*.¹³³ The *Cuno*

743-46.

¹³⁰ See *Cuno*, 386 F.3d at 746-47.

¹³¹ See *id.* at 747.

¹³² See *id.*

¹³³ See, e.g., ALA. CODE §§ 41-23-24(c), 41-23-26, 41-23-30 (2005); ARIZ. REV. STAT. §§ 20-224.03, 20-837, 20-1010, 20-1060, 20-1097.07, 41-1525(A)(2)-(3), 41-1525, 41-1525.01, 42-12008, 43-1074, 43-1161 (2005); ARK. CODE ANN. §§ 15-4-1702 to 15-4-1708, 26-53-132 (Michie 2005); CAL. REV. & TAX. CODE §§ 17053.70, 17268, 17276.1, 17276.2, 17276.4, 17276.5, 23612.2, 23622, 23622.5, 23622.7, 24356.5, 24356.7, 24384.5, 24416.1, 24416.2, 24416.4, 24416.5, 24416.6 (West 2005); COLO. REV. STAT. §§ 39-30-103.5, 39-30-104, 39-30-105, 39-30-105.5, 39-30-105.6, 39-32-105, 39-30-106, 39-30-107.5 (2005); CONN. GEN. STAT. §§ 12-81(59), 12-81(60), 12-81(70), 12-81(72), 12-81k, 12-94c, 12-217e, 12-638b, 112-217n, 2-217v, 12-412(43), 32-70 to 32-75, 32-75a, 32-75c (2005); D.C. CODE ANN. §§ 47-846.1, 47-858.03, 47-1807.4 to 47-1808.7 (2005); FLA. STAT. ch. 205.054, 212.08, 212.097, 212.098, 220.03, 220.181, 220.182, 220.183, 290.0069, 288.095, 288.106, 288.107, 624.4072, 624.5105 (2005); GA. CODE ANN. §§ 36-88-4 to 36-88-10, 48-7-40.1 (2005); HAW. REV. STAT. §§ 209E-2, 209E-9, 209E-10, 209E-11 (2005); 35 ILL. COMP. STAT. 5/203, 105/12, 110/12, 115/12, 120/1d to 120/1f, 120/1j, 120/1j.1, 120/1n, 120/5k, 200/18-170, 5/201(f)-(g) (2005); IND. CODE §§ 4-4-6.1-1.3, 4-4-6.1-2.5, 6-1.1-12-40, 6-1.1-20.8, 6-2.5-4-5, 6-3-2-7, 6-3-3-10, 6-3.1-7-1 to 6-3.1-7-6, 6-3.1-10-1 to 6-3.1-10-9 (2005); IOWA CODE §§ 15.332, 15.333A, 15.335, 15A.9, 15E.192, 15E.193, 15E.193A, 15E.193B, 15E.193C, 15E.196, 422.33(5), 403.6, 404.3, 404A.1 (2005); KY. REV. STAT. ANN. §§ 154.45-090, 154.690 (Banks-Baldwin 2005); LA. REV. STAT. ANN. §§ 51:1784(C), 51:1787 (West 2005); MD. CODE ANN., PROP.-GEN. § 9-103 (2005); MD. CODE ANN., TAX-GEN. §§ 10-205, 10-702 (2005); MICH. COMP. LAWS §§ 125.2103, 125.2114, 125.2114a, 125.2115, 125.2120, 125.2120a, 125.2121c, 205.54j, 207.771, 207.774, 207.779(10), 208.37a (2005); MINN. STAT. §§ 273.13, 469.171 (2005); MISS. CODE ANN. § 27-65-101 (2005); MO. REV. STAT. §§ 135.110, 135.215, 135.220, 135.225, 135.235, 135.247, 135.535, 135.1078, 273.1398(4), 447.708, 469.171 (2005); NEB. REV. STAT. §§ 77-27,188(3), 192 (2005); N.J. STAT. ANN. §§ 40A:12A-53, 52:27H-76, 52:27H-78, 52:27H-79, 54:27H-80, 52:27H-86, 54:32B-8.22 (West 2005); N.M. STAT. ANN. §§ 7-2-18.4, 7-2A-1, 7-36-3.2, 5-9-6 (Michie 2005); N.Y. TAX LAW §§ 15, 19, 209-b, 210, h. 50a, 485-e, 606, 1119, 1456, 1511 (McKinney 2005); N.C. GEN. STAT. §§ 105-129.5(c), 105-129.12A (2005); OHIO REV. CODE ANN. §§ 5709.62, 5709.63, 5709.64, 5709.65, 5709.66 (Anderson 2005); OKLA. STAT. tit. 62, § 690.4, tit. 62, § 690.20, tit. 62, § 842, tit. 62, § 844, tit. 62, § 860, tit. 68, § 690.4, tit. 68, § 2357.81 (2005); OR. REV. STAT. §§ 285C.175, 285C.200, 285C.215, 285C.255, 285C.309, 285C.400, 285C.403, 285C.406, 285C.412, 315.507, 317.124 (2005); 72 PA. CONS. STAT.

decision thus leaves these states, municipalities, and citizen-advocacy groups with a hard choice:¹³⁴ preserve tax incentive programs without accountability mechanisms, or abandon tax incentive programs as a method of inducing economic growth and job opportunities. States and municipalities, hoping to attract business and appear responsive to the economic needs of their respective constituencies, can be expected to opt for preserving tax incentive programs even if accountability mechanisms must be sacrificed.¹³⁵ Citizen-advocates and legal scholars, in contrast, are likely to support the abandonment of most tax incentive programs because with the absence of accountability mechanisms, communities have lost a powerful tool to ensure that businesses receiving tax incentives truly improve the communities from which they are deriving benefit.¹³⁶ Nonetheless, it seems unlikely that such citizen-advocates will prevail when faced with a strong and coordinated business lobby that is currently attempting to challenge the *Cuno* decision.¹³⁷ If the *Cuno* decision stands, these powerful businesses are likely to pursue no-strings-attached tax incentives to the potential detriment of the economically depressed communities in which they do business.

§§ 8902-A to 8906-A (2005); R.I. GEN. LAWS §§ 41-64.3-7, 42-64.1-7, 42-64.3-6, 42-64.3-7, 42-64.3-7.1, 42-64.3-8.1, 42-64.3-9 (2005); S.C. CODE ANN. § 12-10-95 (Law. Cop. 2005); TENN. CODE ANN. §§ 67-2-104, 67-4-712, 67-4-2009 (2005); TEX. GOV'T CODE ANN. §§ 2303.401, 2303.508 (Vernon 2005); TEX. TAX CODE ANN. §§ 151.431, 151.429(a)-(b), 171.501, 171.751, 171.755, 171.756, 171.761, 171.1015, 171.7541 (Vernon 2005); UTAH CODE ANN. §§ 9-2-412, 9-2-413, 9-2-1801, 63-55-209 (2005); VA. CODE ANN. §§ 58.1-439, 58.1-3220, 58.1-3221, 58.1-3245.8, 59.1-279, 59.1-280, 59.1-282, 59.1-283, 59.1-284.01, 59.1-280.1, 59.1-284.01 (Michie 2005); WASH. REV. CODE §§ 82.62.010 to 82.62.060 (2005); W. VA. CODE § 5B-2B-5 (2005); WISC. STAT. §§ 71.28(1dx), 71.47(1dx), 560.785(1)(c) (2005).

¹³⁴ The Defendants seem to be considering petitioning for a writ of certiorari given that they recently requested and received an extension of the deadline to apply for a writ of certiorari. See *supra* note 31.

¹³⁵ Voinovich, *supra* note 3, at 10.

¹³⁶ See, e.g., Jennifer L. Gilbert, *Selling the City Without Selling Out: New Legislation on Development Incentives Increases Accountability*, 27 URB. LAW. 427 (1995) (discussing efforts by states to make businesses receiving tax incentives more accountable to the states and local communities); Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and A Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 278 (2002).

¹³⁷ For the motion for rehearing en banc, a wide range of business interests submitted briefs in support of the Defendants, including the Ford Motor Company; the Kentucky, Michigan, Ohio, Tennessee, Toledo, and Detroit Chambers of Commerce; the National Association of Manufacturers; the United States Chamber of Commerce; Nissan of North America; the Ohio Manufacturers' Association; the Tax Executives Institute; and the United Auto Workers. See *Cuno v. DaimlerChrysler et al.*, IN THE NEWS (Mayer, Brown, Rowe & Maw, Chicago, Ill.), available at <http://www.mayerbrownrowe.com/litigation/appellate/publications/article.asp?id=1754&nid=1929> (last visited Apr. 20, 2005).