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TAXPAYER STANDING AND *DAIMLERCHRYSLER v. CUNO*: WHERE DO WE GO FROM HERE?

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In granting certiorari in the case of *DaimlerChrysler Corp. v. Cuno*, the Supreme Court asked the parties to brief "whether respondents have standing to challenge Ohio's investment tax credit." This report applies modern standing doctrine to the *Cuno* case and concludes that the *Cuno* plaintiffs do not have standing to raise their claims in federal court. Moreover, the authors write, allowing the *Cuno* plaintiffs' case to be resolved in federal court would open the federal court system to a wide range of taxpayer challenges better left to the political branches of government. Nevertheless, they recognize that there may be other litigants that would have standing to challenge Ohio's investment tax credit in federal court.

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The Supreme Court is scheduled to hear argument in *DaimlerChrysler v. Cuno*[1] on March 1. The question before the Court is whether Ohio's investment tax credit violates the Commerce Clause of the U.S. Constitution. The plaintiffs argue that Ohio's investment tax credit is an improper means of encouraging businesses like DaimlerChrysler to invest in Ohio over other states. Specifically, the plaintiffs contend that the state of Ohio, the city of Toledo, and various state and local government officials contravened the "dormant Commerce Clause" of the Constitution when they facilitated DaimlerChrysler's use of the Ohio investment tax credit as part of a package of incentives in connection with DaimlerChrysler's expansion of its Jeep assembly plant in Toledo.

When we first looked at the case, and when we talked to other lawyers or professors about it, one question kept coming up: Forget the substance — why do the plaintiffs have standing? Our conclusion is very simple: They don't. In this article, we argue that the plaintiffs in *Cuno* lack federal standing for several reasons.[2] Ideally, perhaps, we would like the Supreme Court to use the *Cuno* case to resolve a circuit split over taxpayer standing to challenge state laws in federal court. We believe, however, that the Court could deny standing on several other bases that do not require treading new ground. Moreover, we argue that other parties may be better situated doctrinally to contest the Ohio investment tax credit, but that whatever the underlying merits of that challenge, leaving the matter to the political process is preferable to entertaining the *Cuno* plaintiffs' suit in federal court.

I. Analyzing the *Cuno* Plaintiffs' Case

Under Article III of the Constitution, a plaintiff must satisfy three elements to establish standing in federal court: (1) she has suffered an "injury-in-fact," (2) the conduct giving rise to her complaint caused that injury, and (3) a favorable decision by the courts will likely

[1] *See DaimlerChrysler v. Cuno*, 126 S.Ct. 36 (2005) (order granting petition for certiorari).

[2] In some sense that is an unfair result in this case. The plaintiffs originally brought their suit in Ohio state court and argued that both a local property tax break and the State investment tax credit violated the dormant Commerce Clause. DaimlerChrysler sought to remove the case, and the district judge found standing at least regarding the local property tax issue. The district court's dismissal of the local property tax issue for failure to state a claim was upheld by the Sixth Circuit; however, the Supreme Court has thus far declined to grant the plaintiffs' petition for certiorari on that issue. So the *Cuno* plaintiffs have litigated the case in federal court against their wishes, yet they will have to begin again in state court if the Supreme Court denies their standing to be there. Despite that problem, federal standing cannot be waived; the *Cuno* plaintiffs simply lack standing.

provide redress.[3] The alleged injury must be ''concrete and particularized'' and ''actual or imminent,'' as opposed to ''conjectural or hypothetical''; that injury must be ''fairly traceable to the challenged action of the defendant''; and the court's ability to redress the injury must be ''likely, as opposed to merely speculative.''[4] Beyond constitutional standing, a plaintiff must also satisfy prudential requirements that the complaint present more than mere ''generalized grievances'' and that the ''zone of interests'' of the constitutional or statutory provision invoked include the interest asserted.[5] Although the *Cuno* plaintiffs face a number of possible problems in satisfying those myriad requirements, the *Cuno* case particularly implicates a long-standing rift among the circuits over the kind and degree of injury that a state taxpayer must assert to establish standing in federal court.

The Cuno case particularly implicates a long-standing rift among the circuits over the kind and degree of injury that a state taxpayer must assert to establish standing in federal court.

For purposes of our discussion, we divide the plaintiffs into three groups — (1) Kim's Auto and Truck Service (Kim's Auto), an individual plaintiff that argued its business would be harmed as it had to relocate the business under threat of eminent domain to accommodate DaimlerChrysler's expansion of its facilities;[6] (2) other Ohio plaintiffs, who argue that the Ohio investment tax credit deprived their state and local governments of revenues; and (3) Michigan plaintiffs, who allege that, but for the tax incentives provided to DaimlerChrysler, DaimlerChrysler might have located its new facilities in Michigan, thus providing more tax revenue to Michigan and, finally, benefits to the Michigan plaintiffs in the form of increased government spending.[7] All plaintiffs seek the same remedies: a declaration that the provisions of the Ohio Revenue Code permitting the investment tax credit is unconstitutional and preliminary and permanent injunctions against their operation.[8]

A. Injury-In-Fact and Taxpayer Standing

Often, the most contentious issue regarding standing is whether plaintiffs have suffered an injury-in-fact. In a memorandum opposing remand of the case to Ohio state court, DaimlerChrysler argued before the federal district court that Kim's Auto likely pleaded facts sufficient to establish injury-in-fact for constitutional standing purposes.[9] Kim's Auto alleges a specific, though undenominated, financial injury in the form of lost profits to be incurred as a result of having to relocate from property condemned and transferred to DaimlerChrysler for redevelopment.[10] Kim's Auto's claim, if true, may articulate the sort of direct and individualized economic injury adequate to establish injury-in-fact.[11]

Kim's Auto's alleged injury arose from the threat of eminent domain, however. Although standing in this case will be evaluated based on the complaint rather than subsequent events, Kim's Auto subsequently was compensated for its loss when its property was taken. In other words, the statutory scheme for compensating taxpayers whose property is taken is the remedy that makes Kim's Auto whole. Since Kim's Auto received just compensation, and thus at least theoretically was made whole by state and local authorities based on Ohio eminent domain law, Kim's Auto has not ultimately suffered any injury from the proceedings.[12]

Admittedly, some of the economic losses alleged by Kim's Auto may not be covered by eminent domain law.[13] The fact that the state would have to (and did) compensate Kim's Auto for taking its property may or may not compromise the ability of Kim's Auto to establish injury-in-fact in the case at bar. Regardless, as discussed further below, Kim's Auto clearly fails to establish standing with the causation and redressability prongs of the constitutional standing test and the prudential standing zone-of-interests analysis, rendering the injury-in-fact element less critical to resolve.

By contrast, it is difficult to imagine the basis on which Michigan plaintiffs could satisfy the injury-in-fact requirement. Those plaintiffs claim only that they were denied the benefits of spending what their state and municipal governments might have undertaken had DaimlerChrysler chosen to invest and paid taxes in Michigan rather than Ohio. Those alleged ''injuries'' are

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[3]*See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000); *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[4]*Friends of the Earth*, 528 U.S. at 180-181.

[5]*See Allen v. Wright*, 468 U.S. 737, 751 (1984).

[6]The city of Toledo ultimately took Kim's Auto's property by eminent domain. *See City of Toledo v. Kim's Auto and Truck Service, Inc.*, 2003 WL 22390102 (Ohio App. 6th Dist.), *cert denied*, 125 S. Ct. 2988 (2005).

[7]Complaint for Declaratory and Injunctive Relief at 13, 14, 19, *Cuno v. DaimlerChrysler, Inc.*, No. CI0200006084 (Lucas Co., Ohio Mar. 28, 2000) (hereinafter Complaint).

[8]*See id.*

[9]Defendants' Memorandum in Opposition to Plaintiffs' Motion for Remand at 12-21, *Cuno v. DaimlerChrysler, Inc.* 154 F. Supp.2d 1196 (N.D. Ohio 2001) (No. 3:00CV7247).

[10]Complaint at 6. At the time the complaint was filed, Kim's had not yet been forced to move; so it had not realized the alleged losses. *See City of Toledo v. Kim's Auto and Truck Service, Inc.*, 2003 WL 22390102 (Ohio App. 6th Dist.).

[11]*See, e.g.*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970) (recognizing standing to sue for lost profits).

[12]Kim's pursued a takings claim in separate litigation. *See City of Toledo v. Kim's Auto and Truck Service, Inc.*, 2003 WL 22390102 (Ohio App. 6th Dist.).

[13]To be precise, the complaint alleges ''loss of income from temporary closure due to being moved'' as well as a variety of more generalized business impediments including ''temporary shutdowns,'' ''loss of business visibility,'' and ''loss of business customers'' that are presumably intended to convey lost profits which may not be compensable through Ohio eminent domain law. *See* Complaint, *supra* note 7, at 11.

precisely the sort of abstract, conjectural, and hypothetical grievances that the injury-in-fact requirement seeks to avoid.[14]

The remaining Ohio plaintiffs' injury is more difficult to evaluate. Those plaintiffs assert lower overall state tax revenues, and thus fewer government services, as well as a disproportionate shifting to them of the tax burden for remaining state government activities. Although even small economic injuries may suffice to confer standing, those plaintiffs are suing primarily as citizens and taxpayers of the state of Ohio, basing their claim on what lawyers refer to as ''taxpayer standing.''

Even before the Supreme Court set out the modern three-part test for constitutional standing, the Court decided prudentially in *Frothingham v. Mellon* that federal taxpayers could not use their status as taxpayers as a means of obtaining standing in federal court.[15] The Court recognized that, while even a small injury may be enough to confer standing on a plaintiff if it is direct and individualized,[16] the interest of a taxpayer in the federal treasury is ''generalized,'' ''remote,'' ''indeterminable,'' and ''shared with millions of others,'' so it is inadequate for standing purposes.[17]

The Court has adopted only one exception from the *Frothingham* rule. In *Flast v. Cohen* and its progeny, the Court has held that an otherwise generalized injury suffered by federal taxpayers will be adequate to support federal jurisdiction when the allegedly unconstitutional act is an exercise of Congress's taxing and spending power under Article I, section 8 of the Constitution, and the violation in question implicates a specific constitutional limitation imposed on that power.[18] While the exception on its face is more open-ended, in the almost 40 years since deciding *Flast*, the Court has applied the exception only in First Amendment Establishment Clause cases.[19] Moreover, in adopting a more lenient view of taxpayer standing in Establishment Clause cases, the Court has not exempted those plaintiffs from the Article III standing requirements of causation and redressability.[20]

The Court has seemed more amenable to taxpayer suits challenging municipal government action. In *Frothingham* the Court explicitly rejected federal taxpayer standing but also expressly distinguished federal and municipal taxpayers. The Court suggested that the comparative interest of the municipal taxpayers in the use of their tax dollars is sufficiently ''direct and immediate'' to confer standing.[21] Although the Court has not subsequently addressed the standing issue in connection with a municipal taxpayer case,[22] the Court on several occasions has reiterated the same federal/municipal distinction in the standing context.[23]

Given that guidance, the lower courts have been much more willing to permit taxpayer challenges to municipal government action.[24] There is, however, a serious question whether lower courts have been reading the municipal standing doctrine too broadly. While taxpayer standing may be available in the municipal context, in *ASARCO Inc. v. Kadish*, a plurality of the Court indicated that municipal taxpayer standing may not apply in all municipal taxpayer suits.[25]

Regardless, the Ohio plaintiffs are suing neither as federal taxpayers nor as municipal taxpayers. The Ohio plaintiffs challenge the constitutionality of a state statute — the Ohio investment tax credit provision. They are thus seeking standing as state taxpayers. Assuming for this discussion that municipal taxpayer standing requirements are in fact more relaxed than those for federal taxpayers, the jurisprudentially unanswered question is whether state taxpayers for standing purposes should be treated like federal taxpayers or municipal ones.

The circuit courts of appeals are divided over that issue. Several circuits have held that state taxpayers

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[14]*Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-578 (1992); *Allen v. Wright*, 468 U.S. 737, 746-747 (1984); *Sierra Club v. Morton*, 405 U.S. 727, 753-755 (1972).

[15]*See Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* is a companion case to *Massachusetts v. Mellon*, to which the same citation applies; whereas *Frothingham v. Mellon* involved an individual taxpayer suit against a federal statute, *Massachusetts v. Mellon* concerned a challenge by the state of Massachusetts against the same statute. *See id. See also Allen v. Wright*, 468 U.S. 737, 754 (1984). (''This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'')

[16]*See, e.g.*, *United States v. SCRAP*, 412 U.S. 669, 683-690 & n.14 (1973).

[17]*Id.* at 487-488.

[18]*See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 618-620 (1988); *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

[19]*See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 497 n.8, 499 (1982); *Flast v. Cohen*, 392 U.S. 83, 92 & n.6 (1968); *see also* 13 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* section 3531.1 (1984). (''Fate has not been kind to the *Flast* decision. In the field of taxpayer standing, it has been limited to very narrow confines.'')

[20]*See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615-616 (discussing causation and redressability requirements in taxpayer standing context); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472 (1982).

[21]*Frothingham*, 262 U.S. at 486.

[22]*See* Nancy Staudt, ''Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine,'' 52 *Emory L.J.* 771, 825-826 (2003) (surveying cases).

[23]*See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 497-498 (1982); *Coleman v. Miller*, 307 U.S. 433, 445 (1939).

[24]*See, e.g.*, *PLANS, Inc. v. Sacramento City Unified School Dist.*, 319 F.3d 509 (9th Cir. 2003); *see also* Staudt, *supra* note 22, at 827-834 (surveying cases).

[25]*ASARCO*, 490 U.S. at 613 (indicating that the restrictions of federal taxpayer standing doctrine ''*may* not hold for municipal taxpayers *if* it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate,'" and quoting *Frothingham*, 262 U.S. at 486-487). *See also* John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 86-87 (7th ed. 2004) (recognizing the distinction between federal and municipal taxpayers in *Frothingham* but arguing that the distinction no longer exists after *Flast*).

either must show that the state has appropriated taxpayer dollars in a manner inconsistent with a particular constitutional limitation on the state's taxing and spending power as required by *Flast*, or alternatively must assert a more direct and individualized injury as demanded by *Frothingham*.[26] Like the Supreme Court, those courts have been reluctant to extend *Flast*'s reasoning beyond Establishment Clause cases, thus limiting the availability of that avenue.[27] The Ninth Circuit, by contrast, holds the view that *Flast* does not apply in the state taxpayer context at all. Instead, the Ninth Circuit requires a state taxpayer, like a municipal taxpayer, only to plead with specificity that state taxpayer funds generally have been appropriated and spent in an unconstitutional manner.[28]

If state taxpayers are like municipal taxpayers, the Ohio plaintiffs in *Cuno* need only show that providing the investment tax credit to DaimlerChrysler represents state government spending for an allegedly unlawful purpose. By contrast, if state taxpayers are like federal taxpayers, it seems highly unlikely that the Court would recognize the standing of the *Cuno* plaintiffs to challenge the Ohio investment tax credit. *Cuno* is not an Establishment Clause case; while *Flast* is not expressly limited to those cases, the Commerce Clause seems an odd candidate for a first extension of *Flast*'s applicability.

Unfortunately for the Ohio plaintiffs, in our view, the majority rule simply represents the superior reading of the Court's discussion to date of state taxpayer standing.

Unfortunately for the Ohio plaintiffs, in our view, the majority rule simply represents the superior reading of the Court's discussion to date of state taxpayer standing. To support its contrary approach, the Ninth Circuit relies on a finely parsed reading of bits and snippets of Supreme Court rhetoric that does not comport with a more thorough review of the cases. By contrast, the Court has unequivocally and expressly, if infrequently, analogized federal and state taxpayers and expressed the view that state taxpayers must show a direct and individualized injury to establish standing.[29] Moreover, to the extent municipal taxpayer standing is an exception to the normal rule, there is no reasonable basis for extending that rule to state taxpayers.

Furthermore, to the extent municipal taxpayers have standing, the standing doctrine appears to be based on the unique legal status of municipalities. The *Frothingham* Court's primary emphasis in distinguishing federal and municipal taxpayers was the nature of the legal relationships among taxpayers and the different levels of government. Federal and state governments are sovereign entities while municipalities are creatures of state law. The Court expressly noted the reason for recognizing municipal taxpayer standing as ''the peculiar relation between the corporate taxpayer and the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.''[30] By contrast, the relationship between state taxpayers and state government, as in the federal context, is that of citizen and sovereign.[31]

B. Causation, Redressability & Zone of Interests

If federal and state taxpayer standing doctrine follow the same line, then other than possibly Kim's Auto, the *Cuno* plaintiffs simply cannot overcome the taxpayer standing hurdle. While the Court could use *Cuno* as a vehicle for resolving the circuit split over state taxpayer standing doctrine, however, the Court need not even address injury-in-fact or taxpayer standing to deny standing to all of the plaintiffs. Existing jurisprudence clearly supports conclusions that the *Cuno* plaintiffs all fail the causation and redressability prongs of the Article III standing test as well as the zone-of-interests standard for prudential standing.

1. Causation. The causation requirement for constitutional standing requires that the injury alleged by the plaintiff be caused by the purportedly wrongful action of the defendant.[32] While an injury can be indirect and still suffice for causation purposes,[33] a causal relationship that is too remote, attenuated, or speculative will be inadequate to confer standing.[34] Instead, the plaintiffs must demonstrate that they have alleged facts that establish that their alleged injuries ''fairly can be traced to the

[26]*See Board of Education of the Mt. Sinai Union Free School District v. New York State Teachers Retirement System*, 60 F.3d 106, 111 (2d Cir. 1995); *Taub v. Kentucky*, 842 F.2d 912, 918-919 (6th Cir. 1988); *Korioth v. Briscoe*, 523 F.2d 1271, 1277 and n.16 (5th Cir. 1974). The Tenth Circuit explicitly disavows *Flast*'s applicability in the state taxpayer context, but similarly distinguishes between Establishment Clause and other cases and adopts the same functional approach to state taxpayer standing as the Second, Fifth, and Sixth circuits in the non-Establishment-Clause context. *See Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1401 (10th Cir. 1992).

[27]*See, e.g., Booth v. Hvass*, 302 F.3d 849 (8th Cir. 2002) (declining to extend *Flast v. Cohen* to grant state taxpayer challenge on Equal Protection Clause grounds); *Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2002) (same with Free Exercise Clause challenge); *Taub*, 842 F.2d at 918-919 (same with suit alleging Article I, section 10 and due process violations).

[28]*See Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005); *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984).

[29]*See ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989); *Doremus v. Board of Education v. Hawthorne*, 342 U.S. 429, 434 (1952); *Williams v. Riley*, 280 U.S. 78, 79 (1929).

[30]*See Frothingham*, 262 U.S. at 487.

[31]For a more thorough discussion of that idea, see Kristin E. Hickman, ''How Did We Get Here Anyway? Considering the Standing Question in *DaimlerChrysler v. Cuno*,'' 4 *Geo. J.L. & Pub. Pol'y* (forthcoming), available at http://www.ssrn.com/abstract=859784.

[32]*See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975).

[33]*See id.* at 504-505 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

[34]*See, e.g., Allen v. Wright*, 468 U.S. 737, 781-782 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976).

challenged action of the defendant[s].''[35] In *Cuno*, it is hard to see how any of the plaintiffs can meet that requirement.

Again, the only plaintiff that has even a colorable argument in that regard is Kim's Auto, and its case is weak at best. There is little doubt that the relocation of Kim's Auto's business is traceable to DaimlerChrysler's decision to expand its facility in Toledo. The decision by the city of Toledo to assist DaimlerChrysler through eminent domain proceedings is the direct action that forced Kim's Auto to move. But that is not the question before the Court. Because Kim's Auto raises the broader challenge to the constitutionality of the Ohio investment tax credit, the causation question the Court must evaluate is whether the provision of that tax credit is responsible for DaimlerChrysler's decision and the resulting displacement of Kim's Auto's business.[36]

The investment tax credit is most likely only one of many factors that influenced DaimlerChrysler's decision to expand in Toledo rather than elsewhere. Indeed, a vast literature challenges the significance of state tax incentives over other factors including prevailing local wages, workforce skills, utilities costs, and state regulatory climate in influencing business location decisions.[37] The fact that DaimlerChrysler already had a plant located in Toledo likely weighed more heavily in its analysis than the investment tax credit.

The Court's existing jurisprudence holds that being one of many factors influencing a decision is inadequate to establish causation.[38] For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court considered whether an IRS ruling allowing hospitals to deny more than emergency services to indigent citizens and still retain tax-exempt status in fact caused hospitals in the plaintiffs' area to deny the plaintiffs nonemergency care.[39] Recognizing that a hospital could and would consider a variety of factors in electing to pursue that policy, as well as evidence suggesting high variability in hospital dependence on the special tax benefits conferred by exempt status, the Court considered the link between the IRS ruling and the hospitals' actions too speculative to satisfy the causation element of constitutional standing.

If Kim's Auto has standing in that instance, then, in any state with a lower corporate tax rate or other more pro-business policies than its neighbors, any taxpayer whose property is taken through eminent domain to accommodate new business development could have standing to challenge the state's policies. The chain of causation would be that, but for the state's more pro-business policies, the company would not choose to expand its operations in that state and the plaintiff would not lose his or her property. Such a broad application of the causation element is inconsistent with the Court's current jurisprudence on causation.

Causation is even more tenuous for the Ohio and Michigan plaintiffs. The Ohio plaintiffs assume that, but for the investment tax credit, the Ohio general fund would have received more tax revenues that Ohio state government officials would have used to the Ohio plaintiffs' benefit and/or their contributions to the state's general fund would have been lower, in proportionate, if not absolute, terms. The Michigan plaintiffs allege an even longer causal chain of DaimlerChrysler locating its new facility in Michigan rather than Ohio, and that Michigan state and local governments would have received additional tax revenues that those governments would have used for the Michigan plaintiffs' benefit. The Court has been willing on some occasions to find causation when the government action in question probably, if indirectly, caused the plaintiffs' injury.[40] But even if we assume that, but for the investment tax credit, more tax revenue would have flowed into state coffers, policymakers face many demands for the limited resources under their control, and the probability that those officials would channel additional funds to benefit the plaintiffs cannot be high. Particularly in the case of the Michigan plaintiffs, the sheer number of parties and contingencies on which their causal chain relies leaves it unlikely that the existence of the investment tax credit means fewer government benefits to them. Indeed, the mere fact that both Michigan and Ohio plaintiffs essentially lay claim to the same tax dollars that eliminating the Ohio investment tax credit would allegedly raise suggests the purely hypothetical nature of the causal relationship they assert.

2. Redressability. The redressability analysis in *Cuno* strongly resembles the causation discussion above but with even clearer results. The redressability element of constitutional standing demands that a plaintiff demonstrate that the requested relief is likely to redress the injury claimed.[41] For that purpose, it is not enough to speculate that the remedy sought *might* alleviate the injury alleged. Instead, the plaintiff must adduce facts showing *substantial probability* of that outcome.[42] In analyzing redressability, the Court must consider the facts as

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[35]*Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 41; *see also Allen v. Wright*, 468 U.S. 737, 753 (1984) (employing similar language to describe the causation element of constitutional standing).

[36]*Compare Allen v. Wright*, 468 U.S. at 757-760; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 41-43.

[37]*See, e.g.*, Peter D. Enrich, ''Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business,'' 110 *Harv. L. Rev.* 377, 390-392 (1996) (discussing the literature).

[38]*See, e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 42; *Allen v. Wright*, 468 U.S. at 757-758.

[39]*See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 42-43.

[40]*See, e.g.*, *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

[41]*See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38. (''The relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.'')

[42]*See id.* at 561; *see also Warth v. Seldin*, 422 U.S. 490, 504 (1975). (''Petitioners must allege facts from which it reasonably could be inferred that . . . there is a substantial probability that . . . if the court affords the relief requested, [the injury] of the petitioners will be removed.'')

they existed at the time the plaintiffs filed their complaint, as opposed to the present time.[43] Because the only remedy is the invalidation of the Ohio Revenue Code provision that permits the investment tax credit, the *Cuno* plaintiffs' complaint comes nowhere near satisfying the redressability requirement for constitutional standing.

The claim raised by Kim's Auto most obviously fails to establish standing on redressability grounds. The only remedy sought by the *Cuno* plaintiffs is the invalidation of, and injunction against, the Ohio Revenue Code provision that permits the investment tax credit. That relief most likely would not have precluded DaimlerChrysler from expanding its Toledo facility or the city of Toledo from taking Kim's Auto's property. Moreover, invalidating the Ohio investment tax credit would not compensate Kim's Auto for any uncompensated economic losses Kim's Auto purportedly suffered on relocating its business. In cases like *Linda R.S. v. Richard D.* and *Steel Co. v. Citizens for a Better Environment*, the Court has declared lack of nexus between injuries claimed and remedies sought to be fatal to a standing claim.[44] Although the owners of Kim's Auto may feel personal gratification at seeing the investment tax credit declared unconstitutional, that generalized relief cannot satisfy the redressability requirement for constitutional standing.

The Cuno plaintiffs' complaint comes nowhere near satisfying the redressability requirement for constitutional standing.

Similarly, the facts alleged by both the Ohio and Michigan plaintiffs are inadequate to show that their alleged injuries are likely to be redressed by a decision invalidating the Ohio investment tax credit provision. The Ohio plaintiffs allege that the Ohio investment tax credit deprived their state government of tax revenues and shifted the burden of supporting government spending to them. The Michigan plaintiffs also seek the benefit of tax dollars generated by the location of DaimlerChrysler's facility in their state. To satisfy redressability, a determination by the Court that the Ohio investment tax credit is unconstitutional would have to remedy the burden shifting alleged by the Ohio plaintiffs or the Michigan plaintiffs' hope that DaimlerChrysler would move and pay taxes to their state.

It is impossible for both the Ohio and Michigan plaintiffs to bring their goals to fruition, as DaimlerChrysler was bound to pick one state or the other as the location of its plant. But the likelihood of either outcome depends on state legislators and, for the Michigan plaintiffs, DaimlerChrysler to respond to a decision by the Court in a particular way. In *Allen v. Wright*, *Simon v. Eastern Kentucky Welfare Rights Organization*, and other cases, the Court declared the likelihood that private parties would respond in a particular way to some tax incentives as too speculative to establish redressability.[45] In *ASARCO Inc. v. Kadish*, the Court expressed even less confidence in its ability to predict the policy decisions of state governmental actors.[46] The link between the plaintiffs' various asserted injuries and the remedy they seek is too tenuous and speculative to satisfy the redressability element of constitutional standing.

3. Prudential standing: zone of interests. Finally, prudential limitations on standing beyond those constitutionally required offer yet one more basis for denying the *Cuno* plaintiffs standing. Beyond the taxpayer standing doctrines discussed above, the Court adheres to another prudential standing requirement known as the zone-of-interests standard. That test obliges courts to consider "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by" the constitutional or statutory provision on which the plaintiffs' claim is based.[47] Thus, to satisfy that prudential requirement, the *Cuno* plaintiffs must demonstrate that the Commerce Clause protects or regulates the interests that they assert.[48]

The Court has recognized that the purpose of the Commerce Clause is to enable citizens of the various states "to engage in interstate commerce free of discriminatory taxes" imposed by other states.[49] The Court has allowed both out-of-state and in-state taxpayers to challenge state tax laws that burden or interfere with their pursuit of interstate commerce.[50] None of the *Cuno* plaintiffs claim to be engaged in interstate commerce, however, nor do they claim that granting the investment tax credit to DaimlerChrysler in any way burdens or interferes with their participation in interstate commerce. Although the Court has at times interpreted the zone-of-interests test quite broadly,[51] the rights that the *Cuno*

[43] *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (citing and quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)).

[44] *See, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105-106 (1998); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

[45] *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 757-758 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-44 (1976).

[46] *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1995).

[47] *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Valley Forge Christina College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[48] *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-154 (1970).

[49] *Boston Stock Exchange*, 429 U.S. at 321 n.3.

[50] *See, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (allowing in-state purchaser of natural gas from out-of-state suppliers to challenge Ohio tax on those purchases); *Baccus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (permitting in-state liquor wholesalers purchasing from out-of-state suppliers to challenge Hawaiian state liquor tax exemption for locally produced liqueur); *Boston Stock Exchange*, 429 U.S. at 321 n. 3 (allowing out-of-state stock exchanges to challenge New York transfer tax).

[51] *See, e.g.*, *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987).

plaintiffs assert, however valid they might be generally, are neither protected nor regulated by the Commerce Clause.

II. Does Anyone Have Federal Standing?

The question remains: Does anyone have standing in federal court to contest Ohio's investment tax credit? It is possible that there are plaintiffs that would have standing in federal court. The underlying problem, however, in finding a party with standing may be one of substance more than standing. It is hard to find a plaintiff who is actually being discriminated against by the Ohio tax statute.

One possible plaintiff under the Sixth Circuit's logic would be an out-of-state competitor to DaimlerChrysler that wanted to expand but did not want to do so in Ohio. The argument would have to be that Ohio's tax statute violated interstate commerce and caused the competitor injury by subsidizing DaimlerChrysler and thus making the competitor uncompetitive. The argument seems a little far-fetched to us, but an out-of-state competitor is the most logical party to have standing under the Sixth Circuit's analysis.

A second possible plaintiff might be a company doing business and paying taxes in Ohio that chooses to invest in an additional physical plant and equipment in another state. The company would argue that Ohio's statute discriminated against interstate commerce by giving tax advantages to DaimlerChrysler for in-state investment that are unavailable to similar Ohio companies investing in other states.

Finally, a competitor of DaimlerChrysler seeking to locate facilities in Ohio might be able to fashion a coherent discrimination argument. The hypothetical Ohio-bound competitor could argue that DaimlerChrysler was receiving a larger tax benefit because of its already existing Ohio tax liability. The argument would have to be that the Ohio tax credit was so large that it rewarded companies with existing Ohio tax liability, and that a new Ohio-based company could not generate enough tax liability to receive the full benefit of the credit. Thus, a company with business contacts with Ohio would get a bigger benefit than companies with no existing contacts.[52] Conferring standing under those circumstances would substantially expand the susceptibility of many state tax policies to competitor challenges. But the Court has in the past employed dormant Commerce Clause analysis to invalidate provisions that resulted in a higher tax burden on out-of-state taxpayers;[53] so, under the right set of facts, that argument strikes us at least as a colorable one.

The *Cuno* plaintiffs do not like the decision that Ohio state and local government officials made regarding DaimlerChrysler and Toledo's redevelopment plan, but their arguments really reflect disagreement over policy choices rather than cognizable, individualized claims. By contrast, each of our hypothetical plaintiffs would have at least a particularized, quantifiable complaint rather than merely a generalized policy disagreement. Those plaintiffs could colorably argue that they suffered an injury in fact (the loss of business), that the Ohio statute caused that injury (by providing a subsidy to competitors), and that the invalidation of the tax credit would redress that injury. In our view, it is still debatable whether our hypothetical plaintiffs would have standing, but they clearly would have stronger arguments than those presented by the *Cuno* plaintiffs.

III. The Ideal Course

As we have indicated, we do not believe that the *Cuno* plaintiffs have standing under existing Supreme Court jurisprudence. But we concede that the jurisprudence is unclear enough that the Supreme Court could find standing in this case if it chooses.[54] The ultimate question, therefore, is whether taxpayers like the *Cuno* plaintiffs should have standing to sue. It is our view that a better approach to the standing issue answers that question in the negative.

Standing doctrine plays an important role in a system of government that divides power among three coequal branches and dual sovereigns. Both Article III and prudential standing requirements serve the federal judiciary well by limiting its jurisdiction to actual disputes between parties that judges are particularly equipped to resolve.

The federal courts have eschewed, for both constitutional and prudential reasons, ''appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'''[55] The federal courts use standing doctrine to ensure that the party bringing the suit has a concrete and definite stake in the outcome. Federal standing is almost never appropriate when taxpayers are

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[52]We note that under the current posture of this case it is impossible to know if companies that are residents of Ohio receive a larger benefit than companies outside Ohio. The district court originally found for DaimlerChrysler on a motion to dismiss for failure to state a claim; thus, the factual record was not developed. Interestingly, the Sixth Circuit did not remand the case for further factual findings but instead held the statute invalid. Thus, it is unlikely that the Sixth Circuit was relying on that type of injury to sustain standing.

[53]*See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725 (1981) (invalidating first-use tax that taxed natural gas moving through Louisiana at a higher rate than gas produced in Louisiana); *Boston Stock Exchange*, 429 U.S. at 318 (overturning a New York tax scheme that taxed out-of-state transfers of stock at a higher rate than in-state transfers). *But see Hatch v. Reardon*, 204 U.S. 152 (1907) (refusing to entertain a commerce clause challenge to a New York stock transfer tax law and finding that the plaintiff in that case did not have standing because the transaction at issue was an intrastate one).

[54]*See, e.g.*, 3 Richard J. Pierce Jr., *Administrative Law Treatise* paras. 16.4 and 16.5 (4th Ed. 2002) (discussing malleability and inconsistency of constitutional standing doctrine).

[55]*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

simply arguing that a policy decision is wrong and hurts them in some collective way as members of society.

The *Cuno* plaintiffs are perfect examples of why taxpayers should not have standing to bring this suit in federal court. Those plaintiffs do not have a direct stake in the outcome of this case. They are not at all concerned about proper interpretation of the Commerce Clause, nor were they discriminated against in interstate commerce. Instead, they are citizens who did not want DaimlerChrysler to expand its Toledo plant, whether at all or at least on a tax-advantaged basis. Even Kim's Auto's more individualized complaint was one that was truly directed at the government's decision to take its property and not at Ohio's taxing system. Beyond the just compensation due to Kim's Auto for the taking of its property, the *Cuno* plaintiffs' fight is a political and not a legal one. It is exactly in those types of situations that standing in federal court is and should be unjustified.

> ***The Cuno plaintiffs are perfect examples of why taxpayers should not have standing to bring this suit in federal court. Those plaintiffs do not have a direct stake in the outcome of this case.***

Particularly to the extent plaintiffs are relying on their status as taxpayers, policy considerations weigh in favor of prohibiting standing. One of the reasons for not allowing federal taxpayers to have standing solely based on remote and generalized harms is that the cases or controversies they raise are not the sort the courts are particularly equipped to resolve. In the *Cuno* context, allowing state taxpayers to bring suit without more than a generalized injury is similarly problematic. Ohio has a population of more than 11.35 million. That large population ensures that the effect of any decision regarding Ohio's investment tax credit will be shared by a sizeable group and will have a negligible effect on any one individual citizen's pocketbook.

Federal standing doctrine prevents the judiciary from intruding too deeply into matters of policy better left to the states or the political branches of the federal government. The federal courts quite simply cannot alleviate the *Cuno* plaintiffs' dissatisfaction with DaimlerChrysler and their state and local governments without both micromanaging state tax policy and dictating to private corporations the terms on which they can make their business location decisions. Indeed, given the competing interests of the Ohio and Michigan plaintiffs, it would be impossible for anyone to placate both.

Reading Article III's requirement that there be a ''case'' or ''controversy'' for federal jurisdiction to accommodate the *Cuno* plaintiffs would open the federal courts to suits on a wide range of state tax and other political issues. Citizens with complaints about state legislative or regulatory policies would love to be able to bring claims in federal court. Many of those complaints do not belong in court at all. If state courts wish to entertain those suits within their borders, that is their choice, within the constraints of their own state constitutions. But the federal courts should not do so.

Allowing standing in federal court in situations like this one would open the federal court system to a range of suits involving the generalized concerns of citizens. The federal system runs more efficiently and equitably when actions are brought by plaintiffs who have real concrete concerns about the issues presented.