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Circuit Court

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

CHRISTOPHER JENNER, et al., Plaintiffs, v. ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, Defendant.	)	Case No. 2015-MR-16 Judge John M. Madonia

PLAINTIFFS' RESPONSE
<u>IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS</u>

Plaintiffs filed this lawsuit against Defendant Illinois Department of Commerce and Economic Opportunity ("DCEO") to challenge DCEO's awards of tax credits that exceed the amounts permitted under the Economic Development for a Growing Economy Tax Credit Act ("EDGE Act"), 35 ILCS/5-1 *et seq*. Although the EDGE Act limits a business's tax credits to the amount of income taxes withheld from "New Employees" hired *after* the business and DCEO enter into a tax-credit agreement, DCEO has nonetheless adopted a regulation that purports to authorize tax credits based on the amount of income taxes withheld from employees hired both *before and after* a business enters into a tax-credit agreement. Plaintiffs challenge that regulation for exceeding DCEO's authority under the EDGE Act.

Plaintiffs have standing to bring their claim because, as taxpayers, they will be liable to replenish the treasury for public funds lost from both (1) DCEO's administration of the regulation they challenge and (2) the tax credits DCEO unlawfully awards under that regulation. Accordingly, this Court should deny DCEO's motion to dismiss for lack of standing under 735 ILCS 5/2-619.

BACKGROUND

I. The EDGE Act authorizes DCEO to award tax credits to select businesses.

The EDGE Act authorizes DCEO to enter into "Agreements" to award tax credits to businesses that propose projects that would "create new jobs in Illinois." 35 ILCS 10/5-15(b). (Compl. ¶¶ 20-21, 28.) To qualify to receive EDGE tax credits, a business must propose a project that meets certain criteria set forth in the statute. *See* 35 ILCS 10/5-20(a), (b). (Compl. ¶¶ 22-23.)

After a business applies for an EDGE tax credit, a body within DCEO considers the application and makes a recommendation as to whether DCEO should accept it and provides guidance as to the amount of the credit. 35 ILCS 10/5-25(b), 5-40. (Compl. ¶¶ 24-26.) If DCEO then decides to award a tax credit, it must determine the amount of the credit and enter into an "Agreement" with the business, which must include, among other things: a "detailed description of the project that is the subject of the Agreement"; the duration and amount of the tax credit (determined by DCEO); a minimum number of years for the project; a "specific method for determining the number of New Employees employed during a taxable year"; and a requirement that the business report to DCEO "the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information the [DCEO] Director needs." 35 ILCS 10/5-45, 5-50. (Compl. ¶¶ 27-28.)

II. The EDGE Act limits the amounts of its tax credits.

The EDGE Act limits the amount of the tax credit a business can receive through an Agreement, tying it to the taxes paid by new employees the business hires in the state. (Compl. ¶ 29.) Specifically, the Act provides that the tax credit "shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement." 35 ILCS 10/5-15(d). (Compl. ¶ 30.) The Act defines the "Incremental Income Tax" attributable to a project as "the

total amount withheld during the taxable year from the compensation of New Employees under Article 7 of the Illinois Income Tax Act arising from employment at a project that is the subject of an Agreement." 35 ILCS 10/5-5 (internal footnote omitted). (Compl. ¶ 31.) "New Employees" are those employees of the business who are both: (1) "first employed by [the] Taxpayer in the project that is the subject of an Agreement" and (2) "hired *after* the Taxpayer enters into the tax credit Agreement." 35 ILCS 10/5-5 (emphasis added). (Compl. ¶ 32.) The Act contains two exceptions to this general rule controlling who may be considered a "New Employee": one for employees who fill certain longstanding vacancies and one for certain employees who were hired within 15 days of the Act's enactment in 1999. 35 ILCS 10/5-5. (Compl. ¶¶ 33-34.)

Otherwise, in sum, the Act limits the amount of the tax credit a business can receive under an Agreement to the amount of income tax withheld from employees who are both (1) hired to work on the project that is the subject of the Agreement and (2) hired *after* the business enters into the Agreement. (Compl. ¶ 35.)

III. DCEO has adopted a regulation that purports to authorize greater tax credits than the EDGE Act permits.

Despite the EDGE Act's language limiting tax credits to the amount of taxes withheld from employees hired after the business enters into an Agreement, DCEO has adopted a regulation that purports to authorize EDGE tax credits based on income taxes paid by certain employees hired *before* a business enters into an Agreement. (Compl. ¶¶ 36, 42.)

DCEO's regulation defines the "Credit" DCEO awards under the Act as "the amount agreed to between the Department and applicant," which is "not to exceed the incremental payroll attributable to the applicant's project." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15). (Compl. ¶ 37.) DCEO defines "incremental payroll," in turn, as "the total amount withheld by the taxpayer during the taxable year from the compensation of new employees *and*

retained employees under Article 7 of the Illinois Income Tax Act [35 ILCS 5/Art. 7] arising from such employees' employment at a project that is the subject of an Agreement." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15) (emphasis added). (Compl. ¶ 38.) DCEO's definition of "new employee" comports with the Act's definition: "a full-time employee first employed by a taxpayer in the project that is the subject of an Agreement and who is hired after the taxpayer enters into the Tax Credit Agreement." 14 Ill. Admin. Code § 527.20. (Compl. ¶ 39.) It adds, however, an additional exception not contained in the Act, which allows a business to treat an employee as "new" if he or she "fills a vacancy that had been continuously vacant for the 184 day period immediately preceding the date of the Agreement." 14 Ill. Admin. Code § 527.20. (Compl. ¶ 39.) Further, DCEO's definition of "retained employee" goes far beyond the Act's definition of a "new employee" and includes any "full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related (sic) to the project." 14 Ill. Admin. Code § 527.20. (Compl. ¶ 40.) For purposes of the regulation's definition, "'directly and substantially-related (sic) to the project' means at least two-thirds of the employee's job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project." 14 Ill. Admin. Code § 527.20. (Compl. ¶ 40.) DCEO applies these definitions in determining the amounts of tax credits it awards. *See* 14 Ill. Admin. Code §§ 527.20, 527.70. (Compl. ¶ 41.)

Thus, DCEO's regulations allow a business to receive a larger tax credit than it could receive under the Act's language alone. Instead of having its tax credit limited to the amount of income tax withheld from *new* employees' paychecks, a business can receive a tax credit up to the amount of income tax withheld from the paychecks of both new *and retained* employees who work on the project that is the subject of an Agreement. (Compl. ¶ 42.)

IV. DCEO's issuance of tax credits that exceed the amounts authorized by the EDGE Act injures Plaintiffs.

Plaintiffs, as Illinois taxpayers (Compl. ¶¶ 9-19, 47), are responsible for replenishing the State's general revenue funds for the loss of revenue from any excessive EDGE tax credits that DCEO awards (*Id.* ¶¶ 48-49, 56).

STANDARD

In considering a motion to dismiss for lack of standing under § 2-619 of the Code of Civil Procedure, a court determines whether a plaintiff has standing by looking to the allegations of the complaint. *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 48 (1st Dist. 2004). "When ruling on a section 2-619 motion, a court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor." *Chicago Teachers Union, Local 1 v. Bd. of Ed. of the City of Chicago*, 189 Ill. 2d 200, 206 (2000).

ARGUMENT

For more than a century, Illinois courts have recognized taxpayer standing to challenge unlawful government actions that deplete public funds because taxpayers are the equitable owners of public funds and will be liable to replenish the treasury for lost funds. Here, the regulation that Plaintiffs challenge depletes public funds in two ways: (1) through the resources DCEO expends administering the unlawful regulation; and (2) through the tax credits DCEO unlawfully awards under the regulation. In arguing for dismissal, DCEO has failed entirely to address the first basis for Plaintiffs' standing. For that reason alone, its motion should fail. In addition, DCEO's attack on Plaintiffs' second basis for standing lacks any support in the applicable case law or common sense. Substantively, there is no difference between unlawful spending and an unlawful tax credit: both are unlawful government actions that will make

taxpayers liable to replenish the treasury for lost funds. The Court should therefore deny DCEO's motion to dismiss.

I. Plaintiffs have standing to enjoin DCEO's use of public resources to administer the regulation they challenge.

It is beyond dispute that Illinois taxpayers have standing to enjoin a state agency from expending resources to administer an unlawful law or regulation. This case requires nothing more than a straightforward application of that well-established rule: Plaintiffs allege that DCEO has adopted an unlawful regulation and is administering it in an unlawful manner; therefore, they have standing to challenge that regulation and enjoin the use of further state resources on its administration.

"It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds." *Barco Mfg. Co v. Wright*, 10 Ill. 2d 157, 160 (1956). This right is based on "the taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation." *Id.*; *see also, e.g., Jones v. O'Connell*, 266 Ill. 443, 447 (1914) ("This court has always recognized that rule and has uniformly held that the tax-payers are in equity the owners of the property of a [government], and whenever public officials threaten to pay out public funds for a purpose unauthorized by law or misappropriate such funds, equity will assume jurisdiction to prevent the unauthorized act or to redress the wrong."); *Ill. Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 29 (recently reaffirming these principles).

Taxpayers not only have standing to challenge the legislature's appropriations or a public body's payouts of cash; they also have standing to challenge and enjoin the misappropriation of public funds through a public body's *administration* of an unlawful statute or regulation. *Krebs v. Thompson*, 387 Ill. 471, 473 (1944) ("It has long been the settled rule in Illinois that the

expenditure of public funds by an officer of the State, for the purpose of administering an unconstitutional act, constitutes a misapplication of such funds."); *see also Snow v. Dixon*, 66 Ill. 2d 443, 451 (1977) ("[A] taxpayer may bring suit to enjoin the misuse of public funds in administering an illegal legislative act . . . ."); *Crusius*, 348 Ill. App. 3d at 49-50 (same). The expenditure of any amount of public resources – "great or small" – "for the purpose of administering an unconstitutional statute is such an injury to every taxpayer that he may bring a suit to enjoin such unlawful expenditure and misapplication of the funds of the State." *Krebs*, 387 Ill. at 475-76; *see also Snow*, 66 Ill. 2d at 450 (quoting *Krebs*).

Thus, for example, the taxpayer plaintiff in *Krebs* had standing to challenge a statute regarding the licensing of professional engineers as unconstitutionally vague because the state applied public funds in administering that statute. 387 Ill. at 475-76. Likewise, in *Crusius*, a taxpayer had standing to challenge a statutory provision regarding the issuance of gambling licenses as unconstitutional special legislation because the taxpayer's complaint alleged that the state had processed a license application under the challenged provision, which "plainly" indicated that the state had expended public funds to "implement" it. 348 Ill. App. 3d at 51.

Plaintiffs in this case have standing for the same reason that the *Krebs* and *Crusius* taxpayer plaintiffs had standing: because the state applies public funds in administering the regulation they challenge. Plaintiffs have alleged a series of activities that DCEO engages in to administer the regulation: it considers applications for EDGE tax credits; it determines the amounts of tax credits to be awarded; it enters into agreements to award tax credits; it issues tax credits; and it receives reports from businesses that receive credits regarding the number of new employees the business has hired, income taxes withheld from new employees, and other information DCEO's director requests. (Compl. ¶¶ 24-28, 41, 45, 55.) Because DCEO is a state

agency, those actions necessarily require the application of public funds. *See Crusius*, 348 Ill. App. 3d at 51. Plaintiffs have also alleged that they are taxpayers who have an equitable ownership in public funds because they will be liable to the treasury for their unlawful depletion. (Compl. ¶¶ 48-49, 56-57.) Therefore, Plaintiffs have alleged all the facts necessary to establish their standing as taxpayers to challenge the regulation, and DCEO's motion to dismiss for lack of standing must fail.[1]

II. Plaintiffs have standing to enjoin DCEO's awards of unlawful tax credits.

In addition, Plaintiffs have standing to challenge DCEO's regulation because the tax credits that DCEO awards under it deplete public funds and therefore make Plaintiffs liable to replenish the public treasury.

A. Tax credits are equivalent to government spending and should be treated the same for purposes of taxpayer standing.

Tax credits are substantively indistinguishable from government spending. As courts and scholars have long recognized, granting a tax credit is no different in effect from collecting tax money and then issuing a check for the same amount back to the taxpayer. In other words, tax credits simply allow the government to grant subsidies without going to the trouble of collecting and disbursing funds. *See Rainbow Apts. v. Ill. Prop. Tax Appeal Bd.*, 326 Ill. App. 3d 1105, 1108 (4th Dist. 2001) (tax credits "practically equivalent to a government subsidy"); *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. 1987) (tax credit is "as much a grant of public money . . . and is as much a drain on the state's coffers as would be an outright payment by the

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[1] If the Court were to conclude that Plaintiffs have not alleged sufficiently specific facts to support this basis for standing, Plaintiffs would respectfully request leave to amend their complaint. Plaintiffs' current allegations suffice, however, because the Court must "accept as true . . . all inferences that reasonably can be drawn in the plaintiff's favor." *Chicago Teachers Union*, 189 Ill. 2d at 206. It is only reasonable to infer that DCEO expends public resources administering the regulation Plaintiffs challenge. *See Crusius*, 348 Ill. App. 3d at 51 (allegation that Gaming Board denied license application under the challenged statute and was defending that denial in an administrative proceeding sufficed to "plainly" establish that public funds were being expended to implement the law).

state"); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705, 717 (1970) ("A dollar is a dollar – both for the person who receives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label."). Indeed, tax credits intended to provide subsidies and encourage particular behaviors are commonly referred to in federal tax and spending policy and in legal scholarship as "tax *expenditures*." Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 861 (1993) (emphasis added).

Accordingly, the same principles that support taxpayer standing to challenge unlawful expenditures also support taxpayer standing to challenge unlawful tax credits. Like unlawful spending, unlawful tax credits create a "deficiency" in the public treasury that taxpayers will be liable to make up for with their own tax payments. *See Barco*, 10 Ill. 2d at 160. It makes no difference from the taxpayer's perspective whether the state chooses to award an illegal subsidy – and create a deficiency – through ordinary spending or through a tax credit.

DCEO argues that the tax credits Plaintiffs challenge cannot give rise to taxpayer standing because the tax credits do not constitute an "expenditure, "disbursement," or "misappropriation" of public funds and because "Plaintiffs can demonstrate no equitable interest in taxes not collected from third parties." (Memo. 4-5.) To the contrary, however, the "taxes not collected" in this case are taxes that state law requires businesses to pay, which the state would receive in its treasury but for DCEO's challenged regulation and actions. The injury to taxpayers is real: money that, by law, should have gone in the treasury did not, and they are liable to replenish the treasury for the amounts lost.

Indeed, money does not have to arrive at the state treasury before taxpayers have an equitable interest in it. In one of the earliest Illinois cases on taxpayer standing, the Illinois Supreme Court held that taxpayers had standing where a county treasurer collected tax funds and kept them for himself, rather than sending them to the state treasury as required, because the funds he wrongfully retained would have to be "made up by taxation." *Jones*, 266 Ill. at 444-47. Here, likewise, funds wrongfully retained by Illinois businesses – funds that will not be sent to the state treasury as a result of DCEO's unlawful tax-credit awards – will have to be "made up by taxation," and taxpayers likewise have standing to prevent the loss of state funds.

DCEO's suggestion that recognizing Plaintiffs' standing to challenge unlawful tax credits would require this Court to improperly modify, expand, or overrule Illinois Supreme Court decisions is incorrect. (*See* Memo. 15-16.) The Supreme Court has had no occasion to address taxpayer standing to challenge tax credits in particular, but nothing in its decisions indicates that it intended to forbid taxpayer standing to challenge tax credits. On the contrary, as shown above, the Court's reasons for recognizing taxpayer standing to challenge unlawful expenditures equally supports taxpayer standing to challenge unlawful tax credits. DCEO has identified no good reason why public bodies should be able to escape accountability to taxpayers as long as they act unlawfully through tax credits rather than through spending.

B. The cases DCEO relies on from other jurisdictions are not relevant to taxpayer standing in Illinois.

The cases on which DCEO relies from other jurisdictions – one applying Missouri law, the other applying federal law – have no relevance to this case.

1. The Missouri Supreme Court's decision in *Manzara v. State* does not support denying Illinois taxpayers standing to challenge tax credits.

DCEO's argument receives no support from the Missouri Supreme Court case on which it relies, *Manzara v. State*, 343 S.W.3d 656 (Mo. banc 2011), for two reasons. First, only three out of seven judges[2] in *Manzara* took the position that taxpayers do not and should not have standing to challenge illegal tax credits because they are not public expenditures. Second, Missouri's test for taxpayer standing is more stringent than Illinois' and therefore is not relevant in any event.

In *Manzara*, only three out of seven judges actually took the view that Missouri taxpayers do not and should not have standing to challenge tax credits because they are not public expenditures. 343 S.W.3d at 657-64 (opinion of Russell, J.). Three other judges determined that taxpayers *do* have standing to challenge tax credits but concluded that the plaintiffs' claims failed on the merits. *Id.* at 664-78 (opinion of Wolff, J.). The remaining judge concluded that Missouri's current test for taxpayer standing denies taxpayers standing to challenge tax credits but also stated that the tax credits at issue "constitute[d] an expenditure of public funds" and that "strong arguments can be made that the . . . test should be expanded to allow a taxpayer to challenge an illegal tax credit because the policy for allowing taxpayer standing would be the same for tax credits as it is for direct expenditures of public funds generated through taxation." *Id.* at 678-79 (opinion of Stith, J.). That judge did not consider it necessary for the court to rule on that question, however, because the parties did not brief it and it was not dispositive. *Id.* at 679. Thus it appears that, if the Missouri Supreme Court had been presented with arguments as to whether Missouri should recognize taxpayer standing to challenge tax credits and the issue

[2] Missouri calls its highest court's members "judges" rather than "justices."

had been dispositive, the court likely would have held that taxpayers *do* have standing to challenge unlawful tax credits.

Moreover, in any event, *Manzara*'s analysis is irrelevant to this case because Missouri's current test for taxpayer standing is different from – and stricter than – Illinois' test. Since 1989, the Missouri Supreme Court has required taxpayers to establish one of three conditions to establish standing: "(1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Id.* at 659 (opinion of Russell, J.) (citing *E. Mo. Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 47 (Mo. banc 1989)). In Illinois, however, a plaintiff asserting taxpayer standing need only allege equitable ownership of funds depleted by misappropriation and his or her liability to replenish them. *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011) (*citing Golden v. City of Flora*, 408 Ill. 129, 131, (1951)). The funds need not be "generated through taxation" nor lost through a "direct" expenditure.

Further, the *Manzara* opinion on which DCEO relies reasoned that tax credits were not public funds because a "tax credit expresses the legislature's wish to declare a portion of the pool of taxable assets off-limits to its own power to collect taxes." 343 S.W.3d at 660 (opinion of Russell, J.). Here – putting aside the two states' completely different tests for taxpayer standing – that reasoning does not apply because Plaintiffs claim that DCEO is awarding tax credits that the legislature did *not* authorize; i.e., they claim that DCEO is allowing businesses to retain funds that the legislature *intended the state to have* when it enacted the tax code and the EDGE Act's limitation on EDGE tax credits. (*See* Compl. ¶¶ 43-46.)

2. Federal case law, which rejects Illinois' standard for taxpayer standing, is irrelevant and does not support denying Plaintiffs standing.

DCEO also receives no support from the federal case on which it relies, *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), because the federal courts have explicitly rejected Illinois' standard for taxpayer standing. (*See* Memo. 7-9.) As *Winn* itself explains, the federal courts, unlike the Illinois courts, *never* recognize taxpayer standing based on a taxpayer's liability to replenish the treasury for misallocated funds. *See Winn*, 131 S. Ct. at 1442-45. As discussed above, the Illinois Supreme Court has always taken the opposite view and held that a taxpayer's liability to replenish the treasury for misallocated funds is a sufficient injury to establish taxpayer standing. *See Barco*, 10 Ill. 2d at 160. Therefore, *Winn* and other federal cases on taxpayer standing are entirely irrelevant to whether an Illinois taxpayer has standing to challenge an Illinois law or regulation in the Illinois courts.

The "'narrow exception' to 'the general [federal] rule against taxpayer standing'" discussed in *Winn* and DCEO's argument (Memo. 7-8) is equally irrelevant to taxpayer standing in Illinois courts. *See Winn*, 131 S. Ct. at 1445 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). Under that exception, a taxpayer has standing to challenge an unconstitutional law in federal court when there is: (1) a "'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked'"; and (2) "'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'" *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)). In Illinois, in contrast, a taxpayer is *never* required to show such a "logical link" or "nexus" to establish standing; all that matters is the taxpayer's liability to replenish misallocated funds. *Cf. Snow*, 66 Ill. 2d at 451 ("[A] taxpayer may bring suit to enjoin the misuse of public funds in administering an illegal legislative act even though the taxpayer is

not subject to the provisions of the act."); *Jones*, 266 Ill. at 450-51 (taxpayers had standing to challenge misappropriation of money collected through inheritance taxes even though they had not paid inheritance taxes because the lost funds "would have to be replaced by taxation, the burden of which would fall on the tax-payers").

Accordingly, *Winn* and federal case law do not support DCEO's argument regarding whether Illinois courts should recognize taxpayer standing to challenge unlawful tax credits.

III. Plaintiffs are the "real party in interest" in this case.

DCEO's argument that the State of Illinois is the "real party in interest" and therefore has the exclusive right to challenge DCEO's regulation and actions is incorrect. (Memo. 9-12.) Taxpayers have standing to challenge and enjoin unlawful government actions that deplete public funds regardless of whether a public official might also have the right to do so. In an early case recognizing taxpayer standing, the Illinois Supreme Court stated that, where public funds are being misappropriated, "a taxpayer . . . has such a direct interest that he may maintain a suit in equity for the protection of that interest *although a public official might maintain a suit on behalf of the state*." *Jones*, 266 Ill. at 450 (emphasis added).

DCEO's real-party-in-interest argument receives no support from the sole case on which it relies, *Lyons v. Ryan*, 201 Ill. 2d 529 (2002). In that case, the plaintiffs brought a taxpayer derivative action alleging that certain state officials had conspired with a political campaign to issue commercial drivers' licenses to unqualified drivers in exchange for political contributions. *Lyons*, 201 Ill. at 532. For their remedies, the plaintiffs sought "the imposition of constructive trusts on the funds and benefits alleged to be illegally received by defendants" and recovery of funds that the defendants had allegedly fraudulently obtained. *Id.*

In *Lyons,* the plaintiffs – unlike Plaintiffs in this case – did not base their standing on their liability as taxpayers to replenish the treasury for lost funds. Indeed, they did not claim any injury to themselves, only injury to the state. *Id.* at 535. The funds over which they sought to impose a constructive trust were campaign contributions, which "had no impact on the state treasury"; salaries already paid to officials, which were already in private hands and would have been paid regardless of whether the illegal activity had occurred; and money already spent on equipment, which was already in private hands and would have been spent regardless of whether the illegal activity had occurred. *Id.* at 537-38. Thus, the Court concluded that there were no actual public funds at stake and that the plaintiffs could not base their standing "on the creation of 'public' funds through the imposition of a constructive trust" on money held by private parties. *Id.* at 538.

Lyons did not alter – or even address – the longstanding rule that Illinois taxpayers have standing to bring actions to challenge and enjoin the misallocation of public funds. As *Crusius* has since recognized, *Lyons* does not bar a taxpayer from bringing an action seeking a declaration that an enactment is unlawful or an injunction to prevent state resources from being used to administer an unlawful enactment. *Crusius*, 348 Ill. App. 3d at 51.

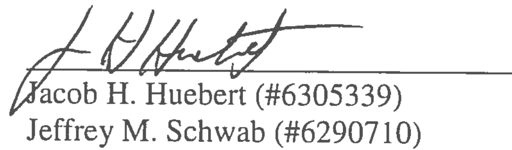
Because Plaintiffs have brought their action to protect their own interests as taxpayers in avoiding increased tax liability resulting from DCEO's administration of an unlawful regulation and unlawful awards of tax credits, they are the real party in interest in this case, and they have standing to challenge DCEO's regulation and actions authorizing and awarding EDGE tax credits that exceed the amounts the EDGE Act allows.

CONCLUSION

Illinois' standard for taxpayer standing allows Plaintiffs to challenge and enjoin DCEO's use of public resources to administer an unlawful regulation as well as DCEO's awards of unlawful tax credits. This Court should therefore deny DCEO's motion to dismiss.

Dated: April 13, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on April 13, 2015, I served the foregoing Response in Opposition to Defendant's Motion to Dismiss upon Defendant's counsel by sending it via U.S. Mail and email to:

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