No. 4-15-0522

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

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| CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD, | ) | On Appeal from the Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois |
| | ) | No. 15 MR 16 |
| Plaintiffs-Appellants, | ) | The Honorable John Madonia, Judge Presiding |
| v. | ) | |
| ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, | ) | |
| Defendant-Appellee. | ) | |

**BRIEF OF APPELLANTS**
**CHRISTOPHER JENNER, ET AL.**

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**ORAL ARGUMENT REQUESTED**

## POINTS AND AUTHORITIES

## NATURE OF CASE

Plaintiffs allege that Defendant Illinois Department of Commerce and Economic Opportunity exceeded its authority when it adopted 14 Ill. Admin. Code § 527.20 and when it awarded tax credits pursuant to that regulation in amounts greater than those authorized by statute. The trial court did not address the merits of Plaintiffs' claim but instead dismissed it for lack of standing under 735 ILCS 5/2-619. R. C121.

## ISSUE PRESENTED

Plaintiff taxpayers allege that Defendant Illinois Department of Commerce and Economic Opportunity exceeded its authority by adopting a regulation that purports to authorize the Department to award business tax credits in amounts greater than the underlying statute permits. Do plaintiffs have standing as taxpayers to challenge the regulation and to enjoin future awards of tax credits in amounts that exceed the statutory limit?

## JURISDICTION

This is an appeal under Illinois Supreme Court Rules 301 and 303 from the trial court's order, entered May 12, 2015, which granted Defendant's motion to dismiss with respect to Plaintiffs' sole cause of action. R. C121. Plaintiffs filed their notice of appeal on June 1, 2015. R. C126-28.

## STATUTE AND REGULATION INVOLVED

This case involves the Economic Development for a Growing Economy Tax Credit Act, 35 ILCS 10/5-1 *et seq.*, and a regulation adopted to implement the Act, 14 Ill. Admin. Code § 527.20, both of which are set forth in the appendix.

## STATEMENT OF FACTS

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

In 1999, Illinois enacted the Economic Development for a Growing Economy Tax Credit Act ("EDGE Act"), which authorizes Defendant Illinois Department of Commerce and Economic Opportunity ("DCEO") to award tax credits to select businesses "that propose[] a project located or planned to be located in Illinois" and meet certain other criteria set forth in the statute. 35 ILCS 10/5-15(b), 5-20(a)-(b). R. C3, C6. The Act provides that when DCEO awards an EDGE tax credit, DCEO and the business receiving the credit must enter into an "Agreement," 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, which DCEO determines; a minimum number of years for the project; a "specific method of 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 [DCEO's] Director needs." 35 ILCS 10/5-45, 5-50. R. C7.

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

DCEO cannot issue tax credits in any amount that it wants. Rather, the EDGE Act limits the amount of the tax credit that DCEO can award to a business, tying the maximum tax-credit amount to the amount of state income taxes paid by new employees the business hires in the state after entering into the tax-credit Agreement. R. C7-8.

Specifically, the Act provides that the amount of the tax credit that a business may receive under an Agreement "shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement." 35 ILCS 10/5-15(d). R. C8. 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). R. C8. "New Employees" are those employees of the business who are both: (1) "first employed by [the business] in the project that is the subject of an Agreement" and (2) "hired *after* the [business] enters into the tax credit Agreement." 35 ILCS 10/5-5 (emphasis added). R. C8. The Act contains two exceptions to this general rule controlling who may be considered a "New Employee": Certain employees who were hired within 15 days of the Act's enactment in 1999 may be considered "New Employees" even though they do not satisfy the criteria, as may an "old" employee who fills a job previously held by a "New Employee" who was promoted to another position. 35 ILCS 10/5-5. R. C8.

Otherwise, in sum, the Act limits the amount of the tax credit that DCEO may award to a business under an Agreement to the amount of income tax withheld from the business's employees who are both (1) hired to work on the project that is the subject of the business's tax-credit Agreement and (2) hired after the business enters into the Agreement. R. C8.

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

After the EDGE Act became law, DCEO adopted regulations to implement it. Despite the EDGE Act's language limiting EDGE tax credits to the amount of taxes withheld from *new* employees hired *after* a business enters into an Agreement, DCEO adopted a regulation that purports to authorize EDGE tax credits based on taxes withheld from both new employees and certain *old* employees hired *before* a business enters into an Agreement. R. C9.

DCEO's regulations limit the amount of an EDGE tax credit that DCEO can award to "the incremental payroll attributable to the applicant's project." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15). R. C9. That language might appear similar to the statute's language limiting the amounts of EDGE tax credits, but the definitions DCEO adopted in the regulation, which it applies in determining the amounts of the tax credits it awards, reveal that the regulation's limit is actually much higher than the limit provided in the statute. The regulation defines "incremental payroll" 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). R. C9. The regulation defines "retained employee," in turn, to include 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. R. C9. 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. R. C9.

Thus, DCEO's regulations allow a business to receive a larger tax credit than that Act permits: Instead of having its tax credit limited to the amount of income tax withheld from new employees' paychecks, as the statute requires, 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. R. C10. DCEO's issuance of these tax credits depletes public funds. R. C11.

## IV. The trial court dismissed Plaintiffs' complaint challenging DCEO's awards of excessive tax credits.

Plaintiffs are Illinois taxpayers who are liable to replenish any deficiency in the state's treasury. R. C11. Plaintiffs filed their complaint challenging § 527.20 and DCEO's awards of tax credits that exceed the amounts authorized by the EDGE Act on January 9, 2015. R. C3. On March 16, 2015, DCEO moved to dismiss Plaintiffs' complaint under 735 ILCS 5/2-619 on the basis that Plaintiffs lacked standing. R. C66. The trial court granted DCEO's motion on May 12, 2015. R. C121. Plaintiffs filed their notice of appeal on June 1, 2015. R. C126.

## 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 and tax-credit awards that Plaintiffs challenge deplete public funds in two ways: (1) through the resources DCEO expends administering the regulation; and (2) through the tax credits DCEO unlawfully awards under the regulation, which deprive the State of revenue to which it would otherwise be entitled under the law. Plaintiffs therefore have standing to challenge the regulation on two grounds, either of which would independently suffice, and the trial court therefore erred in dismissing their complaint.

In reviewing a motion to dismiss under 735 ILCS 5/2-619, the Court determines whether a plaintiff has standing by looking to the allegations of the complaint, and it "must accept as true all well-pled facts in the plaintiff's complaint and all inferences that reasonably can be drawn in the plaintiff's favor." *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 48 (1st Dist. 2004). The Court's review of a § 2-619 motion is de novo. *Id.*

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

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

### A. Plaintiffs have standing as taxpayers to enjoin the use of public funds to administer an unlawful regulation.

"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 uniformly held that the taxpayers 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 (reaffirming these principles).

Taxpayers have standing not only to challenge the legislature's appropriations or a public body's payouts of cash but also to challenge the misuse of public funds through a public body's *administration* of an unlawful enactment. *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 [subject to challenge by taxpayers]."); *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 expenditures and misapplication of 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 for being unconstitutionally vague because the state applied public funds in administering that statute. 387 Ill. at 475-76. Similarly, 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, and Plaintiffs will be liable as taxpayers to replenish those funds.

DCEO applies public funds administering the regulation Plaintiffs challenge through a series of activities Plaintiffs have identified in their complaint: DCEO 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, the amount of income taxes withheld from new employees, and other information DCEO's director requests. R. C7, C10, C12. Those actions necessarily entail the application of public funds because DCEO is a state agency.[1] *See Crusius*, 348 Ill. App. 3d at 51. And Plaintiffs are taxpayers who have an equitable ownership in those public funds because they will be liable to the treasury for their unlawful depletion. R. C11. Thus, Plaintiffs have alleged all the facts necessary to establish their standing as taxpayers to challenge the regulation, and the trial court therefore erred when it dismissed their complaint for lack of standing.

### B. Taxpayer standing is not limited to challenges to statutes.

The trial court incorrectly concluded that Plaintiffs lack standing because they do not challenge an "unconstitutional act" or "an illegal legislative act" but rather "are attempting to challenge . . . more of a policy," citing *Stermer*, 2014 IL App (4th) 130079. R. Vol. II 39. That conclusion has no basis in *Stermer* or any other case law.

Again, taxpayers have standing "to enjoin the misuse of public funds." *Barco*, 10 Ill. 2d at 160. That standing exists regardless of whether the "misuse" occurs pursuant to a statute, a regulation, or a government official's *ultra vires* actions. *See, e.g., Jones*, 266 Ill. at 444-47 (taxpayers have standing to challenge official's personal retention of tax funds). Besides, Plaintiffs do not, in fact, challenge a mere "policy"; they challenge a

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[1] In the trial court, Plaintiffs requested leave to amend their complaint in the event that the court concluded that they had not pleaded this basis for standing with sufficient detail. R. C95. The Court denied leave to amend because it concluded that Plaintiffs would not have standing in any event. R. Vol. II 40. If this Court were to conclude that Plaintiffs were required to plead more specific facts, Plaintiffs would ask the Court to remand the case to give them the opportunity to amend their complaint.

regulation, which has the full "force and effect of law." *People v. Becker*, 315 Ill. App. 3d 980, 1000 (1st Dist. 2000).

Contrary to the trial court's ruling, Plaintiffs' challenge is not "forbidden [by] the *Stermer* case." R. Vol. II 39. The trial court apparently based this conclusion on *Stermer*'s statement (in dicta) that "[t]he taxpayer standing doctrine does not permit courts to engage in policy judgments about how revenues or savings should be allocated." 2014 IL App (4th) 130079, ¶ 29. But that point has no relevance here. Plaintiffs are not asking the courts to make a "policy judgment" that is properly made by the other branches of government; of course courts may never do that in any type of case, regardless of whether it is brought by taxpayers. *See, e.g., Hayen v. County of Ogle*, 101 Ill. 2d 413, 421 (1984) (court not a "superlegislature," cannot "weigh the wisdom of legislation"). Rather, Plaintiffs are asking the courts to enjoin the misuse of funds for an illegal purpose – which *Stermer* itself acknowledged *is* proper in the very same paragraph that the trial court apparently relied on. *Stermer*, 2014 IL App (4th) 130079, ¶ 29.

### C. Plaintiffs have standing regardless of the amount DCEO spends to administer the challenged regulation.

The trial court also erred in concluding that Plaintiffs lack standing on the ground that public funds "are going to be spent [administering] the [EDGE] program" regardless of whether the regulation Plaintiffs challenge is struck down. R. Vol. II 39. In so ruling, the court accepted DCEO's argument that Plaintiffs have suffered no injury as taxpayers because DCEO would use the same personnel and equipment to administer the EDGE program, supposedly at the same exact expense to taxpayers, in any event. R. C109-110; R. Vol. II 12-15.

The case law makes clear that it does not matter for purposes of taxpayer standing whether the State's misuse of funds actually causes the State to have less money than it otherwise would have. In *Krebs*, the Court rejected the State's argument that taxpayers lacked standing because the State's application of the act they challenged would "result in a net profit to the State" and thus create no deficiency for taxpayers to replenish. 387 Ill. at 474-76. The Court concluded that the unlawful use of public funds in which taxpayers have an equitable interest inherently injures taxpayers in any event and suffices by itself to establish taxpayer standing. *See id.* at 475-76. If taxpayers have standing where the misuse of funds results in a *profit* to the state, as in *Krebs*, then they must also have standing where the misuse of funds (supposedly) results in neither a net profit nor a net loss to the State, as DCEO has alleged here.

Moreover, DCEO's argument relies on speculation: The record contains no evidence to support the premise that DCEO spends the same amount of money administering the regulation that Plaintiffs challenge as it would spend administering a lawful regulation that limited tax credits in accordance with the EDGE Act. If anything, drawing inferences from the complaint in the Plaintiffs' favor, as the Court must, *Crusius*, 348 Ill. App. 3d at 48, requires the Court to reach the opposite conclusion. It only makes sense that DCEO likely spends more money applying this regulation than it otherwise would spend because the regulation increases the number of businesses that qualify for EDGE tax credits: Under this regulation, a business could hire *zero* new employees but still qualify for a tax credit based on its retained employees. If the regulation limited tax-credit awards as the EDGE Act requires, however, that would not be possible; a business would only qualify to receive a tax credit if it hired genuine new employees. If more businesses are applying for and receiving EDGE tax credits under this regulation than otherwise would, as one would expect, then over time DCEO's administrative costs could be higher than they otherwise would be. If so, then even if DCEO were correct that taxpayers lack standing to challenge government actions that do not result in a net loss of public funds – which it is not – its argument would still fail.

## II. Plaintiffs also have standing to challenge DCEO's excessive tax-credit awards because the tax credits deplete public funds.

As discussed above, DCEO's use of public funds to administer the regulation Plaintiffs challenge suffices by itself to give Plaintiffs standing as taxpayers. In addition and in the alternative, Plaintiffs have also standing to challenge DCEO's regulation on a second independent basis: because the tax credits that DCEO awards under the regulation deplete public funds and therefore make Plaintiffs liable to replenish the public treasury.

In substance, tax credits are 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 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, e.g., 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 state"). As a leading tax scholar put it, "[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." 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). Indeed, tax credits intended to provide subsidies and encourage particular behaviors – like the EDGE tax credits at issue in this case – are commonly referred to in federal tax and spending policy and 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 reasoning that justifies recognizing taxpayer standing to challenge unlawful expenditures also justifies recognizing taxpayer standing to challenge unlawful tax credits. "The key to taxpayer standing is the plaintiff's liability to replenish public revenue depleted by an allegedly unlawful governmental action." *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011). Like unlawful spending, unlawful tax credits create a "deficiency" in the public treasury and therefore injures taxpayers who will be liable to replenish the treasury with their own tax payments. *Cf. 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 thus create a deficiency – through ordinary spending or through a tax credit.

DCEO has argued that Plaintiffs lack standing because they allegedly "can demonstrate no equitable interest in taxes not collected from third parties" that were never actually in the state treasury. R. C72-73. To the contrary, however, the Illinois Supreme Court has long recognized that money need not arrive at the state treasury before taxpayers have an equitable interest in it. In one of the earliest Illinois cases on taxpayer standing, the Court held that taxpayers had standing where a county treasurer collected funds and, instead of sending them to the state treasury as required, kept them for himself 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 businesses that receive excessive tax credit awards – i.e., funds that will not be sent to the state treasury that would be sent to it but for the regulation and actions Plaintiffs challenge – will have to be "made up by taxation," and taxpayers therefore have standing to prevent the loss of state funds.

## III. Plaintiffs are "real parties in interest" in this case.

The trial court's conclusion that the State of Illinois has the exclusive right to challenge DCEO's regulation and actions as the "real party in interest" is incorrect. R. Vol. II 39-40. It is not clear whether the trial court considered this an independent basis for dismissing Plaintiffs' claim. Either way, it is incorrect because taxpayers have standing to challenge and to seek to enjoin unlawful government actions that deplete public funds regardless of whether a state official or agency might also have the right to do so. Indeed, in an early case recognizing taxpayer standing, the Illinois Supreme Court stated that, where public funds are being misappropriated, "a tax-payer . . . 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).

It would make no sense to deny taxpayers standing to challenge a regulation whenever a government official could theoretically bring the same challenge because the purpose of taxpayer standing is to allow taxpayers to protect their interests when government officials fail to do so. *See People v.*

*Holten*, 287 Ill. 225, 231 (1919) ("If those charged with the duty of protecting and conserving the public money fail or refuse to act . . . for the benefit of the tax-payers . . . the tax-payers may resort to equity to redress the wrong. It certainly cannot be that in such cases the tax-payers are helpless."). Indeed, this case illustrates why taxpayer standing is necessary: the regulation Plaintiffs challenge has existed for some 15 years, but neither the Attorney General nor any other state official has taken any action to challenge it even though it plainly contradicts state law.

DCEO's argument that the State of Illinois is the real party in interest, which the trial court apparently accepted, relied entirely on a wholly inapposite case, *Lyons v. Ryan*, 201 Ill. 2d 529 (2002), and conflated two entirely different concepts: taxpayer standing and taxpayer *derivative* standing. R. C77-80.

This case is about ordinary taxpayer standing, which enables taxpayers to protect *their own* equitable interest in public funds that they will be liable to replenish. *See Barber*, 406 Ill. App. 3d at 1102. *Lyons*, in contrast, was about taxpayer derivative standing, under which taxpayers may bring actions *on behalf of the state* (not themselves) to recover public funds for the state from a third party who wrongfully holds them. *See Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 500-01 (2005) (contrasting the taxpayer derivative claims in *Lyons* with "true" taxpayer claims).

Unlike Plaintiffs in this case, the *Lyons* plaintiffs did not base their standing on their equitable ownership of the funds at issue or 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. *Lyons*, 201 Ill. 2d at 535. For their remedies, they sought "the imposition of constructive trusts on [the] funds and benefits alleged to be illegally received by defendants" and recovery of funds *by the State* that the defendants had allegedly fraudulently obtained. *Id.* at 532. The Court concluded that the plaintiffs lacked standing because there were not actually any public funds at stake in the case: the funds over which the plaintiffs sought to impose constructive trusts 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.* 537-38.

Thus, *Lyons* did not alter – indeed, *had nothing to do with* – the well-established rule that taxpayers have standing to bring actions to challenge and enjoin the misallocation of public funds. *See Scachitti*, 215 Ill. 2d at 501 ("*Lyons* does not interfere with a citizen's right to bring taxpayer actions."); *Crusius*, 348 Ill. App. 3d at 51 (*Lyons* did not prohibit taxpayer from seeking a declaration that an enactment is unlawful or an injunction to prevent state resources from being used to administer it).

Because Plaintiffs brought their action to protect their own interests as taxpayers in avoiding increased tax liability, they are the real party in interest in this case, and they have standing to challenge DCEO's regulation both because DCEO expends public funds to administer it and because the tax credits DCEO awards under the regulation are public funds.

## CONCLUSION

A state agency cannot escape accountability for its unlawful actions simply by awarding subsidies through tax credits rather than through ordinary spending. Illinois case law makes clear that taxpayers have standing to enjoin the use of state resources on unlawful actions, regardless of whether the unlawful actions involve the issuance of tax credits or anything else. In addition, taxpayers have standing to challenge awards of tax credits in particular because awarding a tax credit is substantively indistinguishable from awarding a monetary subsidy – in either event, the state creates a deficiency that taxpayers are liable to replenish.

Plaintiffs therefore respectfully ask this Court to rule that Plaintiffs have standing to challenge DCEO's regulation, which effectively rewrote the EDGE Act to allow much greater tax credits than the General Assembly authorized in the statute; reverse the judgment of the trial court; and remand this case for consideration of the merits of Plaintiffs' claim.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, and certify that I verily believe the same to be true.

Jacob H. Huebert

## CERTIFICATE OF SERVICE

I certify that on September 21, 2015, I served the foregoing Brief of Appellants Christopher Jenner et al. and its separate appendix upon Defendant-Appellee's counsel by sending three copies via U.S. mail to:

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