No. 4-15-0522

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

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
Plaintiffs-Appellants,	)	No. 15 MR 16
v.	)	The Honorable John Madonia, Judge Presiding
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,	)	
Defendant-Appellee.	)	

REPLY BRIEF OF APPELLANTS
CHRISTOPHER JENNER, ET AL.

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ORAL ARGUMENT REQUESTED

In their primary brief, Plaintiffs, all of whom are Illinois taxpayers, identified two independent, sufficient bases for their standing to challenge the regulation and tax-credit awards at issue in this case: (1) the depletion of public funds through the resources Defendant Illinois Department of Commerce and Economic Opportunity ("DCEO") expends administering the regulation; and (2) the depletion of public funds through the tax credits DCEO awards under the regulation. DCEO has failed to refute either one.

I. Taxpayers have standing to enjoin the use of public funds to administer an invalid regulation.

DCEO attempts to refute Plaintiffs' first basis for standing by arguing that taxpayers can only sue to enjoin the use of public funds to administer an invalid *statute,* and thus cannot sue to enjoin the use of public funds to administer an invalid *regulation*. (Def.'s Br. at 17.) That position directly contradicts the reasoning of the Illinois cases on taxpayer standing.

Taxpayer standing does not depend on whether a taxpayer claims a statute is invalid; it depends on whether the taxpayer "seek[s] to enjoin the misuse of public funds," which the Illinois Supreme Court has recognized as "a damage which entitles [taxpayers] to sue." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956). As this Court has stated, "[t]he key to taxpayer standing is the plaintiff's liability to replenish public revenues depleted by an allegedly unlawful governmental action." *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011).

Thus, under these well-established principles, if a government entity uses public funds to administer an invalid regulation, Plaintiffs have standing to bring a lawsuit to enjoin that depletion of public funds.

DCEO says it is "telling[]" that Plaintiffs have "not cite[d] a single case in which the Illinois courts have allowed taxpayer standing under these circumstances" – i.e., where taxpayers have challenged governmental actions taken pursuant to an invalid regulation rather than an invalid statute. (Def.'s Br. 19.) That is not "telling" at all, however, because, until now, Illinois appellate courts have never been presented with a taxpayer lawsuit challenging the misuse of funds under an invalid regulation. But the case law makes clear that it does not matter whether a plaintiff is challenging actions taken pursuant to a regulation; again, what matters is that the plaintiff is seeking to enjoin "the misuse of public funds." *Barco*, 10 Ill. 2d at 160.

DCEO fails to identify any reasons why taxpayers should not have standing to challenge the misuse of public funds in administering an invalid regulation to the same extent that they have standing to challenge the misuse of public funds in administering an invalid statute. Indeed, DCEO's position makes no sense: Regardless of whether a government entity misuses public funds pursuant to a statute or pursuant to a regulation, the injury to taxpayers is the same – so it only makes sense that taxpayers' standing would be the same. DCEO suggests that recognizing Plaintiffs' standing in this case could lead to a flood of "costly litigation" that could potentially

"grind government to a halt" as taxpayers file lawsuits challenging "virtually any decision – or any mistake – made by a government official or entity." (Def.'s Br. 18.) But such hyperbole is unwarranted. This case does not concern taxpayer standing to challenge just any action by a government entity that a taxpayer disagrees with; it concerns whether taxpayers can seek to enjoin the expenditure of public funds on illegal actions putatively authorized by an invalid regulation that directly contradicts a statute. There is no reason to believe that allowing taxpayer lawsuits under such circumstances would unduly burden the government, and, in any event, the Illinois Supreme Court has already concluded that taxpayers should and do have standing to enjoin government entities' and officials' illegal use of public funds *in general*.

II. Taxpayers have standing to enjoin the issuance of illegal tax credits.

DCEO's arguments challenging Plaintiffs' second basis for standing – their injury from the depletion of public funds resulting from DCEO's issuance of unlawful tax credits – also lack merit.

A. Tax credits are economically equivalent to other government expenditures.

DCEO has failed to refute Plaintiffs' argument that tax credits are substantially identical to ordinary disbursements of government funds – and can give rise to taxpayer standing to the same extent – because they have the same effect on the State's treasury. (*See* Plfs.' Br. 14.) In attempting to do so,

DCEO makes two main arguments: (1) it notes that a U.S. Supreme Court case drew a distinction between tax credits and ordinary expenditures; and (2) it argues that tax credits and expenditures "do not necessarily have identical economic effects." (Def.'s Br. 13-14.) Neither of these arguments identifies a difference between tax credits and other government expenditures that is relevant to Illinois taxpayers' standing to challenge illegal tax credits.

1. ***Arizona Christian School Tuition Org. v. Winn*** is irrelevant to Illinois taxpayers' standing to challenge illegal tax credits in Illinois courts.

The federal case on which DCEO relies, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), has no relevance to Illinois taxpayer standing because the federal courts have explicitly rejected the reasoning that underlies Illinois taxpayer standing.

As the *Winn* decision itself explains, the federal courts – unlike Illinois courts – *never* recognize standing based on a taxpayer's liability to replenish the treasury for misallocated funds, regardless of whether the taxpayer alleges illegal spending or the illegal issuance of tax credits. *See Winn*, 131 S. Ct. at 1443. That is because the U.S. Supreme Court has concluded that the illegal spending's "effect upon future taxation" is "too remote, fluctuating and uncertain to give rise to a case or controversy" under Article III of the U.S. Constitution. *See id.* (internal marks omitted).

The Illinois Supreme Court, on the other hand, 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 give the taxpayer standing to challenge the misuse of the State's general revenue funds. *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.

Winn involved a "narrow exception" to the "general [federal] rule" against taxpayer standing, which applies in certain cases where the government has allegedly used public funds in a manner that violates the Establishment Clause of the First Amendment to the United States Constitution. *See Winn*, 131 S. Ct. at 1445-46. Specifically, taxpayers may have standing where "sectarian [organizations] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience." *Id.* at 1448. In *Winn*, the Court concluded that taxpayers lacked standing to challenge a law authorizing tax credits for donations to organizations that grant students scholarships to attend private schools, including religious schools, because the taxpayers could not show that funds extracted from them were given to a religious institution. *Id.*

Under the analysis in *Winn*, it is essential for a taxpayer to show that his or her funds are going to the treasury and, in turn, to sectarian

organizations because, in the Supreme Court's view, only that kind of direct coerced support can give rise to a violation of freedom of conscience that would constitute a sufficient injury to give the taxpayer standing. *See id.* at 1447. That analysis has no relevance, however, to a plaintiff's standing to sue on the liability-to-replenish theory for standing that the Illinois Supreme Court has long recognized. Under the Illinois courts' liability-to-replenish theory of standing, it makes no difference whether a subsidy is granted in the form of a tax credit or an ordinary expenditure because the taxpayer's injury – his or her liability to make up for the lost funds – is exactly the same either way.

2. DCEO fails to identify any economic difference between tax credits and other government expenditures.

DCEO lacks any support for its assertion that that tax credits and ordinary expenditures "do not necessarily have identical economic effects." (Def.'s Br. 14.) According to DCEO, the two types of subsidy might have different economic effects because some tax credits, such as those at issue here, "leave . . . money in the hands of private parties to spend as they choose, while the government can spend [public funds] only as legally authorized." (*Id.*) DCEO further observes that "the very point of the tax credit plaintiffs challenge here is to stimulate economic activity in the State . . . , which, if successful, would lead to *greater* tax receipts than the amount of the credit." (*Id.*)

But DCEO has not identified any economic difference between tax credits and other government expenditures. It is true that tax credits leave funds in the hands of select businesses to spend as they choose, which could stimulate economic activity, which could lead to a net increase in the State's tax revenue. But what if DCEO did not issue tax credits to those businesses but instead wrote them checks? The effects would be identical, both for the businesses and, more importantly, for the State's treasury: the businesses could spend the funds as they choose, which could stimulate economic activity, which could lead to a net increase in the State's tax revenue. Thus, DCEO has not shown any relevant difference between subsidies that take the form of tax credits and subsidies that take the form of cash payments.

Besides, the possibility that illegal tax credits (or illegal expenditures of any kind) could indirectly lead to greater tax revenues is irrelevant to the question of whether taxpayers have standing to challenge them. The Illinois Supreme Court has held that the possibility that the revenues generated by an illegal action could outweigh the costs of that action – i.e., that the State could turn a profit from expending resources on an illegal activity – does not mitigate taxpayers' injury and thus does not deprive taxpayers of standing to enjoin the illegal action. *See Krebs v. Thompson*, 387 Ill. 471, 476 (1944).

B. This case is not similar to *Lyons v. Ryan* or other cases in which taxpayers sought to recover funds private parties allegedly owed to the State.

DCEO maintains that only the Attorney General has standing to bring Plaintiffs' claim, just as the Attorney General was the only party with standing to pursue the claims that taxpayer plaintiffs attempted to bring in *Lyons v. Ryan*, 201 Ill. 2d 529 (2002) and *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484 (2005). (Def.'s Br.12-13.) According to DCEO, this case is like *Lyons* and *Scachitti* because it effectively seeks a declaration that "certain funds in the hands of private parties [are] owed to the State." (Def.'s Br. 12-13.) DCEO's analysis is fatally flawed, however, because it overlooks fundamental differences between Plaintiffs' taxpayer claims and the taxpayer *derivative* claims at issue in *Lyons* and *Scachitti*.

Unlike the Plaintiffs in this case, the *Lyons* and *Scachitti* plaintiffs asserted taxpayer derivative claims to recover funds that certain individuals and private organizations allegedly owed to the State. *See Lyons*, 201 Ill. 2d at 531-35; *Scachitti*, 215 Ill. 2d at 489-90. Unlike Plaintiffs in this case, the *Lyons* and *Scachitti* plaintiffs did not seek to enjoin a government entity's illegal actions. Accordingly, because the Attorney General has the exclusive authority to bring actions to recover funds owed to the State, the Illinois Supreme Court held that the *Lyons* and *Scachitti* plaintiffs lacked standing to bring their taxpayer derivative claims. *Lyons*, 201 Ill. 2d at 535-40; *Scachitti*, 215 Ill. 2d at 497-500.

Because *Lyons* and *Scachitti* concerned taxpayer derivative claims against private parties, their rejection of taxpayer plaintiffs' claims has no relevance to Plaintiffs' standing to bring a "true" taxpayer claim against DCEO. *See Scachitti*, 215 Ill. 2d at 500-01 (contrasting taxpayer derivative claims with "true" taxpayer claims). Indeed, in *Scachitti*, the Court explicitly recognized that taxpayers *do* have the right to bring an action to enjoin government entities' actions that deplete public funds: "[O]ur holding in *Lyons* does not interfere with a citizen's right to bring taxpayer actions. . . . seeking relief from illegal or unauthorized acts of public bodies or public officials, which acts are injurious to their common interests as . . . taxpayers." *Id.* at 501 (citing 74 Am. Jur. 2d Taxpayers' Actions § 1 (2001)).

To try to overcome this flaw in its argument, DCEO argues that, although Plaintiffs do not explicitly seek recovery of funds from private parties, "functionally [Plaintiffs] are asking [the Court] to declare certain funds in the hands of private parties to be owed to the State." (Def.'s Br. 12-13.) But that would be equally true in a case in which plaintiffs alleged that that a government entity was making illegal cash payments to private parties – something taxpayers indisputably would have standing to enjoin. DCEO has failed to explain why the implication that private parties have improperly received funds from the State would not affect plaintiffs' standing in a case involving ordinary spending but nonetheless should affect plaintiffs' standing in a case involving tax credits. As discussed below, it is irrelevant

that the tax-credit funds at issue here did not pass through the State treasury.

DCEO also suggests that accepting Plaintiffs' position would allow "taxpayers [to] become roving tax collectors, able to sue anyone they believed was paying too little in taxes." (Def.'s Br. 11.) That, of course, is wrong because, again, this case only concerns taxpayers' ability to sue a government entity to enjoin its misuse of public funds, which is exactly what the Illinois Supreme Court and this Court have said that taxpayers are entitled to do. *See, e.g., Scachitti*, 215 Ill. 2d at 501; *Barber*, 406 Ill. App. 3d at 1102. This case has nothing to do with whether taxpayers can sue private parties to recover funds owed to the government. Again, it is well established – and wholly irrelevant to this case – that they cannot. *See Scachitti*, 215 Ill. 2d at 499-500.

C. Funds need not arrive at the State treasury before taxpayers can become liable to replenish them.

DCEO also argues that taxpayers lack standing to challenge the issuance of a tax credit because a taxpayer cannot be liable to "replenish" funds that never arrived at the State treasury, citing a dictionary definition of "replenish." (Def.'s Br. 16.) But funds do not have to actually arrive at the State treasury before taxpayers can be liable to replenish them. As Plaintiffs showed in their primary brief, the Illinois Supreme Court made that clear more than a century ago in *Jones v. O'Connell*, 266 Ill. 334 (1914), in which a

taxpayer had standing to challenge a county treasurer's unlawful retention of funds he should have turned over to the State treasury. (*See* Plfs.' Br. 15-16.)

DCEO attempts to distinguish *Jones* by observing that it involved "taxes that had already been collected." (Def.'s Br. 10.) That fact is irrelevant, however, because if DCEO were correct that a taxpayer cannot be liable to "replenish" funds the State treasury has never received, then the plaintiff in *Jones* would not have had standing because the funds at issue in that case never arrived at the State treasury. But, of course, the plaintiff in *Jones* did have standing, *Jones*, 266 Ill. at 447-48, and thus so do Plaintiffs.

DCEO also attempts to distinguish *Jones* by observing that, in that case, "the plaintiff sued the person who actually had possession of the disputed money." (Def.'s Br. at 10.) But that difference is also irrelevant. In *Jones*, the government official whom taxpayers sought to enjoin happened to be keeping the public funds at issue himself rather than giving them to others. If the treasurer had been transferring the funds to some third party, the taxpayer plaintiff still would have had standing to sue and enjoin the treasurer because the taxpayer's injury would have been the same: he would have been liable to make up for the funds the State lacked as a result of the official's unlawful actions. *See Jones*, 266 Ill. at 447 (taxpayers have standing "whenever public officials threaten to *pay out* public funds for a purpose unauthorized by law") (emphasis added).

D. Missouri case law supports recognizing Plaintiffs' standing to challenge illegal tax-credit awards.

In their primary brief, Plaintiffs quoted a Missouri Supreme Court decision that stated that a tax credit is "as much as grant of public money . . . and is as much a drain on the state's coffers as would be an outright payment by the state." *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. 1987.) (Plf.'s Br. 14.)

In response, DCEO points to a later decision by that court, *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011), which it says "refused to grant taxpayer standing for a challenge to a tax credit." (Def.'s Br. 15-16.) In fact, however, only three out of seven judges[1] in that case took the position that taxpayers do not and should not have standing to challenge illegal tax credits because they are not public expenditures. Moreover, 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. *See Manzara*, 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

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

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.) (emphasis added). That judge did not consider it necessary for the court to reach 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 on whether Missouri should recognize taxpayer standing to challenge tax credits and the issue 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 more restrictive than – Illinois' test. Since 1989 – after *Curchin* and before *Manzara* – 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. 1989)). In Illinois, in contrast, the

funds at issue need not be "generated through taxation" or lost through a "direct" transaction; rather, a plaintiff asserting taxpayer standing needs only to allege equitable ownership of funds depleted by misappropriation and his or her liability to replenish them. *Barber*, 406 Ill. App. 3d at 1102 (citing *Golden v. City of Flora*, 408 Ill. 129, 131, (1951)).

Further, the primary *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.

III. The Statement of Facts in Plaintiffs' primary brief is entirely proper.

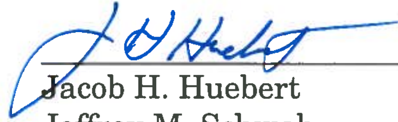
Finally, there is no merit to DCEO's argument that the Court should strike Section III of the Statement of Facts in Plaintiffs' primary brief for allegedly containing impermissible "argument." (Def.'s Br. 6-7.) Section III contains no argument about how the Court should resolve this appeal. Rather, it provides essential background information by setting forth the allegations that underlie the legal claim Plaintiffs have stated in their

complaint. The merits of Plaintiffs' claim are not at issue in this appeal, which only concerns Plaintiffs standing to bring the claim. Because the Court is reviewing a motion to dismiss for lack of standing under 735 ILCS 5/2-619, the legal sufficiency of Plaintiffs' claim is assumed and therefore is not a proper subject of argument. *See Bank of Am., N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 57. Accordingly, it was proper for Plaintiffs to set forth the details of their claim in their brief's Statement of Facts rather than its Argument section, and striking those details would pointlessly remove essential information from Plaintiffs' brief.

Conclusion

Illinois courts have consistently held that Illinois taxpayers may bring lawsuits to hold government entities accountable when they use public funds to commit illegal actions. DCEO has presented no good reasons to create exceptions to that rule for government entities that act under an unlawful regulation rather than an unlawful statute or entities that issue an illegal subsidy in the form of a tax credit rather than an ordinary expenditure. The Court should therefore reverse the trial court's dismissal of Plaintiffs' claim and remand this case for consideration of its merits.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rule 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 16 pages.

Jacob H. Huebert

CERTIFICATE OF SERVICE

I certify that on February 12, 2016, I served the foregoing Reply 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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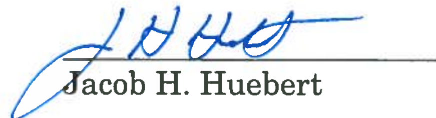

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