Statement of Senator George V. Voinovich
Subcommittee on International Trade
of the Senate Committee on Finance
"Cuno and Competitiveness: Where to Draw the Line"
March 16, 2006

Chairman Thomas and Subcommittee members, good morning and thank you for this opportunity to testify before you at this important hearing to discuss the U.S. Court of Appeals for the Sixth Circuit's decision in *Cuno v. DaimlerChrysler* and its effect on competitiveness. I welcome this hearing, and believe it is an important step in enacting the Economic Development Act of 2005, which I introduced.

First, I want to make this clear: while I was governor, the investment tax credit at issue in *Cuno* was essential to Ohio's economic success. During my administration, the Ohio Legislature enacted the investment tax credit, as well as other incentives, to help attract new business and expand existing business in Ohio.

It worked. After the investment tax credit program was enacted, Ohio surged ahead of other states in new business development and existing business expansion. Since the investment tax credit was enacted, over 20,000 businesses have been able to claim a total of $2 billion in credits, leveraging $34 billion in new equipment investments across Ohio.

The Ohio investment tax credit had concrete effects on business decisions. For example, during a House Judiciary Subcommittee hearing on *Cuno*, Michele Kuhrt, currently Vice President Corporate Tax for Lincoln Electric, a 111-year old Cleveland-based manufacturing company, testified "without this tax credit, our investments in Ohio would certainly have been less. Since 1995 when the Ohio manufacturing credit began, Lincoln Electric's capital expenditures in Ohio have exceeded one-quarter of a billion dollars. In many of the investment analyses we prepare, taxes are a significant and, in some cases, a deciding factor on where to locate our capital."

Given that tax incentives are an important tool of economic development, and in the wake of the *Cuno* decision, I introduced the EDA. The bill has bi-partisan support, is co-

sponsored by all of the Senators in the Sixth Circuit, and is also supported by the National Governors Association, the National Association of Counties, the U.S. Conference of Mayors, the National League of Cities, the International Brotherhood of Teamsters, and the National Association of Manufacturers.

In *Cuno*, the Sixth Circuit held that Ohio's investment tax credit was discriminatory because it granted preferential tax treatment to in-state investments, and thus violated the so-called dormant Commerce Clause of the U.S. Constitution.

As you know, the Commerce Clause grants Congress the power to regulate interstate commerce. On the flip side, the dormant Commerce Clause restricts states from unduly burdening interstate commerce in the absence of Congressional action.

Applying the dormant Commerce Clause can be challenging. In *Cuno*, the federal trial court and the federal appellate court disagreed as to the appropriate application of the dormant Commerce Clause. The disagreement between these courts reflects the differences between two general, but conflicting legal principles the Supreme Court has developed regarding state taxes. The first principle is that a state may not impose a tax that discriminates against interstate commerce by providing a direct commercial advantage to local business. The second principle is that a state may use its tax system to encourage intrastate commerce and may compete with other states for interstate commerce so long as the state does not discriminatorily tax the products manufactured or the business operations performed in any other state. My understanding is that the Court has never completely reconciled these two principles.

On March 1, 2006, the Supreme Court heard oral arguments in *Cuno*, and a decision is expected later this year. If the Court chooses to uphold or reverse *Cuno*, its decision likely will be narrowly tailored, and there is no guarantee that the Court will reconcile these conflicting legal principles. If the Court dismisses the case for lack of standing by the plaintiffs, as many legal observers believe is the likely outcome, then states and

businesses will be left without clear guidance as to the validity of state tax incentive programs.

Whatever decision the Court reaches, Congress is in the position to clarify the legality of tax incentives used for economic development by exercising its Commerce Clause powers and enacting the EDA. If Congress enacts the EDA, it would end the legal ambiguity surrounding such incentives once and for all.

Without the EDA, other challenges to long-standing incentive programs in other states will occur. These are not speculative possibilities. There are lawsuits similar to the one brought in *Cuno* pending in a number of other states.

The uncertainty resulting from *Cuno* causes state and local governments and businesses to not be able to rely upon negotiated agreements with mutual benefits. This uncertainty will trigger large expenditures of public and private monies to determine what incentives or subsidies will pass legal muster. By enacting the EDA, Congress will prevent this confusion and waste of resources required by endless litigation, which is why the bill has gained such wide-spread support.

The EDA was drafted with input from the best tax and constitutional lawyers to ensure that the bill would be carefully crafted to protect the most common and benign forms of tax incentives, but not to authorize those tax incentives that truly discriminate against interstate commerce. Moreover, the EDA does not require that states offer tax incentives. The policy considerations and fiscal impact of tax incentives are complex questions that are driven by the facts and circumstances of each state. The EDA simply recognizes that the fifty states, not the Courts, are in the best position to evaluate these issues.

States are the laboratories of democracy and innovation. The economic development programs the states enact help create jobs and prosperity by allowing each state to tailor

packages to encourage new growth through tax incentives for job training, job creation, and investment in new plants and equipment.

As we all know, companies considering investment opportunities are comparing not just different states in the U.S., but also countries around the globe. As Ms. Kuhrt of Lincoln Electric stated, "Many other [international] locations offer exceptional tax incentives, low wages, and no litigation costs. For a company like Lincoln Electric, our preference is to create jobs inside the United States. However, the economic factors presented by many other jurisdictions can make an investment decision to locate outside the United States overwhelming."

As a former governor who had to compete against Japan, Canada, China, India and Europe for business expansion as well as new business projects, I know just how important a role tax incentives play in attracting new businesses, as well as in retaining existing businesses. As Ms. Kuhrt's statement demonstrates, and I can verify from my experience as governor, our international competitors are certainly not going to stop using tax and other incentives to attract business. We should not impede the states' ability to do the same.

To compete in the global economy, states need to be able to use tax incentive policies as one tool for economic development. By enacting the EDA, the winners will be working men and women, and their families, who will benefit from new business investment and existing business expansion.

Thank you for allowing me to testify today, and I look forward to working with you as we move forward.