IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

RAYMOND GADDY, BARRY HUBBARD, LYNN WALKER HUNTLEY, and DANIEL REINES,	
Plaintiffs,	
vs.	
	CIVIL ACTION NO. 2014-CV-244538
GEORGIA DEPARTMENT OF REVENUE, and DOUGLAS J. MACGINNITIE, in his official capacity as STATE REVENUE COMMISSIONER OF THE GEORGIA DEPARTMENT OF REVENUE,	
Defendants,	
and	
RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER,	
Intervenor-Defendants.	

INTERVENOR-DEFENDANTS' CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO COUNTS I – III AND VI

Intervenor-Defendants move this Court, pursuant to O.C.G.A. § 9-11-12(c), for an Order granting them judgment on the pleadings as to each of the constitutional claims raised by Plaintiffs in Counts I, II, III, and VI of the Complaint. This motion is supported by the accompanying memorandum of law.

Respectfully submitted this 9th day of July, 2014.

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CERTIFICATE OF SERVICE

Pursuant to O.C.G.A. § 9-11-5, a copy of this Intervenor-Defendants' Cross Motion for Partial Judgment on the Pleadings as to Counts I-III and VI and the Memorandum of Law in Support of have been hand-delivered upon the following parties, this 9th day of July, 2014:

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Plaintiffs,	
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GEORGIA DEPARTMENT OF REVENUE, and DOUGLAS J. MACGINNITIE, in his official capacity as STATE REVENUE COMMISSIONER OF THE GEORGIA DEPARTMENT OF REVENUE,	**CIVIL ACTION NO. 2014-CV-244538**
Defendants,	
and	
RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER,	
Intervenor-Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PARENT-INTERVENORS' CROSS-MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO COUNTS I – III AND VI

INTRODUCTION

This case involves Georgia's Scholarship Tax Credit Program ("Scholarship Program" or "Program"), O.C.G.A. § 20-2A-1, *et seq.*, and O.C.G.A. § 48-7-29.16, which provides Georgia taxpayers a dollar-for-dollar tax credit for their charitable contributions to nonprofit, scholarship-granting organizations. Under the Georgia Constitution, the General Assembly may exercise its "power of taxation . . . *for any purpose authorized by law*." Ga. Const. Art. VII, § III, ¶ I(a)

(emphasis added). Providing educational options and encouraging financial assistance to families to defray the cost of private education is plainly permitted by the Georgia Constitution. *See, e.g.*, Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (authorizing the General Assembly "[t]o provide grants, *scholarships*, loans, or other assistance to students and to parents of students for educational purposes") (emphasis added).

Plaintiffs allege that the provision of tax credits to help fund student scholarships violates four provisions of the Georgia Constitution. Compl. Counts I – III, VI. However, neither the text nor the history of the Georgia Constitution supports Plaintiffs' contentions. Parent-Intervenors therefore move for partial judgment on the pleadings as to each of the alleged constitutional violations in Counts I, II, III, and VI of the Complaint.[1] Count VI is Plaintiffs' request for "Injunctive Relief" and is therefore predicated entirely on the asserted constitutional violations. The request for an injunction does not provide a substantive basis for relief on its own.

Plaintiffs' constitutional challenges to Georgia's Scholarship Program are all facial, making this case particularly amenable to disposition by motion for judgment on the pleadings. The only questions that must be answered are legal in nature—and, in particular, constitutional—meaning there is no need for a detailed fact record. "[D]etermining the meaning of the Constitution . . . [is] the exclusive function of the courts . . . ." *Thompson v. Talmadge*, 201 Ga. 867, 872 (1947). Because there is no need to develop a factual record in order to rule on Plaintiffs' constitutional claims, Parent-Intervenors respectfully submit this memorandum of law in support of their Motion for Partial Judgment on the Pleadings as to Counts I – III and VI.

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[1] Parent-Intervenors do not move for judgment on the pleadings as to Counts IV (alleging violations of the Georgia tax code) and V (seeking mandamus relief).

STANDARD OF REVIEW

If the pleadings disclose with certainty that Plaintiffs would not be entitled to relief under the plain text and history of the Georgia Constitution, as well as the precedents interpreting it, Parent-Intervenors are then entitled to judgment as a matter of law. O.C.G.A. § 9-11-12(c); *Cardin v. Outdoor E.*, 220 Ga. App. 664, 665 (1996). Of course, Parent-Intervenors are mindful of the fact that, for the purposes of a motion for judgment on the pleadings, Plaintiffs' well-pled material allegations are to be taken as true. *Ford v. Whipple*, 225 Ga. App. 276, 277 (1997).

GEORGIA'S SCHOLARSHIP TAX CREDIT PROGRAM

Under Georgia's Scholarship Program, enacted in 2008, individuals, business owners, and corporations who choose to contribute to Student Scholarship Organizations ("SSOs") are eligible for a dollar-for-dollar tax credit against their state income taxes. O.C.G.A. § 48-7-29.16(b). SSOs are tax-exempt organizations that obligate at least 90% of their annual revenue to student scholarships so that students may attend the qualified private schools of their parents' choice.[2] O.C.G.A. § 20-2A-1(3)(A). SSOs may not limit scholarship availability to students of only one school. O.C.G.A. § 20-2A-1(3)(B). Individual taxpayers are eligible for a state income tax credit of up to $1000. O.C.G.A. § 48-7-29.16(b)(1). Married couples filing a joint return are eligible for a credit of up to $2500. O.C.G.A. § 48-7-29.16(b)(2). Owners of pass-through business entities are eligible for a credit of up to $10,000. O.C.G.A. § 48-7-29.16(b)(3).

[2] The requirement that SSOs obligate 90% of their annual revenue to fund student scholarships is actually a baseline figure. Once an SSO receives revenue exceeding $1.5 million, the percentage of its annual revenue that must be dedicated to funding student scholarships increases to 93%. O.C.G.A. § 20-2A-2(1). That percentage reaches 95% for SSOs that receive revenues in excess of $20 million. *Id.*

Corporations are eligible for a credit for contributions to SSOs of up to 75% of their annual Georgia income tax liability. O.C.G.A. § 48-7-29.16(c).

The aggregate amount of tax credits available to Georgia taxpayers is $58 million, on a first-come, first-served basis. O.C.G.A. § 48-7-29.16(f)(1)-(2). Taxpayers who have their requested contribution to an SSO preapproved by the Department of Revenue must make their contribution "within 60 days after receiving notice from the department that the requested amount was preapproved." O.C.G.A. § 48-7-29.16(f)(3). For the 2014 tax year, all $58 million in tax credits was claimed by January 22, 2014. Compl. ¶ 53. This means that taxpayers have already made their contributions to SSOs, but they must wait to claim the credit until they file their 2014 tax returns.

The Program places numerous restrictions on SSOs. It caps the maximum amount of scholarships so that they do not "exceed the average state and local expenditures per student" enrolled in the Georgia public schools. O.C.G.A. § 20-2A-2(1). SSOs must also "consider financial needs of students based on all sources" of income, O.C.G.A. § 20-2A-2(1.1), and file detailed reports with the Department of Revenue disclosing information about the number and dollar value of scholarships issued, the income-level and number of dependents in each family who received scholarships, and a list of their donors. O.C.G.A. § 20-2A-3(a)(1)-(5). Further, SSOs must submit to the Department of Revenue an annual audit by an independent C.P.A. that verifies they have complied with these—and many other—requirements of the law.[3] O.C.G.A. § 20-2A-2(5).

[3] The requirement that SSOs perform an independent audit was added in the 2013 legislative session and requires that such audit be conducted "within 120 days after the completion of the [SSOs'] fiscal year." O.C.G.A. § 20-2A-1(5). Thus, having only gone into effect at the start of this year, SSOs have not yet filed audits with the Department of Revenue because SSOs are still in the midst of their current fiscal years.

The Department of Revenue is vested with significant authority to penalize SSOs for noncompliance with the Program's requirements. O.C.G.A. § 20-2A-7. The Department's power includes the ability to shut down an SSO entirely and demand that all funds in an SSO's scholarship account be transferred to a "properly operating" SSO. O.C.G.A. § 20-2A-7(a)(2)(B). The Program also makes it a crime for any officer or director of an SSO to participate in any "intentional violation" of the Program. O.C.G.A. § 20-2A-7(c).

As of 2013, at least one SSO has awarded nearly 13,000 scholarships since 2008. Compl. ¶ 21.

LEGAL ARGUMENT

Plaintiffs allege that the Scholarship Program, on its face, runs afoul of four provisions of the Georgia Constitution. Plaintiffs' claim in Count I hinges on their (incorrect) assertion that the Scholarship Program is a publicly funded "educational assistance program" governed by the Educational Assistance Provision, Ga. Const. Art. VIII, § VII. They claim that the Program runs afoul of the Educational Assistance Provision for two reasons. First, because the SSOs that administer the Program are charitable organizations and not "public authorities or public corporations." Ga. Const. Art. VIII, § VII, ¶ III. And second, because contributions to SSOs are eligible for a tax credit and not merely "deductible for state income tax purposes." Ga. Const. Art. VIII, § VII, ¶ I(b). Plaintiffs' assertion in Count II is that the Scholarship Program violates the Constitution's Gratuities Clause, which is intended to ensure that public monies are used for public purposes. Ga. Const. Art. III, § VI, ¶ VI. In Count III, Plaintiffs assert a violation of Georgia's Establishment Clause, which is designed to ensure separation of church and state. Ga. Const. Art. I, § II, ¶ VII. Plaintiffs' fourth and final constitutional claim arises under the Public Education Provision, Ga. Const. Art. VIII, § I, ¶ I, but this claim is not separately pled. Rather, it

is cited in Plaintiffs' request for "Injunctive Relief." Compl., Count VI, ¶ 3. Of course, Plaintiffs' request for injunctive relief is not a stand-alone, substantive claim. Their request for injunctive relief is predicated entirely on the Program being unconstitutional. However, in addition to citing the constitutional provisions in Counts I – III, Plaintiffs also cite the Constitution's Public Education Provision. Parent-Intervenors treat this citation as a separate allegation and address it accordingly. Plaintiffs' argument with regard to the Public Education Provision is based on their notion that if the Scholarship Program were struck down, any resulting increase in revenue to the State would be used to fund public education.

Parent-Intervenors demonstrate that the Scholarship Program passes constitutional muster in three parts. In Part I, Parent-Intervenors show that the Program is a proper exercise of the General Assembly's plenary taxing power. In Part II, Parent-Intervenors explain why the Scholarship Program is not a publicly funded educational assistance program, and hence not governed by the requirements of the Educational Assistance Provision, and that as a privately funded program it is perfectly consistent with the plain text of the Gratuities, Separation, and Public Education provisions of the Georgia Constitution. And in Part III, Parent-Intervenors assume *arguendo* that the Scholarship Program is a publicly funded educational assistance program and demonstrate that it operates in perfect harmony with the Georgia Constitution.

I. Georgia's Scholarship Tax Credit Program Is a Valid Exercise of the General Assembly's Taxing Authority.

Unless the Plaintiffs can identify a specific prohibition against offering tax credits to Georgia income-tax payers for their donations of money, from their own private bank accounts, to charitable organizations that provide scholarships to students, the Scholarship Program must stand. This is because "[t]he General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States,

which it shall deem necessary and proper for the welfare of the state."[4] Ga. Const. Art. III, § VI, ¶ I. The plain text of the Georgia Constitution thus makes it clear that the State's Constitution "is a power-limiting document rather than a power-granting document," Melvin B. Hill, *The Georgia State Constitution* 81, (Oxford Univ. Press 2011), meaning that "the General Assembly has all powers of government not specifically limited or prohibited by the Constitution." *Id.* (citing *Plumb v. Christie*, 103 Ga. 686, 694 (1898) (noting that the General Assembly "can do all things not prohibited by the constitution")).

The Georgia Constitution's Taxation Clause, Ga. Const. Art. VII, § III, ¶ I(a), clarifies the General Assembly's authority to exercise its "power of taxation" for "any purpose authorized by law." Offering tax credits to taxpayers who donate to charities that help parents and students offset the costs associated with private education is a "purpose authorized by law" because the plain text of the Georgia Constitution encourages the General Assembly to create programs that empower parents to meaningfully exercise their constitutional right to direct their children's education.

The framers of the Georgia Constitution, and the voters who ratified it, took education seriously, as evidenced by the inclusion of a separate Education Article, Article VIII. As part of their commitment to education, the framers and voters imposed on the State of Georgia, as a "primary obligation," the duty of providing a free, tax-supported "adequate public education." Ga. Const. Art. VIII, § I, ¶ I. However, the framers and voters also recognized that there is no one-size-fits-all approach to education. As such, they crafted a separate provision to ensure that the General Assembly's duty to fund a free public education does not preclude it from

[4] There is no dispute that the Scholarship Program is constitutional under the Constitution of the United States. *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

empowering parents to exercise their fundamental right to "direct the . . . education of [their] children." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). The Georgia Constitution thus explicitly encourages the creation of scholarship programs to assist parents in choosing private schools. Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (authorizing the General Assembly to enact laws "[t]o provide grants, *scholarships*, loans, or other assistance to students and to parents of students for educational purposes") (emphasis added).

Georgia's founders and voters clearly believed that policies and programs such as the challenged Scholarship Program further the State's overall goal of making a quality education available to all children within the State. The fact that the General Assembly has chosen to offer tax credits to taxpayers who donate their own money to scholarship-granting charities, as opposed to funding scholarships from the general treasury, is in perfect harmony with the Constitution's intent to give the General Assembly wide latitude in setting education policy. *See Subcommittee on Retirement and Scholarships: State of Georgia Select Committee on Constitutional Revision 1977-1981* at 12 (Ga. September 28, 1977) ("I think the main intent of Senator Holloway was to have a broad section in the Constitution so that the General Assembly would have full freedom of action in doing or undoing whatever it wanted to do." (Statement of Dr. Payton)) (Attach. 1 to Parent-Intervenors' Resp. Opp'n. Pls.' Partial Mot. J. Pleadings).

If the General Assembly is allowed to fund scholarships directly from the state treasury, surely it is permitted to encourage private charity by offering a limited tax credit to Georgia taxpayers to achieve the same end. As the Georgia Supreme Court has noted, within the realm of education policy, there is usually "more than one constitutionally permissible method" of pursuing the state's goals within the limits of the Constitution's text. *McDaniel v. Thomas*, 248 Ga. 632, 647 (1981).

II. Georgia's Scholarship Program Does Not Violate the Plain Text of the Georgia Constitution.

Plaintiffs' alleged constitutional violations find no support in the Constitution's plain text. As shown in Part A, below, the Educational Assistance Provision (Count I) governs only programs funded with public funds. It does not govern programs, like the Scholarship Program at issue here, funded with private dollars. Part B explains that the General Assembly has not granted a prohibited "gratuity" (Count II) because the Scholarship Program both furthers a valid public purpose (education) and provides the State of Georgia with substantial benefits, as a matter of law. In Part C, Parent-Intervenors demonstrate that the Scholarship Program aids parents and students, such as themselves, not religious institutions (Count III). And finally, Part D proves that the Scholarship Program does not violate the Public Education Provision (Count VI) because, even if the Program were struck down or otherwise eliminated, there is neither a guarantee that state revenues would actually increase, nor would there be any obligation on the part of the General Assembly to use any increased revenues to fund public education.

A. The Scholarship Program Is Funded by Private Donations, Not Public Funds, and Is Therefore Not Governed by the Educational Assistance Provision.

The Georgia Constitution's Educational Assistance Provision authorizes the General Assembly to expend "*public funds* . . . [t]o provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes." Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (emphasis added). The parties are in significant disagreement about the meaning of the term "public funds." Parent-Intervenors take the position that money that could have been collected as taxes, but is not in fact collected, whether excluded by means of a tax credit, deduction, exemption, refund, or any other tax mechanism, remains private, not public, funds. If

the tax-credit-eligible donations to SSOs are private funds, then the Educational Assistance Provision does not govern how the Scholarship Program operates.

Accordingly, as a threshold matter, this Court must first determine whether or not the monies donated by Georgia taxpayers to SSOs, and that are eligible for a tax credit under the Program, are public or private funds under the Georgia Constitution. In interpreting the Constitution, the Court presumes that the authors and voters employed the words therein "in their natural and ordinary meaning." *McCook v. Long*, 193 Ga. 299, 303 (1942). Conversely, the Court refrains from any interpretation that would render a word "superfluous or meaningless." *Blum v. Schrader*, 281 Ga. 238, 241 (2006).

The Arizona Supreme Court considered this same question under the Arizona Constitution's analogous religion clauses and concluded that tax credit programs involve private funds. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (interpreting Ariz. Const. Art. II, § 12, which states in relevant part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment," and Art. IX, § 10 stating that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."). The opinion is lengthy, well-reasoned, and its conclusion on this issue has stood the test of time, having been accepted by other state courts and the U.S. Supreme Court. *See, e.g.*, *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 2001) and *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

The Arizona Supreme Court looked first to the "natural, obvious and ordinary meaning" of the words "public money" as "*revenue* received from federal, state, and local governments from taxes, fees, fines, etc," *Kotterman*, 972 P.2d at 618, ¶ 36 (emphasis added) (quoting Black's

Law Dictionary 1005 (6th ed. 1990)). The court then went on to point out that with a tax credit "no money *ever* enters the state's control" or "is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials." 972 P.2d at 618, ¶ 36. As such, it was not difficult for the court to determine that "under any common understanding of the words, we are not here dealing with 'public money.'" *Id. See also Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding [SSO] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *State Bldg. & Constr. Trades Council of Cal. v. Duncan*, 162 Cal. App. 4th 289, 294, 299 (2008) (finding that "[t]ax credits are, at best, intangible inducements offered by government, but they are not actual or de facto expenditures by government" and thus "tax credits do not constitute payment out of public funds" under a state statute); *Toney*, 744 N.E.2d at 358 (rejecting "plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money").

The Arizona Supreme Court further reasoned that to conclude that "a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. The tax on that amount would then instantly become public money." 972 P.2d at 618, ¶ 40 (footnote omitted). The court rejected that finding, because "such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim." *Id.* If the Arizona Supreme Court is correct, then, as the U.S. Supreme Court points out, Plaintiffs' theory that tax credits are the equivalent of public funds treats all income "as if it were government property even if it has not come into the tax collector's hands." *Winn*, 131 S. Ct. at

1448. But that proposition makes no sense because "[p]rivate bank accounts cannot be equated with the . . . State Treasury." *Id.*

Plaintiffs base their notion that tax credits are the equivalent of public funds on the "tax expenditure theory," which is a theory sometimes "used by government as a tool for analyzing budgetary policy." *Kotterman*, 972 P.2d at 619, ¶ 41. Indeed, this theory is a tool used by the General Assembly. *See* O.C.G.A. § 45-12-75 (requiring the preparation of the Tax Expenditure Report); *see also* Compl., Ex. 5 (Georgia Tax Expenditure Report for FY2013). Plaintiffs seem to ignore, however, that the theory is not limited to tax credits. It encompasses tax credits, deductions, differential tax rates, and exclusions from income (such as property tax exemptions). *See* Compl., Ex. 5, p. 3. According to the 2013 Tax Expenditure Report, deductions for charitable contributions "cost" the state $449 million—dwarfing the $58 million tax credit program challenged here. *Id.* at 14. Nevertheless, Plaintiffs contend that credits are constitutionally distinct from deductions, which they appear to concede to be perfectly proper.

The Arizona Supreme Court, while noting the "mechanical differences between deductions and credits" did not believe "such distinctions are constitutionally significant." *Kotterman*, 972 P.2d at 619, ¶ 12. *See also Toney*, 744 N.E.2d at 357-58 (noting that if tax credits were the equivalent of public funds then other tax equivalents such as deductions and exemptions could also be considered public funds); *cf. Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding [SSO] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."). "Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by taxpayers." *Kotterman*, 972 P.2d at 612, ¶ 12 (citation omitted). Absent a constitutionally

relevant distinction between credits and other tax policy equivalents, a finding that tax credits constitute public funds could subject numerous long-standing tax exemptions and deductions to constitutional challenge.

Under any common understanding of it, the term "public funds" does not encompass money donated by Georgia taxpayers to private charities just because those donations make the taxpayer eligible for a tax credit. The Scholarship Program is funded by voluntary, taxpayer contributions, *i.e.*, private dollars, to charitable organizations. No Program funding stems from public funds drawn from the public treasury. Therefore, as a matter of the plain text, the Educational Assistance Provision—which allows the General Assembly to expend "*public funds* . . . [t]o provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes," Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (emphasis added), does not govern the Scholarship Program. Accordingly, Parent-Intervenors are entitled to judgment as to Count I of the Plaintiffs' Complaint.

B. The Gratuities Clause Is Not Violated Because the Scholarship Program Furthers a Public Purpose and Generates Benefits for the State.

The Gratuities Clause states that "[e]xcept as otherwise provided in the Constitution, the General Assembly shall not have the power to grant any donation or gratuity . . . ." Ga. Const. Art. III, § VI, ¶ VI(a)(1). The Gratuities Clause is not violated when a challenged appropriation or program is "in aid of a public purpose from which great benefits are expected." *Campbell v. State Rd. & Tollway Auth.*, 276 Ga. 714, 718 (2003). Gratuities are thus a prohibition on gifts, not on public services that are paid for with government assistance. Parent-Intervenors are entitled to judgment on the pleadings as to Count II because the Scholarship Program serves a valid public purpose and benefits the State, as a matter of law.

1. Supporting Students and Parents in Their Pursuit of a Good Education Is a Valid Public Purpose.

Scholarship programs funded by tax credits have been challenged under similar "anti-gratuities" or "anti-donation" provisions in other states. Those challenges have been rebuffed because "State assistance to ensure that . . . children are well educated is a public purpose . . . ." *Toney v. Bower*, 744 N.E.2d at 363; *Kotterman v. Killian*, 972 P.2d at 621, ¶¶ 51-52 (Arizona's scholarship tax credit "served a public purpose and adequate consideration was provided for the public benefit conferred"); *see also Jackson v. Benson*, 578 N.W.2d 602, 628-29, ¶ 95 (Wis. 1998) (emphasizing that "education constitutes a valid public purpose, [and] that private schools may be employed to further that purpose"). It is difficult to conceive of any program that offers families meaningful educational options to meet their children's unique learning styles as serving anything other than a valid public purpose.

2. The Program Benefits the State of Georgia, as a Matter of Law.

The Georgia Supreme Court does not consider benefits provided to individuals to be gratuitous if the State receives something in return. *See AAA Bail Bonding Co. v. State*, 259 Ga. 411 (1989) (statute permitting remission of bond payments to bail bonding companies not gratuity, in part because the bonds were purchased with private funds, not funds from state treasury); *Haggard v. Bd. of Regents of the Univ. Sys. of Ga.*, 257 Ga. 524 (1987) (transfer of student fees to private athletic association not a gratuity because Board of Regents receives great benefits from the association); *Arneson v. Bd. of Trs.*, 257 Ga. 579 (1987) (payment of benefits to government employees in exchange for "perform[ed] services" not a gratuity).

Scholarship programs, like the one challenged here, provide tremendous benefits to the state—as a matter of law. The U.S. Supreme Court, in a decision upholding educational tax benefits under the federal Establishment Clause, noted that "[b]y educating a substantial number

of students," private schools "relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller v. Allen*, 463 U.S. 388, 395 (1983). These benefits include, but are not limited to, "the development of educational settings that . . . invigorate learning, improve academic achievement, and [that] provide additional choices for parents and children." *Kotterman*, 972 P.2d at 623, ¶ 62; *see also id.* at 616, ¶ 24 ("[T]he Arizona tax credit allows *all* taxpayers to give their funds voluntarily in support of a multi-dimensional educational system for the state, *and its benefits flow in virtually every direction.*") (second emphasis added). Arguably, the mere fact that the Program relieves the State of the obligation to educate participating students in its public schools renders non-gratuitous whatever benefits the Program provides to individual taxpayers, SSOs, and scholarship recipients. In any event, the Program produces significant benefits to the State, its taxpayers, and its citizens.

The Scholarship Program serves a valid public purpose and is of great benefit to the state. It is not a gratuitous give-away, but rather furthers the important public interest in offering Georgia families additional educational options. Accordingly, the program does not violate the Gratuities Clause.

C. The Scholarship Program Is Consistent with the Plain Language of the Establishment Clause.

Georgia's Establishment Clause states that "[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Ga. Const. Art. I, § II, ¶ VII. The Scholarship Program does not implicate the Establishment Clause, as Plaintiffs contend in Count III, for two reasons. First, under the Program, no money is "ever taken from the public treasury, directly or indirectly." And second, even if money is taken from the treasury in some fashion, it is taken "in aid of"

parents and students and not "in aid of any church, religious denomination or of any sectarian institution."

1. The Establishment Clause Is Not Implicated Because, Just Like with Tax Deductions and Tax Exemptions, No Money Is Taken, Directly or Indirectly, From the Public Treasury.

The Establishment Clause is not violated because money excluded by way of the various tax relief mechanisms available to the State is not taken "directly or indirectly" from the state treasury. The Georgia Supreme Court has previously considered—and rejected—the notion that exemptions from taxation were the equivalent of money taken from the public treasury. In *Wilkerson v. City of Rome*, the Court stated that:

> *No principle of constitutional law is violated* when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or *when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of state governments.* Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any one of these things does not become unconstitutional simply because of its susceptibility to abuse. *Our constitution*, while it takes away the temptation and power to make such discrimination either in favor of or against any one religious denomination or sect, *leaves it open to the Legislature to encourage religious instruction by exempting from taxation for the support of the State government "places of religious worship."* Code, § 5182 [1910], [§ 6554].

152 Ga. 762, 775-76 (1922) (emphasis added) (construing Ga. Const. Art. 1, § 1, ¶ 14 (Civil Code (1910), § 6370), which declared: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religionists, or of any sectarian institution.").

Georgia has long granted property tax exemptions to religious institutions and explicitly preserved those exemptions in the 1983 Constitution. Ga. Const. Art. VII, § II, ¶ IV. And

according to Plaintiffs' own pleadings, deductions for charitable contributions "cost" the state $449 million in FY2013. Compl., Ex. 5, p. 14 (Georgia Tax Expenditure Report for FY2013). Property tax exemptions and deductions for charitable contributions are of far more monetary value to religious institutions than the third-party tax credit program at issue here. Exemptions permit religious entities to escape taxation entirely. And tax-deductible contributions provide religious institutions with unrestricted funds to further their religious missions. But the tax credit at issue here requires a lengthy chain of private decisions to occur before any funds reach a religious institution—and then requires the religious institution to provide educational services in exchange for those funds. If tax exemptions and deductions do not violate the Establishment Clause, there is no principled reason why this tax credit would.[5]

2. The Establishment Clause Is Also Not Implicated Because the Scholarship Program Aids Parents and Students, Not Religious Institutions.

The Scholarship Program does not violate Georgia's Establishment Clause for a second, independent reason. The only group receiving "aid" is families, in the form of religiously neutral scholarships controlled exclusively by parents. Any money that a religious school receives as an incident of family choice is not "aid," but payment in exchange for services rendered.

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[5] *See Winn*, 131 S. Ct. at 1448 ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Toney*, 744 N.E.2d at 357 ("Giving the term [public fund] such a meaning may have broad implications for other tax credits, deductions, and exemptions from taxation . . . . We are unwilling to interpret the term "public fund" so broadly as to endanger the legislative scheme of taxation.") (citations omitted); and *Kotterman*, 972 P.2d at 618, ¶ 38 ("If [tax] credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions.").

The Scholarship Program is notable for many things,[6] including a complete absence of any state action advancing religion. As the Georgia Supreme Court noted in *Bennett v. City of LaGrange*, the Establishment Clause is concerned with state action. 153 Ga. 428, 437 (1922) ("When the *State* selects a sectarian institution of learning, and commits to such institution its wards, for whose maintenance and education it pays, it gives the most substantial aid to such an institution.") (emphasis added); *Taetle v. Atlanta Indep. Sch. Sys.*, 280 Ga. 137, 138 n.4 (2006) (same) (quoting *Bennett*, 153 Ga. at 437); *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that there can be no violation of the federal Establishment Clause unless it is "fair to say that the *government itself* has advanced religion through its own activities and influence.").

The Scholarship Program is entirely religion-neutral. Taxpayers direct their money to the SSO of their choice. Parents choose the school they want their child to attend, without any state action or influence, and apply to one of the numerous privately created SSOs for a scholarship. Any money that ultimately reaches a religious school does so only as a result of the genuine and independent choices of multiple Georgia taxpayers and parents.[7] *See Mueller v. Allen*, 463 U.S.

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[6] Such as helping over 13,000 Georgia students obtain an education in the environment best tailored to meet their individual learning styles. *See* Compl. ¶ 21.

[7] In his dissent from the denial of rehearing *en banc* in *Winn v. Arizona Christian School Tuition Organization*, Judge Diarmuid O'Scannlain explained with an insightful illustration why the absence of government action in a scholarship tax credit means there can be no government aid, direct or indirect, to religion:

> To illustrate my point, consider the following hypothetical. Assume the exact statutory scheme embodied in Section 1089: anyone can create an STO, anyone can donate to an STO, and STOs can limit their scholarships to particular types of schools. Now imagine that only agnostics decide to create STOs. Imagine further that every STO refuses to provide tuition assistance to religious schools. In short, assume there is absolutely no money

388, 400 (1983) (holding that the historic purposes of the federal Establishment Clause "simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

Moreover, those scholarships, many of which are partial and do not cover the entire cost of tuition, constitute payment for educational services rendered. No "natural and ordinary" meaning of the word "aid" would encompass a consumer purchasing goods or services from a private enterprise. Housing subsidies are not "in aid of" landlords. Medicare payments are not made "in aid of" hospitals. Thus, in the same way that foods stamps aid individuals and not grocery stores, so the Scholarship Program aids parents and students and not schools. The scholarships, issued to parents and payable to the school of their choice in exchange for an education, are not "in aid of" schools, religious or otherwise.[8]

This point is underscored by the overwhelming majority of state courts that have recently considered legal challenges to educational assistance programs (both publicly and privately funded) under similar state constitutional provisions. These courts have concluded that similar educational assistance programs "aid" or "benefit" students—not religious institutions. *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their

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> available for parents who want to send their children to a religious school. Would the parents be justified in accusing the *government* of depriving their children of school funds? Of course not.

586 F.3d 649, 662 (9th Cir. 2009), *denying reh'g of* 562 F.3d 1002 (9th Cir. 2009), *rev'd* 131 S.Ct. 1436 (2011).

[8] *Bennett v. City of LaGrange*, 153 Ga. 428, is not to the contrary because that decision did not purport to restrict private action taken under a religiously neutral state aid program.

children to attend"); *Niehaus v. Huppenthal*, 310 P.3d 983, 987, ¶ 15 (Ariz. App. 2013) ("The specified object of the ESA is the beneficiary families, not private or sectarian schools"); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 11CA1856, 2013 WL 791140, at 14, ¶ 67 (Colo. App. Feb. 28, 2013) ("[T]he purpose of the [Choice Scholarship Program] is to aid students and parents, not sectarian institutions"); *Cain v. Horne* (*Cain* I), 183 P.3d 1269, 1274, ¶ 11 (Ariz. App. 2008) (upholding voucher program under Arizona's analogous Religion Clause because "parents and children make an independent, personal choice to direct the funds to a particular school, which may be either religious or secular"), *overruled on other grounds by Cain v. Horne* (*Cain* II), 202 P.3d 1178 (Ariz. 2009); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. 2001) ("[T]he Act allows Illinois parents to keep more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children"); *Toney*, 744 N.E.2d at 360-63 (finding persuasive the reasoning in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993), that "[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Kotterman*, 972 P.2d at 620, ¶ 46 ("The way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach"); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Jackson v. Benson*, 578 N.W.2d 602, 626-27, ¶¶ 81-82 (Wis. 1998) (describing the vouchers as "life-preservers" that have "been thrown" to students participating in the program).

Finally, examining the "entire text" of the Georgia Constitution, it is abundantly clear that the framers and voters did not consider scholarship programs to be "in aid of any church, sect, cult, or religious denomination or of any sectarian institution." By including a separate provision in the Constitution authorizing the General Assembly to create scholarship programs, and fund those programs directly from the public treasury (unlike the privately funded program at issue here), it is clear that the drafters and ratifiers of the Georgia Constitution believed scholarship programs to be "in aid of" parents and children. *See* Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (granting the General Assembly authority to "provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes."). Indeed, Georgia has enacted numerous scholarship programs whose recipients are permitted to enroll in religious schools.[9] Because Plaintiffs offer no limiting principle as to why the Establishment Clause would be any less applicable to these publicly funded programs than to the privately funded program at issue here, a ruling striking down the Scholarship Program would jeopardize Georgia's many post-secondary education programs.

D. Tax Credits Generally—and the Scholarship Program Specifically—Do Not Interfere With the General Assembly's Duty to Fund an Adequate Public Education.

Plaintiffs' claim that the Scholarship Program violates the Georgia Constitution's Public Education Provision, Ga. Const. Art. VIII, § I, ¶ I, is not well-developed. Compl., Count VI, ¶ 3. The Public Education Provision states, in part, that "[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia." Plaintiffs seem

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[9] Georgia Student Finance Commission, *Eligible Institutions for the HOPE Scholarship, Zell Miller Scholarship, and Public Safety Memorial Grant*, http://www.gsfc.org/main/publishing/pdf/common/HOPE_Eligible_Institutions.pdf (last visited July 3, 2014) (including Covenant College (http:// www.covenant.edu/about/who) and Emmanuel College (http:// www.ec.edu/about-ec), both religious colleges).

to be arguing that this Provision is violated because if the Scholarship were struck down, any resulting increase in revenue to the State would be used to fund public education. *See* Compl. ¶¶ 48-54 (alleging that the Scholarship Program "redirects" $58 million dollars a year from the general fund that would otherwise be available to fund public schools). This argument must fail because even if this—or any other tax credit—were eliminated, there is no guarantee that any additional revenues raised by the General Assembly would be set aside for public education. There is simply no provable connection between any one tax credit, deduction, or exemption and the amount of money the General Assembly chooses to appropriate to meet its obligation to fund public education.

The General Assembly faces myriad funding decisions each legislative session. Even if the Scholarship Program were eliminated and even if the General Assembly saw a corresponding $58 million dollar increase in its revenues—which is a *big* "if" considering the fact that Georgia allows for so many other ways for a taxpayer to reduce his or her (or its) income tax liability through various exemptions, deductions, and other tax credits, *see* Compl. Ex. 5 (Georgia Tax Expenditure Report for FY2013)—the General Assembly would be under no obligation to direct additional state revenues to fund public education. It could justifiably direct additional revenues to public safety or mental health—or to other areas that have seen budget cuts recently. Neither the Scholarship Program nor any other means of tax relief directly correlates with the amount of money appropriated by the General Assembly to fund public education.

III. Assuming *Arguendo* that the Scholarship Program Is a Publicly Funded Educational Assistance Program it Does Not Violate Either the Gratuities Clause or the Educational Assistance Provision of the Georgia Constitution.

Plaintiffs assert the Scholarship Program is a publicly funded educational assistance program that is authorized by the Georgia Constitution's Educational Assistance Provision.

Compl., Count I, ¶ 5 ("The Tax Credit Program constitutes an educational assistance program under Article VIII, § VII, ¶ I of the Georgia Constitution."). This, of course, is a legal, not a factual, allegation and is not entitled to any weight. *Novare Grp., Inc. v. Sarif*, 290 Ga. 186, 191 (2011) (trial court not required to accept legal conclusions in consideration of motion for judgment on the pleadings). As explained in Part II.A., *supra*, Parent-Intervenors do not agree that the Scholarship Program is a publicly funded educational assistance program governed by the Educational Assistance Provision because the Program is not funded with public dollars appropriated from the state treasury.[10]

If, however, this Court were to agree with Plaintiffs that the Scholarship Program is a publicly funded educational assistance program, the constitutional analysis varies slightly for the Gratuities Clause and the Educational Assistance Provision from the analysis presented above in Parts II.A. and II.C. Parent-Intervenors include this additional section to address *arguendo* those two constitutional provisions because the analysis would vary if the Scholarship Program is construed to be a publicly funded educational assistance program governed by the Educational Assistance Provision, Article VIII, § VII, ¶ I(a)(1).

In Part III.A., *infra*, Parent-Intervenors address the plain text of the Gratuities Clause, which states that "*[e]xcept as otherwise provided in the Constitution*, the General Assembly shall not have the power to grant any donation or gratuity . . . ." Ga. Const. Art. III, § VI, ¶ VI(a)(1) (emphasis added). If the Scholarship Program is a publicly funded educational assistance program, the Educational Assistance Provision "otherwise provide[s]" that the General

[10] Parent-Intervenors do believe, however, that the Educational Assistance Provision is relevant to the proper interpretation of other provisions of the Georgia Constitution, such as the Establishment Clause. *See McDaniel v. Thomas*, 248 Ga. 632, 646 (1981) ("[e]very statement in a state constitution must be interpreted in the light of the entire document, and not sequestered from it . . . ." (alteration in original)).

Assembly may "provide grants, *scholarships*, loans, or other assistance to students and to parents of students for educational purposes," Ga. Const. Art. VIII, § VII, ¶ I(a)(1) (emphasis added). Thus, if Plaintiffs are correct that the Scholarship Program is a publicly funded educational assistance program, the Program is clearly exempted from the Gratuities Clause through the plain language of the Clause itself.

With regard to the Educational Assistance Provision, Part III.B., *infra*, demonstrates that the Educational Assistance Provision was written and intended to provide the General Assembly significant discretion over designing and implementing educational assistance programs and that, as such, the provisions that Plaintiffs cite are, according to their plain text and the intent of the drafters, permissive, not proscriptive.

A. If the Scholarship Program Is an Educational Assistance Program, Then It Is Exempt from the Plain Language of the Gratuities Clause.

The Gratuities Clause, in its entirety, states that "*[e]xcept as otherwise provided in the Constitution*, the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public." Ga. Const. Art. III, § VI, ¶ VI(a)(1) (emphasis added). If the Scholarship Program is an educational assistance program under Ga. Const. Art. VIII, § VII, ¶ I(a)(1), the Gratuities Clause is not applicable because "grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes" are "otherwise provided [for] in the Constitution." Thus, even if offering financial assistance to families in the form of private school scholarships could be considered a "donation" or "gratuity," which it is not, educational assistance programs are exempted by the plain language of the Gratuities Clause itself.

As a leading authority on the Georgia Constitution has written, "the reason that a separate constitutional provision [the Educational Assistance Provision] was added in the first place on

this subject was to ensure that these types of scholarships, loans, and grants would not be construed as a violation of the gratuities prohibition in Article III, Section VI, Paragraph VI." Melvin B. Hill, *The Georgia State Constitution* 199 (Oxford Univ. Press 1994). *See also* 1971 Op. Ga. Att'y Gen. No. 71-147 (opining that Art. III, Sec. VIII, Para. XII of the 1976 Georgia Constitution, the predecessor to the 1983 Georgia Constitution's Gratuities Clause, does not apply to state grants for educational purposes).

If Plaintiffs are correct that the Scholarship Program is a publicly funded educational assistance program, it is exempt from the Gratuities Clause, meaning Parent-Intervenors are clearly entitled to judgment on the pleadings as to Count II.

B. The Educational Assistance Provision Gives the General Assembly Wide Latitude when Creating Educational Assistance Programs.

Plaintiffs assert that the Scholarship Program is a publicly funded educational assistance program authorized by the Educational Assistance Provision of the Georgia Constitution, but claim the Program runs afoul of two sections of that Provision. Plaintiffs' first alleged violation of that Provision is that the Program is administered by SSOs, which are private charities. Plaintiffs assert that educational assistance programs must be operated by "public authorities or public corporations." Ga. Const. Art. VIII, § VII, ¶ III. Plaintiffs' second asserted violation is that because contributions to SSOs are eligible for a tax credit, the Program runs afoul of the Educational Assistance Provision's language that says contributions to educational assistance programs "may be deductible for state income tax purposes." Ga. Const. Art. VIII, § VII, ¶ I(b).

Plaintiffs' crabbed reading of the Educational Assistance Provision has no merit because the paragraphs they cite are, on their face, permissive, not proscriptive. And even if the Court found the language to be ambiguous, the debates surrounding the adoption of the Educational Assistance Provision demonstrate that the Provision's drafters intended the language to be broad

enough to allow for flexibility with the advent of new educational assistance programs.[11] As Senator Holloway, the chairman of the Subcommittee on Retirement and Scholarships, explained, the drafters intended "to have a broad section in the Constitution so that the General Assembly would have full freedom of action in doing or undoing whatever it wanted to do" regarding scholarship programs. *Subcommittee on Retirement and Scholarships: State of Georgia Select Committee on Constitutional Revision 1977-1981* at 12 (Ga. September 28, 1977) (Attach. 1 to Parent-Intervenors' Resp. Opp'n. Pls.' Partial Mot. J. Pleadings); *see also id.* at 9-10 (statement of Dr. Payton, stating that the goal is to reduce "the fifteen-odd pages of the Constitution that have to do with student aid and come up with . . . constitutional authorization for student aid programs in as few words as possible, leaving matters to the legislature to decide from year to year in the future as to how these programs should be established and operated and avoiding the necessity of having to go back and amend the Constitution."). Indeed, the goal of the 1983 Constitution was to reduce the overall length of the document, not impinge on the General Assembly's power to create educational assistance programs.[12]

Nothing in the text of the Educational Assistance Provision limits the General Assembly's authority to (1) utilize private charities, public authorities or corporations, or

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[11] In construing the meaning of constitutional language, the Georgia Supreme Court frequently looks to the understanding expressed by the people involved in the drafting and ratifying of the constitution. *Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 269-70 (2011).

[12] The drafters approved of drafting the Educational Assistance Provision in such a manner as to encourage innovative new programs to provide assistance to Georgia students. *See Subcommittee on Retirement and Scholarships: State of Georgia Select Committee on Constitutional Revision 1977-1981* at 5 (Ga. October 12, 1977) ("It was my thought that a better solution . . . would be to . . . make it broad so that . . . innovative programs could be established when it was advisable within the framework of sound public policy and acceptable educational goals." (Statement of Mr. Findley)) (Attach. 2 to Parent-Intervenors' Resp. Opp'n. Pls.' Partial Mot. J. Pleadings); *see also* Melvin B. Hill, *The Georgia State Constitution* 24 (Oxford Univ. Press 2011) ("The rallying cry for the Select Committee on Constitutional Revision had been 'brevity, clarity, flexibility'").

government agencies to administer educational assistance programs or (2) grant citizens and businesses tax credits for their contributions to such programs. Judgment on the pleadings in favor of Parent-Intervenors as to Count I is thus warranted regardless of whether the Scholarship Program is a privately funded tax credit program that is exempt from the language of the Educational Assistance Provision or a publicly funded educational assistance program governed by the Educational Assistance Provision.

1. The Constitution Allows, but Does Not Require, Public Authorities or Public Corporations to Administer Educational Assistance Programs.

Plaintiffs claim the Scholarship Program violates Paragraph III of the Educational Assistance Provision because it is administered by SSOs, which are private charitable organizations. Paragraph III states that "[p]ublic authorities or public corporations heretofore or hereafter created for such purposes shall be authorized to administer educational assistance programs and, in connection therewith, may exercise such powers as may now or hereafter be provided by law." Ga. Const. Art. VIII, § VII, ¶ III. Nothing in the text of Paragraph III demands—or even suggests—the General Assembly's power to structure educational assistance programs is limited to utilizing *only* public authorities or corporations for their administration. The General Assembly is free to create public authorities or corporations to administer educational assistance programs or not, just as it is free to fund such programs from the treasury or by encouraging private donations and granting tax relief to its citizens.

The intent behind Paragraph III was really quite simple: to provide existing public corporations and authorities the ability to remain in place after the overhaul of the 1976 Constitution.[13] *Subcommittee on Retirement and Scholarships: State of Georgia Select*

[13] *Accord State v. Regents of Univ. Sys. of Ga.*, 179 Ga. 210, 222 (1934) (confirming that the Board of Regents, a public corporation, is a "creature of the state," but "not the state, or part of

Committee on Constitutional Revision 1977-1981 at 4 (Ga. October 12, 1977) ("[W]e tried to put in the Constitution the . . . authority that would authorize the continuation of all existing programs, but enough flexibility that in the future as other ideas come along, the Constitution wouldn't be a stumbling block to them." (Statement of Mr. Findley)) (Attach. 2 to Parent-Intervenors' Resp. Opp'n. Pls.' Partial Mot. J. Pleadings).

To understand just how narrow Plaintiffs' interpretation of the Educational Assistance Provision's Paragraph III truly is, it is helpful to understand that public authorities and public corporations are distinct from official government agencies. Public authorities and corporations "are created by law and given corporate powers to pursue a public purpose. Legally, however, they are considered *instruments* of government—but not official agencies."[14] Jackson, Edwin L., *Public Authorities and Public Corporations*, New Georgia Encyclopedia (Aug. 20, 2013), http://www.georgiaencyclopedia.org/articles/government-politics/public-authorities-and-public-corporations. That means that government agencies such as Georgia's Department of Revenue and the Department of Education are not "public authorities or public corporations." While

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the state, or an agency of the state."). The 1976 Constitution specifically authorized the Board of Regents to issue scholarships. Ga. Const. Art. X, § II, ¶ VII (1976). *See also* Ga. Code Ann. § 20-3-231 (establishing the Georgia Higher Education Assistance Corporation as a public authority); Ga. Code Ann. § 20-3-233 (establishing the Georgia Student Finance Authority as a public corporation).

[14] "Public authorities and corporations . . . came into use in Georgia as a means of circumventing a constitutional provision in effect from 1877 to 1972 that essentially prohibited the state government from borrowing money." Jackson, Edwin L., *Public Authorities and Public Corporations*, New Georgia Encyclopedia (Aug. 20, 2013), http://www.georgiaencyclopedia.org/articles/government-politics/public-authorities-and-public-corporations. Because of this ban, "it was difficult, if not impossible, in Georgia to fund major capital improvements in a single fiscal year." *Id.* The Supreme Court has upheld this practice, ruling that such debt is the legal responsibility of the authority—and not the state. *See, e.g.*, *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 334 (1955) ("revenue bonds or certificates issued by a State Authority or instrumentality of the State under such provisions are not obligations or debts of the State").

Paragraph III plainly authorizes the General Assembly to continue utilizing public authorities to administer existing educational assistance programs, and to utilize them in the future, it is absurd to suggest the drafters intended to prohibit the General Assembly from utilizing other types of organizations—such as official government agencies or non-profit organizations—in the future.

Indeed, if Plaintiffs are correct that only public authorities or public corporations may administer educational assistance programs, then the Georgia Special Needs Scholarship Program, O.C.G.A. § 20-2-2110 to -2118, enacted in 2007 to allow any student with a disability to receive a state-funded scholarship to attend the private school of their parents' choice, would also be unconstitutional. The Special Needs Program is administered by two government agencies—the State Board of Education and the State Department of Education—and not by public authorities or public corporations. *See* O.C.G.A. § 20-2-2117(a).

2. The "Deductibility" Language Does Not Prohibit Other Forms of Tax Relief for Donations to Educational Assistance Programs.

Plaintiffs also claim the Scholarship Program violates Paragraph I(b) of the Educational Assistance Provision because donations to SSOs are eligible for a tax credit and not merely a tax deduction. Compl., Count I, ¶ 8. Paragraph I(b) states that "[c]ontributions in support of any educational assistance program now or hereafter established under provisions of this section *may be* deductible for state income tax purposes as now or hereafter provided by law." Ga. Const. Art. VIII, § VII, ¶ I(b) (emphasis added). The fact that the General Assembly "may" make contributions in support of educational assistance programs tax deductible, does not prohibit it from exercising its general taxing authority to make contributions to private charities in support of educational assistance programs eligible for a tax credit. Moreover, the use of the permissive "may" instead of the word "shall," coupled with the history of the Educational Assistance Provision demonstrating an intent to give the General Assembly flexibility and freedom to

innovate in the area of educational scholarships, is unassailable proof that allowing tax credits for donations to SSOs does not run afoul of this Provision.

Paragraphs I(b) and III of the Educational Assistance Provision, on their face, and as evidenced by the drafters' intent, were not intended to be prescriptive, but rather permissive. The framers desired to give the General Assembly wide latitude to create innovative educational assistance programs.

CONCLUSION

Interpreting the Georgia Constitution "in the light of the entire document," *McDaniel v. Thomas*, 248 Ga. 632, 646 (1981), rather than taking Plaintiffs' approach of sequestering individual sections and paragraphs from the whole, *see* Pls.' Mem. Law. Support Mot. J. Pleadings as to Count III, leaves no doubt that the General Assembly was well within its constitutional authority to enact the challenged Scholarship Program, which provides Georgia income-tax payers with a tax credit for their voluntary contributions to non-profit scholarship-granting organizations.

Having demonstrated with certainty that the pleadings disclose they are entitled to judgment as a matter of law, Parent-Intervenors request entry of their proposed Order granting them judgment on the pleadings as to Counts I, II, III, and VI of Plaintiffs' Complaint.

Respectfully submitted this 9th day of July, 2014.

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