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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

RAYMOND GADDY, BARRY HUBBARD, LYNN WALKER HUNTLEY, and DANIEL REINES,	
Plaintiffs,	
vs.	
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.	

INTERVENOR-DEFENDANTS' MOTION TO DISMISS

Intervenor-Defendants move this Court for an Order dismissing Plaintiffs' Complaint for lack of standing.

Respectfully submitted this 8th day of May, 2014.

By: _____

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**Pro hac vice applications pending*

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Plaintiffs,	)	
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	)	**CIVIL ACTION NO. 2014-CV-244538**
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Defendants.	)	

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS

Introduction

Georgia's Scholarship Tax Credit Program ("Scholarship Program" or "Program"), enacted in 2008, encourages individuals and businesses to donate money to Student Scholarship Organizations by granting them a dollar-for-dollar tax credit against their state income taxes. O.C.G.A. §§ 20-2A-1, *et seq.*; 48-7-29.16. Student Scholarship Organizations (SSOs) are private charitable organizations that are required to use at least 90 percent of their annual revenue to fund tuition scholarships so that students may attend the qualified private schools of their parents' choice. O.C.G.A. § 20-2A-1(3)(A). Each individual taxpayer and business has an annual cap on the amount of tax credits they can claim under the Program. O.C.G.A. § 48-7-

29.16(b)(1)-(3), (c). The aggregate amount of tax credits allowed to Georgia taxpayers is $58 million, available on a first-come, first-served basis. O.C.G.A. § 48-7-29.16(f)(1)-(2). In 2012, 13,285 students were awarded scholarships under the Program.[1] The average scholarship amount was $3,388.[2]

All Plaintiffs lack standing to bring their constitutional claims against the Program.[3] Plaintiffs rely on two bases for standing: O.C.G.A. § 9-6-24 and Georgia's taxpayer-standing doctrine under its common law. Contrary to Plaintiffs' assumption, O.C.G.A. § 9-6-24 cannot be used to challenge laws as unconstitutional. In addition, Plaintiffs fail to allege a sufficient injury to bring a claim under Georgia's limited taxpayer-standing doctrine. Plaintiffs' constitutional claims should thus be dismissed for lack of standing.

A. Plaintiffs Cannot Challenge the Constitutionality of a Law Under O.C.G.A. § 9-6-24.

Plaintiffs repeatedly cite § 9-6-24 as a basis for bringing their constitutional claims. *See, e.g.*, Compl. ¶¶ 1; 10; Count VI, ¶ 7. Section 9-6-24,[4] however, cannot be used for constitutional challenges. Instead, it can only be used to challenge a public official's failure to enforce a law as written. There is no ambiguity on this issue; two Georgia Supreme Court cases are directly on

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[1] *See* The Friedman Foundation for Educational Choice, *Qualified Education Expense Tax Credit*, http://www.edchoice.org/School-Choice/Programs/Private-School-Tax-Credit-for-Donations-to-Student-Scholarship-Organizations.aspx (visited May 7, 2014).

[2] *See id.*

[3] This brief specifically addresses why Counts I, II, III, and VI should be dismissed. Intervenor-Defendants also join, in part, the State's Motion to Dismiss Counts IV and V. Specifically, Intervenor-Defendants join the State's argument that Plaintiffs have not alleged that an actual violation of the Georgia Tax Code has occurred under Count IV. Intervenor-Defendants also join the State's argument that Plaintiffs are not entitled to mandamus relief under Count V because the courts cannot force officials to perform discretionary acts.

[4] Section 9-6-24 states, "Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced." Section 9-6-24 was formerly O.C.G.A. § 64-104.

point: *Adams v. Georgia Department of Corrections*, 274 Ga. 461, 462-63 (2001) and *Moseley v. Sentence Review Panel*, 280 Ga. 646, 646-49 (2006).

Section 9-6-24 allows a private citizen to "turn to the judicial branch to seek to compel or enjoin the actions of one who discharges public duties where the question is one of public right and the object is to procure the enforcement of a public duty." *Adams*, 274 Ga. at 461 (citation and internal quotation marks omitted). Any citizen can request such relief without having to show a "legal or special interest." *See* O.C.G.A. § 9-6-24. The pertinent question here is what constitutes "a public duty." *See id.* The Georgia Supreme Court has explained that the "public duty" of officials in the executive branch is simply to enforce a law as written—whether a law is unconstitutional is a separate issue that cannot be resolved through O.C.G.A. § 9-6-24.

In *Adams*, for instance, the Court held that citizens could not use § 9-6-24 to challenge the constitutionality of a state law designating the electric chair as the state's means of execution. *Adams*, 274 Ga. at 462-63. The citizens alleged the law constituted cruel and unusual punishment in violation of both the state and federal constitutions and thus sought to enjoin the Department of Corrections and its officials from complying with it. The Court dismissed the action for lack of standing. It found that the officials' "public duty" was simply to "enforce the statutes passed by the General Assembly." *Id.* at 462. Because the citizens challenged "the very constitutionality" of the law, the citizens sought "to prevent, rather than to enforce, the performance of a public duty." *Id.* The citizens' action was thus "contrary to" § 9-6-24. *Id.* In addition, the Court emphasized that the State's use of the electric chair is a "political issue," and

until a party had "proper" standing"[5] to challenge it in court, "the General Assembly is the sole forum for resolution of such political issues." *Id.* at 462-63.

In *Moseley*, the Supreme Court reached the same conclusion. *See* 280 Ga. at 646-48. There, a district attorney challenged a law giving a state panel the power to review and modify court-imposed prison sentences; the attorney claimed the panel's authority violated the State Constitution's separation of powers provision. Reaffirming *Adams*, the Georgia Supreme Court found that the challenge was not an attempt to enforce public duties, but was instead an attempt to "prevent [officials] from performing [their] official duties, based on a determination that the legislation pursuant to which [they] act[] is unconstitutional." *Id.* at 647. The Court thus found that the district attorney could not rely on § 9-6-24 for his standing.[6] As the Court noted, to find otherwise would necessarily mean that challenged officials have a public duty to "initiate and pursue litigation which challenges the constitutionality of [their] statutory authority. . . ." *Id.* at 647. The absurdity of such an obligation is obvious.

Here, just like in *Adams* and *Moseley*, Plaintiffs attempt to prevent the Department of Revenue and its Commissioner from administering a law as written. Specifically, Plaintiffs seek to enjoin the Defendants from "pre-approving the tax credit contribution amounts and allowing individuals and corporations in Georgia to claim the dollar-for-dollar reductions in Georgia tax liability for Qualified Education Expenses under the Tax Credit Program." Compl. at 29, ¶ C.

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[5] The Court noted that on the same day that it decided *Adams*, it decided a constitutional challenge to the electric chair brought by death row inmates, who unlike the taxpayers in *Adams*, established the requisite injury for standing. *Adams*, 274 Ga. at 463.

[6] Ultimately, the Court found the district attorney could continue the action, but only because he suffered an actual injury from the challenged statute. That was because it "interfered with his authority as a judicial officer," including by undermining his authority to negotiate binding plea agreements in his criminal cases. *Moseley*, 280 Ga. at 647-48. The Court was careful to emphasize that the district attorney's standing arose only from his official position, and that he had no standing as a private citizen. *Id.* at 647-48.

Yet the Scholarship Program requires the Defendants to do exactly this. *See, e.g.*, O.C.G.A. § 48-7-29.16(f)(3). Thus, Plaintiffs "seek to prevent, rather than to enforce, the performance of a public duty." *Adams*, 274 Ga. at 462. Accordingly, like in *Adams* and *Moseley*, Plaintiffs cannot rely on § 9-6-24 for standing to seek their requested relief.

B. Plaintiffs Also Lack Taxpayer Standing.

In addition to § 9-6-24, Plaintiffs invoke only one other basis for standing: taxpayer standing under Georgia's common law. *See, e.g.*, Compl. ¶ 9. Georgia, however, allows taxpayer standing in only very limited circumstances, and Plaintiffs do not meet the requirements here. Unlike under § 9-6-24—which plaintiffs may invoke without injury—taxpayer standing requires an actual injury to a "taxpayer's interest." *See, e.g.*, *City of E. Point v. Weathers*, 218 Ga. 133, 135 (1962). Plaintiffs have not alleged such an injury here, nor can they.

Georgia taxpayers do not have automatic standing to challenge any law as unconstitutional. As the Georgia Supreme Court frequently states, "[s]tanding to challenge a statute on constitutional grounds in Georgia depends on a showing the plaintiff was injured in some way by the operation of the statute or that the statute has an adverse impact on the plaintiff's rights." *E.g.*, *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 273 (2008); *see also Perdue v. Lake*, 282 Ga. 348, 348 (2007) (stating it is a "prerequisite to attacking the constitutionality of a statute [to] show[] that it is hurtful to the attacker").

Georgia's taxpayer-standing doctrine is no exception. Taxpayers can only challenge a government act resulting in an illegal expenditure of public revenue or an illegal increase in their taxes. *See, e.g.*, *Juhan v. City of Lawrenceville*, 251 Ga. 369, 370 (1983) (holding taxpayer lacked standing to challenge an allegedly illegal government contract because she did not allege that it resulted in "expenditure of public revenue" and she did not meet the requirements for § 9-

6-24); *Weathers*, 218 Ga. at 136-37 (explaining that even the most lenient Georgia-taxpayer-standing cases require the taxpayer to show he will be "injuriously affected" by the challenged act through the creation of illegal expenses or a "resulting increase in taxes"). Here, Plaintiffs are not challenging "expenditures of public revenue," nor have they alleged the Program will increase their taxes. Instead, they are challenging a Program that allows private parties to voluntarily donate to private organizations in exchange for a tax credit.

While the Georgia Supreme Court has never considered a taxpayer's standing to challenge a tax credit program, the U.S. Supreme Court—to which the Georgia courts often turn on standing questions—has.[7] *See Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 434 (2007) ("In the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."). In *Arizona Christian School Tuition Organization v. Winn,* a majority of the U.S. Supreme Court found that state taxpayers lacked standing to challenge an Arizona tax-credit school-choice program under the federal Establishment Clause. *See* 131 S. Ct. 1436, 1440 (2011). The program was almost identical to the one at issue here: it allowed individuals to donate to private scholarship organizations, including to organizations providing scholarships to students attending religious schools, in exchange for dollar-for-dollar tax credits. *Id.* at 1440-41. The majority found that it was purely speculation that the program could ever harm the taxpayer plaintiffs, providing two primary reasons for this conclusion.

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[7] The Georgia Supreme Court did address a taxpayer's challenge to an allegedly illegal tax *exemption* for dealer-owned vehicles, but that case does not help Plaintiffs here. *See Lowry v. McDuffie,* 269 Ga. 202 (1998). The Court found the taxpayer was injured because "[a]n illegal exemption places a greater tax burden upon those taxpayers being required to pay." *Id.* at 203 (citation and internal quotation marks omitted). But here, unlike in *Lowry*, the Court cannot assume that Plaintiffs' tax burden will increase because of the Program. As discussed below, the mechanics of the Program show it may actually save the State money, or at the very least, be revenue neutral. *See Winn*, 131 S. Ct. at 1444.

First, contrary to costing the state revenue, the Court found that the program "might relieve the burden" placed on the public schools and the State budget.[8] *Id.* at 1444. That was because "the average value" of a "scholarship may be far less than the average cost of educating an Arizona public school student." *Id.* (citing *Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students[,] [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.")). *See also Weathers*, 218 Ga. at 134, 136-37 (finding taxpayers lacked standing to bring a constitutional challenge to the city's ban on malt sales, which they alleged would result in the loss of $90,000 in city revenue annually, because "no facts [were] alleged to show that such expenses will be incurred.")

Second, *Winn* emphasized a second, independent reason that the taxpayers lacked standing to challenge the program: "tax credits" are not "government expenditures." *Id.* at 1447. As the Court explained, when "taxpayers choose to contribute to [scholarship organizations], they spend their own money, not money the State has collected from respondents or from other taxpayers." *Id.* at 1447. Thus, neither their donations nor the resulting tax credits can be considered expenditures from the state treasury. *See also Juhan*, 251 Ga. at 370 (holding taxpayer had no standing to challenge allegedly illegal government contract because she did not allege it would have resulted in "expenditures of public revenue"); *cf. Flast v. Cohen*, 392 U.S. 83 (1968) (allowing taxpayer standing to challenge the government's *direct* financing of instruction and supplies for sectarian schools).

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[8] The U.S. Supreme Court also found that "[e]ven assuming" that the program would adversely affect the state budget, it was "speculation" that state lawmakers would "react to revenue shortfalls by increasing [the plaintiffs'] tax liability." *Winn*, 131 S. Ct. at 1444. The same is true here. Plaintiffs have not alleged, nor can they show, that their taxes will increase as a direct result of the Program. This is despite the fact that the Scholarship Program has already been in place for over 5 years.

In fact, several courts have addressed whether tax credits for donations to school-choice scholarship programs constitute government expenditures, and like in *Winn*, virtually all of them have held they do *not*. *See Kotterman v. Killian*, 972 P.2d 606, 617-18 (Ariz. 1999) (finding the term "public money" did not encompass tax credits as "[n]o money ever enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials") (including string cite in support); *Toney v. Bower*, 744 N.E.2d 351, 357-378 (Ill. App. 2001) (finding that the terms "public fund" and "appropriation" were not broad enough to encompass a tax credit, and concluding that to find otherwise would "endanger the legislative scheme of taxation"); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. 2001) (same). The only court to hold otherwise is a New Hampshire state trial court, but its decision is currently on appeal at the state supreme court. *See Duncan v. State of New Hampshire*, No. 219-2012-CV-00121, * 20-26 (N.H. Super. Ct., June 17, 2013).

Here, just like in *Winn*, Plaintiffs have not adequately alleged that the Scholarship Program will harm their interests as taxpayers—nor could they truthfully allege this.[9] Plaintiffs have only alleged that the Program causes them to "directly or *indirectly*" shoulder "a greater portion of Georgia's tax burden." Compl. ¶ 9 (emphasis added). Not only is this allegation purely speculative, but such an indirect and amorphous injury is insufficient to establish standing. *See, e.g., Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 354 (2006) (stating a plaintiff's alleged injury must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.") (citations omitted) (internal punctuation omitted).

[9] Oddly, although Dr. Reines complains that he has no way of determining whether his tax credit donations are well spent, he does not state whether or not he asked the SSO he donates to for information on how it spends its donations.

First, like in *Winn*, Plaintiffs cannot show that the Program will cost the state money. The State is already constitutionally obligated to provide each child with a free education, *see* Ga. Const. Art. VIII, § 1, ¶ 1, and many Program scholarships are far less than the $8,983 that the State spends on average to educate each public school student.[10] *See* Compl. ¶ 26 (stating the $8,983 average). In addition, the Program prohibits SSOs from giving even one scholarship that is higher than this average. O.C.G.A. § 20-2A-2(1); Compl. ¶¶ 25-26. Thus, the Program "might" very well save the State money, or at the very least, be revenue neutral. *See Winn*, 131 S. Ct. at 1444. Any suggestion to the contrary is unsupported speculation. *See, e.g., Manlove v. Unified Gov't of Athens-Clarke County*, 285 Ga. 637, 638 (2009) ("[T]hreat of injury in fact for standing purposes must 'be actual and imminent, not conjectural or hypothetical.'") (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

Second, just as in *Winn*, *Kotterman*, *Toney*, and *Griffith*, the Program does not spend one cent of the money that Plaintiffs paid into the State treasury; instead, it merely gives tax credits to third parties. Plaintiffs themselves cannot even confidently allege that the Program directly harms them. *See* Compl. ¶ 9 (stating the Program "directly or *indirectly*" harms the Plaintiffs) (emphasis added). Thus, just as in *Winn*, Plaintiffs have fallen fall short of alleging the "concrete" and "particularized" injury needed for standing. *See, e.g., Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 354 (Ga. 2006).

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[10] According to the GOAL Scholarship Program, the largest SSO in the state, GOAL gave 3,676 scholarships in 2013, for an average amount of $3,597. Georgia GOAL Scholarship Program, *Georgia Student Scholarship Organization Transparency and Accountability Survey* (Dec. 16, 2013) at 7-8, *available at* http://www.goalscholarship.org/docLib/20131219_TransparencyandAccountabilitySurvey121613.pdf. The Friedman Foundation for Educational Choice reports similarly low average scholarship amounts. *Qualified Education Expense Tax Credit*, http://www.edchoice.org/School-Choice/Programs/Private-School-Tax-Credit-for-Donations-to-Student-Scholarship-Organizations.aspx (visited May 7, 2014) (average scholarship is $3,388).

Finally, Plaintiff Daniel Reines' voluntary contributions to the Program do not change the analysis: like the other three Plaintiffs, Dr. Reines lacks an injury sufficient to challenge the Program's constitutionality. Compl. ¶ 5. First, Dr. Reines does not even allege that he believes that the Scholarship Program is unconstitutional. Instead, Dr. Reines claims only that his "injury" arises from the Program's "lack of accountability" under the Georgia Tax Code. Compl. ¶ 5. Thus, he lacks standing to challenge the Program's constitutionality. *See, e.g.*, *Atlanta Taxicab Co.*, 281 Ga. at 345 ("Before a statute can be attacked by anyone on the ground of its unconstitutionality, he must show that its enforcement is an infringement upon his right of person or property, and that such infringement results from the unconstitutional feature of the statute upon which he bases his attack.") (citation omitted); *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 93 (1978) (holding taxpayer could not bring constitutional challenge to tax law because the "alleged statutory deficiency has caused this taxpayer no harm, injury, or other adverse effect"). In addition, Dr. Reines could simply stop this supposed "injury" by ceasing contributions to the Program. But instead, he "continues" to voluntarily participate. Compl. ¶ 5. Such a self-inflicted "injury" is not sufficient for standing.

Thus, all Plaintiffs lack sufficient injury under Georgia's limited taxpayer-standing doctrine to bring a constitutional challenge to the Program.

Conclusion

Plaintiffs lack standing to challenge the Program on constitutional grounds. Section 9-6-24 cannot be used to challenge laws as unconstitutional. Plaintiffs also fail to allege the requisite injury to bring a claim under Georgia's limited taxpayer-standing doctrine. Their constitutional claims should be dismissed.

Dated May 8, 2014.

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Proposed Order

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Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

Intervenor-Defendants' Motion to Dismiss is hereby granted.

So ordered, this ___ day of _____, 2014.

_____

Hon. Kimberly M. Esmond Adams

CERTIFICATE OF SERVICE

Pursuant to O.C.G.A. § 9-11-5, a copy of this proposed Motion, the Memorandum in Support thereof, and a proposed Order granting the Motion, each of which are proffered for filing should the Parent-Applicants' Unopposed Motion for Leave to Intervene be granted, have been hand-delivered upon the following parties, this 8th day of May, 2014:

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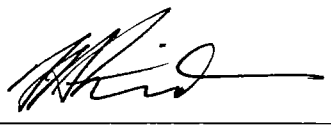
By: 

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