IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RAYMOND GADDY, BARRY HUBBARD, LYNN WALKER HUNTLEY, and DANIEL REINES,

Plaintiffs,

v.

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.

Civil Action No. 2014-CV-244538

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS

Plaintiffs Raymond Gaddy, Barry Hubbard, Lynn Walker Huntley, and Daniel Reines (collectively, "Plaintiffs"), respectfully submit this response in opposition to Intervenor-Defendants Ruth Garcia, Robin Lamp, Teresa Quinones, and Anthony Seneker (collectively, "Intervenors") Motion to Dismiss Plaintiffs' Verified Complaint for Writ of Mandamus and Injunctive Relief (hereinafter "Complaint") against Defendants' Georgia Department of Revenue and Douglas MacGinnitie (collectively, "Defendants").

Plaintiffs bring this lawsuit challenging the constitutionality of House Bill 1133 ("HB 1133"), codified in O.C.G.A. § 20-2A-1 *et seq.* (hereinafter the "Tax Credit Scholarship Statute" or "Tax Credit Program"), claiming the Tax Credit Program violates the Georgia Establishment Clause, the Educational Assistance Provisions of the Georgia Constitution, and the Gratuities Clause. Plaintiffs also seek mandamus relief to force Defendants compliance with provisions of the Tax Credit Program statute and the Georgia Tax Code. Plaintiffs have standing to assert these claims 1) pursuant to the principles of O.C.G.A. § 9-6-24 because this case involves a question of public right and seeks enforcement of a public duty, and 2) under Georgia's taxpayer standing jurisprudence which recognizes taxpayers' rights to assert claims where the State is allowing illegal tax benefits.

Intervenors contest Plaintiffs' grounds for standing, claiming 1) that Plaintiffs do not have standing to challenge the constitutionality of a statute or stop Defendants from enforcing the Tax Credit Program as written, as well as 2) that Plaintiffs have not shown taxpayer standing because the Tax Credit Program does not involve an illegal expenditure of public revenue. Intervenors' position lacks merit. To make their argument, Intervenors misconstrue Plaintiffs basis for standing by asserting that Plaintiffs are seeking mandamus to stop the enforcement of the Tax Credit Program. Plaintiffs are not. Instead, Plaintiffs are seeking an injunction. Georgia courts have long held—as recognized by the cases cited by Intervenors—that O.C.G.A. § 9-6-24 gives taxpayers standing to bring claims for injunctive relief to challenge the authority provided to a public official where the authority is unlawfully granted, and therefore the actions taken by the public official pursuant to that authority are ultra vires. In addition, on a motion to dismiss, the Court is to accept Plaintiffs' allegations as true. And Plaintiffs' Complaint specifically alleges the Tax Credit Program results in an illegal government expenditure that injures Plaintiffs

by increasing the burden they are required to pay. *See Lowry v. McDuffie*, 269 Ga. 202, 203 (1998) ("Each taxpayer has an interest in seeing that no other taxpayer is illegally exempted from the payment of such tax. . . . An illegal exemption places a greater tax burden upon those taxpayers being required to pay.").

Intervenors' Motion to Dismiss should be denied.

SUMMARY OF RELEVANT FACTS[1]

Under the Tax Credit Program, individuals and corporations receive dollar-for-dollar tax credits for Qualified Education Expenses of donations and contributions made to private Student Scholarship Organizations ("SSOs"). Compl. ¶ 34. Qualified Education Expenses are defined by O.C.G.A. § 48-7-29.16(a)(2) as a donation by a taxpayer during the tax year to an SSO operating under the Tax Credit Program, which is used for tuition and fees at a qualifying private school, and for which a credit under the statute is claimed and allowed. *Id.* The scholarship amounts are not *de minimus*, as the private school can receive up to $8,983.00 towards the full amount of a student's tuition – representing the average state and local expenditures per public school student. *Id.* ¶¶ 25-26; Compl. Ex. 4.

Through the tax credits, individuals and corporations in Georgia are given a dollar-for-dollar reduction in their total tax liability otherwise imposed by Georgia's income tax statute. *Id.* ¶ 35. The tax credits – provided by the Georgia Legislature to incentivize individuals and corporations to donate money to SSOs – are the sole source for making the scholarship funds available to students. Compl. ¶ 39. The tax credits for Qualified Education Expenses provide a substantially greater benefit to the individuals and corporations receiving the credits than would a mere tax deduction. *Id.* ¶ 40. Whereas a tax deduction is an amount subtracted from gross

[1] For a full explanation of the facts at issue in the litigation, see Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, filed on June 9, 2014.

income when calculating adjusted gross income, or from adjusted gross income when calculating taxable income, a tax credit is subtracted directly from total tax liability, resulting in a dollar-for-dollar reduction in tax liability. *Id.* ¶ 41. For example, for a taxpayer in Georgia, a $1,000 tax deduction lowers the taxpayer's tax bill by at most $60, but a $1,000 tax credit lowers the taxpayer's tax bill by the full $1,000, regardless of which tax bracket the taxpayer is in. *Id.* ¶ 42.

Tax expenditures, like the tax credits given to individuals and corporations in Georgia for Qualified Education Expenses, represent an allocation of government resources in the form of taxes that could have been collected and appropriated if not for the preferential tax treatment given to the expenditure by the Georgia Legislature. *Id.* ¶ 43. The State specifically refers to tax credits as tax expenditures and also includes Qualified Education Expenses in the yearly Georgia Tax Expenditure Report. *Id.* ¶ 44; Comp. Ex. 5. Tax credits are referred to as tax expenditures by the State because they represent tax revenues that would have otherwise been generated if not for their special treatment in the Georgia Tax Code. Compl. ¶ 45. The amount of tax credits available for Georgia taxpayers set by the Georgia Legislature is currently $58 million. *Id.* ¶ 51. The 2014 amount of $58 million in tax credits already has been claimed. *Id.* ¶ 53.

The Department of Revenue and Defendant MacGinnitie pre-approve the contribution amounts of individuals and taxpayers in Georgia, on a first-come first-served basis, and then ensure that the proper documentation is supplied to support the taxpayers' claims to Qualified Education Expense credits when taxpayers file their tax returns. *Id.* ¶ 38. In all other respects, the Tax Credit Scholarship Statute empowers private, self-appointed SSOs and private schools to administer the program.

SSOs openly acknowledge that they are accepting and redirecting Georgia tax dollars to be used for scholarships for students to attend private and mostly religious schools. *Id.* ¶ 55.

Many of these SSOs attempt to incentivize taxpayers in Georgia to donate to the SSOs by pointing out that the donations are Georgia tax dollars, which can be paid to the SSOs instead of the Department of Revenue under the Tax Credit Program. *Id.* ¶ 56; *see also id.* ¶¶ 57-61 (noting examples of religious and non-religious SSOs openly acknowledging the use of Georgia tax funds to provide scholarships). Like the SSOs, numerous private schools enthusiastically ask parents and other Georgia taxpayers to redirect their Georgia tax dollars for the benefit of the schools and their religious missions, as well as the students receiving scholarships. *Id.* ¶ 62; *see also id.* ¶¶ 63-67 (providing examples of religious and non-religious private schools opening acknowledging donors can redirect their tax dollars for the benefit of the schools).

Religious private schools participating in the Tax Credit Program also recognize the tremendous benefits received by schools under the Tax Credit Program. For example, Grace Christian Academy's website explains:

> **How does this strengthen our ministry?** Your contribution helps strengthen and grow GRACE by helping to increase enrollment. The school will be able to help more families in need of financial assistance by accessing funds that are in the new scholarship program without taxing the funds that we raise annually out of our own budget to help families in need. As our school grows, our students will be directly impacted, as we are able to add more services, more programs, more staff, more technology, more facilities, and more educational and ministry opportunities.
>
> **This is a great tool we have been given to help grow our ministry to Christian families** and we encourage you to consider becoming involved in the program.

Id. ¶ 66; Compl. Ex. 12.

Plaintiffs are Georgia taxpayers and have an interest in seeing that no other Georgia taxpayer receives an illegal tax credit under the Tax Credit Program. Compl. ¶ 9. Because illegal tax credits place a greater tax burden on other taxpayers, Plaintiffs are injured by having to shoulder, directly or indirectly, a greater portion of Georgia's tax burden because of the illegal

tax credits received by others under the Tax Credit Program. *Id.* ¶ 9. Defendant Georgia Department of Revenue is vested with authority and responsibility for implementing relevant provisions of the Tax Credit Program and Georgia Tax Code in compliance with the Georgia Constitution. *Id.* ¶ 11. Defendant MacGinnitie has ultimate authority and responsibility for implementing the provisions of the Tax Credit Program and for overseeing the Department of Revenue's compliance with its statutory provisions, the Georgia Tax Code, and the Georgia Constitution. *Id.* ¶ 13.

Intervenors are parents of student recipients of scholarships under the Tax Credit Program.

STANDARD OF REVIEW

To sufficiently state a claim in Georgia, a plaintiff must simply state "[a] short and plain statement of the claims showing that the pleader is entitled to relief." O.C.G.A. § 9-11-8(a)(2)(A) (2006). The standard for evaluating a motion to dismiss under Georgia Rule of Civil Procedure 12(b)(6) allows dismissal "*only* where a complaint shows *with certainty* that the plaintiff would not be entitled to relief *under any state of facts* that could be proven in support of his claim." *Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc.*, 297 Ga. App. 28, 28 (2009) (internal quotation marks omitted) (emphasis added).

ARGUMENT

I. PLAINTIFFS HAVE STANDING PURSUANT TO PRINCIPLES OF O.C.G.A. § 9-6-24 TO SEEK INJUNCTIVE RELIEF TO STOP DEFENDANTS' ULTRA VIRES ACT OF IMPLEMENTING THE UNCONSTITUTIONAL TAX CREDIT PROGRAM

Intervenors rely on two cases, *Adams v. Georgia Department of Corrections*, 274 Ga. 461 (2001) and *Moseley v. Sentencing Review Panel*, 280 Ga. 646 (2006), to argue that the constitutionality of a statute cannot be challenged under O.C.G.A. § 9-6-24, and that O.C.G.A. § 9-6-24 cannot be used to prevent an official from administering a law as written. These

arguments misconstrue the holdings in *Adams and Moseley*, as well as Plaintiffs' asserted basis for standing.

The Georgia Supreme Court in *Adams* and *Moseley* found that *mandamus* under O.C.G.A. § 9-6-24 could not be sought against the defendants to *prevent* enforcement of a public duty, because mandamus relief is intended to *compel* performance of a public duty. *See Adams*, 274 Ga. at 462, 463 (noting that "appellants seek to prevent, rather than to enforce, the performance of a public duty," and finding that because appellants sought "to block, rather than to enforce, the performance of a public duty, the trial court properly dismissed the mandamus petition for lack of standing."); *Moseley*, 280 Ga. at 646 (noting that the plaintiff "could certainly have sought to compel the [defendant] to perform the public duties that the General Assembly ha[d] conferred upon it. However, [the plaintiff] actually sought the converse. [The plaintiff's] objective was to prevent the [defendant] from performing its official duties, based on a determination that the legislation pursuant to which it act[ed] was unconstitutional."). Here, Plaintiffs do not attempt to seek *mandamus relief* under O.C.G.A. § 9-6-24 to *stop* Defendants from implementing the Tax Credit Program, and instead ask for *injunctive* relief pursuant to the principles of O.C.G.A. § 9-6-24 to *prevent* Defendants' unconstitutional activities.[2] This is entirely proper, as O.C.G.A. § 9-6-24 serves a basis for standing to seek injunctive relief to prevent the unlawful acts of a public official. Indeed, *Moseley* specifically recognizes the propriety of such actions. *See Moseley*, 280 Ga. at 648-49 (noting that the legal principle set forth in O.C.G.A. § 9-6-24 "applies equally when determining standing in other contexts"

[2] Plaintiffs note that they do seek mandamus relief to compel Defendant MacGinnitie's compliance with his non-discretionary duties imposed by the provisions of the Georgia Tax Code and Tax Credit Program. *See* Compl. Count V. As this claim for mandamus relief properly seeks to compel his compliance with the statute, rather than stopping him from enforcing the law as written, this claim is consistent with the holdings in *Adams* and *Moseley*.

involving equitable relief, and finding the plaintiff's invocation of the legal principle set forth in O.C.G.A. § 9-6-24 was set forth as the authority for him to challenge the allegedly unconstitutional statute at issue). The Court in *Adams* also expressly recognized a plaintiff's standing for injunctive relief, citing to the long line of Georgia Supreme Court cases finding that O.C.G.A. § 9-6-24 gives taxpayers standing to bring claims for injunctive relief to challenge the authority provided to a public official where the authority is unlawfully granted, and therefore the actions taken by the public official pursuant to that authority are ultra vires. *See Adams,* 274 Ga. at 462 (citing *League of Women Voters, Inc. v. Atlanta*, 245 Ga. 301 (1987), which found that taxpayers had standing for their claim for injunctive relief under O.C.G.A. § 9-6-24 to prevent the city council from recognizing or giving effect to appointments made by the President Pro Tempore of the city council, claiming he had no authority to make the appointments, and *Arneson v. Bd. of Trustees of the Employees' Retirement Sys. of Ga.*, 257 Ga. 579, (1987), concluding that taxpayers could challenge the defendants' award of retirement benefits, even though the taxpayer plaintiffs were not beneficiaries of the retirement system, because "[t]he public may not be estopped by the acts of an officer done in the exercise of an unconferred power" and "[p]ublic responsibility demands public scrutiny.")); *see also Brissey v. Ellison*, 272 Ga. 38, 39 n.4 (2000) ("While O.C.G.A. § 9-6-24 has been codified in the 'Mandamus' article of Chapter 6 of Title 9, this Court has held that its principles are not confined to mandamus cases, and has authorized its use as a basis for standing to seek injunctive relief to restrain allegedly ultra vires acts of public officials where the question is one of public right and the object is to procure enforcement of a public duty.").

If statutory authority granted by the Georgia Legislature violates the Georgia Constitution, the statutory authority is undoubtedly unlawful, making any action taken pursuant

to that authority ultra vires. *See Newsome v. City of Union Point*, 249 Ga. 434, 437 (1982) (noting that the resident and taxpayer's claim for equitable relief to declare void an ordinance enacted by the city based on the claim the ordinance was unconstitutional, if "valid, could potentially make the municipality's actions ultra vires so as to give him standing."); *Atlanta Journal v. Hill*, 257 Ga. 398, 400 (1987) (finding that public officers had no lawful authority to act under a delegation of authority that violated the Constitution). A claim that other taxpayers have been granted a tax benefit that violates the Georgia Constitution has been found to constitute an allegation of ultra vires actions by public officials. *See Lowry*, 269 Ga. at 204 n.6 (noting that "[i]n the present case, [the plaintiff's] contention that dealers are granted an exemption that violates the Georgia Constitution raises the possibility of ultra vires actions by public officials."). Accordingly, Plaintiffs' have asserted valid claims for standing based on their allegations that Defendant MacGinnitie is violating the Georgia Constitution through his implementation of the unconstitutional Tax Credit Program. The holdings from *Adams* and *Moseley* support Plaintiffs' standing to bring this claim.

Finally, contrary to Intervenors' contention, *Adams* did not hold that the constitutionality of a statute can never be challenged under O.C.G.A. § 9-6-24. Rather, *Adams* held that O.C.G.A. § 9-6-24 does not provide general standing to challenge constitutional provisions aimed at *private* rights. In particular, the decision hinged on the conclusion that the cruel and unusual punishment protections of the Eighth Amendment of the United States Constitution and the comparable Georgia constitutional provisions were not intended to benefit the public at large, as is required for O.C.G.A. § 9-6-24 to apply. *See Adams*, 274 Ga. at 462 (reasoning that "[t]he cases which recognize the existence of standing under O.C.G.A. § 9-6-24 involve enforcement of a duty that 'is . . . of a public nature, affecting the people at large," and "[t]he duty in question

must be one which affects the general public rather than a private individual," but concluding "[t]he Eighth Amendment of the United States Constitution and the comparable Georgia constitutional provision are not intended to benefit the public at large." (quoting *Bd. of Comm'rs of the City of Manchester v. Montgomery*, 170 Ga. 361, 365 (1930))). Here, the Tax Credit Statute certainly affects the "people at large" because all taxpayers like Plaintiffs are burdened by the illegal tax credits. *See Lowry v. McDuffie*, 269 Ga. 202, 203 (1998) ("Each taxpayer has an interest in seeing that no other taxpayer is illegally exempted from the payment of such tax. . . . An illegal exemption places a greater tax burden upon those taxpayers being required to pay.").

II. PLAINTIFFS HAVE TAXPAYER STANDING UNDER GEORGIA LAW

Intervenors also contend that Plaintiffs have not adequately alleged Georgia taxpayer standing, claiming Plaintiffs must show a government action resulting in an illegal expenditure of public revenue or an illegal increase in their taxes, and that the Tax Credit Program does not amount to either.[3] Intervenors' argument is misguided for a motion to dismiss where Plaintiffs' allegations are to be taken as true. Plaintiffs allege that Qualified Education Expense tax credits constitute a tax expenditure, which represent an allocation of government resources in the form of taxes that could have been collected and appropriated if not for the preferential tax treatment given to the expenditure by the Georgia Legislature. Compl. ¶ 43. Plaintiffs allege that the State specifically refers to tax credits as tax expenditures and also includes Qualified Education Expenses in the yearly Georgia Tax Expenditure Report. *Id.* ¶ 44; Comp. Ex. 5. Plaintiffs also allege tax credits are referred to as tax expenditures by the State because they represent tax revenues that would have otherwise been generated if not for their special treatment in the Georgia Tax Code. Compl. ¶ 45. Given Plaintiffs' allegations that the Qualified Education

[3] Intervenors' arguments boil down to whether the tax credits constitute public funds, which is an issue extensively addressed in Plaintiffs' Response to Defendants Motion to Dismiss.

Expense tax credits violate the Georgia Constitution, Plaintiffs have alleged that the tax credits result in illegal expenditures of public revenue. These allegations are sufficient for Plaintiffs' taxpayer standing under Georgia law.

A. Illegal Tax Benefits Result in Injuries to Other Taxpayers Under Georgia Law.

Georgia law recognizes that if the tax credits are illegal, Plaintiffs as taxpayers are injured per se. The Supreme Court of Georgia has specifically found that taxpayers have an interest in seeing that no other taxpayer illegally receives a tax benefit, as an illegal tax benefit places a greater burden upon those taxpayers being required to pay without the benefit. *Lowry*, 269 Ga. at 203. The burden suffered by taxpayers not receiving the illegal tax benefit authorizes their standing to challenge the constitutionality of the statute providing the illegal tax benefit. *See id.* (finding that the plaintiff had standing to challenge the constitutionality of the statute granting tax exemption at issue which he alleged violated multiple provisions of the Georgia Constitution). This notion that an illegal tax benefit harms and therefore confers standing on those not receiving it is not unique to Georgia. *See e.g.*, *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (2011) ("It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds. . . . This is because the illegal expenditure of general public funds may always be said to involve a special injury to the taxpayer not suffered by the public at large, *i.e.*, nontaxpaying citizens.") (internal citations and quotations omitted); *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007) ("[I]t is generally recognized that a Minnesota taxpayer has a broader basis for standing than a litigant in federal court . . . it is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys.") (internal citations and quotations omitted); *Jacob v. State*, 12 Neb. App. 696, 701 (2004) ("A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for

governmental purposes.") (internal citation omitted); *Eastern Missouri Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 46 (Mo. 1989) ("In order to maintain a suit, taxpayers need not prove their taxes will increase because of the alleged expenditure. The impact on the taxpayer is presumed.") (internal citations omitted).

B. *Winn* Has No Bearing on this Case.

Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011), has zero bearing on this case, but Intervenors rely so heavily on it that Plaintiffs are compelled to address it. *Winn* did not analyze or in any way provide guidance on proper Georgia taxpayer standing. Rather, in *Winn*, the U.S. Supreme Court addressed whether the plaintiffs had *Federal Article III* standing to challenge a Tax Credit Program in Arizona *under the Federal Establishment Clause*. The Court found that the plaintiffs lacked *federal* standing because they challenged a tax credit benefitting religious schools, which under the *Federal Establishment Clause* principles did not injure the taxpayer plaintiffs (or which injury was speculative), as opposed to a direct governmental expenditure, which would cause a traceable injury to taxpayers. Generally speaking, and as discussed by the Court in *Winn*, *federal* (wholly unlike Georgia) "standing cannot be based on a plaintiff's mere status as a taxpayer." *Winn*, 131 S. Ct. at 1442-43. After rejecting general taxpayer standing, the Court turned to a narrow exception to *federal* standing requirements carved out by the *Flast v. Cohen* decision, a case involving a particular *federal* taxpayer standing exception under the *Federal Establishment Clause*. *Id.* Under the *Flast* exception, *federal* taxpayer standing is acknowledged when "individuals suffer a particular injury" under the *Federal Establishment Clause* because "their property is transferred [directly] through the Government's treasury to a sectarian entity." *Id.* at 1438. Using *Flast* as controlling precedence, the *Winn* Court analyzed the distinction between the tax credits complained of by the plaintiffs and the tax expenditures at issue in *Flast*. For the purposes of determining the

requisite injury under the *federal* standing doctrine, the Court found that the tax credits at issue did not involve *direct* government expenditure and thus were too speculative to satisfy the specific injury requirements.

The *Winn* Court's *federal* injury-focused analysis of direct government expenditures is meaningless here. Discussed above in Section I, and II(A), Georgia law is very distinct from federal standing law and the exception carved out by *Flast*. *Winn*'s injury-focused analysis is wholly absent from Georgia's taxpayer standing rules, which do not require any specialized harm and recognize that Plaintiffs are burdened by an unconstitutional tax statute merely by being taxpayers. Any extension of *Winn* to the present case would disregard and re-write Georgia standing law.

1. Even Applying *Winn*'s Analysis, Plaintiffs Have Standing Under the *Flast* Exception.

The Court in *Flast,* and subsequently *Winn,* analyzed the question of injury for standing purposes under the lens of the Federal Establishment Clause, which looks for (and only considers harm to come from) direct government expenditures in aid of sectarian institutions. Although specific injury is not a requirement for standing under Georgia law, Plaintiffs meet the *Flast* exception because Georgia's Establishment Clause considers even *indirect* support from the State's funds to sectarian institutions injurious to taxpayers and, consequently, unconstitutional. "No money shall ever be taken from the public treasury, directly **or indirectly**, in aid of any church, sect, cult, or religious demonization or of any sectarian institution." GA. CONST. ART. I, § II, ¶ VII.

Tax credits, at a minimum, constitute money taken indirectly from the State Treasury. In this regard, Justice Kagan's analysis for the dissent in *Winn*'s 5-4 decision could not be more on

point when considered in light of Georgia's more expansive Establishment Clause language. Justice Kagan noted that "[t]ax breaks c[ould] be viewed as a form of government spending…even assuming the diverted tax funds d[id] not pass through the public treasury." *Winn*, 131 S. Ct. at 1456 (Kagan, J., dissenting) (internal citations omitted). "Both special tax benefits and cash grants represent[ed] a charge made upon the state," and "both deplete[d] funds in the government's coffers by transferring money to select recipients." *Id.* And "[r]egardless of which mechanism the State use[d], taxpayers ha[d] an identical stake in ensuring that the State's exercise of its taxing and spending power complie[d] with the Constitution." *Id.* at 1457. Kagan's dissent stands for the common sense position that tax credits are tantamount to *direct* expenditures from the public treasury to sectarian institutions, and thus sufficiently injurious to taxpayers to warrant standing under federal law. Given *Winn*'s 5-4 split on whether tax credits represent *direct* expenditures and Kagan's strong analysis for the dissent there can be no doubt that the *Winn* court would find that tax credits amount at least to *indirect* expenditures. Therefore, the tax credits allowed through the Tax Credit Program are injurious to Plaintiffs under a *Winn* analysis as they run afoul of Georgia's prohibition on *indirect* expenditures to sectarian institutions. And as such, though not the appropriate analysis, Plaintiffs have standing even under an application of strict federal standing rules to Georgia's Establishment Clause. Clearly, Plaintiffs have standing under Georgia's more relaxed rules.

2. Intervenors' Application of *Winn* is Misplaced and Wrong.

Intervenors contend that "like in *Winn*, Plaintiffs cannot show that the Program will cost the state money" and "the Program does not spend one cent of the money that Plaintiffs paid into the State treasury." (Intervenors' Motion to Dismiss, p. 9). Whether the Tax Credit Program costs the State money is immaterial to the validity of Plaintiffs' claims. But in any event, Intervenors' reliance on *Winn* to contend that the Tax Credit Program may save the State money,

or at least be revenue neutral, is inappropriate at the motion to dismiss stage because it implicates a factual dispute that cannot be decided without discovery. Intervenors' speculation that the Program may save the State money is no more sound than Plaintiffs allegations that it costs the State money.[4]

Intervenors bold contention that the Tax Credit Program, like in *Winn*, "does not spend one cent of the money that Plaintiffs paid into the State treasury" is misplaced and simply wrong. (Intervenors' Motion to Dismiss, p. 9). It is misplaced because the injury under *Winn* involved a question of direct spending from the State Treasury—that under the Federal Establishment Clause only direct spending was prohibited and thus injurious to tax payers. Here, under Georgia's Establishment Clause, both direct and indirect spending of State money is prohibited and therefore injurious. So, whether the Tax Credit Program spends money that Plaintiffs paid into the State Treasury under a *Winn* analysis is irrelevant to the issue before the Court of whether the Tax Credit Program involves money spent directly or indirectly from the State Treasury.

Moreover, the notion that the Tax Credit Program does not spend one cent of the money Plaintiffs paid into the State Treasury is simply wrong. The Tax Credit Program necessarily involves money paid into the State Treasury in at least two ways. First, many taxpayers are reimbursed for their tax credit donation through a refund *directly* from the State Treasury of money they "deposited into the State Treasury." For example, many taxpayers have taxes taken out of their paychecks each pay period by their employers and their taxes then are sent to the State Treasury. If the taxpayer makes a donation to claim the tax credit available under the Tax Credit Program, it is a distinct probability that the taxpayer will receive a tax refund at the end of

[4] Intervenors also attempt to distinguish *Lowry* on this same ground, Intervenors' Motion to Dismiss, p. 6 n.7, but this argument is improper for the same reasons.

the year drawn directly from the public treasury as reimbursement for that tax credit. One SSO's explanation of the tax implication is as follows:

> "Donor" taxpayer has GA taxes withheld from his paycheck each month. When "Donor" is filing his taxes, he learns that although his total tax liability is $5,000, he paid into the system $4,500. "Donor" would typically get back $500 as a refund for overpayment of his tax liability. "Donor" made a $2,500 contribution to the GATAP as well, effectively reducing his GA tax liability from $5,000 to $2,500. Since "Donor" had already paid $4,500 into the system, he will now receive approximately $3,000 as a refund.

See Georgia T.A.P. Tax Implications (Attached hereto as Attach. 1). In other words, for those who pay their taxes in full through employer withdrawals and then also make a donation entitling them to a Qualified Education Expense tax credit, they will have overpaid their taxes by the amount of the tax credit. And how is this remedied? They receive a reimbursement directly from the State Treasury of the money they previously "deposited into the State Treasury."

Second, the Tax Credit Program requires Defendants to expend their resources and personnel to review, approve and execute the tax credits. Defendants pre-approve the Qualified Education Expense donations that are used to provide the scholarships or tuition grants, and Defendants ensure proper documentation is provided by the donating taxpayers to receive tax credits. *See* Compl. ¶ 38; *See* O.C.G.A. § 48-7-29.16(f)(3) (2013) (noting a taxpayer must notify the Department of Revenue of the total amount of the contribution that the taxpayer intends to make to an SSO, and "the commissioner shall preapprove or deny the requested amount within 30 days after receiving the request from the taxpayer and shall provide notice to the taxpayer and the student scholarship organization of such preapproval or denial"). Defendants must collect and publish information from SSOs regarding their activities under the Tax Credit Program and are required to make sure SSOs comply with various provisions of the law. *See* O.C.G.A. § 20-2A-3 (Supp. 2013) (noting SSO reporting requirements); O.C.G.A. § 48-7-29.16(d)(2)

(2013) (requiring Defendants to revoke the status of SSOs that represent that in exchange for contributing to the SSO, taxpayers will receive scholarships for the direct benefit of particular individuals). All those responsible for carrying out these statutorily required functions for the Tax Credit Program are State employees paid from the State Treasury. Thus, the very functioning of the Tax Credit Program is directly dependent on and involves money "deposited into the State Treasury or controlled by State Officials."

Finally, as explained in II(A), Georgia, in fact, does consider tax credits to be expenditures of state funds, including tax credits for Qualified Education Expenses. Thus, *Winn's* conclusion that tax credits are not government expenditures is inconsistent with Georgia law and irrelevant to Plaintiffs' standing here.

CONCLUSION

Plaintiffs have standing under the principles of O.C.G.A. § 9-6-24 to challenge Defendants' ultra vires actions without the need to show a specific injury, as well as by virtue of alleging sufficient facts to show injury per se as taxpayers resulting from the illegal tax credits being Georgia tax expenditures. Intervenors' Motion to Dismiss should be denied.

Dated: June 23, 2014

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Civil Action No. 2014-CV-244538

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing ***Plaintiffs' Response in Opposition to Intervenor-Defendants' Motion to Dismiss*** upon the following counsel of record via U.S. Mail and email, addressed as follows:

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By: 
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ATTACHMENT

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TAX CREDIT BILL
DONORS
DONATE
FORMS & LINKS
FAQs
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Tax Implications

1. Already receiving a refund before the contribution
A."Donor" tax payer has GA taxes withheld from his paycheck each month. When "Donor" is filing his taxes, he learns that although his total tax liability is $5,000, he paid into the system $4,500. "Donor" would typically get back $500 as a refund for overpayment of his tax liability. "Donor" made a $2,500 contribution to the GATAP as well, effectively reducing his GA tax liability from $5,000 to $2,500. Since "Donor" had already paid $4,500 into the system, he will now receive approximately $3,000 as a refund.

2. Tax bill owed before the contribution
A."Donor" tax payer has GA taxes withheld from his paycheck each month, but because his withholdings were high, he ended up owing GA taxes when doing his return. "Donor" has a total GA tax liability of $4,000, but he only paid into the system $2,600, leaving "Donor" with a $1,400 tax bill due when filing his GA return. After making a $2,500 contribution to the GATAP, "Donor" reduced his total tax liability from $4,000 to $1,500. Since "Donor" has already paid in $2,600 in taxes, "Donor' would receive an approximate refund of $1,100 from the state of GA.

3. Liability less than donation amount
A."Donor" tax payer has GA taxes withheld from his paycheck each month. At the end of the year, "Donor" learns that he paid into the system $3,000. He also learns that his total tax liability is only $2,000. "Donor" should recieve a $1,000 refund. "Donor" made a contribution to the GATAP for $2,500. Since "Donor"'s tax liability was less than the amount he contributed, "Donor" will have to carry forward the balance to next year's tax return. The "Donor" can carry this donotion forward for up to 5 years. By making the contribution, "Donor" reduced his tax liability from $2,000 to $0 for this year and since "Donor" had paid into the system $3,000, he would receive an approximate refund of $3,000. When "Donor" files his tax return the next year, he will use the left over $500 from the previous year's contribution as a credit on his GA tax liability.

Tax Scenarios

Standard Tax Scenario (assume $2,500 donation)
1. State tax liability is reduced by $2,500 on state return
2. Donor takes $2,500 charitable contribution on the federal return
3. Donor adds back $2,500 to Georgia AGI as income (get hit for max of 6% on the $2,500)
4. For standard scenarios, state tax liability is deductible on federal return. By taking this credit, the donor reduces the amount of available state tax liability to deduct on the federal return.