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,	
and	
RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER,	
Intervenor-Defendants.	

REPLY IN SUPPORT OF PARENT-INTERVENORS' MOTION TO DISMISS

Parent-Intervenors, by and through undersigned counsel, hereby reply in support of their Motion to Dismiss. Parent-Intervenors' Memorandum in Support of their Motion to Dismiss (hereinafter "Parent-Intervs.' Mot.") explains that Plaintiffs do not have standing under either O.C.G.A. § 9-6-24 or Georgia's taxpayer-standing doctrine to bring their constitutional claims against the Scholarship Tax Credit Program ("Scholarship Program" or "Program").

In their Response (hereinafter "Pls.' Resp."), Plaintiffs fail to carry their burden to show otherwise. Plaintiffs argue that O.C.G.A. § 9-6-24 gives them standing to challenge the

Program's constitutionality, despite two recent Georgia Supreme Court decisions that hold that O.C.G.A. § 9-6-24 can never be used to challenge a law's constitutionality. Plaintiffs' efforts to distinguish these cases are not credible. In addition, Plaintiffs cannot show that they have taxpayer standing. Taxpayers have standing only to challenge a government expenditure or an increased tax burden. Plaintiffs cannot show that the Program results in either. As Plaintiffs lack standing, Plaintiffs' constitutional claims should be dismissed.[1]

STANDARD OF REVIEW

"[W]here standing is disputed, the litigant claiming standing has the burden of proving it." *Sherman v. City of Atlanta*, 293 Ga. 169, 173 (2013) (citing *Dep't of Human Res. v. Allison*, 276 Ga. 175, 178 (2003)). Standing must be established before a court can decide the merits of an issue. *Sherman*, 293 Ga. at 172 ("[S]tanding is in essence the question of whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975) (internal punctuation and italics omitted)).

ARGUMENT

Plaintiffs have failed to carry their burden to show that they have standing under either O.C.G.A. § 9-6-24 or Georgia's taxpayer-standing doctrine to bring their constitutional claims against the Scholarship Program.

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[1] Parent-Intervenors' Motion to Dismiss addresses only Plaintiffs' standing to bring their constitutional claims, found at Counts I, II, III, and VI. Parent-Intervenors also join, in part, the State's Motion to Dismiss Counts IV and V. Specifically, Parent-Intervenors join the State's argument that Plaintiffs have not alleged that an actual violation of the Georgia Tax Code has occurred under Count IV. *See* Br. Supp. Mot. Dismiss of Georgia Dep't of Rev. and State Rev. Comm'r. at 30. Parent-Intervenors 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. *Id.* at 31-33.

Plaintiffs cannot have standing under O.C.G.A. § 9-6-24 because the Georgia Supreme Court has held that it only allows standing to enforce a law as written and cannot be used to challenge a law's constitutionality.[2] *Moseley v. Sentence Review Panel*, 280 Ga. 646, 646-49 (2006); *Adams v. Ga. Dep't. of Corr.*, 274 Ga. 461, 462-63 (2001).

Plaintiffs advance three arguments to try to distinguish *Moseley* and *Adams*, but none are credible. They primarily argue that the Court found no citizen standing in *Moseley* and *Adams*, not because the plaintiffs in both cases brought constitutional challenges, but because they made a technical pleading error. But the Court never said this, and Plaintiffs' sole support is partial quotes taken out of context. Plaintiffs next argue that *Adams* found that a constitutional challenge can be brought under O.C.G.A. § 9-6-24, as long as the challenge invokes a constitutional provision granting a public right. The Court was clear, however, that the public-rights requirement was merely a second reason plaintiffs failed to show standing, in addition to their improper use of O.C.G.A. § 9-6-24 to bring a constitutional challenge. Finally, Plaintiffs argue that they have standing under O.C.G.A. § 9-6-24 because it allows standing to challenge all ultra vires action, and unconstitutional acts are ultra vires. This claim, however, rests on outdated dicta that were later rejected by *Adams* and *Moseley*.

Plaintiffs also misrepresent the requirements for taxpayer standing. Pls.' Resp. at 10-17. As Parent-Intervenors have explained, Parent-Intervs.' Mot. at 5-6, Georgia's taxpayer-standing doctrine is very limited. Taxpayers have standing to challenge only government expenditures or

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[2] Section 9-6-24 states, "[w]here 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.

As explained in Parent-Intervenors' Memorandum in Support of their Motion to Dismiss, Plaintiffs pursue standing under O.C.G.A. § 9-6-24 because it is the only avenue that allows them standing without having to show an injury. Parent-Intervs.' Mot at 3.

increased tax burdens. *City of E. Point v. Weathers*, 218 Ga. 133, 135-36 (1962). But Plaintiffs erroneously claim that Georgia taxpayers automatically have standing to challenge any tax law, ignoring that the Georgia Supreme Court has twice denied standing to taxpayers who failed to meet these criteria. *Id.*; *Lott Inv. Corp. v. Gerbing,* 242 Ga. 90, 93 (1978).

In addition, Plaintiffs fail to show that the Scholarship Program constitutes either a government expenditure or an increased tax burden. First, tax credits are not government expenditures as a matter of law, and to find otherwise would jeopardize the entire legislative scheme of taxation. Second, Plaintiffs cannot show that the Program results in an increased burden as they have neither alleged (nor can they prove) that it results in a net loss to the state or an increase in their taxes.

Plaintiffs thus lack standing to challenge the Program's constitutionality, and their constitutional claims should be dismissed.

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

Plaintiffs' claim that O.C.G.A. § 9-6-24 provides standing to bring constitutional challenges is flatly contradicted by two directly on-point Georgia Supreme Court decisions. *See Moseley v. Sentence Review Panel*, 280 Ga. 646, 646-49 (2006); *Adams v. Ga. Dep't. of Corr.*, 274 Ga. 461, 462-63 (2001). *Moseley* and *Adams* clearly establish that O.C.G.A. § 9-6-24 can only be used to enforce a law as written and cannot be used to challenge a law's underlying validity, including its constitutionality. *Id.*

Plaintiffs' three attempts to distinguish these cases stretch them beyond recognition.[3] *See* Pls.' Resp. at 6-10. Plaintiffs first argue that the Court found no standing in *Moseley* and *Adams,*

[3] Plaintiffs also claim that Parent-Intervenors "misconstrue Plaintiffs [sic] basis for standing by asserting that Plaintiffs are seeking mandamus. . . ." Pls.' Resp. at 2. It is unclear why Plaintiffs

not because plaintiffs there brought constitutional challenges, but because plaintiffs in both cases mistakenly requested mandamus relief instead of an injunction. Pls.' Resp. at 6-8. But nowhere does the Court say this. In addition, as the Court (and even the Plaintiffs) recognize, O.C.G.A. § 9-6-24 allows both mandamus and injunctive relief, and the standard governing both forms of relief is identical. It does not make sense that the Court would deny standing just because a plaintiff couched his requested relief as a mandamus instead of an injunction.

Second, Plaintiffs argue that *Adams* found that a constitutional challenge can be brought under O.C.G.A. § 9-6-24 as long as the challenge invokes a constitutional provision granting a public right (as opposed to a private one). Pls.' Resp. at 9. But this public-rights analysis merely provided a second reason for why plaintiffs there lacked standing under O.C.G.A. § 9-6-24, in addition to the plaintiffs' improper use of § 9-6-24 to challenge a law's underlying validity.

Third, Plaintiffs argue that they have standing under O.C.G.A. § 9-6-24 because it allows standing to challenge all ultra vires action, and an unconstitutional act is ultra vires. Pls.' Resp. at 8-9. Plaintiffs cite only two cases in support of this claim, both which merely speculate about the "possibility" and "potential[]" of standing to bring constitutional challenges under O.C.G.A. § 9-6-24. *See Lowry v. McDuffie*, 269 Ga. 202, 204 n.6 (1998); *Newsome v. City of Union Point*, 249 Ga. 434, 437 (1982). Both "possibility" and "potential[]" are now foreclosed by *Adams* (2001) and *Moseley* (2006).

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think Parent-Intervenors misconstrued their request for an injunction, and they provide no citation. Parent-Intervenors' Memorandum was very clear that Plaintiffs were requesting an injunction. *See, e.g.*, Parent-Intervs.' Mot. at 4 ("Plaintiffs attempt to prevent the Department of Revenue and its Commissioner from administering a law as written. Specifically, Plaintiffs seek to enjoin the Defendants . . . .") (quoting Compl. at 29, ¶ C). Moreover, as Parent-Intervenors discuss below, Plaintiffs' claim is a red herring as the principles governing both forms of relief under O.C.G.A. § 9-6-24 are identical. *Infra* Part I.A.2.

Tellingly, Plaintiffs fail to cite a single case granting a plaintiff standing to bring a constitutional challenge under O.C.G.A. § 9-6-24, or indeed any challenge to a law's validity.

A. *Adams* and *Moseley* are clear that O.C.G.A. § 9-6-24 cannot be used to challenge a law's underlying validity.

Plaintiffs argue that the Court found the plaintiffs in *Adams* and *Moseley* lacked standing under O.C.G.A. § 9-6-24, not because they brought constitutional challenges, but because the plaintiffs in both cases erroneously requested mandamus relief instead of an injunction. Pls. Resp. at 6-8. Nothing in the opinions supports this reading.

1. Adams *bars Plaintiffs from having standing under O.C.G.A. § 9-6-24.*

Contrary to Plaintiffs' assertion, *Adams* turned on the limits of O.C.G.A. § 9-6-24, not a technical pleading error. 274 Ga. at 462. There, the Court held plaintiffs lacked standing under O.C.G.A. § 9-6-24 to challenge the constitutionality of a law providing for electrocution as the means of capital punishment. The *Adams* plaintiffs argued that they had standing under O.C.G.A. § 9-6-24 because government officials have a "duty" to follow the Constitution, but the Court found that a government official's "duty" is simply to enforce a statute as written:

> [T]he existence of standing under O.C.G.A. § 9-6-24 ultimately depends upon whether appellees owe a *public duty* which appellants, as members of the public, are entitled to have enforced. . . . [A]ppellees' duty was to enforce the provisions of the statute as written. Thus, *contrary* to O.C.G.A. § 9-6-24, appellants seek to prevent, rather than to enforce, the performance of a public duty. Appellants' challenge is to the very *constitutionality* of the underlying enactment pursuant to which appellees are compelled to perform their obligation of carrying out all lawfully imposed criminal sentences.

Id. at 461-62 (emphases added). As the Court held, challenging a law's "underlying" validity is "contrary" to the purpose of O.C.G.A. § 9-6-24. *Id.* at 462. Section 9-6-24 is thus not a proper vehicle for a constitutional challenge.

Nothing in *Adams*, either explicitly or implicitly, indicates that the reason the plaintiffs lacked standing was because they sought mandamus instead of injunctive relief. In fact, it is well established that O.C.G.A. § 9-6-24 allows a citizen to request either. *E.g.*, *Adams*, 274 Ga. at 461-462 (stating O.C.G.A. § 9-6-24 allows a 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" (emphasis added) (citation and internal quotation marks omitted)). And as the Court has stressed, (and Plaintiffs themselves recognize,) the principles governing O.C.G.A. § 9-6-24 "appl[y] equally" to both forms of relief. *Moseley,* 280 Ga. at 649; *see also Weathers*, 218 Ga. at 136 (interpreting § 64-104, the substantially identical predecessor to § 9-6-24); Pls.' Resp. at 8 (citing *Brissey v. Ellison*, 272 Ga. 38, 39 n.4 (2000)).

While the *Adams* plaintiffs happened to be requesting mandamus relief, the Court was clear that injunctive relief would not be available to them either because they were challenging a statute's validity. For the same reasons, Plaintiffs cannot request an injunction under O.C.G.A. § 9-6-24 based on the Scholarship Tax Credit Program's alleged unconstitutionality.

2. Moseley *also bars Plaintiffs from having standing under O.C.G.A. § 9-6-24.*

In *Moseley*, the Court reaffirmed the rule in *Adams* that plaintiffs cannot bring constitutional challenges under O.C.G.A. § 9-6-24. 280 Ga. at 646-49 (relying on *Adams* and finding that district attorney did not have standing under O.C.G.A. § 9-6-24 to challenge constitutionality of state sentencing panel's authority). Like in *Adams*, the Court found that the *Moseley* plaintiff improperly relied on O.C.G.A. § 9-6-24 because he did "not seek enforcement of the Panel's performance of its public duties, but challenges the validity of the public duties that the General Assembly has authorized it to exercise . . . ." *Id.* at 647.

Moseley never found that its plaintiff made an error by failing to request an injunction. In fact, contrary to Plaintiffs' assumption, the *Moseley* plaintiff requested both "mandamus and *injunctive relief*" under O.C.G.A. § 9-6-24. *Id.* at 649 (Court's emphasis); *id.* at 651 (Hunstein, J., dissenting). But the Court found that because of the limits on O.C.G.A. § 9-6-24, the only way Moseley had standing to request an injunction was in his official capacity as the district of attorney, not in his private capacity as a citizen under O.C.G.A. § 9-6-24.[4] *Id.* at 647-48.

Thus, it does not matter that Plaintiffs here are requesting an injunction instead of a mandamus; *Adams* and *Moseley* are clear that neither is available for a constitutional challenge under O.C.G.A. § 9-6-24.

B. *Adams*' public-rights requirement was merely an additional reason the plaintiff lacked standing and is not determinative here.

Plaintiffs make a second attempt to distinguish *Adams*, again without success. They claim that *Adams* does not prohibit O.C.G.A. § 9-6-24 from *ever* being used to bring a constitutional challenge, but instead prohibits it only from being used to claim violations of constitutional provisions aimed at private rights. Pls.' Resp. at 9. Plaintiffs thus claim that *Adams* allows standing under O.C.G.A. § 9-6-24 for constitutional challenges involving "public rights," like their suit alleging violations of Georgia's Establishment Clause. *Id.* This interpretation has no support in *Adams* itself. The Court's public-rights discussion merely provides an additional reason for why plaintiffs there lacked standing.

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[4] In fact, the reason the majority and dissent dispute whether the *Moseley* plaintiff had standing in his official capacity to seek an injunction is because the plaintiff alleged standing to bring a mandamus and injunction under O.C.G.A. § 9-6-24, only in his citizen capacity. *Id.* at 649 (majority opinion); *id.* at 651 (Hunstein, J., dissenting). The majority thus had to construe his complaint "liberally" to find that Moseley sufficiently alleged standing in his official capacity as well. *Id.* at 647 (majority opinion). It would obviously have been much simpler for the Court to simply base Moseley's standing for his requested injunction under O.C.G.A. § 9-6-24, as he had explicitly requested, but as the Court found, O.C.G.A. § 9-6-24 cannot be used for constitutional challenges.

Adams essentially set forth a two-step inquiry for standing under O.C.G.A. § 9-6-24, both prongs of which must be satisfied; the *Adams* plaintiffs failed both. The inquiry requires plaintiffs to show (1) that they seek to enforce a government-owed duty, which *Adams* defined as an obligation "to enforce the provisions of the statute as written" *and* (2) that this duty is one which affects the general public rather than a private individual. *See Adams*, 274 Ga. at 461-62 ("[T]he existence of standing under O.C.G.A. § 9-6-24 ultimately depends upon whether appellees owe a public duty which appellants, as members of the public, are entitled to have enforced."); *id.* at 462 ("[S]tanding under O.C.G.A. § 9-6-24 involve[s] enforcement of a duty that is of a public nature, affecting the people at large." (internal punctuation omitted)). The *Adams* plaintiffs' failure to meet the first prong is discussed extensively above. *Supra* Part I.A. The Court's discussion of plaintiffs' failure to carry the second, public-rights prong was just an additional reason why they lacked standing.

It is unnecessary to address the public-rights prong in constitutional challenges, as plaintiffs can never have standing there under O.C.G.A. § 9-6-24. So the only time the public-rights prong should come into play is when plaintiffs are bringing actions to enforce laws as written. That was exactly what happened in two of the cases *Adams* relies on for its public-rights analysis.[5] *See id.* at 462 (citing *League of Women Voters v. City of Atlanta*, 245 Ga. 301, 302 (1980) (residents have standing to challenge political appointments they claimed violated the city charter and city code); and *Bd. of Comm'rs v. Montgomery*, 170 Ga. 361, 365 (1930) (residents

[5] The Court cited a third case that extensively discussed the public-rights requirement, which actually did involve constitutional challenge. *Arneson v. Bd. of Trs. of Emps. Ret. Sys.*, 257 Ga. 579 (1987). But this case is not helpful for determining whether O.C.G.A. § 9-6-24 can be used for constitutional challenges. In circular reasoning, the Court there found that plaintiffs lacked standing under O.C.G.A. § 9-6-24 because their claims that the acts were unconstitutional had no merit, and thus plaintiffs could not argue that they had a public right to enforce the constitutional provisions at issue. *Id.* at 581-82. Unlike *Adams* and *Moseley*, the Court did not address whether O.C.G.A. § 9-6-24 could ever be used for constitutional challenges in *Arneson*.

have standing to enforce statutory duty to appoint city manager with responsibility for administration of all municipal departments)). The Court's decision in *Moseley* bolsters this point. Decided five years after *Adams*, *Mosley* did not even mention the public-right/private-right distinction, as the plaintiff there brought a constitutional challenge. *Moseley*, 280 Ga. at 646-49. Here, this Court similarly does not need to address the second prong.

Thus, Plaintiffs cannot distinguish *Adams* and *Moseley*. Both these cases make clear that Plaintiffs cannot bring their constitutional challenges to the Scholarship Program under O.C.G.A. § 9-6-24, regardless of their requested relief or the nature of the alleged constitutional violation.

C. Plaintiffs' last argument regarding O.C.G.A. § 9-6-24 relies on outdated dicta.

Plaintiffs last argue that O.C.G.A. § 9-6-24 allows standing to challenge any ultra vires act and that they thus have standing because all unconstitutional acts are ultra vires. Pls.' Resp. at 8-9. Their sole support is mere speculation in two cases about the "possibility" and "potential[]" of citizen standing to bring constitutional challenges under O.C.G.A. § 9-6-24. *Lowry v. McDuffie*, 269 Ga. 202, 204 n.6 (1998); *Newsome v. City of Union Point*, 249 Ga. 434, 437 (1982). Of course, *Moseley* and *Adams* foreclose this "possibility." *Supra* Part I.A.

In *Newsome*, the plaintiff brought several claims against a law allowing the licensing and sale of alcohol, including constitutional claims; the Court dismissed them all for lack of standing under O.C.G.A. § 9-6-24. When the Court addressed the constitutional claims, it speculated that the alleged unconstitutional action could "*potentially* make the municipality's actions ultra vires so as to give him standing." *Id.* at 437 (emphasis added). The Court did not analyze the issue beyond that, however, as it found, in somewhat circular reasoning, that plaintiff ultimately

lacked standing because his constitutional claims were "without merit." *Id.*; *see also id.* at 436 (affirming that plaintiff lacked standing for all his claims).[6]

The dictum in *Lowry* is similarly unhelpful. As discussed in the next section, *Lowry* found that its plaintiff had standing under Georgia's taxpayer-standing doctrine, not under O.C.G.A. § 9-6-24, to bring a constitutional challenge to a tax exemption for dealer-owned vehicles. *Infra* Part II.C. In a footnote, *Lowry* speculates that plaintiff may also have standing because his claim "that dealers are granted an exemption that violates the Georgia Constitution raises the *possibility* of ultra vires actions by public officials." *Lowry*, 269 Ga. at 204 n.6 (emphasis added) (citing O.C.G.A. § 9-6-24 case, *Arneson v. Bd. of Trs. of Emps.' Ret. Sys.*, 257 Ga. 579 (1987)). But as *Lowry* had already determined the plaintiff had standing as a taxpayer, it did not evaluate O.C.G.A. § 9-6-24 any further.

Unlike the dicta in *Newsome* and *Lowry*, *Moseley* and *Adams* carefully analyzed O.C.G.A. § 9-6-24 and found it did not allow citizen standing to bring constitutional claims; their determinations on this issue are binding.

II. Plaintiffs Also Fail to Show They Have Taxpayer Standing.

As Parent-Intervenors have explained, Parent-Intervs.' Mot. at 5-6, Georgia's taxpayer-standing doctrine is very limited. Taxpayers have standing only to challenge government expenditures or increased tax burdens. *Weathers*, 218 Ga. at 135. But Plaintiffs erroneously claim that Georgia taxpayers automatically have standing to challenge any tax law. In addition,

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[6] The Court conducted the same circular reasoning in *Arneson v. Board of Trustees of Employees' Retirement System*, 257 Ga. 579, 581-82 (1987), which also found plaintiffs lacked standing to bring a constitutional challenge under O.C.G.A. § 9-6-24 because their claims that the acts were unconstitutional had no merit. *Supra* at 9 n.5. *Arneson* did not address whether O.C.G.A. § 9-6-24 could ever be used for constitutional challenges.

Plaintiffs fail to show that the Scholarship Program constitutes either a government expenditure or an increased tax burden.

Plaintiffs present five arguments for their claim that the Program tax credits are government expenditures. First, they argue that because their complaint alleges it to be true, the Court must assume it to be so at the motion-to-dismiss stage. Pls.' Resp. at 10. But whether a tax credit is a government expenditure is a legal conclusion—not a factual one—and this conclusion has already been expressly rejected by seven courts to have considered the issue. Importantly, six of these cases were decided on a motion to dismiss or otherwise without discovery. One of these cases was the U.S. Supreme Court decision of *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), which found that taxpayers lacked standing to challenge an almost identical scholarship tax credit program to the one at issue here. Plaintiffs call *Winn*'s analysis "meaningless here" and having "zero bearing." Pls.' Resp. at 12-13. In doing so, Plaintiffs pointedly ignore that the Georgia Supreme Court "frequently" looks to the United States Supreme Court on standing issues. *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.").

Plaintiffs' next two arguments also implicate tax deductions and tax exemptions, neither which is considered a government expenditure. Plaintiffs argue that tax credits must be government expenditures because the State includes them in its yearly Tax Expenditure Report. Pls.' Resp. at 10. Plaintiffs neglect to mention, however, that this report also includes tax exemptions and tax deductions. *See, e.g.*, Compl. Ex. 5 at 5. Third, Plaintiffs complain that because some Program donors overpay their taxes, some of the tax credits briefly enter the state

treasury before reimbursement, thus making some credits a public expenditure. Pls.' Resp. at 15-16. Again, the same is true of tax deductions and exemptions, which often result in tax refunds.

Plaintiffs' last two reasons for why tax credits are public expenditures are similarly unpersuasive. Plaintiffs argue that the Program results in government expenditures because paid state workers spend time administering the Program. *Id.* at 16-17. This argument has already been flatly rejected by the Georgia Supreme Court. *Weathers*, 218 Ga. at 135. Plaintiffs next argue that because tax credits are an *indirect* expenditure, Plaintiffs would have standing to challenge them under the U.S. Supreme Court's *Flast* exception for taxpayer standing, outlined in *Winn,* 131 S. Ct. at 1445-49. Pls.' Resp. at 13-14. This argument is flawed on several levels, most notably through its reliance on the *Winn* dissent. And even assuming that tax credits *are* indirect expenditures (which they are not), nothing in *Winn*'s majority opinion—or Georgia caselaw—supports the notion that there is taxpayer standing to challenge indirect government expenditures; only direct expenditures will do.

Finally, not only is the Program not a government expenditure, but it does not result in an increased tax burden. Plaintiffs allege no facts that the Program results in either a net-loss for the state or that it resulted in a tax increase—nor can they. Based on the text of the statutes governing the Program, it is at the very least revenue neutral: it saves the State the cost of educating over 13,000 students in the public school by helping their parents send them to private schools.

Plaintiffs thus cannot carry their burden to show they have taxpayer standing.

A. Georgia taxpayers do not automatically have standing to challenge any tax law.

Plaintiffs' main premise is that taxpayers automatically have standing to challenge any tax law as unconstitutional. *See, e.g.*, Pls.' Resp. at 13 ("Georgia's taxpayer standing rules . . .

recognize that Plaintiffs are burdened by an unconstitutional tax statute merely by being taxpayers."); Pls.' Resp. at 11 ("Georgia law recognizes that if the tax credits are illegal, Plaintiffs as taxpayers are injured per se."). This premise is wrong.

Unlike under O.C.G.A. § 9-6-24—which plaintiffs may invoke without injury—taxpayer standing requires an injury to the "taxpayer's interest." *Weathers*, 218 Ga. at 135. Thus, Georgia taxpayers can only challenge government action resulting in a government expenditure or increased tax burden, as such action directly involves a taxpayer's own money. *Id.* (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"); *see also Lowry*, 269 Ga. at 203 (allowing taxpayer to challenge tax exemption because it "places a greater tax burden" on taxpayers).

In fact, the Georgia Supreme Court has twice denied standing to taxpayers who challenged tax laws as unconstitutional when they failed to meet these criteria. In *Weathers*, for example, the Court found that taxpayer plaintiffs lacked standing to bring a constitutional challenge to a repeal of license and excise taxes imposed upon malt beverage dealers.[7] Although the plaintiffs alleged the repeal would cause the city to forego $90,000 in taxes annually, the Court found the plaintiffs did not adequately allege that the law resulted in an expenditure of funds.[8] *Id.* at 137. Similarly, in *Lott Investment Corp. v. Gerbing*, the Court held that a taxpayer could not bring a constitutional challenge to a tax law because the "alleged statutory deficiency has caused this taxpayer no harm, injury, or other adverse effect." 242 Ga. 90, 93 (1978).

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[7] The suit was an indirect attack on the ordinance prohibiting the sale of malt beverages, which the Court previously found that plaintiffs lacked standing to challenge in an earlier suit. *See Weathers v. Stith*, 217 Ga. 39 (1961).

[8] The *Weathers* plaintiffs also alleged that this loss of revenue "would cause the municipal taxes upon plaintiffs to be increased," *id.* at 135, but the Court did not address this claim.

Plaintiffs failed to address either *Weathers* or *Lott*, despite Parent-Intervenors relying on them in their motion. *See* Parent-Intervs.' Mot. at 5-7, 10. Perhaps that is because, as in *Weathers* and *Lott*, Plaintiffs cannot show the Program affects their taxpayers' interest as it neither results in a government expenditure nor an increased tax burden.

B. Plaintiffs cannot show the Scholarship Program is a government expenditure.

Plaintiffs present five arguments for their claim that the Program tax credits are government expenditures. All these arguments fail as a matter of law.

1. Plaintiffs cannot rely on a legal conclusion alleged in their complaint to show standing—especially when this conclusion has already been rejected by the courts.

Plaintiffs first argue that because their Complaint alleges the Program tax credits to be a government expenditure, the Court must assume it to be so at the motion-to-dismiss stage. Pls.' Resp. at 10. This is incorrect. Whether tax credits constitute government expenditures is a legal question, not a factual one. Plaintiffs' allegations in their Complaint on this issue thus carry no weight. *See, e.g.*, *Mabra v. SF, Inc.*, 316 Ga. App. 62, 65-66 (2012) (stating that a "legal conclusion" in the complaint carries no weight); *ALW Mktg. Corp. v. McKinney*, 205 Ga. App. 184, 186 (1992) (same).

Indeed, virtually every court to have addressed this issue has concluded that a tax credit is not a public expenditure as a matter of law. Almost all[9] of these cases were decided without discovery. *See Winn,* 131 S. Ct. at 1440 (2011) (motion to dismiss); *Kotterman v. Killian*, 972 P.2d 606, 617-18 (Ariz. 1999) (en banc) (direct action to Arizona Supreme Court); *Toney v. Bower*, 744 N.E.2d 351, 357-58 (Ill. App. Ct. 2001) (motion to dismiss); *State Bldg. & Constr. Trades Council v. Duncan*, 76 Cal. Rptr. 3d 507, 510, 514-15 (Cal. Ct. App. 2008) (mandamus

[9] *Olson v. State* also concluded that tax credits and tax exemptions are not public expenditures, and thus denied taxpayers standing to challenge them, *infra* Part II.B.1.i, but this case happened to be decided on summary judgment. 742 N.W.2d 681, 683 (Minn. Ct. App. 2007).

action); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) (motion to dismiss); *Manzara v. State*, 343 S.W.3d 656, 659-61 (Mo. 2011) (en banc) (motion to dismiss). The only court stating otherwise is the New Hampshire state trial court, but its decision is currently on appeal at the state supreme court; as Parent-Interverors previously explained, the trial court's reasoning is not convincing. *See Duncan v. State*, No. 219-2012-CV-00121, slip op. at *20-26 (N.H. Super. Ct. June 17, 2013); Resp. Opp. Pls.' Partial Mot. J. Pleadings at 17, n.7.

The U.S. Supreme Court case, *Winn,* is especially persuasive. There, the Court held that taxpayers did not have standing to challenge a tax credit scholarship program—almost identical to the one at issue here—because it did not constitute a government expenditure or result in a net loss to the State. 131 S. Ct. at 1444-47. Plaintiffs call *Winn*'s analysis "meaningless here" and having "zero bearing." Pls.' Resp. at 12-13. In doing so, Plaintiffs pointedly ignore that the Georgia Supreme Court looks to the United States Supreme Court on standing issues. *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."). As Georgia has neither decided whether taxpayers have standing to challenge tax credits nor whether tax credits constitute government expenditures, *Winn* is the best authority for guidance on these questions.

Indeed, *Winn* is particularly instructive on the issue of Georgia's taxpayer standing here. Although it is true that there is generally no federal-taxpayer standing, Pls.' Resp. at 12-13, the U.S. Supreme Court has a narrow exception in Establishment Clause cases. *Winn*, 131 S. Ct. at 1445. So, similar to Georgia, the U.S. Supreme Court recognizes federal-taxpayer standing to challenge government expenditures allegedly supporting a sectarian institution. *Id.* at 1445,

1448; Pls.' Resp. at 13 (acknowledging that federal caselaw allows taxpayer standing for "government expenditures in aid of sectarian institutions"). Thus, *Winn*'s conclusion that a tax credit is not a government expenditure carries special weight for Georgia courts.[10]

Therefore, Plaintiffs' legal conclusion in their complaint is immaterial; tax credits are not government expenditures as a matter of law.

i. The taxpayer standing cases that Plaintiffs cite from other states actually support that tax credits are not public expenditures.

Plaintiffs cite no authority finding that a tax credit is a public expenditure or that taxpayers have standing to challenge a tax credit. Instead, Plaintiffs cite four state court cases for the unremarkable proposition that many states, including Georgia, allow taxpayers to challenge government expenditures. Pls.' Resp. at 11-12. Ironically, three of these citations are to courts that have found that tax credits are *not* government expenditures. And two of these courts, including in one of the very opinions that Plaintiffs cite in support of their position, have specifically held that taxpayers do not have standing to challenge a tax credit.

Plaintiffs first cite to the Illinois Appellate Court. Pls.' Resp. at 11 (citing *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (2011)). The Illinois Appellate Court has twice found that a tax credit is *not* a government expenditure. *Toney*, 744 N.E.2d at 357-58 (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*, 747 N.E.2d at 426 (same).

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[10] The main difference between Georgia and federal taxpayer standing doctrine in the Establishment Clause context is that Georgia also considers an increased tax burden to provide taxpayer standing, *infra* Part II.C, which does not seem to be permitted under the *Flast* exception.

Plaintiffs' references to the Minnesota and Missouri courts further undercut their position. Plaintiffs cite to *Olson v. State*, 742 N.W. 2d 681 (Minn. Ct. App. 2007), yet this very decision found that taxpayers did not have standing to challenge tax credits and tax exemptions because they did *not* constitute government expenditures. *Id.* at 683, 685. The Court explained,

> [h]ere, appellants are challenging the constitutionality of statutes based on an assertion that exemption from taxation will result in an increase in tax burden on them. Although appellants argue that they have standing to challenge legislative actions that create an increase in overall tax burden, there must still be a link between that challenge and an illegal expenditure of tax monies. While taxpayers have a real and definite interest in challenging such illegal expenditures, there are no such expenditures here.

Id. at 685 (citation omitted).[11] Plaintiffs finally cite to the Missouri Supreme Court decision, *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. 1989). But like in Minnesota, the Missouri Supreme Court recently found that a tax credit is not a government expenditure, and is thus not sufficient for taxpayer standing. *Manzara v. State*, 343 S.W.3d 656, 659-61 (Mo. 2011) (en banc). *Manzara* explained that "a taxpayer must establish that one of three conditions exists [for standing]: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Id.* at 659 (citing *E. Mo. Laborers*, 781 S.W.2d at 47). Like here, the *Manzara* plaintiffs had alleged that they met the first condition. *Id.* at 659. The Court rejected this allegation, explaining at great length why "tax credits are not expenditures". *Id.* at 659-663. As the Court reasoned,

> a tax credit expresses the legislature's wish to declare a portion of the pool of taxable assets off-limits to its own power to collect taxes.

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[11] Notably, the court's reference to "exemption from taxation" refers to both tax credits and exemptions. *See id.* at 683; *Olson v. State*, No. C8-05-2727, 2006 WL 6112093, at * 5 (Minn. Dist. Ct. Aug. 7, 2006) (stating plaintiffs contend that "the legislation results in an illegal expenditure of public funds (by granting tax exemptions, tax credits, etc., for up to 12 years)") (Opinion attached).

> Properly understood, this does not result in "less" money in the treasury because the legislature never wished it to be there in the first place. A tax credit is not a drain on the state's coffers; it closes the faucet that money flows through into the state treasury rather than opening the drain.

Id. at 660. The court thus denied taxpayer standing.

Therefore, virtually all authority, including authority Plaintiffs themselves rely on, has found that tax credits are not public expenditures. As stated above, the only case finding the contrary is a state trial court opinion currently on appeal, *see Duncan v. State*, No. 219-2012-CV-00121, slip op. at *20-26 (N.H. Super. Ct. June 17, 2013). Parent-Intervenors therefore respectfully request that this Court join *Winn*, *Kotterman*, *Toney*, *Griffith*, *Manzara*, *State Building & Construction Trades Council*, and *Olson* to conclude that tax credits are not government expenditures.

2. *It is irrelevant that the State's Tax Expenditure Report includes tax credits.*

Plaintiffs next claim that tax credits must be government expenditures because the State includes tax credits in its annual Tax Expenditure Report. Pls.' Resp. at 4, 10 (citing Compl. ¶ 44; Compl. Ex. 5). Plaintiffs neglect to mention, however, that this report also includes tax exemptions and tax deductions, *see, e.g.*, Compl. Ex. 5 at 5—neither of which is legally considered a government expenditure.

Wilkerson v. City of Rome is particularly instructive on this point. 152 Ga. 762, 775-76 (1922). There, the Court found that tax exemptions for religious institutions do not violate Georgia's Establishment Clause, a provision also at issue here.[12] *Id.* ("No principle of constitutional law is violated . . . when religious teaching is encouraged by a general exemption

[12] At the time, Georgia's Establishment Clause was found at Article I, section 1, paragraph 14 instead of Article I, section II, paragraph VII, but its language was the same.

of the houses of religious worship from taxation for the support of state governments.").[13] Specifically, the Court rejected the notion that tax exemptions were the equivalent of money "taken from the public treasury, directly or indirectly." *Id.* Plaintiffs here seem to agree that exemptions and deductions are not government expenditures, but they struggle to distinguish them from tax credits. Their argument boils down to an assertion that tax credits simply lower a tax bill by a greater amount than the tax exemptions and deductions. *See* Pls.' Resp. at 3-4; Compl. ¶ 40. Not only is this not always the case,[14] but it is hardly a persuasive distinction.

Moreover, Courts have squarely rejected this false distinction and agree that tax credits are legally indistinguishable from deductions and exemptions. *See, e.g.*, *Kotterman*, 972 P.2d at 621 ¶ 50 ("[W]e see no constitutional difference between a credit and a deduction" and if tax credits for religious education were unconstitutional, "we would also be forced to rule that deductions for charitable contributions to private schools were unconstitutional"); *Toney*, 744 N.E.2d at 357 (noting that if tax credits were the equivalent of public funds then other tax benefits such as deductions and exemptions could also be considered public funds and would "endanger the legislative scheme of taxation"); *Cf. Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) ("Like contributions that lead to charitable tax deductions,

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[13] In *Lowry*, the Court found that taxpayers had standing to challenge a tax exemption not because it was a public expenditure, but because the exemption would increase the taxpayer's tax burden. 269 Ga. at 203. This decision is discussed below. *Infra* Part II.C.

[14] There are situations where a tax deduction would provide a greater benefit to particular individuals and businesses than a Program tax credit, especially as the Scholarship Program places significant caps on the maximum amount of tax credits that individuals and corporations may receive for scholarship donations. *See* O.C.G.A. § 48-7-29.16(b). For instance, individuals are limited to a maximum $1000 Program tax credit. *Id.* Thus, a wealthy individual's direct donation to a religious (or nonreligious) non-profit school could result in a reduction in tax liability from a tax deduction that far exceeds the maximum $1000 he or she could receive from a Program tax credit. *See* O.C.G.A. § 48-7-27(a) (adopting federal tax deductions to calculate Georgia taxable net income); I.R.C. § 170(a)(1),(c)(2)(B) (federal deduction for charitable contributions to religious and educational non-profit organizations).

contributions yielding [scholarship organization] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Manzara*, 343 S.W.3d at 661 ("The tax exemptions in [another case] and the tax credits here are similar in that they both result in a reduction of tax liability. The government collects no money when the taxpayer has a reduction of liability, and no direct expenditure of funds generated through taxation can be found.")

Moreover, according to Georgia's 2013 Tax Expenditure Report, deductions for charitable giving and medical expenses "cost" Georgia over $449 million in FY 2013—dwarfing the $58 million tax credit Program challenged here.[15] Compl., Ex. 5 at 14. In fact, Georgia has a long history of granting property tax exemptions to religious institutions. Ga. Const. art. VII, § II, ¶ IV (specifically preserving property tax exemptions for religious institutions). Meanwhile, charitable donations to nonprofit religious organizations, including religious schools, qualify for a deduction. O.C.G.A. § 48-7-27(a) (adopting federal tax deductions to calculate state taxable net income); I.R.C. § 170(a)(1),(c)(2)(B) (federal deduction for charitable contributions to religious and educational non-profit organizations). Yet Parent-Intervenors are unaware of any case to have held these deductions and exemptions to be public expenditures.

Thus, tax credits' inclusion in the State's Tax Expenditure Report does not support Plaintiffs' argument that they are government expenditures. To find otherwise would "endanger the legislative scheme of taxation." *See Toney*, 744 N.E.2d at 357; *see also Kotterman,* 972 P.2d at 621 ¶ 50 (Ariz. 1999) (stating that if tax credits for religious education were unconstitutional, "we would also be forced to rule that deductions for charitable contributions to private schools were unconstitutional").

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[15] Georgia also has numerous tax credit programs besides the Scholarship Program, some of which invariably benefit religious institutions. For example, employers (including religious entities) who provide or sponsor child care for employees are eligible for a tax credit of up to 75 percent of the employers' direct costs of this child care. O.C.G.A. § 48-7-40.6.

3. *It is irrelevant that some of the tax credits briefly enter the State treasury before they are reimbursed to donors.*

Plaintiffs next complain that that some of the tax money credited to donors briefly enters the state treasury before the donors receive their tax refunds. Pls.' Resp. at 15-16. That is because, as Plaintiffs explain, "many taxpayers have taxes taken out of their paychecks each pay period by their employees and their taxes are then sent to the State treasury." *Id.* at 15. But there are two separate problems with arguing that money returned to taxpayers as a result of their overpayment of taxes constitutes public money taken from the state treasury.

First, the same is true for tax deductions and exemptions, which often result in tax refunds. As just discussed above, there is no principled legal distinction between these three types of tax incentives, and a ruling finding tax credits to be public expenditures would jeopardize the State's entire taxation scheme.

Second, as the Arizona Supreme Court pointed out "[t]his expansive interpretation" would mean that "*all* taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." *Kotterman*, 972 P.2d at 618 ¶ 37 (emphasis added). "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.* ¶ 40. Thus, when the State refunds money overpaid by the taxpayer, the state is not paying out public funds, it is merely returning the taxpayer's own money to him or to her. Notably, *Kotterman*'s reasoning has endured for over a decade and has been endorsed by the U.S. Supreme Court. *See, e.g.*, *Winn*, 131 S. Ct. at 1441.

Therefore, the fact that taxpayers sometimes overpay their taxes should have no bearing on whether Program tax credits are public expenditures.

4. *The mere fact that State employees help administer the Program is not sufficient to constitute a government expenditure.*

Next, Plaintiffs argue that because paid state employees spend some time administering the Program, the Program results in incidental government expenditures. Pls.' Resp. at 16. ("[T]he Tax Credit Program requires Defendants to expend their resources and personnel to review, approve, and execute the tax credits. . . . . All those responsible for carrying out these statutorily required functions for the Tax Credit Program are State employees paid from the State Treasury."). Not only did Plaintiffs fail to allege this in their Complaint, but the Georgia Supreme Court has already rejected this exact argument. Indeed, to find otherwise would make Georgia's taxpayer standing virtually limitless.

The Georgia Supreme Court has already held that government-employee time spent administering an alleged unconstitutional law is insufficient to constitute a government expenditure for taxpayer standing; only a direct expenditure qualifies. In *Weathers*, a city passed a law making it illegal to sell malt beverages and repealed ordinances authorizing the collection of license and excise taxes on malt-beverage dealers. 218 Ga. at 135. Taxpayers challenged the tax repeals as unconstitutional, claiming they had standing in part because the city officials would spend paid time in "enforcement of the illegal ordinance." *Id.* at 137. The Court found such administrative acts "would not necessarily require the expenditure of any money" and were thus insufficient for taxpayer standing. *Id.* In other words, the government must actually directly spend money on the law to constitute a government expenditure sufficient for taxpayer standing. *See also Winn*, 131 S. Ct. at 1445 (explaining that taxpayers have standing to challenge public expenditures, but not for time spent by paid state employees, as this was "at most an 'incidental expenditure of tax funds.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968), and citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35 (1952)).

To find that government-employee time spent administering a law constitutes a government expenditure would eviscerate several of Georgia's standing cases. Government employees obviously spent paid hours enforcing the laws challenged in *Adams* and *Moseley*, just as government employees spent time enforcing the alleged illegal tax law in *Lott* and on the alleged illegal contract in *Juhan v. City of Lawrenceville*. *See 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"); *Juhan v. City of Lawrenceville*, 251 Ga. 369, 369 (1983) (holding taxpayer lacked standing to challenge an allegedly illegal government contract because it did not result in an expenditure of public revenue). Yet in each, the Court denied plaintiffs taxpayer standing.

Indeed, to find otherwise would make Georgia's taxpayer standing virtually limitless. If a taxpayer had standing to challenge any law that a paid government employee spent time administering or enforcing, no law would be out of bounds. Georgia would then have one of the broadest taxpayer-standing doctrines in the country. *See* Joshua Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1281-82 & n.122 (2012) (identifying only three states— Colorado, Washington, and West Virginia— that *might* allow taxpayers to challenge any government law).

Thus, the mere fact that State employees spend time enforcing the Scholarship Program is insufficient to give Plaintiffs taxpayer standing.

5. *Plaintiffs do not have standing under the* Flast *exception, outlined in* Winn.

Finally, Plaintiffs argue they have taxpayer standing under *Winn* because the Program constitutes an indirect expenditure. Pls.' Resp. at 13-15. In *Winn*, the U.S. Supreme Court held

that plaintiff taxpayers do *not* have standing to challenge a scholarship tax credit program, virtually identical to the one at issue here, because under *Flast v. Cohen*, taxpayers have standing only to challenge *direct* expenditures allegedly in violation of the Establishment Clause. *Winn*, 131 S. Ct. at 1445-48 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)). Plaintiffs' odd argument that they qualify for *Flast*'s narrow exception is flawed on several levels, including its reliance on the *Winn* dissent.

Plaintiffs are trying to cram a square peg into a round hole. They claim that "[g]iven *Winn*'s 5-4 split on whether tax credits represent *direct* expenditures and Kagan's strong analysis for the dissent [that tax credits are expenditures] there can be no doubt that the *Winn* court would find that tax credits amount at least to *indirect* expenditures. Therefore the [Program tax credits] are injurious to Plaintiffs under a *Winn* analysis as they run afoul of Georgia's prohibition on *indirect* expenditures to sectarian institutions." Pls.' Resp. at 14. Plaintiffs seem to be arguing that *Flast* found a *direct* government expenditure a sufficient taxpayer injury to allege a violation under the federal Establishment Clause because the federal Establishment Clause prohibits *direct* expenditures in support of religion, and that thus, an *indirect* expenditure should be a sufficient taxpayer injury to allege a violation under Georgia's Establishment Clause, which arguably prohibits indirect expenditures in support of religion.[16]

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[16] Whether an indirect government expenditure violates Georgia's Establishment Clause is not clear and Plaintiffs' briefing in this case takes contradictory positions on this issue. The Clause states that "No 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 (emphasis added). Plaintiffs sometimes argue that the word "indirectly" modifies the clause "[no] money shall ever be taken from the public treasury." *See, e.g.*, Pls.' Resp. at 13-14. Other times, they argue that "indirectly" modifies "in aid of." *See, e.g.*, Pls.' Mem. Law Supp. Mot. J. Pleadings as to Count III at 5-7. Yet the Georgia Establishment Clause only uses the word "indirectly" once, and it can modify only one of the clauses. Regardless of which clause the phrase modifies, however, Plaintiffs do not have standing under Georgia's taxpayer standing doctrine.

This convoluted argument fails due to its reliance on several false premises about federal Establishment Clause jurisprudence, taxpayer standing under both the federal and Georgia Constitutions, and the nature of tax credits. First, the federal Establishment Clause does not just prohibit direct expenditures in aid of religion, as Plaintiffs assume. *See* Pls.' Resp. at 13 (stating that the "Federal Establishment Clause . . . only considers . . . direct government expenditures in aid of sectarian institutions" as a violation); *id.* at 15 ("[U]nder the Federal Establishment Clause only direct spending [is] prohibited."). To the contrary, there is a whole variety of government action that can violate the federal Establishment Clause, including actions that only involve indirect or even incidental government expenditures.[17] *Flast* simply limited taxpayer standing to direct government expenditures because only these expenditures confer a directly traceable injury to taxpayers; a claimed injury from indirect and incidental expenditures, on the other hand, is too attenuated. *Winn*, 131 S. Ct. at 1445-46 (citing *Flast*, 392 U.S. at 106).

Thus, it does not follow (under *Winn* or otherwise) that a Georgia taxpayer should have standing to challenge an indirect expenditure allegedly in aid of religion just because Georgia's Establishment Clause arguably prevents such an indirect expenditure. Indeed, Plaintiffs cite no authority—either federal or Georgian—that an indirect expenditure provides sufficient injury for taxpayer standing.[18] *See, e.g.*, *Weathers*, 218 Ga. at 135-37 (finding repeal of tax laws did not

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[17] For example, the U.S. Supreme Court has long held that state officials cannot require or encourage students to pray in school. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962). But as *Winn* reiterated, taxpayers do not have standing under *Flast* to challenge mandatory prayer because it involves at most an "incidental expenditure of tax funds." *Winn*, 131 S. Ct. at 1445 (citing *Flast*, 392 U.S. at 102 and *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35 (1952)). Plaintiffs wanting to challenge school prayer instead have to base their standing in injury outside the taxpayer-standing doctrine.

[18] That is not to say that Georgia taxpayers could never challenge an indirect expenditure allegedly in violation of the Georgia Establishment Clause. Georgia taxpayers could bring such a challenge if they alleged the indirect expenditure resulted in an increase in their taxes. *Infra*

result in a government expenditure sufficient for taxpayer standing despite plaintiffs' allegations that it cost the city $90,000 in tax revenue and that paid city employees spent time administering the repeal.)

Moreover, Plaintiffs' argument relies on the unsupported premise that tax credits are "indirect expenditures." Pls.' Resp. at 14. Plaintiffs merely cite the *Winn* dissent for this conclusion; they cite no authority suggesting that a majority of the U.S. Supreme Court—or more importantly, any Georgia court—finds tax credits to be indirect government expenditures. As the *Winn* majority found, tax credits are instead private "contributions result[ing] from the decisions of private taxpayers regarding their own funds." *Winn*, 131 S. Ct. at 1439.

Therefore, Plaintiffs cannot show that they have taxpayer standing under the *Flast* exception, nor can they provide any other basis for their conclusion that the Program results in a government expenditure. Accordingly, the only way for Plaintiffs to show a sufficient taxpayer interest for standing is to show the Program has increased their tax burden. They cannot.

C. Plaintiffs cannot show the Program will increase their tax burden.

As Plaintiffs fail to show the Program constitutes a government expenditure, the only way for Plaintiffs to carry their burden to show the Program affects their taxpayers' interest is to show that the Program increases their tax burden. *Supra* Part II.A. Logically, Plaintiffs can only do this if they show that the Program results in a net-loss to the State or increases their taxes. Plaintiffs cannot show this; in fact, they have not even alleged this.

Lowry is the only Georgia case finding that a challenged law resulted in an increased tax burden sufficient for taxpayer standing. There, a taxpayer challenged a county's tax exemption for dealer-owned vehicles. 269 Ga. at 202-03. Even though the Court did not find the

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Part II.C. In addition, Georgia plaintiffs could challenge an indirect expenditure if they had standing outside of the taxpayer-standing context.

exemption was a government expenditure, the Court found plaintiff had standing because it would "place[] a greater tax burden upon those taxpayers being required to pay." *Id.* at 203. Implicit in the Court's analysis was that the exemption would reduce the funds in the State's treasury, thus causing the plaintiff and other taxpayers to make up the difference. *Id.*; *see also Weathers*, 218 Ga. at 135 (explaining that taxpayers must show they will be "injuriously affected" by the challenged act through the creation of "illegal expenses" or a "resulting increase in taxes").

Here, in contrast, this Court cannot assume the Program will increase taxpayers' burden. Unlike the tax exemption in *Lowry,* the Program tax credits are not simply a gratuitous gesture by the State that will automatically result in lost revenue for the State. The tax credits are instead an exchange of money for services rendered. *See, e.g.*, *Arneson v. Bd. of Trs.*, 257 Ga. 579, 581 (1987) (finding payment of benefits to government employees in exchange for "perform[ed] services" is "not a gratuity" under the Constitution.) The credits assist parents in paying for educational services rendered by private schools—services that the State would otherwise pay to provide in the public schools. *See* Ga. Const. art. VIII, § 1, ¶ 1 (obligating the State to provide each child with an education). Indeed, the State currently pays on average $8,983 to educate each public school student and the Program prohibits scholarships that are higher than this average. Compl. ¶ 25-26; O.C.G.A. § 20-2A-2(1). Moreover, many Program scholarships are far less than this $8,983 average.[19] Thus, the Program is written to save the State money or, at the very least, be revenue neutral.

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[19] 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,* 7-8 (Dec. 16, 2013), *available at* http://www.goalscholarship.org/docLib/20131219_Transparencyand AccountabilitySurvey121613.pdf. The Friedman Foundation for Educational Choice reports

This is exactly the conclusion that several other courts have come to in evaluating similar school-choice tax-relief programs. In addressing a tax-credit program almost identical to Georgia's, the U.S. Supreme Court in *Winn* found that "[t]he costs of education may be a significant portion of Arizona's annual budget, but the tax credit, by facilitating the operation of both religious and secular private schools, could relieve the burden on public schools and provide cost savings to the State." 131 S. Ct. at 1438; *see also Mueller v. Allen*, 463 U.S. 388, 395 (1983) (upholding school-choice tax deduction in part because "[b]y educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers"); *Toney*, 744 N.E.2d at 361 (upholding school-choice tax credit in part because "private schools, both sectarian and nonsectarian . . . relieve taxpayers of the burden of educating additional students [in the public schools]").

Plaintiffs argue that "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." Pls.' Resp. at 14-15. Plaintiffs misstate *Winn*'s procedural posture; *Winn* (as well as *Toney*) actually were decided on a motion to dismiss without discovery. Thus, it is appropriate for this Court to come to the same conclusion at this stage.

Assuming the Program's effect on the State treasury is a factual issue, Plaintiffs have not created a factual *dispute*; they never alleged that the Program is a net-loss for the State or otherwise increases their taxes, nor have they pointed to any facts that suggest this. This is

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similarly low average scholarship amounts. *Georgia Qualified Education Expense Tax Credit*, http://www.edchoice.org/School-Choice/Programs/Private-School-Tax-Credit-for-Donations-to-Student-Scholarship-Organizations.aspx (visited July 16, 2014) (average scholarship is $3,388).

despite the Program being in effect for over six years and the State routinely making its budgetary records publicly available.

Not only have Plaintiffs never alleged that the Program is a net-loss for the State or an increased tax burden, they have no intention of proving either. According to Plaintiffs, "[w]hether the Tax Credit Program costs the State money is *immaterial* to the validity of Plaintiffs' claims," Pls. Resp. at 14 (emphasis added). Plaintiffs also pointedly ignore Parent-Intervenors' observation that Plaintiffs failed to allege that the Program caused a tax increase. Parent-Intervs.' Mot. at 5-8.

Plaintiffs have only alleged the Program causes them to "directly or *indirectly*" shoulder "a greater portion of Georgia's tax burden." Compl. ¶ 9 (emphasis added); Pls.' Resp. at 5. It is unclear what Plaintiffs mean by this allegation. Plaintiffs should not be able to rest their standing on a vague and conclusory statement that the Program causes them to indirectly shoulder a greater portion of Georgia's tax burden. Indeed, such an indirect and amorphous injury is never sufficient to show taxpayer standing. Parent-Intervs.' Mot. at 9; *see also Manlove v. Unified Gov't of Athens-Clarke Cnty.*, 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 Inst.,* 555 U.S. 488, 493 (2009))).

Thus, Plaintiffs are unable to carry their burden to show that they satisfy the criteria for taxpayer standing. They can show neither that the Program is a public expenditure nor an increase in their tax burden.

CONCLUSION

Plaintiffs have failed to show that they have standing under either O.C.G.A. § 9-6-24 or Georgia's taxpayer-standing doctrine to bring their constitutional claims against the State's

Scholarship Tax Credit Program. Because Plaintiffs have no other basis for standing, Plaintiffs' constitutional claims should thus be dismissed.

Respectfully submitted this 17th 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' Reply in Support of their Motion to Dismiss has been hand-delivered upon the following parties, this 17th day of July, 2014:

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