IN THE SUPREME COURT
OF THE STATE OF GEORGIA

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

Appellants,

vs.

GEORGIA DEPARTMENT OF REVENUE, and LYNNETTE T. RILEY, in her official capacity as STATE REVENUE COMMISSIONER OF THE GEORGIA DEPARTMENT OF REVENUE,

Appellees,

and

RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER

Intervenor-Appellees.

Docket No: S17A0177

BRIEF FOR *AMICI CURIAE* CATO INSTITUTE, NEAL MCLUSKEY, AND JASON BEDRICK IN SUPPORT OF INTERVENOR-APPELLEES

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Perry J. McGuire
Georgia Bar No. 493458
SMITH, GAMBRELL & RUSSELL, LLP
Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592
(404) 815-3614
pmcguire@sgrlaw.com

Attorneys for Amici Curiae

QUESTIONS PRESENTED FOR REVIEW

Amici take no position on the question of standing. We focus instead on the issues going to the merits of the case:

1. Whether the trial court erred in determining that Georgia's scholarship tax credit program did not violate the state constitution's No-Aid Clause, forbidding the government from providing aid to sectarian organizations out of the public treasury. In other words, does allowing taxpayers who donate to qualifying scholarship organizations to receive a tax credit violate the separation of church and state when some of the scholarships are eventually used to attend religiously affiliated private schools?
2. Whether the trial court erred in determining that Georgia's scholarship tax credit program did not violate the state constitution's Gratuities Clause, forbidding the government from giving any gift or gratuity without receiving substantial benefit in consideration for the transfer.

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INTEREST OF *AMICI CURIAE*

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences and forums, and files *amicus* briefs.

Neal McCluskey is the director of Cato's Center for Educational Freedom and is author of *Feds in the Classroom: How Big Government Corrupts, Cripples, and Compromises American Education* (2007). Before Cato, McCluskey served in the U.S. Army, taught high-school English, and was a reporter covering municipal government and education in suburban New Jersey. McCluskey holds a bachelor's degree from Georgetown University, a master's degree in political science from Rutgers University, and a Ph.D. in public policy from George Mason University.

Jason Bedrick is a Cato education policy analyst. He previously served in the New Hampshire House of Representatives and as a research fellow at the Josiah Bartlett Center for Public Policy. Bedrick received his master's degree, with a focus in education policy, from the Kennedy School at Harvard University. His thesis, "Choosing to Learn," assessed eight states' scholarship tax credit programs.

This case is of central concern to *amici* because it affects the freedom of choice in education, including a broad range of educational tax credits and deductions at the state and national levels.

STATEMENT OF THE CASE

In 2008, Georgia enacted the Qualified Educational Tax Credit Program, a scholarship tax credit program similar to programs that currently operate in 17 states. The program's purpose is to expand educational opportunities for Georgia schoolchildren. Under the program, individual and corporate donors can receive a tax credit against their state income tax liability in exchange for contributions to qualified, nonprofit Student Scholarship Organizations that aid Georgia families in paying tuition at qualified private schools of their choice. Donors are not permitted to earmark donations for specific students. Students can receive up to $8,983 (the average government expenditure for each student at a district school) toward tuition at the school of their choice. Georgia currently offers a total of $58 million in scholarship tax credits to taxpayers on a first-come, first-served basis.

Plaintiffs raised a number of constitutional challenges to the scholarship tax credit program. They argued that the program violated the Georgia Constitution's No-Aid Clause, which states that "[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Ga. Cont. Art. I, § II(a)(7); the

Gratuities Clause, which states that "the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public." Ga. Const. Art. III, § VI, para. VI; and the Educational Assistance Provisions, which discuss educational "grants, scholarships, loans, [and] other assistance to students and to parents of students for educational purposes." Ga. Const. Art. VIII, § VII, paras. I(b) & III. Plaintiffs also made statutory claims.

The trial court held that plaintiffs lacked standing to challenge the tax credit program. It further ruled that, even if they had standing, plaintiffs' constitutional arguments failed on the merits because tax credits are not government funds. Violations of the No-Aid Clause and Educational Assistance Provisions require that *public* funds be spent in aid of a sectarian institution, and the Gratuities Clause could not have been violated because "the General Assembly cannot donate or give what it does not own." *Gaddy v. Georgia Dep't. of Revenue*, No. 2014-CV-244538 at *17 (Sup. Ct. Fulton Cty. Feb. 5, 2016). Plaintiffs appealed.

SUMMARY OF THE ARGUMENT

This brief focuses solely on the No-Aid Clause and Gratuities Clause claims.[1] *Amici* urge the Court to affirm the trial court. Georgia's Qualified Educational Tax Credit Program does a great service to the state and its citizens, providing the parents of countless students—especially from disadvantaged

[1] While *amici* take no position on standing, our arguments regarding the private nature of the scholarship funds involved in the program at issue have a significant impact on that question.

communities—the opportunity to take control of their children's education, choosing the school that best serves their needs regardless where they can afford to live. Striking it down would eliminate those opportunities and jeopardize many other programs that rely on tax credits, exemptions, and deductions.

The court below correctly rejected the appellants' arguments that the tax credit program violates the state constitution's No-Aid and Gratuities Clauses. Because the program makes no expenditures from the public fisc, it cannot violate the No Aid Clause. Taxpayers choose to donate voluntarily using their own private funds and receive a tax credit for the amount of the donation; no money ever enters or leaves the treasury. Appellants' argument that the state's "losing out" on potential tax revenue constitutes an indirect public expenditure fails because it relies on a budgetary theory that finds no support as a legitimate means of constitutional interpretation under Georgia law. Their argument that the program constitutes an unconstitutional gratuity is likewise incorrect because the tax credits are not public funds, and the government cannot give away that which it does not own. Even if Georgia were giving up something of value, it would not be a "gratuity" because the state receives a substantial benefit in return: increased educational attainment, plus secondary effects. A program by which taxpayers donate to scholarship funds that allow children to attend any school they get into is simply not the evil that these constitutional provisions were intended to combat.

ARGUMENT

I. THE SCHOLARSHIP TAX CREDITS ARE CONSTITUTIONAL UNDER GEORGIA'S NO-AID CLAUSE

A. Tax credit scholarship funds are not taken from the public treasury.

The Georgia Constitution's No-Aid Clause states: "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. Cont. Art. I, § II(a)(7). The appellants fail to show that: (1) money has been taken from the public treasury; and (2) that this money aids a church or other sectarian institution.

Appellants rely on a budgetary perspective called "tax expenditure analysis" that has been rejected as a legitimate means of constitutional interpretation not only by the lower court here, but also by the U.S. Supreme Court and every state supreme court that has addressed the scholarship tax credits issue.

1. Tax credits are not direct appropriations.

Georgia's scholarship tax credit program does not take money from the public treasury. In fact, the money donated to the scholarship organizations never reaches public coffers at all. Individual taxpayers donate to private scholarship organizations that then aid citizens in paying for their children's tuition at a private school. These taxpayers can then claim a tax credit for their donation, just as donors to other nonprofits can claim a tax deduction. The state exercises *no control* over which scholarship organizations donors choose to support, which students

receive scholarships, or at which schools parents choose to use the scholarships. As a Florida appeals court stated in upholding a similar program under a no-aid provision that is nearly identical to Georgia's, "no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with 'public money,'" *McCall v. Scott*, 2016 Fla. App. LEXIS 12301, No. 1D15-2752 at *24–25 (Fla. Dist. Ct. App. Aug. 16, 2016) (quoting *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (en banc)). *See also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("Private bank accounts cannot be equated with the . . . state treasury."); *Magee v. Boyd*, 175 So. 3d 79, 121 (Ala. 2015) ("Traditional definitions of 'appropriations' do not extend to include tax credits."); *Manzara v. State*, 343 S.W.3d 656, 664 (Mo. 2011) (en banc) (holding that "tax credits are not government expenditures"). Funds that remain entirely in private hands, outside the public fisc or the control of any government official, remain private funds. No high court has ever held otherwise.

Tax credits are not expenditures of funds from the public fisc so much as the reduction of a taxpayer's tax liability. Private funds only become state property after there is a final determination of the amount owed by law—after calculating numerous exemptions, deductions, and credits—and the state actually collects the

funds that were owed. In some cases, however, taxpayers will have some of their paycheck withheld and deposited to the state throughout the year, and those taxpayers might receive a refund from the state treasury they overpaid. Appellants argue that this refund, because it is "drawn directly from the public treasury as a reimbursement for that tax credit," constitutes "State money." The lower court correctly rejected this argument, holding instead that "tax refunds return a taxpayer's own money that he overpaid to the state, not the State's money." (R-1188). Appellants argue that the lower court erred because "all revenues are paid into the general fund and all refunds come from the general fund"—so it is supposedly "State money" that is "taken from the treasury." This is also incorrect. The treasury is not *appropriating a gift of public funds* but rather *returning private funds to their lawful owner*. The funds that private citizens have overpaid remain their own, no matter where the state keeps those funds before returning them as required by law. *Accord Kotterman*, 972 P.2d at 618 (Ariz. 1999) ("[F]unds 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.").

2. Tax credits are not indirect appropriations.

Even though the tax credit program is not a direct appropriation of funds from the state treasury, appellants argue that the program *indirectly* takes public money because it utilizes funds that would have otherwise been paid into the

treasury in the form of taxes. This argument improperly relies on a budgetary perspective known as "tax expenditure analysis" that has been repeatedly rejected as a legitimate theory of constitutional analysis by the lower court, other state supreme courts that have addressed the issue, and even the U.S. Supreme Court.

Appellants also rely on a non-binding opinion of the attorney general from 1960-61 which stated that Georgia's Establishment Clause "is far more explicit than the Federal" and "refers to money being granted 'directly or indirectly,' which indicates on its face the broadest type of proscription." Op. Att'y Gen. 1960–61 p. 351. Appellants argue that this must therefore include donated "money that would otherwise go to the State's coffers," or else "Georgia's prohibition against money taken directly or *indirectly* from the public treasury" would not "mean anything." Brief of Appellants 23. Appellants are incorrect.

Appellants' reasoning reflects "tax expenditure analysis," which was defined by Prof. Peter D. Enrich of Northeastern University Law School, as "a tax program or statutory provision that serves the same functions as direct governmental spending in furtherance of a specific legislative policy." One of the earliest and foremost critics of the concept, Prof. Boris I. Bittker of Yale Law School, wrote in 1969 that tax expenditure analysis necessarily entails the drawing of "debatable lines" such that "every man can create his own set of 'tax expenditures,' but it will be no more than his collection of disparities between the income tax law as it is,

and as he thinks it ought to be." Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 260 (1969).

The malleability of tax expenditure analysis is illustrated by the lack of agreement among its proponents on standards for determining which tax provisions should be classified as expenditures and which should not. As Prof. Edward A. Zelinsky of the Yeshiva University Cardozo School of Law explains:

> The quandaries of defining tax expenditures arise not simply at the margins, but rather at the very core of the concept. We thus find adherents of tax expenditure analysis still debating among themselves how to define tax expenditures—nearly two generations after the concept was introduced.

Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25, 28 (2011), http://www.yalelawjournal.org/pdf/994_mx3arnp9.pdf.

Adopting appellants' tax expenditure analysis would have consequences far beyond this case. In arguing that tax credits constitute tax expenditures, appellants cite Georgia law, which defines a "tax expenditure" as "any statutory provision which exempts, in whole or in part, any specific class or classes of persons, income, goods, services, or property from the impact of established state taxes, including but not limited to tax deductions, tax allowances, tax exclusions, tax credits, preferential tax rates, and tax exemptions." O.C.G.A. § 45-12-71(15). Of course, the appellants' brief strategically omits all references to tax deductions,

exemptions, and so on. But if this law's definition of "tax expenditures" means that the court must view all tax credits as "direct expenditures of State tax revenues," as the appellants allege, then the same must be true for tax deductions and exemptions.[2] This, of course, would render unconstitutional not only other tax credit programs that beneficiaries can use to obtain services from religious (and private secular) organizations, such as the child and dependent care tax credit, O.C.G.A. § 48-7-29.10, and low-income housing credit, O.C.G.A. § 50-26-89(a), but also Georgia's longstanding tax deductions for contributions to charities that happen to be religious, O.C.G.A. § 48-7-30, teachers' expenses if they happen to work at religious schools, O.C.G.A. § 48-7-27, and so on—because the deductions and exemptions would also constitute "tax expenditures."[3] Such sweeping change to Georgia's tax policy should come from the political branches, not the judiciary.

To the extent that the appellants implicitly argue that this Court need not extend tax expenditure analysis beyond this case, such a request calls for the type of outcome-oriented judging that this Court eschews. The only basis for such line-

[2] In a footnote, appellants purport to distinguish deductions and exemptions from credits by noting that the latter give the taxpayer a "substantially greater benefit than tax deductions" or exemptions—but they do not even try to show how this greater financial benefit is constitutionally relevant. Indeed, the very law they cite makes no such distinction.

[3] Georgia's longstanding property tax exemptions for charities, O.C.G.A. § 48-5-41, would also be endangered but for a constitutional provision that implicitly recognizes the validity of direct-tax exemptions for religious groups ("Any law which reduces or repeals exemptions granted to religious or burial grounds or institutions of purely public charity must be approved by two-thirds of the members elected to each branch of the General Assembly.") Ga. Const. Art. VII, § II, ¶ IV. Of course, if the Georgia constitution permits the *direct* exemption of taxes otherwise owed by religious groups, then surely it permits the *incidental* benefit of credits for their donors.

drawing is to reach the result that appellants seek in this case: ending the scholarship tax credit program without ending deductions like those for charitable contributions or teachers' expenses. There is no non-political rule of decision that would result in such a determination. That is, there is no neutral legal principle under which the tax credit program is unconstitutional, but the same schools that cannot benefit from the tax credit scholarships *can* benefit from charitable contributions for which donors received tax deductions—or, for that matter, that those schools should be directly exempted from paying property taxes.

Fortunately, this Court has no need to strike down all these tax benefits. Viewing various types of provisions that reduce a taxpayer's liability as "tax expenditures" may be a useful tool for budgetary purposes, but the courts are under no obligation to do the same. The perspective of those wearing black robes is not necessarily the same as those wearing green eyeshades. Indeed, in considering the issue of scholarship tax credits, no high court has so far adopted tax expenditure analysis as a constitutional doctrine. The court below was right to reject it as well.

The trial court appropriately followed the reasoning of *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), in which the Arizona Supreme Court rejected a similar tax expenditure analysis. *Kotterman* involved a challenge to Arizona's tax credit law, which provided tax credits up to $500.00 to individual taxpayers who donated to scholarship organizations that funded students attending nonpublic schools.

Arizona has two provisions in its constitution similar to Article I, § II, ¶ VII:

> The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Ariz. Const. art. II, § 12.

> No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Ariz. Const. art. IX, § 10.

The *Kotterman* plaintiffs also used tax expenditure analysis to argue that tax credits were an "appropriation of public money made in aid of [a] private or sectarian school" in violation of the state constitution. Arizona's supreme court unequivocally rejected this argument:

> [N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Kotterman, 972 P.2d at 618.

The *Kotterman* dissent attempted to distinguish between tax credits and so-called "neutral deductions," like property tax exemptions for charitable organizations and tax deductions for donations to charitable organizations:

> [The tax credit law] is a direct government subsidy limited to supporting the very causes the state's constitution forbids the

> government to support. Unlike neutral deductions, the credit is not the state's passive approval of taxpayers' general support of charitable institutions. Thus, there is no philanthropy here, no neutrality, and no limitation to secular use.

Id. at 642-43 (Feldman and Moeller, J.J., dissenting). But what the *Kotterman* dissenters raise is the proverbial distinction without a difference, one that would not support confining tax expenditure theory to just the tax credits at issue here.

The so-called "neutral deductions" are no more limited to secular uses than the credits in the tax credit program. In both instances, the State encourages private philanthropy for a public purpose through reductions in tax liability while remaining neutral among the providers of the charitable or educational service, be they secular or religious. If anything, the so-called "neutral deductions" are less neutral than tax credits. The latter are limited to individuals and businesses funding scholarship recipients who may or may not attend a religious school, while the former can be claimed for donations *directly* to houses of worship and religious schools or—for property-tax exemptions—by the religious groups themselves.

Appellants attempt to distinguish this case from *Kotterman* by arguing that the Georgia constitution, unlike Arizona's, also forbids "indirect" appropriations of public funds. They assume that tax credits constitute such "indirect" appropriations, but provide no evidence that the relevant provision was ever understood that way, nor any precedent thus treating tax credits, nor any grounds for distinguishing them from other types of tax reductions (like deductions or

exemptions) for purposes of determining what constitutes an indirect appropriation. However, a plain reading of the Georgia constitution belies the appellants' assumption. What the state constitution says is that "no money shall ever be taken from the public Treasury, directly or indirectly, in aid of" religious institutions—but tax credits are not funds "taken from the public Treasury." Moreover, as discussed *infra* Part I.B, the funds aid not religious institutions, but rather the students who use the scholarship funds to obtain an education.

As the Florida court of appeals recently determined in interpreting its own "no-aid" provision, which likewise states that no funds "shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination," Fla. Const. art I, § 3: the "express language of Florida's no-aid provision contains no limit on the Legislature's taxing authority, including the Legislature's power to enact laws creating tax credits or exemptions; rather, this provision 'focuses on the use of state funds to aid sectarian institutions, not other kinds of support.'" *McCall*, 2016 Fla. App. LEXIS at *21.

3. The program's voluntary nature assuages any fear of religious coercion.

The argument that tax credits function as indirect appropriations from the state treasury also fails due to the voluntary nature of the program. The purpose of the No-Aid Clause is primarily to prevent the State from establishing a religion or coercing taxpayers into supporting particular religious institutions through their

taxes. *See Wilkerson v. City of Rome*, 152 Ga. 762, 781 (1922) ("constitutional provisions like [the No-Aid clause], were intended to forbid the levy of direct taxation to support the establishment of a State religion, or to forbid any preference or discrimination between religious sects or creeds."). By contrast, the taxpayer's decision of whether to participate in the scholarship tax credit program is entirely voluntary, as is the decision of which qualifying organization—secular or sectarian—they want their donation to fund. The purpose of Georgia's No-Aid provision is "to protect the citizens of this State against having money wrung from them by taxation taken or appropriated in aid of any of the institutions therein mentioned." *Cf. Bennett v. La Grange*, 153 Ga. 428 (1922). The structure of the program at issue removes any such concern here. The important distinction is that these are *private* funds, being *voluntarily* paid by individual taxpayers.

In interpreting its nearly identical no-aid clause, the Florida court of appeals has previously recognized a distinction between legislative appropriations and mere reductions in tax liability: "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." *Bush v. Holmes*, 886 So. 2d 340, 356–57 (Fla. 1st DCA 2004) (en banc). The Florida court relied on the reasoning of Justice Brennan in a 1970 Supreme Court case:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, in the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches, while in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions. Thus, the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 690–91 (1970) (Brennan, J., concurring). And while that case dealt with tax exemptions, the Supreme Court recently made the same distinction, in *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). In *Winn*, the Court was asked to review the constitutionality of tax credits offered under an Arizona scholarship program substantially similar to Georgia's program. The Court recognized that—at least in Establishment Clause contexts—tax credits and government expenditures differ in very important ways:

> It is easy to see that tax credits and governmental expenditures can have similar economic consequences. . . . Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience. . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens

> a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Id. at 141–42. In short, tax credits allow individual taxpayers to control how their money is spent, while government expenditures from the general treasury fund provide no such control. With state-expenditure programs, citizens are forced to pay for whatever government officials choose to spend their money on. By contrast, with tax credits, no one is forced to support any particular organization unless they choose to do so. That individual control over how one's money is spent is an important distinction when the entire purpose of Georgia's No-Aid Clause is to protect taxpayers from being forced to support religious organizations.

B. Even if the tax credits are public funds, they are not used "in aid of any sectarian institution."

As noted above, for the scholarship tax credits to violate Georgia's No-Aid Clause, they must not only be taken from the public treasury, but they must aid religious institutions. Even if the Court somehow finds that tax credits are public funds, these funds are not appropriated to aid any religious institution.

The scholarship tax credits have the primary secular purpose of helping children receive an education that best meets their learning needs. The Georgia constitution explicitly authorizes the state to expend public funds to "provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes." Ga. Const. Art. VIII, § VII(a)(1). Parents may use the

scholarship funds at a wide variety of educational institutions. Although parents may choose to enroll their children in religious schools, the program does not provide a benefit to any sectarian institution that is not also available to any other qualifying organization (including secular private schools).

Accepting appellants' argument would have wide-ranging repercussions on many other government programs. If providing a tax credit to someone who donates to a scholarship fund so a student can attend a Catholic school violates the Georgia constitution, then surely the direct appropriation of state funds for use at religious institutions must be unconstitutional. That would mean, for example, that patients would be barred from using their Medicaid card at Catholic hospitals and that students receiving state-funded HOPE scholarships would not be able to use them to attend Emory University (affiliated with the United Methodist Church).

Fortunately, this Court has no need to strike down these various programs. It is widely recognized that the ultimate beneficiaries of Medicaid, the low-income housing credit, or HOPE scholarships are the individuals who use the funds to obtain health care, shelter, or education—not the institutions that provide those services. Even though hospitals, homeless shelters, and colleges ultimately benefit from the funds, the state's purpose in enacting these programs was not "in aid of" them but "in aid of" the citizens they serve. So too, the ultimate beneficiaries of the tax credit program are the students, not the private schools they choose to attend.

Any benefit to the schools is incidental to the actual purpose of providing educational opportunity to young Georgians. As the U.S. Supreme Court held concerning a school voucher program challenged under the Establishment Clause, the role of the state ends with individual aid recipients:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

New York's highest court held likewise in interpreting a provision similar to Georgia's No-Aid Clause[4] with regard to the use of public funds to buy textbooks for public and private school students, including at religious schools. The court properly recognized that the public aid was given to the students, even though the schools benefitted financially by being relieved of the cost of purchasing the textbooks themselves. The court held: "Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral

[4] "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught…" (emphasis added) N.Y. Const. Art. XI, § 3.

effect of the statute, and, therefore, cannot be properly classified as the giving of aid *directly or indirectly*." *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. Ct. App. 1967) (emphasis added), *aff'd by Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)).

Moreover, the legislature did not institute the program to aid any particular institution, whether religious or secular, because it exercises no control over which institutions receive funds. No state official has *any* control over which scholarship fund donors choose to support, which students receive scholarships, or which schools the scholarship families choose for their children. The incidental benefit that some parochial schools may derive from the tax credit program is far removed from the sort of aid that the drafters of the No-Aid Clause sought to prohibit.

II. THE SCHOLARSHIP TAX CREDITS ARE CONSTITUTIONAL UNDER GEORGIA'S GRATUITIES CLAUSE

Appellants also claim that the tax credit program violates the state constitution's Gratuities Clause. Georgia's constitution provides that "the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public." Ga. Const. art. III, § VI, ¶ VI. This provision prevents politicians from using their legislative authority to shower patronage on friends and allies once taking office.

In determining what constitutes an unconstitutional gratuity, this Court has repeatedly held that "there is no gratuity when the state receives a substantial benefit in exchange for the use of public property." *Avery v. State of Ga.*, 295 Ga.

630, 633 (2014) (quoting *Campbell v. State Road & Tollway Authority*, 276 Ga. 714, 718 (Ga. 2003); *Garden Club of Ga. v. Shackelford*, 274 Ga. 653, 654 (2001); *Swanberg v. City of Tybee Island*, 271 Ga. 23, 26 (1999). The U.S. Supreme Court has likewise interpreted the provision as not applying to a "conveyance in aid of a public purpose from which great benefits are expected." *Georgia v. Cincinnati So. Railway*, 248 U.S. 26, 30 (1928). Thus, in alleging a violation of the Gratuities Clause, a plaintiff must show that the General Assembly gave something of value to a third party for which no substantial benefit was conferred to the state in return. The tax credits here do not violate the Gratuities Clause because they further a public purpose and generate substantial benefits for Georgia's citizens.

A. The scholarship tax credit program furthers a public purpose and generates benefits for the state.

This Court's precedent is clear: no gratuity exists when the public receives substantial benefit in return for the public outlay or for forgiving a debt to the state. The scholarship tax credit program does confer a significant benefit on the state and citizens of Georgia by expanding educational opportunity and relieving taxpayers of their constitutional duty to pay to educate the scholarship students in public schools. As the following cases demonstrate, this Court has a long history of holding that similarly diffuse public benefits to satisfy the Gratuities Clause.

1. In *Avery*, the Paulding County Airport Authority issued a $3.6 million bond to fund the improvement and expansion of the local airport. Silver Comet, a

commercial airline that leased a substantial portion of the airport, then offered to pay the principal and interest on the bond in order to "provide the [Airport] Authority with an incentive to issue revenue bonds for the purpose of expanding the taxiways at the Airport." 295 Ga. at 630. Concerned taxpayers sued, claiming that the bond violated, *inter alia*, Georgia's Gratuities Clause. This Court held that the bond was not a gratuity because it provided the county a substantial benefit:

> Paulding County's issuance of the bond creates a substantial benefit for the county, namely the presence and use of an airport which can accommodate commercial passenger flights. This is a direct benefit to the Airport Authority and Paulding County, and the fact that Silver Comet receives a secondary benefit as being the commercial airline service renting part of the terminal and landing flights on the expanded taxiway does not change this result.

Id. at 634.

2. *Campbell* also dealt with state bonds issued to fund infrastructure improvements. Georgia empowered its State Road and Tollway Authority (SRTA) to issue bonds not to exceed $822 million to pay for various transportation projects, and pledged its federal highway funds to finance the projects. Taxpayers sued, claiming the resolution permitting SRTA to receive federal funds was an unconstitutional gratuity. This Court disagreed. Since the legislation included strict requirements that the SRTA spend the funds "solely for public road and transportation purposes," and "these projects provide substantial benefits to the state and its citizens," it did not violate the Gratuities Clause. 276 Ga. at 718.

3. In *Garden Club*, taxpayers sued over a state law that allowed owners of outdoor advertising to cut trees on public property that interfere with the public's ability to read the advertisements. The Court originally rejected the General Assembly's argument that providing information to Georgia citizens and travelers using its roadways was a substantial benefit and found the policy to be a gratuity: "an unobstructed view of outdoor advertising signs on private property supports the sign owners without providing a substantial benefit to the state or its citizens. . . . [T]ravelers could obtain the same information about available goods and services from other sources without the loss of the state's natural resources." 274 Ga. at 654. The General Assembly responded by declaring in a new statute that "outdoor advertising provides a substantial service and benefit," and included provisions setting out a permit system that required advertisers to pay for the value of any vegetation removed. This Court held that those changes were enough to satisfy the Gratuities Clause because the DOT and advertisers presented evidence at trial that "the traveling public benefits from billboard advertising by receiving information that assists them in making decisions"—and because advertisers were now required to pay for the benefits they received. *Id*. at 655.

4. In *Swanberg*, this Court held that a county's conveyance of public land to the Marine Rescue Squadron did not violate the Gratuities Clause. The county conveyed the land "upon express direction that the land shall be used solely by the

Marine Rescue Squadron. . . for rescue missions in the Tybee area." 271 Ga. at 26. This Court considered the fact that the Squadron used the property in exchange for providing search-and-rescue services to be a substantial public benefit.

5. In *Cincinnati Southern Railway*, Georgia granted a right of way to the railroad but then tried to repeal the act and treat it as having only given the railroad a revocable license. The railroad argued that the state had granted it an irrevocable right of way and the state countered that the grant was invalid and unenforceable under the Gratuities Clause because there was no consideration. In upholding the grant under the Gratuities Clause as providing the state a substantial public benefit, the U.S. Supreme Court stated that "[a] conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent and in our opinion is not within the meaning of the word [gratuity] as it naturally would be understood." 248 U.S. at 30.

Amici take no position on the wisdom of spending taxpayer dollars in a manner similar to any of the above cases. Nevertheless, what these cases show is that the state is not required to engage in a strict *quid pro quo* cash transaction to avoid running afoul of the Gratuities Clause. Courts will take primary and even secondary, diffuse, or abstract benefits into account and will generally defer to the legislature's reasonable judgment of what those benefits are. The stated purpose of the statute authorizing the scholarship tax credits is "to provide for a program of

educational improvement." 2007 Ga. HB 1133 (May 14, 2008). Legislators were concerned for students at underperforming public schools and that the scholarship tax credit program was an attempt to rescue "passengers on a sinking ship." Delon Pinto & Wade Walker, *Education: Elementary and Secondary Education*, 25 GA. ST. U.L. REV. 73, 75 (2008) (quoting Editorial, *Our Opinion: Gutting Our Schools*, Atlanta Journal-Constitution, Mar. 13, 2008, at A18).

This program here confers a significant benefit on the state and citizens of Georgia. It provides parents—particularly lower-income parents living in communities serviced by historically underperforming district schools—greater opportunity to choose the school they think is best for their children. Numerous random-assignment studies—the gold standard of social-science research—have found that expanding educational opportunity in this manner tends to improve student outcomes, including higher scores on standardized tests and higher levels of high school graduation and college matriculation. *See, e.g.*, Greg Forster, *A Win-Win Solution*, EdChoice, May 18, 2016, https://www.edchoice.org/research/win-win-solution. *See also, e.g.*, *Kotterman*, 972 P.2d at 623, ¶ 24 ("As we have seen, the Arizona tax credit allows all taxpayers to give their funds voluntarily in support of a multi-dimensional educational system for the state, and *its benefits flow in virtually every direction*.") (emphasis added).

B. The program benefits taxpayers generally.

As the court below properly recognized, the scholarship program relieves the state of its constitutional duty to educate scholarship recipients in public schools: "When these children leave the public schools with a scholarship, the State no longer has to bear this expense. *See* Ga. Const. Art. VIII, § I, ~ I (obligating the State to provide each child with an education)." *Gaddy*, No. 2014-CV-244538 at *10. Taxpayers may even save money because the program caps the value of each scholarship at the average annual state and local expenditures per child at the public schools. O.C.G.A. § 20-2A-2(1). In 2016, scholarships were capped at $9,081 and yet the average tax-credit scholarship for the 2015-16 academic year was only $3,425. Georgia Dep't of Educ., Statutorily Required Statement of Maximum Scholarship Amount for 2016, https://www.gadoe.org/External-Affairs-and-Policy/Policy/Documents/SSO%20Scholarship%20Cap.pdf; *Georgia—Qualified Education Expense Tax Credit*, EdChoice, https://www.edchoice.org/school-choice/programs/georgia-qualified-education-expense-tax-credit (last visited Oct. 30, 2016). *See also, e.g.*, *Winn*, 131 S. Ct. at 1438 ("The 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.").

Even if appellants disagree regarding the extent to which these various benefits may actually come to pass, neither state nor federal precedent requires that the state empirically prove *x* dollars of material benefit to satisfy the Gratuities Clause. Such calculations, if even possible, are unnecessary because the Georgia Constitution does not require a specific pecuniary benefit. Indeed, it is axiomatic that a law enacted to expand educational opportunities serves a public purpose and is intended to substantially benefit the state—arguably even more than expanding an airport or making highway improvements.

Moreover when viewing the Gratuities Clause within its larger constitutional context, it is clear that this sort of program is simply not what the Clause's drafters intended to prevent. The prohibition of gratuities is meant to protect Georgia taxpayers from legislators' using their time in office to hand out government largesse to their friends. As noted above, no state official exercises any control over who makes a tax-credit-eligible donation, which scholarship organization they choose to support, which students receive scholarships, or which schools those students attend. Using universally obtainable tax credits to finance improved educational opportunities for students who would not otherwise be able to afford choosing to attend private school is, to borrow the words of the U.S. Supreme Court, simply "not within the class of evils that the constitution intended to prevent." *Cincinnati So. Railway*, 248 U.S. at 30.

CONCLUSION

For the foregoing reasons, and those stated by the appellees, this Court should affirm the lower court.

Respectfully submitted, this 3rd day of November, 2016.

/s/ Ilya Shapiro
Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

/s/ Perry J. McGuire
Perry J. McGuire
Georgia Bar No. 493458
SMITH, GAMBRELL & RUSSELL, LLP
Promenade, Suite 3100
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592
(404) 815-3614
pmcguire@sgrlaw.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Brief for *Amici Curiae* Cato Institute, Neal Mcluskey, and Jason Bedrick In Support of Intervenor-Appellees with the Clerk of Court using the eFast system and also certify that service was made by United States Mail with proper postage affixed thereto to ensure proper delivery addressed to counsel as follows:

William King Whitner Shauna Tameka Phillips Andrea Joy Pearson PAUL HASTINGS LLP 1170 Peachtree Street, N.E., Suite 100 Atlanta, Georgia 30309 *Attorneys for Appellant*	William Wright Banks, Jr., Sr. A.A.G. Warren R. Calvert, Sr. A.A.G. Alex F. Sponseller, A.A.G. Samuel S. Olens, A.G. Mitchell Philip Watkins Department of Law 40 Capitol Square, S.W. Atlanta, Georgia 30334 *Attorneys for Appellee*
Frank B. Strickland John J. Park, Jr. Strickland Brockington Lewis, LLP Midtown Proscenium, Suite 2200 1170 Peachtree Street, N.E. Atlanta, Georgia 30309 *Attorneys for Other Party*	Timothy D. Keller Institute for Justice 398 South Mill Ave., Suite 301 Tempe, Arizona 85281 Erica J. Smith Institute for Justice 901 N. Glebe Road, Suite 900 Arlington, Virginia 22203 *Attorneys for Other Party*

Dated: November 3, 2016

/s/ Perry J. McGuire
Perry J. McGuire